

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2138

MARK DEAN SCHWAB,

Appellant,

v.

Death Warrant
Signed
Execution Stayed

THOMAS S. D. HALL
2000 FEB -8 A 11:21
CLERK, SUPREME COURT
DVA

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY,
STATE OF FLORIDA

NOTICE OF SUPPLEMENTAL AUTHORITY

PETER J. CANNON
Fla. Bar No. 0109710
MARK S. GRUBER
Fla. Bar No. 0330541
Capital Collateral Regional
Counsel-Middle Region
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR APPELLANT

COMES NOW, the Appellant, Mark Dean Schwab, by and through undersigned counsel pursuant to Fla.R.App.P. 9.225, and submits this Notice of Supplemental Authority.

Baze v. Rees, (No. 07-5439) (transcript of oral argument heard before the United States Supreme Court on January 7, 2008).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Supplemental Authority has been furnished by U.S. Mail, first class postage, to Kenneth Nunnely, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 3958 on this 7th day of February, 2008.



Peter J. Cannon
Florida Bar No. 0109710
Mark S. Gruber
Florida Bar No. 0330541
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
(813) 740-3544
Attorneys for Defendant

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in the Case 07-5439, Baze v. Rees.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

~~ON BEHALF OF THE PETITIONERS~~

MR. VERRILLI: Mr. Chief Justice and may it please the Court:

Kentucky's lethal injection procedures pose a danger of cruelly inhumane executions. If the first drug in the three-drug sequence, the anesthetic thiopental, is not effectively administered to the executed inmate, then the second drug, pancuronium, will induce a terrifying conscious paralysis and suffocation and the third drug, potassium chloride, will inflict an excruciating burning pain as it courses through the veins.

CHIEF JUSTICE ROBERTS: Mr. Verrilli, your argument is based on improper administration of the protocol. You agree that if the protocol is properly followed there is no risk of pain?

MR. VERRILLI: I disagree with that respectfully, Mr. Chief Justice. The protocol simply does not address several key steps where risks can arise

1 and, beyond that, the protocol's -- and I think this is
2 critically important -- the protocol's procedures for
3 monitoring to assure that the inmate is adequately
4 anesthetized are practically nonexistent.

5 CHIEF JUSTICE ROBERTS: I thought your
6 expert -- I'm looking at page 493 to 494 of the joint
7 appendix -- agreed that if the two grams of sodium
8 pentothal is properly administered, the way he put it,
9 in virtually every case there would be a humane death.

10 MR. VERRILLI: That is true, but there can
11 be no guarantee that it will be properly administered
12 and that is because even in clinical settings there are
13 always -- there is always the potential for difficulty
14 which manifests itself in actual problems, for example
15 in the setting of an IV.

16 JUSTICE KENNEDY: Well, if it were properly
17 administered, would you have a case here? Let's assume
18 100 percent of cases are properly administered.

19 MR. VERRILLI: If there were a way to
20 guarantee that the procedure worked every time, then we
21 wouldn't have substantial risk.

22 JUSTICE KENNEDY: No, my question --

23 MR. VERRILLI: But --

24 JUSTICE KENNEDY: Let's assume
25 hypothetically, and we know this isn't true, that 100

1 percent of the time it's properly administered. Then do
2 you have an argument to present to the Court?

3 MR. VERRILLI: Well, if the "if" is, I
4 apologize for this, but for clarity -- the "if" is that
5 100 percent of the time the dose of anesthetic is
6 properly administered into the condemned inmate, then we
7 ~~don't have a significant risk. Of course that is not~~
8 what the record in this case establishes. The record
9 establishes the contrary. There is -- you cannot assure
10 that there is going to be a guarantee of -- of
11 successful administration of the anesthetic. And that
12 is why the monitoring part of the process is so
13 critical.

14 JUSTICE GINSBURG: But would you -- would
15 the monitoring suffice? In other words, you started out
16 by saying there is no way that it could be administered
17 and assure 100 percent against risk, so it would be
18 helpful if you clarified: Yes, there is a way of
19 monitoring adequately and tell us what that would be, or
20 no, there is no way.

21 MR. VERRILLI: Yes, Justice Ginsburg. I
22 think we have tried to suggest in our brief that there
23 is a way to monitor effectively even with the three-drug
24 protocol. It's challenging. The key component of that
25 is that one needs a person trained in monitoring

1 anesthetic death to participate in the process.

2 JUSTICE SCALIA: Who would be a medical
3 doctor -- and medical doctors, according to the Code of
4 Ethics of the American Medical Association, can't
5 participate.

6 MR. VERRILLI: Well, Your Honor, of course,
7 ~~that's why there is another practical alternative here,~~
8 which solves that problem, which is the single dose of
9 barbituate, which does not require the participation of
10 a medically trained professional.

11 JUSTICE ALITO: Well, that seems to be a big
12 part your argument, but it doesn't appear that that
13 argument was raised at all in the Kentucky courts, and
14 it seems that there is virtually nothing in the record
15 of this case that shows that that's practical or that
16 it's preferable to the three-drug protocol. It may well
17 be, but without anything in the record of this case, how
18 could we hold that the three drug protocol is
19 unconstitutional?

20 MR. VERRILLI: Well, if I may Justice Alito,
21 I do think and I'd like to provide the references where
22 it is raised and then the evidentiary references that
23 support the argument --

24 JUSTICE ALITO: Where was it raised? The
25 citations in the brief that was submitted by your

1 co-counsel are inaccurate to show that it was raised in
2 the Kentucky courts.

3 MR. VERRILLI: Well, at page 684 of the
4 joint appendix, the -- this is the trial brief, the
5 brief raised in the trial court -- one assertion made
6 there is that an alternative chemical or combination of
7 ~~chemicals that poses less risk of unnecessary pain and~~
8 suffering during an execution is --

9 JUSTICE ALITO: No, that's -- that's the
10 trial court, and you think that just the word an
11 "alternative chemical poses less risk" is sufficient to
12 raise the argument that the three-drug protocol is
13 unconstitutional, because a single drug protocol
14 involving thiopental is preferable. That one word?

15 MR. VERRILLI: And then -- and then, no.
16 And then later, on page 701, the brief argues that there
17 are nonpainful ways of stopping the heart.

18 JUSTICE BREYER: What are they? That is, I
19 was -- I can't find -- what should I read? Because I've
20 read the studies. I've read that Lancet study, which
21 seemed to me the only referee for it said it wasn't any
22 good. And I've read the Zimmer study and I found in
23 there an amazing sentence to me which says that The
24 Netherlands Information Task Force concluded it is not
25 possible to administer so much of it that a lethal

1 effect is guaranteed. They're talking about thiopental.
2 So I'm left at sea. I understand your contention. You
3 claim that this is somehow more painful than some other
4 method. But which? And what's the evidence for that?
5 What do I read to find it?

6 MR. VERRILLI: The thiopental is a
7 ~~barbiturate and by definition will inflict death~~
8 painlessly. The record in this case establishes -- each
9 expert, the Petitioner s expert and Respondents' expert,
10 testified that it is guaranteed at the three gram dose
11 to cause death.

12 JUSTICE BREYER: But that's what they're --
13 they're giving a three gram dose, I take it, and if --
14 or two grams or three grams; I thought it was three
15 grams here. And I ended up thinking of course there is
16 a risk of human error. There is a risk of human error
17 generally where you're talking about the death penalty,
18 and this may be one extra problem, one serious
19 additional problem. But the question here is can we say
20 that there is a more serious problem here than with
21 other execution methods? I've read the studies. What
22 else should I read?

23 MR. VERRILLI: Well, I think the record
24 references, which I think the record pretty clearly
25 establishes, Your Honor, that death is certain to occur

1 through the use of thiopental at the three gram dose.

