COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2005-SC-00543

RALPH BAZE AND THOMAS C. BOWLING **APPELLANTS**

VS. **APPEAL FROM FRANKLIN CIRCUIT COURT**
HONORABLE ROGER L. CRITTENDEN, JUDGE
NO. 04-CI-1094

JONATHAN D. REES, ET AL. **APPELLEES**

BRIEF FOR APPELLANTS BAZE AND BOWLING

DAVID M. BARRON
SUSAN J. BALLIET
ASSISTANT PUBLIC ADVOCATES
DEPARTMENT OF PUBLIC ADVOCACY
100 FAIR OAKS LANE, SUITE 301
FRANKFORT, KY 40601
(502) 564-3948; FAX (502) 564-3949

CERTIFICATE OF SERVICE:

The undersigned does hereby certify that copies of this brief were served on the following named individuals by U.S. mail, postage prepaid, on October 6, 2005: Hon. Roger Crittenden, Judge Franklin Circuit Court, P. O. Box 678, Frankfort, Ky. 40602, Hon. Jeff Middendorf, General Counsel, Department of Corrections, 2439 Lawrenceburg Road, P.O. Box 2400, Frankfort, Ky. 40602, and to the Hon. David Smith, Assistant Attorney General, at 1024 Capital Center Drive, Frankfort, Ky. 40601.

COUNSEL FOR APPELLANTS

INTRODUCTION

This is an appeal challenging the Franklin Circuit Court's 1) dismissal of Appellants' challenge to the constitutionality of electrocution; and, 2) denial of Appellants' challenge to the procedures and chemicals utilized in Kentucky lethal injections, alleging violations of §17 of the Kentucky Constitution and the 8th Amendment cruel and unusual punishment clause of the United States Constitution.

In 1998, lethal injection was considered more humane than electrocution, so the Kentucky legislature changed its method of execution to lethal injection.[1] The statute allows inmates to select electrocution,[2] and retains electrocution as the sole method of execution if lethal injection is found unconstitutional.[3] Thus, there is a possibility that Baze or Bowling will be electrocuted.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants requests oral argument because the constitutionality of electrocution as a method of execution is an unresolved issue that raises serious questions concerning evolving standards of decency and the infliction of unnecessary pain and suffering, and because, as the Franklin Circuit Court recognized, Appellants' challenge to the lethal injection chemicals and procedures is a case of first impression in Kentucky raising the "substantial issue [of the] constitutionality of Kentucky's manner and means of effecting execution by lethal injection" that must be addressed so "the citizens of Kentucky can be assured that their government's duty and responsibility of enforcing a death sentence is being administered in a constitutionally proper manner."[4]

STATEMENT CONCERNING CITATIONS TO THE RECORD

There are three sets of transcripts of evidence. The first set encompasses Volumes I-VII. The second set picks up chronologically after Vol. VII, but is labeled Vol. I-V. The third set encompasses the supplemental record and is labeled Supp. Vol. I-IV. Each of these sets begins with page one. For

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[1] K.R.S. §431.220.
[2] *Id*.
[3] K.R.S. §431.223.
[4] TR 2, Vol. I at 40 (Order and Opinion granting temporary injunction barring Bowling's execution, dated Nov. 23, 2004, at 4) (Appendix at 24).

clarity, Appellant uses the abbreviations TR 1, TR 2, and TR Supp. to refer to the different sets of transcripts. TE refers to exhibits entered into evidence at trial.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Two hundred years ago, at the beginning of the nineteenth century, "…the great spectacle of physical punishment disappeared; the tortured body was avoided; the theatrical representation of pain was excluded from punishment."[5] Electrocution –thought to be quick and painless—has turned out to represent a backward step, a reversion to the gross theatrical penal style of the 1700's.[6] The condemned prisoner

> cringes, leaps, and fights the straps with amazing strength. The hands turn red, then white, and the cords of the neck stand out like steel bands. The prisoner's limbs, fingers, toes, and face are severely contorted. The force of the electrical current is so powerful that the prisoner's eyeballs sometimes pop out and rest on [his] cheeks. The prisoner often defecates, urinates, and vomits blood and drool. The body turns bright red as its temperature rises, and the prisoner's flesh swells and his skin stretches to the point of breaking. Sometimes the prisoner catches on fire . . . sounds like bacon frying, and the sickly sweet smell of burning flesh permeates the chamber . . . the prisoner almost literally boils . . . . The body frequently is badly burned and disfigured.[7]

Society has turned against electrocution. Courts have begun to find electrocution unconstitutional, and many states have replaced electrocution with lethal injection. With two exceptions,[8] Kentucky is one of these states.[9] Unfortunately, the chemicals and procedures Kentucky uses for lethal injection are not humane as was once thought. Rather, like electrocution, Kentucky's chemicals and procedures pose an unnecessary, avoidable risk of pain and suffering.

A. The electrocution process.

In a judicial electrocution, current is introduced through "a tight cap containing an electrode with a saline solution moistened sponge" that is placed on the inmate's head.[10] Because the brain is a

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[5] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 14 (Alan Sheridan trans., 2d Vintage Books ed. 1995). Foucault (1926-1984) was a French historian and philosopher. In *Discipline and Punish* (first published in 1975), he presents the development of the more humane way of treating criminals rather than torturing them.

[6] Id.

[7] *Glass v. Louisiana*, 471 U.S. 1080, 1087-88 (1985) (internal citations omitted) (Brennan, J., dissenting from the denial of certiorari on the constitutionality of electrocution).

[8] Inmates sentenced to death prior to March 31, 1998 may choice electrocution. K.R.S. § 431.220. Electrocution is the method of execution if lethal injection is found unconstitutional. K.R.S. § 431.223.

[9] K.R.S. § 431.220.

[10] TR 1, Vol. I at 111 (Fred A. Leuchter, *Modular Electrocution System Manual* at 2).

poor conductor of electricity, each ankle is fitted with an electrode "causing the current to divide and guaranteeing passage through the complete trunk" of the inmate's body.[11]

B. The execution of Harold McQueen.

In preparation for its first electrocution in over 30 years, Kentucky's execution team was trained by officers experienced with executions in Georgia[12] - - a state known for botched electrocutions that had left inmates breathing after the first cycle of electricity.[13] After this training, on July 1, 1997, Kentucky electrocuted Harold McQueen. As the volts of electricity entered his body, McQueen's hands "jerked and balled up into a fist. Smoke rose from the electrodes on his right ankle."[14] The post mortem report detailed second degree burns on his scalp and body, including charred skin with blistering.[15] The gruesome nature of McQueen's execution sparked national and local debate about the use of electrocution.[16]

C. Kentucky's legislative movement away from electrocution.

Within months of McQueen's electrocution, for humanitarian reasons, Kentucky changed its method of execution to lethal injection.[17] In Kentucky, all condemned inmates are now executed by lethal injection, except that inmates sentenced to death prior to March 31, 1998, may choose

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[11] *Id*.
[12] TR I, Vol. I at 86-87 (Bill Estep, *First Kentucky Execution Since 1962 May Come Soon*, Lexington Herald Leader, Dec. 12, 1996).
[13] *See, e.g.*, Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L. J. 1, tb. 8 (2002); Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 412-24 (1997) (Appendix at 39-51); Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 664-74 (1994).
[14] TR 1, Vol. I at 88-91 (Michael Collins, *Chair's First Victim in 35 Years*, The Kentucky Post, July 1, 1997; *accord*, TR 1, Vol. I at 93-95 (Noelle Phillips, *McQueen Executed Death Penalty Carried Out for First Time in 35 Years*, Owensboro Messenger-Inquirer, July 1, 1997).
[15] *See* TR 1, Vol. I at 97-101 (Post mortem examination report on Harold McQueen)(Appendix at 53-58).
[16] *See* TR 1. Vol. I at 103-05 (Associated Press, *Kentucky Ready to Execute Prisoners by Lethal Injection*, The Evansville Courier, July 25, 1998 at A 5).
[17] TR 1, Vol. I at 107-08 (Associated Press, *Lawmaker Wants Lethal Injection Offered as Execution Alternative*, Lexington Herald-Leader, March 15, 1997).

electrocution.[18] Electrocution also remains the method of execution if lethal injection is found unconstitutional.[19]

D. The national movement away from electrocution - - courts find electrocution unconstitutional.

During the past decade, many inmates have suffered extreme pain and mutilation, even though their electrocutions went according to plan.[20] There have also been many botched electrocutions.[21] As a result, states began abolishing electrocution,[22] and, in 1999, the United States Supreme Court granted certiorari to consider the constitutionality of electrocution.[23] The Court dismissed the case when Florida changed its method of execution to lethal injection.[24] Since then, the Georgia Supreme Court and a federal district court in Nebraska, applying evolving standards of decency, have held that electrocution is cruel and unusual.[25]

E. The history of lethal injection.

In 1977, Oklahoma became the first state to adopt lethal injection.[26] Oklahoma adopted a two-drug cocktail of sodium thiopental and potassium chloride, which it mistakenly characterized as a "paralytic agent."[27] Texas and many other states --including Kentucky-- followed suit, adopting

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[18] K.R.S. §431.220.
[19] K.R.S. §431.223.
[20] *See, e.g.*, Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L. J. 1, tb. 8 (2002); Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 412-24 (1997) (Appendix at 39-51); Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 664-74 (1994).

[21] *Id*.
[22] *See, e.g.*, Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L. J. 1, 85-86, tb. 3 (2002).

[23] *Bryan v. Moore*, 528 U.S. 960 (1999).
[24] *Bryan v. Moore*, 528 U.S. 1133 (2000)(dismissing the grant of certiorari); Fla Stat. § 922.105 (changing the method of execution to lethal injection).
[25] *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001), *Palmer v. Clarke*, 293 F.Supp.2d 1011, 1065-66 (D. Neb. 2003) (overruled on procedural grounds in *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005). The *Palmer* Court held that the challenge to electrocution was not ripe, but stated, *in dicta*, that electrocution violates the 8th Amendment. *Palmer*, 293 F.Supp.2d at 1064-65.

[26] TR, 2, Vol. V at 685 (Order denying declaratory judgment at 2) (Appendix at 7); Tape 7; 4/18/05; 10:05:04 (Test. of Prof. Denno).
[27] TE Plaintiffs' Exhibit 7 (Oklahoma's original lethal injection protocol) (Appendix at 287-92); Tape 7;

sodium thiopental and potassium chloride from Oklahoma, and adding a true paralytic agent -- pancuronium bromide-- based on misunderstanding Oklahoma's protocol.[28] As recognized by the court below, after Oklahoma adopted its protocol:

> …there is scant evidence that ensuing States' adoption of lethal injection was supported by any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods…..States simply fell in line relying solely on Oklahoma's protocol…. Kentucky is no different.[29]

New Jersey, however, does not use a paralytic agent.[30]

F. The lethal injection chemicals.

Sodium thiopental is an ultra-short acting barbiturate,[31] administered to render hospital patients unconscious prior to giving them a longer-acting sedative.[32] Long replaced in medical settings by a safer, easier drug to administer,[33] thiopental has little to no pain relieving qualities,[34] and begins to wear off in minutes.[35] It does not cause death when administered with potassium chloride.[36]

The second chemical, pancuronium bromide, is banned for use in euthanizing animals in numerous states --including Kentucky.[37] Pancuronium is a long-acting neuromuscular blocking agent that paralyzes all voluntary muscles.[38] It makes people appear motionless and asleep even if they are

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4/18/05; 10:10:50 (Test. of Prof. Denno).
[28] Tape 7; 4/18/05; 10:08:40 (Test.of Prof. Denno).
[29] TR 2, Vol. V at 685 (Order denying declaratory judgment at 2) (Appendix at 7).
[30] Tape 7; 4/18/05; 10:10:39 (Test. of Prof. Denno).
[31] TR 2, Vol. V at 691 (Order denying declaratory judgment at 8) (Appendix at 13).
[32] Tape 10; 4/20/05; 1:28:16 (Test. of Dr. Heath).
[33] *Id*. at 1:49:40.
[34] *Id*. at 1:26:51; 1:53:45.
[35] *See, e.g.*, Tape 9; 4/19/05; 12:32:34 (Test. of Dr. Haas).
[36] Tape 10; 4/20/05; 2:03:24; 2:04:06 (Test. of Dr. Heath).
[37] Fla. Stat. §§ 828.058 and 828.065; Ga. Code Ann. § 4-11-5.1; Me.Rev.Stat. Ann. tit. 17, § 1044); Md.Code Ann., Criminal Law, § 10-611; Mass.Gen.Laws § 140:151A; N.J.S.A. 4:22-19.3; N.Y.Agric. & Mkts § 374; Okla. Stat., Tit. 4, § 501; Tenn.Code Ann. § 44-17-303; and, Tex. Health & Safety Code, § 821.052(a). In 1998, Kentucky became one of many states that implicitly banned such practices. K.R.S. section 312.181 (17) and KAR 16:090 section 5(1). The other states that implicitly ban using a sedative in conjunction with a neuromuscular blocking agent for euthanasia are: Conn. Gen.Stat. § 22-344a; Del.Code Ann., Tit. 3, § 8001; 510 Ill. Comp. Stat., ch. 70, § 2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Missouri 2 CSR 30-9.020(F)(5); R.I. Gen. Laws § 4-1-34; and, S.C. Code Ann. § 47-3-420.
[38] *See, e.g.*, Tape 10; 4/20/05; 1:31:35 (Test. of Dr. Heath); Tape 13; 5/20/05; 10:07:10 (Test. of Dr. Dershwitz).

conscious and suffering extreme pain.[39] It does not relieve pain or cause death when given with potassium chloride.[40]

The final chemical, potassium chloride, stops the heart and causes death.[41] It also causes violent convulsions and an extreme burning sensation in every nerve of the body.[42] Alternative chemicals that cause death with far less risk of pain and suffering are available.[43]

G. **Kentucky's lethal injection process.**

Kentucky's DOC embraced the same tri-chemical cocktail used in other states, adopting a protocol that calls for administering --in succession-- 3 grams of sodium thiopental,[44] 25 milligrams of saline,[45] 50 milligrams of pancuronium bromide, 25 milligrams of saline, and 240 milliequivalents of potassium chloride. Kentucky's Department of Corrections, "did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned."[46]

