IN THE SUPREME COURT OF THE UNITED STATES

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RALPH BAZE AND THOMAS C. :

BOWLING, :

Petitioners :

v. : No. 07-5439

JOHN D. REES, COMMISSIONER, :

KENTUCKY DEPARTMENT OF :

CORRECTIONS, ET AL. :

- x

Washington, D.C.

Monday, January 7, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on Behalf of the Petitioners.

ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on Behalf of the Respondents.

GREGORY G. GARRE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
DONALD B. VERRILLI, JR., ESQ.	
On behalf of the Petitioners	3
ROY T. ENGLERT, JR., ESQ.	
On behalf of the Respondents	26
GREGORY G. GARRE, ESQ.	
On behalf of the United States, as amicus curiae, supporting the Respondents	45
REBUTTAL ARGUMENT OF	
DONALD B. VERRILLI, JR., ESQ.	
On behalf of the Petitioners	54

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: No, my question --

MR. VERRILLI: But --

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

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

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

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

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

anesthetic death to participate in the process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

through the use of thiopental at the three gram dose.

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

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

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

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

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

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

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

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

MR. VERRILLI: Well, yes there would, Mr. Chief Justice, because the reality is that thiopental and other barbituates are anti-convulsives. Their point is to -- among other things to suppress any involuntary muscle --

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

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

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

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

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

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

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

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

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

MR. VERRILLI: The monitor for anesthetic.

JUSTICE GINSBURG: Yes.

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

JUSTICE GINSBURG: And what is --

MR. VERRILLI: That is correct.

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

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

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

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

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

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

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

additionally trained.

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

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

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

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

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

MR. VERRILLI: Right.

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

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

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

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

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

MR. VERRILLI: Well --

JUSTICE SCALIA: That's their contention.

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

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

MR. VERRILLI: Yes. It --
JUSTICE SCALIA: Did you introduce evidence to show that indeed medically trained personnel were readily available to do the things you say?
MR. VERRILLI: I don't think we introduced evidence that medically trained personnel were ready available, but we did introduce evidence about what needed to be done and, of course, as I said, Kentucky like the other states had their ability to bring medically qualified personnel to bear to run this process. And so I do think --
JUSTICE SCALIA: I'm very reluctant to send it back to the trial court so we can have a nationwide cessation of all executions while the trial court finishes its work and then it goes to another appeal to the State supreme court and ultimately, well, it could take years.
MR. VERRILLI: I understand that, Your Honor, and that's why I suggest --
JUSTICE SCALIA: You wouldn't want that to happen.
MR. VERRILLI: That's why I suggested that there is -- that this case can be decided on the basis of the record here because the undisputed expert testimony on these key issues shows the deficiencies in

the protocol.

JUSTICE SOUTER: May I ask you another question?

MR. VERILLI: Yes.

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

MR. VERRILLI: That's correct.

JUSTICE SOUTER: And that was undisputed?

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

JUSTICE SOUTER: Okay.

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

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

MR. VERRILLI: The record establishes that

death is certain.

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

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

JUSTICE SOUTER: That is the massive dose.

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

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

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

gone as high as five grams.

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

MR. VERRILLI: Right.

JUSTICE GINSBURG: In the Federal response.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: No --

MR. VERRILLI: And --

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

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

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

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

JUSTICE SCALIA: But if you're not using the

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

MR. VERRILLI: No.

JUSTICE SCALIA: Can you rectify that?

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

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

MR. VERRILLI: No.

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

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

JUSTICE SCALIA: Hanging certainly would, right?

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

JUSTICE SCALIA: Is that a hard question?

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

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

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

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

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

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

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

MR. VERRILLI: Well, electrocution may well.

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

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

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

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

MR. VERRILLI: From this Court's cases.

JUSTICE SCALIA: Dictum in our cases, right?

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

JUSTICE SCALIA: Dictum in our cases.

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

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

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

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

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

ORAL ARGUMENT OF ROY T. ENGLERT, JR.,
ON BEHALF OF RESPONDENTS

MR. ENGLERT: Mr. Chief Justice and may it

please the Court:

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

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

MR. ENGLERT: Yes.

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

MR. ENGLERT: Yes.

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

The problems the prison population --

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

MR. ENGLERT: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

Now, Mr. Verrilli says use a blood pressure monitor as a safeguard. Justice Kennedy said doesn't the record show that that's not of any use at very low blood pressures, and Justice Kennedy is exactly correct, at page 578 of the joint appendix. Dr. Dershowitz testified that the blood pressure cuff simply would have no usefulness in monitoring at this level of introduction of the barbituate.

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

JUSTICE STEVENS: Yes, but isn't it clear

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

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

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

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

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

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

JUSTICE STEVENS: I understand.

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

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

MR. ENGLERT: No, not effective.

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

MR. ENGLERT: Correct.

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

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

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

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

JUSTICE STEVENS: Right. I understand that.

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

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

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

MR. ENGLERT: No, Your Honor. No.

JUSTICE STEVENS: But then the risk of

excruciating pain outweigh the risk of an undignified death?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ENGLERT: Well --

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

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

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

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

MR. ENGLERT: That much is reasonable.

JUSTICE SOUTER: Okay.

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Okay what's your.

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

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

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

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

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

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

JUSTICE GINSBURG: What are the reasons.

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

JUSTICE GINSBURG: But have you that expert

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

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

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

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

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

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

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

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

MR. ENGLERT: Well --

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

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

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

MR. ENGLERT: Well, Your Honor --

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

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

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

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

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

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

JUSTICE STEVENS: The three-drug protocol?

MR. ENGLERT: The three-drug protocol.

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

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

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

MR. ENGLERT: Correct.

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

MR. ENGLERT: That's correct.

JUSTICE GINSBURG: That's --

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

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

doesn't do enough to protect dignity.

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

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

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

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

MR. ENGLERT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GARRE: Well, Justice --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GARRE: That would be --

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

MR. GARRE: Yes.

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

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

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

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

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

MR. GARRE: May I answer the question.

CHIEF JUSTICE ROBERTS: Yes.

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

JUSTICE KENNEDY: Did you mean to say unconsciousness.

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

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

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

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

it's not tolerated with animals.

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

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

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

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

CHIEF JUSTICE ROBERTS: Finish your sentence.

