GRANTED

No. 99-6723

In The

Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

v.

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Florida

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether, in light of contemporary scientific knowledge and presently available alternatives, execution of a death sentence by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).[1]

STATEMENT OF THE CASE

One hundred years ago – on the eve of the twentieth century – this Court sanctioned the State of New York's experiment through the use of modern science to find "the most humane and practical method ... of carrying into effect the sentence of death." Deborah W. Denno, *Is Electrocution*

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[1] Both parties have consented to the appearance of NACDL as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup.Ct. Rule 37.6.

an Unconstitutional Method of Execution? The Engineering of Death over the Century, 35 Wm. & Mary L. Rev. 551, 566-67 (1994)("Denno I"). New York's Governor noted in this regard:

> The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide the means for taking the life of such as are condemned to die in a less barbarous manner.

In re Kemmler, 136 U.S. 436, 444 (1890)(quoting the annual message of the Governor of New York, dated January 6, 1885).

Thus was electrocution adopted as the principal execution alternative to hanging in this century. Denno I, at 562-607. By 1913, the year preceding the outbreak of World War I, a total of fifteen states had changed to electrocution as a result of "a well-grounded belief that electrocution is less painful and more humane than hanging." *Malloy v. South Carolina*, 237 U.S. 180, 185 (1914). By 1949, electrocution reached its high-water mark, having been adopted by twenty six states. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 Iowa L. Rev. 319, 365 n.276, 404-08 (Tables 3-7) (1997)("Denno II").[2]

From the outset, however – beginning literally with the botched execution of William Kemmler himself --

[2] No state has adopted electrocution since 1949, and, beginning in 1951, it has been steadily abandoned in favor of, *inter alia*, lethal injection in all but four jurisdictions: Florida, Georgia, Alabama and Nebraska. *See* Denno II, 82 Iowa L. Rev. at 363-70 & nn.270-98 (collecting statistics on changes of execution methods by states). *See also Provenzano v. State*, 1997 WL 756012 (Fla. September 24, 1999), at *6 (Harding, C.J., specially concurring) and *24 & n.38 (Shaw, J., dissenting).

electrocution has been fraught with extraordinary uncertainties (not to mention regular and repeated malfunctions) in the course of its administration. Denno II, 82 Iowa L. Rev. at 336. *See also Provenzano*, at *5 (Harding, C.J. specially concurring)("each time an execution is carried out, the courts wait in dread anticipation of some 'unforeseeable accident'").

Notwithstanding the *Kemmler* Court's naïve confidence that "it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless death" (136 U.S. at 443), the history of electrocution in this century has amounted to an unimaginable spectacle more reminiscent of a "gruesome ritual" involving "a barbaric torture device". Martin R. Gardner, *Executions and Indignities – An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 Ohio State L.J. 96, 126-27 n.228 (1978). *See also* the graphic catalogue of post-*Gregg* botched electrocutions since 1979 in Denno II, 82 Iowa L. Rev. at 412-24; *Glass v. Louisiana*, 471 U.S. 1080, 1086-92 (1985)(Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

As we stand on the eve of the twenty-first century, then, the time is long overdue that we reconsider the electric chair in light of contemporary scientific knowledge, presently available medical alternatives (e.g., lethal injection), and the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion). So considered – one hundred years after *Kemmler* – the electric chair should be retired as a one-time technological advance whose time has come and long-since gone. *Compare Kemmler*, 136 U.S. at 446 (burning at the stake, crucifixion, breaking on the wheel); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878)(disemboweling, beheading, quartering, public

dissection); *Weems v. United States*, 217 U.S. 349, 377 (1910)(quartering, hanging in chains, castration). *See also* Denno I, 35 Wm. & Mary L. Rev. at 567 n.87 (enumerating thirty four methods of execution known at the time of *Kemmler*).

