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 LOUIS STEIN CENTER FOR LAW AND ETHICS, FORDHAM UNIVERSITY SCHOOL OF LAW, AND PROFESSORS EDWARD A. BRUNNER, M.D., Ph.D., ROBERT A. BURT, J.D., MARGARET A. FARLEY, Ph.D., AND SHERWIN B. NULAND, M.D., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether execution by electrocution generally, and in Florida's electric chair specifically, violate the Eighth Amendment's Cruel and Unusual Punishments Clause.

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INTEREST OF *AMICUS CURIAE*[1]

The Louis Stein Center for Law and Ethics is based at Fordham University School of Law. The Stein Center reflects the law school's commitment to teaching, legal scholarship, and professional service that promote the role of ethical perspectives in legal practice, legal institutions, and the development of the law itself. Toward this end, the Stein Center sponsors programs, develops publications, and supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law faculty have examined the ethical dimensions of the administration of criminal justice, as well as questions of biomedical ethics. Because *Bryan v. Moore* calls into question the extent of courts' adherence to "evolving standards of decency," we believe that the Stein Center's consideration of the contours of the Eighth Amendment's proscription against cruel and unusual punishment may provide the Court with a unique perspective on the issues relevant to this case.

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[1] Both parties have consented to the appearance of *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.

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STATEMENT

On July 8, 1999, Allen Lee Davis' execution in Florida's electric chair gained national and international attention. Post-execution photos and testimony indicated that Davis suffered a nose bleed that poured down his shirt, that he evidenced deep burns on his head, face, and body, and that he was partially asphyxiated before and during the electrocution from the five-inch-wide mouth strap that belted him to the chair's head-rest. There was also testimony that after guards placed the mouth strap on him, Davis' face became red and he repeatedly mouthed and attempted to yell to the guards in an effort to get their attention. *Provenzano v. Moore*, No. 95973, 1999 WL 756012 (Fla. Sept. 24, 1999) *20-22 (Shaw, J., dissenting). In the post-execution photos taken by Department of Corrections personnel, "a sponge placed under [Davis'] head-piece obscures the top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap." *Id.* at *22.

Thomas Provenzano, who was scheduled to be executed in Florida State Prison the next day, filed a petition with the Florida Supreme Court seeking a stay of execution and arguing that the state's electric chair was cruel and unusual punishment. The Florida Supreme Court remanded Provenzano's case to the circuit court to conduct an evidentiary hearing on the constitutionality of Florida's electric chair. After the hearing, the circuit court held that electrocution in Florida's electric "is not unconstitutional." *Provenzano*, at *3. In a 4-3 per curiam opinion, a plurality of the Florida Supreme Court affirmed in three pages the circuit court's "finding that the electric chair is not unconstitutional." *Id.* at *3. Moreover, the plurality reiterated its previous holding in *Jones v. State*, 701 So.2d 76 (Fla. 1997), that had rejected the claim that Florida's use of electrocution violated "evolving standards of decency." *Provenzano*, at *3. The court implied there was no need to readdress the "evolving standards of decency" issue.

SUMMARY OF ARGUMENT

The Eighth Amendment was enacted to proscribe "torturous" and "barbarous" punishments, the penalties most commonly associated with executions. *See Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam). As yet, however, no court has provided a modern and comprehensive Eighth Amendment review of any execution method, including electrocution. In general, courts dismiss constitutional challenges to electrocution entirely by relying on the outdated precedent of *In re Kemmler*, 136 U.S. 436 (1890). In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and therefore never addressed directly the constitutionality of electrocution. *Id.* at 443. Alternatively, as in *Provenzano*, courts engage in a brief Eighth Amendment review that focuses predominantly on the amount of pain inflicted while ignoring other Eighth Amendment standards.

A modern and comprehensive Eighth Amendment review of medical, historical, and societal evidence demonstrates that electrocution does not comport with "evolving standards of decency." Electrocution inflicts unnecessary pain and physical violence, and is at risk of continuing to do so given a demonstrated pattern of botched electrocutions. Moreover, legislative trends show a clear and consistent break from electrocution. If the Cruel and Unusual Punishments Clause is applied in the way that it was originally intended, the Court would find electrocution unconstitutional.

