No. 06-

IN THE

SUPREME COURT OF THE UNITED STATES

RALPH BAZE, ET AL.,

Petitioner

v.

JOHN D. REES, ET AL.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Although the Court has authorized civil actions challenging portions of a method of execution, it has not addressed the constitutionality of a method of execution or the legal standard for determining whether a method of execution violates the Eighth Amendment in over 100 years--leaving lower courts with no guidance on the law to apply to the many lethal injection challenges filed since the Court's rulings allowing the claim in a civil action. Lower courts have been left to look to cursory language in the Court's opinions dealing with the the death penalty on its face and prison conditions. As a result, the law applied by lower courts is a haphazard flux ranging from requiring "wanton infliction of pain," "excessive pain," "unnecessary pain," "substantial risk", "unnecessary risk," "substantial risk of wanton and unnecessary pain," and numerous other ways of describing when a method of execution is cruel and unusual.

Considering that at least half the death row inmates facing an imminent execution in the last two years have filed suit challenging the chemicals used in lethal injections, certiorari petitions and stay motions on the issue are arriving before the Court so often that this issue is one of the most common issues. Thus, it is important for the Court to determine the appropriate legal standard, particularly because the difference between the standards being used is the difference between prevailing and not.

This case presents the Court with the clearest opportunity to provide guidance to the lower courts on the applicable legal standard for method of execution cases. This case arrives at the Court without the constraints of an impending execution and with a fully developed record stemming from a 20-witness trial. The record contains undisputed evidence that any and all of the current lethal injection chemicals could be replaced with other chemicals that would pose less risk of pain while causing death than the tri-chemical cocktail currently used. Although this automatically makes the risk of pain associated with the use of sodium thiopental, pancuronium bromide, and potassium chloride unnecessary, relief was denied on the basis that a "substantial risk of wanton and unnecessary pain" had not been established. This squarely places the issue of whether "unnecessary risk" is part of the cruel and unusual punishment equation and whether an "unnecessary risk" exists upon a showing that readily available alternatives are known.

The Kentucky Supreme Court's decision gives rise to the following important questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

PARTIES TO THE PROCEEDING BELOW

The plaintiffs in the state court trial and the appellants on appeal to the Kentucky Supreme Court were Ralph Baze and Thomas C. Bowling - - two Kentucky death-sentenced inmates. They are the Petitioners in this action.

The following parties were named as defendants in the circuit court proceedings: John D. Rees, Commissioner of Kentucky Department of Corrections; Glenn Haeberlin, then the Warden of the Kentucky State Penitentiary where Kentucky executions are carried out; and, Ernie Fletcher, Governor of the Commonwealth of Kentucky.

In the Kentucky Supreme Court, the following parties were appellees: John D. Rees, Glenn Haeberlin, and Ernie Fletcher.

Thomas Simpson succeeded Glenn Haeberlin as Warden of the Kentucky State Penitentiary. Thus, he, not Haeberlin, is the appropriately named Respondent here. Rees and Fletcher remain as Commissioner of the Kentucky Department of Corrections and Governor of the Commonwealth of Kentucky, respectively. Thus, they are also named Respondents in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ralph Baze and Thomas C. Bowling, pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky affirming the denial of Petitioners' declaratory judgment action challenging the chemicals and procedures used in Kentucky lethal injections.

CITATIONS TO OPINION BELOW

The opinion of the Kentucky Supreme Court, *Baze*, *et al. v. Rees*, *et al.*, is published at 217 S.W.3d 307 (Ky. 2006), and is attached as part of the appendix (1-10). The unpublished order denying the timely filed petition for rehearing by a vote of 6-1 is attached. (Appendix at 11). The Franklin Circuit Court order denying the declaratory judgment action is unpublished and attached as part of the appendix (Appendix at 12–25).

JURISDICTION

This Court's jurisdiction to review the decision of the Supreme Court of Kentucky is invoked pursuant to 28 U.S.C. § 1257(a). The Supreme Court of Kentucky issued its decision on November 22, 2006, and denied the timely petition for rehearing on April 19, 2007. This petition has been filed within 90 days of that decision.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[1]

Kentucky carries out lethal injections by injecting the same three chemicals used by all states other than New Jersey that carry out lethal injections: 1) sodium thiopental; 2) pancuronium bromide; and, 3) potassium chloride. This tri-chemical cocktail was first adopted in Oklahoma and first used in 1982 in Texas.

Sodium thiopental is a short-acting barbiturate that begins to wear off almost immediately. When sodium thiopental was first adopted as part of the lethal injection protocol, it was a state-of-the-art anesthetic. Since then, it has been replaced in surgical settings by propafol. Pancuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscle movements, but has no impact on the ability to feel pain. It prevents a person from speaking,

[1] The official record of Kentucky court proceedings is a videotape. Here, the record is comprised of more than ten videotapes. Because this case is only at the petition for a writ of certiorari stage and this Court does not use videotape records, Petitioners have not included videotape citations to trial testimony in this case.

moving, or expressing any other outward signs of pain or consciousness, but is extremely agonizing in a conscious person as the inflicted person suffocates just as if he or she was drowning with weights on his or her body to prevent movement. Potassium chloride, otherwise known as road salt used to melt ice, is injected to cause cardiac arrest, but is excruciatingly painful in a conscious person.

When used in lethal injections, sodium thiopental serves the purpose of rendering the condemned inmate unconscious. Pancuronium bromide is supposed to stop respiration, and potassium chloride is supposed to cause cardiac arrest. Because potassium chloride stops the heart from beating, death can and would be caused without the use of pancuronium bromide - - a drug that is not permitted to be used to euthanize animals. Other than to pronounce death, doctors are not involved in Kentucky lethal injections, and the chemicals are injected from a room adjacent to the execution chamber.