2 JUSTICE BREYER: What do we do with the
3 euthanasia -- instead of talking -- I looked; I found it
4 more important to look at what they do with euthanasia
5 than to look at what they do with animals, frankly, and
6 I was therefore taken aback with the sentence I just
7 read to you. What am I supposed to do about that?

8 MR. VERRILLI: Well, I think to refer
9 instead to the expert testimony in this case which says
10 that death is certain to occur, and in addition, that
11 medical testimony in this case that it is certain to
12 occur in a very few minutes. Those are the transcript
13 references that we provided at page 18 of the reply
14 brief.

15 CHIEF JUSTICE ROBERTS: That method has
16 never been tried, correct.

17 MR. VERRILLI: Well, it has never been tried
18 on humans. That is correct. It is --

19 CHIEF JUSTICE ROBERTS: Do we know whether
20 there are risks of pain accompanying that method?

21 MR. VERRILLI: I think you do, Mr. Chief
22 Justice, because by definition, barbituates cannot
23 inflict pain and do not inflict pain.

24 CHIEF JUSTICE ROBERTS: The record
25 establishes that the second drug that's used here is

1 used to prevent involuntary muscle contractions. That
2 would not be -- there wouldn't be a safeguard against
3 that under one drug protocol, I take it.

4 MR. VERRILLI: Well, yes there would,
5 Mr. Chief Justice, because the reality is that
6 thiopental and other barbituates are anti-convulsives.

7 Their point is to -- among other things to suppress any
8 involuntary muscle --

9 CHIEF JUSTICE ROBERTS: Can you -- do you
10 agree that that is an appropriate problem to be
11 addressed by the execution protocol, that they should
12 try to reduce the likelihood of involuntary muscle
13 contractions?

14 MR. VERRILLI: No, because to the extent
15 that the reason that they are offering to do it, is
16 because of the potential for discomfort that it may
17 cause the audience given the risk that the --

18 CHIEF JUSTICE ROBERTS: I think that their
19 -- one of their reasons was that it would enhance the
20 dignity, not only of the procedure as a whole, but also
21 to the condemned.

22 MR. VERRILLI: I understand that, Mr. Chief
23 Justice, but given the extent to which it increases the
24 risk that there can be ineffective anesthesia, and it
25 can go undetected, it doesn't seem to us to be an

1 argument of sufficient force to justify using it despite
2 that risk particularly when it seems to us that the
3 issue of dignity can be addressed by communication with
4 the audience.

5 CHIEF JUSTICE ROBERTS: What do we do with
6 the -- if you prevail here, and the next case is brought
7 ~~by someone subject to the single drug protocol and their~~
8 claim is: Look this has never been tried. We do know
9 that there's a chance that it would cause muscle
10 contractions that would make my death undignified. It
11 will certainly extend how long it takes to die, so I'm
12 subject to a lingering death and the more humane
13 protocol would be the three drug protocol?

14 MR. VERRILLI: Well, I think with respect to
15 the lingering death point, I think it would, this
16 Court's cases are talking about is the consciousness of
17 lingering death and the torture that that imposes, which
18 you wouldn't have of course in this situation. I don't
19 think there is a credible argument that the use of a
20 barbituate alone could inflict pain. They do not
21 inflict any pain. Now, of course there are
22 possibilities of maladministration, but not
23 maladministration of a one drug protocol that results in
24 any pain, and therefore there is just not a credible
25 Eighth Amendment argument. It seems to me that it

1 couldn't be cruel and unusual punishment, because there
2 is no pain.

3 JUSTICE GINSBURG: Mr. Verrilli, I think
4 that your main argument in this case, I mean, there's --
5 barbituate only seems to have come up rather late in the
6 day, as Justice Alito pointed out, but your main
7 arguments seem to be that the controls were inadequate.
8 So you were beginning to say what controls would be
9 necessary to render this procedure constitutional, and
10 one that you said -- trained personnel to monitor the
11 flow.

12 MR. VERRILLI: The monitor for anesthetic.

13 JUSTICE GINSBURG: Yes.

14 MR. VERRILLI: To ensure that anesthetic
15 depth has been achieved and maintained.

16 JUSTICE GINSBURG: And what is --

17 MR. VERRILLI: That is correct.

18 JUSTICE GINSBURG: Two questions: Who would
19 the trained personnel be? And, the second question,
20 what would be the measures that they would employ?

21 MR. VERRILLI: The trained personnel could
22 be a physician, a nurse or anyone trained by them
23 adequately in this process.

24 JUSTICE BREYER: Well, what do we do about
25 the point -- the point that the doctors or the nurses

1 say it's unethical to help with an execution? I mean,
2 if we are going to talk about the constitutionality of
3 the death penalty per se, that isn't raised in this
4 case. And what the other side says is, well, you're
5 just trying to do this by the back door, insist upon a
6 procedure that can't be used.

7 MR. VERRILLI: Well, I think the one point
8 of the one-drug protocol, of course, is to demonstrate
9 that we are not doing that. Beyond that, it seems to me
10 that the State can't have it both ways with respect to
11 the -- the issue of the participation of medically
12 trained personnel. On the one hand, they cannot say
13 that we have qualified medically able personnel
14 participating in this process and that's our guarantee
15 of its efficacy, and on the other hand say a requirement
16 of having trained qualified personnel participate is
17 impossible. And they do say that. For example the EMTs
18 that participate in Kentucky are under the same ethical
19 set of issues as doctors are.

20 JUSTICE GINSBURG: Could you use those EMTs?
21 Would they be qualified? Would the team that inserts
22 the IV, would that team be qualified?

23 MR. VERRILLI: With additional training they
24 could be qualified. They aren't qualified by virtue of
25 their training to become EMTs. They would have to be

1 additionally trained.

2 JUSTICE SOUTER: Mr. Verrilli, are we in the
3 difficult position in hearing your answers that, in
4 effect, we're being asked to make findings of fact about
5 the availability of medical personnel and the
6 feasibility of training and so on that the trial court
7 never made because it didn't think it had to make a
8 comparative analysis here, so that if, in fact, the
9 comparative analysis is crucial to the case, we should
10 send the thing back for factfinding by a trial judge
11 rather than trying to do it here. Should we remand if
12 we accept your argument?

13 MR. VERRILLI: It is true Justice Souter
14 that the trial court did not make factual findings on a
15 whole range of issues with respect to the difficulties
16 of constituting the proper dose, the risk of catheter
17 placement, the risk of blowouts, the risk of mixing up
18 syringes, and the adequacy of the monitoring. And I
19 agree, Your Honor, that it did so because it didn't
20 believe that that was particularly relevant to the issue
21 before it. And that's the -- the basis of our
22 disagreement with respect to the legal test.

23 Now, it is -- it is our position that the
24 record is sufficiently clear and sufficiently
25 uncontradicted on the key points with particular respect

1 to monitoring that the Court would not have to remand
2 but it certainly would be a reasonable thing to do in
3 view of the deficiencies in the actual findings.

4 JUSTICE KENNEDY: You were interrupted, and
5 you gave Justice Ginsburg -- you said you have two
6 problems for monitoring. She asked you who would do
7 this and what measures would they use.

8 MR. VERRILLI: Right.

9 JUSTICE KENNEDY: And you were never able to
10 get to the second.

11 MR. VERRILLI: With respect to the second,
12 it's a combination. They would use the available
13 equipment, EKG and blood pressure cuff which is the
14 standard practice used for monitoring for
15 unconsciousness, but in addition, as the expert
16 testimony in the case established, you have to have
17 close -- close visual observation by the trained person.

18 JUSTICE KENNEDY: Well, as to the cuff, I
19 thought the record was rather clear that it is just not
20 used at these low blood pressure levels.

