No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE DARICK DEMORRIS WALKER SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. 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 chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

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STATEMENT OF INTEREST[1]

Amicus Darick Demorris Walker is a death-sentenced inmate in Virginia who is uniquely positioned to provide the Court with information regarding the importance of the availability of 42 U.S.C. § 1983 to challenge the method by which states administer lethal injection as a form of execution. He has filed such a challenge in Virginia and in the course of pursuing his lawsuit, he has obtained substantial discovery regarding Virginia's lethal injection procedure, which is similar in key respects to the procedure used by all other states that employ lethal injection, including Florida. The information learned by Amicus regarding Virginia is not readily available to the public and would not otherwise be known by the Court without the submission of an amicus brief of this kind. Amicus, therefore, submits this amicus brief to inform the Court about serious problems with state lethal injection protocols and the need for Section 1983 to enable death-sentenced inmates to redress such problems.

SUMMARY OF ARGUMENT

Virginia, like other states, has chosen a lethal injection procedure that raises grave constitutional concerns. Amicus has learned via discovery that Virginia entrusts the administration of its three-drug chemical combination to prison employees who lack any training in administering anesthesia. The executioners—led by a high school graduate with no medical training whatsoever—have no idea how to determine whether an inmate has achieved a sufficiently deep level of sedation that he is adequately shielded from the agonizing pain caused by the lethal chemicals. Even if the executioners had been taught how to monitor the level of sedation, their training would be useless because they are physically separated from the inmate by a curtain during the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than counsel to Amicus made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

entire procedure. And the inmate cannot express consciousness or pain because he has been administered, for cosmetic reasons, a paralyzing drug that neither aids his anesthesia nor hastens his death.

The state's protocol itself reveals either a lack of concern about the infliction of extreme pain or ignorance of how each chemical operates. For example, if the prisoner remains alive ten minutes after the drugs are applied, the protocol directs the executioner to readminister the painful killing drugs—but *not* the anesthesia. If the inmate is still alive after ten minutes, however, it is probably because the executioners failed to properly administer the drugs—and that the anesthesia either wore off or never took hold. Yet Virginia will not apply additional anesthesia.

Virginia adheres to its unsound method of conducting lethal injection despite evidence of problems in other states that use similar methods and despite the ready availability of alternative methods. Virginia could readily use different, less painful drugs, or it could employ personnel who are trained in ensuring that the person is properly anesthetized and therefore does not experience pain. Without meaningful explanation, the state rejects both options.

Absent a cause of action under Section 1983, Amicus would not have been able to expose the astonishing inadequacies inherent in the design and implementation of Virginia's protocol. The state has fought tenaciously to shield its procedures from public disclosure and judicial review. Only Amicus's lawsuit has forced Virginia to disclose its procedures—over the Commonwealth's vehement and repeated objections before both the district judge and the magistrate judge. Even after disclosing its procedures in discovery, Virginia unsuccessfully tried to prevent Amicus from presenting information about those procedures to this Court. This penchant for secrecy underscores the need for courts to adjudicate Section 1983 challenges to specific lethal injection protocols in order to ensure that lethal injection is in fact carried out in a constitutional manner.

ARGUMENT

I. SECTION 1983 IS A VITAL TOOL TO ENSURE THAT LETHAL INJECTION IS CONDUCTED IN A CONSTITUTIONAL MANNER

Amicus has filed his suit to challenge serious yet wholly avoidable problems with Virginia's lethal injection protocol. His suit questions not *whether* he may be executed, nor even *when*, but rather *how*. The tight veil of secrecy in which Virginia and other states cloak their execution procedures prevents death-sentenced inmates from learning the details about how the state intends to kill them. In pursuing his Section 1983 claim, Amicus has learned new and disturbing facts about Virginia's lethal injection procedure, which he discusses in depth below. *See infra* pp. 8-15. Amicus accordingly believes that Section 1983 is critical to ensuring that if he is to be executed, his execution does not unnecessarily and unconstitutionally risk causing him excruciating pain.

Amicus's execution is unscheduled. He currently has pending two separate habeas petitions: a petition on remand from this Court for reconsideration in light of *Banks* v. *Dretke*, 540 U.S. 668 (2004),[2] and an authorized successive petition raising a claim of mental retardation in which the Fourth Circuit has ordered an evidentiary hearing.[3]

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[2] *See Walker* v. *True*, 126 S. Ct. 1028 (2006).

