No. 07-5439

In the Supreme Court of the United States

RALPH BAZE AND THOMAS C. BOWLING, PETITIONERS

v.

JOHN D. REES, COMMISSIONER,
KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Like the federal government and the vast majority of States that have the death penalty, Kentucky conducts executions of individuals convicted of capital offenses and sentenced to death by means of lethal injection: specifically, by administering a series of three drugs that is intended to cause death in a painless and expeditious manner. The question presented is as follows:

Whether Kentucky's method of execution constitutes cruel and unusual punishment under the Eighth Amendment, based solely on the risk that the drugs involved will cause pain if improperly administered.

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INTEREST OF THE UNITED STATES

This case involves a challenge to the constitutionality of Kentucky's method of execution—lethal injection—based solely on the risk that the drugs involved will cause pain if improperly administered. Federal law authorizes capital punishment for a variety of offenses and provides that federal death sentences shall be implemented in the manner prescribed by the pertinent State's own law. In conducting executions by lethal injection, the federal government administers the same series of three drugs as Kentucky. Several federal prisoners who have been sentenced to death are currently pursuing similar method-of-execution claims to the instant claim. See *Robinson* v. *Mukasey*, No. 1:07-cv-

02145 (D.D.C.); *Roane* v. *Mukasey*, No. 1:05-cv-02337 (D.D.C.). The United States therefore has a substantial interest in this case.

STATEMENT

A. Background

1. The use of capital punishment in America dates virtually from the foundation of the first colony. Capital punishment was sanctioned in all of the colonies; the predominant method of execution was hanging, but burning, disemboweling, and dismembering were used in exceptional cases. Following the adoption of the Constitution, hanging was used in virtually all executions. In 1889, New York, after looking for a more humane option, switched to electrocution; other States followed suit, based on the "well grounded belief that electrocution is less painful and more humane than hanging." *Malloy* v. *South Carolina*, 237 U.S. 180, 185 (1915). For much of the 20th century, electrocution was the predominant method of execution in the United States; some States adopted lethal gas, and a few States continued to use hanging or a firing squad. See Stuart Banner, *The Death Penalty: An American History* 6-9, 70-80, 169-170, 189, 199, 202-203 (2002) (Banner).

After this Court affirmed the constitutionality of capital punishment in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), there was increasing concern that electrocution might not in fact cause death in a painless or expeditious manner. See Banner 297. In 1977, legislators in Oklahoma who shared that concern, after consulting with the chair of the anesthesiology department at the University of Oklahoma College of Medicine, proposed a bill adopting lethal injection as the State's method of execution. See *Beardslee* v. *Woodford*, 395 F.3d 1064, 1073 (9th Cir.),

cert. denied, 543 U.S. 1096 (2005). The Oklahoma Legislature enacted that bill, and other States subsequently switched to lethal injection as well. Lethal injection is now the sole or primary method of execution in 37 of the 38 States that authorize capital punishment. See *Beardslee*, 395 F.3d at 1072 & n.8.

Of the 37 States that conduct executions by means of lethal injection, the vast majority—at least 29—do so by administering the same series of three drugs originally devised by the Oklahoma Department of Corrections. See *Workman* v. *Bredesen*, 486 F.3d 896, 907 (6th Cir.), cert. denied, 127 S. Ct. 2160 (2007). The first drug is sodium thiopental (or sodium pentothal), a fast-acting barbiturate that anesthetizes the subject within 60 seconds. J.A. 762-763, 806. The second is pancuronium bromide, a neuromuscular paralytic that prevents bodily movement and ultimately halts respiration. *Ibid.* The third is potassium chloride, an agent that induces cardiac arrest. *Ibid.* While jurisdictions administer the three drugs in somewhat different dosages, it is undisputed that, if properly administered, the massive dose of sodium thiopental that is typically given—ten times the amount used in a typical surgical procedure—would anesthetize the subject for hours, such that the administration of the other two drugs would be painless. J.A. 541; see Resp. Br. 37-38, 49. It is also undisputed that, if properly administered, the dose of each drug that is typically given would ordinarily be sufficient to induce death on its own. J.A. 547; see, *e.g.*, *Workman*, 486 F.3d at 902.

2. Like the States, the federal government has conducted executions since the Nation's founding. See Dave Turk, U.S. Marshals Service, *Historical Federal Executions* (visited Dec. 10, 2007) <www.usmarshals.

gov/history/executions.htm>. The statute that currently governs federal executions is the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.* The FDPA specifically provides that federal death sentences shall be "implement[ed] * * * in the manner prescribed by the law of the State in which the sentence is imposed," or, if the sentencing State does not authorize capital punishment, in the manner prescribed by a State designated by the sentencing court. 18 U.S.C. 3596(a). Since the FDPA's enactment, the federal government has executed three individuals, all by lethal injection; 48 other individuals are currently awaiting execution in the federal system.

The Federal Bureau of Prisons (BOP) conducts executions at the United States Penitentiary in Terre Haute, Indiana. The BOP has developed a uniform written protocol for carrying out executions where the relevant State prescribes lethal injection as the manner of execution. See App., *infra*, 1a-6a. That protocol provides that the subject should be executed using 5 grams of sodium thiopental, 240 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *Id.* at 3a-4a. It further specifies that the series of drugs should be administered intravenously, preferably by means of a femoral vein; if peripheral veins are to be used, the protocol requires that a backup line be established, for use in the event that the primary line fails. *Id.* at 3a. "Qualified personnel" are responsible for preparing the series of drugs, establishing intravenous access, and controlling the flow of the drugs; the protocol defines "qualified personnel" as individuals who have "necessary training or experience in the function they will perform in implementing the federal death sentence." *Id.* at 2a-5a. Qualified personnel are expressly

required to monitor the consciousness of the subject; they are permitted to administer the last two drugs in the series only after determining that the subject has been rendered unconscious by the dose of sodium thiopental. *Id.* at 5a-6a.

B. Facts And Proceedings Below

1. Around 7 a.m. on April 9, 1990, Eddie and Tina Earley and their two-year-old son, Christopher, were sitting in their car in Lexington, Kentucky, outside Earley Bird Cleaners, a dry-cleaning business that they owned. Petitioner Bowling crashed his car into the Earleys' car. Bowling got out of his car, drew a gun, and fired indiscriminately into the Earleys' car, killing Eddie and Tina Earley and wounding Christopher. After going over and looking at the victims, Bowling got back in his car and drove away. See *Bowling* v. *Commonwealth*, 873 S.W.2d 175, 176-177 (Ky. 1993), cert. denied, 513 U.S. 862 (1994).