21 MR. VERRILLI: No, I don't think so, Justice
22 Kennedy. There was some question about whether the
23 third device that this monitor is used but the blood --
24 the tracking of blood pressure is a critical way of
25 monitoring for unconsciousness as is the EKG and --

1 JUSTICE SCALIA: Mr. Verrilli, this is an
2 execution, not surgery. The other side contends that
3 you need to monitor the depth of the unconsciousness.
4 When you expect to bring the person back and do not want
5 harm to occur to the person. But they assert that to
6 know whether the person is unconscious or not all it
7 ~~takes is a slap in the face and shaking the person.~~

8 MR. VERRILLI: Well --

9 JUSTICE SCALIA: That's their contention.

10 MR. VERRILLI: There is no slap in the face.
11 There is no shaking the person. There's no testing of
12 that kind whatsoever under the Kentucky protocol. So
13 even under that understanding, which we don't think is
14 correct, that -- we don't have that here and that's one
15 of the problems. All there is, is visual observation by
16 an untrained warden and an untrained deputy warden who
17 had testified in this case that they don't know what to
18 look for to determine whether somebody is conscious or
19 unconscious.

20 JUSTICE SCALIA: With regard to the trial
21 court's failure to make findings about the availability
22 of people to do this and about the possibility of --
23 practical possibility of more effective and less painful
24 drugs, was that a failure to ignore evidence that you
25 produced?

1 MR. VERRILLI: Yes. It --

2 JUSTICE SCALIA: Did you introduce evidence
3 to show that indeed medically trained personnel were
4 readily available to do the things you say?

5 MR. VERRILLI: I don't think we introduced
6 evidence that medically trained personnel were ready
7 available, but we did introduce evidence about what
8 needed to be done and, of course, as I said, Kentucky
9 like the other states had their ability to bring
10 medically qualified personnel to bear to run this
11 process. And so I do think --

12 JUSTICE SCALIA: I'm very reluctant to send
13 it back to the trial court so we can have a nationwide
14 cessation of all executions while the trial court
15 finishes its work and then it goes to another appeal to
16 the State supreme court and ultimately, well, it could
17 take years.

18 MR. VERRILLI: I understand that, Your
19 Honor, and that's why I suggest --

20 JUSTICE SCALIA: You wouldn't want that to
21 happen.

22 MR. VERRILLI: That's why I suggested that
23 there is -- that this case can be decided on the basis
24 of the record here because the undisputed expert
25 testimony on these key issues shows the deficiencies in

1 the protocol.

2 JUSTICE SOUTER: May I ask you another
3 question?

4 MR. VERRILLI: Yes.

5 JUSTICE SOUTER: May I ask another question
6 about the state of the evidence. It really goes to an
7 understanding of your position that was discussed a
8 little bit earlier about the preferability of simply
9 barbiturate dose as opposed to the three-drug
10 combination. You said a moment ago that the evidence
11 was -- and I think it was undisputed evidence -- that
12 three grams of the barbiturate actually used would be
13 sufficient to cause death; is that correct.

14 MR. VERRILLI: That's correct.

15 JUSTICE SOUTER: And that was undisputed?

16 MR. VERRILLI: Each side's expert testified
17 to precisely the same thing.

18 JUSTICE SOUTER: Okay.

19 MR. VERRILLI: Three grams was certain to
20 cause death.

21 JUSTICE SOUTER: So that if the current
22 three-gram dosage were used and the second and third
23 drugs were not administered, death would occur based on
24 the undisputed evidence in this case.

25 MR. VERRILLI: The record establishes that

1 death is certain.

2 JUSTICE SOUTER: Secondly, my understanding,
3 my recollection, is that in a couple of places in your
4 brief, one at least, you referred to the preferability
5 of administering a, and I think the term was, massive
6 dose of barbiturate, which I took to mean more than the
7 three grams. Is that what you meant?

8 MR. VERRILLI: No. Three grams is a massive
9 dose.

10 JUSTICE SOUTER: That is the massive dose.

11 MR. VERRILLI: But if one had any doubt
12 about the certainty of the effect of causing death, one
13 could always just increase the dose. But the record
14 here is that three grams --

15 JUSTICE SOUTER: Is there any evidence in
16 the record about what the enhanced dose would
17 appropriately be if you decided or if a protocol author
18 decided that there would be no chance whatsoever that
19 death would not occur, and the amount should be greater
20 than three grams? Was there any evidence in the record
21 about how much there ought to be if you were going to go
22 above three grams?

23 MR. VERRILLI: I'm not sure there's anything
24 in the record, Your Honor. There is discussion in the
25 amicus briefs about some other jurisdictions that have

1 gone as high as five grams.

2 JUSTICE GINSBURG: And the government has
3 told us they do.

4 MR. VERRILLI: Right.

5 JUSTICE GINSBURG: In the Federal response.

6 CHIEF JUSTICE ROBERTS: You have objections
7 that would apply even to your single drug protocol. You
8 tell us that one reason this challenged protocol doesn't
9 work is because people will mix the drugs in the wrong
10 way, including the sodium pentathol. That objection
11 would still be there if we adopted your alternative,
12 wouldn't it?

13 MR. VERRILLI: No, Mr. Chief Justice,
14 because, as I've tried to say earlier, even if there is
15 maladministration --

16 CHIEF JUSTICE ROBERTS: I'm focusing
17 specifically on the mixing of the drugs. The mixing of
18 the sodium pentathol would be undertaken under the
19 Kentucky procedure and under your proposed alternative,
20 correct?

21 MR. VERRILLI: That's correct. But the
22 difference is if there's an error at that stage in the
23 process and the execution proceeds, there may be a
24 problem that needs to be fixed, but it will not be a
25 problem that causes any pain, and that's the critical

1 difference because if it doesn't cause pain it can't be
2 a cruel and unusual punishment.

3 JUSTICE SCALIA: We have been discussing
4 this as though that is a constitutional requirement.
5 Where does that come from, that you must find the method
6 of execution that causes the least pain? We have
7 approved electrocution, we have approved death by firing
8 squad. I expect both of those have more possibilities
9 of painful death than the protocol here. Where does
10 this come from that in the, in the execution of a person
11 who has been convicted of killing people we must choose
12 the least painful method possible? Is that somewhere in
13 our Constitution.

14 MR. VERRILLI: We don't make the argument
15 that States are required to choose the least painful
16 method possible. Our standard is grounded on three, I
17 think, extremely solid, well- established points of
18 Eighth Amendment doctrine.

19 The first one is this: The core concern of
20 the Eighth Amendment at the time of its founding, of
21 course, was precisely the question of whether the
22 carrying out of death sentences would inflict torturous
23 deaths. So we're at the core of the historical concern.

24 JUSTICE SCALIA: No, I don't agree with
25 that. The concern was with torture, which is the

1 intentional infliction of pain. Now, these States, the
2 three-quarters of the States that have the death
3 penalty, all except one of whom use this method of
4 execution, they haven't set out to inflict pain. To the
5 contrary, they have introduced it presumably because
6 they, indeed, think it's a more humane way, although not
7 one that is free of all risk.

8 MR. VERRILLI: That's the second principle,
9 Your Honor, is that this Court's cases, including the
10 ones that Your Honor averted to, have said that the
11 standard is whether the means of execution inflicts
12 unnecessary pain.

13 JUSTICE SCALIA: No --

14 MR. VERRILLI: And --

15 JUSTICE SCALIA: Unnecessary and wanton,
16 unnecessary and wanton infliction of pain.

17 MR. VERRILLI: Well, the -- with all due
18 respect, Wilkerson and Kemmler say "unnecessary pain."
19 Resweber says "unnecessary pain and" --

20 JUSTICE SCALIA: Well, then, you're changing
21 your position. You said -- you just said earlier that we
22 didn't have to find the least painful way.

23 MR. VERRILLI: No, that's correct, because
24 --

25 JUSTICE SCALIA: But if you're not using the

1 least painful way, you are inflicting unnecessary pain,
2 aren't you?

