IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROBERT GLEN COE

Petitioner

v.

RICKY BELL, Warden

Respondent

No. 3:92-0180
Judge Nixon

PETITIONER'S REPLY TO RESPONDENT'S
SUPPLEMENTAL MEMO

As Robert Coe has previously emphasized, now that the case is back before this Court, this Court has jurisdiction, and the Court *is not* required to dismiss the petition, but may act in any manner which is consistent with justice, so long as that action does not contravene the prior appellate mandate. In this case, the Court is not constrained to dismiss the petition, as this is not required by the mandate, the mandate being the only constraint upon this Court's exercise of its jurisdiction. Neither is the court precluded from taking whatever further action is required in the interests of justice. 28 U.S.C. §2243. It retains the authority to ensure the vindication of Robert Coe's constitutional rights.

As to the electrocution claim, amendment is warranted, as it does not contravene the prior mandate, which merely held that this Court's pre-Bryan exercise of discretion (to deny amendment) was not improper. In exercising its limited discretion now, this Court may take into account the intervening grant of certiorari in Bryan, which calls into question the propriety of this Court's pre-Bryan exercise of discretion. In addition, the concurring and dissenting opinion of Georgia Supreme Court Justice Sears in the recent Wilson v. State, 1999 Ga. LEXIS 1035 (Nov. 1, 1999) further

highlights the viability of Robert Coe's electrocution claim and the significance of Bryan to states other than Florida where electrocution is a method of execution. See Appendix 1 (slip op. of Justice Sears). As Justice Sears noted in dissent, Bryan calls into question the constitutionality of electrocution in such states and counsels in favor of allowing consideration of any such claim at this time. In fact, with Bryan calling into question the entire basis of this Court's prior denial of amendment, the just result is for this Court to again exercise its discretion (discretion which the Sixth Circuit previously acknowledged, See Coe v. Bell, 161 F.3d at 341) and to allow the amendment and to hear the claim.

Absent an amendment allowed by this Court at this time, Robert Coe risks losing all federal review of a viable constitutional claim. This Court has the power and authority to rectify this situation, and the Court should do so, by allowing the amendment on the electrocution claim and conducting further proceedings.

In addition, as previously argued, the Court should also allow amendment of the *Ford* claim and address those issues not fully addressed by the federal courts in earlier proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid to Glenn R. Pruden, Assistant Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243, on this 3 day of January, 2000.

APPENDIX 1

SEARS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of appellant's adjudication of guilt. However, regarding appellant's death sentence, the majority implicitly concludes that no Eighth Amendment concerns are raised by the sentence of death by electrocution.[1] This conclusion, however, is reached without the benefit of forthcoming guidance from the United States Supreme Court on that issue, and without an analysis of the voluminous evidence that is available regarding the constitutional implications of electrocution. For the first time in its history, the United States Supreme Court is poised to make a determination of whether there is evidence to show that a particular method of execution -- electrocution -- violates the Eighth Amendment's prohibition against cruel and unusual punishment. Because I believe prudence requires this Court to stay its Eighth Amendment rulings in capital cases until we receive guidance from the United States Supreme Court in the coming months, I respectfully dissent to the affirmance of appellant's death sentence.

At the outset, I emphasize that my constitutional concerns are not with the State's power to impose the death penalty for statutorily-enumerated crimes.[2] Rather, my concern focuses upon the only available method of carrying out a death sentence in Georgia -- electrocution in Georgia's electric chair. Despite having issued opinions in many matters in which death sentences have been imposed, the United States Supreme Court has never decided whether there

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[1] In all capital cases, this Court is obligated to undertake a *sua sponte* review of the death sentence to determine, among other things, whether the penalty is excessive. OCGA § 17-10-35. "This penalty question is one of cruel and unusual punishment, and is for the court to decide" in all cases. Blake v. State, 239 Ga. 292, 297 (236 SE2d 637) (1977).

