IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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ABU-ALI ABDUR'RAHMAN, Appellant, vs. PHIL BREDESEN (formerly Don Sundquist), Governor of the State of Tennessee, QUENTON WHITE (formerly Donal Campbell), Commissioner, Tenn. Dep't. of Correction, RICKY BELL, Warden of Riverbend Maximum Security Institution, VIRGINIA LEWIS, Warden, Special Needs, TENNESSEE DEP'T OF CORRECTION Appellees.	)	Case No. M2003-01767-SCR11-CV (Court of Appeals of Tennessee, No. M2003-01767-COA-R3-CV) (Chancery Court for Davidson County, No. 02-2236-III) CAPITAL CASE ORAL ARGUMENT REQUESTED

APPELLANT'S SUPPLEMENTAL BRIEF

Bradley A. MacLean (BPR # 9562)
STITES & HARBISON PLLC
Sun Trust Center, Suite 1800
424 Church Street
Nashville, Tennessee 37219
(615) 782-2237

William P. Redick, Jr. (BPR # 6376)
P.O. Box 187
Whites Creek, Tennessee 37189
(615) 742-9865

Counsel for Appellant

Of Counsel:
Cynthia W. MacLean (BPR # 18094)
c/o STITES & HARBISON PLLC
424 Church Street
Nashville, Tennessee 37219

ORAL ARGUMENT REQUESTED

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APPELLANT'S SUPPLEMENTAL BRIEF

Appellant Abu-Ali Abdur'Rahman submits this Supplemental Brief pursuant to Tenn.R.App.P. 11(f).[1]

This case raises issues of first impression. This Court should step to the forefront and rule that, regardless of what other states might do, Tennessee will not sanction a sloppy and arbitrary means of lethal injection when a simpler and more rational method is readily available.

A. The Standards For Animal Euthanasia Must Serve As Minimal Standards For Executing Humans.

In the recently decided case of *Roper v. Simmons*, 543 U.S. ___, 125 S.Ct. 1183 (2005), the United States Supreme Court again held that the constitutionality of a form of punishment shall be determined by referring to "the evolving standards of decency that mark the progress of a maturing society." 125 S.Ct. at 1190 (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)(plurality opinion)). The Court in *Roper* explained that the beginning point of the analysis is a "review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Id.* at 1192. The Court said that it must then determine, "in the exercise of our own independent judgment," whether the challenged punishment complies with current standards of decency. *Id.*

Tennessee, by enacting the Nonlivestock Animal Humane Death Act, T.C.A. § 44-17-301 *et seq.*, has joined at least eighteen other states that in recent years have enacted legislation

[1] Appellant's Rule 11 Application for Permission to Appeal (referred to herein as the "Rule 11 Application") also serves as Appellant's principal Brief, as previously ruled by this Court. Appellant incorporates by reference all arguments made in the Rule 11 Application.

banning the use of neuromuscular blocking agents such as Pavulon[2] in animal euthanasia.[3] Tennessee and these other states have codified the basic standards for animal euthanasia established nationwide by the American Veterinary Medical Association (the AVMA). *See* 2000 Report of the American Veterinary Medical Association Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n, 669, 681 (2001), at 680 (Trial Ex. 5). This is irrefutable objective evidence of a standard of decency in the treatment of animals that certainly should apply to humans.

We submit that the average citizen would say it is indecent to execute a human being using a method that is not fit for a dog.

B. <u>There Is No Objective Evidence That The Use Of Pavulon Complies With Current Standards Of Decency</u>.

Both the Chancery Court and the Court of Appeals supported their decisions below by pointing to similar lethal injection protocols used in other states. Tennessee should not allow other states to set its standard of decency. Besides, in this instance any argument based on reference to other states' practices is based on a fallacy.

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[2] Pavulon is the trade name for pancuronium bromide, the neuromuscular blocking agent to be used under the TDOC lethal injection protocol. The prohibition against using neuromuscular blocking agents in the euthanasia of domesticated animals is contained in T.C.A. § 44-17-303(c).