Kentucky's protocol provides that outside the view of any witness, and without supervision, a secret IV team mixes the chemicals, and straps the prisoner to a gurney.[47] Next, the secret team inserts two IV's, attempting first to place these in the prisoner's arms.[48] If that fails, the team spends up to 60 minutes attempting to insert the IVs in any location other than the neck.[49] Once the I.V.'s are inserted, the team retreats to a concealed chamber, and then the curtains open. Witnesses may now see the prisoner, who is strapped spread-eagled on the gurney with two IV's sticking out , each connected to a

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[39] *Id*.
[40] Tape 10; 4/20/05; 1:55:57; 2:03:24 (Test. of Dr. Heath).
[41] *Id*. at 2:03:24.
[42] *Id*. at 2:01:29.
[43] *Id*. at 1:46:40; 2:34:48.
[44] Appellees increased the dose of thiopental from 2 grams to 3 grams during this litigation.
[45] The saline solution is used to flush the I.V. line. It has no impact on the human body.
[46] TR 2, Vol. V at 689 (Order denying declaratory judgment at 6) (Appendix at 11).
[47] TE Plaintiffs' Exhibit 8 (Kentucky's lethal injection protocol); TE Plaintiffs' Exhibit 1 (December 14, 2004 revisions to Kentucky's lethal injection protocol).
[48] *Id*.
[49] TE Plaintiffs' exhibit 1 (December 14, 2004 revisions to Kentucky's lethal injection protocol); Tape 8; 4/18/05; 3:12:00 (Test. of Der. Rees); Tape 9; 4/19/05; 10:17:20 (Test. of Def. Haeberlin).

long hollow plastic tube that extends through a wall to the secret control chamber.[50] On the warden's signal, the executioner pushes the plungers, attempting to deliver the chemicals to the prisoner in the other room.[51]

Unfortunately, Kentucky's chemicals and protocol do not produce a quick and painless death. Sodium thiopental does not relieve pain,[52] is difficult to mix,[53] and wears off quickly.[54] Pancuronium neither relieves pain nor causes the prisoner's death.[55] Worse, by paralyzing the prisoner, pancuronium bromide casts a veil over the proceedings, making it difficult to monitor for consciousness and pain. Also, pancuronium causes the agony of suffocation.[56] The third chemical, potassium chloride, causes violent convulsions as it sears through all the veins like "the fires of hell."[57]

The Department of Corrections could check to make sure an inmate is under surgical anesthesia before administering pancuronium bromide and potassium chloride, but they refuse to do so.[58] In Kentucky, an EKG monitor is present outside the execution chamber to determine death, but not for any other purpose.[59] Properly trained personnel could use the EKG monitor, in conjunction with other equipment, to determine if a person is conscious prior to injecting the second and third chemicals.[60] Neither the necessary equipment nor individuals properly trained to monitor consciousness are used during Kentucky lethal injections.[61]

In addition, at any point until death is pronounced, a stay of execution could be granted. If so, DOC would be required to take all reasonable steps to reverse the effects of the chemicals. The first two

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[50] TE Plaintiffs' Exhibit 8 (Kentucky's lethal injection protocol); TE Plaintiffs' Exhibit 1 (December 14, 2004 revisions to Kentucky's lethal injection protocol).
[51] TE Plaintiffs' Exhibit 8 (Kentucky's lethal injection protocol); TE Plaintiffs' Exhibit 1 (December 14, 2004 revisions to Kentucky's lethal injection protocol).
[52] Tape 10; 4/20/05; 1:26:51; 1:53:45 (Test. of Dr. Heath).
[53] *Id*. at 1:49:56.
[54] *See*, *e.g.*, Tape 9; 4/19/05; 12:32:34 (Test. of Dr. Haas).
[55] Tape 10; 4/20/05; 1:55:57; 2:03:24 (Test. of Dr. Heath).
[56] *Id*. at 1:35:20.
[57] *Id*. at 2:01:29.
[58] "Surgical anesthesia" is the level of unconsciousness at which a person will not wake due to painful stimuli. Tape 11; 4/21/05; 10:17:30 (Test. of Dr. Watson).
[59] Tape 9; 4/19/05; 10:11:30 (Test. of Def. Haeberlin).
[60] Tape 10/ 420/05; 1:39:00 (Test. of Dr. Heath).
[61] TR 2, Vol. V at 692 (Order denying declaratory judgment at 9) (Appendix at 14)..

chemicals are easily reversible by properly trained medical personnel provided with the proper equipment.[62] But, undisputed trial testimony shows that the necessary equipment is not on site during the execution,[63] and that any life-saving measures will be performed not by a practicing physician, but by a psychiatrist.[64]

H. Kentucky's only lethal injection - - Edward Harper.

On May 25, 1999, the first chemical in Kentucky's tri-chemical cocktail –sodium thiopental-- started flowing into Harper's veins at 7:16 p.m..[65] He was still alive three minutes later, at 7:19 p.m., when he received the suffocating, paralyzing pancuronium bromide.[66] He was still alive, and paralyzed, one minute after that, at 7:20 p.m., when the third chemical, potassium chloride, seared into his bloodstream.[67] And it took another full minute more for the paralyzed Harper to die, finally, at 7:21 p.m..[68] Two minutes --one hundred and twenty seconds-- of living hell.

Monitoring Harper to ensure a state of surgical anesthesia --and, if necessary, giving more thiopental prior to injecting pancuronium and potassium chloride-- would have eliminated the risk that Harper could wake and endure moments of agony. But no one monitored Harper.

The fact that Harper's execution involved a high risk of pain is underscored by Harper's toxicology results, which indicate how much anesthetic was actually delivered to Harper's bloodstream. Kentucky's Chief Medical Examiner, Dr. Tracy Corey, testified that she drew blood from the most reliable locations for determining post mortem concentrations of sodium thiopental –the vena cava and the axillary vein.[69] Kentucky's Chief Toxicologist, Mike Ward, testified that he determined there was

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[62] Tape 9; 4/19/05; 12:16:44 (Test. of Dr. Haas); Tape 10; 4/20/05; 2:15:18 (Test. of Dr. Heath).
[63] *Compare*, TE Plaintiffs' Exhibit 28 (list of equipment on Banyon Stat Kit 700 crash cart) (Appendix at 398); *with*, Tape 13; 5/2/05; 11:19:24 (Test. of Dr. Dershwitz).
[64] Tape 9; 4/19/05; 10:21:30 (Test. of Def. Haeberlin); Tape 9; 4/19/05; 12:13:30 (Test. of Dr. Haas).
[65] TE Plaintiffs' Exhibit 3 (Chemical Disposition form and body diagram of Harper listing times chemicals were injected) (Appendix at 196); TE Plaintiffs' Exhibit 5 (EKG of Harper during his execution); Tape 10; 4/20/05; 2:10:08-2:15:17 (Test. of Dr. Heath).
[66] *Id.*
[67] *Id.*
[68] TE Plaintiffs' Exhibit 5 (EKG of Harper during his execution); Tape 10; 4/20/05; 2:11:57; 2:15:00 (Test. of Dr. Heath).
[69] Tape 8; 4/18/05; 2:23:33 (Test. of Dr. Corey); Tape 11; 4/21/05; 10:20:20 (Test. of Dr. Watson).

between 3 to 6.5 mg/L of sodium thiopental in Harper's blood[70] -- well below the 35 mg/L of thiopental necessary to ensure that a person will not wake from painful stimuli.[71] Autopsies from other states have produced similarly disturbing low levels of sodium thiopental,[72] indicating that Kentucky's tri-chemical cocktail often produces the agony of suffocation and the burning "fires of hell."

I. **Procedural History.**

Baze and Bowling filed suit on August 9, 2004, seeking a declaration that both electrocution, and the chemicals and procedures Kentucky uses for lethal injections, violate the cruel and unusual punishment clause of the 8th Amendment of the United States Constitution and § 17 of the Kentucky Constitution.[73] Relying on *Nelson v. Campbell*,[74] the circuit court dismissed the electrocution claim as improperly filed as a civil action.[75]

But the circuit court denied the motion to dismiss the lethal injection claim, and permitted discovery.[76] Sixteen depositions were taken. Interrogatories were conducted, and documents produced. Appellees attempted to put an end to the litigation by scheduling Bowling's execution for November 30, 2004. The lower court, however, refused to permit this litigation to be mooted out by a party's execution. On November 23, 2004, the lower court granted an injunction, stating that the "substantial issue [of the] constitutionality of Kentucky's manner of effecting execution by lethal injection" must be addressed so "the citizens of Kentucky can be assured that their government's duty and responsibility of enforcing a death sentence is being administered in a constitutionally proper manner."[77] Appellees did not appeal. Instead, they changed their lethal injection protocol.

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[70] Tape 8; 4/18/05; 2:56:15 (Test. of Michael Ward).
[71] TE Plaintiffs' Exhibit 29 (Disposition of Toxic Drugs and Chemicals in Man) (Appendix at 393-96); Tape 13; 5/2/05; 11:25:27 (Test. of Dr. Dershwitz); Tape 8; 4/18/05; 2:54:50 (Test. of Michael Ward); Tape 11; 4/21/05; 10:17:30 (Test. of Dr. Watson).
[72] TE Plaintiffs' Exhibit 19 (Toxicology results from inmates executed in South Carolina) (Appendix at 312-70); TE Plaintiffs' Exhibit 20 (Toxicology results from inmates executed in North Carolina) (Appendix at 372-91); Tape 11; 4/21/05; 11:28:10 (Test. of Dr. Watson).
[73] TR 1, Vol. I at 1-33 (Complaint for Declaratory Judgment and Injunctive Relief).
[74] 541 U.S. 637 (2004).
[75] TR 1, Vol. VII at 940 (Order dismissing electrocution claim, dated 10/13/04, at 2) (Appendix at 3).
[76] *Id*.
[77] TR 2, Vol. I at 40 (Order and Opinion granting temporary injunction barring Bowling's execution, dated Nov. 23, 2004) (Appendix at 24).

They added a crash cart with inadequate equipment to be operated by a psychiatrist, changed their protocol to require spending 60 minutes attempting to insert two I.V.'s before determining that it cannot be done, and increased the amount of thiopental from 2 to 3 grams.[78] Appellees did not consult any medical personnel about changing the dosage of sodium thiopental from 2 grams to 3 grams,[79] or about the other changes they made to the protocol.[80]

The first trial in the country on the chemicals and procedures used in lethal injections began in Franklin Circuit Court on April 18, 2005, and concluded on May 10, 2005. Appellants presented 18 witnesses, including three experts, and Appellees presented two.[81] On July 8, 2005, the circuit court held that an I.V. needle could not be inserted in the neck, but denied all other claims.[82]

ARGUMENT

[78] TE Plaintiffs' Exhibit 1 (December 14, 2004, revisions to Kentucky's lethal injection protocol).
[79] TR 2, Vol. V at 689-90 (Order denying declaratory judgment at 6-7) (Appendix at 11-12).
[80] *See, e.g.*, Tape 8; 4/18/05; 3:12:44 (Test. of Def. Rees).
[81] Appellants presented the expert testimony of Professor Deborah Denno, the leading expert in the country on lethal injection procedures and protocols; Dr. Mark Heath, an anesthesiologist and Professor at Columbia University Medical School; Dr. William Watson, a Doctor of Pharmacy and the head of Toxico Surveillance for the federal government. Appellants also presented testimony from the following individuals: Dr. Tracey Corey (Chief Medical Examiner for the Commonwealth of Kentucky and the person who drew blood from Edward Harper after he was executed by lethal injection in Kentucky); Michael Ward (Chief Toxicologist in the Commonwealth of Kentucky and the person who conducted the toxicology analysis on Harper's blood); Tom Campbell (Deputy Commissioner for Adult Institutions when Harper was executed); William Henderson (Deputy Warden in the execution chamber with Harper during his execution); Philip Parker (Warden in the execution chamber with Harper when he was executed, and the person who drafted Kentucky's lethal injection protocol); Defendant John Rees (Commissioner for the Kentucky Department of Corrections, who was one of the people who drafted the first lethal injection protocol in the country, and the person who unilaterally changed Kentucky's lethal injection protocol during litigation in this case); Defendant Glenn Haeberlin (Warden at Kentucky State Penitentiary. After the conclusion of the trial, he was replaced by Tom Simpson); Richard Pershing (Deputy Warden who will be present in the execution chamber with the Appellants when they are executed); Dr. Steve Hiland) (Physician at Kentucky State Penitentiary, where executions are carried out); Dr. Scott Haas (Psychiatrist who is the Medical Director for the Department of Corrections); Nurse John Wood (Nurse Service Administrator at Kentucky State Penitentiary); Carol Weihrer (woman who suffered through conscious paralysis during surgery); Dr. Rafi (Physician employed by the Department of Corrections who will conduct physical examinations of Appellants in the days and weeks leading up to their executions); Nancy Doom (Deputy Warden at Kentucky State Penitentiary); and, Joe Stuart (Deputy Warden at Kentucky State Penitentiary).

Appellees presented the testimony of Dr. Mark Dershwitz (anesthesiologist); and, Defendant John Rees (Commissioner for the Kentucky Department of Corrections).
[82] TR 2, Vol. V. at 684 (Order denying declaratory judgment) (Appendix at 6).

Standard of review

The burden of proof in declaratory judgment actions is preponderance of the evidence.[83] On appeal, findings of fact are to be set aside if they are clearly erroneous.[84] If further pleadings or proof are necessary, the Court may grant a remand.[85] Conclusions of law are reviewed de novo.[86]

The constitutional standard for determining if a punishment is cruel and unusual.

A punishment (or a particular aspect of a punishment) is cruel and unusual in violation of § 17 of the Kentucky Constitution and the 8th Amendment to the United States Constitution if one of five criteria is satisfied: [87] 1) the physical pain inflicted is excessive; 2) the risk of pain is more than the Constitution tolerates; 3) the risk of pain and suffering is unnecessary in light of available alternatives; 4) the means for carrying out the execution mutilates the body; or, 5) the means for carrying out the execution violate the evolving standards of decency.

A. excessive pain

A punishment is cruel when it involves "something more than the mere extinguishment of life," such as "torture or a lingering death."[88] Degree of suffering, not duration, is the important inquiry. Extreme pain during moments of consciousness renders an aspect of an execution procedure unnecessarily cruel.[89] Suffering for as little as twenty seconds has been considered excessive.[90] The

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[83]TR 2, Vol. V at 688 (Order denying declaratory judgment at 5) (Appendix at 10), *citing*, *Woods v. Commonwealth*, 142 S.W.3d 24, 43 (Ky. 2004).

