No. 05-1036

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

PHIL BREDESEN, *et al.*,

Respondents.

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

BRIEF OF AMICI CURIAE TENNESSEE MEDICAL PROFESSIONALS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The undersigned amici represent a coalition of Tennessee medical professionals of varying backgrounds with a vested interest and expertise in the ethical and humane practice of medicine and the proper administration of the drugs used to execute prisoners.[2] As physicians and medical professionals, amici have extensive experience in medicine, including anesthesiology, and a deep familiarity with and understanding of the issues involved in the administration and effect of the intravenous drugs used in the lethal injection protocol of Tennessee, which is similar, if not identical, to the protocols in 26 other states. Amici offer no opinion as to the constitutionality of the death penalty, as that issue is not before the Court on this petition, and write with the hope that our expertise with the medical issues involved will assist in the Court's evaluation of whether to grant certiorari on the important legal issues raised in the petition.

Included among the amici are Dr. Naji Abumrad, current Chairman of the Department of Surgery at the Vanderbilt University School of Medicine, and Dr. John Sergent, current Vice Chairman for Education in the Department of Medicine at Vanderbilt University and former member of the Board of Directors of the Nashville Clinical Ethics Guild. Also

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than amici and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] A complete list of the medical professionals participating in this brief can be found herein, immediately following the conclusion, on page 18.

included are Professor Alan Cherrington, Chair of Molecular Physiology and Biophysics at Vanderbilt University School of Medicine, Dr. James Sullivan, former member of the Board of Trustees of the Tennessee Medical Association, and Dr. Will Kendrick, an anesthesiologist, and a member of the American Society of Anesthesiologists.

SUMMARY OF THE ARGUMENT

The petition presents the Court with the opportunity to address whether, consistent with the Eighth Amendment, condemned inmates in Tennessee and 26 other states can be subjected to the unnecessary and foreseeable risk of excruciating pain and suffering during execution as a result of those states' lethal injection protocols. The combination of drugs used in those states and the protocols for their administration pose an unnecessary and unconstitutional risk of gratuitous pain during execution. There is no dispute that the administration of either Pavulon or potassium chloride would -- absent adequate anesthesia -- violate the Eighth Amendment's prohibition against cruel and unusual punishment. Nonetheless, the protocol used by the State of Tennessee to administer sodium thiopental, which is intended to bring the inmate to a sufficient anesthetic depth during execution, is woefully deficient, and makes it inevitable that, over time, some inmates will be subject to the wanton infliction of pain. These deficiencies include (1) the use of sodium thiopental, an ultrashort-acting barbiturate, as a long-acting anesthetic; (2) the lack of adequate training for those who administer the drugs, and (3) the failure and/or inability to monitor adequately the state of consciousness of the inmate during the execution procedure. This last risk is unnecessarily exacerbated by the needless use of Pavulon -- a neuromuscular blocking agent that paralyzes the skeletal or voluntary muscles, but has no effect on awareness, cognition, or sensation. Indeed, the 2000 Report of the American Veterinary Medical Association, a group that has far more

experience in the area of euthanasia, emphasizes that drugs like Pavulon are "unacceptable and are absolutely condemned for use as euthanasia agents." If that is the case for animals, the question presented by this case to this Court is whether, under the Constitution, the same is true for human beings.

The Court should also grant certiorari in order to clarify what, if any, level of risk that an execution protocol will inflict unnecessary and foreseeable tortuous pain is constitutionally acceptable. A review of the decisions below and in other jurisdictions makes clear that state and federal courts are uncertain as to the standard by which the risks of the wanton infliction of pain are to be considered under the Eighth Amendment.

ARGUMENT

I. The Supreme Court Should Grant Certiorari To Ensure That Condemned Inmates Are Not Subjected To An Unnecessary And Foreseeable Risk Of Gratuitous Pain And Suffering During Execution by Lethal Injection Under Tennessee's Protocol.

The petition presents the Court with the opportunity to provide state and federal courts with much-needed guidance regarding the constitutionality of state protocols for the execution of condemned inmates by lethal injection. Although lethal injection was not introduced in the United States until 1982, it is now the primary method of execution in 37 of the 38 states that authorize capital punishment, *see* Pet. App. 18a; *see also, e.g., Beardslee v. Woodford*, 395 F.3d 1064, 1073-74 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005) (citations omitted), and accounts for 98% of all

executions in the United States since January 1, 2000.[3] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment Statistics*, http://www.ojp.usdoj.gov/bjs/cp.htm (last visited April 18, 2006).