[3] The states that expressly forbid the use of neuromuscular blocking agents to euthanize animals, in addition to Tennessee, are Florida, Fla. Stat §§ 828.058 and 828.065; Georgia, Ga. Code Ann. § 4-11-5.1; Maine, Me. Rev. Stat. Ann., tit. 17, § 1044; Maryland, Md. Code Ann., Criminal Law, § 10-611; Massachusetts, Mass. Gen. Laws ch. 140 § 151A; New Jersey, N.J. Stat. Ann. 4:22-19.3; New York, N.Y. Agric. & Mkts Law § 374; and Oklahoma, Okla. Stat. tit. 4, § 501. The states that mandate the use of particular methods for animal euthanasia, most often the use of the sedative pentobarbital, and therefore implicitly ban the use of neuromuscular blocking agents are: Connecticut, Conn. Gen. Stat. § 22-344a; Delaware, Del. Code Ann. Tit. 3, § 8001; Illinois, 510 Ill. Comp. Stat. 70/2.09; Kansas, Kan. Stat. Ann. § 47-1718(a); Kentucky, Ky. Rev. Stat. Ann. § 321.181(17) and Ky. Admin. Regs. 16:090 section 5(1); Louisiana, La. Rev. Stat. Ann. § 3:2465; Missouri, Mo. Rev. Stat. § 578.005(7); Rhode Island, R.I. Gen. Laws § 4-1-34; South Carolina, S.C. Code Ann. § 47-3-420; and Texas, Tex Health & Safety Code Ann. § 821.052(a).

As mentioned above, the United States Supreme Court instructs that to determine the evolving or contemporary standards of decency for Eighth Amendment purposes, "[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the *enactments of legislatures that have addressed the question.*" *Roper v. Simmons*, 125 S.Ct. at 1192 (emphasis added). The focus must be on *legislative* action, and not on the internal decisions of administrative agencies acting through ad hoc committees without public oversight or legislative ratification.

The proof in this case demonstrates that the TDOC lethal injection protocol was cobbled together by the ad hoc "lethal injection committee" formed by the prior TDOC Commissioner, and that this committee delegated the entire job of formulating the lethal injection protocol to the Warden. *See* Rule 11 Application, pp. 17-20. The proof also establishes that neither the Warden nor the committee made any inquiry into contemporary standards of decency, either in Tennessee or in the nation as a whole. Trial Transcript, p. 204; *see* Rule 11 Application, pp. 17-20. Finally, the proof is clear that the work of this committee was neither sanctioned by the General Assembly nor exposed to public view, and the TDOC lethal injection protocol was neither ratified nor even reviewed by any elected body or elected official. *Id.* The TDOC lethal injection protocol, therefore, is not a *legislative enactment* that reflects contemporary standards of decency.

The mere fact that this kind of protocol is used in several other states is no reflection of contemporary standards of decency. The record in this case lacks any evidence that the protocols from most states were developed by elected legislative bodies, or were developed under procedures that allowed for public oversight and legislative review. Trial Transcript, pp. 210-2.

In other words, the protocols in most states were likely developed in a non-legislative manner similar to the way the TDOC protocol was developed.[4]

Finally, the issue before the Court concerns not only contemporary nationwide standards under the United States Constitution, but more importantly contemporary standards of decency in Tennessee under the Tennessee Constitution. Tenn. Const., Art. I, §§ 13, 16. The best evidence of Tennessee's applicable standard of decency is the Tennessee Nonlivestock Animal Humane Death Act.

C. No Other Reported Cases Have Fully Addressed The Merits Of Appellant's Claims In This Case.

Although other jurisdictions have addressed legal challenges to lethal injection, no other jurisdiction has made a merits ruling on the claims asserted by Appellant in this case.

To the best of our knowledge, Appellant is the first petitioner in the country to challenge the use of Pavulon in lethal injection on the ground that its use in animal euthanasia is strictly prohibited under any set of circumstances. We also believe that Appellant is the first to challenge the "chemical veil" aspects of Pavulon and therefore to raise claims under the Eighth and First Amendments arising from the fact that the paralytic effects of Pavulon disguise the execution process from the views of the executioner, the inmate's counsel, and the public.