[2] See e.g., Pruitt v. State, 270 Ga. 745 (514 SE2d 639) (1999)(Sears, J., writing for the majority's affirmance of death sentence); Whatley v. State, 270 Ga. 296 (509 SE2d 45) (1999) (same); Thomason v. State, 268 Ga. 298 (486 SE2d 861) (1997) (same).

is evidence to show that any particular method of execution (including electrocution) violates the Eighth Amendment's Cruel and Unusual Punishment Clause.[3] However, that will soon change, as the Supreme Court has recently granted certiorari in a capital habeas corpus action to review whether execution by electrocution violates the Federal Constitution's prohibition against cruel and unusual punishment.[4]

Nor has Georgia's Supreme Court ever undertaken its own analysis of whether there is objective evidence to show that death in the State's electric chair constitutes cruel and unusual punishment, as that phrase is constitutionally understood.[5] Rather, this Court has habitually disposed of such claims perfunctorily, without considering whether a growing body of evidence indicates that electrocution causes a lingering death and undue violence, torture, and mutilation.[6] I believe that it is time for this Court to cease its cursory review of Eighth Amendment claims in capital cases, and to confront head-on the issue of whether there is evidence to show that

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[3] Denno, Getting to Death: Are Executions Constitutional?, 82 Iowa Law Rev. 319 (1997). See Poyner v. Murray, 508 U.S. 931, 933 (113 SC 2397, 124 LE2d 299) (1999) (Souter, J., joined by Blackmun and Stephens, dissenting from denial of certiorari).

Contrary to popular misconception, the Supreme Court's ruling in In re Kemmler, 136 U.S. 436 (10 SC 930, 34 LE 519) (1890) (the last case in which the High Court has considered a method of execution), does not hold that electrocution is per se constitutional if there is no undue pain suffered by the condemned. See Poyner, supra. Rather, the Kemmler decision merely deferred to the New York state court's finding that, in light of the available options at that time, electrocution was permissible as a more humane alternative to death by hanging. Kemmler, 144 U.S. at 444 (noting that the then-governor of New York had called execution by hanging "barbaric"). Indeed, Kemmler cannot be read as rejecting evidence that purportedly shows electrocution is constitutionally cruel and unusual, because, at the time it was decided, no one had yet been electrocuted. Moreover, at the time Kemmler was decided, it was not yet established that the Eighth Amendment applies to the States through the Fourteenth Amendment. Cf. Robinson v. California, 370 U.S. 660, 667-68 (82 SC 1417, 8 LE2d 758) (1962). Shortly after Kemmler was issued, William Kemmler became the first man executed in the electric chair in what was widely publicized as a grotesque and morbid technical bungle. See Denno, supra, p. 362 n. 261.

[4] Bryan v. Moore, Case No. 99-6723 (Oct. 26, 1999). See 68 USLW 3281 (11/2/99).

[5] See DeYoung v. State, 268 Ga. 780 (493 SE2d 157) (1997) (Fletcher, PJ, concurring); see also Stanford v. Kentucky, 492 U.S. 361, 369 (109 SC 2969, 106 LE2d 306) (1989) (Eighth Amendment determination should be based as much as possible upon objective criteria).

[6] See e.g., DeYoung, supra; Wallons v. State, 266 Ga. 77 (463 SE2d 868) (1995).

execution by electrocution is unconstitutionally cruel and unusual. To my mind, the logical and prudent first step in that process is to await pending word from the nation's highest court regarding that very issue.[7]

The constitutional ramifications of electrocution are overly ripe for review. An Eighth Amendment analysis of evidence pertaining to any method of execution would adhere to four lines of inquiry: (1) Does the method of execution involve "something more than the mere extinguishment of life,"[8] such as "torture or a lingering death . . . something inhuman and barbarous"?;[9] (2) Is the infliction of unnecessary pain, undue physical violence, or bodily mutilation and distortion inherent in the method of execution?;[10] (3) Does the method of execution offend "the evolving standards of decency that mark the progress of a maturing society,"[11] and has it been approved, rejected or abandoned in other states and in other civilized nations?[12]; and (4) Are more humane methods of execution available?[13]

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[7] I note that Florida, one of only two other states to currently practice electrocution, has stayed all of its executions of condemned prisoners until the U.S. Supreme Court issues its ruling on the constitutionality of electrocution. See "Special Session Could Introduce Lethal Injection," Orlando Sentinel, 12/6/99.