I. *KEMMLER* WARRANTS RECONSIDERATION UNDER MODERN EIGHTH AMENDMENT STANDARDS

When the United States Constitution was being ratified, the Framers included in the Bill of Rights a prohibition of cruel and unusual punishments created expressly to proscribe the kinds of "torturous" and "barbarous" penalties associated with certain methods of execution. *See Furman*, 408 U.S. at 238. To date, however, courts generally have provided only superficial Eighth Amendment review of the constitutionality of execution methods, particularly electrocution. Most commonly, courts dismiss the electrocution challenge entirely (often in one sentence) by relying on the century-old precedent of *In re Kemmler*, 136 U.S. 436 (1890). *See* Deborah W. Denno, *Is Electrocution An Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 616-23 (1994) [hereinafter Denno-I] (collecting authorities); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 321-54

(1997) [hereinafter, Denno-II] (collecting authorities).[2] In *Kemmler*, the Court held that the Eighth Amendment did not apply to the states and deferred to the New York legislature's conclusion that electrocution was not a cruel and unusual punishment under the state's Electrical Execution Act. *Kemmler*, 136 U.S. at 443.

For a range of reasons, *Kemmler*'s precedential value has diminished substantially over the last century. First, the *Kemmler* Court never specifically employed the Cruel and Unusual Punishments Clause even though post-incorporation cases have continued mistakenly to cite *Kemmler* as an Eighth Amendment case. *See* Denno-II, 82 Iowa L. Rev. at 334 (collecting cases). Next, the *Kemmler* Court adopted the burden of proof promulgated by the New York court that required the prisoner to show "beyond doubt" that the execution method was cruel and unusual. *Kemmler*, 136 U.S. at 442. However, this standard has not been used since *Kemmler* in death penalty cases. Although courts, as in *Provenzano*, typically fail to identify the burden of proof when reviewing the constitutionality of execution methods, the burden of proof courts cite most frequently -- preponderance of the evidence -- is far less stringent. Denno-II, 82 Iowa L. Rev. at 335 (collecting cases). Moreover, a court reviewing electrocution under the Eighth Amendment would not defer to the state's legislature to the extent this Court did when deciding *Kemmler*. *Kemmler*, 136 U.S. at 442-43 (quoting the New York Supreme Court's explanation of why it deferred to the legislature). Most critically, *Kemmler* was decided before anyone had been electrocuted; therefore, the Court had limited evidence in reaching its conclusion. Historical analyses suggest

[2] Reprints of Professor Denno's *William & Mary Law Review* and *Iowa Law Review* articles are being lodged with the Clerk, for the convenience of the Court.

that *Kemmler* was based in large part on the law, science, and politics of the time as well as the particular uncertainties resulting from the passage of New York's Electrocution Act. *See generally* Craig Brandon, The Electric Chair: An Unnatural American History 7-159 (1999); Denno-I, 35 Wm. L. Rev. at 562-604 (detailing the competition between Thomas Edison and George Westinghouse concerning whose current would dominate the electrical industry).

Both legally and scientifically, then, Kemmler's 1890 electrocution was a "human experiment." By all accounts, the experiment failed. In graphic detail, the media reported the confusion, mistakes, and physical violence that resulted from Kemmler's execution. Regardless, electrocution became a popular means of execution in other states, which also reported mishaps and botches. *See* Brandon at 7-257; Denno-I, 35 Wm. L. Rev. at 599-676. Seemingly, the desire to perpetuate the death penalty outweighed any humanitarian goal to switch to a new method. *See* Denno-II, 82 Iowa L. Rev. at 388-94.

The *Kemmler* Court's factual assumptions regarding the acceptability of electrocution have no support in light of modern evidence of electrocution's effects on the human body. *See, e.g., Poyner v. Murray*, 508 U.S. 931, 933 (1993) (Souter, J., joined by Blackmun and Stevens, JJ, respecting denial of certiorari) (emphasizing that *Kemmler* was not "a dispositive response to litigation of the issue [of the constitutionality of electrocution] in light of modern knowledge"). One of the *Kemmler* Court's legal conclusions, however, remains viable: "Punishments are cruel when they involve torture or a lingering death.... something more than the mere extinguishment of life." *Kemmler*, 136 U.S. at 447.

Since 1962, when the Court held in *Robinson v. California*, 370 U.S. 660, 666 (1962), that the Eighth

Amendment applies to the states, the Court's Eighth Amendment doctrine has emphasized an "evolving standard of dec ncy." *See* Denno-II, 82 Iowa L. Rev. at 337-38 (collecting cases). Consistent with the "evolving standards of decency" and *Kemmler*'s "torture and lingering death" standards, the Court's Eighth Amendment jurisprudence suggests four interrelated criteria for determining the constitutionality of an execution method : (1) "the unnecessary and wanton infliction of pain," (2) "nothing less than" human dignity (e.g., "a minimization of physical violence during execution"), (3) the risk of "unnecessary and wanton infliction of pain," and (4) "evolving standards of decency" as measured by "objective factors to the maximum extent possible," such as legislation passed by elected representatives or public attitudes. *See* Denno-II, 82 Iowa L. Rev. at 321-402 (collecting cases).