[84] Kentucky Rules of Civil Procedure, Rule 52.01.

[85] K.R.S. §418.065.

[86] *Wheeler & Clevinger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 612 (Ky. 2004), *citing*, *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998) (stating that "[w]e review questions of law de novo, and, thus, without deference to the interpretation afforded by the circuit court").

[87] This Court regards the variation in phraseology between the 8th Amendment and the Kentucky Constitution as "a distinction without a difference." *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003). Thus, Appellants are referring to both the cruel and unusual punishment clause under §17 of the Kentucky Constitution and the cruel and unusual punishment clause of the 8th Amendment to the United States Constitution each time Appellants mention the 8th amendment, the Kentucky Constitution, or cruel and unusual punishment.

[88] *In re Kemmler*, 136 U.S. 436, 447 (1890).

[89] *See Fierro v. Gomez*, 865 F.Supp. 1387, 1410 (N.D. Cal. 1994), *remanded on other grounds by*, *Gomez v. Fierro*, 519 U.S. 918 (1996).

[90] *See Palmer v. Clarke*, 293 F.Supp.2d 1011, 1064-66 (D. Neb. 2003), *overruled on other grounds by*, *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005); *see also, Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994)

excessive pain prohibition also addresses more than the level of pain. It also bars pain that is "purposeless and needless,"[91] or "without penological justifications."[92]

B. unnecessary risk of pain and suffering

The 8th Amendment to the United States Constitution also "forbids the infliction of unnecessary pain in the execution of the death sentence."[93] In determining whether a punishment constitutes "unnecessary" pain or creates an "unnecessary" risk of pain and suffering, a court must judge the cruelty of the method of execution in light of currently available alternatives.[94] Any risk of pain is unnecessary if a viable alternative that poses less risk of pain and suffering exists.

C. risk of pain that is more than the Constitution tolerates

Courts applying the 8th Amendment do not focus on ugly isolated instances. Rather, they focus on procedures in general. The inquiry is whether the challenged procedure is adequately designed and implemented to avoid undue risk of pain and suffering.[95] An aspect of an execution procedure that poses too great a risk of pain is unconstitutional regardless of whether alternatives exist.

D. mutilation of the body.

The cruel and unusual punishment clause also prohibits mutilation, because "[t]he basic premise underlying the Eighth Amendment is nothing less than the dignity of man."[96] "Civilized standards . . . require a minimization of physical violence during execution irrespective of the pain that such violence

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(suggesting that one and a half minutes of suffering constitutes cruel and unusual punishment).

[91] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *accord Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding that the 8th Amendment prohibits punishments that "involve the unnecessary and wanton infliction of pain").

[92] *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (*quoting Gregg*, 428 U.S. at 183; *citing Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968) (holding that a punishment is cruel and unusual when "it exceeds any legitimate penal aim").

[93] *Francis*, 329 U.S. at 463; *accord*, *Gregg*, 428 U.S. at 173.

[94] *Workman*, 429 S.W.2d at 378 (a cruel and unusual punishment approach "should always be made in light of developing concepts of elemental decency.").

[95] *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (the inquiry is whether the procedures pose an "objectively intolerable risk of harm"); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the 8th Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of" to be more than the Constitution tolerates); *Campbell*, 18 F.3d at 687 (holding that an 8th Amendment challenge to a method of execution must be considered in terms of the risk of pain).

[96] *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

might inflict on the condemned. Similarly, basic notions of human dignity command that the State minimize mutilation and distortion of the condemned prisoner's body."[97] When unnecessary pain or mutilation occurs so frequently that it becomes "inherent in the method of punishment," the cruel and unusual punishment clause is violated.[98]

E. evolving standards of decency.

The cruel and unusual punishment clause has an "expansive and vital character."[99] Thus the clause has been interpreted "in a flexible and dynamic manner,"[100] consistent with "evolving standards of decency that mark the progress of a maturing society,"[101] evaluated "in light of contemporary human knowledge,"[102] and "informed by objective factors.'"[103]

Objective factors include historical evidence, the consensus of the international community, and legislative developments within the states.[104] "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[105] But the number of states enacting legislation is not as important as the "consistency of the direction of change."[106] When an aspect of a punishment violates the evolving standards of decency, it constitutes cruel and unusual punishment.[107]

PART I – ELECTROCUTION

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[97] *Glass*, 471 U.S. at 1085 (Brennan, J. dissenting); *see Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (noting that disembowelment, public dissection, burning alive, and drawing and quartering are unnecessarily cruel).
[98] *Francis*, 329 U.S. at 464.
[99] *Weems v. United States*, 217 U.S. 349, 373 (1909).
[100] *Stanford v. Kentucky*, 492 U.S. 361, 371 (1989), *overruled on other grounds by*, *Roper v. Simmons*, 125 S.Ct. 1183 (2005).
[101] *Simmons*, 125 S.Ct. at 1190; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002);*Trop*, 356 U.S. at 101; *accord Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).
[102] *Robinson v. California*, 370 U.S. 660, 666 (1962).
[103] *Atkins*, 536 U.S. at 312-316; see *also*, *Roper v. Simmons*, 125 S.Ct. 1183 (2005); *Enmund v. Florida*, 458 U.S. 782, 786-88 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[104] *Atkins*, 536 U.S. at 312-16; *see also*, *Simmons*, 125 S.Ct. at 1198-1200 (acknowledging international law as reflective of the evolving standards of decency); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (recognizing that international law is a legitimate factor for this Court to consider as an indicator of contemporary standards)
[105] *Atkins*, 536 U.S. at 312 (*quoting Penry*, 492 U.S. at 331).
[106] *Id.* at 315.
[107] *Simmons*, 125 S.Ct. 1190, *citing*, *Trop*, 356 U.S. at 100-01.

I. Electrocution constitutes cruel and unusual punishment in violation of the 8th Amendment to the United States Constitution and § 17 of the Kentucky Constitution.

This entire claim including all subparts is PRESERVED at TR 1, Vol.. 1 at 23-26, 28-29, 37-81; TR 1, Vol. 7 at 939-941.

Evolving standards of decency -- as reflected by legislative trends, international law, and the rarity of electrocutions - - compel the conclusion that electrocution is no longer constitutionally acceptable. The mutilation, burning, and grotesque physical indignities that routinely accompany electrocution violate human dignity.[108] Scientific research and eyewitness observations confirm that electrocution causes a lingering death whereby the inmate suffers far more pain and suffering than the "mere extinguishment of life."[109] Finally, the large number of botched executions demonstrate a risk of unnecessary pain inherent in electrocution that is more than contemporary society tolerates.[110]

A. Execution by electrocution violates "evolving standards of decency."

The parameters of the cruel and unusual punishment clause are flexible, and change with the times.[111] The meaning of cruel and unusual changes "as public opinion becomes more enlightened by a humane justice."[112] That is, the cruel and unusual punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[113]

Standards of decency are measured by objective factors, including legislative attitudes towards a

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[108] *See Weems*, 217 U.S. at 377; *Trop*, 356 U.S. at 100
[109] *See Francis*, 329 U.S. at 463; *Kemmler*, 136 U.S. at 437.
[110] *See*, *e.g.*, TR 2, Vol. II at 226 (Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 Ohio St. L. J. 1, 89 (2002) (discussing emergency legislation to abolish electrocution in Ohio passed at the urging of the Department of Corrections due to concerns over potential problems when an chose electrocution over lethal injection).

[111] *See Weems*, 217 U.S. at 378; *McQueen v. Parker*, 950 S.W.2d 226, 227 (Ky. 1997) (recognizing that the constitutionality of electrocution under evolving standards of decency can be revisited).
[112] *Weems*, 217 U.S. at 378.
[113] *Trop*, 356 U.S. at 101.

particular punishment (reflected by the number of states using the penalty and current trends for and against it) and the consensus of the international community.[114] Since the first electrocution was carried out in 1890, this country has had more than 100 years to experiment with methods of execution. By now, society recognizes that electrocution is not the painless, dignified method of execution that it was supposed to be when it was first hailed as the humane replacement for hanging.

1. By an overwhelming majority, state legislatures have established a national consensus against judicial electrocution.

The primary indicator of a society's standard of decency is its legislature's response to forms of punishment.[115] The legislative consensus against judicial electrocution is broad and deep.

In 1949, 26 states used electrocution.[116] Since 1949, however, no state legislature has selected electrocution as a method of execution.[117] Only one state, Nebraska, still utilizes electrocution as the sole method of execution.[118] Only six states allow inmates to select electrocution.[119] These numbers demonstrate an enormous consensus (larger than in any case where the United States Supreme Court has found a national consensus) that electrocution violates evolving standards of decency. In addition, the "consistency of the direction of change" and the reasons for these changes provide insurmountable evidence that electrocution is no longer an acceptable method of execution.[120]

In the past decade, humanitarian concerns have prompted 10 states - -including Kentucky - - to drop electrocution as the sole method of execution.[121] Yet, Kentucky has retained electrocution as an

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[114] *Atkins*, 536 U.S. at 312-16; *Thompson*, 487 U.S. at 838 (recognizing that a comparison to Western nations is a good indicator of whether a particular situation conforms with evolving standards of decency).
[115] *Atkins*, 536 U.S. at 312; *Penry*, 492 U.S. at 331; *Stanford*, 492 U.S. at 370-71
[116] Denno, *Getting to Death*: *Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 365 (1997).
[117] *Id*.
[118] TR 1, Vol. III at 419 (*Methods of Execution*, Death Penalty Information Center, *available at*, www.deathpenaltyinfo.org/article.php?scid=8&did=245).
[119] *Id*.
[120] *Cf*., *Atkins*, 536 U.S. at 315.
[121] The ten states that, since 1994, dropped electrocution as a sole method of execution are: ALA. CODE § 15-18-82 (2002); CONN. GEN. STAT. §54-100 (a) (1995); FLA. STAT. ANN. § 922.105 (1) (2000); GA. CODE ANN. § 17-

option for inmates sentenced to death before March 31, 1998, and as the sole method of execution if lethal injection is found unconstitutional.[122] A year later, when the United States Supreme Court granted certiorari to determine if electrocution constitutes cruel and unusual punishment,[123] Florida immediately replaced electrocution with lethal injection, mooting out the case.[124] Less than a month later, the Court denied a petition for an original writ of habeas corpus challenging electrocution under the 8th Amendment— the writ fell one vote shy of being granted[125.] Five votes are necessary to grant hearing on an original writ of habeas corpus. Four Justices would have heard the case. Nonetheless, the message that the Court might declare electrocution unconstitutional has been heard loud and clear.

In 2001, Georgia provided the option of lethal injection,[126] and in 2002, Alabama replaced electrocution with lethal injection.[127] This leaves Nebraska as the only state requiring electrocution in all circumstances.[128] The consistency of the direction of change in a short period of time makes it clear that a national consensus has emerged rejecting electrocution.[129]

The current national consensus against electrocution far exceeds the standard enunciated by the United States Supreme Court to trigger the protection of the 8th Amendment. In striking down the death penalty for the mentally retarded, the Court relied on the fact that 18 states, including many in the past few years, had abolished the death penalty for the mentally retarded.[130] Earlier, the Court struck down

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10-38 (a) (2000), IND. CODE § 35-38-6-1 (a) (1995); K.R.S. § 431.220 (1)(a)-(1)(b) (1998); 1995 N.Y. LAWS 1 § 32 (1995); S.C. CODE § 24-3-530 (1995); TENN. CODE ANN. § 40-23-114 (1998); and VA CODE ANN. § 53.1-234 (1995).

[122] K.R.S. § 431.220 (1)(a)-(1)(b) (1998); K.R.S. §431.223. Although six other states provide condemned inmates the option to choose electrocution, Georgia and South Carolina are the only other states that have created the default method of electrocution for inmates sentenced before a specific date who fail to affirmatively select lethal injection. This portion of Georgia's execution statute was struck down in *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001), where the court ruled that electrocution violates the 8th Amendment.

[123] *Bryan v. Moore*, 528 U.S. 960 (1999).

[124] *Bryan v. Moore*, 528 U.S. 1133 (2000); FLA.. STAT.. ANN. § 922.105(1).

[125] *In re Tarver*, 528 U.S. 1152 (2000).

[126] GA. CODE ANN. § 17-10-38 (a).

[127] ALA. CODE § 15-18-82.

[128] NEB. REV. STAT. § 29-2532.

[129] *See Dawson v. State*, 554 S.E.2d 137 (Ga. 2001); and *Palmer v. Clarke*, 293 F.Supp.2d 1011, 1064-66 (D. Neb. 2003) (relying on the consistent move away from electrocution).

[130] *Atkins*, 536 U.S. at 314-15.

the death penalty for certain kinds of felony murder, explaining that of the 36 death penalty jurisdictions, only 8 allowed capital punishment for such an offense.[131] The Court has also struck down capital punishment for the rape of an adult woman, on the basis that only 3 states imposed such a sentence for either raping an adult or a child.[132] Further, the Court found the mandatory death penalty to be cruel and unusual punishment because only 10 jurisdictions had mandatory death penalty laws.[133] Finally, just last term, the United States Supreme Court struck down the death penalty for juveniles partly because 18 death penalty jurisdictions had already outlawed the juvenile death penalty.[134]

Regarding electrocution, the national consensus is much greater. Today, only one of the 26 states that utilized electrocution in 1949 still uses electrocution as the sole method of execution. In the past decade, 10 states have abolished electrocution. This consistency in change, along with the fact that no state that has forsaken electrocution has returned to it, demonstrates that electrocution no longer comports with contemporary standards of decency.

