

IN THE
SUPREME COURT OF FLORIDA

CASE NO. _____

JUDY A. BUENOANO,
Appellant,
versus
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

SUMMARY INITIAL BRIEF OF APPELLANT
ON APPEAL OF DENIAL OF MOTION FOR
FLA. R. CRIM. P. 3.850 RELIEF

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INTRODUCTION: THE CLAIM INVOLVED IN
THIS ACTION IS ONE OF GREAT IMPORTANCE

The claim involved in this action is an important one. It is obviously a claim of importance to the Appellant and her counsel .. as the detailed factual allegations included in the Rule 3.850 motion and its appendix describe,' Ms. Buenoano will literally be burned alive in Florida's electric chair, will be tortured, and will suffer great pain. The Department of Corrections (DOC) knows that its equipment no longer works appropriately.' The State has not even alleged in this case that

The Rule 3.850 motion and appendix were previously forwarded to the Florida Supreme Court.

'Indeed, the DOC knew this before Mr. Tafero's execution, yet told no one:

My name is Fred A. Leuchter, Jr. and I live in Boston, Massachusetts. I am a consulting engineer, working under the company name of Fred A. Leuchter Associates, Inc. I design and construct electric chairs. I have designed the electric chair for three states.

* * *

In 1986 the name of my company was American Engineering. During that year, I was contacted by representatives of the Florida State Prison, including Mr. Robin Adair and Mr. Thomas Barton. Mr. Adair told me that the leg electrode they were using in the electric chair in Florida had proved defective on their last execution and that the condition of the head electrode was questionable. He asked me to submit a bid for a new **leg** electrode and headpiece for the electric chair housed at Florida State Prison.

(footnote continued on following page)

the DOC will carry out executions competently and has not proffered a single fact to dispute those presented by the Appellant.

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I sent a price quote of \$3,425 to Mr. Adair. This quote included a leg stock, including two leg electrodes, and a replacement helmet for an electric chair, along with the shipping cost. The letter including my price quote was dated December 12, 1986. I also during that time explained to Mr. Adair that in my expertise I did not believe that a single leg electrode was capable of properly conducting the electricity during an execution, and that the system that I had designed included two leg electrodes. The system in place at Florida State Prison simply was not functioning appropriately.

Mr. Adair responded that my price quote was too high, and that he and Mr. Barton wanted me to fabricate a leg electrode from an old army boot and a copper strip. At this juncture it became apparent to me that the Department of Corrections was not competent to design electric chair components as no one there seemed to fully apprehend the principles involved. Explaining that an electrode fabricated from an old army boot was inadequate for a competent execution I declined further participation in these efforts.

Mr. Adair later told me that he had fabricated his own army boot electrode and that it had worked on the next executee. I failed to report this interaction with the Department of Corrections to Mr. Nickerson.

After hearing that there were unusual circumstances involved in the execution of

(footnote continued on following page)

Although it is aware of the problems, the DOC refuses to take any corrective action or to make any of the needed repairs. Indeed, the DOC has to date kept most of its files hidden, and many of the facts supporting this claim have only come to light because of an inquiry by the Florida Legislature. The allegations now before the Court in this case are serious and important. They are important not only to Ms. Buenoano, but to all Florida capital prisoners, their counsel, and their families, to the public, and to this Court's modern capital punishment jurisprudence. The circuit court did not order that Ms. Buenoano be burned and tortured when it sentenced her to death. But the DOC will do just that to her. Judicial intervention is necessary. This claim needs to be resolved fully and fairly in an evidentiary forum -- the interests of all concerned would be

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Jesse Tafero, I contacted Mr. Barton's office on May 5, 1990, and inquired again as to the defective equipment originally discussed in 1986. At that time Mr. Decker advised me that the problems in the last execution had not been corrected, and that the Department of Corrections was once again interested in retaining my services. Mr. Decker also told me that I should call back in a few days and we would discuss the possible purchase of electric chair components.

When I called Mr. Decker back a few days later, he told me that that there was no need for my services. To my knowledge, the problems have not been repaired to date.

(Affidavit of Fred A. Leuchter, Jr.).

ill-served by anything less, while the respect for human dignity embodied in the eighth amendment's cruel and unusual punishment clause demands no less.

The lower court originally ruled (orally at the Monday, June 11, 1990, hearing) that it had jurisdiction to entertain the claim and that the claim was not subject to a procedural bar because the facts supporting it were unavailable earlier. The lower court's initial ruling on the jurisdiction question was eminently correct. This Court has ruled that Fla. R. Crim. P. 3.850 is the proper forum for capital prisoners to bring claims challenging the State's authority to carry out an execution. See Smith v. State, 457 So. 2d 1380, 1381 (Fla. 1984) (racial discrimination challenge to State's authority to carry out execution proper in Rule 3.850 action); Henry v. State, 377 So. 2d 692 (Fla. 1979) (same). This Court has also ruled that Rule 3.850 is the proper forum for the litigation of substantive and subsidiary issues involved in capital collateral cases, even when another remedy may be available to the petitioner. See Provenzano v. State, 15 F.L.W. 260 (Fla. Apr. 26, 1990) (Rule 3.850 is the proper forum to challenge the State's refusal to comply with the Florida Public Records Act even when a separate civil remedy may be available to the petitioner). Here, Appellant was sentenced to death, not to torture, pain, and burning. It is the circuit court initially, and this Court on appellate review, that must resolve whether the sentence imposed

will be carried out appropriately or whether this woman will be subjected to a punishment that the eighth amendment forbids.

