No. 05-1036

In the Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

PHIL BREDESEN, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN*
Associate Solicitor General
425 FIFTH AVENUE NORTH
NASHVILLE, TN 37243
(615) 741-3499

* *Counsel of Record*

Becker Gallagher Legal Publishing, Inc. 800.890.5001

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether Tennessee's lethal injection protocol, which is initiated by the administration of a lethal dose of a barbiturate sedative and thus presents a "less than remote" risk of pain and suffering to the prisoner, violates the Eighth Amendment's prohibition against cruel and unusual punishment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Rule

Other Authorities

OPINIONS BELOW

The October 17, 2005, opinion of the Tennessee Supreme Court, which affirmed the judgment of the Tennessee Court of Appeals, is reported at 181 S.W.3d 292 (App. 1a) The opinion of the Tennessee Court of Appeals, which affirmed the judgment of the trial court, is unreported. (App. 32a) The memorandum and order of the Davidson County Chancery Court is also unreported. (App. 75a)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner, Abu-Ali Abdur'Rahman, is a Tennessee inmate currently under sentence of death for the first degree murder of Patrick Daniels on February 17, 1986. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990). By letter dated April 3, 2002, petitioner, who was then facing an April 10, 2002, execution date,[1] sought a declaratory order from the Tennessee Department of Correction concerning the "constitutionality, legality, and applicability" of the Department's lethal injection protocol. That request was denied on May 28, 2002. (App. 5a) On July 26, 2002, petitioner filed an action in the

---

[1] That execution was stayed on April 8, 2002, by order of this Court. *Abdur'Rahman v. Bell*, 535 U.S. 981 (2002). A June 18, 2003, execution date was set by the Tennessee Supreme Court on March 6, 2003, but that execution was stayed by order of the United States Court of Appeals for the Sixth Circuit. *Abdur'Rahman v. Bell*, Nos. 02-6547/6548 (6th Cir. June 6, 2003). A new execution date has not been set.

Davidson County, Tennessee, Chancery Court challenging the validity and constitutionality of Tennessee's lethal injection protocol under the Eighth Amendment to the United States Constitution. (App. 5a-6a)[2]

As found by the trial court (App. 78a-79a), the lethal injection protocol in Tennessee consists of the injection of three drugs: sodium thiopental (Pentothal), pancuronium bromide (Pavulon), and potassium chloride. Seven syringes are prepared: one syringe of Pentothal, two syringes of Pavulon, two syringes of potassium chloride, and two syringes of saline.[3] Then seven exact replicas of these syringes are prepared as backups. The syringes are labeled 1 through 7 in the sequence that they are to be injected, namely, Pentothal, saline, Pavulon, saline, and potassium chloride.[4] They are also color-coded based on the contents of the syringe. (App. 78a)

After the inmate is transported to the execution chamber, IV catheters are placed in both of the inmate's arms by

---

[2] Petitioner's challenge was also brought under the Tennessee Constitution and under state statutes. (App. 5a-6a)

[3] Pentothal comes in a powder form and, due to its short shelf-life, is converted into a liquid form just before the execution. Pavulon and potassium chloride come in a liquid form and do not have to be mixed. (App. 78a)

[4] The drugs are administered in the following dosages: 5 grams of sodium pentothal, 100 milligrams of Pavulon, and 200 milligrams of potassium chloride. (App. 7a)

certified EMT paramedics.[5] After the flow of normal saline is begun, the paramedics leave the execution chamber. The warden, deputy warden, and a chaplain remain. The executioner is located in a room next to the execution chamber, but behind a window with a portal for the IV lines. There is also a camera above the gurney in the execution chamber and a monitor in the executioner's room. (App. 79a)

At the appropriate time, the warden signals the executioner to begin the sequential injection of the three drugs into the IV tubing connected to the catheter in the inmate's arm. The camera and monitor allow the executioner to observe the flow of the drugs to the IV;[6] the warden, who is located approximately a foot from the inmate's head, can also see the flow of the drugs through the tubing and can notify the executioner if problems are encountered. Following the injection of the drugs and a five-minute waiting period, the inmate is examined by a physician, who pronounces death. (App. 79a)