2. The international community has unanimously rejected electrocution as a form of punishment.

The current international consensus against electrocution is as strong if not stronger than the consensus that previously led the United States Supreme Court to outlaw other forms of punishment. In *Trop v. Dulles*,[135] the Court held that denaturalizing a person court-martialed for desertion amounts to cruel and unusual punishment. Relying on the fact that only 2 of 84 nations imposed denaturalization as a sanction for desertion, the Court found that "the civilized nations of the world are in virtual unanimity" against the punishment.[136] In striking down the death penalty for rape, the Court noted that only 3 of 60 nations in the world surveyed in 1965 authorized death under such circumstances.[137] Finally, the Court

[131] *Enmund v. Florida*, 458 U.S. 782 (1982).
[132] *Coker*, 433 U.S. at 594.
[133] *Woodson v. North Carolina*, 428 U.S. 280, 298-99 (1976).
[134] *Simmons*, 125 S.Ct. at 1192.
[135] 356 U.S. 86 (1958)
[136] *Id.*
[137] *Coker*, 433 U.S. at 596 n.10.

struck down the death penalty for juveniles partly because of the "stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[138]

As with the juvenile death penalty, we find ourselves alone. Today, the United States is the only country that electrocutes its citizens to death.[139] Because the civilized nations of the world "are in virtual unanimity" in opposing this method of execution, this Court should find that electrocution offends modern standards of decency.[140]

B. Mutilation of the body during an electrocution offends the "dignity of man."[141]

Throughout American history, mutilation of the body has been condemned as violating the "dignity of man." A New York Herald editorial published in 1884 called for an end to the gallows because "[s]cience stands ready to provide Justice with a number of perfectly expeditious, neat and non-disfiguring homicidal methods. It is quite easy to devise a plan by which the death of a murderer would be instantaneous, and into which neither the horrible nor the grotesque would enter."[142] Electrocution, when it was introduced as a means of execution more than a century ago, was heralded as the scientific solution to the problem of disfiguring spectacles that plagued beheading and hanging. Electrocution, however, has never lived up to its expectation because it also disfigures the human body.

Most electrocutions last longer than seven minutes during which "the prisoner's death is rendered a gruesome spectacle."[143] "Increasingly, there are reports that electrocution involves . . . (b) bodily mutilation and distortion, including third and fourth degree burns to the face and scalp, exploding body parts, and layers of skin melting away so as to reveal bone; and (c) grotesque physical violence indicative of both inhumanity and barbarity."[144] Electrocution also causes drooling, vomiting blood,

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[138] *Simmons*, 125 S.Ct. at 1198.
[139] *Provenzano v. Moore*, 744 So.2d 413, 440 (Fla. 1999) (Shaw, J., dissenting). Only Nebraska uses electrocution as its sole method of execution. NEB. REV. STAT. §29-2532; TR I at 419. And only South Carolina requires electrocution (for inmates sentenced prior to June 8, 1995) when the inmate declines to "select" the manner of his death. S.C. CODE §24-3-530.
[140] *Simmons*, 125 S.Ct. at 1198;T*rop*, 365 U.S. at 103.
[141] *Trop*, 356 U.S. at 100.
[142] New York Herald, Aug. 10, 1884, *quoted in*, C. Brandon, The Electric Chair: An Unnatural American History (McFarland Publishers 1999) at 39.
[143] *Buenoano v. State*, 565 So.2d 309, 311 (Fla. 1990).
[144] *Wilson v. State*, 525 S.E.2d 339, 352 (Ga. 1999)(Sears, J., dissenting).

defecation, and urination.[145] "[E]very electrocution in Florida [was] accompanied by the inevitable convulsing and burning,"[146] as were all electrocutions in Georgia,[147] Nebraska,[148] and the most recent electrocution in Kentucky.[149] "Halo burns" on the scalp that go as deep as the skull, "arcing burns" where the electricity exits and reenters the human body, and "drip burns" are characteristic of executions by electrocution. These burns all occur when the electrocution goes according to protocol as it allegedly did with the execution of Harold McQueen. McQueen's body was marred by first and second degree burns on his skull, other "irregular" electrical burns, and "charred" skin with blistering.[150]

Similar observations were made by Rabbani Muhammad when he examined Leo Jones' body shortly after Jones was electrocuted in Florida. Muhammand saw:

> intense burns caused by the execution. . . . Leo's head was disfigured and swollen. The skin around his right eye was blistered. There was also two deep black burns on Mr. Jones' right leg. The skin in between the legs was blistered and pink flesh was visible on the upper leg burn.

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[145] TR 1, Vol. II at 196 (Dr. Harold Hillman Aff.) (Appendix at 74); *accord*, *Getting to Death*: *Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 359 (1997).

[146] *Provenzano*, 744 So.2d at 431 (Shaw, J., dissenting)

[147] *Dawson*, 554 S.E.2d at 332 ("some degree of burning of the prisoner's body is present in every electrocution"); *see, e.g.*, TR 1, Vol. III at 345-49 (autopsy of Larry Lonchar) (describing burns Lonchar suffered during his electrocution); TR 1, Vol. III at 360-65 (autopsy of John Eldon Smith) (same); TR 1, Vol. III at 368-70 (autopsy of Henry Willis) (same and noting "blistering associated with a lesion toward the mid portion of the distal one half of the right lower leg which is also typical of those documented in previous executions"); TR 1, Vol. III at 372-74 (autopsy of James E. Messer) (describing burns Messer suffered during his execution and noting that the blistering and other marks on the body "are typical in size and shape to those seen in previous executions"); TR 1, Vol. III at 376-78 (autopsy of Ivon Stanley) (describing burns Stanley suffered during his execution).

[148] *State v. Mata*, No. CR 99-52 at 4 (Dist. Ct. Keith County, Neb. May 8, 2000) ("All of the witnesses described burn marks on the inmates where the electrodes were attached to the inmate's body"), TR 1, Vol. III at 380-97; *see also Palmer*, 293 F.Supp.2d at 1065 (describing the burns suffered by electrocuted inmates in Nebraska).

[149] *See* TR 1, Vol. I at 97-101 (Post Mortem Examination Report on Harold McQueen) (Appendix at 53-58).

[150] *See Id*. According to the Madisonville Medical Examiner's Office, more than 100 photos were taken of McQueen's body immediately preceding and after his electrocution. Appellees have refused to disclose these photos. *See* TR 1, Vol. III at 425-26 (Open Records Act request to the Madisonville Medical Examiner's Office, dated July 19, 2004), and, TR 1, Vol. III at 428-29 (Letter in Response to Open Records Act request, dated July 26, 2004, denying request for execution photos of Harold McQueen). This Court can presume that the photos vividly depict the mutilation of McQueen's body.

> Most shockingly, I noticed a hole in his chest directly above the breast bone which had blood flowing from it.[151]

Jesse Tafero, Pedro Medina, and Allen Davis also were mutilated during their electrocutions. Flames spewed from the heads of Tafero and Medina, while the execution of Allen Davis "resulted in a bloody side show--a spectacle more befitting of a 'B' Hollywood movie than a state-sanctioned execution." [152]

"When Tafero's execution began, smoke and flames instantaneously spurted from his head for a distance of as much as twelve inches."[153] A witness described Tafero's body as covered with head wounds including a "dominant charred area and a myriad of smaller gouged, raw areas to the upper right side and lower right of the large burned area . . . The rest of that area was a dark brownish color, slightly lighter than the charred area."[154] Photos of Tafero's body showed "places in which skin appeared to be peeling away from the skull. In addition, most of Tafero's eyebrows and eyelashes had been burned away."[155]

Medina's execution was similar in that "smoke emanated from under the right side of Medina's head piece, followed by a 4 to 5 inch yellow-orange flame."[156] According to the post-mortem examination, Medina's "head had a burn ring on the crown of the head that was common in executions by judicial electrocution. Within the burn ring there was a third degree burn on the crown of the head, with deposits of charred material. . . ."[157]

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[151] TR I, Vol. III at 401-02 (Rabbani Muhammad Aff.) (Appendix at 184-85).

[152] *Provenzano*, 744 So.2d at 450 (Pariente, J., dissenting); *see also*, TR 1, Vol. I at 407-09 (photographs of Allen Davis' body after his electrocution but while still seated in the electric chair - - these photos were attached as an Appendix to the Florida Supreme Court's opinion in *Provenzano*) (Appendix at 28-30).
[153] *Buenoano*, 565 So.2d at 310.
[154] *Id*. at 314 (Kogan, J., dissenting).
[155] *Id*.
[156] *Jones v. Florida*, 701 So.2d 76, 86 (Fla. 1997) (Kogan, C.J., dissenting).
[157] *Id*.

These vivid examples of electrocutions resulting in mutilation are not unique to Florida or Kentucky. Evidence that inmates have caught fire, spurted blood, or been completely charred has also emerged from Alabama, Georgia, Indiana, Louisiana, Nebraska, and Virginia.[158]

Dale A. Baich, who witnessed Nebraska electrocute John J. Joubert had this description of the electrocution:

> Mr. Joubert's head snapped to the back of the electric chair and his feet curved inward, making him look grossly pigeon-toed. . . . Mr. Joubert's skin color changed from blue to red. . . . The color of Mr. Joubert's skin became more red and his fingers remained curled in tight fists. . . . Mr. Joubert's skin color changed from red to purple. . . . Mr Joubert's skin color began to change[] from purple to charcoal. The charcoal color of the hands was darker than the color of Mr. Joubert's head.[159]

Frank Coppola, a Virginia prisoner, was electrocuted as flames engulfed his leg and head.[160] Blood poured from Wilbur Lee Evans' face as he was electrocuted.[161] Wayne Robert Felde, electrocuted in Lousiana, suffered such severe 3rd and 4th degree burns that "chunks of skin had been burned off the left side of his head, revealing his skull bone."[162] Robert Williams, a Louisiana prisoner, was electrocuted as flames erupted and his penis exploded.[163] These examples highlight the grotesque nature of electrocution.

Disfigurement is almost universally recognized as a profound form of degradation and humiliation that is condemned by virtually every culture.[164] In times of political upheaval, opposing factions used disfigurement and mutilation of the dead to terrorize and humiliate their opponents.[165]

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[158] *See* TR 1, Vol. III at 306-25 (descriptions of botched electrocutions) (Appendix at 32-51).
[159] TR 1, Vol. III at 415 (Dale A. Baich Aff.) (Appendix at 191).
[160] Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 665 (1994).
[161] TR 1, Vol. III at 320 (Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 360, 419, Appx. 2 (1997)) (Appendix at 46).
[162] TR 1, Vol. III at 316-17 (*Id*. at 360, 415-16, Appx. 2) (Appendix at 42-43).
[163] TR 1, Vol. III at 314-15 (*Id*. at 413-14) (Appendix at 40-41).
[164] Marina Warner, *No Go the Bogeyman: Scaring, Lulling and Making Mock* 133-134 (Farrar, Strauss and Giroux 1998)
[165] John S. Herbrand, *Validity, Construction, and Application of Statutes Making it a Criminal Offense to Mistreat or Wrongfully Dispose of a Dead Body*, 81 A.L.R. 3d 1071 (1977).

Conversely, most cultures have elaborate burial rituals that scrupulously provide for the careful preservation of the physical integrity of the dead -- a deep-seated human need.[166]

Physical mutilation is cited among the atrocities forbidden in the Supreme Court's early cases.[167] The Florida Supreme Court has conceded that death by guillotine would violate the 8th Amendment, even though probably instantaneous and painless, because it disfigures the inmate.[168] Disfigurement and mutilation have been abhorred throughout history. Now there is evidence showing that electrocution causes the mutilation and disfigurement that it was intended to avoid. Because this mutilation offends the "dignity of man," execution by electrocution is cruel and unusual punishment.

C. As demonstrated by scientific research and eyewitness accounts of electrocutions, execution by electrocution violates the 8th Amendment and §17 of the Kentucky Constitution because it causes a lingering death characterized by excessive pain.

Expert opinion based on scientific research shows that many of the factors associated with electrocution (including severe burning, boiling body fluids, asphyxiation, and cardiac arrest) cause extreme pain when unconsciousness is not instantaneous.[169]

Because the human skull is bone, it insulates the brain from electrical current, preventing voltage from penetrating the brain to cause unconsciousness.[170] Autopsy examinations of persons executed by electrocution show virtually no damage to the brain, thus indicating that the brain is likely not wholly incapacitated during a judicial execution.[171] Studies conducted on accidental electrocution

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[166] *Id*.

[167] *See, e.g.*, *Weems*, 217 U.S. at 372 ("there could be exercise of cruelty by laws other than those which inflicted bodily pain or mutilation"); *Wilkerson*, 99 U.S. at 135 (citing drawing, beheading, quartering, and public dissection as punishments forbidden by the 8th Amendment).

[168] *Provenzano*, 744 So.2d at 449.

[169] TR 1, Vol. II at 184 (Orrin Devinsky, M.D. Aff.) ("Electrocution can be intensely painful") (Appendix at 62); TR 1, Vol. II at 193 (Dr. Harry Hillman Aff.) ("[E]xecution by electrocution is extremely painful") (Appendix at 71); TR 1, Vol. II at 211 (Dr. Donald D. Price, PH.D. Aff.) ("Electrocution in the electric chair is virtually certain to result in sensation of extreme and unimaginable pain") (Appendix at 89); Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 356 (1997)

[170] TR 1, Vol. II at 194 (Dr. Harold Hillman Aff.) (Appendix at 72); Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 639 (1994).

[171] *Palmer*, 293 F.Supp.2d at 1065; *see also*, TR 1, Vol. II at 216 (Donald D. Price, Ph.D. Aff.) (finding that 26 out of 39 autopsy records of individuals executed in the electric chair "were reported as having no gross abnormality of the brain") (Appendix at 94).

and burn victims, along with examinations of electrocuted inmates further support the conclusion that inmates were not only conscious during the electrocution, but suffering extreme pain.

First, autopsy photos show that "the prisoner suffers third and fourth degree burns at the electrode's point of contact . . . . Third and fourth degree burns are excruciatingly painful . . . . Patients with severe burns, who survive, are regularly treated with powerful analgesics for their pain."[172] Second, during an electrocution, "the body fluids must have heated up to a temperature close to the boiling point of water in order to generate the wisps of steam or smoke, which witnesses often note."[173] Third, much smaller voltages of current are used in some countries for torture. Statements from electrocution victims and experiments on volunteers in Denmark have confirmed that the larger the voltage applied, the more painful the torture.[174] Fourth, electrocution victims normally die of asphyxia and cardiac arrest, which causes gasping for breath, and finally death by asphyxia.[175] Finally, the inmate's lack of movement during an execution does not mean that he is unable to feel pain. Rather, "[h]e cannot move because all of his muscles are contracted maximally."[176] This physiological effect, along with the "burning and cooking of body parts," is excruciatingly painful and prevents the prisoner from crying out or providing other outward signs of the massively painful effects of electrocution.[177]

Eyewitness observations of judicial electrocutions also confirm the conclusion that electrocuted inmates consciously suffered extreme pain during lingering deaths. During John Lewis Evans' 14-minute electrocution in Alabama

> sparks and flames erupted from the electrode tied to Mr. Evans' left leg. His body slammed against the straps holding him in the electric chair and his fist clenched permanently . . . . A large puff of greyish smoke and sparks poured out from under the

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[172] TR 1, Vol. II at 194 (Dr. Hillman Aff.) (Appendix at 72); *accord*, Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 637-38 (1994); Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 357(1997).
[173] TR 1, Vol. II at 194-95(Dr. Hillman Aff.) (Appendix at 72-73).
[174] TR 1, Vol. II at 195 (*Id.*).
[175] *Id.*
[176] *Id*.
[177] TR 1, Vol. II at 219 (Donald D. Price, PH.D. Aff.) (Appendix at 97); *accord* TR 1, Vol. II at 195 (Dr. Harold Hillman Aff.) (Appendix at 73); Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 412-24 (1997) (Appendix at 39-51).

