APPENDIX A

No 06-

In the
Supreme Court the United States

MICHAEL W. NANCE
Petitioner

VS.

THE STATE OF GEORGIA

On petition for a Writ of Certiorari to the Georgia Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

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June 16, 2006

Capital Case – No execution date set

Capital Case – No execution date set

QUESTIONS SUBMITTED FOR REVIEW

1. Whether the trial court can waive Petitioner's right to a hearing on physical restraints and rely of a six year old ruling in a prior trial.

2. Whether Georgia's execution procedures and lack of medical assistance violate the eighth amendment of the Constitution of the United States.

3. Whether Georgia's statute restricting observation of significant portions of the execution procedures and recordation methods violates the Petitioner's right to free speech and freedom of the press.

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CITATION TO THE OPINION BELOW

The decision of the Supreme Court of Georgia in this case appears as Nance v. State, Supreme Court of Georgia, slip opinion S05P1438 attached as Appendix A.

A Motion for Reconsideration was filed subsequent to the Supreme Court of Georgia's ruling. A copy of that Court's denial of the motion is included as Appendix B.

A motion for Extension to file Petition for Writ of Cert was timely filed. The order granting the extension is included as Appendix C.

Petitioner's trial counsel filed an "Amended Motion to Strike as Unconstitutional Article 2 of Chapter 10 of Title 17 of the Official Code of Georgia, including O.C.G.A Sections 17-10-30, 17-10, 33, 117-10-38 as amended, 17-10-41 and 17-10-44" prior to Petitioner's second trial and is attached as Appendix D. The decision of the Gwinnett County Superior Court denying the same motion (related to questions 2 and 3) is attached as Appendix E.

Because the Supreme Court of Georgia references Petitioner's prior trial, a copy of the trial court's prior ruling regarding use of the stun belt fined January 24, 1997 is attached in Appendix F and trial counsel's "Motion to Prevent Use of Stun Belt" filed prior to Petitioner's second trial April 24, 2002 as Appendix G. No written order was issued concerning the trial court's ruling in Petitioner's 2nd trial regarding use of the stun belt.

STATEMENT OF JURISDICTION

The Georgia Supreme Court issued its decision on December 1, 2005. Motion for Reconsideration was timely filed. The Georgia Supreme Court denied that motion on January 17, 2006. Petitioner timely filed for an Extension to file Petition for Certiorari on March 23, 2006. Such extension was granted on March 29 and petition is due on June 16, 2006. Petitioner, having asserted below and now before this Court the deprivation of rights secured by the first, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

Congress shall make no law... abridging freedom of speech, or of the press...

No person shall be held to answer for a capital, or otherwise infamous crime, ..., nor be deprived of life, liberty, or property without due process of law...

In all criminal prosecutions, ..., and to have the assistance of counsel for his defense.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed.

No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

PROCEDURAL HISTORY

A "Motion to Prevent Use of Stun Belt" in 1996 prior to Petitioner's first trial. A hearing was held. The court made no findings and issued an order denying "Motion to Prevent Use of Stun Belt".

Petitioner was convicted and sentenced to death for the murder of Gabor Balough in Gwinnett Superior Court in 1997. On direct appeal, the Georgia Supreme Court upheld Petitioner's conviction but reversed as to sentencing, finding that the trial court abused its discretion in qualifying a juror who was unfit. Nance v. State, 272 Ga. 217 (2000).

Petitioner filed several motions including "Motion to Prevent Use of Stun Belt" and "Amended Motion to Strike as Unconstitutional Article 2 of Chapter 10 of Title 17 of the Official Code of Georgia, including O.C.G.A Sections 17-10-30, 17-10, 33, 117-10-38 as amended, 17-10-41 and 17-10-44"

Petitioner filed a motion in the trial court asserting double jeopardy. After hearing arguments, the trial court denied Petitioner's motion. The double jeopardy claim was denied by Georgia Supreme court in Nance v. State, 274 Ga.311 (2001).

The trial court refused to hear an evidentiary hearing on "Motion to Prevent Use of Stun Belt". The court denied "Amended Motion to Strike as Unconstitutional Article 2 of Chapter 10 of Title 17 of the Official Code of Georgia, including O.C.G.A Sections

17-10-30, 17-10, 33, 117-10-38 as amended, 17-10-41 and 17-10-44". The Petitioner was then retried for the sentencing phase only. The jury imposed the death penalty on September 20, 2002.

A Motion for New Trial was filed October 18, 2002. An amended Motion for New Trial was filed September 24, 2004 and a 2nd amended Motion for New Trial was filed October 1, 2004. An order denying the Motion for New Trial was filed March 11, 2005.

Notice of Appeal to the Georgia Supreme Court was filed April 11, 2005. On direct appeal his convictions and sentence were affirmed, Nance v. State, Supreme Court of Georgia, slip opinion S05P1438 (December 1, 2005). Motion for Reconsideration was timely filed December 11, 2005 . The Georgia Supreme Court denied that motion on January 17, 2006. Petitioner timely filed for an Extension to file Petition for Certiorari on March 23, 2006. Such extension was granted on March 29 and petition is due on June 16, 2006.

WHETHER THE TRIAL COURT CAN WAIVE PETITIONER'S RIGHT TO A HEARING ON PHYSICAL RESTRAINTS AND RELY OF A SIX YEAR OLD RULING IN A PRIOR TRIAL

FACTS RELEVANT TO QUESTION PRESENTED

The failure of the trial court to have a hearing on the issue of use of a stun belt before Petitioner's second sentencing trial denied the Mr. Nance his rights under the Fifth and Sixth Amendments to the United States Constitution.