After an evidentiary hearing, the trial court dismissed petitioner's complaint on June 1, 2003, concluding that petitioner had failed to demonstrate that the lethal injection protocol was unconstitutional. (App. 92a-93a) The court found that "some 30 states use the same lethal injection

---

[5] In the event the paramedics are unable to establish a port, a physician is available to perform a "cut down" procedure, where an incision is made to gain direct access to a vein. (App. 78a) The trial court ultimately found that a "cut down" "is a simple procedure which physicians are taught in medical school, and does not pose an unreasonable excessive risk." (App. 92a)

[6] The camera allows the executioner to "zoom in" on the catheters. (App. 8a)

method as Tennessee, including use of Pavulon. Tennessee copied other states in developing its method." (App. 83a) The court rejected the criticisms lodged by petitioner's witnesses regarding the lack of physical proximity between the inmate and the executioner, color-coding of the syringes, the use of Pentothal, and the lack of physician involvement in the execution. (App. 84a-85a)[7] Rebutting petitioner's criticisms, the court found, was the state's "direct evidence of the effects of the Tennessee lethal injection method in question in this case," namely, the autopsy results of a previously executed Tennessee inmate (App. 90a), as well as "the testimony of Warden Bell of the precautions taken and training engaged in to minimize error." (App. 91a)

With respect to petitioner's challenge to the use of Pavulon, while the trial court found "that the State failed to provide any proof of the reasons for its use in the lethal injection method," it nevertheless also found that "the proof demonstrated that there is a less than remote chance that the condemned would ever be conscious by the time the Pavulon was administered." (App. 87a, 88a)

> All of the experts testified that if the lethal injection method proceeds as planned it will not result in physical or psychological suffering: the five grams of Pentothal will render the prisoner unconscious or

---

[7] With respect to the latter, the court observed that the standards of ethics among physicians, which direct them not to participate in an execution, "render it difficult if not impossible to find an individual physician who would consider it consistent with his professional ethical standards to monitor the induction of a lethal injection." (App. 85a)

> dead, Pavulon is injected and paralyzes the prisoner, and the sodim (sic) chloride[8] stops the heart.

(App. 89a)[9] Rejecting petitioner's claims, the trial court ultimately concluded that "the proof demonstrated that there is less than a remote chance that the prisoner will be subjected to unnecessary physical pain or psychological suffering under Tennessee's lethal injection method." (App. 92a)

The Tennessee Court of Appeals affirmed the judgment of the trial court on October 6, 2004. (App. 32a) The court concluded that petitioner had not proved that the lethal injection protocol was inconsistent with contemporary norms of society, or that it offends the dignity of prisoners or society, or that it would cause unnecessary physical pain or psychological suffering. "Accordingly, we concur with the trial court's conclusion that executions carried out in accordance with the Department's protocol do not constitute cruel and unusual punishment." (App. 71a)

On October 17, 2005, the Tennessee Supreme Court, after granting petitioner's application for appeal by permission, affirmed the judgment of the Court of Appeals. (App. 2a) Upon reviewing and applying relevant decisions of this Court, the state court concluded that lethal injection, in general, and Tennessee's lethal injection protocol, in particular, are

---

[8] Doubtless this reference to sodium chloride was a misnomer, as the trial court had previously indentified the third drug in the protocol as potassium chloride. *See* App. 78a.