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[4] Apparently lethal injection is used by 37 of the 38 states with the death penalty. *Cf. Beardslee v. Woodford*, 395 F.3d 1064, 1072 n.8 (9th Cir. 2005) (*per curiam*). Only eight of these states have statutes that prescribe the types of chemicals to be used in lethal injection, and most of these statutes are relatively old: Arkansas, Illinois, Maryland, Montana, North Carolina, Oklahoma, Oregon, and Wyoming. The remaining 29 states have no statutory provisions regarding the chemicals to be used in lethal injection. Indeed, several state lethal injection statutes contain provisions designed to protect condemned inmates in ways that are not provided for in the TDOC protocol. For example, Connecticut requires that the lethal injection procedures be developed in consultation with the Commissioner of Public Health. Conn. Gen. Stat. § 54-100(a). Florida requires that the persons who handle the lethal injection drugs be authorized by public health authorities to handle those types of drugs. Fla. Stat. § 922.105(6). Colorado, New Hampshire and South Dakota expressly require that the persons who carry out executions must be properly trained. Colo. Rev. Stat. § 18-1.3-1204; N.H. Rev. Stat. § 630:5(XV); S.D. Code § 23A-27A-32.

Since Appellant commenced this action in July, 2002, other petitioners have made similar challenges to the protocols in other states, and these challenges have failed on procedural grounds (discussed below). None of the reported decisions adjudicated the merits of the claims Appellant is making in this case.

The most recent reported decision on lethal injection is *Beardslee v. Woodford*, 295 F.3d 1064 (9th Cir. 2005) (*per curiam*). There the petitioner filed an action under 42 U.S.C. § 1983 claiming that the use of Pavulon in a protocol similar to Tennessee's violated the condemned inmate's Eighth and First Amendment[5] rights. The petitioner filed his action one month before his scheduled execution and sought a preliminary injunction staying the execution. The district court denied the injunction largely on the ground that the action was filed so close in time to the execution date. In an expedited appeal, the Ninth Circuit addressed only the question of whether the district court abused its discretion in denying the injunction. *Id.* at 1076. The Ninth Circuit made clear that "the question before us is not the ultimate resolution of the merits of this issue." *Id.*

Although in *Beardslee* the Ninth Circuit upheld the district court's denial of a preliminary injunction, the Court expressed serious concerns about the California lethal injection protocol and pointed out that prior lethal injection decisions have not addressed the same issues that Beardslee was raising. The Court said:

> As we observed in *Cooper* [*v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004)], "execution by lethal injection is now used by 37 of the 38 states with the death penalty." *Cooper*, 379 F.3d at 1033. Thus, objective evidence of contemporary values indicates that lethal injection has been deemed an acceptable means for society to implement a death sentence. However, this observation does not address the issue raised in this case because Beardslee is not raising a generic challenge to lethal

[5] The petitioner in *Beardslee* asserted the First Amendment claim that the paralytic effect of Pavulon interferes with the condemned inmate's constitutionally protected interest in expressing the pain and suffering he might be experiencing. Although Appellant also hereby asserts that claim, Appellant's primary First Amendment claim is different. Appellant is claiming that his right to access to the courts is unconstitutionally infringed by the paralytic effects of Pavulon. Appellant also asserts this claim under Tenn. Const., Art. I, §§ 8, 13, 16, 17 and 19. *See* Rule 11 Application, pp. 46-48.

injection as a means of execution. Rather, he contests the specific protocol used in California, most importantly, the use of pancuronium bromide.