3 MR. VERRILLI: No.

4 JUSTICE SCALIA: Can you rectify that?

5 MR. VERRILLI: Yes, because, Justice Scalia,
6 our position is that the pain that is inflicted here
7 when this goes wrong is torturous, excruciating pain
8 under any definition. We're not talking about a slight
9 increment different. We're talking about the infliction
10 of torturous pain.

11 JUSTICE ALITO: Isn't your position that
12 every form of execution that has ever been used in the
13 United States, if it were to be used today, would
14 violate the Eighth Amendment?

15 MR. VERRILLI: No.

16 JUSTICE ALITO: Well, which form that's been
17 used at some time in an execution would not violate?

18 MR. VERRILLI: We would have to suggest it
19 to the test that we are advocating, which it would --
20 whether there is a risk of torturous pain.

21 JUSTICE SCALIA: Hanging certainly would,
22 right?

23 MR. VERRILLI: Well, it would have to be
24 subjected to the test.

25 JUSTICE SCALIA: Is that a hard question?

1 Is that a hard question, whether hanging would, whether
2 you had experts who understood the dropweight, you know,
3 that was enough that it would break the neck?

4 MR. VERRILLI: If there is a risk of
5 torturous pain and if there are readily available
6 alternatives that could obviate the risk, then any
7 significant risk --

8 JUSTICE SCALIA: Hanging's no good. What
9 about electrocution?

10 MR. VERRILLI: Well, it would depend. The
11 argument about electrocution, Justice Scalia, is whether
12 or not it is painless, and that was its point when it
13 was enacted, that it would be a painless form of death.

14 JUSTICE SCALIA: It has to be, it has to be
15 painless?

16 MR. VERRILLI: It does not, but that was its
17 point, and I think one would have to subject it to the
18 test to see whether it inflicts severe pain that is
19 readily avoidable by an alternative.

20 JUSTICE ALITO: You have no doubt that the
21 three judge protocol that Kentucky is using violates the
22 Eighth Amendment, but you really cannot express a
23 judgment about any of the other methods that has ever
24 been used?

25 MR. VERRILLI: Well, electrocution may well.

1 But it would depend again, Your Honor. If it could be
2 established that it was painless, that there wasn't a
3 risk that it could go wrong in a way that inflicts
4 excruciating pain then it would be upheld. If it
5 couldn't, it wouldn't. That does seem a serious
6 question. Obviously, the Court granted certiorari to
7 consider it a few terms ago. But that would be the
8 test, the mode of analysis here, and I --

9 JUSTICE SCALIA: I would think you'd have to
10 show it's unusual, not painless. I mean, cruel and
11 unusual is what we're talking about. There's no
12 painless requirement in there.

13 MR. VERRILLI: There is an unnecessary pain
14 requirement. There is also, Justice Scalia --

15 JUSTICE SCALIA: Where does this unnecessary
16 pain requirement come from?

17 MR. VERRILLI: From this Court's cases.

18 JUSTICE SCALIA: Dictum in our cases, right?

19 MR. VERRILLI: Yes, it comes from this
20 Court's cases.

21 JUSTICE SCALIA: Dictum in our cases.

22 MR. VERRILLI: Well, it seems to me it's
23 more than that. And Pinetti is one case that shows it,
24 because there's a case in which the Eighth Amendment
25 forbid the execution of a person who was insane at the

1 time of execution. In that situation there is no intent
2 on the part of the people carrying out the execution to
3 inflict cruel and unusual punishment. This Court didn't
4 require intent in Pinetti. In fact, it said something
5 quite different, really the polar opposite. It said
6 that the States have to have in place procedures to
7 ensure that there wasn't an arbitrary infliction of the
8 death penalty in that circumstance, without any
9 requirement of intent.

10 The Gregg-Woodson-Lockett cases don't have a
11 requirement of intent, and the Kemmler and Wilkinson
12 cases don't have a requirement of intent in them either.
13 With respect to the "unusual" character of it, just
14 drawing from the dictionary definitions that Your Honor
15 posed in the Harmline case, this is unusual in precisely
16 that way in that it is, if Your Honor will just bear me,
17 it is such that does not occur in ordinary practice. So
18 I do think it's unusual in that sense.

19 And I'd like to reserve the balance of my
20 time if I may.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Verrilli. Mr. Englert?

23 ORAL ARGUMENT OF ROY T. ENGLERT, JR.,

24 ON BEHALF OF RESPONDENTS

25 MR. ENGLERT: Mr. Chief Justice and may it

1 please the Court:

2 Mr. Verrilli and I agree that if the first
3 drug is properly administered there will be a painless
4 death. It is only if the first drug is not properly
5 administered that there is any possible constitutional
6 argument in this, in this case.

7 ~~JUSTICE STEVENS: But do you also agree with~~
8 the counter- proposition that if it is not properly
9 administered there is some risk of excruciating pain?

10 MR. ENGLERT: Yes.

11 JUSTICE STEVENS: And do you agree that if
12 that risk, say, occurred in every case, that it would
13 violate the Eighth Amendment?

14 MR. ENGLERT: Yes.

15 Because the administration of the first drug
16 is so important, it is important to focus on the
17 safeguards Kentucky has in place to make sure that the
18 first drug is properly administered. Contrary to what
19 Mr. Verrilli has suggested, Kentucky has excellent
20 safeguards in place. Let me start with who, who puts in
21 the IV line, which is the most critical step of the
22 process. Kentucky uses what is probably literally the
23 best qualified human being in the Commonwealth of
24 Kentucky to place the IV line. It uses a phlebotomist
25 who in her daily job works with the prison population.

1 The problems the prison population --

2 JUSTICE SOUTER: I take it this is obvious,
3 but I wondered when I went through the brief. I assume
4 this phlebotomist is not an MD?

5 MR. ENGLERT: Correct.

6 JUSTICE SOUTER: What is the training? I
7 mean, "phlebotomist" is somebody who works with veins, I
8 take it. What is the training?

9 MR. ENGLERT: The training is a certain
10 amount of learning followed by on-the-job experience.
11 This person places 30 needles a day in the prison
12 population and at page 273 of the joint appendix it
13 points out that she works in her daily job with the
14 prison population. So what she is used to from many
15 years of working with the prison population is the kind
16 of problems of compromised veins we have in the inmate
17 population specifically.

18 JUSTICE SOUTER: So it's somebody like the
19 Red Cross worker who puts in the needle when somebody
20 donates blood.

21 MR. ENGLERT: No, Your Honor. It's someone
22 like the person who inserts an IV in a hospital. The
23 experts in this case all agreed that in a hospital
24 setting IVs are not inserted by medical doctors, they
25 are inserted by phlebotomists. That's what they do.

1 They teach medical residents how to insert IVs because
2 doctors in training don't know how to do this. And it's
3 what's somewhat derisively referred to as scut work in
4 the hospital setting.

5 JUSTICE GINSBURG: Mr. Englert, I thought
6 that there wasn't a serious question about who inserts
7 the IV, that those are trained people, but the point
8 that was highlighted was that the people who control the
9 flow into the IV connection, that those people have no
10 training, the ones that are called executioners, the
11 ones who operate the, what is it, the syringe.

12 MR. ENGLERT: Your Honor, Kentucky has
13 safeguards in place to make sure that the inmate is
14 asleep before the second and third drugs are given.
15 Now, with respect to those people's training, it's not
16 accurate that they have no training. Kentucky has had
17 one execution since 1998, since it adopted lethal
18 injection, one execution altogether by lethal injection.
19 It's had 100 practice sessions. Kentucky requires
20 monthly practice sessions every month by the execution
21 team because it is very concerned to get it right.