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

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

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

A

aback 9:6
ability 17:9
able 13:13 15:9 41:21
above-entitled 1:14 57:16
absolute 38:22
accept 14:12
accident 49:4
accidental 46:12 46:17 49:19
accompanying 9:20
accurate 29:16 30:3,14
ace 38:4
achieved 12:15
acknowledge 40:24
acknowledges 41:23
action 47:3
actual 4:14 15:3
add 36:19
added 46:11
addition 9:10 15:15
additional 8:19 13:23 52:22
additionally 14:1
address 3:25
addressed 10:11 11:3
adequacy 14:18
adequate 40:17 40:25
adequately 4:3 5:19 12:23
adjacent 42:23 43:4
administer 7:25 39:15,20 40:7
administered 3:13 4:8,11,17 4:18 5:1,6,16 18:23 27:3,5,9 27:18 31:18 32:10,13 33:13 33:17 36:18 56:20
administering 19:5 39:24 40:5 41:1 55:4
administers 55:17
administration 3:20 5:11 27:15 32:1 41:13 56:21
admitted 56:2
adopt 35:22 46:2
adopted 20:11 29:17 43:19
advocate 43:22
advocates 53:19
advocating 23:19
agent 35:7,24
ago 18:10 25:7
agree 3:21 10:10 14:19 21:24 27:2,7,11 36:17 47:25 48:21 50:15
agreed 4:7 28:23
agrees 45:25
agriculture 38:23
AL 1:9
Alito 6:11,20,24 7:9 12:6 23:11 23:16 24:20 48:4,25
alive 56:23
allow 51:3,10
allowed 37:12
allowing 52:15 52:16
alternative 6:7 7:6,11 20:11 20:19 24:19 45:7 48:7 50:4 50:5 51:8
alternatives 24:6 48:13 49:10,15 50:10
altogether 29:18
AMA 39:22
amazing 7:23
Amendment 11:25 21:18,20 23:14 24:22 25:24 27:13 46:10,14,19 48:8
American 6:4 35:1
amicus 1:24 2:8 19:25 44:5 45:20
amount 19:19 28:10 32:18
analogize 57:1
analogized 47:4
analysis 14:8,9 25:8 48:12,15 48:18 52:6,8
anesthesia 10:24 54:23 55:2,4 55:10
anesthesiology 55:16
anesthetic 3:12 5:5,11 6:1 12:12,14 55:13
anesthetics 56:9
anesthetized 4:4
anguish 46:11
anguishing 46:19
animals 9:5 34:22,25 35:25 54:20 55:1,9
anonymity 42:19,21
answer 32:9 34:11 37:9 51:6 53:25 56:23
answers 14:3
anti-convulsives 10:6
apologize 5:4
apparently 30:9
appeal 17:15
appear 6:12
appearance 33:5,7 36:24
APPEARAN... 1:17
appendix 4:7 7:4 28:12 30:25 31:6,11 31:19 43:3 56:11
application 53:7
applied 41:23 47:18,19
applies 47:22
apply 20:7
appropriate 10:10 35:12 52:6 54:3
appropriately 19:17
approved 21:7,7
arbitrary 26:7
area 42:3 53:21
argue 39:1,4,7
argues 7:16
arguing 49:18
argument 1:15 2:2,10 3:3,6,20 5:2 6:12,13,23 7:12 11:1,19 11:25 12:4 14:12 21:14 24:11 26:23 27:6 38:17 43:20 45:18 54:16
arguments 12:7
asked 14:4 15:6 31:19 56:18,20
asleep 29:14
assert 16:5
assertion 7:5
assess 52:17
Association 6:4 35:1
assume 4:17,24 28:3 31:19 35:17
assure 4:3 5:9 5:17
attention 44:4
audience 10:17 11:4
author 19:17
availability 14:5 16:21
available 15:12 17:4,7 24:5 48:13 49:9,15
averted 22:10 50:20
AVMA 35:22
avoid 41:3
avoidable 24:19
avoided 34:8,13
awake 30:25 31:4 39:6
a.m 1:16 3:2 57:15
a/K-PLG 38:11

B

B 1:18 2:3,11 3:6 54:16
back 13:5 14:10 16:4 17:13 42:14 50:21 51:1,10,14 52:7 55:6,14
balance 26:19
barbituate 6:9 11:20 12:5 31:14 32:11
barbituates 9:22 10:6 32:19
barbiturate 8:7 18:9,12 19:6

bare 38:22
barred 35:8 39:22
based 3:20 18:23
basic 40:14 41:2
basis 14:21 17:23 41:17 51:24
Baze 1:3 3:4
bear 17:10 26:16
beginning 12:8
behalf 1:19,21 1:23 2:4,6,8,12 3:7 26:24 45:19 54:17
beings 38:23
believe 14:20 37:13
benefit 36:7 43:15,16
benefits 35:14
best 27:23 39:3
better 51:16
beyond 4:1 13:9 38:21
big 6:11
bit 18:8 34:12
blocking 35:7,24
blood 15:13,20 15:23,24 28:20 31:7,10,12,22
blowouts 14:17
board 50:8
body 32:18
botched 38:3,4,9 38:13 55:21
BOWLING 1:4
break 24:3
Brennan 47:18 49:6
Breyer 7:18 8:12 9:2 12:24 50:5,17 52:3 55:14
brief 5:22 6:25 7:4,5,16 9:14 19:4 28:3 41:22 44:6
briefs 19:25 30:3 44:5,5 46:21
bring 16:4 17:9 33:19 55:6
bromide 35:6
brought 11:6 53:19
burning 3:17

C

C 1:3 2:1 3:1
California 41:25 52:21
called 29:10 38:4
cancer 47:25
candid 52:7
capital 50:7
capture 50:19
careful 50:9,12
carefully 30:16
Carolina 56:5
carried 47:8 49:5
carries 54:21
carry 44:2
carrying 21:22 26:2
case 3:4 4:9,17 5:8 6:15,17 8:8 9:9,11 11:6 12:4 13:4 14:9 15:16 16:17 17:23 18:24 25:23,24 26:15 27:6,12 28:23 37:12 38:18,19 40:16 41:7,13 41:14,24 42:2 42:25 44:8,25 45:3,8 47:4,4,9 47:18,19 48:3 49:1,20 50:12 51:11,13,13,16 52:1,7,9,10,16 53:16 55:24 56:1,4,13 57:14,15
cases 4:18 11:16 22:9 25:17,18 25:20,21 26:10 26:12 46:11 47:9 49:18 50:25 57:3
catheter 14:16
cause 8:11 10:17 11:9 18:13,20 21:1 31:17,24 32:11 36:18 41:15
caused 46:12
causes 20:25 21:6
causing 19:12
center 38:4
certain 8:25 9:10,11 18:19 19:1 28:9 31:17 32:18 34:14
certainly 11:11 15:2 23:21 53:21
certainty 19:12
certiorari 25:6
cessation 17:14
challenged 20:8
challenging 5:24 49:3,13
chamber 30:1
chance 11:9 19:18
changes 43:2
changing 22:20
character 26:13
check 39:16
chemical 7:6,11
chemicals 7:7 57:9
Chief 3:3,8,19 3:24 4:5 9:15 9:19,21,24 10:5,9,18,22 11:5 20:6,13 20:16 26:21,25 33:2 35:21 43:17 45:6,16 45:22 54:1,14 54:18 55:2 57:6,8,13
chloride 3:16
choice 57:5,9
choose 21:11,15
circumstance 26:8
circumstances 32:11
citations 6:25
cites 44:7
claim 8:3 11:8 48:18,22
claims 46:10 47:5,5,6,20 48:3 53:19
clarified 5:18
clarity 5:4 53:21
clear 14:24 15:19 31:6,25 32:9 37:9 50:16 56:9
clearly 8:24 48:6
clinical 4:12
close 15:17,17 30:18 39:9 52:14
closed 31:2
Code 6:3
combination 7:6 15:12 18:10
come 12:5 21:5 21:10 25:16 35:1,3 47:13 50:11 51:14
comes 25:19 32:20 43:22 53:6
coming 46:25 51:25 53:1
commensurate 57:11
COMMISSIO... 1:7
Committee 44:7
Commonwealth 27:23 57:4
communication 11:3
comparative 14:8,9 36:7 48:4 49:16 50:2 52:8
comparison 51:4,5,5 52:6 52:25 53:7
comparisons 51:3
completely 51:9
component 5:24
compromised 28:16
concern 21:19 21:23,25 55:3 55:6
concerned 29:21
concerns 50:15
concluded 7:24 52:22 54:3
conclusion 36:11
condemned 5:6 10:21 54:4 56:6
conditions 46:23 47:5,10,15,19
confinement 46:23 47:5,10 47:20 57:2
connection 29:9
conscious 3:15 16:18
consciousness 11:16 39:16 54:4
consider 25:7