> hood that covered Mr. Evans' face . . . . Two doctors examined Mr. Evans and declared that he was not dead . . . . More smoke emanated from his leg and head. Again, the doctors examined Mr. Evans. The doctors reported that his heart was still beating, and that he was still alive.[178]

The extreme pain that Evans suffered while his body cooked is not an isolated incident. Larry Lonchar and Alpha Otis Stephens' executions in Georgia were very similar. Lonchar "certainly seemed to be alive,"[179] as he "moaned . . . and seemed to gasp for air."[180] Stephens'

> body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths . . . two doctors examined him and said he was alive.[181]

Eight minutes elapsed before the second jolt caused Stephens' death.[182] In Nebraska, Harold Otey "was still breathing after the first and second applications of electricity."[183] In Virginia, Wilbert Lee Evans "appeared to give an audible moan or groan when the electricity was first applied," and Derick Lynn Peterson's execution took thirteen minutes because his "heart continued to beat."[184] In Indiana, William Vandiver "continued to breathe after the first two jolts of 2,300-volt current." His execution took seventeen minutes.[185] And in Florida, Jesse Tafero "continued to clench his fists, nod, convulse, and appear to breathe deeply . . . while Tafero's throat produced gurgling sounds."[186] Tafero was not dead

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[178] *Glass*, 471 U.S. at 1091-92 (Brennan, J., dissenting).
[179] TR 1, Vol. II at 260 (Clive A. Stafford Smith Aff.) (Appendix at 137); TR 1, Vol. III at 323-34 (Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 422-23, Appx. 2 (1997)) (Appendix at 49-50).
[180] TR 1, Vol. II at 264 (Rhonda Cook, *Lonchar Dies in Electric Chair for '86 Killings*, Atlanta Journal and Constitution, November 14, 1997) (Appendix at 142).
[181] TR 1, Vol. III at 315 (Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 414, Appx. 2 (1997)) (Appendix at 41); *accord* TR 1, Vol. II at 254 (*The Execution Tapes* (Department of Corrections audio recordings of Georgia electrocutions), *available at*, http://www.soundportraits.org/on-air/execution_tapes/) (Appendix at 131).
[182] TR 1, Vol. III at 315 (Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 414, Appx. 2 (1997)) (Appendix at 41).
[183] *Palmer*, 293 F.Supp.2d at 1065; *accord* , TR 1, Vol. II at 270 (Paula B. Hutchison Aff.) ("I heard a low growling or guttural sound from Mr. Otey's direction, which lasted several seconds. I recall that he was still breathing after the first jolt.") (Appendix at 148).
[184] TR 1, Vol. III at 320-22 (Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 419-21, Appx. 2 (1997)) (Appendix at 46-48).
[185] TR 1, Vol. III at 316 (*Id*. at 415) (Appendix at 42).
[186] TR 1, Vol. III at 318-19 (*Id*. at 417-18) (Appendix at 44-45).

until the third application of electricity.[187] These are only some of the many examples of inmates who were consciously suffering extreme pain during their electrocution.[188]

The scientific evidence and eyewitness accounts of electrocution "show[] that death by electrocution is neither quick nor painless."[189] Rather, the condemned inmate is "conscious, strapped into the chair, [and] paralyzed yet aware of the gruesome burning of his body."[190] As demonstrated by the repeated observations of breathing despite the initial jolts of electricity, the excruciating pain is inherent in electrocution. Thus, execution by electrocution constitutes excessive pain in violation of the cruel and unusual punishment clause of the Kentucky and federal Constitutions.

D. The risk of conscious pain during electrocution is more than the Constitution tolerates.

With each electrocution, there is a risk of pain and suffering that is more than the Constitution tolerates. Because the ability to feel pain is controlled by brainstem function located deep within the insulated brain, electrocution likely does not instantly and permanently destroy the pain centers; thereby, creating a high risk that the condemned inmate will feel the pain of electrocution.[191] If too much current, or too little current reaches the prisoner's brain, the result is excruciating pain.[192]

This risk is increased by the number of botched electrocutions. In the post-*Furman* era,[193] at least 19 of 152 electrocutions were botched --13%, or one out of every 7 to 8 electrocutions.[194] The

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[187] TR 1, Vol. II at 275 (Robert H. Kirschner, M.D. Aff.) (Appendix at 153).
[188] *See* TR 1, Vol. III at 306-25 (descriptions of botched electrocutions) (Appendix at 32-51).

[189] *Palmer*, 293 F.Supp.2d at 1066; *accord*, TR 1, Vol. II at 188 (Orrin Devinsky Aff.) ("There is empirically supported evidence from other forms of electrical injury to the brain that intentional electrocution is a poor means of rapidly executing an individual without pain and suffering.") (Appendix at 66); TR 1, Vol. II at 193 (Dr. Harold Hillman Aff.) ("[E]xecution by electrocution is extremely painful . . . because . . . death is never instantaneous") (Appendix at 71).
[190] Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 640 (1994) (*quoting* Dr. Hillman).
[191] TR 1, Vol. II at 204-21 (Donald D. Price, PH. D. Aff.) (Appendix at 83-100); Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 640 (1994).
[192] *Id*.
[193] *Furman v. Georgia*, 408 U.S. 238 (1972), struck down the death penalty as applied in the United States. Revised death penalty statutes were upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976).
[194] *See* TR 1, Vol. II at 296-300 (*Execution Database*, Death Penalty Information Center, *available at* www.deathpenaltyinfo.org/getexecdata.php); TR 1, Vol. III at 306-25 (descriptions of botched electrocutions).

error rate is so high that with each electrocution, "the courts wait in dread anticipation of some 'unforeseeable accident.'"[195] It is no longer necessary to tolerate the risks involved in discharging high-voltage electric current through the unpredictable pathways of the human body. To continue to accept those risks, now deprived of any "legitimate penological objective,"[196] is unconscionable.

II. Appellants' claim seeking declaratory judgment that electrocution violates §17 of the Kentucky Constitution and the 8th Amendment to the United States Constitution is properly before this Court.

This entire claim including all subclaims is PRESERVED. TR 1, Vol. 1 at 23-26, 28-29, 37-81; TR 1, Vol 7 at 939-941.

Nelson v. Campbell[197] does not bar a civil action challenging a method of execution, nor does Rule 57 of the Kentucky Rules of Civil Procedure.[198] In 1997, this Court said it could reconsider the constitutionality of electrocution on a properly developed record in a case not marred by delay.[199] This Court should now do so.

A. An action seeking declaratory judgment that electrocution is unconstitutional is cognizable in a civil action.

The lower court improperly held that *Nelson* bars civil actions challenging a method of execution.[200] *Nelson* expressly refused to answer whether challenges to lethal injection or electrocution fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to

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[195] *Provenzano v. Moore*, 744 So.2d 413, 417 (Fla. 1999).
[196] *Farmer,* 511 U.S. at 833.
[197] 541 U.S. 637 (2004).
[198] Rule 57 states that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief."
[199] *McQueen v. Parker*, 950 S.W.2d 226, 227 (Ky. 1997).
[200] TR 1, Vol. VII at 940 (Order dismissing electrocution claim at 2, dated 10/13/04) (Appendix at 3).

the conditions of a condemned inmate's death sentence that are properly filed as a civil action.[201] *Nelson* recognizes that a suit seeking to enjoin a particular means of execution does not directly call into question the validity of the sentence because "by simply altering its method of execution, the State can go forward with the sentence."[202] That is the case here. Thus, *Nelson* does not bar Appellants' civil action. To the contary, it appears to condone it. Thus, this Court should reverse the lower court, particularly since no other avenue of relief is available.

Nelson also recognizes that a cause of action must exist when an inmate raises a constitutional challenge to a method of execution based on information not available when the inmate was sentenced to death. The fact that there is a legislative and judicial trend away from electrocution is new information unavailable when Appellants were sentenced to death and when this Court decided *McQueen*. Thus, this Court must provide an avenue for presenting this claim.

B. The United States Supreme Court's 1890 decision on the constitutionality of electrocution is not binding.

The United States Supreme Court upheld the constitutionality of execution by electrocution in *In re Kemmler*,[203] in 1890, and has not revisited the issue. *Kemmler*, however, does not bind this Court today because 1) it did not rely on the 8th Amendment; 2) it was decided prior to an electrocution occurring, and, therefore, before any scientific studies, documentation, and eyewitness observations could be utilized to show the pain and mutilation involved in electrocution; and, 3) standards of decency have evolved.

Additionally, the Kentucky Supreme Court has held that its prior rulings upholding the constitutionality of electrocution "may not preclude reconsideration of this issue with a properly developed record."[204] The instant case presents this Court with the opportunity to reconsider this issue with a properly developed record, and also with the benefit of new evidence that by now a super

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[201] *Nelson*, 541 U.S at 643-44.
[202] *Id*. at 644.
[203] 136 U.S. 436 (1890).
[204] *McQueen v. Parker*, 950 S.W.2d 226, 227 (Ky.1997).

majority of states have eliminated electrocution - - evidence that was unavailable to this Court when it decided *McQueen*. Thus, it is time for this Court to revisit the constitutionality of electrocution.

1. All precedent holding that execution by electrocution conforms with the 8th Amendment is based on an insupportable 1890 decision.

United States Supreme Court Justices Souter, Blackmun, and Stevens recently addressed the constitutionality of electrocution, noting that "[t]he Court has not spoken clearly on the underlying issue since *In re Kemmler*, and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question."[205] Although *Kemmler* was decided in 1889-1890, during the infancy (early years) of electrical science and prior to the first electrocution, state and federal courts, including the Kentucky Supreme Court, have repeatedly relied upon *Kemmler* as dispositive. *Kemmler*, however, was decided under the privileges and immunities clause rather than the 8th Amendment, which, at the time, did not apply to the states. *Kemmler* also was grounded on constitutional premises long since rejected, and on factual assumptions that have failed the test of experience and scientific progress. Finally, *Kemmler* was decided prior to the first electrocution, and, therefore, no evidence concerning electrocutions existed. Technological advances and new perspectives resulting from this scientific evidence must be considered by this Court.[206] For these reasons, this Court is not bound by *Kemmler*, and should reconsider the constitutionality of electrocution.

2. Past assumptions under *Kemmler* should be rejected under evolving standards of decency.

Scientific and medical knowledge and technology have made great strides since 1890. The 8th Amendment is not a static concept but must draw its meaning from the evolving standards of decency

[205] *Poyner v. Murray*, 508 U.S. 931, 932 (1993) (Souter, Blackmun, and Stevens, dissenting from the denial of certiorari).
[206] *See McQueen v. Parker*, 950 S.W.2d 226 (Ky.1997).

that mark the progress of a maturing society.[207] In *Brown v. Board of Education*, the Court has also recognized that courts can, and often should, re-evaluate out-dated precedent like *Kemmler*.[208]

In *Brown*, the Court refused to bind the Nation and the federal judiciary to the outdated findings of *Plessy v. Ferguson*.[209] The Court re-examined issues in the context of contemporary circumstances and new scientific revelations using the following formula:

> In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives plaintiffs of equal protection of the laws.[210]

The *Brown* Court recognized that whatever may have been the extent of knowledge at the time of *Plessy*, its finding in *Brown* was supported by modern scientific authority.[211] Likewise, only by considering electrocution in light of the full developments of the law and its present place in American life can it be determined if it constitutes cruel and unusual punishment.

Despite the profound evolution of law and science over the past one hundred years, federal and state courts continue to utilize *Kemmler* to systematically reject any constitutional challenge to electrocution. *Kemmler*, however, was a fact-based opinion involving uncertain and speculative scientific knowledge that has failed the test of time. Further, modern jurisprudence has rejected the legal premises

upon which *Kemmler* was based. As Justice Brennan eloquently stated:

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[207] *Trop*, 356 U.S. at 101.
[208] *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *McQueen v. Parker*, 950 S.W.2d 226 (Ky. 1997).
[209] 163 U.S. 537 (1896).
[210] *Brown*, 347 U.S. at 492-93.
[211] *See Brown*, 347 U.S. at 494. To dismiss the ancient precedent of *Plessy*, the *Brown* Court relied upon the works of contemporary scientists to demonstrate that "we know a lot more now than we did back then." *See* Richard Kluger, Simple Justice, 705-06 (Vintage Books ed., Random House, Inc. 1977). Specifically, the Court relied on scientific studies conducted subsequent to *Plessy* which were in contradiction to the "bad science" utilized to justify *Plessy*. *Id*. at 706.

> State and federal courts recurrently cite to *Kemmler* as having conclusively resolved that electrocution is a constitutional method of extinguishing life, and accordingly that further factual and legal consideration of the issue is unnecessary . . . . But *Kemmler* clearly is antiquated authority. It is now well-established that the Eighth Amendment applies to the States through the Fourteenth Amendment. Moreover, the Court long ago rejected *Kemmler*'s "historical" interpretation of the Cruel and Unusual Punishments Clause, emphasizing instead that the prohibitions of the Clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." This is because "[t]ime works changes [and] brings into existence new conditions and purposes . . . . Accordingly, Eighth Amendment claims must be evaluated "in the light of contemporary human knowledge, rather than in reliance on century-old factual premises that may no longer be accurate.[212]

By granting certiorari in *Bryan v. Moore*[213] to consider the constitutionality of electrocution, the Court recognized Justice Brennan's admonition that *Kemmler* is not controlling precedent concerning the constitutionality of electrocution. Although *Bryan* became moot after a change in state law, states clearly got the message that reliance on *Kemmler* was no longer automatic. As previously mentioned, the Georgia Supreme Court has ruled that execution by electrocution violates the Georgia Constitution.[214] And a federal district court in Nebraska has stated, in dicta, that execution by electrocution violates the 8th Amendment.[215] These courts recognize that "prior rulings . . . regarding the constitutionality of the use of electrocution cannot be deemed determinative of the issue . . . [because] whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency."[216] This Court should find that *Kemmler* is no longer binding precedent, and that contemporary standards of decency have evolved to the point where electrocution violates the 8th Amendment of the United States Constitution and §17 of the Kentucky Constitution.

