

CAPITAL CASE
EXECUTION SCHEDULED DECEMBER 11, 2025 at 10:00 a.m. Central

No. 25-6317; 25A669

IN THE
Supreme Court of the United States

HAROLD WAYNE NICHOLS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

REPLY TO THE BRIEF IN OPPOSITION

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It's hurting so bad.
-Byron Black during his execution by pentobarbital,
August 5, 2025

In less than 24 hours, the State of Tennessee plans to execute Harold Wayne Nichols under an experimental protocol that recently resulted in the botched and severely painful execution of Byron Black. Despite Nichols' efforts to obtain details about the chemical that will be used to kill him through public records inquiries, the State has continually dodged these requests. Thus, it is unknown to Nichols and the citizens of Tennessee the provenance, quality, and expiration date of the pentobarbital. Because legitimate pharmaceutical companies refuse to provide chemicals for executions, there is reason to suspect that Tennessee's pentobarbital supply was supplied on the grey market, has not been properly stored, could be expired and of lesser potency, and has not been subjected to quality-assurance testing. All of these issues could result in a prolonged and painful execution, or a failed attempt. Nevertheless, the State insists on killing Nichols without revealing anything about the pentobarbital and without allowing him to exercise his due process right to challenge the pentobarbital lethal injection protocol.

I. Recent botched pentobarbital executions belie the State's assertions.

The State confidently asserts that lethal injection is "widely touted" as "more humane" than electrocution. Brief in Opposition at 6. The State ignores a long history of lethal injection executions that have gone horribly awry. Since 1985, there have been at least 51 executions by lethal injection that have been widely considered botched by media witnesses and researchers.¹ Gruesome incidents in these executions have involved execution teams struggling for up to three hours to find a vein—sometimes attempting to stick the prisoner simultaneously on both sides of his body; a syringe coming out of the

¹ <https://deathpenaltyinfo.org/executions/botched-executions> (last accessed Dec. 10, 2025).

prisoner's arm 24 minutes into the execution, spraying chemicals around the room; incidents of invasive cut-down procedures in the femoral vein near the groin to achieve needle insertion; numerous incidents of prisoners visibly showing physical evidence of pain such as heaving chest, back arching against gurney, choking, gagging, gasping, coughing, groaning in pain, convulsing, vomiting, lengthy, painful incisions causing bleeding and bruising. *Id.*

Only ten states have approved the use of a one-drug pentobarbital protocol, and its use is relatively new and untested.² The State of Tennessee has only executed two people by this method, and one of those was botched. Byron Black moaned and made a statement expressing his excruciating pain. Media witnesses were clearly shaken by witnessing his death. Travis Loller, *Attorneys say electrocardiogram at Tennessee execution was active after inmate was pronounced dead*, Associated Press (Oct. 24, 2025); Catherine Sweeney, *Autopsy sheds light on Byron Black's painful execution*, WPLN News (Sept. 11, 2025). Black's autopsy showed that he experienced pulmonary edema and that his heart continued to beat for at least two minutes after pronouncement of death.

In other states, prisoners have shown excruciating pain during executions involving pentobarbital. During his execution in Oklahoma in 2014, Michael Lee Wilson stated, "I feel my whole body burning" after being injected with a cocktail of pentobarbital, vecuronium bromide, and potassium chloride.³ When South Dakota executed Eric Robert by pentobarbital in 2012, he gasped heavily and snored loudly with his eyes open, his skin

²<https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols> (last accessed Dec. 10, 2025).

³ <https://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/> (last accessed Dec. 10, 2025).

turning purple.⁴ Benjamin Ritchie violently lurched against his restraints during his execution by pentobarbital in Indiana in 2025.⁵ These incidents raised questions about the quality, age, and storage conditions of the pentobarbital used in those executions. Prior to the federal government rescinding the use of a pentobarbital-only protocol based on its risk of causing unnecessary pain and suffering, media witnesses reported that many of the 13 federal death-row prisoners executed with pentobarbital grimaced, shook, shuddered, winced, twitched, and their stomachs rolled and convulsed uncontrollably (a sign of pulmonary edema).⁶

These incidences lead to the undeniable fact that lethal injection by pentobarbital inheres an intolerable risk of “terror, pain, or disgrace.” *Bucklew v. Precythe*, 587 U.S. 119, 133 (2019). To date, the executions using pentobarbital have demonstrated an unacceptable risk of pain and suffering. Using only pentobarbital to execute a human being is extremely likely to cause pulmonary edema, causing pain and the terrorizing sensation of drowning. (Doc. 48-1, PageID# 529).