considerably 49:14
consideration 36:7 44:4 51:2
considerations 35:2
considering 54:7
constituting 14:16
Constitution 21:13 48:2
constitutional 12:9 21:4 27:5 41:4 46:5
constitutionali... 13:2 40:15
constitutionally 41:24 51:22
contend 32:22
contends 16:2
contention 8:2 16:9
context 46:10
continue 52:17
continuously 52:18
contractions 10:1,13 11:10
contrary 5:9 22:5 27:18 38:25 50:25
control 29:8
controls 12:7,8
convicted 21:11
convictions 57:2
core 21:19,23
correct 9:16,18 12:17 16:14 18:13,14 20:20 20:21 22:23 28:5 31:11 33:3 36:22 38:21 43:8,11 45:9 54:7
CORRECTI... 1:9
cost 36:22,23,25 37:4
counsel 57:13
counter 27:8
country 38:3 48:20
couple 19:3
course 5:7 6:6 8:15 11:18,21 13:8 17:8 21:21 46:23 55:3
courses 3:17
court 1:1,15 3:9 5:2 7:5,10 14:6 14:14 15:1 17:13,14,16 25:6 26:3 27:1 38:25 40:20 41:8 45:2,2,4 45:23,24 46:15 46:16 47:3,8 47:17,22 49:1 51:10,19,25 56:5
courts 6:13 7:2
court's 11:16 16:21 22:9 25:17,20 44:4 46:8,11 49:18
covered 42:25
co-counsel 7:1
create 33:17 53:11 57:9
creates 33:10,11
credible 11:19 11:24
credited 56:5
critical 5:13 15:24 20:25 27:21
critically 4:2
Cross 28:19
crucial 14:9
cruel 12:1 21:2 25:10 26:3 42:6
cruelly 3:11
cuff 15:13,18 31:12
curiae 1:24 2:9 45:20
current 18:21
currently 54:6
curtains 42:16
cut 55:23

D

D 1:7 3:1
daily 27:25 28:13
danger 3:11 54:25 55:10 57:10
day 12:6 28:11 47:23
days 32:7
death 4:9 6:1 8:7,11,17,25 9:10 11:10,12 11:15,17 13:3 18:13,20,23 19:1,12,19 21:7,9,22 22:2 24:13 26:8 27:4 31:17,24 32:11 33:5,7 33:20 34:2,14 38:3 43:21 45:5 46:4 47:21 48:1 53:18 55:13 56:19
deaths 21:23
decide 40:22,24 41:7,21 51:20 51:20,23
decided 17:23 19:17,18 45:2 51:17 53:9,10
decision 35:13 44:7 50:11 52:4 53:20
deep 54:4
deeply 54:12
deficiencies 15:3 17:25
definition 8:7 9:22 23:8
definitions 26:14
degree 49:14
deleterious 36:12,16
deliberate 57:1 57:5,9
deliberately 39:14
demonstrate 13:8
Department 1:8 1:23
depend 24:10 25:1 45:7
Depends 37:18
deposition 32:7
depth 12:15 16:3
deputy 1:22 16:16 29:25 30:19 31:1
derisively 29:3
derived 46:22
Dershowitz 30:24 31:4,12 32:7 34:20 37:13 56:15
described 33:2 49:12
despite 11:1
determine 16:18
develop 51:7
developed 50:13
developing 47:25
device 15:23
devised 36:9 48:19
dictionary 26:14
Dictum 25:18,21
die 11:11 34:10 34:16 37:6
difference 20:22 21:1 31:2 57:3
different 23:9 26:5 35:2 45:14,14 48:2 55:18
difficult 14:3
difficulties 14:15
difficulty 4:13
dignified 33:20 33:20,20 34:10
dignifying 43:14
dignity 10:20 11:3 33:22 36:25 43:20,25 44:1,16
directed 47:6
disagree 3:23
disagreement 14:22
discomfort 10:16
discussed 18:7
discussing 21:3
discussion 19:24
distinct 36:8
distinction 47:12,13
district 38:25
disturbed 50:22
disturbing 52:3 52:3
doctor 6:3 55:16
doctors 6:3 12:25 13:19 28:24 29:2 39:24
doctrine 21:18
document 32:6
doing 13:9 40:25
DONALD 1:18 2:3,11 3:6 54:16
donates 28:20
door 13:5

dosage 18:22 54:3,7
dose 5:5 6:8 8:10,13 9:1 14:16 18:9 19:6,9,10,13 19:16 31:21 32:10
doses 50:25
doubt 19:11 24:20
downs 55:23
Dr 30:24 31:4,5 31:5,12,18 32:7 34:20 37:13 56:11,15 56:18
dramatically 55:18
drawing 26:14
drop 31:23
dropweight 24:2
drug 3:12,14,16 6:18 7:13 9:25 10:3 11:7,13 11:23 20:7 27:3,4,15,18 29:24 31:15 32:1,13,23 33:9,9,11,12 33:16 34:13,14 34:16,21,23,25 36:13,17,17,18 36:21,24 37:3 37:4 41:2,10 41:15 43:10,23 43:25 44:17 50:5 51:7 52:21
drugs 16:24 18:23 20:9,17 29:14 38:24 39:15,20,24 40:5,9,11,12
due 22:17
D.C 1:11,18,20 1:23

E

E 2:1 3:1,1
earlier 18:8 20:14 22:21
easily 50:20
effect 8:1 14:4 19:12 29:25 37:16 52:10
effective 16:23 32:24,25 54:23
effectively 3:13 5:23
efficacy 13:15
effort 30:7 39:12 51:8
Eight 11:25
Eighth 21:18,20 23:14 24:22 25:24 27:13 46:10,14,19 48:8
either 26:12 41:9
EKG 15:13,25
electrocution 21:7 24:9,11 24:25
element 48:5
eliminating 45:10
employ 12:20
EMTs 13:17,20 13:25
enacted 24:13
ended 8:15
endless 48:23 49:23
ends 48:15
Englert 1:20 2:5 26:22,23,25 27:10,14 28:5 28:9,21 29:5 29:12 30:13 32:3,8,14,17 32:25 33:3,6 33:11,15,24 34:3,11,19,24 35:6,11,20,23 36:14,16 37:5 37:11,18,23 38:1,21 39:17 39:20 40:3,13 40:19 41:5,8 41:19,22 42:4 42:10,13 43:8 43:11,13 44:13 44:18,24 45:9 45:17 55:22 56:8,17
enhance 10:19
enhanced 19:16
ensure 12:14 26:7 54:4
ensuring 54:23
entirely 45:25 50:8
equated 36:25
equipment 15:13
error 8:16,16 20:22 38:13
ESQ 1:18,20,22 2:3,5,7,11
established 15:16 21:17 25:2 48:6 49:17 51:21 54:13
establishes 5:8,9 8:8,25 9:25 18:25 49:5
establishing 46:9 49:1
Estelle 46:15 49:5
ET 1:9
ethical 13:18
ethics 6:4 39:23
euthanasia 9:3,4
euthanize 54:20
euthanizing 35:25 55:9
everybody 47:25
evidence 8:4 16:24 17:2,6,7 18:6,10,11,24 19:15,20 36:5 37:20 38:11 39:1 51:9,25 56:5
evidentiary 6:22
exact 38:9
exactly 31:10
example 4:14 13:17
excellent 27:19
excruciating 3:17 23:7 25:4 27:9 33:10,12 33:23 34:1,4,4 34:8 37:16,19 37:20 38:20 41:16 47:21
excruciatingin... 48:1
excuses 30:22 38:5,6,13
executed 3:14 53:10
execution 7:8 8:21 10:11 13:1 16:2 20:23 21:6,10 22:4,11 23:12 23:17 25:25 26:1,2 29:17 29:18,20 30:1 32:24 39:8 40:4 42:19 44:3 45:25 46:3,24 47:5 47:15 50:13 53:2
executioner 40:2
executioners 29:10 43:6
executions 3:11 17:14 38:3,5 48:20 50:14 54:21 55:21
expect 16:4 21:8 31:22,22,23 37:14 56:19
expeditious 52:5
experience 28:10 40:11
expert 4:6 8:9,9 8:9 9:9 15:15 17:24 18:16 31:18 39:25 40:3 56:16
expertise 40:9,9 40:10
experts 24:2 28:23 38:12 56:1
explain 53:23
express 24:22
extend 11:11
extent 10:14,23
extra 8:18
extraordinary 46:6
extremely 21:17 42:20,24
eye 31:2