[9] "A large dose of Pentothal is applied in the Tennessee lethal injection method — five grams. The testimony from the experts was that a dosage in this amount in and of itself should result in death." (App. 85a)

consistent with contemporary standards of decency. (App. 15a-18a) Observing that lethal injection "is commonly thought to be the most humane form of execution" (App. 17a), the court found that "the evidence in this case has established that Tennessee's lethal injection protocol is consistent with the overwhelming majority of lethal injection protocols used by other states and the federal government." (App. 17a-18a)

The court further concluded that the protocol did not "offend[] either society or the inmate by the infliction of unnecessary physical or psychological pain and suffering." (App. 19a) The court found that petitioner's arguments for how the use of Pavulon creates a risk of unnecessary suffering "are not supported by the evidence in the record." (App. 19a) "[A]lthough it was undisputed that the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering, all of the medical experts who testified before the Chancellor agreed that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death." (App. 19a) The court also rejected petitioner's arguments for how perceived deficiencies in the protocol's procedures heighten the risk, finding that "petitioner's arguments simply are not supported by the evidence in the record." (App. 20a) The court ultimately concluded, "based on the evidence found in the record," that "the petitioner has failed to establish that the lethal injection protocol is cruel and unusual punishment under the United States or Tennessee constitutions." (App. 21a)

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE TENNESSEE SUPREME COURT DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT; THE STATE COURT FAITHFULLY FOLLOWED THIS COURT'S PRIOR DECISIONS IN REJECTING PETITIONER'S EIGHTH AMENDMENT CHALLENGE TO TENNESSEE'S LETHAL INJECTION PROTOCOL.

"The Eighth Amendment to the United States Constitution provides that '[e]xcessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S. Const. amend VIII." (App. 15a) In its opinion deciding petitioner's case, the Tennessee Supreme Court wrote as follows:

> Nearly one hundred years ago, the United States Supreme Court recognized that the cruel and unusual punishments clause "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910) (citations omitted). The Court has explained that the Eighth Amendment draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). Indeed, the Court has reasoned that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 125 S.Ct. 1183, 1190 (2005); s*ee also Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

> The United States Supreme Court has emphasized three factors in determining whether the severity of punishment imposed for an offense or upon a defendant or a class of defendants constitutes cruel and unusual punishment under the Eighth Amendment: first, whether the punishment for the crime conforms with contemporary standards of decency; second, whether the punishment is grossly disproportionate to the offense; and third, whether the punishment achieves legitimate penological objectives. *See Roper*, 125 S.Ct. at 1190; *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002); *Solem v. Helm*, 463 U.S. 277, 292 (1983). . . .
>
> The analysis is quite similar in cases where the challenge is not simply to the type of punishment but also to the method for carrying out the punishment. The United States Supreme Court has considered, for instance: (1) whether a method of execution comports with the contemporary norms and standards of society; (2) whether a method of execution offends the dignity of the prisoner and society; (3) whether a method of execution inflicts unnecessary physical pain; and (4) whether a method of execution inflicts unnecessary psychological suffering. *Weems*, 217 U.S. at 373. These factors dictate that punishments may not include torture, lingering death, wanton infliction of pain, or like methods. *Estelle*, 429 U.S. at 102; *In re Kemmler*, 136 U.S. 436, 447 (1890).

(App. 15a-16a) (internal state court and parallel citations omitted) As this excerpt illustrates, the state court faithfully followed this Court's precedent in arriving at its judgment.

A. The Tennessee Supreme Court Properly Applied This Court's Precedent to Conclude That Tennessee's Lethal Injection Protocol Does Not Violate Contemporary Standards of Decency.

Applying these decisions, the state court concluded that lethal injection, in general, and Tennessee's lethal injection protocol, in particular, were consistent with contemporary standards of decency. It found that Tennessee's protocol "is consistent with the overwhelming majority of lethal injection protocols used by other states and the federal government." (App. 17a-18a) With respect to petitioner's specific objection to the inclusion of Pavulon (pancuronium bromide) in the protocol, while the Court agreed with the trial court that the State had failed to show a legitimate reason for the use of Pavulon,[10] it also found that "the undisputed evidence before the [trial court] was that only two states do not use some combination of sodium Pentothal, Pavulon, and potassium chloride." (App. 18a)[11]

---

[10] While petitioner describes the use of Pavulon as "pointless" and as "serving absolutely no purpose," the state court finding — stated, as it is, in the negative — does not support such a characterization. *See* App. 7a (recounting warden's testimony regarding inclusion in the protocol of Pavulon, "which stops the inmate's breathing").