22 Now, with respect to pushing the IV, those
23 are people whose training is participation in the
24 practice sessions, but to make sure that the first drug
25 has had its intended effect, the warden and the deputy

1 warden are in the execution chamber. They are literally
2 right on top of the inmate. It's suggested in the
3 briefs that they're feet away. That's not accurate.
4 The record reflects they are inches away.

5 JUSTICE GINSBURG: But they also are not
6 trained people. I think what seems puzzling to me is
7 the State has made an effort to make sure that the
8 people on the team that inserts the IV, that those are
9 well-trained professional people, but then apparently
10 they leave the room, so that once the IV is inserted
11 there is no professional person that has any further
12 part.

13 MR. ENGLERT: That's -- to say they leave
14 the room is accurate, but the suggestion that they have
15 no further part is misleading. They go into the next
16 room. They watch through a one-way mirror, carefully
17 watching to make sure nothing has gone wrong. They're
18 in close proximity to the inmate and they are watching
19 now with respect to the warden and deputy warden it's
20 been suggested they don't know what to look for. That's
21 false. The record shows otherwise. The main problem in
22 the excuses that have gone wrong the main problem is an
23 IV goes into tissue instead of the vein. If that
24 happens, Dr. Dershowitz testified, pages 600 to 601 of
25 the joint appendix the inmate would be awake and

1 screaming. The warden and the deputy warden know how to
2 tell the difference between sun whose eye haves closed
3 and who seems to have gone to sleep and someone who is
4 awake and screaming. It's not just Dr. Dershowitz, it's
5 Dr. Haas and Dr. Highland, pages 353 and 386 of the
6 joint appendix also testified that this would be clear.

7 ~~Now, Mr. Verrilli says use a blood~~
8 pressure monitor as a safeguard. Justice Kennedy said
9 doesn't the record show that that's not of any use at
10 very low blood pressures, and Justice Kennedy is exactly
11 correct, at page 578 of the joint appendix.

12 Dr. Dershowitz testified that the blood pressure cuff
13 simply would have no usefulness in monitoring at this
14 level of introduction of the barbituate.

15 Mr. Verrilli has mentioned the one drug
16 protocol at some length this morning and has said it is
17 certain to cause death if three grams of sodium
18 thiopental are administered. His expert, Dr. Heath,
19 page 499 of the joint appendix, was asked let's assume
20 that you don't take any other measures and gave a
21 three-gram dose of sodium thiopental, what would you
22 expect to happen? I would expect the blood pressure to
23 drop. Would that kill them? No, I wouldn't expect it
24 to cause death.

25 JUSTICE STEVENS: Yes, but isn't it clear

1 that a five gram administration of that drug would be
2 fatal?

3 MR. ENGLERT: No, Your Honor. There is
4 nothing in this record --

5 JUSTICE STEVENS: It's not in the record,
6 but it's in this document that we received the last few
7 days, this long deposition of Dr. Dershowitz.

8 MR. ENGLERT: Justice Stevens, let me be
9 very precise in this answer, if I can. What is clear is
10 that a rapidly administered three or five gram dose of a
11 barbituate would cause death in normal circumstances.

12 JUSTICE STEVENS: And if it doesn't, if you
13 just administered more of the drug, then what?

14 MR. ENGLERT: That's problematic actually.
15 This is all way outside the record.

16 JUSTICE STEVENS: I understand.

17 MR. ENGLERT: My understanding is that the
18 human body can't take more than a certain amount of the
19 barbituates, so it actually becomes problematic to go
20 past five grams, which is why nobody comes goes higher
21 than five grams.

22 JUSTICE STEVENS: Would you contend that the
23 second drug in the three-drug protocol is necessary in
24 order to make the execution effective?

25 MR. ENGLERT: No, not effective.

1 JUSTICE STEVENS: Particularly the one that
2 the Chief Justice described.

3 MR. ENGLERT: Correct.

4 JUSTICE STEVENS: You don't want to have
5 unpleasant appearance of death at the time.

6 MR. ENGLERT: Well, it's more than
7 unpleasant appearance of death, Your Honor.

8 JUSTICE STEVENS: What is the justification
9 for the second drug when it does, that is the drug that
10 creates the risk of excruciating pain?

11 MR. ENGLERT: That's the drug that creates
12 the risk of excruciating if and only if the first drug
13 is improperly administered.

14 JUSTICE STEVENS: Right. I understand that.

15 MR. ENGLERT: And the justification is many
16 safeguards are in place to make sure the first drug is
17 properly administered so it doesn't create any real
18 risk.

19 And second, it does bring about a more
20 dignified death, dignified for the inmate, dignified for
21 the witnesses. It's not just --

22 JUSTICE STEVENS: The dignity of the process
23 outweighs the risk of excruciating pain?

24 MR. ENGLERT: No, Your Honor. No.

25 JUSTICE STEVENS: But then the risk of

1 excruciating pain outweigh the risk of an undignified
2 death?

3 MR. ENGLERT: A substantial risk of
4 excruciating pain, a substantial risk of excruciating
5 pain --

6 JUSTICE STEVENS: Even a minimal risk.
7 Everyone who goes through the process knows there is
8 some risk of excruciating pain that could be avoided by
9 a single-drug protocol. Would he prefer to say, I want
10 to die in a dignified way?

11 MR. ENGLERT: Your Honor, if I may answer
12 your question a little bit indirectly. That risk cannot
13 be -- the risk of pain can be avoided by single drug
14 protocol, but there's not a certain death with one drug
15 protocol. It's also a very -- it takes a very long time
16 to die with one drug protocol.

17 JUSTICE STEVENS: Well, what's "very long?
18 10 minutes?

19 MR. ENGLERT: Again, your Honor, this is way
20 outside the record. What Dr. Dershowitz --

21 JUSTICE STEVENS: They use a single drug
22 protocol for animals because it's more humane than the
23 three drug protocol.

24 MR. ENGLERT: No, no. They use a single
25 drug with animals because that is the tradition the

1 American Veterinary Medical Association has come up
2 with, using somewhat different considerations. That's
3 what they've come up with --

4 JUSTICE SOUTER: Well, isn't it required by
5 Kentucky law?

6 MR. ENGLERT: The use of pancuronium bromide
7 or any neuromuscular blocking agent, any paralytic, is
8 barred by Kentucky law -

9 JUSTICE SOUTER: Okay, so something more is
10 involved than merely veterinary practice.

11 MR. ENGLERT: In the veterinary setting
12 someone, some appropriate policymaker has made the
13 decision that what they perceive as risks outweigh the
14 benefits.

15 JUSTICE SOUTER: Right. But in the setting
16 of Kentucky law the legislature of Kentucky has said we
17 are going to make this a legal requirement and I assume
18 they had some reason for it other than the fact that
19 vets do it that way.

20 MR. ENGLERT: Well --

21 CHIEF JUSTICE ROBERTS: Does the Kentucky
22 law do anything other than adopt the AVMA guidelines.

23 MR. ENGLERT: All the Kentucky law does is
24 forbid the use of a neuro muscular blocking agent
25 euthanizing animals and that's there is no record of

1 this but presumably that's because veterinarians told
2 the state let slate our that was a good idea.

3 JUSTICE SOUTER: Why was that necessary to
4 pass a law if the standard veterinary practice was not
5 to use T I'm obviously trying to get to what evidence we
6 have here for a finding somewhere that we can take into
7 consideration that there is a comparative benefit under
8 the, under the veterinary practice as distinct from the
9 protocol which has been devised so isn't it reasonable
10 to suppose that the Kentucky legislature needs some kind
11 of a finding came to some kind of a conclusion that in
12 fact there was /SEUG deleterious about using the second
13 drug.

14 MR. ENGLERT: That much is reasonable.

15 JUSTICE SOUTER: Okay.

16 MR. ENGLERT: What's deleterious about using
17 the second drug we all agree is if the first drug is
18 mall administered it can cause main. If the first drug
19 is not mall add /STEUPBer inned no pain, no pain in
20 humans, no pain in an the mas the judgment was weighed
21 not to use the second drug.