F

face 16:7,10
faced 47:20
faces 47:24
fact 14:4,8 26:4 35:18 36:12 38:25 40:25 41:15 50:22 55:24
factfinding 14:10
factual 14:14 45:3
fail 43:21
failure 16:21,24
fair 56:24
false 30:21 39:9
families 42:18 42:18

Farmer 47:18 49:6
fatal 32:2
favor 40:24
feasibility 14:6
feasible 48:12 49:15 50:4
Federal 20:5 48:9 53:23 54:2,6,8
feet 30:3
figure 37:8
filed 44:5
finality 48:24
find 7:19 8:5 21:5 22:22 38:7 51:4
finding 36:6,11 38:24 40:10 43:9
findings 14:4,14 15:3 16:21 52:9
finds 55:24
fine 51:4
Finish 57:6
finishes 17:15
firing 21:7
first 3:4,11 21:19 27:2,4 27:15,18 29:24 33:12,16 36:17 36:18 39:13 46:8 49:17 51:6
five 20:1 32:1,10 32:20,21 47:23 53:24 54:7
fixed 20:24
flaws 46:7
flee 53:24
Florida 52:22
flow 12:11 29:9
focus 27:16
focusing 20:16
Fogel 41:24
follow 44:13
followed 3:22 28:10 46:1
forbid 25:25 35:24
force 7:24 11:1
forced 47:22
foremost 51:7
forgive 56:14
form 23:12,16 24:13
found 7:22 9:3
founding 21:20
four 56:6
frankly 9:5 44:24
free 22:7 46:1
friend 55:21
front 53:16
full 51:2
fundamental 46:7 57:3
further 30:11,15 52:16
future 46:10

G

G 1:22 2:7 3:1 45:18
Gamble 46:16 49:5
Garre 1:22 2:7 45:17,18,22 47:2,16 48:11 48:16,21 49:11 50:1 51:6,13 51:19 52:12 53:4,8,13,17 53:22,25 54:2 54:11,14
gasping 56:7
General 1:22
generally 8:17
getting 52:5
Ginsburg 5:14 5:21 12:3,13 12:16,18 13:20 15:5 20:2,5 29:5 30:5 39:11,18,19,25 40:6 42:14 43:6,9,12 53:22
given 10:17,23 29:14 57:10
giving 8:13
go 10:25 19:21 25:3 30:15 32:19 37:11,12 42:22 43:2 51:10 53:20
goes 17:15 18:6 23:7 30:23 32:20 34:7
going 5:10 13:2 19:21 35:17 41:20 43:17 48:23 50:6 51:14,14,24 52:1,16 55:10
good 7:22 24:8 36:2 41:9 42:24 43:1,5 43:24,25
gotten 49:21
government 20:2 48:9 53:23 54:3,6,8
gram 8:10,13 9:1 32:1,10
grams 4:7 8:14 8:14,15 18:12 18:19 19:7,8 19:14,20,22 20:1 31:17 32:20,21 50:24 53:24 54:5 56:12,14,19
granted 25:6
great 53:20
greater 19:19 49:14 53:21
Gregg-Woods... 26:10
GREGORY 1:22 2:7 45:18
ground 40:23
grounded 21:16
guarantee 4:11 4:20 5:10 13:14
guaranteed 8:1 8:10
guidelines 35:22
guy 38:15

H

Haas 31:5
habeas 47:12
hand 13:12,15
handy 56:15
hanging 23:21 24:1
Hanging's 24:8
happen 17:21 31:22 44:25
happened 38:7
happens 30:24
Harbison 37:13
hard 23:25 24:1
harm 16:5
Harmline 26:15
haves 31:2
hear 3:3
hearing 14:3 51:2
heart 7:17
Heath 31:18 56:11,18
held 44:9,19
help 13:1
helpful 5:18
high 20:1
higher 32:20
Highland 31:5
highlighted 29:8
Hiland 47:18
Hill 47:4,9
historical 21:23
history 43:21
hold 6:18 41:10 42:6 44:11,21 44:25
holding 46:11
honest 41:12
honestly 50:22
Honor 6:6 8:25 14:19 17:19 19:24 22:9,10 25:1 26:14,16 28:21 29:12 32:3 33:7,24 34:11,19 41:19 54:2
hospital 28:22 28:23 29:4
hours 54:12
human 8:16,16 27:23 32:18 38:13,23 44:6 44:7
humane 4:9 11:12 22:6 34:22
humans 9:18 36:20
hurdle 49:21
hypothetically 4:25

I

idea 36:2
identified 36:23
ignore 16:24
imagination 53:18
impermissible 50:14
implemented 47:8
important 4:2 9:4 27:16,16 42:20
impose 49:14
imposes 11:17
impossible 13:17
improper 3:20 53:2

improperly 33:13
improve 45:15
inaccurate 7:1
inadequate 12:7 45:3
inadequately 56:1
inadvertent 46:12,18
inches 30:4
including 20:10 22:9
increase 19:13
increases 10:23
increment 23:9
indifference 57:2
indirectly 34:12
induce 3:15
ineffective 10:24
inferior 48:10
inflict 3:16 8:7 9:23,23 11:20 11:21 21:22 22:4 26:3
inflicted 23:6 55:11
inflicting 23:1
infliction 22:1 22:16 23:9 26:7 46:13,13 46:18 49:19
inflicts 22:11 24:18 25:3
inform 38:4
Information 7:24
inherent 38:22
inhumane 3:11
injection 3:10 29:18,18 52:19 55:25
injury 46:10
inmate 3:14 4:3 5:6 28:16 29:13 30:2,18 30:25 33:20 38:9 39:16 43:15,20,23 44:16 54:5,12 56:6
inmates 47:20
inmate's 42:18
inned 36:19
inquiry 49:16 50:3
insane 25:25
insert 29:1
inserted 28:24 28:25 30:10
inserts 13:21 28:22 29:6 30:8
insist 13:5
insofar 47:6
instance 39:13
insufficient 44:10,20
intended 29:25
intent 26:1,4,9 26:11,12
intentional 22:1
interest 44:15
internal 52:20
interrupted 15:4
introduce 17:2,7
introduced 17:5 22:5
introduction 31:14
invalidate 45:24
invite 44:4
involuntary 10:1,8,12 56:8
involved 35:10
involves 38:23
involving 7:14
issue 11:3 13:11 14:20 40:16 45:1 48:3 51:17,20 52:10
issues 13:19 14:15 17:25
itch 39:9
IV 4:15 13:22 27:21,24 28:22 29:7,9,22 30:8 30:10,23 40:7 42:15 43:5
IVs 28:24 29:1 39:2,3 42:16 42:24