At least 26 states use the same combination of drugs as Tennessee, administered in essentially the same way, in executing condemned inmates by lethal injection. 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. 97, 146 (2002) (hereinafter "Denno, *When Legislatures Delegate Death*"). Those drugs consist of sodium thiopental, which is intended to serve as an anesthetic; pancuronium bromide (hereinafter referred to by its trade name "Pavulon"), a neuromuscular blocking agent that paralyzes the skeletal or voluntary muscles, including those of the chest and diaphragm, but has no effect on awareness, cognition, or sensation; and potassium chloride, a salt solution that induces cardiac arrest, and is intended to cause the inmate's death. *See Beardslee*, 395 F.3d at 1072-73; *see also* 2 Trial Tr. 106-13 (testimony of Dr. Mark Heath).

There can be no dispute that the injection of either Pavulon or potassium chloride in an inmate who is not adequately anesthetized would violate the Eighth Amendment's prohibition on cruel and unusual punishment

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[3] Despite the pervasiveness of lethal injection executions in the United States, this Court has never addressed whether this method of execution or the states' protocols for its administration violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See State v. Webb*, 750 A.2d 448, 454-55 (Ct. 2000) ("Since deciding *Louisiana ex rel. Francis v. Resweber*, [329 U.S. 459 (1947)] the United States Supreme Court has not addressed the constitutionality of any method of execution.").

by inflicting unnecessary extreme pain and suffering.[4] *See* Pet. App. 19a (noting that "it was undisputed that the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering"); *see also Beardslee*, 395 F.3d at 1071 ("The [State of California] concedes that if the inmate is not properly sedated by the first drug, the inmate will experience torturous pain."); *Brown v. Crawford*, 408 F.3d 1027, 1028 (8th Cir.), *cert. denied*, 125 S. Ct. 2927 (2005) (same); *Evans v. Saar*, 412 F. Supp. 2d 519 (D. Md. 2006) ("The State [of Maryland] concedes that if an inmate is not adequately anesthetized he will suffer an inhumane death."); Pet. 6-7 (detailing extreme pain and suffering caused by administration of Pavulon and potassium chloride to a conscious individual). Thus, unless an inmate is brought to an appropriate anesthetic depth by the injection of sodium thiopental, and unless that depth is maintained throughout the lethal injection process, the inmate will experience excruciating pain and suffering, but be unable to communicate this given the paralytic effects of Pavulon. *See* 2 Trial Tr. 119-20. Yet, achieving and maintaining an appropriate anesthetic depth is an extraordinarily complex endeavor that requires specialized training, procedures, and equipment.

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[4] Tennessee's (and other states') decision to use potassium chloride, an extremely painful drug, to cause death is unnecessary and substantially increases the risk that an inmate will suffer an inhumane death – particularly in light of the availability of other equally effective and essentially painless medications that could serve the same purpose. *See* Pet. 15-16; 1 Trial Tr. 71. Further, as discussed in greater detail below, and as the State of Tennessee essentially conceded in the proceedings below, the use of Pavulon in the lethal injection protocol serves no substantial purpose and compounds the risk that an inmate may suffer excruciating pain during the execution. 2 Trial Tr. 118-19.

As discussed in Section II, *infra*, the protocol used by the State of Tennessee for the administration of sodium thiopental is woefully deficient, and makes it inevitable that, over time, some inmates will suffer excruciating and unnecessary "tortuous" pain. As such, there is a foreseeable risk that Tennessee's lethal injection protocol will result in unnecessary and wanton infliction of pain in bringing about petitioner's death. Because 26 other states use the same protocol, the petition raises an issue of great importance and merits certiorari.

II. Tennessee's Lethal Injection Protocol Creates An Unnecessary and Foreseeable Risk That Individuals Will Not Be Adequately Anesthetized During The Lethal Injection Process.

Amici will not restate the myriad of deficiencies identified in the petition concerning the lethal injection protocol that the State of Tennessee uses. *See* Pet. 16-19. Rather, amici have focused on three basic defects inherent in Tennessee's lethal injection protocol – each of which poses an unnecessary and foreseeable risk of inflicting substantial pain on a condemned inmate. As set forth in more detail below, those three defects are (1) the use of sodium thiopental as an anesthetic, (2) the lack of adequate training for those who administer the drugs, and (3) the failure and/or inability to monitor adequately the state of consciousness of the inmate during the execution procedure.

