No. 05-1036

IN THE
Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Phil Bredesen et al.

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

REPLY BRIEF FOR THE PETITIONER

Bradley A. MacLean
STITES & HARBISON, PLLC
Sun Trust Center, Suite 1800
424 Church St.
Nashville, TN 37219

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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REPLY BRIEF FOR THE PETITIONER

1. The interests of the states, capital defendants, the federal judiciary, and a society searching in vain for confidence in the administration of the death penalty are all profoundly disserved by the current extraordinary uncertainty over the constitutionality of the three-drug protocol used to carry out nearly every execution in the nation. Essentially *every* state and federal execution in the United States for the past six months has been diverted into rushed trial and appellate litigation over the Eighth Amendment's application to the use of drugs that are not necessary to kill the condemned inmate but instead serve only to create the risk that he will be tortured to death.

This is the prototypical instance in which only this Court's intervention can restore order to a process that is, in a word, broken. Whatever one's views of capital punishment, no person can fairly regard the status quo as either acceptable or sustainable. A stream of last-minute lawsuits, appeals, stays, motions to vacate stays, and applications for extraordinary writs are all but guaranteed to remain standard operating procedure until the question is settled by this Court. As the State of Florida tellingly argued in the parallel *Hill* case, "these issues – the method and means of carrying out an execution – are populating the federal district courts as a result of the Court's most recent decisions. * * * For all intents and purposes, every State actively seeking to carry out capital sentences has been impacted." Br. of Resp., *Hill* v. *McDonough*, No. 05-8794, at 27-28.[1] No end to this litigation is presently imaginable. Despite the profound questions raised regarding the excruciating pain that may be brought on

[1] Because petitioner's right to bring his claim under state-law procedures is uncontested, this case does not give rise to the question presented by *Hill – viz.*, whether such a claim would be a successive federal habeas petition if filed under 42 U.S.C. 1983 by an inmate who has already filed a prior federal habeas petition.

by Pavulon and potassium chloride, states have overwhelmingly resisted taking any steps to reevaluate a lethal injection scheme that was, by all accounts, initially adopted without any significant input from relevant medical experts, unthinkingly copied by correctional administrators lacking relevant training, and now carried out by untrained and mostly unidentified correctional personnel. See, *e.g.*, Human Rights Watch, *So Long As They Die: Lethal Injections in the United States* 12-14, 28-29 (Apr. 2006), available at http://hrw.org/reports/2006/us0406/ (visited May 2, 2006). Simultaneously, capital defendants will obviously continue to employ every available litigation tool to fend off the prospect of such a horrific death. This is a recipe for unending disruptive litigation, which can only be resolved by a definitive answer from this Court to the question presented.

Indeed, this Court's eventual intervention seems all but inevitable, as this torrent of litigation has already generated the inconsistent patchwork of rulings that typifies the circumstances in which certiorari is granted in order to bring uniformity to important questions of federal law. Three federal death row inmates and "6 of the 17 state death row inmates scheduled to die between January 1 and April 21 received at least temporary stays of execution based on lethal-injection-related claims." Charles Lane, *As Challenges to Lethal Injection Mount, Justices Set to Hear Case*, WASH. POST, Apr. 26, 2006, at A7. Executions in California – which has 645 death row inmates – have been halted through at least September 2006; because an appeal is virtually certain to follow the district court's ruling in the *Morales* case, it is likely that executions will be prohibited in that state until at least well into 2007. See Henry Weinstein, *Executions Unlikely for Rest of Year*, L.A. TIMES, Apr. 28, 2006, at B1. On the other hand, several other courts have denied stay requests, with no coherent distinction between the cases, as each arises from essentially the same execution protocol. While these stay decisions are undeniably consequential for the individuals involved, very few if any of the appeals from

those orders have presented this Court with the opportunity to decide the underlying constitutional question free of procedural complications. Perhaps for that reason, this Court has left standing both the decisions granting and denying stays of execution with regard to the substantive Eighth Amendment question. Further disparate treatment of similarly situated inmates on such a critical question can be avoided by granting certiorari in this case to conclusively resolve the constitutional question.