In *Provenzano*, the Florida Supreme Court's skeletal *per curiam* opinion virtually ignored the great bulk of the Court's Eighth Amendment jurisprudence. Therefore, the Florida Supreme Court effectively begged the question of electrocution's continued propriety under an "evolving standards of decency" test. Indeed, no court has reviewed the constitutionality of electrocution under modern Eighth Amendment standards which consider, as a substantial part of an "evolving standards of decency" analysis, legislative trends and related information, such as public opinion polls.

II. MODERN EIGHTH AMENDMENT ANALYSIS DEMONSTRATES THAT EXECUTION BY ELECTROCUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Under the Court's modern Eighth Amendment jurisprudence, pain is only one of a range of factors suggesting that an execution by electrocution constitutes cruel and

unusual punishment. This section discusses briefly the pain and physical violence of electrocution, but then focuses on other Eighth Amendment criteria, most particularly the strong showing of legislative trends away from electrocution.

A. Electrocution Constitutes "Unnecessary and Wanton Infliction of Pain"

The most recent research and eyewitness observations suggest that many factors associated with electrocution, such as severe burning, boiling body fluids, asphyxiation, and cardiac arrest, can cause extreme pain when unconsciousness is not instantaneous. *See* Denno-II, 82 Iowa L. Rev. at 354-58 (summarizing available medical publications, eyewitness reports, and affidavit testimony). Table 9 (App., *infra*) provides brief summaries of nineteen botched electrocutions following *Gregg v. Georgia*, 428 U.S. 153 (1976), when the Court ended its moratorium on the death penalty. *See id.* at 168-207. These botches provide considerable evidence of extensive pain and suffering experienced by electrocuted prisoners. Notably, even a routine or "properly performed" electrocution can cause intense pain and a lingering death. *See* Sherwin B. Nuland, M.D., *Cruel and Unusual*, N.Y. Times, Nov. 9, 1999, at A25 ("Even when it functions exactly as it should, the electric chair is a brutal killer."); *see also* Sherwin B. Nuland, How We Die: Reflections on Life's Final Chapter (1993) (discussing different methods of death and the pain associated with them).

B. Electrocution Constitutes "Physical Violence" and Offends "Human Dignity"

Evidence of mutilation resulting from electrocution is derived from three sources: post-execution autopsies, which are required in some states; observations provided by experts; and

witnesses' descriptions of executions, some of which are detailed in App., Table 9, *infra*. The effects of electrocution on the human body include the following: charring of the skin and severe external burning, such as the possible burning away of the ear; exploding of the penis; defecation and micturition, which necessitate that the condemned person wear a diaper; drooling and vomiting; blood flowing from facial orifices; intense muscle spasms and contractions; odors resulting from the burning of the skin and the body; and extensive sweating and swelling of skin tissue. Denno-II, 82 Iowa L. Rev. at 359.

Similar to Allen Lee Davis' execution, for example, the execution of Wilbert Lee Evans in Virginia resulted in substantial bleeding. According to accounts by witnesses and reporters, blood poured from Evans' eyes and nose, drenching his shirt. Moreover, the flames witnessed during the 1990 execution of Jesse Joseph Tafero and the 1997 execution of Pedro Medina made the public explicitly aware of how a human body could be burned and distorted during an electrocution. *See* App. Table 9, *infra*.

C. Electrocution Constitutes the Risk of "Unnecessary and Wanton Infliction of Pain"

When legislatures or courts validate the use of electrocution, they presume that prison officials will carry out executions properly and that equipment will not malfunction. A focus on electrocutions in all states and over time, however, reveals the potential for prison personnel's contribution to a risk of unnecessary pain.

In 1990, for example, the botched electrocution of Jesse Joseph Tafero in Florida suggested there was a substantial likelihood the state's execution procedure could result in severe pain and prolonged agony. Subsequently, a pattern of

consecutive malfunctions has been established with the botched electrocution of Pedro Medina and, now, James Allen Davis. Tafero's and Medina's executions shared similar problems (most particularly difficulties with the headset sponge), that created the flames, smoke, smell, and burning in both executions. *See* App. Table 9, *infra*. Ironically, Tafero's and Medina's executions closely resembled William Kemmler's over a century ago. The fact that a new and additional set of problems accompanied the execution of James Allen Davis suggests that a continuing pattern of botches is highly foreseeable. Indeed, a pattern of consecutive botching also occurred in Virginia even after the state rewired the electric chair due to prior botching. These problems prompted Virginia to allow inmates a choice between electrocution and lethal injection. *See* Denno-II, 82 Iowa L. Rev. at 362 & n. 262.