On January 30, 1992, Powell County, Kentucky, Sheriff Steve Bennett and Deputy Sheriff Arthur Briscoe went to petitioner Baze's cabin in order to arrest him on multiple fugitive warrants. Baze was hiding in the brush with an assault rifle. As his wife distracted the officers, Baze shot Sheriff Bennett three times in the back, killing him. When Deputy Briscoe attempted to flee, Baze shot him twice in the back; Baze then walked up to Deputy Briscoe, punched him with the muzzle of his gun, and shot him a third time in the head, killing him. See *Baze* v. *Commonwealth*, 965 S.W.2d 817, 819-820 (Ky. 1997), cert. denied, 523 U.S. 1083 (1998).

Petitioners were each convicted in Kentucky state court of two counts of capital murder and sentenced to

death. They have exhausted their direct appeals and federal and state collateral remedies.

2. In 1998, Kentucky adopted lethal injection as its default method of execution. See Ky. Rev. Stat. Ann. § 431.220(1) (LexisNexis 1999). Kentucky uses the same series of three drugs as the federal government and the majority of other States; Kentucky's protocol provides that the subject should be executed using 3 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. J.A. 806, 978-979. The protocol provides that qualified personnel are responsible for preparing the series of drugs, establishing intravenous access, and controlling the flow of the drugs; Kentucky uses a phlebotomist and an emergency medical technician to perform those tasks. J.A. 273-274, 516-517, 761-762, 975-976, 984, 987.

3. In 2004, petitioners filed a civil action against respondents, three state officials, in Kentucky state court, contending that Kentucky's method of execution constituted cruel and unusual punishment under the Eighth Amendment. J.A. 9-50. After a seven-day bench trial with some 20 witnesses, the trial court ruled in favor of respondents in relevant part. J.A. 754-769. After making various factual findings concerning Kentucky's method of execution, the trial court concluded that petitioners had failed to show that the method would "inflict[] unnecessary physical pain upon the condemned." J.A. 766.

4. The Kentucky Supreme Court unanimously affirmed. J.A. 798-809. The court explained that "[a] method of execution is considered to be cruel and unusual punishment under the Federal Constitution when the procedure for execution creates a substantial risk of wanton and unnecessary infliction of pain, torture or

lingering death." J.A. 800 (citation omitted). While the court acknowledged that "[c]onflicting medical testimony prevents us from stating categorically that a prisoner feels no pain," it noted that the individual whom Kentucky had previously executed by lethal injection "went to sleep within 15 seconds to one minute from the moment that the warden began the execution and never moved or exhibited any pain whatsoever subsequent to losing consciousness." *Ibid.* The court affirmed the trial court's findings and held that "[t]he lethal injection method used in Kentucky is not a violation of the Eighth Amendment." *Ibid.*

SUMMARY OF ARGUMENT

In *Gregg*, this Court reaffirmed that capital punishment is constitutional; in doing so, members of this Court explained that "a heavy burden rests on those who would attack the judgment of the representatives of the people" as to how that punishment should be applied and implemented. 428 U.S. at 175 (joint opinion of Stewart, Powell, and Stevens, JJ.). It necessarily follows that there must be some feasible method by which a sentence of death may be executed—and that such a sentence may be imposed and carried out without a never-ending series of demands that a *more* humane method exists.

This Court has never held that a method of execution violates the Eighth Amendment. To the contrary, the Court has rejected challenges to executions by firing squad and electrocution and, at the same time, made clear that jurisdictions are not required to use the "best" available method of execution: *i.e.*, the method that is believed to cause the least amount of pain when compared to other methods. Such a standard would impose an impossible burden on the federal government

and the States and would, at a minimum, be a recipe for judicial micromanagement of execution procedures, including the medical and scientific details of those procedures.

Instead, this Court's method-of-execution cases suggest that the Eighth Amendment would prohibit a method of execution only if it would inflict a considerably greater degree of pain than a feasible alternative method. And where, as here, an individual is claiming that a particular method of execution is invalid because there is a *risk* that it would inflict an excessive degree of pain, the claimant must show, at a minimum, that there is a *substantial* risk—not merely a marginal or hypothetical one—that the challenged method would inflict a significantly greater degree of pain than a feasible alternative method. A contrary rule would turn upside down the presumption in favor of the methods selected by democratically elected legislatures; contravene this Court's cases recognizing that the Eighth Amendment does not protect against accidents, inadvertent failures, or unproven risks; and greatly undermine society's interest in seeing that executions are carried out in a timely manner. The claimant must also show that, in implementing the method of execution at issue, government officials are acting with deliberate indifference to a demonstrated risk posed by that method—not merely that officials failed to take every conceivable precaution to mitigate that risk.

Petitioners cannot satisfy either the objective or the subjective prong of that Eighth Amendment standard. With regard to the objective prong, the risk identified by petitioners—*i.e.*, that the drugs used in their executions will be improperly administered, resulting in excessive pain—is simply too speculative to be constitu-

tionally significant. While some risk of pain is inherent in *any* method of capital punishment, the risk of pain from lethal injection has not been shown to be any greater as a quantifiable matter than the risk of pain from other methods of execution accepted by this Court, including electrocution and hanging. It would be anomalous for the Court to hold that this method of capital punishment—compared to, say, electrocution, see *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947)—imposes a constitutionally unacceptable risk of pain and suffering.

Any risk of pain inherent in lethal injection is manifestly "one that today's society chooses to tolerate." *Helling* v. *McKinney*, 509 U.S. 25, 36 (1993). The vast majority of jurisdictions that authorize capital punishment use the same series of three drugs as Kentucky, and the anecdotal evidence from other jurisdictions cited by petitioners falls fall short of establishing that Kentucky's method of execution gives rise to a substantial risk of excessive pain. Nor do petitioners identify any features of Kentucky's method that substantially increase the risk of pain during their executions. Each of the alternative methods that petitioners propose, moreover, has its own disadvantages, and the Constitution ultimately vests in legislatures, not the courts, the discretion to choose between different methods of execution within a constitutionally permissible range.

Finally, while the Constitution protects against officials who are deliberately indifferent to a constitutionally significant risk of pain, petitioners have failed to show that respondents are acting with anything close to deliberate indifference. Indeed, the whole point of the lethal-injection procedure is to *avoid* the needless infliction of pain and to hasten death. The evidence indicates,

moreover, that respondents, like other federal and state officials, have gone to great lengths to minimize the risk of error and to avoid inflicting excessive pain during executions. Indeed, Kentucky, like the federal government and other States, has reviewed and modified its execution protocol in an effort further to alleviate any risk of pain. The Kentucky Supreme Court therefore correctly rejected petitioners' Eighth Amendment claim.