This Court is unlikely to be presented with a better vehicle to decide the constitutionality of the three-drug lethal injection protocol any time in the reasonably near future. Unlike the stay appeals, the cases decided on motions for preliminary injunctions, and the cases seeking collateral review through habeas or 42 U.S.C. 1983 – all of which involve predicate questions of procedure and standards of review – this case comes to the Court on a direct appeal from a state supreme court. Moreover, respondents do not dispute that the record in this case was fully developed, unhurried by the prospect of an imminent execution. And because the states' execution protocols are generally not materially different, the Court would also be in a position to resolve the question presented with the benefit of the record developed in other similar cases, which will be addressed by *amicus* briefs filed by the parties to those cases. The legal question is moreover relatively straightforward and has already been thoroughly discussed in numerous lower court opinions (including the three lower courts in this case). Finally, this Court is already familiar with the issues presented by this case, which were addressed by several of the *amicus* briefs filed in *Hill*.

This Court's schedule substantially reinforces the benefit to granting certiorari in this case now. The parties would file briefs during the summer and the case could be argued at the opening of the 2006 Term. A decision could be issued this year. So far as petitioner's counsel is aware after considerable study, no other case in a similarly appropriate

posture will be ripe for review in this Court reasonably soon. Thus, although a preliminary record was developed in *Morales*, that case remains in the district court (where a full evidentiary hearing will be held in September), and eventual proceedings before the Ninth Circuit make it likely that it would not reach this Court until late 2007 or early 2008. Deferring review until a later petition thus all but guarantees that the current, untenable morass of litigation nationwide that arises from the absence of a definitive answer to the question presented will continue unnecessarily for at least an additional year.

2. The three essential elements of petitioner's Eighth Amendment claim are undisputed by respondents in the brief in opposition. First, Tennessee's use of Pavulon (also known by its generic name, pancuronium bromide) and potassium chloride in petitioner's execution will serve no purpose. Respondents' own witnesses conceded that fact below, and the lower courts found it as a matter of fact as well. See Pet. 11. Tennessee adopted its protocol not on the basis of any legislative or medical judgment, but because prison administrators blindly copied other states that were, in turn, copying each other. See *id.* 21. The only relevant legislative judgment is the notable prohibition in Tennessee and twenty-nine other states (acknowledged by one question at the oral argument in *Hill* v. *McDonough*, see Tr. of Oral Arg. 36-37) on the use of neuromuscular blocking agents such as Pavulon in the execution of even animals.[2] The lower courts' heavy reliance, which respondents echo, on a supposed consensus among the states is thus deeply flawed, as the state itself refuses to defend the merits of this practice and there is no

[2] Respondents' extended discussion of the debate over the meaning of Guidelines issued by the AVMA (BIO 11) is thus beside the point.

indication of any considered judgment underlying it.[3] See Pet. 19-22.

Second, it is undisputed that if the execution does not proceed flawlessly the second and third drugs in the protocol will cause petitioner excruciating pain as he is killed – pain that is, as noted, also wholly unnecessary. See Pet. 11. Respondents' passing attempt to nonetheless justify the use of Pavulon on the ground that it will stop petitioner's breathing (BIO 9 n.10) says nothing about the potassium chloride – which respondents themselves emphasize "would also cause extreme pain and suffering" (*id.* 15 n.18) – and in any event only reinforces petitioner's claim: the Pavulon serves no purpose in the lethal injection protocol and, if the sodium Pentothal does not work as intended, will torture petitioner.[4]

Third, Tennessee and other states are fully aware of these substantial risks, but have almost uniformly resisted taking any steps to do anything about them. See Pet. 12-14; see also Human Rights Watch, *supra*, at 29.