[3] *See Walker* v. *True*, 399 F.3d 315 (4th Cir. 2005). Amicus is aware of pending lawsuits in at least four other states—Maryland, North Carolina, Oklahoma, and Texas—that are being pursued while collateral attacks remain outstanding. In Oklahoma, two inmates whose federal habeas petitions are still pending have filed § 1983 suits. *See Anderson* v. *Jones*, No. CIV-05-825-F (W.D. Okla. July 20, 2005) (§ 1983 suit filed by two inmates); *Anderson* v. *Mullin*, No. 04-6397 (10th Cir. May 31, 2005) (habeas petition); *Taylor* v. *Gibson*, No. 6:01-CV-00252-JHP-KEW (E.D. Okla. Nov. 29, 2001) (same). In Maryland, an inmate is pursuing a § 1983 claim while his state collateral attack remains pending. *See Evans* v. *Saar*, No. 1:06-cv-00149-BEL (D. Md.) (§ 1983 suit); *Evans* v. *State*, No. 107, 2006 WL 269980 (Md. Feb. 6, 2006) (state collateral attack remains pending). The same is true for inmates in Texas and North Carolina. *See Raby* v. *Livingston*, No. H-05-765 (S.D. Tex. Nov. 16, 2005) (denying motion to dismiss § 1983 claim and discussing procedural posture); *Page* v. *Beck*, No. 5:04-ct-00004-BO (E.D.N.C. Aug. 5, 2004) (same).

In light of this Court's decision in *Nelson* v. *Campbell*, 541 U.S. 637 (2004), and in light of his concerns about the grave yet wholly unnecessary risk of severe pain imposed by Virginia's lethal injection protocol, Amicus filed a Section 1983 complaint in the Eastern District of Virginia on August 10, 2005. The district court denied Virginia's motion to dismiss and held that Amicus stated a claim under Section 1983.[4] The district court subsequently denied Virginia's motion to exclude from the challenge all consideration of the selection, training and qualifications of personnel involved in administering lethal injection.[5]

Following the denial of Virginia's motion to dismiss, Amicus has conducted extensive discovery and has learned a considerable amount about the grave inadequacies of Virginia's lethal injection process. The facts that Amicus has learned, and the unnecessary threat of severe pain that Virginia gratuitously imposes upon the persons that it executes, are a testament to the necessity of Section 1983 as a vehicle to investigate and prosecute such claims.

Without Section 1983, information about the method of lethal injection employed by states and the unnecessary risk of pain that results from these methods would be difficult, if not impossible, to come by. Virginia—like many other states—is extraordinarily secretive about its execution protocols. Not until 2004 did Virginia even disclose the drugs that it uses to execute inmates. Even that disclosure was not accompanied by any disclosure of the training or qualifications of the personnel administering lethal injection.

In Amicus's pending lawsuit, the Commonwealth has fought relentlessly to avoid disclosing anything about its procedures; only by repeated and persistent motions practice before the district court has Amicus succeeded in extracting information. Even after losing its motion to dismiss Amicus's Section 1983 suit, Virginia continued to wage a

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[4] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Oct. 28, 2005).

[5] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006).

two-front war aimed at shielding its execution procedures from the light of day. Before the district judge, Virginia filed three subsequent motions attempting to dismiss, postpone, or limit Amicus's lethal injection challenge. All were denied.[6]

Before the magistrate judge, Virginia argued repeatedly that its security concerns exempted it from the normal discovery obligations of a civil litigant. Virginia adamantly refused to disclose its execution manual until forced to do so by the court—and even then, Virginia insisted that counsel to Amicus sign a strict confidentiality agreement pursuant to a protective order. Similarly, Virginia adamantly resisted Amicus's attempts to depose its current executioners until the district court intervened and ordered Virginia to do so. Virginia even failed to produce any relevant documents other than its execution manual until Amicus filed a motion to compel. And finally, the Commonwealth fought Amicus's attempt to amend the protective order to present this brief to the Court, forcing Amicus to seek and receive specific permission from the magistrate judge.