In 1996, the trial court had a hearing on the use of the stun belt before Petitioner's first trial for murder in 1997. The court made no finding of fact but denied Petitioner's Motion to Prevent Use of Stun Belt. "I'm going to deny the motion to preclude the use of the security belt. Anything else?" (T. Vol. 11/26/1996, p. 87, ruling in it's entirety by Judge Michael C. Clark) No additional findings were in the written order. Appendix F

Petitioner was convicted and sentenced to death for the murder of Gabor Balough in Gwinnett Superior Court. The case was reversed on a juror qualification issue. Prior to the second sentencing trial, Petitioner filed a Motion to Prevent Use of Stun Belt. Petitioner specifically prayed for an evidentiary hearing on the issues raised in the motion. Defense Counsel repeatedly asked for a hearing on this motion (T.3/23/02 vol.1,

p3; T.4/30/02, vol.1, p. 36-38; T. 9/3/02, vol.1, p. 12-14). No such evidentiary hearing was held. On September 3, 2002, the trial court judge stated that he would just leave the issue of the stun belt up to the Sheriff's Department to decide what security measures were or were not utilized. (T. 9/3/02, vol.1, p. 12-14.).

> MR. WILSON: Yes, sir. My -- Mr. Nance has complained to me again.
>
> THE COURT: About?
>
> MR. WILSON: Your Honor, he's -- we would ask the Court to reconsider the motion we previously made regarding the belt Mr. Nance is wearing. It's very uncomfortable, Your Honor. Mr. Nance will be here long days as all the rest of us. It impacts his comfort. It impacts his ability to participate meaningfully in his defense. We would ask the Court to reconsider that and give us a hearing in that matter. He needs to participate meaningfully and assist us in his defense, Your Honor. He needs to help us with voir dire. He needs to help us throughout this trial. He can't do so with this belt.
>
> THE COURT: Okay. Anything else? I ruled on that a couple of times before. I'm going to deny the motion in that regard.
>
> MR. WILSON: Yes, you -- I'm sorry, Your Honor. I don't mean to argue with the Court. But, yes, you had ruled on it before. But we've not had a hearing on it in the last 5 years. As to hearing the matter, it was over 5 years ago. I would ask that we have a hearing on that and let us present evidence.
>
> THE COURT: I remember what was said at the hearing. I remember the threats that were made by Mr. Nance.

I don't see a necessity to have another hearing. It would be rehashing what we've already talked about before. Whether he really meant them or not, I don't know. But I can't just disregard.

MR. WILSON: All right, sir. We respectfully except the Court's ruling.

THE COURT: Sure. Although, I really don't think that he would be a threat to the court reporter at this point, but I do remember him saying that one time that he would be a threat to the court reporter. Maybe at the time he was angry, I don't know. Anything else?

MR. PORTER: I believe it was the prosecutor that was --

THE COURT: Well, that too, you know. I know the court reporter will know. He was talking about biting the nose off the court reporter, if I remember correctly.

MR. PORTER: That was the prosecutor.

THE COURT: Prosecutor, okay. Same thing. Anyway, whether he really is a threat, I'm going to really leave that up to the sheriff's department to make that decision. I'm not going to have it removed at this point. He seems to be a lot lighter than he was before. I don't know if he lost a lot of weight or not.

MR. WILSON: All right, sir.

(Trial transcript 9-3-02, Vol. 1, p.12-13)

THE SUPREME COURT OF GEORGIA'S RULING

This restraint issue was raised to the Supreme Court of Georgia. The court found that a hearing in the second sentencing trial was not necessary. Nance v State, S05S1438 (2005). The Supreme Court of Georgia denied the Petitioner the right to a hearing in his retrial six years after the original hearing. It also fails to note that the trial judge did not make any finding six years prior as required by the rulings of this Court.

Nance v State, S05S1438 (2005)

> "Nance claims the trial court erred by refusing his request to conduct a hearing on whether he should be required to wear a stun belt during his 2002 sentencing trial. A stun belt is an electronic security device worn by a prisoner that can be activated by a remote transmitter which enables law enforcement personnel to administer an incapacitating electric shock if the prisoner becomes disruptive. Unlike shackles, it is worn under the prisoner's clothes and is not visible to the jury. Nance had worn a stun belt at his 1997 trial. Before the 1997 trial, the trial court, who also presided at the 2002 sentencing trial, agreed to the State's request that Nance wear a stun belt in court after conducting a pretrial hearing where evidence was received that Nance had threatened to "bite the nose off" the prosecuting attorney during the trial. At that hearing, witnesses testified about the mechanics of the stun belt, its advantages, and possible alternatives, and Nance testified about the alleged impact a stun belt would have on his comfort and ability to concentrate. The trial judge stated in 2002 he remembered the evidence from the 1997 stun belt hearing and said he could not disregard Nance's threat, even after the passage of several years. He denied Nance's request to conduct another hearing and allowed the use of a stun belt as a security measure at

Nance's sentencing trial.

> It is "well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court." Young v State, 269 Ga. 478 (2), 499 SE2d 60 (1998). The trial court conducted a hearing in this case to determine the necessity of a stun belt and concluded the use of a stun belt was warranted by the threat and would not interfere with the ability of the defendant to receive a fair trial. See id The trial court did not err by failing to hold a second hearing in 2002; the only change in circumstance since the 1997 hearing offered by Nance was the passage of time and this was obvious to the trial court without the need for a second hearing. We find no abuse of discretion by the trial court in its ruling on this issue."

The Georgia Supreme Court refers to a hearing on the use of the stun belt in its opinion rendered December 12, 2005. However, the hearing referred to was in the petitioner's previous sentencing trial, not the sentencing trial at issue. Additionally, no citations were made by the state regarding the prior hearing. The hearing referred to did not have any findings to help determine the use of the belt six years later. (At that hearing officers testified that the Petitioner had not given them any trouble. They only wanted the belt because they knew Petitioner was already under a life sentence and was involved in a capital trial.) (T. Vol. 11/26/96, pp.58-87) The trial court and the Supreme Court of Georgia's reliance on the hearing six years prior is misplaced.

REASON FOR GRANTING THE WRIT

Both the United States Supreme Court and several United States Courts of Appeals have decided this restraint issue in conflict with Georgia's highest court. The Supreme Court of Georgia has decided the matter in conflict with the Fifth, Sixth, and 14th Amendments to the Constitution of the United States.

In the recent case of Deck v. Missouri, 544 U.S. 622 (2005), Supreme Court of the United States addressed the issue of the use of restraints at the sentencing phase of a capital trial. The Court held that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest' –such as the interest in courtroom security—specific to the defendant at trial." Id. at 624 (citing Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986).