SUMMARY OF ARGUMENT

The Eighth Amendment protects us from more than mere physical torture and barbaric punishment. It protects not only against the unnecessary and wanton infliction of pain but also against any punishment that is incompatible with our evolving standards of decency that mark the progress of a maturing society. It also protects the dignity of the individual – even the condemned in his final moments. Cruelty does not necessarily involve pain and may be reflected in needless degradation, even extending to treatment of the remains of the condemned during and after death.

Evaluated under these standards, the use of electrocution as a means of capital punishment no longer comports with the standards of decency that animate the Eighth Amendment. While imposition of a death sentence is supposed to be as instantaneous and painless as possible, contemporary scientific evidence indicates that it inflicts unnecessary pain and suffering on the victim, far more than necessary for the "mere extinguishment of life." In addition, the mutilation, burning and other physical indignities that routinely accompany electrocution unnecessarily violate the human dignity of the condemned. Finally, evolving standards of decency, as reflected in legislative trends, national consensus and the ready availability of a more humane medical alternative – lethal injection – which has already been adopted by the majority of states, compel the conclusion that the electric chair is no longer an acceptable method of capital punishment, scientifically or constitutionally.

ARGUMENT

EXECUTION BY ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT INSOFAR AS IT CONSTITUTES THE UNNECESSARY AND WANTON INFLICTION OF PAIN, VIOLATES HUMAN DIGNITY AND IS CONTRARY TO EVOLVING STANDARDS OF DECENCY IN LIGHT OF HUMANE MEDICAL ALTERNATIVES AND CONTEMPORARY PUBLIC CONSENSUS

As early as 1910, this Court recognized that the Cruel and Unusual Punishment Clause's prohibitions are not limited to those methods of punishment that were considered cruel or unusual at the time the Bill of Rights was adopted. *Weems*, 217 U.S. at 372-73. The Framers understood that our society's mores would evolve, and that some methods that had been widely employed would become unacceptable to society, just as the torturous and barbaric punishments of the Stuarts had become unacceptable by the Framers' own time. *Id.* at 372. They therefore framed a prohibition on cruel and unusual punishment which is dynamic and "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

As this Court made clear in *Trop*, a punishment that is incompatible with our evolving standards of decency violates the cruel and unusual punishment clause. 356 U.S. at 101-02. In addition, a punishment violates the clause if it involves "the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)(opinion of Stewart, Powell & Stevens, JJ.). The Eighth Amendment thus embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency ..." against which we evaluate penal measures. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)(quoting *Jackson v. Bishop*, 404 F.2d

571, 579 (8th Cir. 1968)(Blackmun, J.)); *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987)("any punishment might be unconstitutionally severe if inflicted without penological justification"). Thus, "[P]unishments 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or 'involv[ing] the unnecessary and wanton infliction of pain' are 'repugnant to the Eighth Amendment'". *Hudson v. McMillan*, 503 U.S. 1, 10 (1992).

This Court has emphasized that the Eighth Amendment forbids "inhuman and barbarous" methods of execution that go at all beyond "the mere extinguishment of life" and cause "torture or a lingering death". *Kemmler*, 136 U.S. at 447. It is beyond all debate that the Amendment proscribes all forms of "unnecessary cruelty" that cause gratuitous "terror, pain, or disgrace." *Wilkerson v. Utah*, 99 U.S. at 135-36. *See also Furman v. Georgia*, 408 U.S. 238, 430 (1972)(Powell, J., dissenting)("[N]o court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives").

Indeed, the Constitution requires that the state allow the condemned to die with as much dignity as possible. *Gregg*, 428 U.S. at 182 (opinion of Stewart, Powell & Stevens, JJ.). The Eighth Amendment's protection of "the dignity of man", *Trop v. Dulles*, 356 U.S. at 100, extends beyond prohibiting the unnecessary infliction of pain. It requires a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. Basic notions of human dignity require that the state minimize "mutilation" and "distortion" of the condemned prisoner's body, even after death. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering not only before but also after the death sentence has been fully carried out. *Wilkerson*, 99 U.S. at 135. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 473-74 (1947)(Burton,

J., joined by Douglas, Murphy & Rutledge, JJ., dissenting)("Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. *** The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself"); *In re Storti*, 178 Mass. 549, 60 N.E. 210, 210 (1901)(Holmes, C.J.)(the change from hanging to electrocution "was devised for reaching the end proposed as swiftly and painlessly as possible").