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[3] Respondents' contention that this Court in *Roper* v. *Simmons*, 543 U.S. 551 (2005), "considered both legislative enactments *and state practice* with respect to the execution of juveniles" (BIO 10 (emphasis in original)) is entirely misguided. *Roper* focused first on the limited number of states that by statute permitted execution of juveniles, and only then found it also informative that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent." 543 U.S. at 564. It was necessary to consider "state practice" only because – in contrast to the legislative treatment of the use of neuromuscular inhibitors – a substantial minority of legislatures had approved the execution of juveniles.

[4] As such, petitioner need not establish that the Constitution requires the state to employ the "least painful" method of execution. See Tr. of Oral Arg., *Hill* v. *McDonough*, No. 05-8794, at 47-49. Rather, the point is that the Eighth Amendment does not permit a form of punishment that has no penological function but instead can only serve to cause excruciating pain.

These undisputed facts make out a violation of the Eighth Amendment: the state is fully aware that its conduct creates a wholly unnecessary risk that petitioner will be subject to grotesque pain and suffering.[5]

The state's only answer is to parrot the trial court's statement (Pet. App. 92a) that the risk that the execution will not go as planned is "less than remote." That conclusion is wrong for the reasons discussed *infra*, but in any event it is irrelevant. Respondents ignore that simply exposing petitioner to the fear of an execution by torture inflicts ongoing suffering upon him well before the execution itself. See Pet. 16. Moreover, and independently, the Eighth Amendment has a dignitary component that prohibits treating

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[5] Respondents' passing suggestion that petitioner has not sufficiently raised his claim (BIO 14 n.17) is meritless, and indeed respondents do not actually claim that the issue has been waived. The application of the Eighth Amendment was extensively briefed in, and decided by, all three lower courts. Among other things, petitioner repeatedly argued that the state was aware of the risks and, citing this Court's deliberate indifference holding in *Nelson* v. *Campbell*, 541 U.S. 637 (2004), he argued that the Eighth Amendment was violated in light of, *inter alia*, "[t]he foreseeable risks created by the protocol's lack of specificity in dosages, training requirements, and the care and administration of drugs." Petr. Tenn. S. Ct. Rule 11 App. 28. The lower courts found it significant in denying petitioner's claim that he had made "no showing of malice" by Tennessee officials (Pet. App. 88a) or demonstrated that the execution protocol was sufficiently "haphazard or lackadaisical" (*id.* 71a). It is true that the petition cites additional precedents (see BIO 14 n.17), but that fact obviously does not amount to a waiver of the claim, which was fully considered below. Nor is there any support for respondents' bald assertion (*ibid.*) that "deliberate indifference" claims are a unique species of Eighth Amendment challenges that may be advanced only in an action under 42 U.S.C. 1983. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825 (1994) (*Bivens* action alleging deliberate indifference).

prisoners worse than domesticated animals and blithely creating such an unnecessary risk of horrible suffering.[6] *Id.* 15.

3. The trial court's statement that there is a "less than remote" risk that petitioner will not be fully anesthetized, and then killed, by the sodium Pentothal (Pet. App. 92a; BIO 13) is wrong. The petition addressed this issue in detail, and respondents are unable to offer any substantial defense of the trial court's conclusion. Thus, petitioner faces the risk that he will be inadequately anesthetized because, *inter alia*, the sodium Pentothal used in his execution is past its shelf life, was improperly mixed or contaminated, has deteriorated, or is improperly administered. See Pet. 17-18. If, for one or more of these reasons, petitioner is not properly anesthetized, that fact may not be discovered before the Pavulon and potassium chloride are administered, as Tennessee's protocol does not require that anyone confirm that the sodium Pentothal has taken effect before the final two drugs are injected. See *id.* 18. Nor is that fact likely to be discovered after the final two drugs are administered, as the Pavulon will paralyze petitioner's muscles, thereby preventing him from alerting the executioner. See *id.* 18-19. Indeed, given all of these flaws in Tennessee's protocol, respondents' own expert witness