CONCLUSION.

[212] *Glass*, 471 U.S. at 1082-83 (Brennan, J., dissenting from the denial of certiorari).

[213] 528 U.S. 960 (1999).
[214] *Dawson*, 554 S.E.2d at 144.
[215] *Palmer*, 293 F.Supp. at 1065.
[216] *Dawson*, 554 S.E.2d at 139.

The "electric chair has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber."[217] With each electrocution, society waits in dread anticipation as the barbaric spectacle of electrocuting a person to death - - characterized by exploding body parts, and flames erupting from the head, is played out for the entire world to see. "There comes a time when the Constitution must say enough is enough."[218] It is now time for this Court to abolish execution by electrocution under all circumstances in Kentucky. This is the case. Now is the time.

PART II – LETHAL INJECTION[219]

It is May 25, 1999. Edward Harper is to be executed in minutes. The execution team escorts Harper into the death chamber. They strap him to the gurney with arms outstretched. The I.V. team attempts to insert the needle. It will not go in. They move to another location. Finally, they insert two needles and start the I.V.'s. This is fortunate because they do not know what to do if they failed again.

The curtains open. Harper is lying on a gurney with an I.V. sticking out of each arm. The first chemical begins to flow. Harper moves a little and closes his eyes. A loud gasp of breath is heard, and then silence.

It all seemed to go by so quickly. Harper closed his eyes, and moments later he was dead. It seemed peaceful, just like putting a dog to sleep. Did our eyes deceive us?

Harper's lethal injection, like most lethal injections, appeared painless. Until recently, lethal injection was universally thought to be humane. Within minutes, the inmate's eyes close, we hear a breath, and then the inmate appears dead. We all would like to believe what we see and take comfort in the fact that lethal injection is a peaceful way of taking the life of a convicted murderer. But, what we witnessed during Harper's lethal injection (and others like it) was deceiving. In reality, Kentucky's lethal injection protocol does not provide a peaceful death. But we do not see that because a chemical is intentionally given to prevent us from seeing a gruesome, violent, and painful death. All of this can be

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[217] *Jones*, 701 So.2d at 87-88 (Shaw, J., dissenting).
[218] *Provenzano*, 744 So.2d at 441 (Shaw, J., dissenting).
[219] Pages 30 – 32 contain an overview of Appellants' lethal injection argument. Citations to the record appear in the Statement of the Case and the applicable argument sections.

avoided by changing the procedures and chemicals Kentucky uses during lethal injections - - changes that would lessen the risk of pain and suffering.

Kentucky lethal injections begin by tying the condemned inmate to a gurney. The I.V. team attempts to insert an I.V. in the inmate's arm. If they have difficulty doing so - -which has occurred in numerous lethal injections across the country and Kentucky's only lethal injection - - frantic attempts to insert the I.V. begin. The I.V. team will stick a needle in every part of the body other than the neck in a desperate attempt to start the I.V. They will continue to do this until the I.V. has been started or 60 minutes has elapsed, which could mean at least 20 stabs to the body.

Once the I.V. is inserted, sodium thiopental is injected as the "humane" part of the lethal injection process because it is supposed to render the inmate unconscious so the inmate does not feel pain. But there are three problems with this. First, there are many levels of consciousness, and the only level that eliminates the risk of waking from painful stimuli is a deep level of sedation called surgical anesthesia. Second, sodium thiopental is not a pain reliever. Finally, sodium thiopental is an ultra-short acting barbiturate that may not render a person unconscious long enough to complete the lethal injection. Thus, the inmate could wake up while the killing chemicals are ravaging the inmate's body. This would be excruciatingly painful. Similar experiences have been described as the "fires of hell."[220] Yet, to us witnessing the execution, it will still appear humane.

The second chemical, pancuronium bromide, creates the appearance of a peaceful, humane death. It has no effect on pain. Rather, it paralyzes the voluntary muscles so the inmate cannot tell us that he or she is awake or in pain. It also prevents the inmate from moving or showing any other outward signs of being conscious or suffering. Thus, it creates the surreal appearance that lethal injection is just like

[220] Tape 10; 4/20/05; 10:14:00 (Test. of Carol Weihrer).

putting a sick old dog to sleep. Appellees know this and admit that it is the reason for administering the drug. They do not want us to know what really is happening.

What are they afraid to let us see?

- the conscious inmate;
- the inmate suffering excruciating pain;
- lethal injection not being as painless as it appears;
- it is not like putting our dog to sleep, which would never be done with the chemicals used for lethal injection; and,
- the convulsions caused by the final chemical, potassium chloride.

Potassium chloride causes extreme pain as it ravages the nerves and stops the heart. It also causes convulsions and seizures - - a gruesome sight that is nothing like the peaceful euthanasia of our sick dog. This is the reality of Kentucky's lethal injection process- - a reality that Appellees - - by using pancuronium bromide - - prevents us from seeing, a reality that bears no resemblance to a "death in accord with the dignity of man."

Is there anything we can do about this? The answer is yes. Appellants' brief explains: 1) how the lower court misapplied the governing law; 2) why Kentucky's current lethal injection chemicals and procedures violate the 8th Amendment; and, 3) what can be done to alleviate the violation. Pain killers could be administered. Longer-acting anesthetics could be administered. The paralytic agent could be eliminated from the lethal injection chemicals. Potassium chloride could be replaced by a less painful killing chemical that does not cause convulsions. Monitoring could be done to ensure that the inmate is unable to feel pain prior to injecting the second and third chemicals. Appellees know these things could be done, but refuse to do any of them. The failure to take these steps violates the cruel and unusual punishment clause of the Kentucky and federal constitutions. As a result, we are left with a constitutional method of execution, lethal injection, being performed in an unconstitutional manner. Appellees

disregard of the risk of pain and suffering- which is unnecessary because it could be easily avoided- is deliberate indifference in violation of the 8th Amendment and § 17 of the Kentucky Constitution.

I. The lower court incorrectly required Appellants to prove a "substantial" risk of unnecessary infliction of pain even though no method-of-execution case law requires such a high standard.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol 5 at 644-683, 684-697.

Citing *Gregg v. Georgia*,[221] the lower court ruled that a "method of execution is viewed as cruel

and unusual punishment under the United States Constitution when the procedure for execution creates a 'substantial' risk of wanton and unnecessary infliction of pain, torture or lingering death."[222] *Gregg*, however, never uses the word "substantial" in connection with risk, nor does any other case. Rather, *Gregg* only requires establishing an "unnecessary" risk.[223] The substantial risk standard applied by the lower court is inconsistent with 8th Amendment jurisprudence because a risk that exists - - though not substantial - - is unnecessary if it could easily be avoided, and thus violates the 8th Amendment. Because the lower court held Appellants' to a higher standard of proof than allowed by law, this Court should remand for further consideration under the correct standard.

[221] 428 U.S. 153 (1976).
[222] TR 2, Vol. V at 688 (Order denying declaratory relief at 5) (Appendix at 10).
[223] *Gregg*, 428 U.S. at 173; *Francis*, 329 U.S. at 463.

II. The lower court failed to apply the entire constitutional test for determining if Kentucky's chemicals and procedures for lethal injections violate the cruel and unusual punishment clause of the 8th Amendment and §17 of the Kentucky Constitution.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol. 5 at 644-683; 684-697.

Relying mainly on a 1910 United States Supreme Court case,[224] the lower court held that a method of execution challenge addresses only: "1) whether the method of execution comported [sic] with the contemporary norms and standards of society; 2) whether it offends the dignity of the prisoner and society; 3) whether it inflicts unnecessary physical pain; and 4) whether it inflicts unnecessary psychological suffering."[225] Limiting itself to addressing only 1910 concerns, the court drew the erroneous conclusion that the state and federal constitutions protect only against "cruel and unusual pain," and thus the DOC is not required to use readily available drugs that cause less pain. The court could not have reached this conclusion if it had identified and applied all prongs of the cruel and unusual punishment test.

By misapplying *Gregg*, relying solely on an almost 100-year-old case, and overlooking more recent United States Supreme Court cases articulating the test for cruel and unusual punishment, the lower court's order ignores three important aspects of the cruel and unusual punishment test: 1) identifying the risk of pain and suffering;[226] 2) determining whether that risk is unnecessary;[227] and, 3) determining whether available alternatives that pose less risk exist.[228] As discussed in the subsequent sections, if the court had considered this case under all three prongs, it would have found that Appellants

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[224] *Weems v. United States*, 217 U.S. 349 (1910).
[225] TR 2, Vol. V at 689 (Order denying declaratory judgment at 6) (Appendix at 11).
[226] *Farmer*, 511 U.S. at 846 (the inquiry is whether there exists an "objectively intolerable risk of harm."); *Helling*, 509 U.S. at 33 (holding that 8th Amendment analysis "requires a court to assess whether society considers the risk that the prisoner complains of" to be more than the Constitution tolerates); *Campbell*, 18 F.3d at 687 (holding that an 8th Amendment challenge to a method of execution must be considered in terms of the risk of pain).
[227] *Gregg*, 428 U.S. at 173; *Francis*, 329 U.S. at 463.
[228] *See, e.g.*, *Workman*, 429 S.W.2d at 378 (a cruel and unusual punishment approach "should always be

proved constitutional violations by a preponderance of the evidence because, as the lower court recognized, alternative chemicals exist that pose less risk of pain and suffering. This Court should apply the correct standard and rule that the tri-chemical cocktail used in Kentucky lethal injections violates the cruel and

unusual punishment clause. In the alternative, because the lower court failed to apply the complete legal standard, this Court should reverse and remand for further consideration under these three prongs of the cruel and unusual punishment test.

III. The lower court incorrectly concluded that the chemicals used in Kentucky lethal injections cause a quick, humane death as required by the 8th Amendment.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol. 5 at 644-683; 684-697.

Contrary to the lower court's finding, Kentucky lethal injections do not cause a quick, humane death as required by the 8th Amendment.[229] Suffering for as little as twenty seconds is considered excessive.[230] Suffering lasts longer than that during Kentucky lethal injections. Undisputed testimony established that potassium chloride is the only chemical that causes death.[231] That chemical is administered after two other chemicals.[232] Undisputed testimony also established that Edward Harper, the only inmate executed by lethal injection in Kentucky, did not die until five minutes after the first chemical was injected.[233] This was 120 seconds after the agonizing pancuronium bromide was injected, and 60 seconds after the potassium chloride was injected.[234] There is no reason to believe this would be any different with Appellants' executions. Thus, the lower court's conclusion that lethal injection causes a quick, humane death that comports with the 8th Amendment is unsupported by the trial evidence,

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made in light of developing concepts of elemental decency.").

[229] TR 2, Vol. V at 687 (Order denying declaratory judgment at 4) (Appendix at 9).

[230] *Palmer v. Clarke*, 293 F.Supp.2d 1011, 1064-66 (D. Neb. 2003); *see*, *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (suggesting that one and a half minutes of suffering constitutes cruel and unusual punishment).

[231] Tape 10; 4/20/05; 2:03:24 (Test. of Dr. Heath).

[232] TR 2, Vol. V at 690 (Order denying declaratory judgment at 7) (Appendix at 12).

[233]

[234] Tape 10; 4/20/05; 2:10:08 (Test. of Dr. Heath).

contrary to law, and must be reversed.[235]

IV. Using pancuronium bromide violates the cruel and unusual punishment clause because it creates an unnecessary risk of pain and suffering and makes it extraordinarily difficult to monitor for conscious paralysis.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol. 5 at 644-683; 684-697.

As the lower court found, the second chemical administered during Kentucky lethal injections, pancuronium bromide, "serves no therapeutic purpose" and has no effect on pain.[236] It is a neuromuscular blocking agent that "cause[s] the rapid onset of paralysis,"[237] masking the extreme pain caused by the potassium chloride and the agony of suffocation resulting from the pancuronium bromide.[238] Because potassium chloride will cause death with or without the addition of other chemicals, the agony of suffocation and risk of masking extreme pain and suffering is unnecessary.[239] Thus the use of pancuronium bromide violates the cruel and unusual punishment clause.

The lower court realized that Appellants proved this by a preponderance of the evidence when it noted that "other drugs are available that may further assure that the condemned feels no pain."[240] Yet, the court denied relief for three reasons: 1) because it believes the 8th Amendment does not require states to use the least painful chemicals;[241] 2) because it believes pancuronium's main purpose "to prevent muscular movements in the condemned, involuntary or otherwise, that may result from the subsequent injections of Potassium Chloride" is legitimate; and, 3) because it believes pancuronium's secondary purpose, stopping respiration, is necessary.[242] None of these purported justifications can survive 8th Amendment scrutiny.

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[235] *See Palmer v. Clarke*, 293 F.Supp.2d 1011, 1064-66 (D. Neb. 2003); *See*, *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994) (suggesting that one and a half minutes of suffering constitutes cruel and unusual punishment).
[236] TR 2, Vol. V at 691 (Order denying declaratory judgment at 8) (Appendix at 13); Tape 10; 5/20/05; 1: 55:57 (Test. of Dr. Heath).
[237] TR 2, Vol. V at 691 (Order denying declaratory judgment at 8) (Appendix at 13).
[238] Tape 10; 4/20/05; 1:55:57 (Test. of Dr. Heath); Tape 13; 5/2/05; 11:13:00 (Test. of Dr. Dershwitz).
[239] Tape 10; 4/20/05; 2:03:00 (Test. of Dr. Heath); Tape13; 5/2/05; 9:40:28 (Test. of Dr. Dershwitz).
[240] TR 2, Vol. V at 693-94 (Order denying declaratory judgment at 10-11) (Appendix at 15-16).
[241] *Id.*
[242] TR 2, Vol. V at 691 (Order denying declaratory judgment at 8) (Appendix at 13).