ARGUMENT

KENTUCKY'S METHOD OF EXECUTION DOES NOT VIOLATE THE EIGHTH AMENDMENT

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It does not constitute cruel and unusual punishment to execute an individual by administering the series of three drugs used by Kentucky, the federal government, and the vast majority of other States that sanction capital punishment. That series of drugs is intended to cause death in a painless and expeditious manner, and petitioners have failed to show that there is a substantial risk that Kentucky's method of execution would inflict a significantly greater degree of pain than any feasible alternative method. The judgment of the Kentucky Supreme Court should therefore be affirmed.

A. Because Capital Punishment Is Constitutional, There Must Be A Feasible Method By Which A Sentence Of Death May Be Executed

The starting point for any analysis of petitioners' Eighth Amendment claim is that capital punishment is itself constitutional. It is constitutional not only in the sense that the Court's cases have upheld the death pen-

alty, see, *e.g.*, *Gregg*, *supra*, but also in the sense that the Constitution expressly contemplates capital punishment. The Fifth Amendment "contemplate[s] the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases." *Gregg*, 428 U.S. at 177 (joint opinion). The Grand Jury Clause of the Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Double Jeopardy Clause similarly contemplates jeopardy, but not double jeopardy, of "life or limb." And the Due Process Clause permits "deprivation" of "life," but only through "due process of law." Moreover, the Due Process Clause of the Fourteenth Amendment, adopted more than 75 years later, likewise presumes the existence of the death penalty. And to the extent that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), it was true at the time of *Gregg*, and remains true today, that "a large proportion of American society * * * regard[s] [death] as an appropriate and necessary criminal sanction." *Gregg*, 428 U.S. at 179 (joint opinion).

The necessary corollary of the proposition that capital punishment is constitutional is that there must be some feasible method by which a sentence of death may be carried out, even though it will always be possible to argue that a more "pain-free" method exists. Were it otherwise, the result would be to render capital punishment constitutional in theory, but unconstitutional in practice. Petitioners in this case do not contend that there is no valid feasible method of execution, but instead contend that Kentucky's method of execution gives

rise to an unacceptable risk of pain when compared to alternative methods that they identify. The central question in this case is the applicable legal standard for an Eighth Amendment claim of that variety.

B. The Eighth Amendment Prohibits The Use Of A Method Of Execution When There Is A Substantial Risk That The Method Would Inflict A Significantly Greater Degree Of Pain Than A Feasible Alternative Method And Officials Act With Deliberate Indifference To That Risk

1. In prescribing "cruel and unusual punishments," the Framers of the Constitution "were primarily concerned * * * with proscribing 'tortures' and other 'barbarous' methods of punishment." *Gregg*, 428 U.S. at 170 (joint opinion); see *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976). While there was little discussion of the Eighth Amendment in the debates concerning the Bill of Rights itself, the views of early commentators confirm that the relevant language was intended to prohibit methods of punishment that deliberately inflicted excessive amounts of pain, such as the rack or the stake. See, *e.g.*, James A. Bayard, Jr., *A Brief Exposition of the Constitution of the United States* 154 (2d ed. 1840).

2. This Court has considered claims that a method of execution violates the Eighth Amendment in three cases, but has never held a method invalid.

a. In *Wilkerson* v. *Utah*, 99 U.S. 130 (1878), an individual convicted of murder in territorial court challenged his sentence to death by firing squad. *Id.* at 136. The Court held that the sentence would not constitute cruel and unusual punishment. *Id.* at 133. The Court stated that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall

not be inflicted; but it is safe to affirm that punishments of torture, * * * and all others in the same line of unnecessary cruelty, are forbidden by that amendment." *Id.* at 135-136. The Court cited cases from England in which "other circumstances of terror, pain, or disgrace" were "superadded" to the act of execution. *Id.* at 135. By contrast, the Court noted, the firing squad was routinely used as a method of execution for military offenses, see *id.* at 133-135, and "[o]ther modes besides hanging were sometimes resorted to at common law," *id.* at 137.

b. *In re Kemmler*, 136 U.S. 436 (1889), involved the first execution by electrocution in New York. The defendant argued that his execution would constitute cruel and unusual punishment (and that the Eighth Amendment should be incorporated against the States). *Id.* at 447-448. The Court ultimately rejected the incorporation argument. *Id.* at 449. The Court noted, however, that under the Eighth Amendment, "[p]unishments are cruel when they involve torture or a lingering death." *Id.* at 447. The Court reasoned that "the punishment of death is not cruel, within the meaning of that word as used in the Constitution"; instead, the word "cruel" "implies * * * something inhuman and barbarous, something more than the mere extinguishment of life." *Ibid.* The Court also noted that New York had a counterpart to the Eighth Amendment in its *state* constitution, and observed that the state courts had held that execution by electrocution would not constitute cruel and unusual punishment under that provision, on the grounds that "th[e] act [adopting electrocution] was passed in the effort to devise a more humane method of reaching the result" and that "upon the evidence the legislature had attained * * * the object [it] had in view in [the act's]

passage." *Ibid.* The Court reasoned that, if it were to treat the state courts' holding as "involving an adjudication that the statute was not repugnant to the Federal Constitution," that holding would be "plainly right." *Ibid.*

c. Finally, in *Resweber*, an individual whose execution by electrocution had failed because of a mechanical malfunction contended that Louisiana's subsequent effort to execute him would constitute cruel and unusual punishment (and that the Eighth Amendment should be incorporated against the States). 329 U.S. at 461 (plurality opinion). A plurality of the Court concluded that, while the Fourteenth Amendment "would prohibit by its due process clause execution by a state in a cruel manner," the instant execution would not violate the Eighth Amendment. *Id.* at 463. The plurality reasoned that the Eighth Amendment "[p]rohibit[s] * * * the wanton infliction of pain," but that "[t]he cruelty against which the Constitution protects a convicted man is * * * not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* at 463-464. Applying that standard, the plurality determined that "[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot * * * add an element of cruelty to a subsequent execution," on the ground that "[t]here is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." *Id.* at 464.

Justice Frankfurter concurred in the judgment. *Resweber*, 329 U.S. at 466-472. While he suggested that "a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would * * * raise different ques-

tions," he concluded that it would not violate due process to carry out the instant execution. *Id.* at 471.