22 JUSTICE SOUTER: The only cost correct me if
23 I'm wrong but the only cost that you have identified in
24 using the one drug only are number one, the appearance
25 cost which you equated with dignity in your response to

1 Justice Stevens and number two, the possibility and I
2 don't know how strong a possibility but the possibility
3 that the one drug would not work. Is there any other
4 cost? In using one drug.

5 MR. ENGLERT: Yes. The length of time it
6 takes to die.

7 JUSTICE SOUTER: And I take it you don't
8 have a figure for that Justice Stevens said 10 minutes
9 and I don't think you had a clear answer one way or the
10 other as to whether there was likely to be more.

11 MR. ENGLERT: If you go outside the record
12 of this case in which the record wasn't allowed go into
13 the Harbison record the logic I believe Dr. Dershowitz
14 testified he would expect it to take 30 minutes.

15 JUSTICE SOUTER: And 30 minutes is against
16 some risk of excruciating pain is, that in effect is it
17 reasonable to say 30 minutes is too long.

18 MR. ENGLERT: Depends on how large the risk
19 of excruciating pain S here there is very little
20 evidence risk of excruciating pain.

21 JUSTICE SOUTER: Is your point that there is
22 simply no quantification of what that risk is.

23 MR. ENGLERT: No. That is one of my points
24 but that's not my whole point Justice Souter.

25 JUSTICE SOUTER: Okay what's your.

1 MR. ENGLERT: Take a look at speaking
2 rhetorically, one can take a look at the so-called
3 botched executions in this country the death penalty
4 inform ace center website. The is called botched
5 executions aren't excuses in which there was pain. They
6 are excuses in which in the overwhelming majority one of
7 three things happened. It took a long time Poretto find
8 a vein and that's the only reason they say it was
9 botched or the inmate showed muscle movements the exact
10 same thing the poem poem poem prevents and with no
11 evidence whatsoever there was no pain a/K-PLG those
12 /PHOUFPLTs the experts on the other side suggest those
13 are botched excuses or somebody made a human error and
14 didn't get the /SRAEUB properly. You don't need medical
15 training to tell when the guy says it's not working that
16 it hasn't gone into the vein.

17 JUSTICE SOUTER: So the nub of your argument
18 really is they have not made a case or they do not have
19 a record case for any significant likelihood of
20 excruciating pain is this.

21 MR. ENGLERT: That's correct. Beyond the
22 absolute bare minimum likelihood that is inherent in any
23 process that involves human beings. They agriculture
24 mixing of the drugs is a problem. There is a finding of
25 fact to the contrary by the district court well

1 supported by evidence. They argue that the placing of
2 the IVs is a problem Kentucky really doesn't have the
3 best qualified person in the state to place the IVs,
4 they argue that there is a risk because the people
5 watching don't know what to look for. All they need to
6 look for is swelling, whether the person is awake,
7 that's noticeable to a lay observer. They argue that
8 the personnel monitoring the execution are not
9 sufficiently close which is false. The warden is
10 much away. That's the testimony --

11 JUSTICE GINSBURG: It's still unclear why
12 they should make such an effort to get trained personnel
13 in the first instance and then even if they are in the
14 next room, why isn't, why did they deliberately pick
15 nonprofessional people to both administer the drugs and
16 to check the inmate for consciousness.

17 MR. ENGLERT: There are reasons for that
18 Justice Ginsburg.

19 JUSTICE GINSBURG: What are the reasons.

20 MR. ENGLERT: Okay. To administer the drugs
21 the only trained personnel, the only so-called trained
22 personnel are the people who are barred by the AMA
23 ethics requirements and by Kentucky law from
24 administering the drugs. Doctors and nurses. As to --

25 JUSTICE GINSBURG: But have you that expert

1 team and it seems that they would be preferable to
2 executioner who have no professional qualifications.

3 MR. ENGLERT: The expert team the people who
4 have had 100 practice sessions since the last execution
5 are administering the drugs.

6 JUSTICE GINSBURG: I mean the people who
7 administer the -- who place the IV lines.

8 MR. VERRILLI: They have -- they have zero
9 expertise in pushing drugs. They have expertise in
10 placing the line. They have expertise in finding a
11 vein. They have no more experience pushing drugs than
12 the person who pushes the drugs.

13 JUSTICE STEVENS: Mr. Englert, can I ask you
14 a rather basic question? Do you think the
15 constitutionality of the three-drug protocol itself is
16 at issue in this case or merely the question whether
17 Kentucky has done an adequate job of using that
18 protocol?

19 MR. ENGLERT: Well, I think what's properly
20 before the Court is only the latter question. But
21 obviously --

22 JUSTICE STEVENS: So if we just decide this
23 on the ground -- and the record is very persuasive in
24 your favor, I have to acknowledge -- but if we decide
25 the fact that Kentucky is doing an adequate job of

1 administering this protocol, that would leave open the
2 question whether the basic use of this second drug,
3 which does nothing but avoid unpleasantness of the
4 visitors, is itself constitutional?

5 MR. ENGLERT: Well --

6 JUSTICE STEVENS: Do we have to wait for
7 another case to decide that rule?

8 MR. ENGLERT: I -- the Court could write an
9 opinion either way, obviously. There is a good reason
10 to hold that the use of the second drug is permissible.

11 JUSTICE STEVENS: Because I -- to be very
12 honest with you, I think that you're -- you make a very
13 strong case on the administration in Kentucky on the
14 record in this case, but I'm terribly troubled by the
15 fact that the second drug is what seems to cause all the
16 risk of excruciating pain, and seems to be almost
17 totally unnecessary in terms of any rational basis for a
18 requirement.

19 MR. ENGLERT: Well, Your Honor --

20 JUSTICE STEVENS: But that we're not going
21 to be able to decide today.

22 MR. ENGLERT: Petitioner's own brief
23 acknowledges that the three-drug protocol can be applied
24 constitutionally. Judge Fogel in the Morales case --
25 California --

1 JUSTICE STEVENS: It may have been in this
2 very case, it may be. But that leaves often a whole
3 other area of litigation, is what troubles me.

4 MR. ENGLERT: Every State that has publicly
5 said what it uses, uses the three-drug protocol. It
6 would be very strange to hold that that is cruel and
7 punishment.

8 JUSTICE STEVENS: But no legislature has
9 ever required it, as I understand it.

10 MR. ENGLERT: No, no. 14 legislatures have
11 required it.

12 JUSTICE STEVENS: The three-drug protocol?

13 MR. ENGLERT: The three-drug protocol.

14 Justice Ginsburg, back to your question.
15 There is a reason why the IV team members leave the
16 room. The curtains are opened after the IVs are placed,
17 and the people in the room can be seen by the victim's
18 families, by the inmate's families and by the media.
19 Protecting the anonymity of the execution team is
20 extremely important. They are subject to all kinds of
21 pressures if their anonymity is not protected. So
22 instead of staying in the room, they go again behind a
23 one-way mirror in an adjacent room where they have an
24 extremely good line of sight to the IVs. This is
25 actually covered in the trial record in this case, that

1 they do have a good line of sight. And it's not --
2 nothing really changes because they go into another
3 room. Pages 210 and 286 to 287 of the joint appendix is
4 where there is testimony that the people in the adjacent
5 room do have a good view of the IV line.

6 JUSTICE GINSBURG: And the executioners are
7 also not visible to the public?

8 MR. ENGLERT: Correct.

9 JUSTICE GINSBURG: There was a finding that
10 the second drug serves no therapeutic purpose.

11 MR. ENGLERT: That's correct.

12 JUSTICE GINSBURG: That's --

13 MR. ENGLERT: We don't quarrel with that.
14 The purpose it serves is the purpose of dignifying the
15 process for the benefit of the inmate and for the
16 benefit of the witnesses.