Id. at 1072. The Ninth Circuit refrained from ruling on the question of whether the California lethal injection protocol complied with the Eighth Amendment or with contemporary standards of decency. Having pointed out that at least 19 states prohibit the use of Pavulon in animal euthanasia, *Id.* at 1071, 1072, the Ninth Circuit complained, "The State did not, even under repeated questioning at oral argument, provide a single justification for the use of pancuronium bromide, which is one of the key issues. This is, to say the least, troubling." *Id.* at 1075-6.[6]

D. <u>There Is An Unreasonable Risk That The Condemned Inmate Will Not Be Properly Anesthetized By The Sodium Pentothal</u>.

The Chancery Court and Court of Appeals also rested their decisions below on their surmise that the sodium pentothal will almost certainly render the condemned inmate unconscious, allegedly leaving a less than remote chance that the inmate will experience the intolerable effects of the Pavulon and potassium. This speculation by the courts below is not supported by any evidence in the case.

[6] Other recent decisions, often with dissenting opinions, have dismissed challenges to lethal injection protocols on procedural grounds: either because the petitioner was not entitled to a stay of execution because of the "timing and nature of [petitioner's] request" (*e.g., Reid v. Johnson*, 333 F.Supp.2d 543, 553 (E.D.Va. 2004)), or because the federal court allegedly lacked jurisdiction under the federal habeas statutes (*e.g., Williams v. Roe*, 359 F.3d 811 (6th Cir. 2004) (in split decision, petitioner's endgame challenge to lethal injection dismissed as an improper "second or successive" habeas petition)). None of these decisions made a merits finding upholding a lethal injection protocol that calls for the use of Pavulon. *See, also, Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (in split decision, district court's temporary restraining order vacated on the ground that petitioner made his challenge too late). Again, none of these decisions addresses the merits of the underlying constitutional and legal claims Appellant is raising in this case.

The problem, of course, is that we have very little evidence of what actually occurs during executions.[7] By the time the process is completed, the condemned inmate is dead and buried. During the process, because of the chemical veil effect of the Pavulon, the inmate is completely paralyzed while witnesses are prevented from observing any signs of the inmate's suffering. It is disingenuous for the state to employ a neuromuscular blocking agent that serves no legitimate purpose in lethal injection but effectively disguises the process from the view of any witness, and then to argue that there is no evidence of suffering during the time of execution.

Notwithstanding the disguising effects of Pavulon, there is substantial evidence in this case demonstrating that the TDOC Protocol presents an unacceptable risk of pain and suffering. This evidence includes:

- The fact that the use of Pavulon is prohibited as inhumane in animal euthanasia, a prohibition that arose from long experience in the field of veterinary medicine. Dr. Geiser's testimony, Trial Transcript, pp. 47-92; *see* Rule 11 Application, pp. 21-5.

- The unrebutted testimony of Dr. Heath that the lethal injection system and protocol are "sloppy" and present numerous potential problems that could result in a botched injection (*i.e.*, an injection that fails to introduce the full dosage of the anesthetic into the bloodstream). Trial Transcript, pp. 96-191; *see* Rule 11 Application, pp. 30-38.

[7] At the time this case went to trial, Appellant lacked the resources to investigate the autopsy and toxicology results from executed persons in other states. Since then, some of this information has been compiled and presented in other cases. *See, Reid v. Johnson*, 333 F.Supp. 2d 543 (E.D. Va. 2004); *Beardslee v. Woodford, supra.* This information suggests that in a significant number of cases, an insufficient amount of anesthetic is introduced into the condemned inmate's bloodstream to render him completely unconscious during the execution process. Although this evidence was deemed unreliable by the *Reid* and *Beardslee* courts for purposes of granting a last-minute stay of execution, the Ninth Circuit said: "This evidence, coupled with the opinion tendered by Beardslee's expert, raises *extremely troubling questions about the protocol.*" 295 F.3d at 1075 (emphasis added).

- Documented instances of problems with "blow outs," kinked tubing interfering with the flow of chemicals during the execution process, and other complications encountered by the Warden in his own trial runs. Warden Bell's testimony, Trial Transcript, pp. 234-7, 307; *see* Rule 11 Application, pp. 35-7.