3. As the foregoing discussion demonstrates, there is no support, either in the history of the Eighth Amendment or in this Court's cases interpreting it, for the proposition that States and the federal government may use only one method of execution: *viz.*, the method that is believed to cause the least amount of pain when compared to other methods. Such a proposition also is belied by the fact that, throughout the Nation's history, multiple methods of execution have been in use at any given time. For example, while hanging was the predominant method of execution at the time of the framing, there appears to have been considerable variation in how executions by hanging were carried out—and, at least for military offenses, the firing squad was also used. See Banner 44-48. During much of the 20th century, moreover, jurisdictions simultaneously used as many as four different methods of execution: electrocution, lethal gas, hanging, and the firing squad. See p. 2, *supra*.

If the Eighth Amendment mandated the use of only the "best" available method of execution, as petitioners' "unnecessary risk" standard seemingly (or effectively) contemplates, jurisdictions presumably would be required to choose between an old and new method of execution as soon as each new method became available—and, within the constitutionally mandated "method" of execution, to employ the optimal variation of that method. Cf. J.A. 31 (alleging, in complaint, that the needle used in Kentucky executions is "too large"). And as society progresses, courts would become increasingly enmeshed in reviewing (and second-guessing) the medical and scientific judgments underlying accepted

execution methods. Cf. *Marshall* v. *United States*, 414 U.S. 417, 427 (1974) (noting that, "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation"). Indeed, much of the debate in this case centers on the appropriate type (and dosage) of drugs used in lethal injection—hardly a matter of institutional expertise for the judiciary.

Putting aside how more humane methods of execution could emerge in a regime in which the constitutional mandate of uniformity precluded innovation in the States, the Eighth Amendment does not envision such micromanagement of execution procedures (or give courts adequate tools for the task). See, *e.g.*, *Gregg*, 428 U.S. at 175 (joint opinion) (noting that "[w]e may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved" and that "a heavy burden rests on those who would attack the judgment of the representatives of the people"). Instead, the better reading of the Eighth Amendment—as reflected by this Court's repeated references to "torturous" or "barbarous" punishments—is that a method of execution is unconstitutional only where it would inflict a *considerably* greater amount of pain when compared to another method. See, *e.g.*, *Resweber*, 329 U.S. at 464 (plurality opinion).

While this Court has suggested that the Eighth Amendment inquiry is a comparative one, it has not explicitly specified the baseline against which the challenged method should be measured. The most straightforward approach would be to compare the challenged method with the methods that were viewed as permissi-

ble (or impermissible) when the Eighth Amendment was promulgated. Such an approach would not merely "prevent * * * an exact repetition of history," but would proscribe comparably cruel methods of execution that did not exist at the time of the framing. *Weems* v. *United States*, 217 U.S. 349, 373 (1910).

Another approach—and one suggested by the "evolving standards of decency" methodology of Eighth Amendment interpretation—would be to measure the challenged method of execution against a currently available alternative, and to assess whether the challenged method would inflict a considerably greater degree of pain than the alternative. Under such a standard, a previously permissible method could conceivably be rendered unconstitutional by the development of a better alternative. At the same time, such a standard would afford legislatures at least some leeway in selecting methods of their choosing and would account for the fact that it will invariably be possible for an individual to point to some alternative method or subsequent development suggesting that an existing method is not optimal. Cf. *Gregg*, 428 U.S. at 176 (joint opinion) (noting that "the deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy") (internal quotation marks and citations omitted).

Under such an approach, one highly relevant consideration is "the legislation enacted by the country's legislatures," which this Court has described as "the clearest and most reliable objective evidence of contemporary values." *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). The Court has looked to the practices of the States and the federal government in invalidating

the execution of mentally retarded offenders, see *id.* at 313-317, and juvenile offenders, see *Roper* v. *Simmons*, 543 U.S. 551, 564-567 (2005). Where a majority (or, as here, a vast majority) of jurisdictions use a particular method of execution, it suggests the existence of a consensus that the method in question is the most humane of the currently available methods, because, "[a]s modern sensibilities have moved away from [particular] methods of carrying out a death sentence, so too have the death-penalty procedures of the States and the Federal Government." *Workman*, 486 F.3d at 907. In addition, where a majority of jurisdictions use a particular method, it suggests that "society considers the *risk* [of pain]" inherent in that method to be acceptable. *Helling*, 509 U.S. at 36 (emphasis added).

4. In this case, petitioners do not contend that a particular method of execution would *always* inflict an excessive amount of pain when compared to a feasible alternative; instead, petitioners contend that Kentucky's method of execution is invalid because there is a *risk* that it would inflict a greater degree of pain than the alternative methods that they identify. Put another way, petitioners contend that Kentucky's method would inflict greater pain only in *some* cases: *i.e.*, where the drugs involved are improperly administered.

Although this Court has never directly addressed the issue, the Court's cases suggest that, when an individual is challenging a proposed method of execution on such a probabilistic basis, the challenger must show that there is a *substantial* risk—not merely a remote or hypothetical one—that the method of execution would inflict a *significantly* greater degree of pain than a feasible alternative method (taking into account any countervailing risks posed by the alternative method).

For example, in *Resweber*, the Court rejected the claim that a State's subsequent effort to carry out an execution after a mechanical malfunction would violate the Eighth Amendment, notwithstanding the risk that a similar accident could occur at the second attempt. 329 U.S. at 464 (plurality opinion). Justice Frankfurter, who concurred in the judgment, observed that "a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would * * * raise different questions." *Id.* at 471; see *Glass* v. *Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting from denial of certiorari) (recognizing that a method of execution is unconstitutional only where "it causes torture or a lingering death in a significant number of cases") (internal quotation marks and citation omitted); cf. *Gregg*, 428 U.S. at 188 (joint opinion) (stating that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

This Court's cases involving challenges to conditions of confinement—which the Court has recognized are in some respects analogous to challenges to aspects of an execution method, see *Hill* v. *McDonough*, 126 S. Ct. 2096, 2101-2104 (2006); *Nelson* v. *Campbell*, 541 U.S. 637, 644 (2004)—further support the conclusion that a challenger must show a substantial risk of the requisite quantum of pain. In *Farmer* v. *Brennan*, 511 U.S. 825 (1994), the Court considered a claim that prison officials had failed to protect a prisoner from the risk of violence at the hands of other prisoners. *Id.* at 830-831. The Court repeatedly stated that, "[f]or a claim * * * based on a failure to prevent harm, the inmate must show," *inter alia*, "that he is incarcerated under condi-

tions posing a *substantial* risk of serious harm." *Id.* at 834 (emphasis added); see *id.* at 828, 836, 847. The Court likewise observed that the risk of "accidental" harm does not violate the Eighth Amendment, see *id.* at 840, and that the Constitution is not offended when officials "respond[] reasonably to the risk, even if the harm ultimately was not averted," *id.* at 844.