[11] Indeed, petitioner himself points out that "virtually all of the thirty-seven states that have adopted lethal injection as the primary means of execution use a three-drug cocktail similar to the one that Tennessee plans to use." (Pet.19 & n.5) (internal citation omitted) And several states — petitioner says there are fourteen (Pet. 21 & n.6) — legislatively mandate the inclusion of a chemical paralytic agent like Pavulon.

Petitioner asserts that the Tennessee Supreme Court's decision conflicts with this Court's prior cases because "this Court has repeatedly emphasized that 'the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (Pet. 19) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)). But this Court's prior decisions are clear that, while legislation may present particularly reliable objective evidence of contemporary norms, this is not the only objective evidence at which courts may look. Indeed, just last term, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court, reiterating that the beginning point of the analysis for determining evolving standards of decency is a "review of objective indicia of consensus," considered both legislative enactments *and state practice* with respect to the execution of juveniles. 543 U.S. at 564-565; *see id.*, 543 U.S. at 563 (citing *Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)). In the context of lethal injection, the combination of chemicals that actually are being used by other states in their lethal injection protocols must surely be regarded as objective indicia of consensus. As the Tennessee Supreme Court observed, those protocols "stem from legislation that created lethal injection as a method of execution; moreover, . . . the protocols have remained intact without legislative revision." (App. 18a) In any event, the state court's decision to consider such evidence cannot be said to conflict with this Court's prior decisions in this respect.

Petitioner also asserts that "[t]he Tennessee Supreme Court further erred by deeming irrelevant the widespread prohibition on the use of Pavulon in animal euthanasia," pointing both to state statutes and to the report on euthanasia issued by the American Veterinary Medical Association's Panel on Euthanasia (Pet. 22-24) This, of course, is a merits argument — it does not support petitioner's contention that the Tennessee Supreme Court's decision conflicts with decisions

of this Court. In any event, the comparison to animal euthanasia is inapposite — the circumstances under which pets may be euthanized and those attendant to the execution of a human being as punishment for a capital offense are so wholly different as to render any comparison pointless. As the Tennessee Supreme Court concluded, the Tennessee Nonlivestock Animal Humane Death Act has no application to the capital punishment context. (App. 28a)[12] Moreover, in a recent disclaimer to its most recent report on euthanasia, the AVMA Panel on Euthanasia itself indicated that the report "has been widely misinterpreted" as to how it relates to capital punishment. American Veterinary Medical Association Panel on Euthanasia, February 2006 Rider to *2000 Report of the AVMA Panel on Euthanasia*, 28 J.A.V.M.A. 669 (2001).[13] Underscoring the inappropriateness of petitioner's reliance on animal euthanasia practices, the Panel admonishes in its disclaimer that the guidelines in the report "are in no way intended to be used for human lethal injection" and that "the common method used for human lethal injection [a barbiturate, paralyzing agent, and potassium chloride, in separate syringes] is not cited in the report." *Id.*[14]

---

[12] The trial court observed that Tennessee's statutes on pet euthanasia make clear "that animal euthanasia is carried out much more frequently in less regulated circumstances than the termination of human life such that there is a need to outlaw the use of Pavulon in pet euthanasia." (App. 86a-87a) (internal footnote omitted)

[13] *See* www.avma.org/issues/animal_welfare/euthanasia.pdf.

[14] In the expanded, but unpublished, version of this disclaimer, which is available directly from the AVMA, the Panel chastises those who have used its report "to infer that the AVMA deems [this three-drug combination] an inhumane method of nonhuman euthanasia." AVMA Panel on Euthanasia, "Misuse of the *2000*

B. The Tennessee Supreme Court Properly Applied This Court's Precedent to Conclude That Tennessee's Lethal Injection Protocol Does Not Inflict Unnecessary Pain and Suffering.