First, the 8th Amendment bars not only the unnecessary infliction of pain and suffering, but also the unnecessary risk of pain and suffering.[243] By finding that other available chemicals would better ensure the inmate feels no pain, the court recognized that the risk of pain and suffering caused by pancuronium bromide is unnecessary. Since it is unnecessary, it violates the cruel and unusual punishment clause.

Second, under the 8th Amendment, the only legitimate reasons for using a chemical are that the chemical causes death or relieves (lessens the risk of) pain.. When pancuronium is followed by potassium chloride, stopping respiration accomplishes neither of these requirements when followed by potassium chloride.

Third, muscle spasms and convulsions could be avoided by using an alternative to potassium chloride to stop the heart.[244] Since this could be easily done without increasing the risk of pain, using pancuronium to prevent muscle reactions to potassium chloride is unnecessary, and thus violates the 8th Amendment.

Finally, preventing muscle movements in the condemned that may result from the potassium chloride is a purpose not recognized or allowed by the Kentucky Constitution or the 8th Amendment.[245] The 8th Amendment is concerned with the risk of pain and suffering, not what the public or anyone else will see. Thus, the only valid reasons for using a chemical are either that it causes death or relieves pain and suffering. No other purpose can serve as a basis for holding that a chemical comports with the 8th Amendment.

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[243] *See Farmer*, 511 U.S. at 846 (1994); *Helling*, 509 U.S. at 33; *Francis*, 329 U.S. at 463; *Campbell*, 18 F.3d at 687; *Workman*, 429 S.W.2d at 378.

[244] Tape 13; 5/2/05; 11:15:10 (Test. of Dr. Dershwitz).

[245] *See California First Amendment Coalition v. Woodford*, 2000 WL 33173913 (N.D. Cal. July 26, 2000) (the public's perception of the amount of suffering endured by the condemned, and the duration of the execution are necessary to determine whether a particular execution protocol is acceptable under the cruel and unusual

For the reasons discussed above, this Court must rule that the reasons for using pancuronium are unjustified and do not comport with the 8th Amendment, and that pancuronium bromide violates the cruel and unusual punishment clause because it creates an unnecessary risk of pain and suffering.

V. Using pancuronium bromide as one of the lethal injection chemicals violates the evolving standards of decency prong of the cruel and unusual punishment test because the American Veterinary Medical Association has banned it for the euthanasia of animals and because there is a consistent legislative trend against using neuromuscular blocking agents to euthanize animals.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol. 5 at 684-697.

Section 17 of the Kentucky Constitution and the 8th Amendment cruel and unusual punishment clause mandate that Kentucky's lethal injection process comport with "evolving standards of decency that mark the progress of a maturing society."[246] Evolving standards of decency are judged by norms and standards of American society. [247] The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[248]

Recent research and legislation regarding animal euthanasia proves that the use of pancuronium as a lethal injection chemical violates evolving standards of decency. Specifically, pancuronium is a paralyzing agent that if used in animals would violate Kentucky law, the law of 18 other states, and national standards for veterinarians.

Currently, Kentucky and 18 other states have passed laws that either expressly or implicitly preclude the use of a neuromuscular blocking agent.[249] In 2000, the leading professional association of

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punishment clause), TR Supp., Vol. II at 232-37.

[246] *Trop v. Dulles*, 356 U.S. 86 (1958).

[247] *Weems v. United States*, 217 U.S. 349 (1910).

[248] *Atkins*, 536 U.S. at 311.

[249] Fla. Stat. §§ 828.058 and 828.065; Ga. Code Ann. § 4-11-5.1; Me.Rev.Stat. Ann. tit. 17, § 1044; Md.Code Ann., Criminal Law, § 10-611; Mass.Gen.Laws § 140:151A; N.J.S.A. 4:22-19.3; N.Y.Agric. & Mkts § 374; Okla. Stat., Tit. 4, § 501; Tenn.Code Ann. § 44-17-303; and, Tex. Health & Safety Code, § 821.052(a). In 1998, Kentucky became one of many states that implicitly banned such practices. K.R.S. section 312.181 (17) and KAR 16:090 section 5(1). The other states that implicitly ban using a sedative in conjunction with a neuromuscular blocking agent for euthanasia are: Conn. Gen.Stat. § 22-344a; Del.Code Ann., Tit. 3, § 8001; 510 Ill. Comp. Stat., ch. 70, § 2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Missouri 2 CSR 30-9.020(F)(5); R.I. Gen. Laws § 4-1-34; and, S.C. Code Ann. § 47-3-420.

veterinarians, the American Veterinary Medical Association, promulgated guidelines for euthanasia that explicitly forbid the use of a neuromuscular blocking agent during euthanasia when a sedative (anesthetic or barbiturate) has been administered.[250] Since legislatures began prohibiting using neuromuscular

blocking agents with sedatives, no legislature or other governing body has expressly condoned this practice or repealed statutes forbidding it.

Given the consistency in the regulations, and the number of states disallowing this chemical combination for euthanasia of animals, using pancuronium bromide in conjunction with thiopental is outside the bounds of evolving standards of decency. The recent alterations of euthanasia protocols for animals underscore the inhumanity of using pavulon to execute human beings. A euthanasia practice widely considered unfit for a dog is certainly unfit for humans, particularly since the same result could be accomplished without using pancuronium. This Court should reverse the lower court and rule that administering pancuronium bromide as a lethal injection chemical violates the 8th Amendment because it is inconsistent with contemporary standards of decency.

VI. Using potassium chloride as one of the lethal injection chemicals violates the cruel and unusual punishment clause because it creates an unnecessary risk of pain and suffering in light of readily available alternatives.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol. 1 at 1-61; TR 2, Vol. 5 at 684-697.

Undisputed testimony establishes that potassium chloride causes an extremely painful burning sensation as the chemical ravages the nervous system and stops the heart from beating.[251] This burning sensation, however, is unnecessary because "many non painful ways of stopping the heart" could be implemented that would reduce the risk to zero.[252] The failure to do so perpetuates the unnecessary risk of pain and suffering in violation of the cruel and unusual punishment clause. The lower court, however,

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[250] TR Supp, Vol. II at 251 (*2000 Report of the American Veterinary Medical Association Panel on Euthanasia*, 218 Journal of the American Veterinary Medical Association, 669, 681 (2001)).
[251] Tape 9; 4/19/05; 11:30:50 (Test. of Dr. Hiland); Tape 10; 4/20/05; 2:01:29 (Test. of Dr. Heath); Tape 13; 5/2/05; 11:13:55 (Test. of Dr. Dershwitz).
[252] Tape 10; 4/20/05; 1:46:40 (Test. of Dr. Heath); *accord*, Tape 13; 11:15:10 (Test. of Dr. Dershwitz).

never addressed this issue, because it did not apply all prongs of the cruel and unusual punishment test, and because it incorrectly believed that it could not consider the availability of alternative chemicals in determining whether the use of potassium chloride created an unnecessary risk of pain and suffering. Thus, this Court should either rule that using potassium chloride in lethal injections violates the 8th Amendment or remand this matter for further consideration under the correct 8th Amendment standard.

VII. The failure to administer an analgesic during lethal injections violates the 8th Amendment because it creates an unnecessary risk of pain and suffering.

This claim is PRESERVED. TR 2, Vol. 5 at 644-683; 684-697.

Analgesics relieve pain. As Appellees' expert, Dr. Dershwitz, testified, analgesics are used during surgery to relieve pain, and barbiturates are used to put a person to sleep.[253] None of the chemicals in Kentucky's lethal injection protocol (including thiopental) are analgesics.[254] Appellees do not give inmates a pain reliever during their execution. Because injecting an analgesic would easily decrease the risk of pain and suffering, the failure to administer an analgesic creates an unnecessary risk of pain and suffering in violation of the 8th Amendment. Because the lower court did not apply all prongs of the cruel and unusual punishment test and because it did not believe it could consider the availability of alternative chemicals in deciding whether a constitutional violation exists, the lower court never addressed this issue

on the merits. This Court should either find that the lack of an analgesic violates the 8th Amendment or remand with instructions to address this issue.

VIII. Spending up to 60 minutes attempting to insert an I.V. violates the cruel and unusual punishment clause because it is nothing more than the needless imposition of pain and suffering and because it mutilates the human body.

This claim is PRESERVED. TR 2, Vol. 5 at 644-683; 684-697.

The lower court ruled that spending up to 60 minutes attempting to insert an I.V. is "not excessive but rather necessary due to potential problems that may arise when attempting a

[253] Tape 13; 5/2/05; 11:24:26 (Test. of Dr. Dershwitz).
[254] TR 2, Vol. V at 690-91 (Order denying declaratory judgment at 7-8) (Appendix at 12-13).

venipuncture."[255] The trial testimony shows otherwise. The "60 minute" rule has nothing to do with problems such as "blowouts" as suggested by the trial court. Rather, it has to do with difficulty inserting an I.V. The "60 minute" rule was added after Appellees learned they would not be allowed to make a 5 inch incision into an inmate's body to insert an I.V. if they had difficulty starting an I.V.[256]

Dr. Heath, an anesthesiologist and the only witness who testified about this issue, stated that 60 minutes of sticking someone with a needle is useless and extremely painful. He said it should take only 2 to 3 minutes to insert an I.V.,[257] and that well before 20 minutes have elapsed, the inmate will experience "a lot of pain and discomfort."[258] After 20 minutes, the execution team will have exhausted all available locations to insert a needle.[259] Thus, to allow 60 minutes of inserting an I.V. condones the useless stabbing of a person with a needle that mutilates the body. The cruel and unusual punishment clause does not permit this.

IX. The lack of monitoring to ensure that a condemned inmate is unconscious from the point just prior to injecting pancuronium until death creates an unnecessary risk of pain and suffering in violation of the cruel and unusual punishment clause.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol 1 at 1-61; TR 2, Vol. 5 at 644-683; 684-697.

Although pancuronium paralyzes all voluntary muscles, Appellees could still monitor for consciousness and take appropriate measures to ensure surgical anesthesia and alleviate pain during an execution. The easiest and most obvious way to ensure that an inmate is unconscious during an execution is to check for consciousness prior to injecting pancuronium. This can be accomplished by checking the corneal reflexes, or pinching a person to see if the person responds.[260] These tests, however, do not work once pancuronium is injected. At this point, blood pressure cuffs, an EEG monitor, and an EKG machine (if located in the execution chamber and read throughout the execution,

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[255] TR 2, Vol. V at 690 (Order denying declaratory judgment at 7) (Appendix at 12).
[256] Tape 8; 4/18/05; 3:12:00 (Test. of Def. Rees – Commissioner of Kentucky DOC).
[257] Tape 10; 4/20/05; 2:48:18 (Test. of Dr. Heath).
[258] *Id*. at 2:48:28.
[259] *Id*. at 2:48:18.
[260] *See, e.g.*, Tape 13; 5/2/05; 10:12:10 (Test. of Dr. Dershwitz).

not just at the end to determine death) could be used to monitor for consciousness.[261] As the lower court found, Appellees use none

of this equipment to monitor for consciousness. In fact, they make no attempt to monitor for consciousness. [262] Despite this, the lower court made no legal conclusions based on the lack of monitoring for consciousness. De novo, this Court should rule that the lack of monitoring creates a risk of pain and suffering that is wholly unnecessary because it can be alleviated by proper monitoring by adequately trained personnel. This Court should rule that Appellee's failure to take these steps violates the 8th Amendment.

X. Appellees use of an ultrashort acting barbiturate that could wear off during an execution and the failure to ensure that they are actually delivering an adequate concentration of thiopental to place an inmate under surgical anesthesia for the entire execution creates an unnecessary risk of pain and suffering.

This claim is PRESERVED. TR 1, Vol. 1 at 1-33; TR Supp., Vol 1 at 1-61; TR 2, Vol. 5 at 644-683; 684-697.

Instead of injecting a long-acting barbiturate to render the inmate unconscious, Appellees inject an ultra-short acting barbiturate (thiopental),[263] which begins to wear off immediately.[264] Because of thiopental's short acting nature, anesthesiologists primarily use thiopental as an introductory anesthetic that is followed up with a longer acting anesthetic that keeps the patient asleep for the entire surgical procedure.[265] When administered in combination with another anesthetic, approximately 10-12 mg/L of thiopental in the body is necessary to ensure that a person is unable to respond to verbal stimuli.[266] That concentration, however, should be much higher both when thiopental is used as the only anesthetic and when attempting to ensure that an unconscious person will not wake up from painful stimuli[267] - - a situation with which Appellees' expert, Dr. Dershwitz has little experience, and which he did not

[261] Tape 10; 4/20/05; 1:39:00 (Test. of Dr. Heath).
[262] TR 2, Vol. V at 692 (Order denying declaratory judgment at 9) (Appendix at 14).
[263] TR 2, Vol. V at 691 (Order denying declaratory judgment at 8) (Appendix at 13).
[264] Tape 9; 4/19/05; 12:32:34 (Test. of Dr.Haas); Tape 10; 4/20/05; 1:26:51 (Test. of Dr. Heath).
[265] Tape 10; 4/20/05; 1:28:16 (Test. of Dr. Heath).
[266] Tape 13; 5/2/05; 11:27:14 (Test. of Dr. Dershwitz).
[267] Tape 10; 4/20/05; 1:26:30 (Test. of Dr. Heath); Tape 11; 4/21/05; 9:10:56 (Test. of Dr. Watson).

address.