In reaching its decision, the Court noted that judicial concern regarding shackling once reflected concern for suffering to the accused caused by the "very painful" chains, but that more recently the analysis has turned to the following three fundamental legal principles: (1) visible shackling undermines the presumption of innocence, (2) use of physical restraints interferes with the accused's ability to participate in his own defense and his ability to communicate with his lawyer; and (3) use of visible restraints interferes

with a judge's ability to maintain a dignified judicial process. Id. at 630-31. While the Court conceded that the first issue has no effect at the sentencing phase of a capital trial, because the defendant's conviction means the presumption of innocence no longer applies, it found, nonetheless, that shackles at the sentencing phase "threaten related concerns." Id. at 632.

This Court found that the jury's determination of life or death at the sentencing phase "is no less important than the decision about guilt" due to the "severity" and "finality" of the sanction. Id. (citing Monge v. California, 524 U.S. 721, 732 (1998). The Court also found that

> The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decision making, even where the State does not specifically argue the point.

Id. at 633. The Court concluded that the Fifth and Fourteenth Amendments dictate that "courts cannot place defendants in shackles *or other restraints* visible to the jury during the penalty phase of a capital proceeding" as a matter of routine, and that a judge must make a case specific determination which reflects particular concerns related to the defendant at trial. Id. (emphasis added).

In reviewing this type of issue, the Court pointed to its statement in Holbrook, *supra*, that shackling is "inherently prejudicial." Id. at 635. The Court noted that this statement is "rooted in our belief that the practice will often have negative effects" which cannot be shown in the trial transcript and, therefore, a defendant need not demonstrate actual prejudice to make out a due process violation. Id. The Court held that the "State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" Id. (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Petitioner submits that this court should apply the Supreme Court of the United States' analysis in Deck v. Missouri, *supra,* to the case at bar. The appropriate standard for the utilization of restraints during a sentencing trial in a death penalty case, like Petitioner's, should be:

The use of physical restraints, visible or otherwise, upon an accused in a death penalty sentencing trial violates the accused's right to due process of law, unless the trial court shall entertain evidence and shall find that such restraints are justified by a state interest specific to the defendant on trial.

Federal courts have already reviewed the use of stun belts in the court room. Gonzalez v. Piler, 341 F.3d 897 (9th Cir. 2003); United States v. Durham, 219 F.

Supp.2d 1234 (11th Cir. 2002); see generally American Bar Association Standards for Criminal Justice; Discovery in Trial by Jury, Standard 15-3.2 at 15-78 (3rd Ed. 1996) .

Unseen restraints may impact a defendant's right to a fair trial. Zygadlo v. Wainwright, 720 F.2d 1221, 1223 (11th Cir. 1998). Courts found that many of the reasons cited in Deck v. Missouri, *supra,* for not utilizing visible restraints are equally applicable to non-visible restraints, particularly stun belts. Both Gonzalez and Durham, *supra* were reversed because the trial court made no findings of fact regarding the features of the belt, its use or examining the need for it or alternative methods of restraint. The Durham court said that if the stun belt protrudes from a defendant's back noticeably, it is possible that it may be viewed by jurors, and that, according to the 11th Circuit Court of Appeals, "may be **even more prejudicial than handcuffs or leg irons** because it implies that unique force is necessary to control the defendant." Durham, 219 at 1305. (Emphasis supplied.)

According to the Durham court, the risk of interfering with an accused's Sixth Amendment right to counsel is "far more substantial" when a stun belt is used than when leg shackles are used:

> The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial-including those movements necessary for effective communication with counsel.

Durham, 219 at 1306.

Calling the stun belt a "considerable impediment" to a defendant's ability to follow the proceedings and take an active interest in the presentation of his defense, the 11th Circuit Court of Appeals has noted the use of a stun belt may adversely impact upon a defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense.

> It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial. We have noted that the presence of shackles may significantly affect the trial strategy [the defendant] chooses to follow. [Citing to Zygadlo, *supra*] A stun belt is **far more likely to have an impact on a defendant's trial strategy than are shackles**, as a belt may interfere with the defendant's ability to direct his own defense. (Emphasis supplied).

Durham, 219 at 1306.

In his concurring opinion in the Durham case, Judge Tjoflat refers to Durham's initial pleading requesting a hearing and noted that one of the makers of stun belt devices promotes it to law enforcement personnel for "**total psychological supremacy**...of potential troublesome prisoners." Durham, 219 at 1310. That psychological effect and the defendant's preoccupation with the device can contribute to make him appear to

jurors as though he is uninterested in the proceedings. At a death penalty sentencing trial such as Petitioner's, the jurors are likely to observe the defendant and to factor into their deliberations any oddness about him. While this psychological effect is difficult to quantify, it is one more reason for caution in the use of this type of restraint. If the prosecution is allowed to begin a death penalty sentencing trial with "total psychological supremacy" over the accused, the game may be over before it begins.

Compared to the stun belt, "shackles are a minor threat" to the dignity of the courtroom, Durham, at 1306. "The use of a stun belt has a capacity to be highly detrimental to the dignified administration of justice..." Id.

In summing up its discussion of the problems inherent in the use of a stun belt to restrain a prisoner during a trial, the Durham court said:

> Thus, stun belts pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways. Stun guns are less visible than many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence. However, a stun belt imposes a substantial burden on the ability of a defendant to participate in this own defense and confer with his attorney during a trial. If activated, the device poses a serious threat to the dignity and decorum of the courtroom.

Id., at 1306.

The Gonzales court also found the use of a stun belt may impair a defendant's privilege of testifying on his own behalf. Gonzales, *supra*, at 900; People v. Mar, 28 Cal. 4th 1201, 52 P.3d 95,104, 124 Cal Rptr. 2d 161 (2001). The Gonzales court noted that most defendants would experience an increase in anxiety if compelled to wear the belt at trial, and that this increase in anxiety would likely affect one's demeanor while testifying. This demeanor impacts the jurors' perception of the defendant, thus risking material impairment of and prejudicial effect on the defendant's privilege of testifying. See also, People v. Harrington, 42 Cal. 165, 168 (1871).