Appellant has presented substantial facts demonstrating that because of the Department of Corrections' (DOC) lack of professional competence, she will literally be burned alive and subjected to pain and torture during her execution. The DOC knows that its electric chair does not function appropriately, but refuses to take corrective action. This case thus presents a very significant claim for relief, one which needs to be properly resolved. Contrary to the State's bald assertion, the claim is one which could not have been brought earlier: the facts were simply unavailable to the petitioner at the time of her first Rule 3.850 action, nor could they have been then known to her. The DOC represented to all that it was competent, while even to this day refusing to disclose its files. The DOC knows that its electric chair is literally in need of repairs and simply does not work right: it burns the executee, slowly. Yet, the DOC refuses to do anything about it. Ms. Buenoano, should this claim not be heard and remedial measures subsequently taken, literally will be burned alive in Florida's electric chair, will be tortured, and will suffer pain. The DOC knows this, but refuses to do anything about it. Judicial intervention is warranted.

On Monday, June 11, 1990, the lower court ruled orally (on the record) that it had jurisdiction to entertain the claim, and that the merits of the claim were before the Court. These rulings were in conformity with the ruling rendered by the

circuit court in State v. Squires, another capital action under death warrant involving this issue. Then, by the time the lower court signed an order, it accepted the State's invitation to invoke a procedural bar, and thus ignored its own earlier findings.

This claim is simply not subject to a procedural bar -- the facts supporting it were unavailable earlier. The State has yet to explain how it is that Ms. Buenoano could ascertain the facts supporting this claim earlier when the DOC represented to everyone that it was competent, when the DOC to date still refuses to disclose its files, when many of the facts have only come to light because of an inquiry by the Florida Legislature, and when it is now clear that even the DOC's investigation of **the** execution of Mr. Tafero was no more than an obvious attempt at a cover-up. These are serious allegations. They need to be taken seriously -- this Court cannot condone the burning to death of an inmate, but that is what Ms. Buenoano has alleged will happen to her at her execution, an allegation supported by detailed factual proffers. An evidentiary hearing is necessary to resolve the questions that this claim raises.

The State's procedural bar contentions do not comport with the facts, the lower court's own original ruling, or the circuit court's ruling in the Squires case. More significantly, those contentions are simply wrong -- legally and morally. In essence, the State's argument is that because of a purported bar, this Court should allow Ms. Buenoano to be tortured **and** burned alive

during her **execution**.³ One of the issues that this Court must resolve can thus be phrased as follows: Should this Court at least allow this important claim to be heard, "or should the state be permitted one [more] cruel and unusual punishment [to be carried out] before [the claim is heard]?" Cf. Jones v Thigpen, 741 F.2d 805, 811 (5th Cir. 1984). This Court's procedural default rule cannot be that obscene, or that perverse. What the State is asking -- that because of a supposed bar this Court should allow a human being to be burned alive -- is simply wrong.

On the merits, the claim is presented in the body of this brief. The Court has also had the Rule 3.850 motion and its appendix, documents graphically depicting what this issue involves. An expeditious evidentiary hearing is necessary -- this claim needs to be resolved. It is worth repeating again that the interests of all concerned would be ill-served if a claim such as this is not seriously and properly addressed. And it is worth repeating again that we do not burn people to death in this country -- or, at least, that we should not do that.

³The State's argument would apply with full force if the DOC intended to skin Ms. Buenoano alive: that because of a supposed bar, this Court should allow the DOC to do that, or anything else to an inmate. The respect for human dignity embodied in the eighth amendment's cruel and unusual punishment clause cannot be squared with such a ruling.

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PROCEDURAL HISTORY

Ms. Buenoano was convicted of **first-degree** murder and sentenced to death in Florida's electric chair. **The** conviction and sentence were affirmed on appeal. Buenoano v. State, 527 So. 2d 194 (Fla. June 23, 1988). A Rule 3.850, Fla. R. Crim. P., motion was subsequently filed and summarily denied. A Petition for Habeas Corpus Relief was also filed in the Florida Supreme Court. The Florida Supreme Court denied relief. Buenoano v. State, 15 F.L.W. 196 (Fla. Apr. 5, 1990).

On May 17, 1990, a second death warrant was signed, scheduling Ms. Buenoano's execution for June 19, 1990. Ms. Buenoano filed the instant Rule 3.850 motion, which **was** denied without an evidentiary hearing. A temporary stay of execution was thereafter entered by this Honorable Court.