[8] Kemmler, 136 U.S. at 447. As stated by Justice Burton more than half a century ago:

> The taking of 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.

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 473-74 (67 SC 374, 91 LE 422) (1947) (Burton, J., dissenting). See Kemmler, supra, 136 U.S. at 443-44, 447; Glass v. Louisiana, 471 U.S. 1080, 1085 (105 SC 2159, 85 LE2d 514) (1985) (Brennan, J., joined by Marshall, J., dissenting from denial of certiorari).

[9] Kemmler, 136 U.S. at 447.

[10] Resweber, supra.

[11] Trop v. Dulles, 356 U.S. 86, 100-01 (78 SC 590, 2 LE2d 630) (1958).

[12] See id.; Coker v. Georgia, 433 U.S. 584, 593-94 (97 SC 2861, 53 LE2d 982) (1977).

[13] See Gregg v. Georgia, 428 U.S. 153, 170 and n. 17 (96 SC 2909, 49 LE2d 859) (1976). As stated by Justice Powell:

Regarding the first two of these inquiries: Increasingly, there are reports that electrocution involves (a) lingering death that can last for more than a quarter hour; (b) bodily mutilation and distortion, including third and fourth degree burns to the face and scalp, exploding body parts, and layers of skin melting away so as to reveal bone; and (c) grotesque physical violence indicative of both inhumanity and barbarity.[14] In other words, there is mounting evidence to indicate that electrocution involves more than "the mere extinguishment of

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Neither the Congress nor any state legislature would today tolerate pilloryings, branding, or cropping and nailing the ears -- punishments that were in existence during our colonial era. Should however, any such punishment be prescribed, the courts would certainly enjoin its execution. Likewise, no court would approve any implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives.

Furman v. Georgia, 408 U.S. 238, 430 (92 SC 2726, 33 LE2d 346) (1972) (Powell, J., dissenting). These views of Justice Powell's were largely adopted in Gregg, supra.

[14] For example, in March 1997, Pedro Medina was executed in Florida's electric chair. When the electricity was applied, Medina "lurched backward and balled his hands into fists," while his face mask "burst into flames." Blue and orange flames up to twelve inches long shot from the right side of Medina's head and flickered for up to ten seconds. A solid flame then covered Medina's entire head, from one side to the other. After the current was turned off, a maintenance worker wearing electrical gloves patted out the flames on Medina's body and another worker opened a window to disperse the thick smoke that hung in the air. Witnesses described the smell as nauseating. An autopsy of Medina's corpse revealed a "burn ring" around the crown of his head, within which was a third degree burn containing deposits of charred material. Medina's face was covered with first degree burns, caused by scalding steam. See Denno, supra, App. 2 (A) (18); Provenzano v. Moore, 1999 WL 756012 at * 19 (Fla. 1999) (Shaw, J., dissenting).

When Allen Lee Davis was executed in Florida's electric chair in July 1999, a leather strap was secured across his mouth and part of his nostrils, and a heavy fabric face mask was placed over his head. Blood poured from his nose before and during the electrocution, and several witnesses reported hearing two screams from Davis when the current was applied. By the time the execution was completed, a blood pool "the size of a dinner plate" covered the front of Davis's shirt. It was later determined that Davis's death was caused in part by asphyxiation caused by the leather face strap. As with Medina, Davis's head, face, and scalp were severely burned, as were his knees and thighs. Provenzano, supra at * 20-22.