The State is gravely mistaken in its hasty assertion that pentobarbital is a humane method of execution. Nichols seeks only the opportunity to challenge Tennessee’s protocol, but he has been repeatedly blocked from doing so.

II. A firing squad would significantly reduce a substantial risk of severe pain.

The State responded that Nichols’ facial and as-applied Eighth Amendment

⁴ <https://www.aclutx.org/en/news/failed-experiments-stop-all-lethal-injections-now> (last accessed Dec. 10, 2025).

⁵ <https://indianacapitalchronicle.com/2025/05/20/state-executes-death-row-inmate-benjamin-ritchie-for-fatal-shooting-of-police-officer/> (last accessed Dec. 10, 2025).

⁶ <https://ejl.org/news/justice-department-finds-federal-execution-protocol-may-cause-unnecessary-pain-and-suffering/> (last accessed Dec. 10, 2025).

challenges to the use of pentobarbital fail for three reasons. Brief in Opposition at 21–22. Petitioner here replies to the second reason asserted by the State: that Nichols “failed to show that either proposed alternative will ‘significantly reduce a substantial risk of severe pain.’” Brief in Opposition at 23 (citing *Bucklew v. Precythe*, 587 U.S. 119, 143 (2019)). Petitioner maintains his assertions as to why a firing squad is a feasible, readily implemented alternative and why the State lacks a reasonable justification for not implementing a firing squad as outlined in his Petition for Certiorari.

Defendants, like the lower courts, rely on *Bucklew v. Precythe*, 587 U.S. 119 (2019) and *Barr v. Lee*, 591 U.S. 979 (2020), for the proposition that lethal injection with pentobarbital is more humane than a firing squad. Brief in Opposition at 23. But they ignore that justices on this Court have found that execution by firing squad is constitutional. The plurality opinion in *Baze* noted that this Court has previously held the firing squad is constitutional and has a long history of use in the military. 553 U.S. at 48 (citing *Wilkerson v. Utah*, 99 U.S. 130, 134 (1878)). Justice Kavanaugh cited with approval Justice Sotomayor’s observation that the firing squad “causes an immediate and certain death.” *Bucklew*, 587 U.S. at 153 (Kavanaugh, J., concurring) (citing *Arthur v. Dunn*, 587 U.S. 119, 137 S. Ct. 725, 734 (2017)). In *Glossip v. Gross*, the majority agreed with the dissent that there was “reason” to think firing squad is “relatively quick and painless.” 576 U.S. 863, 880–81 (2015).

Moreover, Nichols offered evidence that injection of a lethal dose of pentobarbital is sure or very likely to cause acute (flash) pulmonary edema. He is likely to remain aware, but unable to respond, as he suffocates. His awareness will not be obvious to observers because he will be restrained or taped down. Black suffered a tortuous and lingering death. He certainly suffered more severe pain

than was necessary to cause his death. Based on publicly available evidence, execution with pentobarbital presents a substantial risk of serious harm of the type condemned by the Eighth Amendment.

Nichols also explained that death by firing squad is quick and painless. In his expert's report, he explains how to carry out an execution by firing squad and even notes the supply of appropriate firearms is more reliable than for lethal injection chemicals. He notes there is already a firing range at the prison where Tennessee's death row inmates are housed, thus execution by firing squad could be readily implemented. He notes other states have been able to accomplish execution by firing squad. The risk of serious pain—severe pain beyond that necessary to cause death—is minimal with a firing squad execution. When execution by firing squad, which is quick and painless, is compared to execution by lethal injection, which causes pulmonary edema and where the inmate lingers, a firing squad is an alternative that substantially reduces the risk of harm.

CONCLUSION

Nichols seeks a stay from the Court to prevent his execution by pentobarbital, a method of execution that has been shown to pose a substantial risk of excruciating pain and terror, in violation of the Eighth Amendment. He has demonstrated that a firing squad is a viable alternative that could be readily implemented in Tennessee.

Further, he seeks to resolve the important Constitutional questions outlined in his Petition for Certiorari. Principally, he seeks the opportunity to exercise his

due process right to challenge Tennessee's protocol, as other similarly situated prisoners have been granted by the State, in violation of Equal Protection. He beseeches this Court to give him his day in court.

Respectfully submitted,

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