Several courts have found the same "close judicial scrutiny" should be required regarding the use of the stun belt as when other physical restraints are utilized. Durham, 219 at 1306; United States v. Theriault, 531 F.2d 281 (5th Cir. 1976); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987). Such judicial scrutiny should include factual findings about the operation of the belt, issues such as the triggering for the belt and the potential for accidental discharge, as assessment as to whether any essential state interest is served by compelling the particular defendant to wear the device, and whether any less restrictive methods of restraint would suffice. And, the trial court's rationale must be placed on the record to enable a reviewing court to determine whether the trial court abused its discretion in requiring the use of the stun belt. Durham, 219 at 1306-1307; Theriault, *supra*.

The Durham court determined that the trial court had not closely scrutinized the use of the stun belt. Further, the 11th Circuit Court of Appeals determined that since the use of the belt infringed upon that defendant's fundamental constitutional right to be present at trial and to participate in his own defense, reversal was required because the government had not proved beyond a reasonable doubt that the error was harmless. Durham, 219 at 1308.

Use of a stun belt as a restraint substantially impacts a defendant's constitutional rights in a criminal trial. The device interferes with a defendant's right to consult with counsel and his right to participate in his own defense. When a stun belt is sought to be used, the trial court must subject that decision to "close judicial scrutiny." The court should entertain evidence as to the operation of the device and explore less restrictive methods. And, if choosing to require the device to be worn, the trial court should make specific findings articulating its rationale for employing the belt.

In the case at bar, Petitioner Nance was denied the right to consult with his attorneys and the right to participate fully in his own defense because of the court trial court's requiring him to wear the stun belt. The court failed and refused repeatedly to hold a hearing to consider evidence as to whether Petitioner should wear the belt. The trial court did not consider any alternative to the use of the stun belt. And, the trial court did not articulate any sufficient rationale for using the belt.

The state cannot demonstrate beyond a reasonable doubt that the infringement upon Petitioner's constitutional rights created by the trial court's error was harmless. Thus, the jury's verdict and sentence should be overturned and the case remanded for a new sentencing trial.

WHETHER GEORGIA'S EXECUTION PROTOCOLS AND LACK OF MEDICAL ASSSITANCE VIOLATE THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

FACTS RELEVANT TO QUESTION PRESENTED

Petitioner filed a motion requesting that the trial court strike as unconstitutional O.C.G.A. 17-10-38, as Amended, as applied by the protocols of the Department of Corrections. The motion specifically targets the protocols and procedures in implementing the lethal injection execution. The motion did not target the statutory authorization for lethal injection.

The protocol calls for a series of three drugs: sodium pentothal, pancuronium bromide (also known as Pauvulon) and potassium chloride.

> Lethal injection usually consists of sequential administration of sodium thiopental for anaesthesia, pancuronium bromide to induce paralysis, and finally potassium chloride to cause death. Without anaesthesia, the condemned person would experience asphyxiation, a severe burning sensation, massive muscle cramping, and finally cardiac arrest.

Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005 The Lancet , Vol. 265, p. 1412-1414

The Georgia lethal injection statute does not require the three drug protocol.

An extensive hearing was held on the protocols, effects and risks of the three drug procedure. The Nance lethal injection protocol hearing is one of the cases cited in the Lancet article as a basis for Dr. Koniaris's conclusions.[1] Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005 The Lancet , Vol. 265, p. 1412-1414.

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[1] "Because no documentation of anaesthesia in the execution chamber existed, the only available objective data were postmortem concentrations of thiopental. Texas and Virginia refused to provide such data, but we obtained autopsy toxicology results from 49 executions in Arizona, Georgia, North Carolina, and South Carolina. Toxicology reports were generated by MedTox Laboratories (St Paul, MN) for Arizona and are available in Beardslee versus Woodford, No C-04-5381 (Northern District of California, 2004). Data from the Division of Forensic Sciences Georgia Bureau of Investigation are available in **State versus Nance, Superior Court Indictment No 95-B-2461-4**. North Carolina reports were obtained directly from the Office of the Chief Medical Examiner. South Carolina Law Enforcement Division Toxicology Department reports were obtained by attorney David Barron, Kentucky Department of Public Advocacy Capital Post-Conviction Unit (personal communication) and are available in Hill versus Ozmint, No 2:04-0489-18AJ (District of South Carolina, 2004)." Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005 The Lancet , Vol. 265, p. 1412-1414 (emphasis added)

The sensitivity to Pentothal varies greatly among individuals.[2] The necessary dosage needed for effective use of Pentothal is susceptible to a number of factors, some well-recognized, others that remain unknown. Known factors that affect the efficacy of Pentothal include body weight, body fat, prior drug usage, the presence in the body of other sedating agents, and the level of anxiety or stress.[3] Given the variable sensitivity and the range of known and unknown factors that influence the effectiveness of Pentothal, there is significant risk that one (1) gram of Pentothal successfully and completely injected may not be effective in causing a deep, lengthy anesthetized state in a condemned individual (i.e. the condemned person may lose consciousness for only a brief period).[4]

> "Toxicology reports from Arizona, Georgia, North Carolina, and South Carolina showed that post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%); 21 (43%) inmates had concentrations consistent with awareness. Methods of lethal injection anaesthesia are flawed and some inmates might experience awareness and suffering during execution."

Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005.

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[2] (Testimony of Dr. Sperry, Tr. 57, July 30,2002).

[3] (Testimony of Dr. Heath, Tr. 332-33, May 1, 2002).

[4] (Testimony of Dr. Heath, Tr. 329-32, May 1, 2002).

The Lancet , Vol. 265, p. 1412-1414

The use of Pavulon in lethal injection adds significant risk to the killing process

Pursuant to the lethal injection protocols, Pavulon is the second lethal drug injected into the inmate.[5] Pavulon blocks the transmission of signals from nerves to muscles, paralyzing the muscles of the patient. The drug has no effect upon a person's sensory abilities (i.e. the ability to think, see, hear, smell, or feel).[6]

If an unconscious condemned person is paralyzed after being administered Pavulon and then regains consciousness, it is almost a certainty that the execution staff would be completely unaware that the person had become conscious.[7] A condemned

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[5] (Ex. 656 (Item 10 of Controlled Chemical Handling Procedures for Execution by Lethal Injection)).