After learning of the chemicals used in lethal injections, Petitioners filed a civil action in a Kentucky trial court arguing that the chemicals and procedures used in lethal injections create an unnecessary risk of pain and suffering. While Petitioners raised numerous arguments, only four are relevant to this Petition for a Writ of Certiorari: 1) the Eighth Amendment prohibits the unnecessary risk of pain and suffering and that a risk of pain and suffering is automatically unnecessary when other chemicals or procedures could be used that pose less risk of pain and suffering; 2) the use of pancuronium bromide is unnecessary because death is caused without it; 3) each of the lethal injection chemicals could be replaced with one or more chemicals that would pose less risk of pain and suffering; and, 4) the Department of Corrections does not have the necessary equipment on hand to perform its constitutional duty under the due process clause

and the Eighth Amendment of maintaining life if a stay of execution was granted after the first or second lethal injection chemical had been injected.

After Respondents' motions to dismiss and for summary judgment were denied, this case went to trial on the merits. The trial lasted seven days, although many of the days were not full days. Approximately twenty witnesses testified, including the following witnesses who testified on Petitioners' behalf: the Chief Medical Examiner in Kentucky; the State's toxicologist; a law professor who has conducted extensive research on lethal injection protocols and how they were adopted, numerous Department of Corrections officials; the then head of Toxicosurveillance for the United States Government, who was also an employee of the Poison Control Center; and, an anesthesiologist who is also a Professor at Columbia Medical School. Respondent presented testimony from the Commissioner of the Department of Corrections (who was also called by Petitioners) and an anesthesiologist who, unlike that Petitioners' anesthesiologist, was paid for his testimony.

At trial, it was established that Respondents had conducted no studies to determine what chemicals to use in lethal injections, but merely relied upon what other states had "successfully" used. Further, undisputed testimony from both the experts for Petitioners and the expert for Respondent established that, if pancuronium bromide was eliminated from the execution process, death would be caused without any additional risk of pain and suffering. This would lessen the risk of pain and suffering because it would make monitoring for consciousness substantially easier. Likewise, undisputed testimony established that sodium thiopental could be replaced with propafol, or that propafol could be used as the only lethal injection chemical. Eliminating pancuronium bromide would lessen the risk of pain and suffering because it would increase the

likelihood that the inmate would be unconscious throughout the execution, and, if used alone, would mean that excruciatingly painful chemicals are not injected.

Finally, undisputed testimony established that potassium chloride could be replaced by another chemical that would stop the heart, such as Dilantin - - a chemical that is less likely than potassium chloride to cause pain. Despite the fact that this undisputed testimony established that the risk of pain and suffering caused by the currently used tri-chemical cocktail was unnecessary because it could easily be avoided, the trial court and the Kentucky Supreme Court upheld the use of these chemicals.

Likewise, the Kentucky courts did nothing about Respondents' inability to maintain life if a stay of execution is granted after the first or second chemical was injected. When this issue was raised at the trial court, it concerned Respondents so much that they purchased a "crash cart" and guaranteed that a doctor would be available during executions to use the crash cart if a last-minute stay of execution is granted. While this appears to be an improvement and, on its face, might appear to resolve the problem, in reality, trial testimony established that it was the equivalent of a pitcher attempting to hide the emery board he used to scuff up the baseball.

At trial, Respondents provided a list of the chemicals and equipment contained in its crash cart. Respondents' expert, Dr. Mark Dershwitz, was asked about the equipment and chemicals, and informed the trial court that those items were insufficient to maintain life after the first or second lethal injection chemicals were injected. Dr. Dershwitz testified that medications to increase blood pressure and contract the heart, as well as, insulin, neostigmine, and artificial ventilation are necessary to maintain life after sodium thiopental and/or pancuronium bromide have been injected into a person. As Dr. Dershwitz pointed out at trial, none of these medications are part of Respondents' crash cart. Despite the obvious deficiencies with

Respondents' crash cart that render it utterly useless and incapable of maintaining life if a stay of execution is granted after the first or second chemical is injected, the trial court denied relief on this claim. Although raised to the Kentucky Supreme Court, that court failed to address this claim.

Petitioners' case arrives at this Court on a fully developed record after a thorough trial on the merits. At the time the trial took place, it was the first full trial in the country on the merits of the constitutionality of the chemicals and procedures used in lethal injections. While there have since been other trials, this case is now the first case raising these issues based on a fully developed record and no immediate execution date to arrive before this Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioners argued in the trial court and on appeal to the Kentucky Supreme Court that the appropriate legal standard for determining whether a portion of a method of execution is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution is whether the method poses an "unnecessary risk" of pain and suffering. Petitioners further argued that, in the context of lethal injection, a risk of pain is rendered "unnecessary" when it can easily be avoided by using alternative chemicals or procedures that lessen the risk of pain and suffering. To that end, at trial, Petitioners presented undisputed evidence that each of the lethal injection chemicals could be replaced with one or more chemicals that pose less risk of pain and suffering.

In deciding this case, the trial court noted that "[e]vidence was considered that other drugs were available that may decrease the possibility of pain" or that "may further assure the condemned person feels no pain." Appendix at 21-22. But, relying on the legal standard that Petitioners must establish that the chemicals or procedures inflict "unnecessary physical pain,"

the trial court denied relief. Appendix at 22. The Kentucky Supreme Court affirmed this decision, after articulating that the appropriate legal standard is "whether the procedure for execution creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death." *Baze*, *et al. v. Rees*, *et al.*, 217 S.W.3d 207, 209 (Ky. 2006), appendix at 3.

Likewise, Petitioners argued before the trial court that the due process clause of the United States Constitution requires Respondents to take affirmative steps to maintain life if a stay of execution is granted after the first or second chemical is injected. In response to this claim, Respondents purchased a crash cart. At trial, however, Petitioners established that the crash cart did not contain the proper equipment. Despite this, the trial court held that the "Kentucky method recognizes the necessary steps for revival sufficient to satisfy the due process rights of the convicted parties." Appendix at 22. Without determining whether Respondents are implementing the steps they recognized, the trial court denied relief on this claim. *Id*. This issue was also raised on appeal. Although the Kentucky Supreme Court noted the trial court's findings and conclusions of law on this issue, the Kentucky Supreme Court failed to address this issue.