Evaluated under these standards, electrocution clearly violates contemporary civilized norms. First, it constitutes the "unnecessary and wanton infliction of pain," entailing far more pain and suffering than the "mere extinguishment of life," as that standard has been enunciated in *Kemmler* and *Resweber*. Second, the mutilation, burning and grotesque physical indignities that routinely accompany the customary electrocution unnecessarily violate the human dignity of the condemned. *See Weems* and *Trop v. Dulles*. Finally, evolving standards of decency, as reflected by legislative trends, national consensus and the ready availability of more humane medical alternatives – alternatives that have already been adopted in the overwhelming majority of states -- all compel the conclusion that electrocution is no longer constitutionally acceptable.

A. The Unnecessary and Wanton Infliction of Pain

Notwithstanding largely outdated claims that electrocution is painless, a substantial body of systematic research has accumulated over the last several decades which, when considered in tandem with recent expert observations and eyewitness accounts, belie any suggestion that electrocution is either invariably instantaneous or painless. Research on the effects of electricity on the brain indicate that during an

intentional electrocution, an individual is very likely to: (1) experience intense pain, (2) die slowly, (3) evidence serious emotional trauma, and (4) remain conscious. Denno II, 82 Iowa L. Rev. at 356-58 & nn.220-240 (and authorities collected therein). Moreover, a wide range of factors associated with electrocution, such as severe (third and fourth degree) burning, boiling bodily fluids (>160 degrees), asphyxiation and cardiac arrest can cause extreme pain when unconsciousness is not instantaneous. *Id.* *See also* Denno I, 35 Wm. & Mary L. Rev. at 637-45 (collecting authorities).

Moreover, the sheer number of documented instances of botched electrocutions, both in the immediate aftermath of *Kemmler* (1890) and, more recently, in the wake of *Gregg* (1976), conclusively demonstrate that the risk of inflicting "unnecessary and wanton pain" as a result of malfunction is substantial. Denno I, 35 Wm. & Mary L. Rev. at 646-54, 662-74; Denno II, 82 Iowa L. Rev. at 360-63, 412-24 (cataloguing at least eighteen botched post-*Gregg* electrocutions, complete with smoke, flames, burning flesh, pungent smells and repeated electrical jolts after initial current failed to kill the condemned).

When Justice Frankfurter cast his deciding vote in *Resweber* (329 U.S. at 471), he specifically disavowed any suggestion that he would countenance "a hypothetical situation, which assumes a series of abortive attempts at electrocution ..." With fifty additional years of history at our disposal, it may safely be said that the likelihood of repeatedly-botched electrocutions is no longer merely hypothetical; rather, it has become a gruesome and ghastly reality.

B. The Offense to Human Dignity

The Eighth Amendment prohibits not only unnecessary pain and suffering in connection with executions. It also prohibits grotesque physical indignities,

pre- or post-mortem, such as mutilation, dismemberment, beheading and dissection. Thus, even were death by electrocution instantaneous, it would still be unconstitutional given the unnecessary violence it inflicts upon the human body. The evidence of post-mortem autopsies, eyewitness accounts, and examinations by experts all confirm without exception that burns and mutilation of the body of the condemned is a regular incident of electrocution.