The Tennessee Supreme Court also rejected petitioner's contention that the protocol creates a risk of unnecessary physical and psychological suffering, finding that "[his] arguments . . . are not supported by the evidence in the record." (App. 19a) "[A]ll of the medical experts who testified before the [trial court] agreed that a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death." (App. 19a) *Cf. Hill v. State,* 921 So.2d 579 (Fla.), *cert. denied*, 126 S.Ct. 1441 (2006) (observing that *two grams* of sodium pentothal was a relatively large quantity as compared to the clinical induction

---

Report of the AVMA Panel on Euthanasia" (Feb. 2006). The Panel points out that, in particular, two segments of its report have been misinterpreted:

> The first section of text indicates that neuromuscular blocking agents should not be the sole method of euthanasia, which, in lethal injection of humans, it is not.
>
> The second section refers to a mixture of a barbiturate and neuromuscular blocking agent ***in the same syringe***, ... Again, as explained above, this does not happen in human lethal injection; the drugs are administered in order, from separate syringes.

Id. (emphasis in original).

dose).[15] Indeed, the trial court had found that the proof simply did not demonstrate that the prisoner would suffer during the execution process. *See* App. 92a ("[T]he proof demonstrated that there is less than a remote chance that the prisoner will be subjected to unnecessary physical pain or psychological suffering under Tennessee's lethal injection method.").[16] These state-court findings are entitled to be given great deference by this Court. *See Arizona v. Fulminante*, 499 U.S. 279, 287 (1991).

To support his insistence that the state court decision somehow conflicts with the very decisions of this Court that it applied to the record in this case, petitioner argues that state correctional officials have displayed "the kind of deliberate

---

[15] In *Sims v. State*, 754 So.2d 657 (Fla. 2000), which was cited in *Hill*, the Florida Supreme Court noted that "a defense expert admitted that only one milligram per kilogram of body weight is necessary to induce unconsciousness, and that a barbiturate coma is induced at five milligrams per kilogram of body weight." 774 So.2d at 665 n.17.

[16] Petitioner assails the Tennessee Supreme Court in this respect, asserting that "it thereby deemed immaterial" the "myriad problems" that he argued would result from the various alleged deficiencies in the protocol's procedures. But the court did not deem such problems immaterial — it deemed them unproven, finding that "petitioner's arguments simply are not supported by the evidence in the record." (App. 20a) *See id.* ("There was no evidence in the record that the procedures followed under the lethal injection protocol have resulted in the problems feared by the petitioner. . . ."). The court further observed that it "[could not] judge the lethal injection protocol based solely on speculation as to problems or mistakes that *might* occur." (App. 20a) (emphasis in original). *See also* App. 91a (trial court credits evidence "of the precautions taken and training engaged in to minimize error").

indifference to the pointless risk of pain and suffering that this Court has repeatedly deemed unconstitutional," citing *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Helling v. McKinney*, 509 U.S. 25 (1993). (Pet. 12). In so arguing, petitioner borrows partly from the standard developed by this Court in a line of cases involving "conditions of confinement" claims under the Eighth Amendment and 42 U.S.C. § 1983. But in his effort now to shift the focus to the subjective state of mind of Tennessee prison officials,[17] petitioner disregards the objective component of such claims — the requirement that the prisoner make a sufficient showing as to both the seriousness of the alleged harm and *the likelihood that it will actually occur*. *Helling*, 509 U.S. at 36. "A prison official's 'deliberate indifference' to *a substantial risk of serious harm* to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (citing, *inter alia*, *Helling*, 509 U.S. 25, and *Estelle,* 429 U.S. 97) (emphasis added). *See Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Here, again, the evidence demonstrates that the risk that a condemned inmate will actually experience pain and suffering as a result of Tennessee's lethal injection protocol is "less than remote." (App. 92a) The decision of the Tennessee Supreme Court, therefore, certainly does not conflict with these cases. *See* App. 23a ("[T]here is no evidence that the Tennessee lethal injection protocol creates an unreasonable risk of unnecessary pain and suffering.").