- The unrebutted testimony of Dr. Heath that sodium pentothal is a highly unstable drug that requires mixing shortly before the execution, and that the mishandling of it can compromise its potency. Trial Transcript, pp. 59-60, 64-65, 109, 114-6, 129-30. This is coupled with the Warden's testimony that he has no training or experience in handling this drug, Trial Transcript, pp. 200, 272-8, and that he may delegate to other unidentified and uncertified prison employees the responsibility for preparing this drug for a lethal injection. Trial Transcript, p. 294-5; *see* Rule 11 Application, pp. 25-8.

- Reports of botched executions from other states as disclosed in an internal TDOC memorandum dated February 4, 1999, from Virginia Lewis (a Defendant in this case) to Linda Dobson, Deputy Commissioner. Trial Exh. 14; also found at Trial Exh. 11, Tab 5, pp. 0053-0054. The information contained in this memorandum was never rebutted by the state, and neither the Warden nor other members of the "lethal injection committee" made any inquiry into the information disclosed in this memorandum. Trial Transcript, pp. 261-4; *see* Rule 11 Application, pp. 37-8.

Dr. Bruce Levey, Appellee's only witness besides the Warden, could not dispute Dr. Heath's testimony that the TDOC lethal injection protocol lacked adequate procedures and safeguards to ensure that the lethal injection will proceed without an unreasonable risk of unnecessary pain and suffering. Trial Transcript, pp. 390-1.

Given that an alternative lethal injection protocol is readily available – a single injection of pentobarbital, the method ordinarily used in animal euthanasia – Appellant has carried his burden of proving that the TDOC Protocol, involving the arbitrary and unjustifiable use of Pavulon, presents an unreasonable risk of causing unnecessary pain and suffering.

E. A Ruling Upholding The TDOC Protocol Would Undermine Public Perception Of Tennessee's Death Penalty System.

As the Chancery Court correctly found, Pavulon serves no legitimate purpose in lethal injection and its use is "arbitrary." The TDOC lethal injection protocol is a stain on Tennessee's controversial death penalty system. The continued use of such an irrational protocol will tend to foster public skepticism about the rationality of the entire death penalty system. Appellant's position in this case is imminently reasonable. A ruling in Appellant's favor should cause no delays in any pending death penalty cases or any disruption to the Tennessee death penalty system. On the other hand, a ruling against Appellant in this case will only breed further contentiousness surrounding the death penalty. There is absolutely no reason to uphold the TDOC protocol. There is every reason to invalidate it.

F. Conclusion.

For all of the reasons set forth in Appellant's Rule 11 Application, and for the reasons set forth above, this Court should declare the TDOC Protocol to be illegal and unconstitutional, and this case should be remanded to the Tennessee Department of Correction to develop a new protocol in public hearings pursuant to the rule-making procedures of the Tennessee Administrative Procedures Act, as contemplated by T.C.A. § 40-23-114(d). As this Court stated in its unpublished decision in *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn., April 19,

2000), "[T]he employment of tested procedures used in the practice of medicine is consistent with the purpose behind the imposition of death by lethal injection, which is to impose death in as humane a manner as possible." Consistent with this principle, this Court should rule that under the Tennessee and United States Constitutions, any execution protocol must be based on sound science in compliance with our State's legislatively enacted standards of decency.

Respectfully submitted,

Bradley A. MacLean (BPR # 9562)
STITES & HARBISON PLLC
Sun Trust Center, Suite 1800
424 Church Street
Nashville, Tennessee 37219
(615) 782-2237

William P. Redick, Jr. (BPR # 6376)
P.O. Box 187
Whites Creek, Tennessee 37189
(615) 742-9865

Counsel for Appellant

Of Counsel:
Cynthia W. MacLean
STITES & HARBISON PLLC
424 Church Street
Nashville, Tennessee 37219

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on the following by hand-delivery on this the 30th day of March, 2005:

Arthur Crownover II
Senior Counsel
Civil Rights and Claims Division
425 Fifth Ave., North
Cordell Hull Bldg.
Nashville, TN 37202

Bradley A. MacLean