17 The Chief Justice said, isn't there going to
18 be litigation against another protocol as soon as it's
19 adopted, and yes, Mr. Verrilli will say that's silly, to
20 protect the dignity of the inmate, that argument will
21 fail. But the history of death penalty litigation
22 suggests that the next advocate who comes along
23 representing an inmate will say, the one drug protocol
24 is no good because it doesn't do enough to protect the
25 dignity, or the two drug protocol is no good because it

1 doesn't do enough to protect dignity.

2 With respect to the time it takes to carry
3 out an execution and whether that's a legitimate
4 consideration, I actually invite the Court's attention
5 to one of the briefs, amicus briefs, filed in support of
6 Petitioners, the Human Rights Watch brief, which in turn
7 cites the decision of the UN Human Rights Committee in
8 the NG case.

9 JUSTICE STEVENS: But if we held that that
10 justification was insufficient to justify this protocol,
11 it's hardly likely we would hold that it's so serious
12 and make the whole procedure unconstitutional.

13 MR. ENGLERT: I'm not sure I follow the
14 question.

15 JUSTICE STEVENS: The interest in protecting
16 the dignity of the inmate and of the observers is the
17 justification for the second drug.

18 MR. ENGLERT: Yes.

19 JUSTICE STEVENS: If we held that that --
20 that that justification is insufficient to justify the
21 protocol, how could we ever hold that that justification
22 is so serious as to make the whole procedure
23 unconstitutional.

24 MR. ENGLERT: I'll tell you frankly how you
25 could hold that. What will happen in the next case is

1 they will say: This issue wasn't raised in the trial
2 court in Kentucky, therefore the Supreme Court decided
3 this case on an inadequate factual record, and therefore
4 the Court should take a new look at it because life and
5 death are at stake.

6 CHIEF JUSTICE ROBERTS: And presumably it
7 would depend upon whatever new alternative the plaintiff
8 in that case proposed.

9 MR. ENGLERT: Correct. If the standard is
10 truly eliminating all unnecessary risk of pain than
11 anything that is not the single optimal standard is
12 unconstitutional, and the States cannot do what they
13 have done for the last 220 years, which is to use
14 different protocols at different times and work to
15 improve their protocols. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Englert. Mr. Garre?

18 ORAL ARGUMENT OF GREGORY G. GARRE,
19 ON BEHALF OF THE UNITED STATES,
20 AS AMICUS CURIAE,
21 SUPPORTING THE RESPONDENTS

22 MR. GARRE: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 Petitioners ask this Court to invalidate a
25 method of execution that everyone agrees is entirely

1 pain free when followed and to order the State of
2 Kentucky to adopt a method that has never been used in
3 any execution and is out of step with the laws and
4 practice in every death penalty jurisdiction in the
5 United States. The proposed constitutional standard
6 that Petitioners say requires this extraordinary result
7 has several fundamental flaws.

8 First, it is at odds with this Court's
9 precedence establishing a substantial risk threshold for
10 claims of future injury in the Eighth Amendment context
11 and this Court's cases holding that the added anguish
12 caused by the negligent, accidental or inadvertent
13 infliction of pain is not the unnecessary infliction of
14 pain prescribed by the Eighth Amendment. Justice
15 Marshall wrote that for the Court in the *Estelle v.*
16 *Gamble* opinion on page 105, and this Court has
17 reiterated the principle that negligent, accidental or
18 inadvertent infliction of pain, however strong or
19 anguishing, is not proscribed by the Eighth Amendment.

20 JUSTICE SOUTER: What do you say to the
21 response which I think was in the briefs that the
22 substantiality requirement has been derived in the
23 course of conditions of confinement -- sort of
24 litigation -- and we really should regard execution as
25 sort of a -- a separate subject for purposes of coming

1 up with a standard. What do you say to that?

2 MR. GARRE: A few things. We are here today
3 in this Section 1983 action, because this Court and the
4 Hill case and the Nelson case analogized methods of
5 execution claims to conditions of confinement claims
6 insofar as these claims are not directed to the
7 punishment itself, but to the manner in which punishment
8 is implemented or carried out. So this Court itself
9 under the Hill and Nelson case put these types of cases
10 into the conditions of confinement.

11 JUSTICE SOUTER: Well, we did for purposes
12 of making a habeas 1983 distinction, but I -- is the
13 distinction supportable when we come down to the
14 question whether there should be a standard specific to
15 execution as opposed to other conditions?

16 MR. GARRE: I don't think it is, Justice
17 Souter. The substantial risk standard that the Court
18 has applied in the Farmer v. Brennan case and the Hilland
19 v. McKinney case -- applied to conditions of
20 confinement claims -- where inmates faced the risk of an
21 excruciating pain or even death. If the risk -- if the
22 standard that the Court applies to someone who is forced
23 to spend -- to live with a five pack a day smoker is
24 substantial risk, even though that person faces the risk
25 of developing lung cancer, which everybody would agree

1 is excruciatingly painful death they're not sure why
2 the Constitution would place any different standard with
3 respect to the types of claims at issue in this case.

4 JUSTICE ALITO: Is there any comparative
5 element in the substantial risk standard, if it were
6 clearly established, undisputed that there was an
7 alternative method that was much less risky, would there
8 be an Eighth Amendment problem with the State or the
9 Federal government nevertheless persisted in using a
10 method that was inferior?

11 MR. GARRE: We think that that could be part
12 of the analysis -- that you would look to other feasible
13 available alternatives. Although I would say that --

14 JUSTICE SCALIA: If that's part of the
15 analysis, this never ends.

16 MR. GARRE: Well, Justice --

17 JUSTICE SCALIA: If that's part of the
18 analysis, there will always be some claim that there is
19 some new method that's been devised, and once again
20 executions are stayed throughout the country.

21 MR. GARRE: And we agree with that, and
22 that's why we think that Petitioner's claim is wrong.
23 It's going to lead to endless litigation and a regime in
24 which there is no finality. The other point I wanted to
25 make, in response to Justice Alito, is that as a

1 threshold matter, this court case is establishing that
2 you have to show with respect to the method you're
3 challenging, a risk that is more than the risk of
4 negligence or accident in the method that is being
5 carried out. And again, *Estelle v. Gamble* establishes
6 that, *Farmer v. Brennan* reiterates that --

7 JUSTICE KENNEDY: So your standard is that
8 there has -- well, don't let me misphrase it for you,
9 but there have to be other obvious available
10 alternatives.

11 MR. GARRE: Well, the way that we've
12 described it, Justice Kennedy, is you that have to show
13 a substantial risk that the method you're challenging
14 would impose a considerably greater degree of pain than
15 other available feasible alternatives. But to get into
16 that kind of comparative inquiry, we do think that you
17 have to get over the first threshold established by this
18 Court's cases -- that you're arguing about something
19 other than the accidental or negligent infliction of
20 pain, and we don't think Petitioners in this case have
21 even gotten over that hurdle.

22 JUSTICE KENNEDY: So your safeguard one is
23 the only -- you have against Justice Scalia, endless
24 litigation, or does your threshold two do the same
25 thing.

1 MR. GARRE: Well, threshold two would as
2 well because once you're into that kind of comparative
3 inquiry you would still have to take a look at the
4 feasible other alternative and no one has ever tried the
5 one drug alternative. Justice Breyer you're right we
6 don't know whether it's going to work in practice.