Mutilation results from excessive burning of the skin that removes chunks of flesh from the prisoner's head and body and reveal leg and skull bone wherever the skin was in contact with an electrode. Charring of the skin is commonplace as are vomiting and drooling, blood flowing from facial orifices, intense muscle spasms and contractions, odors resulting from burning flesh and extensive sweating and swelling of skin tissue as the body temperature heats to in excess of 160 degrees. Were this not enough, the condemned is often compelled to wear a diaper to deal with the involuntary defecation and micturition that is the inevitable by-product of a violent electrocution. Thus is the condemned – fully aware of the cruel indignities that await him in the chair – also condemned to experience elevated levels of anxieties and fear as his execution nears. Denno II, 82 Iowa L. Rev. at 359-60; Denno I, 35 Wm. & Mary L. Rev. at 643-45.

Mutilation of the body, unfortunately, is unavoidable insofar as it is inherent in the very nature of electrocution. That does not, however, exempt it from violating the very proscription that the Eighth Amendment was enacted to prevent – stripping the condemned of his last shred of dignity even while the state takes his very life.

C. Standards of Decency and Legislative Trends

In determining whether a punishment is incompatible with our evolving standards of decency, we look first and primarily to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (opinion of Stewart, Powell & Stevens, JJ.). The most important objective evidence consists of the statutes adopted by society's elected representatives. *Stanford v. Kentucky*, 492 U.S. 361, 367-70 (1989). Where state legislatures have reached a sufficient "degree of national consensus" in rejecting a particular punishment, *id.* at 370-71, that punishment is unconstitutional. Although this Court has never made explicit how much of a consensus is sufficient, it is clear that at some point the state legislative trend will become so compelling that it cannot be ignored. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); *see also Thompson v. Oklahoma*, 487 U.S. 815, 828-29 (1988).

With respect to electrocution, the legislative trend to reject it in favor of lethal injection has amounted to a veritable stampede. No state has adopted electrocution as a method of execution since 1949, when twenty six states employed it. Commencing in 1951, when the trend away from electrocution began, twenty two of those self-same states have switched to lethal injection as the principle mode of execution. *See* Denno II, 82 Iowa L. Rev. at 363-70 & nn.270-298; *see also id.* at 439-64 (Appendix 3)(state by state trends in execution methods). Indeed, in the case of several of the most recent lethal-injection converts – Virginia and Louisiana – problems with repeatedly botched electrocutions and the fear of constitutional litigation with respect to their electric chairs appeared to be the principal motivating factors in their respective legislature's sudden changes of heart vis-à-vis execution methods. *See* Denno I, 35 Wm & Mary L. Rev. at 674-76; Denno II, 82 Iowa L. Rev. at 448 n.823 (Louisiana) and 462-63 n.921 (Virginia).

Thus, at present there are only four states which retain electrocution as their sole methods of execution, three of them representatives of the Old Confederacy – Florida, Georgia and Alabama – and Nebraska. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades Of Constitutional Regulation Of Capital Punishment*, 109 Harv. L. Rev. 355, 405-07 (1995). (It should also come as no surprise that those same three states are also prominently represented on the Honor Roll of repeatedly-botched executions (along with Louisiana and Virginia) during the post-*Gregg* era).

Of course, the standard rejoinder to episodes of botched electrocutions is to attribute them to "unavoidable accidents." There comes a point in time, however, when the sheer multiplicity and frequency of "accidents" becomes so "longstanding, pervasive, well-documented, or expressly noted by prison officials" as to raise a flurry of warning flags under the Eighth Amendment:

> These incidents can, of course, be characterized as isolated. No doubt they are, if what is meant by isolated is that no multistate conspiracy to botch electrocutions exists. But taken together, the innumerable episodes of mechanical failure and human error evidence the reality that the problems with electrocution are inherent in the method and are not limited to the particular equipment or the personnel employed. That the equipment is old or personnel incompetent may be another ground for challenging the administration of the method, but it is not the only ground.

Lonny J. Hoffman, Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 Tex. L. Rev. 1039, 1058 (1992).

Whatever else may be said of us as we close what some historians have characterized as "The American Century," let it also be said that the standards of decency by which we look upon ourselves as a civilized society have sufficiently evolved that we are prepared to relegate medieval torture devices like the electric chair to the dustbin of history.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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