A. The Use Of Sodium Thiopental As An Anesthetic Under Tennessee's Lethal Injection Protocol, As Well As Many Other States', Creates An Unnecessary Risk Of Extreme Pain And Suffering.

The use of sodium thiopental in Tennessee's lethal injection protocol to bring an inmate to a sufficient anesthetic depth during execution substantially increases the likelihood

that an inmate will not be adequately anesthetized when he or she is injected with Pavulon or potassium chloride. Sodium thiopental is an ultrashort-acting barbiturate, which means that its effects are short-lived in comparison to other anesthetics. *See* 1 David E. Longnecker *et al.*, *Principles and Practice of Anesthesiology* 1223 (2d ed. 1998) (hereinafter "*Principles and Practice*"); Ronald D. Miller & Robert K. Stoelting, *Basics of Anesthesia* 61 (4th ed. 2000); *see also* 2 Trial Tr. 107-09. Thus, from a medical standpoint, it is troubling that Tennessee and other states use sodium thiopental to provide long-term anesthesia. It is also disconcerting that Tennessee (and, we understand, other states) administers only a single dose of thiopental rather than using a continuous drip. Basic anesthesiology texts caution that "[c]ontinuous infusion techniques [for thiopental] are more suitable to achieve and maintain a stable level of sedation." *Principles and Practice* at 1225. Given that corrections officials administering thiopental have no experience monitoring anesthetic depth (a point addressed in section B, below), it is especially important to ensure a high, steady dose of the sedation-inducing drug.

Sodium thiopental also has an extremely short shelf life in liquid form, requiring those who administer the drug to measure and mix it, which in all other contexts is viewed as requiring diligent and lengthy instruction in the medical profession. *See* 2 Trial Tr. 122-23. Yet, Tennessee has no rules, regulations, or guidelines of any sort regarding the handling or mixing of sodium thiopental for purposes of lethal injection. *See id.* Further, although five grams of sodium thiopental is the intended dosage under Tennessee's lethal injection protocol, the actual amount cannot be found anywhere in the state's written protocol, and the individual responsible for administering the drug admitted during the proceedings below that he was uncertain of the proper dosage. *See generally* Tenn. Execution Manual, Tr. Ex. 11; *see also* 3 Trial Tr. 273, 321. Such a lackadaisical attitude

towards this temperamental and dangerous drug is untenable from a medical standpoint, and poses a substantial and unconstitutional risk that an inmate will have some level of consciousness that would allow him or her to experience extreme pain when injected with Pavulon or potassium chloride.

B. The Lack Of Training Of The Individuals Who Administer These Drugs Further Increases The Risk Of Infliction Of Tremendous, Unnecessary Pain And Suffering.

Despite the crucial role that the proper administration of sodium thiopental has in Tennessee and 26 other states' lethal injection protocols, Tennessee has no requirement that any person on the execution team, let alone the person administering the sodium thiopental, receive adequate training. Moreover, it appears that not a single state statute requires a member of the execution team – including the individual responsible for administering the sodium thiopental – to be trained to the satisfaction of a licensed anesthesiologist. Indeed, only two states (Connecticut and Texas) even require a member of the team to be a "medical professional" or someone trained to the satisfaction of a licensed physician. *See* Denno, *When Legislatures Delegate Death*, at 156-167; *see also Webb*, 750 A.2d at 452 (noting that Connecticut's protocol required "the insertion of the intravenous catheter by persons trained to the satisfaction of a Connecticut licensed and practicing physician").

It is unconscionable to subject any individual, including condemned inmates, to a scheduled and potentially extraordinarily painful procedure without (i) ensuring that the appropriate anesthetic is used in the procedure; and (ii) that the anesthetic is administered by personnel who are properly

trained in the field of anesthesiology.[5] *See* 2 Trial Tr. 104-05. The absence of such training substantially increases the possibility of such errors as: incorrectly injecting the sodium thiopental into the intravenous line; incorrectly inserting the catheter into the inmate's vein; inadvertent perforation, rupture or leakage of the inmate's vein; and excessive pressure on the syringe plunger. *See* 2 Trial Tr. 133-37. Given that the constitutionality of Tennessee's lethal injection protocol relies entirely on the effective administration of sodium thiopental, Tennessee's failure to ensure that individuals are adequately trained to administer and monitor anesthesia constitutes the type of deliberate indifference that this Court has repeatedly found to be unconstitutional under the Eighth Amendment. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding that deliberate indifference to serious medical needs of prisoners violates Eighth Amendment); *see also Helling v. McKinney*, 509 U.S. 25, 32-33 (1993) (concluding that prisoner stated cause of action under Eighth Amendment based on allegations that state prison had, with deliberate indifference, exposed him to levels of tobacco smoke that pose an unreasonable risk of serious damage to his future health).