Similarly, in *Helling*, the Court explained, with regard to a conditions-of-confinement claim that alleged a risk of *future* injury, that it would constitute "deliberate indifference" if officials ignored "a condition of confinement that is sure or *very likely* to cause serious illness and needless suffering" in the future. 509 U.S. at 33 (emphasis added). In addition, the Court stated that the inmate "must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.* at 36.

While conditions-of-confinement claims do not involve punishment per se, there is no justification for adopting a different—and more stringent—standard for an Eighth Amendment claim concerning the possible infliction of pain during an execution than for a claim concerning the possible infliction of bodily injury (or death) during a confinement for a term of years. In both cases, the pain is not inflicted deliberately, but is a possible unintended consequence of an effort to achieve a legitimate penological objective. There is no reason to conclude that the Eighth Amendment allows for a different risk of pain in either context. Instead, in both cases, the Eighth Amendment affords the benefit of doubt to the government unless the claimant can show the existence of a substantial risk of harm.

Petitioners concede that "[a]n insignificant and unforeseeable risk * * * will not violate the Constitu-

tion," Br. 39, but suggest that, where a risk is foreseeable, even a remote risk could serve as the basis for a valid Eighth Amendment claim, Br. 29, 40, 42. Such a standard, however, cannot be squared with this Court's precedents upholding the constitutionality of methods of capital punishment—especially *Resweber*, in which the risk of error in a second electrocution was plainly apparent, given the failure of the first attempt. The fundamental difficulty with petitioners' approach is that, "[a]t some level, every execution procedure ever used contains risk that the individual's death will not be entirely pain free." *Workman*, 486 F.3d at 908; see *Resweber*, 329 U.S. at 464 (plurality opinion) (noting that "[t]he cruelty against which the Constitution protects a convicted man is * * * not the necessary suffering involved in any method employed to extinguish life humanely").

Moreover, under petitioners' standard, where an individual in one jurisdiction identifies a risk presented by a particular method of execution, however hypothetical, other individuals, in that jurisdiction and others, will inevitably pursue similar claims—with each wave of litigation engendering further delay in the execution of death sentences, even if the claims are ultimately not successful. This Court has repeatedly recognized that "a State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson*, 541 U.S. at 644; see *Hill*, 126 S. Ct. at 2103; *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998). That interest would be greatly undermined if an individual could delay his execution merely by conceiving of some marginal risk arising from a particular execution method.

A further difficulty with petitioner's proposed test is that it would frustrate governmental efforts to experi-

ment with more humane methods of execution. If any risk with a method requires its abandonment in favor of a method perceived to be superior, there will be little scope for governments to modify their procedures. Petitioners' test would essentially mandate a single method of execution nationwide. That not only is inconsistent with general principles of federalism and the history of the evolution of capital punishment, but might preclude development of an even more humane method based on early evidence of risk that proves unfounded.

5. Finally, both the history of the Eighth Amendment and this Court's cases interpreting it indicate that, with regard to a claim that a method of punishment inflicts an excessive amount of pain, the Eighth Amendment has a subjective, as well as objective, component. The Eighth Amendment proscribes the "unnecessary and *wanton* infliction of pain." *Gregg*, 428 U.S. at 173 (joint opinion) (emphasis added). The methods of punishment that the Framers of the Constitution viewed as cruel and unusual, such as burning, disemboweling, and drawing and quartering, were all methods which were known to inflict a considerable amount of pain—and, indeed, which were adopted specifically for that reason. Consistent with that understanding, this Court, in evaluating method-of-execution claims, has consistently considered whether the government acted with the *intent* of inflicting pain. See, *e.g.*, *Resweber*, 329 U.S. at 477 (plurality opinion); *Kemmler*, 136 U.S. at 447.

Where, as here, an individual is not directly challenging a legislature's choice of execution method, but is instead challenging *government officials'* decisions concerning how to *implement* the legislature's chosen method, the subjective component of the Eighth Amendment requires the challenger to demonstrate, at a mini-

mum, that the officials acted with deliberate indifference to a constitutionally significant risk of pain. This Court has long required a showing of deliberate indifference in cases involving challenges to conditions of confinement; indeed, in originally imposing that requirement, the Court relied heavily on its earlier cases (such as *Gregg* and *Resweber*) holding that the Eighth Amendment proscribes the "wanton" infliction of pain. See *Estelle*, 429 U.S. at 104-105. A challenge to officials' decisions concerning how to implement a sentence of death is closely analogous to a challenge to officials' conduct regarding a prisoner's conditions of confinement. In each case, the precise conduct being challenged "does not purport to be the penalty formally imposed for [the] crime," *Wilson* v. *Seiter*, 501 U.S. 294, 302 (1991), and, for that reason, a showing of deliberate indifference is necessary in order to render the challenged conduct "punishment" for Eighth Amendment purposes, see *id.* at 305. As with the "substantial risk" component of the Eighth Amendment standard, there is no justification for applying a different state-of-mind requirement for a challenge concerning the possible infliction of pain during an execution than for a challenge concerning the possible infliction of bodily injury during a term of imprisonment.

In order to demonstrate deliberate indifference, an individual must show that the relevant officials are acting with reckless disregard toward a constitutionally significant risk of pain. *Wilson*, 501 U.S. at 836, 839. It is therefore not sufficient for the individual simply to identify some risk of pain that could be avoided through the exercise of due care. See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986). Nor is it enough for a prisoner to identify a "risk of negligence in implementing a death-penalty procedure." *Workman*, 486 F.3d at 907. Instead,

"[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley*, 475 U.S. at 319.

C. Petitioners Have Failed To Show That Kentucky's Method Of Execution Violates The Eighth Amendment

In this case, petitioners seemingly concede that, "if performed properly," an execution by lethal injection using the same series of three drugs at issue here would be "humane and constitutional." Br. 31. Petitioners' claim instead focuses on two possible ways in which a subject would feel pain during an execution using that series of drugs—both of which depend on the improper administration of the first drug in the series, sodium thiopental. First, petitioners contend that, if the dose of sodium thiopental is improperly administered and the subject is not rendered unconscious, the subject would experience the "agony" of suffocation from the administration of pancuronium bromide. Br. 45. Second, petitioners contend that, if the subject is not rendered unconscious from the administration of sodium thiopental and does not die from the administration of pancuronium bromide, "the injection of potassium [chloride] * * * will cause excruciating pain" before it induces death. *Ibid.* The Kentucky Supreme Court—like every other federal court of appeals or state court of last resort to have considered similar claims—correctly held that petitioners failed to demonstrate a constitutionally unacceptable risk of pain in carrying out Kentucky's chosen method of execution.