REASONS FOR GRANTING THE WRIT

I. In the wake of this Court's rulings that challenges to aspects of lethal injection as a method of execution are cognizable in civil actions, lower courts are struggling - - with little to no guidance from this Court since 1878 - - to determine the legal standard applicable to the sudden mass of legal challenges arguing that a particular aspect of a method of execution is cruel and unusual punishment. The result is numerous variations of legal standards that turn out to be dispositive of the outcome and courts exerting an extraordinary amount of time trying to figure out the appropriate legal standard, which could and should be alleviated by this Court articulating a uniform legal standard for determining whether the chemicals or procedures used in lethal injections constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

In *Nelson v. Campbell*, 541 U.S. 637 (2004), and *Hill v. McDonough*, 126 S.Ct. 2096 (2006), this Court cleared the path for legal challenges to the chemicals and procedures used in lethal injections. Not surprisingly, in the wake of this, at least half of the death-sentenced inmates facing an imminent execution have challenged various aspects of the lethal injection process, placing pressure on the lower courts and this Court to resolve this complex issue under the shadow of an execution date. With no impending execution, this case is not one of those last minute attempts to stave off an execution. Nonetheless, the large number of these types of cases percolating throughout the state and federal courts (both under execution warrant and not) indicates the importance of this Court taking this case to articulate the proper legal standard for determining whether a method of execution (or a portion of it) is cruel and unusual punishment.

Complicating the burden on the lower courts is the fact that this Court has not directly addressed the constitutionality of a method of execution since 1878 (*Wilkerson v. Utah*, 99 U.S. 130 (1878)), but has made cursory reference to varying different standards in cases that have nothing to do with executions. This has resulted in state and federal courts extrapolating standards from non-capital cases to create a legal standard to apply to method of execution cases.

Unfortunately, the legal standard differs between jurisdictions. This difference can be the difference between suffering an excruciatingly painful death by lethal injection and dying in a

dignified manner. And, even when "unnecessary" is found to be part of the legal standard, courts are only paying lip-service to the word, for upholding the use of particular lethal injection chemicals when other chemicals could be used that pose less risk of pain and suffering flies in the face of the ordinary meaning of "unnecessary." Simply, if a readily available alternative exists, the risk of pain and suffering from not using this alternative is unnecessary.

No person should face the risk of excruciating pain and suffering merely because of the state or federal jurisdiction in which the person is condemned. Lower courts should not be forced to continue spending immense amount of time attempting to ascertain the applicable legal standard to use in determining whether a portion of a method of execution constitutes cruel and unusual punishment when this Court can easily provide guidance and resolve the confusion over the applicable legal standard.

As three members of this Court recognized in dissenting from the denial of a stay of execution in *Brown v. Crawford*, 544 U.S. 1046 (2005) (Stevens, joined by, Ginsburg, and Breyer, JJ., dissenting from the denial of a stay of execution), the issue of whether the chemicals and procedures used in lethal injections constitutes cruel and unusual punishment is an important question of federal law for which substantial evidence exists suggests it does violate the Eighth Amendment. To adequately address this, the applicable legal standard must first be settled by this Court. As explained in more detail below, for these reasons certiorari should be granted.

A. Because challenges to the chemicals and procedures used in lethal injections are probably the most commonly recurring legal claim today and because lethal injection claims are taking up more of this Court's and lower courts' time, in capital cases, determining the applicable legal standard to apply to Eighth Amendment method of execution claims will have a wide impact and it will save all courts an enormous amount of time that could be spent on other legal issues.

The number of lethal injection challenges filed in the wake of *Nelson* and *Hill* is astronomical. To present a representative sampling, Petitioner looked at just the past two years. Between 2006 and 2007, nearly half of the 76 non-volunteers executed in this country raised Eighth Amendment challenges to the chemicals and procedures used in lethal injections, some of them raising the claim in both state and federal court and many of them arriving at this Court in the context of a last-minute motion for a stay of execution.[2] In addition, numerous inmates whose executions have been stayed for other reasons or whose execution date have not been set have pending litigation raising Eighth Amendment arguments challenging the chemicals and

[2] *See*, *e.g.*, *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007); *Jones v. Allen*, 485 F.3d 635 (11th Cir. 2007); *Cooey (Filiaggi) v. Strickland*, 484 F.3d 424 (6th Cir. 2007); *Hamilton v. Jones*, 472 F.3d 814 (10th Cir. 2007); *Lambert v. Buss*, 2007 WL 1710939 (7th Cir. 2007); *Woods v. Buss*, 2007 WL 1302119 (7th Cir. 2007); *Dickson v. Livingston*, 2007 WL 1228612 (5th Cir. 2007); *In re Dickson*, 2007 WL 1228554 (5th Cir. 2007); *Pippin v. Quarterman*, 2007 WL 1011639 (5th Cir. 2007); *Diaz v. McDonough*, 472 F.3d 849 (11th Cir. 2006); *Rutherford v. McDonough*, 467 F.3d 1297 (11th Cir. 2006); *Hill v. McDonough*, 464 F.3d 1256 (11th Cir. 2006); *Brown v. Livingston*, 457 F.3d 390 (5th Cir. 2006); *Resendiz v. Livingston*, 454 F.3d 455 (5th Cir. 2006); *Reese v. Livingston*, 453 F.3d 289 (5th Cir. 2006); *Alley v. Little*, 452 F.3d 621 (6th Cir. 2006); *Brown v. Beck*, 445 F.3d 752 (4th Cir. 2006); *Smith v. Johnson*, 440 F.3d 262 (5th Cir. 2006); *Neville v. Johnson*, 440 F.3d 221 (5th Cir. 2006); *Rutherford v. Crosby*, 438 F.3d 1087 (11th Cir. 2006); *Summers v. Texas Dept. Criminal Justice*, 206 Fed.Appx. 317 (5th Cir. 2006); *Patton v. Jones*, 193 Fed.Appx. 785 (10th Cir. 2006); *Alley v. Little*, 186 Fed.Appx. 604 (6th Cir. 2006); *Boltz v. Jones*, 182 Fed.Appx. 824 (10th Cir. 2006); *Alley v. Little*, 181 Fed.Appx. 509 (6th Cir. 2006); *Wilson v. Livingston*, 179 Fed.Appx. 228 (5th Cir. 2006); *Kincy v. Livingston*, 173 Fed.Appx. 341 (5th Cir. 2006); *Hughes v. Johnson*, 170 Fed.Appx. 878 (5th Cir. 2006) ; *Bieghler v. Donahue*, 163 Fed.Appx. 419 (7th Cir. 2006), *injunction vacated by*, *Donahue v. Bieghler*, 126 S.Ct. 1190 (2006); *Jones v. Allen*, 483 F.Supp.2d 1142 (M.D.Ala. 2007); *Dickson v. Livingston*, 2007 WL 1467242 (N.D.Tex. 2007); *Woods v. Buss*, 2007 WL 1280664 (S.D.Ind); *Lambert v. Buss*, 2007 WL 1280659 (S.D.Ind); *Lenz v. Johnson*, 443 F.Supp.2d 785 (E.D.Va. 2006); *Kincy v. Livingston*, 2006 WL 734424 (S.D.Tex.); *Smith v. Johnson*, 2006 WL 644424 (S.D.Tex. 2006); *Vinson v. Johnson*, 2006 WL 4509943 (E.D.Va.); *Brown v. Beck*, 2006 WL 3914717 (E.D.N.C.); *Hill v. McDonough*, 2006 WL 2598002 (N.D.Fla.); *Hill v. McDonough*, 2006 WL 2556938 (N.D.Fla.); *Rutherford v. Crosby*, 2006 WL 228883 (N.D.Fla.); *Resendiz v. Livingston*, 2006 WL 1787989 (S.D.Tex.); *Alley v. Little*, 2006 WL 1697207 (M.D.Tenn.); *Alley v. Little*, 2006 WL 1207611 (M.D.Tenn.); *Moody v. Beck*, No. 5:06-CT-3020 (E.D.N.C. 2006); *Malicoat v. State*, 137 P.3d 1234 (Okla.Crim.App. 2006); *Ex Parte O'Brien*, 190 S.W.3d 677 (Tex.Crim.App.); *Rutherford v. Crist*, 945 So.2d 1113 (Fla. 2006); *Rolling v. State*, 944 So.2d 176 (Fla. 2006); *Hill v. State*, 921 So.2d 579 (Fla. 2006); *Ex Parte Hinojosa*, 2006 WL 2370240 (Tex.Crim.App.); *Ex Parte Moore*, 2007 WL 117702 (Tex.Crim.App.); *Ex Parte Herron*, 2006 WL 1412259 (Tex.Crim.App. 2006); *Bieghler v. State*, 839 N.E.2d 691 (Ind. 2005).