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[5] It is incorrect to suggest that more skill is required for the administration of sodium thiopental in a medical setting than during an execution due to the "delicate balance between unconsciousness and death." *Webb*, 750 A.2d at 456 ("The circumstances surrounding an execution do not require such a balance."). Simply put, although the "delicate balance" here is not between unconsciousness and death, by including Pavulon and potassium chloride in their lethal injection protocols, Tennessee has created the need to monitor successfully the "delicate balance" between unconsciousness and inhumane pain and suffering that is of constitutional import.

C. The Tennessee Protocol Results In A Failure And/Or Inability To Monitor Adequately The Depth of Anesthesia.

An overarching concern implicating Eighth Amendment issues arises also from the troubling lack of monitoring built into lethal injection protocols in Tennessee and around the country. In Tennessee, there is no trained personnel observing closely the individual during execution for the purpose of evaluating whether there is an adequate depth of anesthesia.

First, it is unimaginable, from a medical perspective, that an untrained corrections official would be able to monitor effectively the vital signs and other indicia of depth of sedation, especially when they are not physically in the room with the inmate. 2 Trial Tr. 137-39. It is a basic tenant of anesthesiology that those administering drugs "rely on somatic and autosomatic signs for assessing depth of anesthesia," which can not be done without access to the patient. *Principles and Practice* at 1225. Both the *Harvard Minimal Monitoring Standards* and the guidelines of the American Society of Anesthesiologists (hereinafter "ASA") include a specific provision requiring the anesthesiologist or nurse anesthetist's presence in the room with the individual undergoing anesthesia. *See Principles and Practice* at 795; ASA, *Standards for Basic Anesthetic Monitoring*, at 1 (Oct. 25, 2005) http://www.asahq.org/publicationsAnd Services/ standards/02.pdf. These mandates are necessary because many of the indicia of inadequate anesthesia are quite subtle, including "opened eyes, eyelash reflex, pupillary responses or diameters, perspiration and tearing." ASA Task Force on Intraoperative Awareness, *Practice Advisory for Intraoperative Awareness*, 104 Anesthesiology 847 (2006). Without a trained professional involved, even those elements that can be monitored remotely in theory, such as temperature and heart rate, cannot be properly evaluated.

Likewise, errors in drug administration, such as infiltration (a condition wherein the anesthetic misses the vein and instead collects in the tissue outside of the vein); an IV mistakenly inserted pointing towards the extremities instead of towards the heart; retrograde injection (wherein drugs flow back into the fluid bag rather than into the individual); or stoppage in the flow of drugs due to a kink in tubing, require hands-on monitoring and quick correction. *See* 2 Trial Tr. 134-36; Michael L. Radelet, *Post-Furman Botched Executions* at 3, http://www.deathpenaltyinfo.org /article.php?scid=8&did=478 (last visited April 18, 2006) (describing several executions which were marred by clogged tubing or ineffective drug delivery, errors which were exacerbated by a lack of monitoring). Allowing the execution team to remain in a separate room needlessly exposes the individual being executed to a foreseeable risk of an extremely painful death, a risk which could be remedied by stricter monitoring standards.

Second, the use of the neuromuscular blocking drug Pavulon further and needlessly interferes with the monitoring capabilities of those administering the drugs because it prevents even a medically-trained observer from witnessing (and ameliorating) the pain that an individual is experiencing. The Ethics Committee of the Society of Critical Care Medicine cautioned that "unless the patient is also treated with adequate sedation and analgesia, the NMBAs [neuromuscular blocking agents] may mask the signs of acute air hunger . . ., leaving the patient to endure the agony of suffocation in silence and isolation." Robert D. Truog *et al.*, *Recommendations for End-of-Life Care in the Intensive Care Unit: The Ethics Committee of the Society of Critical Care Medicine*, 29 Critical Care Med. 2332, 2345 (2001). The 37,000-member ASA also warned in its most recent guidelines on point that "[t]he use of neuromuscular blocking drugs may mask purposeful or reflexive movements, and *adds additional importance to the use of monitoring methods*