J

January 1:12
job 27:25 28:13 40:17,25
JOHN 1:7
joint 4:6 7:4 28:12 30:25 31:6,11,19 43:3 56:11
JR 1:18,20 2:3,5 2:11 3:6 26:23 54:16
judge 14:10 24:21 41:24
judgment 24:23 36:20
jurisdiction 46:4
jurisdictions 19:25 54:5
Justice 1:23 3:3 3:8,19,24 4:5 4:16,22,24 5:14,21 6:2,11 6:20,24 7:9,18 8:12 9:2,15,19 9:22,24 10:5,9 10:18,23 11:5 12:3,6,13,16 12:18,24 13:20 14:2,13 15:4,5 15:9,18,21 16:1,9,20 17:2 17:12,20 18:2 18:5,15,18,21 19:2,10,15 20:2,5,6,13,16 21:3,24 22:13 22:15,20,25 23:4,5,11,16 23:21,25 24:8 24:11,14,20 25:9,14,15,18 25:21 26:21,25 27:7,11 28:2,6 28:18 29:5 30:5 31:8,10 31:25 32:5,8 32:12,16,22 33:1,2,4,8,14 33:22,25 34:6 34:17,21 35:4 35:9,15,21 36:3,15,22 37:1,7,8,15,21 37:24,25 38:17 39:11,18,19,25 40:6,13,22 41:6,11,20 42:1,8,12,14 43:6,9,12,17 44:9,15,19 45:6,16,22 46:14,20 47:11 47:16 48:4,14 48:16,17,25 49:7,12,22,23 50:5,7,15,17 51:12,23 52:3 52:24 53:5,9 53:15,22 54:1 54:9,14,18 55:2,13 57:6,8 57:13
justification 33:8,15 44:10 44:17,20,21
justify 11:1 44:10,20

K

keep 56:22
Kemmler 22:18 26:11
Kennedy 4:16 4:22,24 15:4,9 15:18,22 31:8 31:10 49:7,12 49:22 54:9
Kentucky 1:8 6:13 7:2 13:18 16:12 17:8 20:19 24:21 27:17,19,22,24 29:12,16,19 35:5,8,16,16 35:21,23 36:10 39:2,23 40:17 40:25 41:13 45:2 46:2 54:20 55:20 57:4
Kentucky's 3:10
key 3:25 5:24 14:25 17:25
kill 31:23 55:3
killing 21:11
kind 16:12 28:15 36:10,11 49:16 50:2 52:4 56:7
kinds 42:20 53:19
know 4:25 9:19 11:8 16:6,17 24:2 29:2 30:20 31:1 37:2 39:5 50:6 50:18
knows 34:7

L

Lancet 7:20
large 37:18
late 12:5
law 35:5,8,16,22 35:23 36:4 39:23
laws 46:3
lay 39:7

lead 48:23
learning 28:10
leave 30:10,13 41:1 42:15
leaves 42:2
led 55:11
left 8:2
legal 14:22 35:17
legislature 35:16 36:10 42:8
legislatures 42:10
legitimate 44:3
length 31:16 37:5
lethal 3:10 7:25 29:17,18 52:19 55:25 56:12,13
lethality 56:10
let's 4:17,24 31:19
level 31:14
levels 15:20
life 45:4
likelihood 10:12 38:19,22
line 27:21,24 40:10 42:24 43:1,5
lines 40:7 53:20
lingering 11:12 11:15,17
literally 27:22 30:1
litigated 51:16
litigation 42:3 43:18,21 46:24 48:23 49:24 52:2
little 18:8 34:12 37:19
live 47:23
logic 37:13
long 11:11 32:7 34:15,17 37:17 38:7 53:1,5,6
look 9:4,5 11:8 16:18 30:20 38:1,2 39:5,6 45:4 48:12 50:3,9,10,12
looked 9:3
looking 4:6
low 15:20 31:10
lung 47:25

M

main 12:4,6 30:21,22 36:18
maintained 12:15
major 52:20
majority 38:6
making 47:12 57:5
maladministr... 11:22,23 20:15
mall 36:18,19
manifests 4:14
manner 47:7
marker 54:25
Marshall 46:15
mas 36:20
massive 19:5,8 19:10
matter 1:14 49:1 52:17 53:12,14 57:16
McKinney 47:19
MD 28:4
mean 12:4 13:1 19:6 25:10 28:7 40:6 50:17 54:9
means 22:11
meant 19:7
measures 12:20 15:7 31:20
media 42:18
medical 6:2,3,4 9:11 14:5 28:24 29:1 35:1 38:14
medically 6:10 13:11,13 17:3 17:6,10
members 42:15
mentioned 31:15
merely 35:10 40:16
method 8:4 9:15 9:20 21:5,12 21:16 22:3 45:25 46:2 48:7,10,19 49:2,4,13 50:13
methods 8:21 24:23 47:4 51:4
minimal 34:6
minimum 38:22
minutes 9:12 34:18 37:8,14 37:15,17 54:15
mirror 30:16 42:23
misleading 30:15
misphrase 49:8
mix 20:9
mixing 14:17 20:17,17 38:24
mode 25:8
modifications 52:19
moment 18:10
Monday 1:12
monitor 5:23 12:10,12 15:23 16:3 31:8
monitoring 4:3 5:12,15,19,25 14:18 15:1,6 15:14,25 31:13 39:8 55:13
month 29:20
monthly 29:20
months 51:15
Morales 41:24 55:24
morning 3:4 31:16
movements 38:9
muches 39:10
muscle 10:1,8 10:12 11:9 38:9
muscular 35:24

N

N 2:1,1 3:1
nationwide 17:13
necessary 12:9 32:23 36:3 53:1 57:12
neck 24:3
need 16:3 38:14 39:5
needed 17:8
needle 28:19
needles 28:11
needs 5:25 20:24 36:10
negligence 49:4 53:2
negligent 46:12 46:17 49:19 53:6
Nelson 47:4,9
Netherlands 7:24 55:14,15
neuro 35:24
neuromuscular 35:7
never 9:16,17 11:8 14:7 15:9 46:2 48:15 55:9
nevertheless 48:9
new 45:4,7 48:19 52:1,2
newly 50:12
NG 44:8
nonexistent 4:4
nonpainful 7:17
nonprofessional 39:15
normal 32:11
North 56:4
noticeable 39:7
nub 38:17
number 36:24 37:1 54:12 56:15
nurse 12:22
nurses 12:25 39:24

O

O 2:1 3:1
objection 20:10
objections 20:6
obligation 57:11
observation 15:17 16:15
observer 39:7
observers 44:16
obviate 24:6
obvious 28:2 49:9
obviously 25:6 36:5 40:21 41:9
occur 8:25 9:10 9:12 16:5 18:23 19:19 26:17 56:19
occurred 27:12
odds 46:8
offering 10:15
okay 18:18 35:9 36:15 37:25 39:20 52:8
once 30:10 48:19 50:2
ones 22:10 29:10 29:11
one-drug 13:8

one-way 30:16 42:23
on-the-job 28:10
open 41:1
opened 42:16
operate 29:11
opinion 41:9 46:16
opportunity 51:7
oppose 50:7
opposed 18:9 47:15
opposite 26:5
optimal 45:11
oral 1:14 2:2 3:6 26:23 45:18
order 32:24 46:1
ordinary 26:17
ought 19:21 57:1,10
outside 32:15 34:20 37:11
outweigh 34:1 35:13
outweighs 33:23
overwhelming 38:6