---

[17] This action was not brought under § 1983, and petitioner did not pitch this argument to the Tennessee Supreme Court; neither *Helling* nor *Estelle* was even cited by petitioner. This Court has yet to settle the question whether § 1983 is even a proper vehicle for bringing a method-of-execution claim like petitioner's. *See Nelson v. Campbell*, 541 U.S. 637, 644 (2004); *see also Hill v. Crosby, cert. granted*, 126 S.Ct. 1189 (2006).

II. IN UPHOLDING TENNESSEE'S LETHAL INJECTION PROTOCOL, THE TENNESSEE SUPREME COURT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

In support of his bid for this Court's review, petitioner asserts that "Pavulon's use in lethal injection protocols raises an important question." (Pet. 25) (capitalization deleted) Be that as it may,[18] Pavulon's use in lethal injection protocols raises no important question *of federal law*. *See* U.S.Sup.Ct.R. 10(c). Accordingly, it is not a question that is properly before this Court. Indeed, the Tennessee Supreme Court declined to address such a question for this very reason, stating that "the [trial court] and the Court of Appeals correctly observed that the analysis under the Eighth Amendment . . . does not require consideration of whether other means of execution may be superior in some way or the result of a more updated study." (App. 18a) *See* App. 21a ("[W]e recognize that what could be done to update or even

---

[18] In the end, petitioner's focus on the use of Pavulon presents something of a red herring. While petitioner claims that the Pavulon would cause extreme pain and suffering if he were not sufficiently anesthetized, even if the Pavulon were eliminated from the protocol, no one disputes that the potassium chloride would also cause extreme pain and suffering in the absence of the sodium pentothal. *See* App. 89a. But as the state trial court found, notwithstanding Pavulon's inclusion, the protocol "was shown by the proof to be reliable in rendering an inmate unconscious, if not dead, before the paralytical and lethal painful drugs take effect." (App. 77a)

improve the protocol is not the appropriate legal inquiry to be undertaken by this or any other reviewing court.").[19]

The state court was quite right to have declined to field the question petitioner now asks this Court to decide. Whether Tennessee's lethal injection protocol should continue to include Pavulon, or whether there is some other, even better, chemical combination that should be utilized, are simply not questions for this Court to entertain, much less attempt to answer. *See Furman v. Georgia*, 408 U.S. 238, 433 (1972) (Powell, J., dissenting) ("[I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic."). Like the Tennessee Supreme Court, this Court "must instead examine the lethal injection protocol as it exists today." (App. 20a) And examined as it exists today, the state court concluded that it does not inflict cruel and unusual punishment — that whatever the merits or demerits of Pavulon, its inclusion in Tennessee's lethal injection protocol does not violate the Eighth Amendment. For the reasons discussed above, the court's resolution of *that* question — the only important federal question decided by the state court — does not conflict with this Court's prior decisions, or, for that matter, with any decision of another state supreme court or a

---

[19] At the same time, the court "acknowledge[d] and share[d] the [trial court's] concerns that several issues raised by [petitioner's expert] could serve as the basis for future study," including "the need for Pavulon, if any." (App. 21a)

federal court of appeals;[20] it thus does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General

JOSEPH F. WHALEN *
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3499

* *Counsel of Record*

---

[20] *See Bieghler v. State*, 839 N.E.2d 691, 696 (Ind. 2005), *cert. denied*, 126 S.Ct. 1190 (2006) (and cases cited) ("Claims that lethal injection violates the prohibitions against cruel and unusual punishment have been rejected by courts throughout the country in states that appear to have a drug protocol the same as or similar to Indiana's [three-drug protocol].").