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[6] Although the state emphasizes (at 3 & n.6) that under its protocol, the warden is located only a foot from the inmate's head during the execution and that the executioner can use a camera to zoom in on the catheters, there is no evidence that either the warden or the executioner is trained or qualified to recognize any problems. See Pet. 2-4, 18. See also *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006) (rejecting state's proposal that warden be responsible for identifying any problems during the execution, and clarifying that an anesthesiologist or similarly qualified person is required). Moreover, even if a problem is observed during the execution, the state has never indicated that it has any procedure for halting the process or otherwise remedying the situation.

testified at trial that he was not able to provide an opinion that the protocol contained adequate safeguards to ensure that the inmate would be properly anesthetized or to ensure that he would not suffer a torturous death. See Pet. 4-5. The evidence put forward by respondents – merely that one execution in Tennessee had apparently gone as planned and that respondent Ricky Bell had testified he felt he had taken sufficient precautions (see BIO 4) – simply cannot sustain the conclusion that there is no genuine risk of error in the execution protocol.

Any doubt is resolved by the findings of several federal district courts that have considered the same question. In one recent case, executions in California were halted after a district court there found a substantial showing that "the administration of California's lethal-injection protocol creates an undue risk that [the plaintiff] will suffer excessive pain when he is executed." *Morales* v. *Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal.), aff'd, 438 F.3d 926 (CA9), cert. denied, 126 S. Ct. 1314 (2006). The court relied on logs from earlier executions which indicated that – notwithstanding testimony by the state's expert witness that an inmate's breathing should stop within one minute after the sodium Pentothal is administered – the inmates continued to breathe for several minutes after receiving sodium Pentothal. 415 F. Supp. 2d at 1044-46. In another recent case, the district court found that the inmate had raised "substantial questions as to whether North Carolina's execution protocol creates an undue risk of excessive pain." Order, *Brown* v. *Beck*, No. 5:06-CT-3018-H, at 13-14 (E.D.N.C. Apr. 7, 2006), aff'd, No. 06-9, 2006 U.S. App. LEXIS 9894 (CA4), cert. denied, 2006 U.S. LEXIS (Apr. 20, 2006). The court cited, among other things, eyewitness accounts that "report having witnessed individuals writhing, convulsing, and gagging when being executed" – accounts that, according to the same expert witness who appeared in petitioner's case, "are not consistent with a sufficient dose of [sodium Pentothal] having been successfully delivered to the brain such that the condemned

inmate does not feel pain." *Id.* at 9-10. And in *Cooey* v. *Taft*, No. 2:04-cv-1156, 2006 U.S. Dist. LEXIS 24496, at *15 (S.D. Ohio Apr. 28, 2006), the district court found "an unacceptable and unnecessary risk that [the plaintiff] could * * * suffer unnecessary and excruciating pain while being executed in violation of his Eighth Amendment right not to be subjected to cruel and unusual punishment." "Compounding the gravity of the risk that [the plaintiff] will not be properly anesthetized prior to and while being executed," the court explained, "is the absence prior to and during the execution process of certified medical personnel capable of ensuring, among other things, that the drugs are properly prepared and delivered, and that the condemned inmate has been rendered unconscious prior to and during the administration of the [Pavulon] and potassium chloride." *Id.* at **13-14. See also *Anderson* v. *Evans*, No. CIV-05-825-F, 2006 U.S. Dist. LEXIS 1632 (W.D. Okla. Jan. 11, 2006) (rejecting motion to dismiss Eighth Amendment claim)

CONCLUSION

For the foregoing reasons, as well as those set out in the petition, certiorari should be granted.

Respectfully submitted,

Bradley A. MacLean
STITES & HARBISON, PLLC
Sun Trust Center, Suite 1800
424 Church St.
Nashville, TN 37219

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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