P

P 3:1
pack 47:23
page 2:2 4:6 7:3 7:16 9:13 28:12 31:11,19 46:16 56:10,12 56:14,14,15,17
pages 30:24 31:5 43:3
pain 3:17,22 7:7 9:20,23,23 11:20,21,24 12:2 20:25 21:1,6 22:1,4 22:12,16,18,19 23:1,6,7,10,20 24:5,18 25:4 25:13,16 27:9 33:10,23 34:1 34:4,5,8,13 36:19,19,20 37:16,19,20 38:5,11,20 41:16 45:10 46:1,13,14,18 47:21 49:14,20 55:11
painful 8:3 16:23 21:9,12 21:15 22:22 23:1 48:1
painless 24:12 24:13,15 25:2 25:10,12 27:3
painlessly 8:8
pancuronium 3:14 35:6 50:23 54:22 56:3
paralysis 3:15
paralytic 35:7
part 5:12 6:12 26:2 30:12,15 48:11,14,17
participate 6:1,5 13:16,18
participating 13:14 54:24
participation 6:9 13:11 29:23
particular 14:25
particularly 11:2 14:20 33:1
pass 36:4
penalty 8:17 13:3 22:3 26:8 38:3 43:21 46:4 53:18
pentathol 20:10 20:18
pentothal 4:8
people 16:22 20:9 21:11 26:2 29:7,8,9 29:23 30:6,8,9 39:4,15,22 40:3,6 42:17 43:4 51:10,25
people's 29:15
perceive 35:13
percent 4:18 5:1 5:5,17
permissible 41:10
persisted 48:9
person 5:25 15:17 16:4,5,6 16:7,11 21:10 25:25 28:11,22 30:11 39:3,6 40:12 47:24 55:3,19 56:23
personnel 12:10 12:19,21 13:12 13:13,16 14:5 17:3,6,10 39:8 39:12,21,22
persuasive 40:23
Petitioner 8:9 51:24
Petitioners 1:5 1:19 2:4,12 3:7 44:6 45:24 46:6 49:20 51:21 52:13 54:17
Petitioner's 41:22 48:22
phlebotomist 27:24 28:4,7
phlebotomists 28:25
PHOUFPLTs 38:12
physician 12:22
pick 39:14
picked 53:23 54:5
Pinetti 25:23 26:4
place 26:6 27:17 27:20,24 29:13 33:16 39:3 40:7 48:2
placed 42:16
placement 14:17
places 19:3 28:11
placing 39:1 40:10
plaintiff 45:7
please 3:9 27:1 45:23
poem 38:10,10 38:10
point 10:7 11:15 12:25,25 13:7 24:12,17 29:7 37:21,24 48:24 55:14
pointed 12:6
points 14:25 21:17 28:13 37:23
polar 26:5
policymaker 35:12
population 27:25 28:1,12 28:14,15,17
Poretto 38:7
pose 3:10
posed 26:15
poses 7:7,11
position 14:3,23 18:7 22:21 23:6,11
possibilities 11:22 21:8 52:25
possibility 16:22 16:23 37:1,2,2
possible 7:25 21:12,16 27:5
potassium 3:16 54:22 56:3
potential 4:13 10:16
practical 6:7,15 16:23 51:5
practically 4:4
practice 15:14 26:17 29:19,20 29:24 35:10 36:4,8 40:4 46:4 50:6
precedence 46:9
precise 32:9
precisely 18:17 21:21 26:15
prefer 34:9
preferability 18:8 19:4
preferable 6:16 7:14 40:1
prescribed 46:14
present 5:2 51:8 52:1 55:7,8,16
pressure 15:13 15:20,24 31:8 31:12,22
pressures 31:10 42:21
presumably 22:5 36:1 45:6
pretty 8:24
prevail 11:6
prevent 10:1
prevents 38:10
principle 22:8 46:17
prison 27:25 28:1,11,14,15
probably 27:22 53:17
problem 6:8 8:18,19,20 10:10 20:24,25 30:21,22 38:24 39:2 48:8

50:11,13
problematic 32:14,19
problems 4:14 15:6 16:15 28:1,16 55:23
procedure 4:20 10:20 12:9 13:6 20:19 44:12,22 56:21
procedures 3:10 4:2 26:6 56:22
proceeds 20:23
process 5:12 6:1 12:23 13:14 17:11 20:23 27:22 33:22 34:7 38:23 43:15 54:24 55:12,17
produced 16:25
professional 6:10 30:9,11 40:2
proper 14:16
properly 3:21 4:8,11,16,18 5:1,6 27:3,4,8 27:18 33:17 38:14 40:19 53:10
proposed 20:19 45:8 46:5
proposition 27:8
proscribed 46:19
protect 43:20,24 44:1
protected 42:21
protecting 42:19 44:15
protocol 3:21,21 3:24 5:24 6:16 6:18 7:12,13 10:3,11 11:7 11:13,13,23 13:8 16:12 18:1 19:17 20:7,8 21:9 24:21 31:16 32:23 34:9,14 34:15,16,22,23 36:9 40:15,18 41:1,23 42:5 42:12,13 43:18 43:23,25 44:10 44:21 52:21 53:3,7,10
protocols 45:14 45:15 52:19
protocol's 4:1,2
provide 6:21
provided 9:13
providing 53:21
proximity 30:18
public 43:7
publicly 42:4
punishment 12:1 21:2 26:3 42:7 47:7,7 50:8
purpose 43:10 43:14,14
purposes 46:25 47:11
pushes 40:12
pushing 29:22 40:9,11
put 4:8 47:9 56:4
puts 27:20 28:19
puzzling 30:6

Q

qualifications 40:2
qualified 13:13 13:16,21,22,24 13:24 17:10 27:23 39:3
quantification 37:22
quarrel 43:13
question 4:22 8:19 12:19 15:22 18:3,5 21:21 23:25 24:1 25:6 29:6 34:12 40:14,16 40:20 41:2 42:14 44:14 47:14 53:25 56:18,25
questions 12:18 56:20
quite 26:5 50:8 50:9,22

R

R 3:1
raise 7:12
raised 6:13,22 6:24 7:1,5 13:3 45:1
RALPH 1:3
range 14:15
rapidly 32:10
rational 41:17
read 7:19,20,20 7:22 8:5,21,22 9:7
readily 17:4 24:5,19
ready 17:6
real 33:17 54:19 54:25,25
reality 10:5
really 18:6 24:22 26:5 38:18 39:2 43:2 46:24
reason 10:15 20:8 35:18 38:8 41:9 42:15
reasonable 15:2 36:9,14 37:17 57:11
reasons 10:19 39:17,19
reassessed 52:18
REBUTTAL 2:10 54:16
received 32:6
recollection 19:3
recommend 50:23
record 5:8,8 6:14,17 8:8,23 8:24 9:24 14:24 15:19 17:24 18:25 19:13,16,20,24 30:4,21 31:9 32:4,5,15 34:20 35:25 37:11,12,13 38:19 40:23 41:14 42:25 45:3 51:9 54:13 55:24 56:25
rectify 23:4
Red 28:19
reduce 10:12
Rees 1:7 3:4
refer 9:8 55:14
referee 7:21
reference 56:15 56:16
references 6:21 6:22 8:24 9:13
referred 19:4 29:3 55:22 56:17
reflects 30:4
regard 16:20 46:24
regime 48:23
reiterated 46:17
reiterates 49:6
relevant 14:20
relitigate 51:11
reluctant 17:12
remaining 54:15
remand 14:11 15:1
render 12:9 54:11
repeated 52:18
reply 9:13
report 50:23
representation 56:24
representing 43:23
require 6:9 26:4
required 21:15 35:4 42:9,11 53:7
requirement 13:15 21:4 25:12,14,16 26:9,11,12 35:17 41:18 46:22
requirements 39:23
requires 29:19 46:6 50:11 53:3
reserve 26:19
residents 29:1
resolve 52:10
respect 11:14 13:10 14:15,22 14:25 15:11 22:18 26:13 29:15,22 30:19 44:2 48:3 49:2 55:9,20,24 56:6,10,25
respectfully 3:24
Respondents 1:21,25 2:6,9 8:9 26:24 45:21
response 20:5 36:25 46:21 48:25
responses 52:12
result 46:6
results 11:23