[6] (Testimony of Dr. Heath, Tr. 335, May 1, 2002).

[7] While Sandra Cook, the contract LPN who is responsible for starting the peripheral IV in the condemned person and then observes the prisoner during the execution process, initially testified that she looked for signs that would indicate that the prisoner was regaining consciousness during the execution procedures. (The signs she looked for to determine if the condemned person was regaining consciousness were "the eyes or, you know, even they could have some twitching." (Sandra Cook, Tr. 138, April 30, 2002)). She eventually conceded that she would not know if a condemned person paralyzed by Pavulon had regained consciousness. (Sandra Cook, Tr. 151, April 30, 2002). (The signs initially cited by Ms. Cook as

person could regain consciousness because (1) less than the expected dose of anesthetizing drug Pentothal had been successfully injected into the individual's bloodstream, (2) the sensitivity to Pentothal varies greatly among the population[8] and some individuals (particularly those who have been building additional resistance by taking Valium[9] or other anti-anxiety medication) are significantly more resistant to Pentothal than others, or (3) the duration of the effectiveness of the ultra-short acting Pentothal wore off. In such a scenario the execution staff would be completely unaware that the condemned person was experiencing excruciating pain from suffocation (because the diaphragm muscles would be paralyzed), burning in the veins from the injection of the potassium chloride, and finally a massive heart attack induced by the potassium chloride.[10]

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indicators of when a paralyzed person is regaining consciousness are not, in fact, accurate indicators of a person gaining consciousness. (Testimony of Dr. Heath, Tr. 324-25, May 1, 2002).)

[8] (Testimony of Dr. Sperry, Tr. 57, July 30, 2002 (the sensitivity to Pentothal varies greatly from individual to individual)).

[9] (Testimony of Dr. Heath, Tr. 332, May 1, 2002 (drugs such as Valium can make people very resistant to Pentothal)).

[10] (Testimony of Dr. Heath, Tr. 336-37, May 1, 2002 (describing effect of Pavulon and Potassium Chloride upon the body)); (Testimony of Dr. Sperry, Tr. at 33, July 30, 2002 (describing the effect of Potassium Chloride upon the body)).

Dr. Heath explained how, under Georgia's protocols for lethal injection, such a scenario may come about. If, during the injection of the first drug, Pentothal, a problem were discovered with the IV line or injection site, pursuant to the protocols the staff is directed to switch to the second IV line.[11] If the syringe of Pentothal that had been injected into the IV setup were empty and the condemned person appeared unconscious, the staff could mistakenly assume that all of the Pentothal had been successfully injected, and then begin injecting the paralyzing agent, Pavulon, on the second line. The signs and symptoms that indicate how deeply a patient is anesthetized are subtle.[12] Ms. Cook, the execution staff member responsible for watching the condemned person during the execution does not have the training, experience, or expertise to assess these signs and symptoms.[13] Assuming that the condemned person had received only enough Pentothal to be rendered unconscious for a short time, the condemned person would then become

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[11] (Testimony of Wanda Davis, Tr. 219, April 30, 2002) ("A. Leaking or anything. She will signal to us. There is a man in the room with us who watches and knows everything that's going on. He will in turn let me know and that I.V. site will be shut down and we will use the other site. Q. And then you continue on where you were? A. Where we left off, exactly.")

[12] (Testimony of Dr. Heath, Tr. 323-24, May 1, 2002).

[13] (Testimony of Dr. Heath, Tr. 324-25, May 1, 2002).

conscious after he or she had been paralyzed by the Pavulon.[14] The person would be fully conscious and sensory aware, yet could not communicate in any manner with the execution staff or official witness. The condemned person would be suffocating because his diaphragm would be paralyzed, he would feel his veins burn as the alkali Potassium Chloride was injected, and he would then experience a massive heart attack.[15] Including Pavulon in the lethal injection protocols creates significant risks in the execution process, and must be justified by a corresponding penological benefit.

Dr. Kris Sperry, the State Medical Examiner called by the State in this hearing, conceded that it would be impossible to determine if an individual paralyzed by an administration of Pavulon were conscious or not.[16] While Dr. Sperry has no postgraduate

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[14] Significantly, the blood levels of Pentothal of the individuals successfully executed by lethal injection in Georgia have been not been higher than the levels found in the therapeutic setting.

[T]he blood levels of these individuals who died by lethal injection, the blood levels of sodium Pentothal, were lower than the blood levels that are recorded in patients who are undergoing surgical procedures; that is, who are completely put to sleep by sodium Pentothal but their breathing is maintained and they are kept alive by the anesthesiologist while the surgery is going on.

(Testimony of Dr. Sperry, Tr. 35, July 30, 2002).

[15] (Testimony of Dr. Heath, Tr. 337-38, 340-341, May 1, 2002).

[16] (Testimony of Dr. Sperry, Tr. 57, July 30, 2002).

training or expertise in the area of anesthesiology[17], on this particular issue, Dr. Sperry's testimony was in complete agreement with the testimony of Dr. Mark Heath. Dr. Heath is a practicing anesthesiologist who is Board Certified in anesthesiology, an associate professor at Columbia University Medical School who teaches anesthesiology to medical students and residents, conducts research in the field of anesthesiology sponsored by the National Institute of Health, publishes in the field of anesthesiology, and is a member of the American Society of Anesthesiologists.[18]

A recent research article in a respected medical journal, The Lancet, supports Petitioner's argument about the risks inherent in current lethal injection methods. Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005 The Lancet , Vol. 265, p. 1412-1414. Researchers from the University of Miami's Miller School of Medicine, studying execution methods in Texas, Virginia, Arizona, North Carolina, South Carolina, and Georgia, concluded that it was possible that some of the inmates were "fully aware during their executions. We certainly cannot say that these inmates were unconscious and insensate. However, with no monitoring and with the use of the paralytic agent, any suffering of the inmate would be undetected." Koniaris, Inadequate Anesthesia in Lethal Injection for Execution, 2005 The Lancet , Vol. 265, p. 1412-1414.

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[17] (Testimony of Dr. Sperry, Tr. at 11, July 30, 2002).

[18] (Testimony of Dr. Heath, Tr. 323-24, May 1, 2002).