7 JUSTICE SCALIA: Those who oppose capital
8 punishment entirely across the board are quite willing
9 to take a careful look at everything. They are quite
10 willing to take a look at other alternatives. That's
11 the problem we come up with a decision that requires a
12 careful look in every case whenever there is a newly
13 developed method of execution the problem will always be
14 before us and executions will always be impermissible.
15 We agree with those concerns, Justice Scalia, I want to
16 be clear. Our standard is not a least risk --

17 JUSTICE BREYER: You have to, I mean, I
18 can't, I don't know if "substantial" is the right word
19 to capture it. Perhaps the right word is is there a
20 significant risk that can be easily averted and what I'm
21 worried about here is do we or do we not send it back,
22 I'm quite honestly disturbed by the fact that in this --
23 I can't report they both recommend pancuronium and that
24 the sodium thiopental doesn't work not even in grams of
25 three doses in all cases but they think the contrary and

1 if there is uncertainty here should we send it back for
2 consideration of all these things in a more full hearing
3 under a standard that does allow comparisons with other
4 methods not to find a comparison not too fine a
5 comparison but at least a practical comparison.

6 MR. GARRE: And the answer is no. First and
7 foremost they had an opportunity to develop the one drug
8 alternative below. They made no effort to present any
9 evidence on that. The record is completely undeveloped
10 and typically this court doesn't allow people to go back
11 and relitigate a case again.

12 JUSTICE SOUTER: Yes but if we don't do
13 something like that in this case Mr. Garre another case
14 is going to come along and we are going to be right back
15 here a year from now or 18 months from now and wouldn't
16 it be better to get one case litigated thoroughly and
17 get the issue decided rather than simply wait here for
18 another one to wind its way.

19 MR. GARRE: We think that this court should
20 decide the issue. We think it should decide it by
21 saying Petitioners have not established a
22 constitutionally significant.

23 JUSTICE SOUTER: Sure but if we decide it on
24 this basis the next Petitioner is going to say I'm
25 coming into court with evidence these people did not

1 present and therefore we are going to have a new case
2 and new round of litigation and I think what's
3 disturbing Justice Breyer what's disturbing me and
4 others is we want some kind of a decision here, and it
5 seems to me that the most expeditious way of getting it
6 if comparison analysis is appropriate and I will be
7 candid to say I think it is is to send this case back
8 and say okay do a comparative analysis, make the
9 findings and we will then have a case that will in
10 effect resolve the issue as much as one case can ever
11 do.

12 MR. GARRE: Let me make two responses to
13 that if I could again we don't think Petitioners have
14 shown anything close to a substantially of risk and
15 second a virtue in allowing there is a virtue in not
16 going further in this case and allowing the states
17 themselves to continue to assess this matter. The
18 states have continuously reassessed and repeated
19 modifications to their lethal injection protocols three
20 states within the last years have taken major internal
21 reviews of the three drug protocol California Tennessee
22 and Florida they have all concluded that additional
23 safeguards were warranted but that --

24 JUSTICE SCALIA: You say that substantial,
25 that comparison with other possibilities is not

1 necessary so long as the only risk that is coming is a
2 risk of negligence or improper execution of what, of
3 what the protocol requires right?

4 MR. GARRE: That would be --

5 JUSTICE SCALIA: You would say that so long,
6 so long as the only risk comes from negligent
7 application of the protocol, no comparison is required?

8 MR. GARRE: Yes.

9 JUSTICE SCALIA: And if we decided that, if
10 we decided that if this protocol is properly executed,
11 it does not create a substantial risk that would be the
12 end of the matter wouldn't it.

13 MR. GARRE: That would be the end of the
14 matter.

15 JUSTICE SCALIA: And we would not have
16 another case in front of us next year.

17 MR. GARRE: That's probably true. There is
18 no shortage of imagination on the death penalty
19 advocates that have brought those kinds of claims but a
20 decision along those lines would go a great way to
21 providing greater clarity and certainly in this area.

22 JUSTICE GINSBURG: Mr. Garre would you
23 explain to me I can't the Federal Government has picked
24 five grams instead of flee.

25 MR. GARRE: May I answer the question.

1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. GARRE: Yes Your Honor. The Federal
3 Government concluded that that was an appropriate dosage
4 to ensure a deep consciousness among the condemned
5 inmate. Other jurisdictions have picked three grams and
6 I would say that the Federal Government is currently
7 considering whether five or three is the correct dosage.
8 But the Federal Government --

9 JUSTICE KENNEDY: Did you mean to say
10 unconsciousness.

11 MR. GARRE: Unconsciousness, yes to render
12 the inmate deeply unconscious for a number of hours
13 that's established by the record thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you Mr. Garre.
15 Mr. Verrilli, you have three minutes remaining.

16 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,
17 ON BEHALF OF THE PETITIONERS

18 MR. VERRILLI: Thank you Mr. Chief Justice.
19 The risk here is real that is why in the State of
20 Kentucky it's unlawful to euthanize animals in the way
21 that carries out its executions that's true not only
22 with the use of pancuronium one cannot use potassium
23 unless someone trained in ensuring effective anesthesia
24 is participating in the process and what that is is a
25 marker that this is a real danger sufficiently real that

1 it's not tolerated with animals.

2 CHIEF JUSTICE ROBERTS: But the anesthesia
3 concern of course is you don't want to kill the person
4 when you're administering just anesthesia in a surgery
5 so you would want somebody trained there that you could
6 bring them back if anything went wrong that concern is
7 not present here.

8 MR. VERRILLI: Nor is it present with
9 respect to euthanizing animals and never the -- it's the
10 danger of the anesthesia going wrong there can be a
11 torturous pain inflicted that has led veterinarians to
12 say you have to have somebody in the process who is
13 trained in monitoring anesthetic death and Justice
14 Breyer if I could refer back to your Netherlands point
15 my understanding is that in the Netherlands there is a
16 doctor present who is trained in anesthesiology who
17 administers this whole process and so the risk is
18 dramatically different in a situation where you have
19 that trained person there than the situation we have in
20 Kentucky now with respect to the other states and the
21 other so-called botched executions that my friend
22 Mr. Englert referred to is just not right to say that
23 they were all about cut downs and small problems. The
24 record finds a fact in the Morales case without respect
25 to the 11 lethal injection studies there six out of the

1 seven were inadequately -- the experts in that case
2 admitted it was likely that one was not likely an at the
3 time -- at the time that the pancuronium and potassium
4 were put in the system similarly in the case in North
5 Carolina the evidence credited by the court was that
6 with respect to four of them the condemned inmate was on
7 the -- any gasping struggling not the kind of
8 involuntary twitching that Mr. Englert is worried about
9 but clear that the anesthetics are not working with
10 respect to the lethality of thiopental at page 42 of the
11 joint appendix Dr. Heath says that thiopental will be
12 lethal by itself three grams at page 494 he says indeed
13 it will be lethal by itself in virtually every case at
14 two grams. At page, at page forgive me I don't have the
15 page number reference handy but Dr. Dershowitz the
16 state's expert says the same thing now the reference
17 that Mr. Englert referred to at page 499 is where
18 Dr. Heath is being asked a question of whether would
19 you expect death to occur when three grams are
20 administered but he is being asked a series of questions
21 about administration in a surgical procedure which are
22 using ventilators and other procedures to keep the
23 person alive and he said in that setting the answer is
24 no so that's just not a fair representation of the
25 record at all now with respect to the question of

1 whether we ought to analogize this to the deliberate
2 indifference standard and convictions of confinement
3 cases it seems to me there is a fundamental difference
4 here which is that the Commonwealth of Kentucky is
5 making a deliberate choice here.

6 CHIEF JUSTICE ROBERTS: Finish your
7 sentence.

8 MR. VERRILLI: Thank you, Mr. Chief Justice.
9 A deliberate choice here to use chemicals that create
10 this danger and given that it has done so it ought to
11 have the commensurate obligation to take the reasonable
12 steps necessary to on vote the risk.

13 CHIEF JUSTICE ROBERTS: Thank you counsel.
14 The case is submitted.

15 (Whereupon, at 11:05 a.m., the case in the
16 above-entitled matter was submitted.)

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