procedures used in lethal injections that will require the lower courts to figure out the appropriate legal standard for determining whether a portion of a state's method of execution violates the Eighth Amendment prohibition of cruel and unusual punishment.[3] The large number of these types of cases already percolating throughout the court system along with the additional ones that we can anticipate will be filed in the near future or as an execution date approaches makes the constitutionality of the chemicals and procedures used in lethal injections perhaps the most commonly recurring issue litigated in capital cases. Before reaching the merits of these claims, every court addressing it will first have to determine what legal standard applies. This Court can easily resolve this by granting certiorari in this case and laying out the appropriate legal standard. Doing so will save the lower courts a great deal of time, provide guidance on an issue that this Court has not addressed in more than a hundred years, and prevent inconsistent rulings and standards of proof resulting from courts applying different legal standards. In light of the large number of lethal injection cases currently pending and expected to be filed, making this one of the few cases that this Court will review in its upcoming term will be of great benefit to both litigants and courts, perhaps a greater benefit as far as the number of impacted cases than any other case this Court can or will review.

[3] Litigation concerning the chemicals and procedures used in lethal injections is currently pending outside the context of an execution warrant in at least the following states: Arkansas, California, Delaware, Florida, Indiana, Kentucky, Maryland, Missouri, Ohio, Oklahoma, Tennessee, and the federal government. *See*, *e.g.*, *Taylor v. Crawford*, 2007 WL 1583874 (8th Cir.); *Taylor v. Crawford*, 457 F.3d 902 (8th Cir. 2006); *Taylor v. Crawford*, 445 F.3d 1095 (8th Cir. 2006); *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006); *Morales v. Hickman*, 438 F.3d 926 (9th Cir. 2006); *Moore v. Rees*, 2007 WL 1035013 (E.D.Ky.); *Taylor v. Crawford*, 2007 WL 803151 (E.D.Mo.); *Morales v. Hickman*, 415 F.Supp.2d 1037 (N.D.Cal. 2006); *Evans v. Saar*, 412 F.Supp.2d 519 (D.Md. 2006); *Taylor v. Crawford*, 2006 WL 1779035 (W.D.Mo.); *Anderson v. Evans*, 2006 WL 83093 (W.D.Okla.); *Nooner v. Norris*,

B. The fact that this Court has not addressed the constitutionality of a method of execution since 1878 has left the lower courts in a state of disarray in determining the applicable legal standard and has resulted in courts ruling that death-sentenced inmates have little to no likelihood of success on the merits – rendering this Court's rulings in *Nelson* and *Hill* little more than a formality that has created additional litigation before the lower courts.

Although nearly 1100 executions have been carried out since the beginning of 1977, this Court last addressed the constitutionality of a method of execution so long ago that the Bill of Rights had yet to be applied to the states, the right to counsel for indigent defendants was an aberration at best, the concept that the Eighth Amendment involved the evolving standards of decency had yet to be articulated, and anyone who was alive then would be at least 128 years old.

The year was 1878 and the issue was the constitutionality of the firing squad. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), this Court upheld the use of the firing squad, noting that the Eighth Amendment only prohibited forms of torture. One surely did not expect that this would be the one and only time that this Court would directly address the constitutionality of a method of execution or the legal standard for determining whether the method of execution violates the Eighth Amendment.