Resweber 22:19
reviews 52:21
rhetorically 38:2
right 15:8 20:4 23:22 25:18 29:21 30:2 33:14 35:15 50:5,18,19 51:14 53:3 55:22
Rights 44:6,7
risk 3:22 4:21 5:7,17 7:7,11 8:16,16 10:17 10:24 11:2 14:16,17,17 22:7 23:20 24:4,6,7 25:3 27:9,12 33:10 33:12,18,23,25 34:1,3,4,6,8,12 34:13 37:16,18 37:20,22 39:4 41:16 45:10 46:9 47:17,20 47:21,24,24 48:5 49:3,3,13 50:16,20 52:14 53:1,2,6,11 54:19 55:17 57:12
risks 3:25 9:20 35:13
risky 48:7
ROBERTS 3:3 3:19 4:5 9:15 9:19,24 10:9 10:18 11:5 20:6,16 26:21 35:21 45:6,16 54:1,14 55:2 57:6,13
room 30:10,14 30:16 39:14 42:16,17,22,23 43:3,5
round 52:2
ROY 1:20 2:5 26:23
rule 41:7
run 17:10

S

s 2:1 3:1 8:9 37:19
safeguard 10:2 31:8 49:22
safeguards 27:17,20 29:13 33:16 52:23
saying 5:16 51:21
says 7:23 9:9 13:4 22:19 31:7 38:15 56:11,12,16
Scalia 6:2 16:1,9 16:20 17:2,12 17:20 21:3,24 22:13,15,20,25 23:4,5,21,25 24:8,11,14 25:9,14,15,18 25:21 48:14,17 49:23 50:7,15 52:24 53:5,9 53:15
screaming 31:1 31:4
scut 29:3
se 13:3
sea 8:2
second 3:14 9:25 12:19 15:10,11 18:22 22:8 29:14 32:23 33:9,19 36:12 36:17,21 41:2 41:10,15 43:10 44:17 52:15
Secondly 19:2
Section 47:3
see 24:18
seen 42:17
send 14:10 17:12 50:21 51:1 52:7
sense 26:18
sentence 7:23 9:6 57:7
sentences 21:22
separate 46:25
sequence 3:12
series 56:20
serious 8:18,20 25:5 29:6 44:11,22
serves 43:10,14
sessions 29:19 29:20,24 40:4
set 13:19 22:4
setting 4:15 28:24 29:4 35:11,15 56:23
settings 4:12
SEUG 36:12
seven 56:1
severe 24:18
shaking 16:7,11
shortage 53:18
show 7:1 17:3 25:10 31:9 49:2,12
showed 38:9
shown 52:14
shows 6:15 17:25 25:23 30:21
side 13:4 16:2 38:12
side's 18:16
sight 42:24 43:1
significant 5:7 24:7 38:19 50:20 51:22
silly 43:19
similarly 56:4
simply 3:24 18:8 31:13 37:22 51:17
single 6:8 7:13 11:7 20:7 34:13,21,24 45:11
single-drug 34:9
situation 11:18 26:1 55:18,19
six 55:25
slap 16:7,10
slate 36:2
sleep 31:3
slight 23:8
small 55:23
smoker 47:23
sodium 4:7 20:10,18 31:17 31:21 50:24
Solicitor 1:22
solid 21:17
solves 6:8
somebody 16:18 28:7,18,19 38:13 55:5,12
somewhat 29:3 35:2
soon 43:18
sort 46:23,25
Souter 14:2,13 18:2,5,15,18 18:21 19:2,10 19:15 28:2,6 28:18 35:4,9 35:15 36:3,15 36:22 37:7,15 37:21,24,25 38:17 46:20 47:11,17 51:12 51:23
so-called 38:2 39:21 55:21
speaking 38:1
specific 47:14
specifically 20:17 28:17
spend 47:23
squad 21:8
SRAEUB 38:14
stage 20:22
stake 45:5
standard 15:14 21:16 22:11 36:4 45:9,11 46:5 47:1,14 47:17,22 48:2 48:5 49:7 50:16 51:3 57:2
start 27:20
started 5:15
state 13:10 17:16 18:6 30:7 36:2 39:3 42:4 46:1 48:8 54:19
states 1:1,15,24 2:8 17:9 21:15 22:1,2 23:13 26:6 45:12,19 46:5 52:16,18 52:20 55:20
state's 56:16
stayed 48:20
staying 42:22
step 27:21 46:3
steps 3:25 57:12
STEUPBer 36:19
Stevens 27:7,11 31:25 32:5,8 32:12,16,22 33:1,4,8,14,22 33:25 34:6,17 34:21 37:1,8 40:13,22 41:6 41:11,20 42:1 42:8,12 44:9 44:15,19
stopping 7:17
strange 42:6
strong 37:2 41:13 46:18
struggling 56:7
studies 7:20 8:21 55:25

study 7:20,22
subject 11:7,12 24:17 42:20 46:25
subjected 23:24
submitted 6:25 57:14,16
substantial 4:21 34:3,4 46:9 47:17,24 48:5 49:13 50:18 52:24 53:11
substantiality 46:22
substantially 52:14
successful 5:11
suffering 7:8
suffice 5:15
sufficient 7:11 11:1 18:13
sufficiently 14:24,24 39:9 54:25
suffocation 3:15
suggest 5:22 17:19 23:18 38:12
suggested 17:22 27:19 30:2,20
suggestion 30:14
suggests 43:22
sun 31:2
support 6:23 44:5
supportable 47:13
supported 39:1
supporting 1:24 2:9 45:21
suppose 36:10
supposed 9:7
suppress 10:7
supreme 1:1,15 17:16 45:2
sure 19:23 27:17 29:13,24 30:7 30:17 33:16 44:13 48:1 51:23
surgery 16:2 55:4
surgical 56:21
swelling 39:6
syringe 29:11
syringes 14:18
system 56:4