Dr. Dershwitz testified that his calculations concerning consciousness deal only with the amount of thiopental necessary to ensure a lack of response to verbal stimuli, and are based on solely administering thiopental in conjunction with another anesthetic.[268] This is because Dershwitz rarely relies upon thiopental as the sole medication for surgical procedures, and has not reviewed literature on injecting thiopental as the sole anesthetic.[269] He is unfamiliar with the standard text for determining the amount of

thiopental necessary to ensure that a person will not respond to painful stimuli, Disposition of Toxic Drugs and Chemicals in Man by Randall Baselt.[270]

According to Baselt, approximately 39 mg/L of thiopental are necessary to induce general anesthesia (level of consciousness necessary to ensure that a person will not respond to painful stimuli).[271] Kentucky's top toxicologist, Michael Ward, and the head of Toxico-surveillance for the federal government, Dr. Bill Watson, confirmed this.[272]

Three grams of thiopental (the dose Kentucky injects) is not likely to produce 35-40 mg/L of thiopental in the body for the 5 minute minimum that it takes for a lethal injection to cause death. This conclusion is supported by the toxicology results from Edward Harper and also from inmates executed across the country. After attempting to inject 2 grams of thiopental into Harper, Harper's toxicology results showed 3 mg/L of thiopental in the vena cava, 3 mg/L in the axillary vein, and 6.5 mg/L of thiopental in the heart.[273] Similar levels were found in toxicology results out of North Carolina and South Carolina.[274] These numbers have been found universally troubling.[275]

Kentucky's Dr. Corey and Dr. Watson testified that Harper's blood was drawn from the most

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[268] Tape 13; 5/2/05; 10:16:08 (Test. of Dr. Dershwitz).
[269] *Id*. at 11:28:58.
[270] *Id*. at 11:25:07; TE Plaintiffs' exhibit 29 (Appendix at 393-96).
[271] *Id*. at 11:25:27.
[272] Tape 8; 4/18/05; 2:54:50 (Test. of Michael Ward); Tape 11; 4/21/05; 10:17:30 (Test. of Dr. Watson).
[273] Tape 8; 4/18/05; 2:56:15 (Test. of Michael Ward).
[274] Tape 11: 4/21/05; 11:28:10 (Test. of Dr. Watson).
[275] *See, e.g.*, Tape 13; 5/2/05; 11:34:55 (Test. of Dr. Dershwitz).

reliable locations for determining post-mortem concentrations of a drug,[276] and that the concentrations of thiopental reported in the toxicology reports accurately reflect the level of thiopental in his body at the time of death.[277] As Dr. Watson and Michael Ward testified, the level of thiopental found in Harper's body and the similar levels found in numerous other executed inmates are so low that the inmates likely felt the pain of pancuronium and potassium chloride ravaging their systems.[278]

Appellees have done nothing to address the apparent failure to deliver a sufficient amount of thiopental to render an inmate free of pain. Admittedly, they have increased the dose of thiopental from 2 to 3 grams. But this change is negligible because the thiopental concentrations in Harper show that a one gram increase of thiopental will still not be enough to induce surgical anesthesia.[279] Thus, the risk remains that when the second and third chemicals are injected the inmate will be conscious enough to feel severe pain. This pain is intolerable under the cruel and unusual punishment clause if it lasts two minutes, as occurred with Harper, or twenty seconds as in *Palmer*.[280] This is particularly true given that the risk of this pain can be eliminated by using other barbiturates that last a longer period of time.

XI. Appellees' refusal to utilize readily available alternative chemicals and procedures that lessen the risk of pain and suffering and their failure to implement adequate life maintaining procedures in case of a stay of execution constitute deliberate indifference in violation of the cruel and unusual punishment clause of the state and federal constitutions.

This claim is PRESERVED. TR 2, Vol. 5 at 644-683; 684-697.

Deliberate indifference to medical needs of a prisoner, including a refusal to lessen the risk of pain and suffering, constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment.[281] "Deliberate indifference" means "the official was subjectively aware of the risk."[282]

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[276] Tape 8; 4/18/05; 2:23:33 (Test. of Dr. Corey); Tape 11; 4/21/05; 10:20:20 (Test. of Dr. Watson).
[277] Tape 8; 4/18/05; 2:41:08 (Test. of Dr. Corey); Tape 8; 4/18/05; 2:57:32 (Test. of Michael Ward); Tape 11; 4/21/05; 10:47:14 (Test. of Dr. Watson).
[278] Tape 8; 4/18/05; 2:56:00 (Test. of Michael Ward); Tape 11; 4/21/05; 10:17:30 (Test. of Dr. Watson).
[279] Tape 11; 4/21/05; 11:44:42 (Test. of Dr. Watson).
[280] *Palmer*, 293 F.Supp.2d at 1064-66.
[281] *Estelle v. Gamble*, 429 U.S. 97 104 (1976). Because a prisoner remains under the care of the prisoner until death, the dying process by lethal injection must be considered a "medical need" that must be as painless as Appellees can make it.
[282] *Farmer*, 511 U.S. at 837.

Thus, "to state a cognizable claim, a [plaintiff] must allege acts or omissions sufficiently harmful to evidence deliberate indifference,"[283] by establishing that "the official knows of and disregards an excessive risk to inmate health or safety."[284] Appellees have shown deliberate indifference towards known risk of inflicting unnecessary pain in their lethal injection process since its inception.

"There is scant evidence that [any] States' adoption of lethal injection was supported by any additional medical or scientific studies that the adopted form of lethal injection was an acceptable alternative to other methods."[285] Rather, "states simply fell in line relying solely on Oklahoma's protocol . . . . Kentucky is no different."[286] Appellees "did not conduct any independent scientific or medical studies
or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned."[287]

This did not change after Appellants were expressly made aware of the risks associated with their lethal injection chemicals and procedures through this litigation which commenced on August 9, 2005. It also did not change when they were informed of alternative chemicals and procedures for carrying out lethal injections that pose less risk of pain and suffering. In the midst of this litigation, Appellees unilaterally made changes to their execution protocol without consulting any medical personnel familiar with the effects of the chemicals or insertion of I.V.'s.[288] Unsurprisingly, these changes did not fix the problems with the chemicals or procedures for carrying out lethal injections in Kentucky. Instead, the changes created new problems, such as stabbing someone with a needle for 60 minutes in an attempt to insert an I.V., adding a crash cart lacking the drugs necessary to reverse the effects of the lethal injection chemicals to be used, and putting a psychiatrist in charge of maintaining life

[283] *Gamble*, 429 U.S. at 106.
[284] *Farmer*, 511 U.S. at 837.
[285] TR 2, Vol. V at 685 (Order denying declaratory judgment at 2) (Appendix at 7).
[286] *Id.*
[287] TR 2 Vol. V at 689 (Order denying declaratory judgment at 6) (Appendix at 11).
[288] TR 2, Vol. V at 690 (Order denying declaratory judgment at 7) (Appendix at 12).

if a stay of execution is granted.[289]

These changes demonstrate that Appellees are not concerned with alleviating the risk of pain and suffering their lethal injection procedures cause. If they were concerned, they would have looked into the concerns expressed by Appellants, consulted scientific literature and medical personnel about the chemicals and inserting an I.V., and considered changing the chemicals or adopting a chemical cocktail similar to that used in New Jersey, which does not utilize a paralytic agent. Instead of doing this, Appellees admitted at trial that they saw no reason to learn why sodium thiopental, pancuronium bromide, and potassium chloride are used in lethal injections, and whether other chemicals could be used instead.[290] This is a disturbing statement in light of the fact that Appellees were informed through this litigation that at least one state uses different lethal injection chemicals, and that no state has conducted any scientific or medical studies into whether these chemicals cause pain and suffering. In addition, Appellees admitted that they have taken no steps to learn how to monitor for conscious paralysis despite their own expert acknowledging that conscious paralysis is a significant problem.[291]

Appellees' attitude towards the problems with their lethal injection chemicals and procedures demonstrate their deliberate indifference to the risk of pain and suffering during a Kentucky lethal injection. Their failure to consult with medical professionals concerning the viability of using alternative chemicals and procedures, failure to learn how to monitor for conscious paralysis, and failure to ensure that the proper equipment to be used by a physician trained in emergency life-saving measures is available,

constitutes the unnecessary and wanton infliction of pain proscribed by the cruel and unusual

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[289] Appellees increase in the amount of thiopental from 2-3 grams is meaningless since the change was adopted without consulting any medical professionals or scientific literature to see if it would address or alleviate any risks of pain caused by the lethal injection chemicals, and because, if they had consulted experts in the field, they would have learned that the increase makes a negligible difference.

[290] Tape 8; 4/18/05; 3:13:30 (Test. of Def. Rees); Tape 9; 4/19/05; 10:36:40 (Test. of Def. Haeberlin).

[291] Tape 13; 5/2/05; 10:10:45 (Test. Dr. Dershwitz); *accord*, Tape 9; 4/19/05; 11:22:20 (Test. of Deputy Warden Pershing who will be in the execution chamber with the condemned during the execution); Tape 9; 4/19/05; 10:13:00 (Test. of Def. Haeberlin).

punishment clause.[292]

Appellants established all of this by a preponderance of the evidence. Yet, the lower court failed to address the issue, due to its mistaken belief that it could not require Appellees to use chemicals that pose less risk of pain and suffering. This Court should review de novo and reverse by holding that Appellees' violated the cruel and unusual punishment clause because they are aware of the risk posed by their chemicals and procedures and have done nothing to alleviate the risks.

XII. If a stay of execution occurs prior to death, Appellees have an affirmative duty to render adequate medical care to reverse the effects of the chemicals. Baze and Bowling's due process rights would be violated by carrying out an execution before Appellees obtain the necessary equipment to maintain life after the first two chemicals have been administered and before Appellees designate a doctor trained in using this equipment to perform life saving measures if necessary.

This claim is PRESERVED. TR 2, Vol. 5 at 644-683; 684-697.

Once a stay of execution is granted, an execution is no longer sanctioned. This is true even if a stay is granted after the first or second chemical is administered.[293] Thus, a stay creates an affirmative obligation under contemporary standards of decency and morality to take measures to give an inmate a chance to continue living.[294] The failure to "take every feasible and possible step to correct [the] error" of executing an inmate after a stay is granted "wrongfully deprive[s the inmate] of due process and fundamental fairness."[295] Appellees have not taken adequate steps to ensure their ability to reverse the effects of the first two chemicals.

Contrary to the lower court's findings, Appellants do not believe that a "trauma center with a team of cardiac surgeons standing by" is necessary to maintain life once the first two chemicals have

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[292] *See Farmer v. Brennan*, 511 U.S. 825, 846 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1976).
[293] *See In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d 207, 211 (N.J.Super. 2004).
[294] *Id.*
[295] *Id.*

been injected.[296] On the other hand, a crash cart with the wrong equipment and a psychiatrist to perform life saving measures is not sufficient. As undisputed testimony established, the first two chemicals are easily reversible if medical personnel trained in how to reverse these chemicals are present at the execution chamber with the proper equipment.[297] According to Appellees' expert, this equipment must include medications to increase blood pressure and contract the heart, insulin, neostigmine, and artificial ventilation.[298] None of these medications are part of the current crash cart planned to be on site in case of a last minute stay of execution.[299] Thus, Appellees' crash cart is useless at maintaining life if a stay of execution is granted at the last minute.

But even if Appellees obtained adequate equipment, there is a separate problem. They have delegated life-saving duties to a psychiatrist who has not treated patients in many years,[300] and who is not qualified to perform life saving measures. Thus, Appellees' attempts to provide equipment to maintain life if a stay is granted is a sham. It may sound good on paper. But, in practice, it will have the same effect as providing no equipment. Admittedly, "the grant of a stay of execution communicated to prison authorities after the lethal injection has been administered is not a likely event, [but] it can happen,"[301] and has happened. "Should it occur, there can be no justification for depriving that inmate a chance at life."[302] Appellees' failure to take "feasible and possible step[s]" to maintain life under these circumstances

deprives Baze and Bowling of due process and fundamental fairness, and evinces Appellees' deliberate indifference to known medical needs.[303]

CONCLUSION

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[296] *Compare*, TR 2, Vol. V at 694 (Order denying declaratory judgment at 11) (Appendix at 16); *with*, Tape 9; 4/19/05; 12:16:44 (Test. Dr. Haas); Tape 10; 4/20/05; 2:15:18 (Test. Dr. Heath).
[297] Tape 9; 4/19/05; 12:16:44 (Test. of Dr. Haas); Tape 10; 4/20/05; 2:15:18 (Test. of Dr. Heath).
[298] Tape 10; 4/20/05; 2:24:10 (Test. of Dr. Heath); Tape 13; 5/2/05; 11:19:24 (Test. of Dr. Dershwitz).
[299] *Compare*, TE Plaintiffs' Eexhibit 28 (list of equipment on Banyon Stat Kit 700 crash cart) (Appendix at 398); *with*, Tape 13; 5/2/05; 11:19:24 (Test. of Dr. Dershwitz).
[300] Tape 9; 4/19/05; 10:21:30 (Test. of Def. Haeberlin); Tape 9; 4/19/05; 12:13:30 (Test. of Dr. Haas).
[301] *In the Matter of Readoption with Amendments of Death Penalty Regulations*, 842 A.2d at 211.
[302] *Id*.
[303] *Id*.

In determining how it would administer lethal injections, Kentucky failed to consult with any scientific experts or studies, and –instead- rotely adopted a mistaken version of another state's lethal injection protocol. As a result, Kentucky's chosen chemicals and protocol for lethal injection have not turned out to be the humane alternative to electrocution that was hoped for. Kentucky has chosen inappropriate painful chemicals when better, non-painful, alternatives are available. And Kentucky has set up a defective protocol riddled with risk of unnecessary pain and suffering. As a result, Kentucky's lethal injection chemicals and protocol violate the prohibition against cruel and unusual punishment under the 8th Amendment of the United States Constitution and § 17 of the Kentucky Constitution.

REQUEST FOR RELIEF

Appellants respectfully request that this Court:

1) issue a declaratory judgment that execution by electrocution violates the Eighth Amendment to the United States Constitution and/or §17 of the Kentucky Constitution; and,

2) rule that a challenge to the constitutionality of electrocution is properly filed as a civil action.

In the alternative, Appellants request that this Court hold that *Nelson v. Campbell*,[304] does not prohibit the filing of a civil suit challenging a method of execution, and that this Court remand this action to the Franklin Circuit Court for further proceedings on whether electrocution violates §17 of the Kentucky Constitution and the 8th and 14th Amendments of the United States Constitution.

Appellants also request that this Court hold that Kentucky's chemicals and procedures for carrying out lethal injection violate the cruel and unusual punishment clause of the Kentucky and federal constitutions.

[304] 541 U.S. 637 (2004).

In the alternative, Appellants request that this Court remand for further consideration applying correct legal principles including all prongs of the cruel and unusual punishment test.

RESPECTFULLY SUBMITTED,

DAVID M. BARRON
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Ky. 40601
502-564-3948 (office)
502-564-3949 (fax)

SUSAN J. BALLIET
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 301
Frankfort, Ky. 40601
502-564-3948 (office)
502-564-3949 (fax)