1. a. As a preliminary matter, petitioners' claim fails because they have not shown that any risk inherent in Kentucky's three-drug series is one that society would

not tolerate. The federal government, and all but one of the States that authorize capital punishment, use lethal injection—and the vast majority of those jurisdictions use the same series of three drugs (or their functional equivalents) as Kentucky. See p. 3, *supra*. By contrast, petitioners identify no jurisdiction that uses the exact alternative methods that they propose. The overwhelming national consensus in support of the three-drug method strongly supports the conclusion that, whatever the risk that the improper administration of the drugs will result in pain, it is a risk that "today's society chooses to tolerate." *Helling*, 509 U.S. at 36; see *Atkins*, 536 U.S. at 312.

b. While petitioners list various allegedly problematic aspects of Kentucky's execution protocol, see Br. 12-20, petitioners do not contend, much less demonstrate, that Kentucky's protocol so differs from the protocols of other jurisdictions as to render the overwhelming societal consensus in support of the three-drug method irrelevant. To the contrary, in arguing that Kentucky's method gives rise to a constitutionally significant risk of pain, petitioners affirmatively rely on the experiences of other jurisdictions in carrying out executions using the same three-drug series. See Br. 8-9, 20-24.

The anecdotal evidence from other jurisdictions cited by petitioners, however, falls far short of establishing that Kentucky's method of execution would inflict a *substantial* risk of significantly greater pain than petitioners' proposed alternative methods. None of that evidence was introduced in the record in this case, and that is reason enough to affirm the decision below. Even if it had been, however, that evidence would fail to make out the necessary showing to render *Kentucky's* method of lethal injection unconstitutional. It is unclear whether

any of the individuals in petitioners' examples actually suffered excessive pain during their executions.

Petitioners primarily rely on the 2006 Florida execution of Angel Diaz. See Br. 20-21. In that case, it does appear that the execution team failed to insert the intravenous line properly, with the result that drugs were injected into Diaz's muscle tissue rather than his veins. See *Lightbourne* v. *McCollum*, No. SC06-2391, 2007 WL 3196533, at *15 (Fla. Nov. 1, 2007). But the Florida Supreme Court and a state investigation both found that the problems experienced in Diaz's execution were due not to any inherent flaws in the three-drug series, but rather the failure of particular individuals to follow Florida's written protocol. *Id.* at *21; see *id.* at *15-*16 (noting trial-court finding that Diaz did not suffer any pain). And while petitioners contend that California has experienced six "aberrant" executions among the eleven it has performed by lethal injection, see Br. 22, the source on which petitioners rely states only that, according to notes taken at the executions, those individuals may not have ceased *breathing* as a result of administration of sodium thiopental—not that any of those individuals remained *conscious*. See *Morales* v. *Tilton*, 465 F. Supp. 2d 972, 975 (N.D. Cal. 2006).

Finally, even assuming, *arguendo*, that any of the individuals in the examples petitioners cite did suffer excessive pain before being executed, that is not sufficient to demonstrate that *petitioners* face a substantial risk of such pain. See *Helling*, 509 U.S. at 35-36. There is always *some* risk that an execution will not go as planned, but petitioners have failed to quantify that risk—and other courts to have considered similar challenges, like the Kentucky Supreme Court, have concluded that the risk is too remote to be constitutionally

significant. See, *e.g.*, *Taylor* v. *Crawford*, 487 F.3d 1072, 1085 (8th Cir. 2007), petition for cert. pending, No. 07-303 (filed Sept. 5, 2007); *Workman*, 486 F.3d at 910; *Hamilton* v. *Jones*, 472 F.3d 814, 817 (10th Cir.), cert. denied, 127 S. Ct. 1054 (2007). Accordingly, there is no basis for finding a constitutionally unacceptable risk on the record in this case.

c. To the extent that petitioners focus on particular features of Kentucky's execution protocol, petitioners have failed to show that those features substantially increase the risk that they would suffer significant pain during their executions. Here again, petitioners' argument is based entirely on anecdotal evidence or theoretical concerns. As to the risk that the sodium thiopental would be improperly prepared, the trial court specifically found that "there would be minimal risk of improper mixing" of the dose of sodium thiopental if the manufacturer's instructions were followed. J.A. 761. And respondents presented testimony indicating that the preparation of sodium thiopental was not difficult. J.A. 623.

As to the risk that the intravenous line would be improperly set, Kentucky takes many of the same precautions as the federal government. Most importantly, Kentucky, like the federal government, uses qualified personnel to set the line—in Kentucky's case, a phlebotomist and emergency medical technician, who, according to the trial testimony, "know more about [setting lines] than just about anybody else." J.A. 385; see J.A. 580-581. Those personnel had many years of experience and were required to undergo regular practice sessions before participating in an actual execution. J.A. 273-274, 984. In addition, Kentucky, like the federal government (when it obtains access by means of a peripheral vein),

requires the personnel to set a backup line; if the initial dose of sodium thiopental through the primary line does not appear to render the subject unconscious within 60 seconds, an additional dose is administered through the backup line before the last two drugs are delivered. J.A. 279-280, 317-318, 337-338, 978-979. The warden and deputy warden are present in order to monitor the flow of lethal drugs into the subject's vein (and to direct the personnel to switch to the backup line if necessary); respondents presented testimony indicating that it would be "very obvious," even to someone without medical training, if drugs were flowing into the surrounding tissue rather than the vein. J.A. 386; see J.A. 323, 353, 600-601. Finally, while the personnel have one hour to establish peripheral intravenous access, they are not *required* to spend the entire hour attempting to do so—and if they are unable to do so, the execution will be postponed. J.A. 289, 761-762, 976.

Moreover, petitioners acknowledge that there is *no* evidence that there have been any difficulties with Kentucky's execution protocol in practice. See Br. 9. As the Kentucky Supreme Court noted, there has been only one prior execution by lethal injection in Kentucky—and the individual who was executed "went to sleep within 15 seconds to one minute from the moment that the warden began the execution and never moved or exhibited any pain whatsoever subsequent to losing consciousness." J.A. 807; see J.A. 134, 147-148, 189, 277-278, 320, 502-503. While petitioners suggest that "there is no way to know whether [that] execution was humane," Br. 9, the burden is on petitioners to *prove* a substantial risk of pain, not on the State to *disprove* the existence of pain in an execution in which there is no evidence thereof. The lack of even anecdotal evidence of difficulties with

Kentucky's execution protocol strongly counsels against a conclusion that the protocol would subject petitioners to a constitutionally significant risk of pain.

d. In any event, petitioners have failed to show that there is a substantial risk that Kentucky's method of execution would inflict a significantly greater degree of pain than a feasible alternative method, because neither of the two alternative methods that petitioners identify before this Court is obviously superior to the three-drug method and each has its own disadvantages.