The Koniaris article concludes that anesthesia methods in lethal injection are flawed, and that "failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of at least some of those executed." The researchers note that ethical prohibitions against participation by medical doctors in protocol design and execution precludes any certainty as to adequate anesthesia levels. The author srecommends that these executions should cease pending further public review "to prevent unnecessary cruelty and suffering." Id.

Given the increased risk of inflicting truly horrifying pain and suffering upon the condemned person, why is Pavulon used in Georgia's lethal injection procedures?

Dr. Kris Sperry, the State Medical Examiner, provided the simple answer:

> Q. Dr. Sperry, then, if I understand your testimony, the injection of the Pavulon in the dosage that has been described in the – which is in the part of the record in this case – serves no purpose other than to prevent someone from watching the body twitch or enter in to seizure; is that correct?
>
> A. Essentially, yes. . . . [I]n the protocol itself the administration of the Pavulon as the second drug is meant specifically, as you said, Mr. Mears, to paralyze all the muscles of the body so that any involuntary twitching or jerking that may occur as part of the dying process, or seizures which are very common in anyone who dies for any sort of reason, well into the dying process; that is, when their brain is shut down, the body may involuntarily undergo muscular seizures. And that's really what the Pavulon is meant for is to paralyze all the muscles such that those outwardly aesthetically unpleasant things are not seen and do not occur. (Tr. 39-40, July 30, 2002.)

Dr. Mark Heath likewise testified on the use of Pavulon in the lethal injection procedure.

> Q. And finally, two questions. Is there any need to give the Pavulon to bring about a death in these protocols as you understand them?
>
> A. No. . . .
>
> Q. And is there any – so could these procedures be used without using – could everything be the same except take away the Pavulon and you'd still have an execution take place?
>
> A. It wouldn't be the same because it would be better. But it would be otherwise – you'd achieve the goal of death exactly. . . .
>
> It almost seems like a sick joke that somebody would design [the protocols] with an ultra short-acting drug to make the condemned go to sleep and then a long-acting paralyzing drug. It wouldn't be done in clinical practice and I just can't imagine any reason why it would be done here.

(Tr. 366-67, May 1, 2002).

The testimony and evidence introduced at Petitioner's lethal injection hearing brought to light many other significant and unnecessary risks of inflicting severe and prolonged pain and suffering upon the condemned person during a lethal injection execution. For example:

Appropriate drugs, devices, and equipment to respond to complications that will likely occur during the lethal injection process are not available during the execution.

In the November 6, 2001, execution of Jose High, staff attempted and failed to start a peripheral IV in a number of different places on Mr. High's body over a period of thirty-nine (39) minutes. Dr. Rao started an infraclavicular subclavian intravenous central line. A large needle was pushed into Mr. High's chest, below the clavicle, and a catheter was fed into a large vein that runs back from the arms. Serious complications can arise when attempting to insert a central line. For instance, if the patient begins to bleed, the only way to stop the bleeding is to perform surgery to find and close the hole in the vein.[19]

There is also the risk of an arrhythmia occurring during the insertion of the central line. An arrhythmia occurs when the wire that is inserted goes into and irritates the inside of the heart. This causes the heart to stop or beat abnormally[20]. In this event the patient must be given drugs or electrical stimulus from a defibrillator. Arrhythmia can cause blood to back up in the heart and lungs, causing chest pain and the feeling of suffocation, and may cause actual suffocation.[21]

Another complication of the central line procedure is a pneumothorax condition. This complication occurs when the needle that is used to find the vein punctures the area surrounding the lung and causes the lung to collapse. In this instance a large suction tube

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[19] (Testimony of Mark Heath, Tr. 315, April 30, 2002).

[20] (Testimony of Mark Heath, Tr. 316, April 30, 2002).

[21] (Testimony of Mark Heath, Tr. 317, April 30, 2002).

must be inserted into the chest cavity between the ribs and attached to a suction apparatus to reinflate the lung using negative pressure. When the condition is not treated, the patient would feel as if he were suffocating.[22]

In order to perform the central line to medically acceptable standards, there must be sophisticated medical equipment and devices available, along with trained and experienced medical staff, and drugs tailored to treat the complications that may arise.[23] These complications occur at a rate of six (6) percent nationally *in the therapeutic hospital environment.*[24] These safeguards mitigate the risks that may arise when performing a central line and are present in therapeutic hospital environments; it is in fact illegal to perform a central line in a hospital without these safeguards.[25] These safeguards are not available in the execution chamber.

RELEVANT COURT HISTORY OF EIGHT AMENDMENT RIGHTS

The lethal injection method of execution in Georgia violates the prohibitions against cruel and unusual punishments found in the Eighth Amendment of the

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[22] (Testimony of Mark Heath, Tr. 318, April 30, 2002).

[23] (Testimony of Dr. Heath, Tr. 340-341, 352, May 1, 2002).

[24] (Testimony of Dr. Rao, Tr. 297, May 1, 2002).

[25] (Testimony of Dr. Heath, Tr. 365-366, May 1, 2002).

Constitution of the United States. These execution procedures also violate Petitioner's rights under the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also; Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); and Gardner v. Florida, 430 U.S. 349, 357-58 (1977).

When evaluating the constitutionality of a challenged execution method under the cruel and unusual punishment provision, courts must look at whether the method involves "something more than the mere extinguishment of life, such as torture or a lingering death . . . something inhuman and barbarous or inflicts 'unnecessary pain, undue physical violence, or bodily mutilation and distortion.'" See In re Kemmler, 136 U.S. 436, 447 (1890). In addition, the execution method and the manner in which it is carried out must comport with evolving standards of decency. See Gregg v. Georgia, 428 U.S. 153, 171 (1976); Fleming v. Zant, 386 S.E.2d 339, 341 (Ga. 1989) Central to this analysis is the *risk* of inflicting substantial and prolonged pain. See Farmer v. Brennan,

511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison officials may be held liable under 8th Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted); Helling v. McKinney, 509 U.S. 25, 36 (1993) (8th Amendment analysis, "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency").