Only through such discovery—over the Commonwealth's heated objections—has Amicus been able to learn the details of Virginia's lethal injection process and the magnitude of risk inherent therein.[7]

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[6] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Oct. 28, 2005) (denying motion to dismiss); *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Dec. 20, 2005) (denying motion for reconsideration of order denying motion to dismiss lethal injection claim; denying motion for certification as an interlocutory appeal); *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (denying motion to exclude all consideration of selection, qualifications, and training of personnel administering the lethal injection). The motion for reconsideration was granted insofar as it related to Virginia's alternative option of electrocution.

[7] Because of Virginia's continuing attempts to keep its method of execution secret, Amicus is currently subject to a broad protective order issued by the magistrate judge at Virginia's request. *See* Protective Order, *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Dec. 9, 2005) (Jones, Mag. J.); Hearing on Motions Oral Argument Tr., Dec. 9, 2005, at 40 ("Every-

II. VIRGINIA'S PROTOCOL, WHICH GREATLY RESEMBLES THE PROTOCOLS USED BY ALL STATES THAT PERFORM EXECUTIONS BY LETHAL INJECTION, IS SEVERELY DEFICIENT AND EXPOSES THE INMATE TO SERIOUS, UNNECESSARY, AND UNCONSTITUTIONAL HARM

A. Virginia's Lethal Injection Protocol Raises Grave Concern That Condemned Inmates Will Suffer Excruciating Pain

On execution day in Virginia, the Commonwealth places the inmate in the hands of prison employees who lack the appropriate training to conduct the potentially painful procedure that Virginia uses to conduct executions by lethal injection. Rather than adopt one of the many possible ways of performing lethal injection without risk of severe pain—or employ trained professionals who would virtually eliminate that risk—Virginia, like every state that conducts executions by lethal injection, does so using a method that cavalierly risks excruciating pain. Even Virginia's own expert witness concedes that the protocol is constructed in this way for cosmetic reasons, to make the prisoner appear serene.[8] Yet this appearance of serenity may actually mask unbearable pain.

The protocol for lethal injection used by Virginia and by other states raises serious Eighth Amendment concerns. These concerns arise from the complexity of the mechanism

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thing else that we have been talking about is counsel's eyes only until otherwise allowed."). Amicus has obtained specific permission (over the state's vigorous objections) to amend the protective order to discuss certain enumerated topics in this brief. *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (Jones, Mag. J.). Accordingly, Amicus confines himself to discussion of those topics, and cannot reveal all that he knows about Virginia's execution protocol and how it has been implemented.

[8] Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 4 (Jan. 23, 2006). All expert reports, depositions, interrogatory responses and letters cited in this brief are available from counsel to Amicus upon request by this Court. All such documents will be provided in redacted form to conform to the protective order that has been issued by the magistrate judge at Virginia's behest. *See supra* n.7.

for administering the drugs, the use of personnel with inadequate training to monitor the procedure, and the use of chemicals that, without adequate safeguards, can cause extreme pain. These concerns deserve full review by federal courts.

1. Virginia's Lethal Injection Protocol Requires Prison Employees Without Adequate Training to Administer Dangerous Drugs Via a Dangerous Procedure

a. *Virginia has chosen a three-drug combination that may inflict extreme and unnecessary agony*

Virginia—like Florida, and like every other state that conducts lethal injection—uses a three-drug chemical combination that consists of an anesthetic, a muscle paralyzer, and a painful drug that kills by stopping the heart. In Virginia, the drugs are sodium thiopental, pancuronium bromide, and potassium chloride, respectively.

Sodium thiopental is an ultra-short-acting anesthetic that is customarily used in surgery to induce anesthesia for a brief period of time. The drug is packaged in powdered form and must be properly mixed with water in the right concentration in order to have the intended effect. If sodium thiopental is not properly delivered into the inmate's bloodstream, then he may never become adequately anesthetized. Alternatively, even if the inmate is initially anesthetized, his anesthesia may wear off prior to, or during, the application of the subsequent drugs—the last of which is, as discussed below, extraordinarily painful.