While not directly addressing the appropriate legal standard, during the past 128 years, this Court has made reference to when a punishment violates the Eighth Amendment, but only in the context of dicta, general death penalty cases that have nothing to do with the method of execution or even the Eighth Amendment, prison condition cases, and deliberate indifference cases. In *In re Kemmler*, 136 U.S. 436, 447 (1890), a case involving the privileges and immunities clause of the Fifth Amendment to the United States Constitution, this Court stated that the Eighth Amendment prohibits "something more than the mere extinguishment of life,"

No. 5:06-cv-00110 (E.D.Ark.); *Jackson v. Taylor*, No. 06-300 (D.Del.); *State v. Lightbourne*, No. 81-170-CF (Fla.

such as "torture or a lingering death." Then, in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), a case dealing with whether electrocuting a person a second time after the first time failed due to human error that was not likely to repeat itself violates double jeopardy, this Court stated that a punishment is cruel and unusual when it is "purposeless and needless," and that the Eighth Amendment "forbids the infliction of unnecessary pain in the execution of the death sentence." Whether these cases, which were decided before the Eighth Amendment was incorporated to the states, were intended to provide guidance as to when a method of execution violates the Eighth Amendment is unknown. What is known, though, is that the lack of additional guidance from this Court has forced lower courts to rely on these antiquated and outdated cases, and that this Court has complicated the issues by using language in non-method of execution cases dealing with cruel and unusual punishment without saying whether that language applies to method of execution cases.

In *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), which dealt with the constitutionality of the death penalty on its face and as applied, this Court stated that the cruel and unusual punishment clause prohibits "the unnecessary and wanton infliction of pain." Then, in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), a case that has nothing to do with the death penalty, this Court ruled that the Eighth Amendment "requires a court to assess whether society considers the risk that the prisoner complains of" to be more than the Constitution tolerates. This was followed by *Farmer v. Brennan*, 511 U.S. 825, 846 (1994), a deliberate indifference case for placing an inmate in general population, in which this Court ruled that the cruel and unusual punishment test is whether the state officials disregard an "objectively intolerable risk of harm." Did this Court intend for these non-death penalty and non-method of execution cases to articulate the test for determining whether a method of execution (or a portion of it) violates the cruel and

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Cir. Ct, 5th Jud. Cir.); *Timberlake v. Buss*, No. 1:06-cv-01859 (S.D.Ind.).

unusual punishment clause of the Eighth Amendment to the United States Constitution? This question also remains unanswered by this Court, forcing the lower courts to fumble around to try and make sense out of the differing, and, sometimes, contrary language this Court has used to explain the cruel and unusual punishment clause of the Eighth Amendment.

Is a method of execution cruel and unusual punishment in violation of the Eighth Amendment only if it causes "torture or a lingering death?" Or, is it cruel and unusual if the pain is "purposeless and needless," even if it is known to not cause "torture or a lingering death?" Does this mean that chemicals or procedures used in lethal injection are purposeless and needless in violation of the cruel and unusual punishment when other chemicals that are less painful could be used? Perhaps, all that needs to be shown is that the chemicals and procedures inflict "unnecessary" pain? But, does this mean that whenever a state does not replace the lethal injection chemicals with readily available less painful chemicals, the Eighth Amendment is violated? Or is "unnecessary and wanton infliction of pain" considered to be one thing, whereby it must be shown that it is both "unnecessary" and "wanton" for an Eighth Amendment violation to be found? Or, is establishing an "objectively intolerable risk of harm" all that is needed? Is a risk of pain automatically objectively intolerable where alternative chemicals could be used, or does the risk need to be shown to be "substantial?" Do these different articulations of the cruel and unusual punishment standard work together so that the Eighth Amendment is violated where a risk of pain and suffering becomes "unnecessary" because other chemicals could be used that pose less of a risk? And, now that this Court, in *Nelson* and *Hill*, has characterized 42 U.S.C. §1983 suits challenging the chemicals and procedures used in lethal injections as most akin to prison condition cases, must a death-row inmate establish both cruel and unusual punishment and that prison officials are acting "deliberately indifferent" to that?

These are the questions that the lower courts must ask and answer in deciding the numerous lethal injection challenges resulting from this Court's decisions in *Nelson* and *Hill* - - the questions that have been spawned by the vastly different terminology this Court has used to discuss the cruel and unusual punishment clause in many different contexts, and this Court's failure to address the issue in more than 100 years. The result is numerous variations of the standard that require a different showing to prevail.

After analyzing the various decisions rendered by this Court, the Ninth Circuit held that a challenge to a method of execution must be considered in terms of the risk of pain. *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994). The Ninth Circuit later clarified this standard by ruling that a portion of a method of execution is cruel and unusual punishment when it subjects the inmate to "an unnecessary risk of unconstitutional pain or suffering." *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004). The Ninth Circuit, however, never articulated what makes a risk of pain unnecessary. Other courts have avoided this question by applying a much narrower test to determine when a method of execution (or portion of it) is cruel and unusual punishment.

The United States Courts of Appeals for the Tenth Circuit and the Eighth Circuit have ruled that the "controlling standard is that [execution] procedures not involve the unnecessary and wanton infliction of pain." *Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir. 2007); *accord, Taylor v. Crawford*, 2007 WL 1583874, *6 (8th Cir.). The federal district court for the Eastern District of Virginia has characterized the inquiry as whether there is an "objectively substantial risk of harm." *Walker v. Johnson*, 448 F.Supp.2d 719, 722 (E.D. Va. 2006). Both the Connecticut Supreme Court and the Kentucky Supreme Court in this case have held that "[a] method of execution is viewed as cruel and unusual punishment under the federal constitution when the procedure for execution creates a **substantial** risk of wanton and unnecessary infliction

of pain, torture, or lingering death." *State v. Webb*, 750 A.2d 448, 454 (Conn. 2000) (emphasis added); *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006) (appendix at 3) ("substantial risk of wanton and unnecessary infliction of pain.").

The Indiana Supreme Court looks at it a little differently, ruling that a method of execution is cruel and unusual punishment in violation of the Eighth Amendment when it presents "**any unacceptable** risk of a lingering death or the wanton infliction of pain." *Bieghler v. State*, 839 N.E.2d 691, 696 (Ind. 2005) (emphasis added). The Tennessee Supreme Court has ruled that the Eighth Amendment cruel and unusual punishment clause is violated when a method of execution inflicts unnecessary physical or psychological pain and suffering. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 307 (Tenn. 2005).

The United States District Court for the Southern District of Indiana has thrown, perhaps, the biggest curveball to anyone trying to make sense of the various doctrines, incorporating both the deliberate indifference standard from prison condition cases and the general cruel and unusual punishment standard to require a death-sentenced inmate to establish both an unnecessary risk of pain and that the Department of Corrections is deliberately indifferent to that risk of pain. *Woods v. Buss*, 2007 WL 1280664, *8 (S.D. Ind.).