The prohibition against cruel and unusual punishment embraces unnecessary mental as well as physical pain and suffering during the execution process. See Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

Comparison with existing methods is thus required to determine whether or not a punishment involves the "unnecessary cruelty" forbidden by the Eighth Amendment, In re Kemmler, supra, 136 U.S. at 447, since it is not possible to determine whether a punishment has been "reduced, as nearly as possible, to no more than that of death itself," (emphasis supplied), Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. at 474 (Burton, J., dissenting), without comparing the punishment to other available methods to ascertain

Though Georgia may not be constitutionally obliged to make executions absolutely pain-free, significant, conscious pain that lasts for more than a few seconds is

constitutionally intolerable. See Fierro v. Gomez, 865 F. Supp. 1387, 1413 (N.D. Cal. 1994) (holding execution by lethal gas in California held unconstitutional where evidence indicated "death by this method is not instantaneous. Death is not extremely rapid or within a matter of seconds. Rather . . . inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face" and "during this period of consciousness, the condemned inmate is likely to suffer intense physical pain" from "air hunger"; "symptoms of air hunger include intense chest pains ... acute anxiety, and struggling to breath"), aff'd, 77 F.3d 301, 308 (9th Cir. 1996), vacated on other grounds, 519 U.S. 918 (1996).

There is a significant risk that Petitioner's execution by lethal injection in Georgia will cause him significant pain and suffering. A prisoner who has been executed in a painful and inhumane fashion obviously has no remedy after-the-fact. Moreover, it is unreasonable to subject Petitioner, or any other condemned person, to what amounts to a game of Russian Roulette, requiring him to bear a significant risk that his execution will cause unnecessary pain..

Finally, the pain and suffering that Petitioner will endure if he is executed by lethal injection under the Georgia Department of Corrections' inadequate procedures is indisputably unnecessary. The State of Georgia has not asserted that it would be impracticable or unreasonable to design and implement an execution protocol that would

ensure a swift, painless, and humane execution. Where, as here, the Petitioner has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, no court can, in good conscience, condone the risk of sending a man to his state-sponsored death without first assuring itself that the constitutional prohibition against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Georgia found as follows:

> 4. After conducting hearings on the procedures employed by the State of Georgia while carrying out the execution by lethal injection, the trial court ruled that these procedures are not unconstitutional. We find no error. See Riley v. State, *supra*, 278 Ga. 677 (15). See also Dawson v. State, 274 Ga. 327, 334-335 (554 SE2d 137) (2001)

The issue before this Court – whether the three drug protocol and/or the lack of medical assistance is a violation of the Eighth amendment of the United Stated Constitution, is pending in numerous jurisdictions at the present time. The Georgia lethal injection statute does not require the three drug protocol. Thus a ruling on the three drug protocol does not invalidate the basic statute authorizing lethal injection.

O.C.G.A. § 17-10-38. Lethal injection; place of

execution; physician not required to participate

> (a) All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection. Lethal injection is the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead.

The ruling of the Supreme Court of Georgia is in conflict with the Eighth Amendment of the United States Constitution. Federal district courts have already made preliminary findings that the three drug protocol as delineated in the Georgia protocols has substantial risk of causing unnecessary pain and suffering.

In a California United States District Court, Judge Fogel has found that the plaintiff there raised substantial questions that the three drug protocol "creates an undue risk that Plaintiff will suffer excessive pain when he is executed." Morales v. Hickman, 415 F. Supp 1037 (N. D. Cal. 2006) (Order Denying Conditionally Plaintiff's Motion for Preliminary Injunction)(aff'd Morales v. Hickman, 438 F. 3d 926 (9th Cir. 2006) (denial of stay) In that case, Judge Fogel fashioned a optional solution that either a) only sodium thiopental or another barbiturate be used or b) a qualified person experienced in anesthesia monitor the plaintiff at all times to make sure he is under the influence of the first drug such that he would not experience pain from the second. (The State tried but could not avail itself of the options and the case is still pending.)

A North Carolina court required special monitors or doctors added to the protocol to ensure proper anesthesia. Brown v. Beck F. Supp. (E.D.N.C. 2006) (stay denied Brown v. Beck , 445 F. 2d 752 (4th Cir. 2006) (execution was performed with addition of electronic medical monitors)

In Ohio, the federal district court issued a stay based on problems presented with the protocol. Cooey v. Taft, 2:04-CV-1156 (E.D. Ohio 2006) (stayed execution) "[T]he Court is persuaded that there is an unacceptable and unnecessary risk that Plaintiff Hill will be irreparably harmed absent the injunction, *i.e.*, that Plaintiff Hill could suffer unnecessary and excruciating pain while being executed in violation of his Eighth Amendment right not to be subjected to cruel and unusual punishment."

Several cases with the same underlying issue of drug protocols were on hold to await this Court's ruling on Hill v. McDonough, 547 U.S. (2006) Lower courts will go forward on hearings regarding the protocol merits based on this Court's ruling allowing the protocols to be challenged in properly filed 1983 actions. Jackson v. Taylor, 06-300-SLR (D. Del. 2006) (Memorandum Order, stay pending Hill, *supra)*; Moore v. Rees, 3:06-CV-00022-KKC (E.D. Ky 2006); Evans v. Saar, 412 F. Supp. 2d 519 (D. Md. 2006 (filed 1/19/2006); Taylor v. Crawford, 2006 F. Supp. Lexis 25346 (W.D. Mo. 2006) (pending hearings)(on remand from 445 F.3rd 1095 (8th Cir 2006)); Alley v. Little, 2006 304 U.S. App. Lexis 12047 (M.D. Tenn. 2006) (Memorandum 5/11/06, granting stay

pending resolution of Hill, *supra*, reversed); Rutherford v. Crosby, 438 F. 3d 1082 (11th 2006)

"A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311 (2002). The scope of the substantive protections afforded by the Eighth Amendment, as the Atkins Court reiterated, is defined by "evolving standards of decency that mark the progress of a maturing society." Id. at 312 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Atkins Court re-emphasized that evolving standards of decency are best reflected in the various relevant laws enacted throughout the country:

Proportionality review under those evolving standards should be informed by "'objective factors to the maximum possible extent,'" *see* Harmelin v. Michigan, 501 U.S. 957, 1000, 111 S.Ct. 2680 (1991) (quoting Rummel v. Estelle, 445 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry v. Lyaugh, 492 U.S.302, 331, 109 S.Ct. 2934(1989) Moreover, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Id. at 315.

