

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

THOMAS HARRISON PROVENZANO,

Petitioner,

v.

MICHAEL W. MOORE, Secretary
Florida Department of Corrections,
JAMES CROSBY, Superintendent,
Florida State Prison, and STATE
OF FLORIDA,

Respondents.

_____/

PETITION FOR WRIT OF HABEAS CORPUS
AND PETITION TO INVOKE THIS COURT'S ALL WRITS JURISDICTION
AND PETITION FOR EXTRAORDINARY RELIEF
AND APPLICATION FOR STAY OF EXECUTION

COMES NOW THE PETITIONER, THOMAS HARRISON PROVENZANO, by and through his undersigned counsel, and seeks a writ of habeas corpus, invocation of this Court's all writs jurisdiction and requests a stay of execution. In support thereof, Mr. Provenzano would show:

I. STATEMENT OF JURISDICTION

This Court has original jurisdiction to issue all writs necessary to the complete exercise of its jurisdiction. Art. V, § 3(b)(7) Fla.Const. (1980); Fla. R. App. Pro. 9.030(a)(3). Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982). The relief sought here is necessary to the exercise of this Court's exclusive plenary jurisdiction over death penalty cases. Art. V, § 3(b)(1); Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997); Orange County v. Williams, 702 So. 2d 1245 (Fla. 1997); see

Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994) ("all writs" jurisdiction may be invoked in capital cases when warranted).

II. FACTUAL BASIS

A. A Bloody, Lingered Death!

Florida's first use of its new electric chair turned bloody Thursday with the execution of a 350-pound inmate * * * Blood appeared to pour from the mouth and ooze from the chest of Allen Lee "Tiny" Davis as he was hit with 2,300 volts at 7:10 a.m.,¹ although the office of Gov. Jeb Bush said later that all the blood was from a nose bleed.

By the time Davis was pronounced dead at 7:15 a.m., the blood from his mouth had poured out onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even seeping through the buckle holes on the leather chest strap holding him to the chair.

* * *

¹Chart recordings produced by DOC show that Mr. Davis was never hit with 2,300 volts of electricity. At most, 1,500 volts of electricity was in the execution apparatus, a clear and as yet unexplained violation of the execution protocol.

The heavy bleeding was believed to be a first
for 44 modern Florida executions.

* * *

Two muffled screams were heard from Davis
just before the executioner through the
switch.²

"Davis Execution Turns Bloody," St. Petersburg Times, July 8,
1999.

Capital Collateral Regional Counsel, John W. Moser,
witnessed the execution of Allen Lee Davis. Moser took note of
the clock located in the death chamber. Between 7:03 and 7:05
a.m., Mr. Davis was strapped into the electric chair and asked
whether he wanted to make a statement. Mr. Davis declined.
Between 7:05 and 7:10 a.m., "two distinct screams . . . came from
Mr. Davis."

After the screams, at approximately 7:10 a.m., Mr. Davis's
body tensed and arched backwards. Then blood began to drip from
beneath the leather face mask. The blood dripped "onto the right
side of the lapel/collar area of Mr. Davis's white dress shirt."

Very shortly after 7:10 a.m. blood appeared
in the center chest area of the white shirt.

²Because the executioner and the "switch" are concealed it
is impossible for witnesses to see when the executioner throws
the switch. Therefore it is impossible to say, without further
investigation, that Mr. Davis's screams occurred before the
current began to flow into his body.

The size of the blood stain grew to a diamond-like figure of approximately ten (10) inches vertically and 8-10 inches horizontally.

At 7:13 a.m. Mr. Davis exterior chest area moved back and forth several times. Again at 7:16 a.m. I observed the same chest movement.

Affidavit of John W. Moser (July 8, 1999).

Additional media reports indicate that "[t]he black-hooded executioner flipped the switch at 7:05 and power was shut off at 7:07, **correction officials said**. Davis' chest convulsed at least twice before two prison medical officials declared him dead at 7:15 a.m." Florida Execution of 350-pound Inmate Turns Bloody, Miami Herald, July 8, 1999.

B. The Protocol was NOT Followed

In direct contravention of this Court's July 1, 1999 order, Provenzano v. State, Case No. 95,849, and in direct contradiction of the DOC's sworn statements, the protocol that is supposed to govern all Florida executions was not followed in executing Mr. Davis. The protocol requires that 2,300 volts of electricity be sustained for 8 seconds, 1,000 volts for 22 seconds, and 2,300 volts for 8 seconds. Chart recordings show conclusively that during Mr. Davis's execution only **1500 volts** of electricity was flowing during the initial cycle, followed by **600 volts** for 22

seconds, and concluding with **1,500** volts for **4.5** seconds. **DOC IS NOT FOLLOWING THE EXECUTION PROTOCOL.**³

Despite the Department's own incontrovertible proof that the protocol was not followed, Respondent Crosby maintains "that the equipment operated properly during the execution and that no anomalies were observed."

Assuming the cycle began at 7:10 a.m., by 7:11 Mr. Davis should have been dead. His heart should not have been beating, and his lungs should not have been moving his chest up and down, gasping for air. Yet Mr. Davis was bleeding so profusely that an 80-100 square inch pool of formed on his chest. Disinterested eyewitnesses report that this pool of blood was so thick that it oozed through Mr. Davis's shirt, and even through the thick leather strap over his chest.