Witnesses observing Larry Lonchar's November 1996 execution in Georgia's electric chair report that two 2000 volt jolts of electricity were required before he was pronounced dead, and that the process required twelve minutes to complete. During that time, Lonchar moaned, clenched his fists (which had turned dark red), lurched and and gasped for air. Denno, supra, App. 2 (A) (17). Other electrocutions have routinely resulted in third and fourth degree burns with skin sloughing, "meaning the skin had literally come loose from [the] body and was sliding." Id., App. 2 (A) (8). Electrocution sometimes burns chunks of skin off a condemned person's head or leg, revealing the skull or bone beneath the tissue. Id. Electrocution also has caused a man's penis to explode, blood to pour from eye sockets, bodily fluids to boil, and ears to burn away. Id., 82 Iowa L. Rev. at 359, and App. 2 (A) (12).

For an in-depth account of electrocution's effects, see Denno, supra, Appendix 2 (A), "Post-Gregg Botched Executions." See also, Denno, Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century, 35 Wm. & Mary L. Rev. 551 (1994).

life,"[15] the benchmark for constitutional executions, and such evidence should be addressed as part of this Court's responsibility to review all capital sentences in Georgia.

Concerning the third prong of the analysis discussed above, I am increasingly concerned that electrocution and its effects on the human body may offend society's evolving sense of decency. The Eighth Amendment's fundamental purpose is "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[16] The Amendment's scope is not static; rather, it is hewn from the evolving standards of decency that characterize a mature, civilized society,[17] and it acquires meaning "as public opinion becomes enlightened by a humane justice."[18] Thus, whether a particular form of punishment is cruel and unusual under the Eighth Amendment must be determined by considering contemporary moral standards as determined by objective evidence regarding a national consensus.[19]

Electrocution is practiced in no other country in the civilized world. Within this country, 27 states practiced it in 1949. Since then, 20 states have dropped it altogether, and four states -- Arkansas, Ohio, South Carolina and Virginia -- continue to offer it as an alternative; although Ohio has not executed anyone since 1976.[20] At present, only three states -- Georgia, Florida, and Alabama -- actively use electrocution as the sole method of executing condemned

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[15] Kemmler, 136 U.S. at 447.

[16] Ford v. Wainwright, 477 U.S. 399, 410 (106 SC 2595, 91 LE2d 335) (1986).

[17] Trop, supra.

[18] Weems v. United States, 217 U.S. 349, 378 (30 SC 544, 54 LE 793) (1910).

[19] Penry v. Lynaugh, 492 U.S. 302, 331 (109 SC 2934, 106 LE2d 256) (1989); Stanford, supra.

[20] See Provenzano, 1999 WL 736012 at * 23-24.

prisoners.[21]

The death penalty is just punishment for those whose crimes deserve the ultimate penance, and it also serves a societal need to see retribution for that class of crimes. I believe, however, that it's time to examine whether Georgia's current method of enforcing the death penalty and its attending consequences are compatible with the dignity, morality, and decency of society's enlightened consciousness, and is reflective of a humane system of justice. I note that both the American Veterinarian Medical Association and the Humane Society of the United States prohibit electrocution as a means of euthanatizing animals.[22]

Finally, concerning the last prong of the inquiry discussed above, it appears that less cruel and more humane means of execution may currently be practiced in other states and countries.

While this dissent's overview of the Eighth Amendment implications of electrocution barely scratches the surface of what will be required for an adequate in-depth analysis of the constitutional issue I urge the Court to take up, I nonetheless hope it emphasizes the great need for us not to prolong fulfillment of our constitutional responsibility to "protect the dignity of society itself from the barbarity of exacting mindless vengeance."[23] For all the reasons discussed above, I would stay ruling on appellant's Eighth Amendment claim until we receive guidance on that issue from the United States Supreme Court, and I would then proceed with our own assessment of the issue.

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[21] Nebraska legally authorizes electrocutions as its sole method of execution, but has apparently ceased carrying out capital sentences.

[22] See Humane Soc'y of the U.S., General Statement: Regarding Euthanasia Method for Dogs and Cats, 17 Shelter Sense, Sept. 1994 at 11-12; American Veterinarian Med. Ass'n., 202 JAVMA 230, 230-249 (1993).

[23] Ford, supra.