Pancuronium bromide is a neuromuscular blocking agent that acts by paralyzing the muscles—yet has no effect on awareness, cognition, or sensation. It is used in surgery by trained anesthesiologists when it is imperative that the patient not move during the surgery—such as, for example, during delicate eye surgery, in which the slightest movement could prove catastrophic. When pancuronium bromide is injected in the quantity mandated by Virginia's protocol, an inmate is unable to make any voluntary movements—

much less talk or cry out in pain. If he is conscious and in excruciating agony, he will have no way of expressing it. He will be trapped in a chemical tomb.[9]

Potassium chloride is an electrolyte that when administered rapidly and in a high dose causes cardiac arrest. Injection of concentrated potassium activates sensory nerve fibers, causing severe pain as the drug travels through the venous system. There is universal medical agreement that, without adequate anesthesia, an injection of a potassium chloride overdose causes excruciating pain prior to causing cardiac arrest.[10]

b. *Virginia's choice of execution protocol and executioners needlessly increases the danger that the inmate will suffer unbearable pain*

If an inmate is properly anesthetized for the entire lethal injection process, then—by definition—he will feel no pain, except for the trivial amount of pain associated with the initial insertion of the needle. But Virginia, for reasons of its own choosing, has failed to take steps that would ensure that an inmate is properly anesthetized. The Commonwealth enlists executioners who lack training in assessing anesthesia and deploys them in a way that makes it particularly difficult to ascertain whether an inmate is properly anesthetized.

Virginia assigns execution responsibilities to prison employees who have other jobs and who work on the execution team as a sideline without receiving extra compensation.[11]

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[9] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 6 (Jan. 23, 2006).

[10] *See id.* at 5-6. Even Virginia's only expert witness agrees with Amicus on this point. *See* Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 5 (Jan. 23, 2006).

[11] Named Witness 1 Dep. Tr. 130-131. The magistrate judge has ordered that Amicus not provide any information that identifies any personnel of the Virginia Department of Corrections. *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (Jones, Mag. J.), at 2. Accordingly,

On execution day, those employees bring the inmate into the execution chamber, place him on a table, and strap him in.[12] Prison employees insert intravenous lines into his arms and connect the inmate to a cardiac monitor.[13] To enable the lines to reach the injection sites, the protocol provides for the use of extension sets—multiple lengths of connected tubing.[14] Usually, lines are inserted in each arm, and the execution team leader decides into which arm he will push the drugs.[15] Before the drugs are actually administered, the executioners retreat behind a curtain.[16] The only member of the lethal injection team who can view the inmate is the team leader.[17] Even he is limited to viewing through a porthole in the curtain—and the protocol does not even require him to monitor the inmate at all.[18] The current execution team leader in Virginia has no educational training beyond a high school degree and has absolutely no medical training.[19] It is his sole responsibility to check to see whether the drugs—including the anesthesia—are actually flowing properly into the prisoner.[20]

Separated from the inmate by a curtain, the team leader injects the drugs into a tube in the intravenous line, beginning with 2 grams of sodium thiopental, followed by 50 milligrams of pancuronium bromide, followed by 240 milliequiva-

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plaintiff refers to the deponent cited in this footnote as "Named Witness 1." The other "Secret Witness" depositions cited in subsequent footnotes involved executioners who, at Virginia's insistence, Amicus deposed anonymously.

[12] Secret Witness 2 Dep. Tr. 29.

[13] Secret Witness 3 Dep. Tr. 38.

[14] *Id.* at 63-64.

[15] *Id.* at 47.

[16] *Id.* at 39.

[17] Secret Witness 2 Dep. Tr. 33.

[18] *Id.*

[19] Secret Witness 2 Dep. Tr. 9.

[20] *Id.* at 31-32.

lents of potassium chloride.[21] Following the administration of sodium thiopental, the current team leader has observed snoring—a poor gauge of anesthetic depth, *see infra* p. 12—but otherwise neither he nor anyone on the execution team checks in any way to make sure that the inmate is properly anesthetized.[22] Indeed, even if they did check, they would not know what to look for—no one on the team has any training in, or experience at, administering anesthesia.[23]

The protocol provides that after the administration of the potassium chloride, the doctor who attends the execution pursuant to Virginia statute observes the heart monitor and pronounces death at the appropriate moment.[24] *This is the only role played during the execution process by a medical doctor.* The doctor is stationed behind a curtain where he cannot see the inmate.[25]

The protocol provides that if death does not occur within ten minutes after the potassium chloride is administered, then a second set of pancuronium bromide and potassium chloride are administered.[26] The protocol does *not* provide for additional administration of the anesthetic, sodium thiopental.[27] Execution records disclosed to Amicus during discovery reveal that on several occasions, prison employees administered an additional dose of potassium chloride.[28] Yet on all such occasions, the executioners violated the protocol in two ways: by not waiting ten minutes, and by not adminis-

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[21] *Id.* at 14, 33.