Finally, the United States Court of Appeals for the Sixth Circuit stated that a method of execution is cruel and unusual punishment when it involves the "unnecessary and wanton infliction of pain," but then threw in the towel over the difficulty of figuring out how this Court intended for the cruel and unusual punishment test to be applied to method of execution cases, noting that this Court "has considered three [method of execution] challenges under the Eighth Amendment, only one of which reached the merits," and since then "has had ample opportunities to constrain methods of execution that seem to raise far greater risk of cruel and unusual

punishment than lethal injection, but it has declined to do so." *Workman v. Bredesen*, 486 F.3d 896, 906-07 (6th Cir. 2007). Because of how rarely this Court has addressed the issue and this Court's reluctance to do so, the Sixth Circuit punted on the issue, holding that, without Supreme Court guidance or intervention on the issue, the likelihood of success is slim to none, thereby negating the need to decide the claim on the merits.

As the Sixth Circuit recognized, if the constitutional issue this Court's rulings in *Nelson* and *Hill* intended to be addressed on the merits is to be reached, this Court needs to say so and articulate the proper legal standard for doing so in order to prevent chaos in the lower courts and a massive amount of wasted time and money. Otherwise, due to the numerous different standards currently applied by the lower courts, one or more of those courts will surely apply what this Court will later find to be the incorrect standard. This Court should avoid such an unfortunate and irreparable situation by now settling the issue of what legal standard applies.

For purposes of whether to grant this petition for a writ of certiorari, which of the states or federal courts has the better hand on the legal standard is not the important question. Rather, the important fact is that differing standards that cannot be reconciled with each other are being applied by the lower courts and that this Court can easily resolve this by articulating one standard so that the standard of proof and whether a condemned inmate prevails on this important question of federal constitutional law does not depend upon which jurisdiction the inmate is incarcerated.

C. The varying legal standards state and federal courts apply to lethal injection claims conflict and can be the difference between being executed under a risk of pain and suffering and not.

If this was preparation for major league baseball's draft, the pitcher with the 95 mile per hour fastball would appear to be a top choice until a scout notices some major flaws in the pitcher's mechanics, realizes that the pitcher will likely break down, and recommends not drafting him. The various legal standards for determining when a method of execution is cruel and unusual punishment is the legal version of the broken down pitcher with a 95 miles per hour fastball. At first blush, one could think that the different words lower courts have used to articulate when a method of execution is cruel and unusual punishment is a distinction without a difference. But, when one pays closer attention, analyzes the words, and looks at the outcome, it becomes apparent that the standards are very different, meaning that death-sentenced inmates must prove different things depending on what jurisdiction the inmate is confined.

"Substantial" is not the same as "unnecessary" or "unacceptable." Pain is not the same as risk of pain. And, deliberate indifference is an added element beyond anything involving risk of pain. If the death-sentenced inmate is in a federal court within the jurisdiction of the Ninth Circuit, the inmate prevails upon showing an unnecessary risk of pain and suffering. This exact same showing could be made in numerous other jurisdictions, but due to the conflicting legal standards applied, the death-sentenced inmate would lose. If the case was in the Eighth and Tenth Circuit, risk may not even be a factor, but if it is, the inmate would also have to show that it is "wanton." In federal courts in Virginia, the inmate could establish an "unnecessary risk," but still lose because he did not establish that the risk was "substantial." This is also true in Connecticut and Kentucky, where an inmate has to show a substantial risk of "wanton and unnecessary" infliction of pain. In Indiana, the inmate could establish both that the risk of pain is

unnecessary and substantial, but still lose because he did not show it was "unacceptable." And, in federal courts in Indiana, the inmate could satisfy all these standards, but still lose because he did not establish that the Department of Corrections was acting deliberately indifferent to the risk of pain and suffering. While this explains how these standards are different and how it can effect the outcome, the difference is, perhaps, best explained by looking at the application of it in federal courts in California in comparison to the application of it here, in Kentucky.

In *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D.Cal. 2006), a federal district court analyzed a challenge to the chemicals and procedures used in lethal injections under the "unnecessary risk" of pain and suffering standard and reached the conclusion that while California's execution protocol is constitutional when properly administered, the deficiencies in the protocol appear to be correctable and are unnecessary; thereby meaning that California's execution protocol creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. *Id*. at 982.

In stark contrast to *Morales* is the instant case, where the Kentucky courts applied the "substantial risk" of wanton and unnecessary infliction of pain standard. Petitioners presented unrefuted evidence that any risk of pain associated with the use of the tri-chemical cocktail now used by all states other than New Jersey could be replaced by one or more chemicals that would lessen the risk of pain and suffering. By any ordinary definition of "unnecessary," this establishes that the risk of pain and suffering from Kentucky's lethal injection chemicals is unnecessary. But, by looking at what Kentucky's lethal injection chemicals do when properly administered and what happened during the one lethal injection in Kentucky, the Kentucky Supreme Court reached the conclusion that the risk of pain and suffering was not "substantial,"

and thus denied relief. *Baze*, *et al*. v. *Rees*, *et al.*, 217 S.W.3d 207, 212 (Ky. 2006) (appendix at 8-9). The difference between *Morales* and *Baze* appears clear on its face.

If Petitioners were in the the Ninth Circuit, they would have prevailed because they would have established an "unnecessary risk," which is all that is required under the Ninth Circuit's understanding of when a method of execution is cruel and unusual punishment. Because Petitioners are not in the Ninth Circuit, but instead are confined in Kentucky, they lost because they did not prove a "substantial risk" that the "unnecessary risk" would take place. As a result, without this Court's intervention, they will die in a manner where they could suffer pain that could easily be avoided. Whether one goes to his or her death under conditions that could cause pain and suffering should not depend on the jurisdiction in which the inmate committed the offense. Rather, the risk of pain and suffering should be treated the same regardless of where the case originates. Either *Morales* and Petitioners should prevail or neither should. Which outcome this Court chooses is not as important as making a uniform determination of the applicable standard so all death-sentenced inmates are treated the same. This is particularly so when we are dealing with, as we are here, the risk of inflicting pain that can be easily avoided and the public's confidence in how states are carrying out lethal injections.