First, petitioners contend (Br. 51-57), apparently for the first time in this case, that Kentucky could switch from the three-drug method to a one-drug method: *i.e.*, by using a single dose of sodium thiopental (or another barbiturate). Other jurisdictions, however, have considered and validly rejected that alternative. A committee established to review Tennessee's execution procedures, while recognizing that the one-drug method would be easier to administer, concluded that it would likely take longer than the three-drug method. See *Workman*, 486 F.3d at 919. An execution using that alternative would thus potentially implicate a convict's Eighth Amendment interest in not being subjected to a "lingering death," *Kemmler*, 136 U.S. at 447, and, at a minimum, would contravene the government's legitimate penological interest in ensuring that an execution is carried out in an expeditious manner.

The Tennessee committee also noted that there was no record of the efficacy of the one-drug method, because it had not been used in any other jurisdiction, and concluded that the "required dosage of [barbiturate] would be less predictable and more variable when it is used as the sole mechanism for producing death." *Workman*, 486 F.3d at 919. Because the one-drug

method has never been tested, it is theoretically possible that an execution using the one-drug method could fail, see J.A. 24 (alleging in complaint that "sensitivity to thiopental varies greatly among the population and some individuals"), whereas there have been no cases in which an execution using the three-drug method was unsuccessful. For those reasons, the one-drug method does not constitute a feasible alternative method of execution against which Kentucky's three-drug method can validly be measured.

Petitioners suggest that, at a minimum, Kentucky could remove pancuronium bromide from its execution protocol. See Br. 51-53. The trial court, however, specifically found that the inclusion of pancuronium bromide served two legitimate purposes: first, to prevent involuntary muscular movements (which could interfere with the administration of the dose of potassium chloride and could contravene the interests of the convict and the government in ensuring that the execution is conducted with dignity), and second, to stop respiration (and thereby ensure that death is effectuated). J.A. 763; see *Workman*, 486 F.3d at 909; *id.* at 918 (report of Tennessee committee).

Second, petitioners contend that Kentucky could more closely monitor the anesthetic depth of the subject, so as to ensure that the subject is properly anesthetized when the last two drugs in the series are administered. See Br. 57-59. As a preliminary matter, that alternative is premised on the unproven hypothesis that individuals are not properly anesthetized under the three-drug method, despite the massive dose of sodium thiopental that they are typically given—ten times the amount used in a typical surgical procedure, and enough to render an

individual unconscious within 60 seconds (and for hours). See Resp. Br. 37, 49.

Although petitioners are conspicuously circumspect about specifying who should conduct that monitoring, they imply that it should be an anesthesiologist. See, *e.g.*, *id.* at 58-59 (referring to "monitoring by [an] anesthesia professional"). Such an alternative, however, would likely not be feasible, because it is doubtful that Kentucky could find a doctor to participate in an execution (even if state law permitted it to do so). See Ky. Rev. Stat. Ann. § 431.220(3) (LexisNexis 1999). The American Medical Association and the the American Society of Anesthesiologists (ASA) have determined that it is unethical for doctors to participate in executions. See ASA Br. 2-3. At least one group opposed to the death penalty has even brought suit to force a state medical board to take disciplinary action against doctors who participate in executions. See *Zitrin* v. *Georgia Composite State Bd. of Med. Exam'rs*, No. A07A0914, 2007 WL 3025835, at *1 (Ga. Ct. App. Oct. 18, 2007). Accordingly, where lower courts have refused to allow executions to proceed without medical monitoring of anesthetic depth, States have been unable to find a qualified doctor who was willing to participate. See, *e.g.*, *Morales*, 465 F. Supp. 2d at 975-976; cf. *Gonzales* v. *Oregon*, 546 U.S. 243, 252 (2006) (noting that, under Oregon law, a doctor may provide, "but may not administer," a lethal dose). But in a constitutional system that permits the death penalty, the baseline for measuring whether a method inflicts unnecessary pain must be a *feasible* alternative. A theoretical possibility that could not be carried out consistent with the prevailing medical ethics regime is not such an alternative. Like the one-drug method, therefore, medical monitoring of anesthetic

depth does not constitute a feasible alternative method of execution.

2. Finally, even if petitioners could show that Kentucky's method of execution would subject them to a constitutionally significant risk of pain, petitioners have failed to show that, in proposing that method, respondents are acting with deliberate indifference to any such risk. Petitioners concede that Kentucky, like other States, switched to lethal injection because it believed that lethal injection was a *more* humane method of execution than its prior method, electrocution. See Br. 31. Moreover, "[t]he whole point of the [three-drug series] is to avoid the needless infliction of pain, not to cause it," because "[t]he idea is to anesthetize the individual with one drug before the State administers the remaining two drugs, so that the serial combination of drugs causes a quick and painfree death." *Workman*, 486 F.3d at 907.

Petitioners seemingly suggest that Kentucky officials acted with deliberate indifference in adopting the three-drug method because they copied that method from other States. See Br. 8. It was hardly reckless for Kentucky officials to do so, however, in light of the fact that other States had used the same method with few difficulties (and given the absence of any actual evidence concerning the efficacy of alternative methods). J.A. 106, 226, 307. In adopting the three-drug method, moreover, Kentucky did not blindly follow the protocols of other States, but instead made certain modifications to those protocols in developing its own. J.A. 156.

In addition, since Kentucky initially adopted the three-drug method, it has reevaluated and modified its protocol in response to concerns about its efficacy. Among other changes, state officials increased the initial dose of sodium thiopental from 2 grams to 3 grams—a

"unilateral action[]" that the trial court described as "commendable." J.A. 768; see J.A. 71, 255-256, 290-291, 639-640. Other jurisdictions either have conducted or are in the process of conducting reviews of their execution protocols; committees in Florida and Tennessee recommended various modifications to their protocols (while retaining the three-drug series), see *Lightbourne*, 2007 WL 3196533, at *2, *16-*18; *Workman*, 486 F.3d at 913-922, and the BOP continually reassesses various aspects of its own protocol for federal executions conducted by lethal injection. Those reviews reflect that Kentucky and other jurisdictions are "intent not just on satisfying the requirements of the Eighth Amendment but on far exceeding them." *Id.* at 909. Petitioners' proposed standard would have the perverse effect of discouraging such laudable internal reviews—and the adoption of new and potentially improved methods of execution—because, anytime a jurisdiction engaged in such a review, it would expose itself (and other jurisdictions using that same method) to claims that its existing method of execution imposes a constitutionally unacceptable risk of pain in comparison to the alternatives under consideration.