The conflict between jurisdictions, and between federal and State courts, will continue to increase. This court should resolve the conflict. This specific protocol has mounting evidence of its failure. The unfortunate requirement of that building momentum is the unnecessary pain and suffering of inmates to prove that the protocols must be re-examined and medically sound.

WHETHER GEORGIA'S STATUTE RESTRICTING OBSERVATION OF SIGNIFICANT PORTIONS OF THE EXECUTION PROCEDURES AND RECORDATION METHODS VIOLATES THE PETITIONER'S RIGHT TO FREE SPEECH AND FREEDOM OF THE PRESS.

FACTS RELEVANT TO THE QUESTION PRESENTED

Petitioner filed a motion requesting that the trial court strike as unconstitutional O.C.G.A. 17-10-38, as Amended, as applied by the protocols of the Department of Corrections. It specifically addresses the Department of Corrections protocols restricting visual access and recordation. The issue was presented to the Supreme Court of Georgia in Petitioner's brief. The court did not specifically address the allegation.

The Lethal Injection Protocols promulgated by the Department of Corrections prevent the public and the courts from knowing the full extent of the problems that occur during lethal injection executions. The protocols require that *after* the intravenous ports have been started into the veins of the prisoner, the *witness room curtains are opened* and then "[t]he Warden or designee will ask the condemned if he has anything to add to the

final statement."[97] This procedure was followed in the Terry Mincey and Fred Gilreath executions, yet for some reason in the Jose High where execution personnel took thirty-nine (39) minutes to start the IVs and Mr. High was complaining of pain, the protocol was not followed and Mr. High was not permitted to make any additional statements.

The protocols promulgated by the Department of Corrections severely restrict the opportunity for the official independent witnesses and media witnesses to observe the procedures employed during the lethal injection execution. The Lethal Injection Protocols preclude independent official witnesses and media representatives from observing the majority of the lethal injection execution procedures.

> Lethal Injection Protocols 16.3.10 - 18:
>
> 16.3.10The Special Escort Team will attach restraints to arms, legs and body of the condemned.
>
> 16.3.11 The IV team will place intravenous ports into the veins of both arms of the condemned. The heart monitor leads will be applied to the condemned. If the veins are such that an IV cannot be started, a contract physician will perform the cut down procedure to establish an intravenous port.
>
> 16.3.12 Witness Room curtains will be opened by a designated staff member and the microphone turned on. The Warden will introduce himself to witnesses and issue final instructions regarding the execution.
>
> 16.3.13 The Warden or designee will ask the

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97 (Lethal Injection Protocols 16.3.11, 16.3.12, and 16.3.13).

> condemned if he has anything to add to the final statement. Such statements will be limited to two (2) minutes. (Statement shall be recorded by the Warden or designee.) A prayer is offered if condemned requests, which is limited to two (2) minutes.
>
> 16.3.14 The condemned is read essential Order of the Court; the microphone is turned off.
>
> 16.3.15 All unnecessary staff shall clear the execution chamber.
>
> 16.3.16 Execution officials take their place behind the partition.
>
> 16.3.17 Final communication is made to Central Office Command Post. (CP#1)
>
> 16.3.18 The execution is carried out.

Furthermore, Lethal Injection Protocol 11.4 further restricts what recording equipment the independent official witnesses may use during the limited portion of the execution they are even permitted to see.

> Lethal Injection Protocol "11.4 Restrictions: No photographic, recording or computerized equipment will be permitted in the execution chamber or witness room except as specifically authorized by the Warden. All pencils, note pads, etc. will be issued and controlled by designated GDC staff."

REASONS FOR GRANTING THE WRIT

To determine whether lethal injection executions are fairly and humanely administered, or whether they can ever be, citizens and the court must have reliable

information about the "initial procedures" which are invasive, possibly painful and may give rise to serious complications. Witnesses to an execution are watch dogs to insure that procedures are humane and properly conducted.

It is impossible for any reviewing court to have confidence that the execution procedures being followed by the execution personnel do not encompass significant risk of inflicting unnecessary and severe pain and suffering upon the person being executed if witnesses are not able to observe and record events. There is no independent evidence about what is actually occurring during the lethal injection executions because the written protocols are not being followed in significant respects and because the protocols literally keep the curtains closed on the official witnesses for most of the lethal injection procedures.

Virtually identical restrictions in public access of viewing lethal injection executions in other states have already been struck down by the courts. For example, when the gas chamber was used in California, witnesses observed the entire execution process. Then when California changed to the lethal injection method of execution, the protocols were modified so that the witnesses were only permitted to witness the procedures after the condemned person was strapped down and the IV catheters had been started. In California First Amendment Coalition v. Woodford, 299 F.3d 868, (9th Cir. 2002) The Ninth Circuit Court of Appeals affirmed the district court's permanent

injunction which prohibits defendant California Department of Corrections "from preventing uninterrupted viewing of executions from the moment the condemned enters the execution chamber through, to and including, the time the condemned is declared dead." The district court held that "the 8th and the 1st Amendment, taken together, mandate the public's presence during the entire execution." Cal. First Amend. Coalition v. Calderon, 956 F. Supp. 883, 890 (N.D. Cal. 1997) aff'd California First Amendment Coalition v. Woodford, 299 F. 2d 868 (9th Cir 2000).

The reasoning of the federal court in the challenge to the limitation on access in California is applicable here.

Georgia's execution protocols that unconstitutionally limit and preclude the official witnesses from viewing the entire lethal injection process, preclude the public, preventing this Court or any Court from confidently knowing that the Department of Corrections is taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering upon a condemned person during a lethal injection execution.

This Court should resolve the conflict between federal and state courts and the United States Constitution's first amendment guarantees and the lower court's ruling.

CONCLUSION

Petitioner, Michael Wade Nance, requests certiorari review be granted.

Respectfully submitted June 16, 2006,

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CERTIFICATE OF SERVICE

I hereby certify that I have served opposing counsel with a copy of this Petition for Writ of Certiorari by placing said copy in the United States Mail with adequate postage thereon and addressed to:

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