D. The issue of whether the chemicals and procedures currently used in lethal injections poses an unnecessary risk of pain and suffering is an important question of federal law that has not been, but should be, settled by this Court.

How lethal injections are carried out in this country is a matter of grave concern. As the Oklahoma Court of Criminals stated, in 2005, if the allegations concerning problems with the lethal injection chemicals and procedures are true, "they merit serious attention." *Murphy v. Oklahoma*, 124 P.3d 1198, 1209 n.23 (Okla.Crim.App. 2005). Since that time, Ohio carried out an execution that took approximately ninety minutes, as the condemned inmate looked up and said the chemicals are not working.[4] A year later, Ohio carried out another lengthy execution. This time it lasted about two hours - - so long that the condemned inmate had to take a bathroom break.[5] And, Florida carried out an execution that took 34 minutes as the inmate was seen grimacing in pain and moving throughout, only for officials to later realize he suffered twelve inch chemical burns on both arms.[6] These executions have cast a pall over lethal injections in this country and have lessened the public's confidence in how executions are being carried out. These executions along with the proposition, for which there can be no dispute, that the death penalty is a matter of grave public concern make the legal standard for determining whether a portion of a method of execution is cruel and unusual punishment and important issue that should be settled by this Court.

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[4] *See*, Adam Liptak, *Trouble Findign Inmate's Vein Slows Lethal Injection in Ohio*, New York Times (May 3, 2006); John Mangels, *Condemned Killer Complains Lethal Injection 'Isn't Working*,' The Plain Dealer (May 3, 2006); Jim Provance and Christina Hall, *Problems Bog Down Execution of Clark: Drugs Take his Life After 86 Minutes*, Toledoblade.com (May 3, 2006); Reuters, *Killer Executed the Hard Way: Condemned Man Sits Up and Tells Executioners, 'It's Not Working,'* Cnn.com (May 2, 2006); Erica Ryan, *Injection Problems Delay Ohio Execution*, HoustonChronicle.com (May 2, 2006).

[5] *See*, Julie Carr Smyth, *After States' Longest Delay, Man Executed for Cellmate Murder*; Chillicothegazette.com (May 24, 2007); Julie Carr Smyth, *Ohio Executes Man for Killing Cellmate*, Philly.com (May 24, 2007).

[6] *See*, Ron Word, *Official: Execution Took Longer Because Needles Pierced Veins*, Orlando Sentinel (Dec. 15, 2006); Phil Long and Marc Caputo, *Lethal Injection Takes 34 Minutes to Kill Inmate*, MiamiHerald.com (Dec. 14, 2006); Chris Tisch and Curtis Krueger, *Second Dose Needed to Kill Inmate*, TampaBay.com (Dec. 14, 2006); Chris Tisch and Curtis Krueger, *Executed Man Takes 34 Minutes to Die*, TampaBay.com (Dec. 13, 2006)

While one may think that the issue of the method of execution is best settled by the legislature or by the forum of public opinion, whether the problematic executions described above could have been avoided by applying the proper test to determine if a portion of a method of execution is cruel and unusual punishment or even if the above executions would constitute cruel and unusual punishment is an important matter of federal constitutional law. If this Court adopts the "unnecessary risk" standard Petitioner suggests, the horribly disturbing executions that took place in Florida and Ohio can be avoided not only there but in all other states. And, if this Court adopts a different standard, at least all death-sentenced inmates will be treated the same and know what standard they must satisfy, and all Departments of Corrections will know what they need to do to meet minimum constitutional standards. This would be a win, win for the courts, the public, and the parties. The amount of litigation and time spent on it would be substantially lessened. The parties would know what proof and evidence needs to be presented. And, the public's confidence that lethal injections are being carried out in a constitutional manner will be restored.

These issues all revolve around the important question of federal constitutional law of what standard of proof must be met to show that a portion of a method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Certiorari should be granted to resolve this important question of federal constitutional law.

II. The fact that a stay of execution could be granted after the first or second lethal injection chemical is injected is a foreseeable event, but without this Court's intervention, inmates in Kentucky and the rest of the states that carry out lethal injections - - except New Jersey - - will die because the Departments of Corrections are not adequately prepared to reverse the effects of the chemicals and are doing nothing about it, even though the effects of the chemicals could easily be reversed if the proper equipment is used.

As the New Jersey Superior Court recognized, although "the grant of a stay of execution communicated to prison authorities after the lethal injection has been administered is not a likely event, it can happen." *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 211 (N.J. Super. 2004). And, one of Petitioners' experts at trial testified, it has happened in the past.[7] Thus, "it is a foreseeable occurrence. And should it occur, there can be no justification for depriving that inmate a chance at life." *Id*. Yet, that is exactly what will happen here and likely in all future executions if this Court does not take this case and rule that the due process clause requires the Department of Corrections to obtain the proper equipment to maintain life if a stay of execution is granted after the first or second chemical is injected.

The testimony in this case establishes that if the proper equipment is on hand, there would be relatively little difficulty maintaining life after the first two chemicals have been injected. According to Respondents' own expert at trial, this equipment must include medications to increase blood pressure and contract the heart, insulin, neostigmine, and artificial ventilation. Despite their own expert saying this, Respondents have not obtained this equipment, thereby rendering their "crash cart" useless. Why? The answer is simple. As Respondents counsel at trial stated, "the likelihood of this occurring [is] so remote that it is as likely as a plane crashing into the Kentucky State Penitentiary during an execution." While it may be unlikely,

this does not mean that the due process right to life does not apply or that Respondents' obligations dissipate.

A stay of execution creates an affirmative obligation under contemporary standards of decency and morality to take measures to give the inmate a chance to continue living. *Id*. Yet, measures that have any chance of allowing the inmate to continue living will not be taken in any state other than New Jersey unless this Court takes this case and affirmatively states that the Constitution requires the Departments of Corrections to take such measures and to ensure that the measures include the equipment necessary to maintain life. When it comes to life and death, there can be no substitute for doing all that is reasonably possible to maintain life when the law does not permit the execution. This Court's intervention is necessary to ensure this fundamental principle is recognized and applied to death row inmates who receive a last-minute stay of execution.