[22] *Id.* at 37; Secret Witness 3 Dep. Tr. 39.

[23] Defendants' Second Supplemental Response to Plaintiff's Amended Second Set of Interrogatories 7-8; Letter from Banci E. Tewolde to Lara A. Englund, Feb. 28, 2006, at 2; Secret Witness 2 Dep. Tr. 55.

[24] Va. Code §§ 53.1-234, 53.1-235; Secret Witness 2 Dep. Tr. 46.

[25] Secret Witness 2 Dep. Tr. 46.

[26] Secret Witness 4 Dep. Tr. 109.

[27] Named Witness 1 Dep. Tr. 122-123.

[28] Secret Witness 4 Dep. Tr. 110.

tering additional pancuronium bromide.[29] The prison employees were consistent, however, about not administering additional anesthesia.[30]

2. Numerous Aspects of Virginia's Lethal Injection Protocol Raise Serious Concerns About Whether Virginia Is Taking Adequate Steps To Ensure That Inmates Do Not Suffer Excruciating Pain

Amicus's Section 1983 suit does not allege that lethal injection itself is unconstitutional, but he does allege that the way that Virginia is administering lethal injection violates the Constitution. The facts that Amicus has learned via discovery only confirm his view.

First, as discussed above, the use of pancuronium bromide prevents inmates from expressing themselves if they are in fact in great pain because the anesthetic either was not properly applied or subsequently wore off.

Second, the anesthetic is applied by persons who lack relevant training. Administering anesthesia is a difficult task requiring specific training in assessing a person's state of consciousness and ability to perceive pain. Yet the persons involved in administering anesthesia in Virginia executions lack *any* such training, much less adequate training. In particular, the only person who can see the inmate during the administration of the drugs—the team leader—has no training in assessing anesthetic depth; indeed he has no formal education beyond a high school degree.

Third, even if the team leader did have training in anesthesia, he would be unable to accurately gauge whether the inmate is sufficiently anesthetized. Anesthetic depth is usually determined by talking to a patient and watching as consciousness is lost and the patient no longer responds to ver-

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[29] *Id.* at 110-111.

[30] Virginia's execution records, which document for each prisoner the time that each drug was administered (or readministered), demonstrate that additional anesthesia was never applied.

bal commands, touching, and the application of what would otherwise (if the patient were unanesthetized) be painful stimuli. These steps can be performed only if the tester is within literal arm's reach of the patient.[31] Because the team leader and other executioners are distanced from the inmate and separated from him by a curtain, they cannot conduct the necessary tests to determine whether he is properly anesthetized.

Fourth, although the Virginia execution team is not checking to determine whether the inmate is properly anesthetized, they appear to believe that such checking is not necessary because, at least in some cases, they can hear the patient snoring. Yet the use of snoring as a proxy for an adequate depth of anesthesia is medically unacceptable. A person who is snoring is only lightly anesthetized at best and may still be able to experience pain. Furthermore, a lightly anesthetized person can subsequently wake up after the administration of pancuronium bromide—yet be unable to express himself, or move at all, due to the paralysis caused by that drug.[32]

Fifth, Virginia's protocol provides that if the inmate is not dead within ten minutes of the three drugs, then the prison employees will readminister pancuronium bromide and potassium chloride—but that they will *not* administer any additional anesthetic.[33] This further increases the probability that the inmate's original dose of anesthesia, if not

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[31] *See* Expert Report of Dr. Stuart M. Lowson in *Walker* v. *Johnson*, at 5-6 (Jan. 23, 2006).

[32] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 12-13 (Jan. 23, 2006).