T

T 1:20 2:1,1,5 26:23 36:5
take 8:13 10:3 17:17 28:2,8 31:20 32:18 36:6 37:7,14 38:1,2 45:4 50:3,9,10 57:11
taken 9:6 52:20
takes 11:11 16:7 34:15 37:6 44:2
talk 13:2
talking 8:1,17 9:3 11:16 23:8 23:9 25:11
Task 7:24
teach 29:1
team 13:21,22 29:21 30:8 40:1,3 42:15 42:19
tell 5:19 20:8 31:2 38:15 44:24
Tennessee 52:21
term 19:5
terms 25:7 41:17
terribly 41:14
terrifying 3:15
test 14:22 23:19 23:24 24:18 25:8
testified 8:10 16:17 18:16 30:24 31:6,12 37:14
testimony 9:9,11 15:16 17:25 39:10 43:4
testing 16:11
thank 26:21 45:15,16,22 54:13,14,18 57:8,13
therapeutic 43:10
thing 14:10 15:2 18:17 38:10 49:25 56:16
things 10:7 17:4 38:7 47:2 51:2
think 4:1 5:22 6:21 7:10 8:23 8:24 9:8,21 10:18 11:14,15 11:19 12:3 13:7 14:7 15:21 16:13 17:5,11 18:11 19:5 21:17 22:6 24:17 25:9 26:18 30:6 37:9 40:14,19 41:12 46:21 47:16 48:11,22 49:16 49:20 50:25 51:19,20 52:2 52:7,13
thinking 8:15
thiopental 3:13 7:14 8:1,6 9:1 10:6 31:18,21 50:24 56:10,11
third 3:16 15:23 18:22 29:14
THOMAS 1:3
thoroughly 51:16
thought 4:5 8:14 15:19 29:5
three 6:18 8:10 8:13,14,14 9:1 11:13 18:12,19 19:7,8,14,20 19:22 21:16 24:21 31:17 32:10 34:23 38:7 50:25 52:19,21 54:5 54:7,15 56:12 56:19
three-drug 3:12 5:23 6:16 7:12 18:9 32:23 40:15 41:23 42:5,12,13
three-gram 18:22 31:21
three-quarters 22:2
threshold 46:9 49:1,17,24 50:1
time 4:20 5:1,5 21:20 23:17 26:1,20 33:5 34:15 37:5 38:7 44:2 56:3 56:3
times 45:14
tissue 30:23
today 23:13 41:21 47:2
told 20:3 36:1
tolerated 55:1
top 30:2
torture 11:17 21:25
torturous 21:22 23:7,10,20 24:5 55:11
totally 41:17
tracking 15:24
tradition 34:25
trained 5:25 6:10 12:10,19 12:21,22 13:12 13:16 14:1 15:17 17:3,6 29:7 30:6 39:12,21,21 54:23 55:5,13 55:16,19
training 13:23 13:25 14:6 28:6,8,9 29:2 29:10,15,16,23 38:15
transcript 9:12
trial 7:4,5,10 14:6,10,14 16:20 17:13,14 42:25 45:1
tried 5:22 9:16 9:17 11:8 20:14 50:4
troubled 41:14
troubles 42:3
true 4:10,25 14:13 53:17 54:21
truly 45:10
try 10:12
trying 13:5 14:11 36:5
turn 44:6
twitching 56:8
two 4:7 8:14 12:18 15:5 37:1 43:25 49:24 50:1 52:12 56:14
types 47:9 48:3
typically 51:10

U

ultimately 17:16
UN 44:7
uncertainty 51:1
unclear 39:11

unconscious 16:6,19 54:12
unconsciousn... 15:15,25 16:3 54:10,11
unconstitutio... 6:19 7:13 44:12,23 45:12
uncontradicted 14:25
understand 8:2 10:22 17:18 32:16 33:14 42:9
understanding 16:13 18:7 19:2 32:17 55:15
understood 24:2
undertaken 20:18
undetected 10:25
undeveloped 51:9
undignified 11:10 34:1
undisputed 17:24 18:11,15 18:24 48:6
unethical 13:1
United 1:1,15,24 2:8 23:13 45:19 46:5
unlawful 54:20
unnecessary 7:7 22:12,15,16,18 22:19 23:1 25:13,15 41:17 45:10 46:13
unpleasant 33:5 33:7
unpleasantness 41:3
untrained 16:16 16:16
unusual 12:1 21:2 25:10,11 26:3,13,15,18
upheld 25:4
use 9:1 11:19 13:20 15:7,12 22:3 31:7,9 34:21,24 35:6 35:24 36:5,21 41:2,10 45:13 54:22,22 57:9
usefulness 31:13
uses 27:22,24 42:5,5

V

v 1:6 3:4 46:15 47:18,19 49:5 49:6
vein 30:23 38:8 38:16 40:11
veins 3:18 28:7 28:16
ventilators 56:22
VERILLI 18:4
Verrilli 1:18 2:3 2:11 3:5,6,8,19 3:23 4:10,19 4:23 5:3,21 6:6 6:20 7:3,15 8:6 8:23 9:8,17,21 10:4,14,22 11:14 12:3,12 12:14,17,21 13:7,23 14:2 14:13 15:8,11 15:21 16:1,8 16:10 17:1,5 17:18,22 18:14 18:16,19,25 19:8,11,23 20:4,13,21 21:14 22:8,14 22:17,23 23:3 23:5,15,18,23 24:4,10,16,25 25:13,17,19,22 26:22 27:2,19 31:7,15 40:8 43:19 54:15,16 54:18 55:8 57:8
veterinarians 36:1 55:11
veterinary 35:1 35:10,11 36:4 36:8
vets 35:19
victim's 42:17
view 15:3 43:5
violate 23:14,17 27:13
violates 24:21
virtually 4:9 6:14 56:13
virtue 13:24 52:15,15
visible 43:7
visitors 41:4
visual 15:17 16:15
vote 57:12

W

wait 41:6 51:17
want 16:4 17:20 33:4 34:9 50:15 52:4 55:3,5
wanted 48:24
wanton 22:15,16
warden 16:16 16:16 29:25 30:1,19,19 31:1,1 39:9
warranted 52:23
Washington 1:11,18,20,23
wasn't 7:21 25:2 26:7 29:6 37:12 45:1
watch 30:16 44:6
watching 30:17 30:18 39:5
way 4:8,19 5:16 5:18,20,23 15:24 20:10 22:6,22 23:1 25:3 26:16 32:15 34:10,19 35:19 37:9 41:9 49:11 51:18 52:5 53:20 54:20
ways 7:17 13:10
website 38:4
weighed 36:20
well-trained 30:9
went 28:3 55:6
We'll 3:3
we're 14:4 21:23 23:8,9 25:11 41:20
we've 49:11
whatsoever 16:12 19:18 38:11
Wilkerson 22:18
Wilkinson 26:11
willing 50:8,10
wind 51:18
witnesses 33:21 43:16
wondered 28:3
word 7:10,14 50:18,19
words 5:15
work 17:15 20:9 29:3 37:3 45:14 50:6,24
worked 4:20
worker 28:19
working 28:15 38:15 56:9
works 27:25 28:7,13
worried 50:21 56:8
wouldn't 4:21 10:2 11:18 17:20 20:12 25:5 31:23 51:15 53:12
write 41:8
wrong 20:9 23:7 25:3 30:17,22 36:23 48:22 55:6,10
wrote 46:15

X

x 1:2,10

Y

year 51:15 53:16
years 17:17 28:15 45:13 52:20

Z

zero 40:8
Zimmer 7:22

0

07-5439 1:6 3:4

1

10 34:18 37:8
10:03 1:16 3:2
100 4:18,25 5:5 5:17 29:19 40:4
105 46:16
11 55:25
11:05 57:15
14 42:10
18 9:13 51:15
1983 47:3,12
1998 29:17

2

2008 1:12
210 43:3
220 45:13
26 2:6

273 28:12
286 43:3
287 43:3

3

3 2:4
30 28:11 37:14
37:15,17
353 31:5
386 31:5

4

42 56:10
45 2:9
493 4:6
494 4:6 56:12
499 31:19 56:17

5

54 2:12
578 31:11

6

600 30:24
601 30:24
684 7:3

7

7 1:12
701 7:16