* * * * *

The Eighth Amendment proscribes methods of execution that entail a substantial risk of excessive pain, and protects against the administration of capital punishment in a manner that is deliberately indifferent to such an unacceptable risk. But because petitioners in this case presented insufficient evidence that Kentucky's method of execution fails either of those requirements, the Kentucky Supreme Court correctly rejected petitioners' Eighth Amendment claim.

CONCLUSION

The judgment of the Kentucky Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

ADDENDUM TO BOP EXECUTION PROTOCOL
FEDERAL DEATH SENTENCE
IMPLEMENTATION PROCEDURES
EFFECTIVE JULY 1, 2007

A. Federal death sentences are implemented by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director, Federal Bureau of Prisons (BOP) and to be administered by qualified personnel selected by the Warden and acting at the direction of the United States Marshal. 28 CFR 26.3. The procedures utilized by the BOP to implement federal death sentences shall be as follows unless modified at the discretion of the Director or his/her designee, as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances.

B. The identities of personnel considered for and/or selected to perform death sentence related functions, any documentation establishing their qualifications and the identities of personnel participating in federal judicial executions or training of such judicial executions shall be protected from disclosure to the fullest extent permitted by law.

C. The lethal substances to be utilized in federal lethal injections shall be Sodium Pentothal, (thiopental); Pancuronium Bromide and Potassium Chloride.

D. Not less than fourteen (14) days prior to a scheduled execution, the Director or designee, in conjunction with the United States Marshall Service, shall make a final selection of qualified personnel to serve as the executioner(s) and their alternates. See BOP Execution Protocol, Chap. 1, §§ III (F) and IV (B) & (E). Qualified personnel shall have necessary training or experience in the specific function they will perform in implementing the federal death sentence. Any documentation establishing the qualifications, including training, of such personnel shall be maintained by the Director or designee.

E. The Director or designee shall appoint a senior level Bureau employee to assist the United States Marshal in implementing the federal death sentence. The Director or designee shall appoint an additional senior level Bureau employee to supervise the activities of personnel preparing and administering the lethal substances.

F. The lethal substances shall be prepared by qualified personnel in the following manner unless otherwise directed by the Director, or designee, on the recommendation of the on-site medical personnel. The lethal substances shall be placed into four sets of numbered and labeled syringes. Two of the sets of syringes are used in the implementation of the death sentence and two sets are available as a backup.

G. Approximately thirty (30) minutes prior to the scheduled implementation of the death sentence, the condemned individual will be escorted into the execution room. The condemned individual will be

restrained to the execution table. The leads of a cardiac monitor will be attached by qualified personnel. A suitable venous access line or lines will be inserted and inspected by qualified personnel and a slow rate flow of normal saline solution begun.

H. Lethal substances shall be administered intravenously. Venous catheterization of the fermoral vein is the preferred access method. The Director or designee may approve a different method of venous access (1) based on the training and experience of personnel establishing the intravenous access; (2) to comply with specific orders of federal courts; or (3) based upon a recommendation from qualified personnel available at the execution facility.

When venous access is acquired through the femoral vein (accessed near the groin), a set of syringes will consist of:

Syringe # 1 contains 5.0 grams of Sodium Pentothal in 10 ccs of diluent,
Syringe # 2 contains 60 ccs of saline flush,
Syringe # 3 contains 120 milligrams of Pancuronium Bromide,
Syringe # 4 contains 120 milligrams of Pancuronium Bromide,
Syringe # 5 contains 60 ccs of saline flush,
Syringe # 6 contains 120 mEq of Potassium Chloride and
Syringe # 7 contains 120 mEq of Potassium Chloride.

When venous access is acquired through a peripheral vein, a set of syringes will consist of:

Syringe # 1 contains 1.25 grams of Sodium Pentothal in 50 ccs of diluent,
Syringe # 2 contains 1.25 grams of Sodium Pentothal in 50 ccs of diluent,
Syringe # 3 contains 1.25 grams of Sodium Pentothal in 50 ccs of diluent,
Syringe # 4 contains 1.25 grams of Sodium Pentothal in 50 ccs of diluent,
Syringe # 5 contains 60 ccs of saline flush,
Syringe # 6 contains 120 milligrams of Pancuronium Bromide,
Syringe # 7 contains 120 milligrams of Pancuronium Bromide,
Syringe # 8 contains 60 ccs of saline flush,
Syringe # 9 contains 120 mEq of Potassium Chloride and
Syringe # 10 contains 120 mEq of Potassium Chloride.

Each syringe will be administered in the order set forth above when directed by supervisory personnel.

If peripheral venous access is utilized, two separate lines shall be inserted in separate locations and determined to be patent by qualified personnel. A flow of saline shall be started in each line and administered at a slow rate to keep the line open. One line will be used to administer the lethal substances and the second will be reserved in the event of the failure of the first line. Any failure of a venous access line shall be immediately reported to the on-

site medical personnel and the Director's designee. The Director's designee shall take steps consistent with paragraph L below.

I. At the direction of the U.S. Marshal, the flow of lethal substances shall be initiated and controlled by qualified personnel. The first lethal substance (Sodium Pentathol) will be administered followed by saline flush.

Lethal substances will be administered into two identical sets of IV lines, one which is connected to the condemned individual and the other into a disposal container in the execution room. The personnel administering the lethal substances shall not be informed as to which line is connected to the condemned individual.

J. After the first lethal substance has rendered the condemned individual unconscious as determined by qualified personnel, BOP supervisory personnel will direct personnel to administer the remaining lethal substances (Pancuronium Bromide and Potassium Chloride). The fact, time and order of administration of each substance shall be documented and the documentation maintained. The condemned individual's consciousness will be monitored by qualified personnel.

K. In the event that death of the condemned individual has not occurred within five minutes after completion of the administration of the second syringe of Potassium Chloride, personnel shall proceed as outlined in paragraph L.

L. If at any time during the federal death penalty procedure a member of the execution team becomes aware of a situation not contemplated in this procedure, the team member should advise a supervisory BOP team member who shall forthwith advise the Director's on-site designee. The Director's on-site designee, after consulting with the United States Marshal, may direct that the procedure be interrupted, the curtains to the witness viewing rooms be closed, and if necessary, for witnesses to be removed from the facility. A complete assessment of the situation may be done, including if necessary, input from the on-site medical personnel. After consultation with appropriate personnel, a decision will be made to re-commence the procedure from the beginning, to re-commence the procedure from the point of its interruption, or to re-commence the procedure from the beginning at a different time and/or date.