III. Unlike all previous lethal injection cases to arrive at this Court, this case presents an ideal vehicle for addressing the questions presented and the issues discussed in I and II in a manner that will apply to all lethal injection challenges and in a manner that will alleviate the need to grant certiorari in some future case to resolve issues left open by this case - - the equitable principles for determining whether to grant a stay of execution are irrelevant since no execution date is currently scheduled, the record (including the effects of all the chemicals used) is fully developed, the record is undisputed that the lethal injection chemicals could be replaced with alternative chemicals that pose less risk of pain and suffering, and the record is undisputed that Respondents do not have the proper equipment to maintain life if a stay of execution is granted after the first and/or second lethal injection chemical is administered.

To understand why this case is different than all the lethal injection cases that have come before it and why this case presents the most succinct and complete record for this Court to address the important legal issues raised by challenges to the chemicals and procedures used in lethal injections, it is first important to understand what this case is not. It is not about whether

[7] It is undersigned counsel's understanding that Clarence Hill was already strapped to the lethal injection gurney when this Court stayed his execution. If the stay came in only minutes later, the chemicals would likely have begun

lethal injection should be used as a method of execution or even if it is constitutional on its face. It is not about the constitutionality of one particular chemical, as was the case in *Abdur-Rahman*. It is not even about the facial constitutionality of the tri-chemical cocktail used in nearly all executions. It is not a quickly constructed, incomplete record compiled in a short period of time due to an impending execution looming overhead. It is not about a factual dispute over whether the chemicals or procedures used in Kentucky lethal injections (or any lethal injection) causes the wanton infliction of pain and suffering. And, it is not a battle of the experts. Rather, this case asks a simple question that has been difficult to answer and left unanswered by this Court for more than a century - - what is the legal standard for determining whether a method of execution is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution?

In this regard, this case is about whether using chemicals or a procedure that create a known risk of pain and suffering violates the cruel and unusual punishment clause when the chemicals and procedures could be replaced with alternatives that cause less risk of pain and suffering. And, it is about whether, after a stay of execution is granted, a state can allow an execution to take place merely by not using the necessary equipment to reverse the effects of the lethal injection chemicals. In these regards, this case is vastly different than the lethal injection cases previously before this Court that have essentially asked this Court to prohibit the use of a particular chemical. Yet, this case - - with the fully developed record and clear-cut issues that impact the resolution of all lethal injection cases - - will settle issues that must be resolved before reaching the merits of the constitutionality of any particular chemical. And, no case previously before this Court has addressed a state's obligation to maintain life if a stay of execution is granted after the first or second lethal injection chemical is injected.

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to be injected.

With the exception of *Abdur'Rahman*, which addressed only the constitutionality of injecting pancuronium bromide during lethal injections, apparently all petitions for a writ of certiorari dealing with the chemicals or procedures used in lethal injections have come to this Court in the context of a motion for a stay of execution. Because of that, those cases suffered from obvious problems, not the least of which are that the standard for granting a stay of execution had to be addressed and that the claims had to be addressed in an expedited fashion on substantially less than a fully developed record. This case is not like that.

This case arrives at this Court without any of the time constraints or additional legal issues created by an impending execution. It has a fully developed, detailed record from the testimony of twenty witnesses. There was extensive testimony about the chemicals Kentucky and all states other than New Jersey use to carry out lethal injections. Undisputed testimony from both Petitioners' and Respondents' experts established that "many non painful ways of stopping the heart" exist that would reduce the risk of the extremely painful burning sensation that is caused by potassium chloride to zero. The trial court made a factual finding that pancuronium bromide serves no therapeutic purpose during lethal injections and has no effect on pain. Appendix at 19. The trial court also noted that "[e]vidence was considered that other drugs were available that decrease the possibility of pain" and that "other drugs are available that may further assure that the condemned feels no pain." Appendix at 21-22. These findings were upheld by the Kentucky Supreme Court. *Baze*, *et al v. Rees*, *et al.*, 217 S.W.3d 207, 210-13 (Ky. 2006) (appendix at 4-6, 9).

Despite the findings of the trial court, both the trial court and the Kentucky Supreme Court ruled that the tri-chemical cocktail used to carry out lethal injections comports with the Eighth Amendment, even though the courts recognized that the risk of pain and suffering

associated with these chemicals could be avoided. This is despite the fact that Petitioners argued that the cruel and unusual punishment clause of the Eighth Amendment prohibits the unnecessary risk of pain and suffering and that the undisputed testimony that the chemicals could be replaced with other chemicals that pose less risk of pain and suffering makes any risk of pain and suffering associated with the current chemical cocktail unnecessary and thus cruel and unusual punishment.

Likewise, Petitioners argued that the due process right to life was being violated by the fact that Respondents do not have the proper equipment to maintain life if a stay of execution is granted after the first or second chemicals is injected. Even Respondents' only expert admitted that the first two chemicals are reversible and that Respondents' "crash cart" does not contain the necessary equipment to do so. Yet, Petitioners' due process claim was rejected.

The record makes these facts undisputed. Unlike many other cases and the previous lethal injection cases to arrive before this Court, no factual dispute over the likelihood that something will occur is relevant to the issues present to this Court. Rather, the record is clear that the current lethal injection chemicals could be replaced with chemicals that pose less risk of pain and suffering and that the effects of the lethal injection chemicals could be reversed if Respondents use the proper equipment, which they currently do not. Without a dispute about these facts, the legal issues are squarely before this Court in a fashion where no impediments to merits review exist, and the result of clarifying the legal standard in Petitioners' favor is clear - - a lower court would have to find that the risk of pain and suffering associated with the lethal injection chemicals currently used is unnecessary in violation of the Eighth Amendment and Respondents will have to obtain the proper equipment for maintaining life. The undisputed facts leave no alternative if this Court clarifies the applicable legal standard in favor of Petitioners.

Thus, this case comes down to pure legal issues that are outcome determinative and that a massive numbers of courts have been struggling to interpret and apply, resulting in many different interpretations that are the difference between prevailing and not prevailing. This case provides a clear and easy opportunity to resolve these legal issues.

CONCLUSION

For the above reasons, Petitioners respectfully request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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