that assure the adequate delivery of anesthesia." ASA, *Practice Advisory for Intraoperative Awareness and Brain Function Monitoring*, at 854 (emphasis added). Because the widespread use of a drug during executions that serves no purpose other than masking the unpleasantness of observing the effects of putting someone to death and, at the same time, increases the likelihood of an unnecessarily tortuously painful death going undetected and thus unremedied is inconsistent with the Eighth Amendment, this Court's review is warranted.

III. Objective And Anecdotal Evidence Shows That The Possibility Of Such Pain Being Inflicted Is Unnecessarily Real.

In rejecting Petitioner's challenge to Tennessee's lethal injection protocol, the Tennessee Supreme Court based its decision, in part, on the conclusion that petitioner's argument was "premised on a series of presumptions . . . and that the possibility of a 'botched' execution is extremely remote under the protocol." Pet. App. 20a-21a; *see also Webb*, 750 A.2d at 456 (same). The so-called "presumptions" are not, however, as presumptuous as the court suggests, as other courts, faced with virtually identical protocols, have recognized. *See, e.g., Morales v. Hickman*, 415 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir. 2006) (six of thirteen inmates were still breathing more than several minutes after the administration of sodium thiopental, and in several instances, well after the administration of Pavulon, raising "some doubt as to whether the protocol actually is functioning as intended"); *see also Brown v. Beck*, No. 5:06-CT-3018-H, slip op. at 8-10 (E.D.N.C. April 7, 2006) (discussing toxicology data and eyewitness accounts suggesting inadequate anesthesia with thiopental, leading the court to conclude that it could "[]not ignore the serious questions raised by this data"). As the court in *Morales* recognized in requiring either the removal of Pavulon from

the injection protocol or the administration of the drugs by certified anesthesiologists, "because of the paralytic effect of pancuronium bromide [Pavulon], evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia." 415 F. Supp. 2d at 1045.[6]

Most strikingly, the opinion of veterinarians, who have greater experience in the area of euthanasia, stands in stark contrast to the view that underlies the opinions below. As Dr. Dennis Geiser, Chairman of the Department of Large Animal Clinical Sciences at the University of Tennessee College of Veterinary Medicine, testified at the evidentiary hearing in this case, Pavulon, "whether used alone or with other drugs, is not acceptable by the American Veterinary Medical Association for animal euthanasia . . . ." Pet. App. 80a. The 2000 Report of the American Veterinary Medical Association ("AVMA") emphasizes that "all neuromuscular blocking agents [] are unacceptable and are absolutely condemned for use as euthanasia agents." AVMA Panel on Euthanasia, *2000 Report of the AVMA Panel on Euthanasia*, 218 J.A.V.M.A. 669 (2001). Veterinarians, like amici, are professionally invested in the ethical use of anesthetic medications, and their judgment regarding these drugs warrants deference. The 3,100 inmates on death row facing

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[6] The Eighth Circuit Court of Appeals, sitting *en banc*, recently granted a stay in the execution of one individual in order to give time for a full evidentiary hearing on the efficacy of and pain associated with the same three-drug protocol, which this Court affirmed. *Crawford, v. Taylor*, 126 S. Ct. 1192 (2006) (Order in Pending Case Den. Pet. to Vacate Stay of Execution); Cheryl Wittenauer, *Supreme Court Delays Execution in Missouri Death Sentence*, Columbia Missourian, Feb. 2, 2006, http://columbiamissourian.com/news/story.php?ID=18148.

lethal injection deserve to have this Court consider whether it violates the Eighth Amendment for them to be executed in a manner that is considered too inhumane to impose on household animals.

IV. The Court Should Grant Certiorari In Order To Clarify What, If Any, Level Of Risk That An Execution Protocol Will Inflict Unnecessary And Foreseeable Tortuous Pain Is Constitutionally Acceptable.

A review of the decisions below and in other jurisdictions demonstrates that the courts are uncertain as to the standard by which the risks of the wanton infliction of pain are to be considered under the Eighth Amendment. This is a serious uncertainty that this Court needs to resolve.