[33] The protocol further provides that if, after the re-application of pancuronium bromide and potassium chloride, the inmate is still alive after another ten minutes have elapsed, then pancuronium bromide and potassium chloride shall be applied once again—and so forth at ten-minute intervals until the inmate is finally dead. At *no* point does the protocol allow for the readministration of additional anesthetic. Named Witness 1 Dep. Tr. 122-123.

properly administered, may wear off before, or during, the painful administration of potassium chloride. This is particularly worrisome because a delay of ten minutes following the administration of potassium chloride would raise serious questions about whether the executioners had failed to correctly administer the drugs—thereby increasing the chance that the inmate is not properly anesthetized and making the administration of an additional dose of anesthetic all the more necessary.[34] Indeed, the very fact that Virginia's protocol contemplates the possibility that the inmate may still be alive ten minutes after the administration of potassium chloride indicates that Virginia prison officials are aware that the administered drugs will not always reach the inmate as expected and yet they are unwilling to take steps to ensure that the inmate remains properly anesthetized.

Sixth, despite the clear guidelines of Virginia's protocol, the executioners have repeatedly deviated from it. Rather than waiting ten minutes after the application of the first set of the three drugs, and then applying pancuronium bromide and potassium chloride, prison employees on several occasions have waited one to three minutes and then applied only potassium chloride. This inexplicable deviation from protocol raises questions as to the ability of Virginia's executioners to follow the directions they are given, and raises further questions about whether they are able to apply the dangerous drugs with which they are entrusted without exposing inmates to excruciating pain.

Seventh, Virginia's protocol fails to provide adequate guidelines for the real possibility that the prison employees may be unable to obtain peripheral intravenous access, *i.e.*, via an arm or a leg, and thus will need to inject chemicals into a central vein, usually the femoral vein, located in the groin. Central veins, in contrast to peripheral veins, are located deep under skin and tissues and are adjacent to critical

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[34] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 13 (Jan. 23, 2006).

structures. Inserting a catheter into such a vein is a difficult procedure that must be performed by an individual with adequate proficiency and training. Conducting such a procedure in the absence of such training risks severe and painful complications, such as severe blood loss, collection of air between the lung and inner chest wall leading to death by suffocation, perforation of the bladder, and multiple other painful complications.[35] Given that in 2004, Virginia did in fact need to resort to a central vein in order to execute an inmate,[36] the lack of discussion in Virginia's protocol of how to perform the central line creates unacceptable risks.

Eighth, Virginia does not keep adequate records that might allow prison officials to determine whether any problems exist with its protocol. Amicus does not suggest that Virginia is especially deficient compared to other states in this regard—he merely notes that in states that *do* keep such records, such as California, the records have revealed the possible existence of serious problems. For example, in California, logs kept by prison officials suggest that inmates continue to breathe beyond a point that might be expected if the sodium thiopental had been correctly applied. *See infra* p. 15.

In sum, Virginia uses inadequately trained prison employees to administer a complex and dangerous procedure. To perform this procedure correctly, the prison employees must, among other things, mix the anesthetic solution to the designated concentration, check tubes, connectors, and valves to ensure that the drugs are not leaking, monitor the catheter to ensure that it is securely sited within the vein, and adequately flush the intravenous lines with saline solution to avoid the chemicals from mixing, precipitating, and

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[35] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 6-7 (Jan. 23, 2006).

[36] Secret Witness 4 Dep. Tr. 69-70.

failing to reach the inmate at the proper time and in the proper dosages.[37]

For these reasons, a person who is administering anesthesia cannot merely take on faith that the command to deliver anesthesia has automatically transported the recipient into a condition where he can feel no pain. This is especially true in situations where—as here—the procedure calls for the administration of a paralytic agent such as pancuronium bromide. If the inmate tries to express that he is still awake or in pain after the administration of the pancuronium bromide, it will be too late.

If Virginia wishes to use these unnecessarily risky procedures, then it must take steps to ensure that the inmate is free from excruciating pain. But as discussed above, Virginia does not even bother to monitor the anesthetization process while it is taking place to determine whether or not any problems are occurring. Yet data from other states that use protocols very similar to Virginia suggest that—as might be expected when using untrained personnel to administer dangerous drugs—problems do indeed occur.