D. Electrocution Contravenes "Evolving Standards of Decency"

"Evolving standards of decency" can be measured by legislative trends regarding the imposition of a particular punishment. A thorough assessment should consider legislative changes in execution methods over the course of the twentieth century, starting with the New York legislature's 1888 selection of electrocution. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

In general, three themes emerge from an 1888-1999 overview of legislative trends in the use of the five available methods of execution in the United States: hanging, firing squad, electrocution, lethal gas, and lethal injection. First, most state legislatures purport to change from one method of execution to another, or to a "choice" between a state's old method of execution and lethal injection, for humanitarian reasons, although other factors, such as cost, can also be

influential. Second, legislatures evidence a fairly consistent pattern of movement from one method of execution to another, suggesting that states take notice of the methods used, and the difficulties encountered, by other states. Third, since 1977, when lethal injection was first introduced, no state has changed to, or included as an additional "choice," any other method of execution but lethal injection. In general, states' changes in execution methods have occurred in the following order: from hanging to electrocution to lethal gas to lethal injection. The firing squad has been used only sporadically in only a few states. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

In 1853, hanging, the "nearly universal form of execution," was used in 48 "states" (many of which were still considered territories at that time). Nearly four decades later, however, concerns over the barbarity of hanging and the subsequent advent of electrocution prompted states to change their method of execution from hanging to electrocution. Even though the first electrocutions were grotesquely botched, by 1913, a total of 15 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, 26 states had changed to electrocution, the largest number of states that had ever used electrocution at the same time. However, since 1949, no state has selected electrocution as its method of execution. In other words, it has been a half century since any legislature has adopted electrocution as a method of execution. *See* Denno-II, 82 Iowa L. Rev. at 363-408, 439-64; App. Tables 2-4, *infra*.

The gradual cessation of states' adoption of electrocution appears to be attributable to Nevada's switch in 1921 from hanging and shooting to lethal gas in accordance with the state's new Humane Death Bill. By 1955, 11 states

were using lethal gas and 22 states were using electrocution. By 1973, 12 states were using lethal gas and 20 states were using electrocution. Since 1973, however, no state has selected lethal gas as a method of execution. *See* Denno-II, 82 Iowa L. Rev. at 366-67.

With each new lethal gas statute came controversy and constitutional challenges, both before and after the Court's moratorium on capital punishment in *Furman*, 408 U.S. at 238. By 1994, there was a "national consensus" concluding that lethal gas was not an acceptable method of execution. *See* Denno-II, 82 Iowa L. Rev. at 368.

Recent research indicates that there is an even more striking national consensus rejecting electrocution. Since 1973, 12 states have abandoned lethal gas as their exclusive method of execution. By contrast, since 1949, 22 states have abandoned electrocution as their exclusive method of execution. Moreover, 7 of these states have abandoned electrocution in the last six years. *See* Denno-II, 82 Iowa L. Rev. at 368-70; App. Tables 1-4, *infra*.

There are historical differences between the uses of electrocution and lethal gas that point to states' initial, relative reluctance, to reject electrocution. First, over the course of the century, states have relied on *Kemmler* to support the retention of electrocution whereas no Court case has addressed the constitutionality of lethal gas. Next, electrocution was introduced three decades earlier than lethal gas during a time when science was substantially less advanced; therefore, lethal gas, which was also a considerably more visible method than electrocution, had the advantage of greater immediate scrutiny. Nonetheless, electrocution and lethal gas have comparable "legislative lifelines" (61 years and 51 years, respectively) in terms of the point at which they were introduced and the point

at which they were no longer adopted, thereby suggesting comparable periods of tolerance. (Electrocution was first introduced in 1888 and last adopted in 1949; lethal gas was first introduced in 1921 and last adopted in 1973.) Lastly, lethal gas is more expensive than electrocution, a factor that states have acknowledged when they have changed execution methods. *See* Denno-II, 82 Iowa L. Rev. at 370-71 & n.298.