In the proceedings below, the Tennessee Supreme Court noted that the Chancellor concluded that the petitioner failed to show "'a reasonable likelihood of a cruel or inhumane death.'" Pet. App. 14a; *see also id.* 17a (method shown to be "reliable in rendering an inmate unconscious, if not dead, before the paralytic and lethal painful drugs take effect"). The Court of Appeals on the other hand, faulted petitioners for failing to prove that condemned prisons "*will* experience unnecessary physical pain or psychological suffering." *Id.* 67a (emphasis added); *see also id.* 69a (petitioner had failed to prove that the procedure "would cause unnecessary physical pain or psychological suffering"). Elsewhere, the Court of Appeals seemed to be analyzing whether there was "an unacceptably high risk of otherwise avoidable mistakes occurring." *Id.* 71a.

The Tennessee Supreme Court itself took yet another analytic approach and rejected the petitioners' claim for a failing to establish "a risk of unnecessary physical or psychological suffering." *Id.* 15a. It also opined that it could not "judge the lethal injection protocol based solely on

speculation as to problems or mistakes that might occur" but "must instead examine the lethal injection protocol as it exists today." *Id.* 21a (citing *Webb*, 750 A.2d at 456). This standard essentially precludes an inmate from challenging the constitutionality of a state's execution protocol until he can prove that a prior execution had resulted in the foreseeable and wanton infliction of pain. *But see Helling*, 509 U.S. at 33-34 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

In *Webb*, the Connecticut Supreme Court took a somewhat different approach in rejecting a challenge to the state's lethal injection protocol that was based on arguments similar to those presented in the petition. The court held that "the potential for improper administration of the agents is not relevant in the determination of whether the mechanism of execution is constitutional. . . ." 750 A.2d at 455 (rejecting Eighth Amendment challenge to Connecticut lethal injection protocol); *see also Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000) ("Other than demonstrating a failure to reduce every aspect of the procedure to writing, [inmate] has not shown that [Florida's lethal injection] procedures will subject him to pain or degradation if carried out as planned."). It explained that "[a]lthough the defendant introduced extensive testimony regarding the consequences associated with the potential for improper administration of the agents, 'the risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.'" *Webb*, 750 A.2d at 455 (quoting *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994)).

In contrast to the standards applied in *Webb* and *Abdur'Rahman*, courts in the Ninth Circuit have consistently recognized that that an inmate must show that the state's execution protocol "exposes them to *more than a negligible*

risk of being subjected to a cruel and wanton infliction of pain" in order to establish a violation of the Eighth Amendment. *LaGrand v. Lewis,* 883 F. Supp. 469, 471 (D. Ariz. 1995), *aff'd,* 133 F.3d 1253 (9th Cir. 1998); *see also, e.g., Beardslee*, 395 F.3d at 1076 (affirming denial of stay due to inmate's failure to show "enough of a likelihood that he will be conscious during the administration of sodium thiopental . . ."); *Morales*, 415 F. Supp. 2d at 1047, ("[T]he [Pavulon] present action concerns the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed.").

Finally, a number of courts have required a condemned inmate to show that a *substantial or excessive risk* exists that he will be subject to an unnecessary and wanton infliction of pain. *See, e.g., Anderson v. Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *4 (W.D. Okla. Jan. 11, 2006) (holding that inmates stated a valid claim under Eighth Amendment based on allegations showing that Oklahoma's lethal injection protocol "create[d] an excessive risk of substantial injury or deprivation."); *Baker v. Saar*, 402 F. Supp. 2d 606, 608 (D. Md. 2005) (denying inmate's motion for stay of execution due to failure to show that Maryland's lethal injection protocol violated Eighth Amendment); *Reid v. Johnson*, 333 F. Supp. 2d 543, 553 (E.D. Va. 2004) ("[I]n order to ultimately demonstrate a violation of his rights under the Eighth Amendment, Reid must show that there is a substantial risk that he will [be] subjected to an 'unnecessary and wanton infliction of pain.'" (citations omitted)).

If for no other reason, the Supreme Court should grant certiorari to address this uncertainty on this critical issue of the interpretation and application of the Eighth Amendment's prohibition against cruel and unusual punishment. Because the Court has not had an opportunity to address this issue in

the past, courts – including the Tennessee Supreme Court – have focused on different factors and adopted different, and often inconsistent, standards in evaluating the constitutionality of a state's execution protocol under the Eighth Amendment.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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