Witnesses also report that Mr. Davis continued to breath **for at least 5 minutes** after the power was switched off. His death was neither instantaneous nor painless. It was certainly the kind of "savage and inhuman" spectacle forbidden by the Eighth Amendment. Ford v. Wainwright, 477 U.S. 399, 504 (1986). Yet

³There is substantial evidence that voltage levels as low as 2,000 volts consistently result in botched, mutilating, lingering deaths. The power level during Jesse Tafero's execution was 2,000 volts. In two Virginia executions--after the state's expert, Jay Wiechert, worked on the execution equipment, power levels of 1,700 volts were associate with executions that took 13 minutes (Derick Lynn Peterson), and 7 minutes (Roger Keith Coleman). See Deborah Denno, Getting to Death, 82 Iowa L. Rev. at 421 (1997).

another display "befitting the laboratory of Baron Frankenstein."
Jones v. State, 701 So.2d 76, 87 (1997) (Shaw, J., dissenting).

C. More Inconsistencies

After the execution of Pedro Medina, DOC first reported that the flames emanating from Mr. Medina's head were caused by a corroded brass screen in the headpiece. DOC later disavowed this conclusion, and conjectured that the flames were caused by a sponge that was a little too dry. DOC's early reaction to the gushing blood on Mr. Davis's face and chest is to call it a nose bleed.

Whether DOC's latest off the cuff conjecture proves as unreliable as their earlier ones remains to be seen. Counsel for Petitioner attempted to arrange to have a medical examiner attend Mr. Davis's autopsy. By the time Mr. Davis's counsel arrived at the medical examiner's office, the autopsy had already been performed. Thus, Mr. Provenzano's counsel have not had an opportunity either to see Mr. Davis's body or to have a pathologist examine his body. **The results of this examination are critical to determining whether Mr. Davis died instantaneously or lingered in excruciating pain for several minutes. A stay of execution is necessary to allow experts to examine Mr. Davis's body.**⁴ Bleeding and breathing are

⁴Counsel for Mr. Provenzano have diligently been making arrangements to have a medical examiner autopsy Mr. Davis's body. Counsel for Respondent have not assisted in this effort. Mr. Davis's family have refused to allow his body to be cremated until an independent autopsy can be performed.

Counsel for Petitioner were able to speak briefly with a

inconsistent with the state's theory of instantaneous brain death, but are fully consistent with Dr. Wikswo's conclusion that death occurs by heating and asphyxiation.

III. LEGAL STANDARDS

Allen Lee Davis's execution was certainly "something inhuman and barbarous--something more than the mere extinguishment of life." In re Kemmler, 136 U.S. 436, 447 (1890). The degrading and mutilating manner in which he died was a clear violation of the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 372 (1910). Blood gushing from the face and chest of a dying inmate is "repugnant to the conscience of mankind," Estelle v. Gamble, 429 U.S. 97, 105 (1976). Surely, this degrading treatment was "not part of the penalty that criminal offenders pay for their offenses against society." Farmer v. Brennan, 511 U.S. 825, 834 (1994) (internal quotation marks and citation omitted).

The fact that DOC has failed to follow its own protocols during Mr. Davis's execution, and later stated that there were no anomalies during the execution, conclusively establishes their indifference to the severe risks of pain, lingering death, mutilation and degradation in Florida's electric chair. See Helling v. McKinney, 509 U.S. 25 (1993); Farmer v. Brennan, 511 U.S. 825 (1994). DOC officials are unreasonably disregarding an

medical examiner who stated that bleeding would only be seen if something went wrong during the execution. Without examining Mr. Davis's body and investigating the circumstances of execution, he could not say more. A stay of execution is required to allow Petitioner's experts to reach any conclusions.

objectively intolerable risk of harm, and they will continue to do so. See id.

IV. NECESSITY OF AMENDMENT

Due to severe time constraints and the continued recalcitrance of Respondents and their counsel, counsel for Petitioner have been unable fully, or even minimally, to investigate and prepare this petition. Mr. Provenzano respectfully requests that this Court take judicial notice of all documents, arguments, attachments, and pleadings that were part of Provenzano v. State, Case No. 95, 849, and the Petition For Writ of Habeas Corpus filed on his behalf on July 6, 1999. Mr. Provenzano hereby incorporates by specific reference all previous allegations and arguments.

V. CONCLUSION

A stay of Mr. Provenzano's execution, presently scheduled for tomorrow at 7:00 a.m., is required so that an investigation can be undertaken, and if necessary a hearing held to determine the cause of today's malfunction of the electric chair, for the failure to DOC to follow the protocol, and to determine the cause of Mr. Davis's apparently lingering, and certainly grotesque death. Mr. Davis's screams, the attempt to execute him at 7:10, the gushing of blood from Mr. Davis's body, and the movement of his diaphragm and lungs, clearly require expert investigation followed by a hearing. Mr. Provenzano has presented all he can under the circumstances to show that Mr. Davis's judicial electrocution resulted in lingering death, pain, degradation, and

mutilation. The discrepancies between DOC's representations and the objective evidence of the chart recordings requires a hearing.⁵

WHEREFORE, Mr. Provenzano respectfully requests that this Court immediately enter a stay of execution.

⁵There were approximately 15 days between Pedro Medina's execution and the next scheduled execution. This Court granted a stay to Leo Jones and Gerald Stano to enable counsel and the lower court to investigate and conduct a hearing. Jones v. Butterworth, 691 So.2d 481, 482 (Fla. 1997). Surely with little over 16 hours remaining before Mr. Provenzano's execution, a stay is required.