In California, for instance, which uses the same three drugs as Virginia and Florida (and which uses two-and-a-half times as much anesthetic as Virginia), a federal district court recently found that anomalies in past executions were so severe that it barred California from conducting an upcoming execution as scheduled unless it either changed its drugs or employed personnel with adequate training in anesthesia. *See Morales* v. *Hickman*, Nos. C 06-219 JF & C 06-926 JF RS, 2006 WL 335427, at *5-8 (N.D. Cal. Feb. 14, 2006). In particular, the court cited evidence from the state's execution logs that indicated that breathing did not stop as expected within one minute of administration of sodium thiopental, but rather lasted much longer. *See id.* at *5-6; Brief of Amicus Curiae Habeas Corpus Resource Cen-

[37] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 8-10 (Jan. 23, 2006).

ter 12-16. Other states that use the same three-drug combination have experienced significant problems—including leaking intravenous lines, solidifying chemicals that stop flowing, catheters inserted so that the needle points in the wrong direction, difficulties locating veins, and injections that cause veins to collapse.[38] These problems suggest strongly that the untrained personnel who perform lethal injection are not capable of doing so in a way that assures that an inmate is properly anesthetized.

B. Virginia Can Execute Inmates By Lethal Injection In A Way That Does Not Raise Constitutional Concerns

The litany of problems discussed above is not an unavoidable consequence of conducting executions by lethal injection. Rather, these problems are the specific result of deliberate choices made by Virginia (and other states) that

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[38] *See, e.g., Oken* v. *Sizer*, 321 F. Supp. 2d 658, 667 n.7 (D. Md. 2004) (describing an improperly constructed intravenous line leading to fluids leaking and dripping onto the floor); Tim O'Neil, *Too-Tight Strap Hampered Execution*, St. Louis Post-Dispatch, May 5, 1995, at B1; *Witness to a Botched Execution*, St. Louis Post-Dispatch, May 8, 1995, at 6B (describing excessively tight leather straps improperly slowing the flow of the chemicals to the inmate); Michael Overall & Michael Smith, *22-Year-Old Killer Gets Early Execution*, Tulsa World, May 8, 1997, at A1 (describing the execution of Scott Dawn Carpenter, in which the inmate uttered a "guttural sound" and "gasp[ed] for air"); Michael Grazyk, *Convicted Killer Gets Lethal Injection*, Herald (Denison, Tex.), May 8, 1992 (describing inmate's reaction to the drugs as "violent," including "groan[s]," "gasp[s]," and a "coughing spasm"); *1st Try Fails to Execute Texas Death Row Inmate*, Orlando Sent., Apr. 23, 1998, at A16 (describing an execution delayed due to a collapsed vein); Rob Karwath & Susan Kuczka, *Gacy Execution Delay Blamed on Clogged IV Tube*, Chicago Trib., May 11, 1994, at 1 (Metro Lake Section) (describing an Illinois execution in which the chemicals unexpectedly solidified, clogging the intravenous tube that led into the inmate's arm, and prohibiting any further passage); Rhonda Cook, *Gang Leader Executed By Injection Death Comes 25 Years After Boy, 11, Slain*, Atlanta J. Const., Nov. 7, 2001, at B1 (explaining that after trying unsuccessfully for 15 to 20 minutes to locate a vein, technicians had to abandon their effort to insert needles into High's arm; instead, they inserted one in his hand and one between his shoulder and his neck).

are dictated neither by statute nor by the use of lethal injection itself. Simply put, Virginia (and other states) could either (1) use drugs that do not present the risk that an inmate will be paralyzed and in great pain, or (2) employ personnel who are trained in ensuring that a person is properly anesthetized and therefore does not experience pain.

Virginia does not contend that it is necessary to paralyze an inmate in order to kill him. In his expert report, Virginia's only expert witness cited solely cosmetic reasons for using a paralytic agent—the perceived need, in his view, to sanitize the execution process so as to prevent the involuntary contractions that might accompany death.[39]

If, for some reason, Virginia insists on maintaining its use of this unnecessary and dangerous paralytic drug, then it could avoid problems simply by ensuring that the inmate is monitored by a person with training and experience in assessing whether a person has reached, and remains at, a level of anesthesia that prevents him from experiencing pain.[40] No such safeguards have been implemented by Virginia.

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[39] Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 4 (Jan. 23, 2006).

[40] The *Morales* court held that California could execute Morales as scheduled, using the same drugs as Virginia, if during the execution Morales was monitored by a person with formal training and experience in the field of general anesthesia. *See Morales*, 2006 WL 335427, at *8.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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