Recent trends also suggest that state legislatures may have reached a "sufficient" degree of national consensus in rejecting both lethal gas and electrocution as execution methods. Although the Court has never specified how much of a consensus is considered "sufficient," it has rendered punishments unconstitutional with far less consensus than that shown for lethal gas or electrocution. In *Enmund v. Florida*, 458 U.S. 782 (1981), for example, the Court held the death penalty unconstitutional for some kinds of felony murder, explaining that of the 36 death penalty jurisdictions, "only" 8, "a small minority," allowed capital punishment for such an offense. *Id.* at 792. Furthermore, even if the Court considered along with these 8 states an additional 9 jurisdictions that allowed the death penalty for an unintended felony murder if aggravating circumstances outweighed mitigating circumstances, the Court emphasized that still "*only about a third* of American jurisdictions" would allow a defendant to be sentenced to death for such offenses. *Id.* (emphasis added). The Court noted that even though this trend was not "wholly unanimous among state legislatures . . . it nevertheless weighs on the side of rejecting capital punishment for the crime at issue." *Id.* at 793; *see also* Denno-II, 82 Iowa L. Rev. at 371.

In those cases where the Court has rejected Eighth Amendment challenges to a particular punishment, there have been far more states employing that particular punishment than the number of states employing electrocution. *See, e.g.,*

Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989) (rejecting a challenge to the constitutionality of the death penalty for 16-year-olds, noting that 22 of the 37 death penalty jurisdictions allowed capital punishment for such youths); *Penry v. Lynaugh*, 492 U.S. 302, 334-35 (1989) (rejecting a challenge to the constitutionality of the death penalty for mentally retarded persons, emphasizing that only two states had prohibited it). *See also* Denno-II, 82 Iowa L. Rev. at 371 & n. 306.

Over time, lethal injection has become the overwhelmingly dominant method of execution. *See* App. Tables 5-7, *infra*. Among those inmates executed by either electrocution or lethal injection between 1978-79 and 1998-99, 75% were executed by lethal injection and 25% were executed by electrocution. As the total number of executions from these two methods increased over time (from 1 execution in 1978-79 to 156 executions in 1998-99), the percentage of electrocution executions declined steadily. The percentage of electrocution executions declined rapidly from 1980-81 to 1986-87 (from 100% to 56%), increased briefly in 1988-89 (58%), then declined steadily thereafter. The rapid increase in the percentage of lethal injection executions can be attributed to the fact that the increases over time in the total number of executions was driven largely by increases in lethal injection executions. *See id.*

There are other issues that bear on "evolving standards of decency." For example, apart from the United States, no other country in the world uses electrocution. Of the four remaining states in this country that use electrocution (Alabama, Florida, Georgia, and Nebraska), Florida imposes the most electrocution executions. Since *Gregg*, more than half of the electrocutions in this country, and thus in the world, have taken place in Florida. *See* App. Table 8, *infra*.

Electrocution is also not favored as a method of execution among respondents in recent public opinion polls. Lethal injection is preferred by most, if not the great majority, of respondents. *See* Carla McClain, *Arizona Gas Chamber Stays*, Gannet News Serv., Apr. 7, 1992, *available in* LEXIS, Nexis Library, Wires File (84% favoring lethal injection); George Skelton, *Death Penalty Still Strong in State*, L.A. TIMES, Apr. 29, 1992, at A1, A18 (63% favoring lethal injection). Floridians also have indicated majority support for lethal injection after Davis' execution. *See* Steve Bousquet, *Floridians Favor Move from Electric Chair to Injection, Poll Shows*, Miami Herald, Nov. 8, 1999 (reporting the results of an October, 1999, statewide poll conducted by *The Miami Herald* and *The St. Petersburg Times*, in which 58% of the 600 people questioned supported a state law to replace the electric chair with lethal injection). See also, *Poll: Electric Chair Unpopular in Florida*, OMAHA WORLD-HERALD, Nov. 7, 1999, at 22a.

The Florida Corrections Commission, the body responsible for overseeing Florida's electric chair, has also recommended that Florida change to lethal injection. The Commission's survey of execution methods in other states revealed that "numerous states had recently changed to lethal injection from electrocution because it was considered to be a 'more humane method of execution.'" *Provenzano*, at *25 (Shaw, J., dissenting). Lastly, the Humane Society of the United States and the American Veterinarian Medical Association consider electrocution a wholly unacceptable method of euthanasia for animals.

In *Provenzano*, the Florida Supreme Court failed to address these critical "evolving standards of decency" factors. Clearly, a modern Eighth Amendment analysis of electrocution reveals the court's unjustified conclusion that electrocution is constitutional.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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