GROUNDS FOR RELIEF

Ms. Buenoano submits that the execution of **her** sentence of death under the present system for the carrying out of a state-sanctioned execution in Florida would violate **the** eighth and fourteenth amendments to the United States Constitution **and** the corresponding provisions of the Florida Constitution, Florida's statutes and Florida's laws, for the reasons **set** forth in the Rule 3.850 motion and in the body of **this** brief.

(I)

THE EXECUTION OF JUDY A. BUENOANO PURSUANT TO THE STATE OF FLORIDA'S CURRENT PROCEDURES FOR THE CARRYING OUT OF THE EXECUTION OF A SENTENCE OF DEATH SHALL CONSTITUTE UNNECESSARY CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND BECAUSE THE FLORIDA DEPARTMENT OF CORRECTIONS CANNOT PROFESSIONALLY CARRY OUT THE EXECUTION OF A SENTENCE OF DEATH UNDER ITS CURRENT PROCEDURES WITHOUT UNNECESSARILY INFLICTING TORTURE AND PAIN UPON THE DEATH-SENTENCED PRISONER THE EXECUTION OF THIS DEATH SENTENCE SHOULD BE PROHIBITED AND STAYED.

Ms. Buenoano is not challenging the proper carrying out of an execution by electrocution. This claim is based on the fact that the DOC will not carry it out properly, is not competent to do so, yet refuses to correct the problems in its equipment -- problems which the DOC knows about. Jesse Tafero's botched execution was no fluke. It will happen again -- the same electrode, one which does not conduct sufficient voltage, is still the one being used. Rather than facing up to the problem, the DOC has attempted to cover it up. After Mr. Tafero's execution, the DOC's initial reports were:

There was no evidence of flame charring of any portion of the head.

(Department of Corrections [DOC] Report concerning the execution of Jesse Tafero, p. 5) (App. 9, p. 5).

REPORTER: So the sponge didn't cause any charring?

DOC SECRETARY RICHARD DUGGER: No there was no charring evidence on the skull itself caused by the sponge.

(Governor's Press Conference, May 8, 1990).

The photographs contained at pages 5-7 of the Rule 3.850 motion graphically depict that the DOC's representations, even from the outset, did not comport with the facts (See also App. 10). Neither did the DOC's representations that Mr. Tafero did not suffer:

(b) It is not possible to say that Mr. Tafero was "unconscious" after the first and second applications of electricity. Furthermore, it is medically and scientifically irresponsible to reach and articulate such a conclusion based on the observed reactions of Mr. Tafero during the execution. Indeed, it is not unlikely that he was conscious after the first, or first and second applications of current . . .

(Affidavit of Dr. Robert H. Kirschner, M.D., Deputy Chief Medical Examiner, Cook County, Illinois) (App. 19).

The facts giving rise to this claim were obviously unknown to Ms. Buenoano at the time of her original motion to vacate judgment and sentence. Ms. Buenoano's counsel, like the courts, believed that the Department of Corrections authorities charged with the responsibility of carrying out state-sanctioned executions in Florida conducted that task in a professionally competent manner. All concerned relied on the DOC's representations that it was acting competently. It is only in the last few weeks that the facts have come to light demonstrating that the DOC's representations leave quite a great deal to be desired.

It was only recently that the facts have come to light giving rise to this claim, facts demonstrating that whatever professional competence DOC purported to possess is sorely

lacking. As early as 1986 the DOC knew that its electric chair was not functioning properly, yet it hid these facts from all concerned (See Affidavit of Fred Leuchter, Jr., quoted in the introduction to this brief and below; see also Affidavit of Rob Adair, quoted below).

An inmate about to be executed in Florida will likely be burned and tortured during that execution, will be conscious during the event, and will suffer pain. Death is not instantaneous -- the prisoner suffers, and suffers greatly. The facts demonstrate that the DOC is incompetent to carry out executions otherwise. And the DOC would prefer to side-step the issue, rather than facing up to its lack of competency. These facts and the other factual allegations presented in this case which give rise to this claim only first became known beginning on the early morning of May 4, 1990. This claim is thus properly brought in the instant motion to vacate judgment, as Rule 3.850 itself makes plain. Evidentiary resolution is appropriate.

Supposedly, we do not burn people to death in this country, and we do not torture them. The eighth amendment prohibits such things. But Jesse Tafero was burned and tortured. And, given the DOC we are dealing with, it will happen again. Because the instant claim involves the bedrock eighth amendment prohibition against torture and because a reasonable likelihood exists that executions carried out by the Florida Department of Corrections will involve the inflicting of unnecessary pain and suffering, judicial intervention is warranted.

What has been learned regarding the last botched execution (often through unintentional revelation by the Department of Corrections) is startling indeed. Many of the facts have only come to light because of an inquiry by the Florida Legislature. Contrary to the Department of Corrections' conclusions, the questions concerning its professional competency arising from the burning and torture of a human being cannot satisfactorily be answered by submitting a household sponge to the heat of a common bread toaster -- the eighth amendment simply demands more respect for human dignity. But that is all that the DOC has done to address the problem.

The torture-execution of Jesse Tafero had nothing whatsoever to do with the substitution of a synthetic sponge (Cf., DOC Report at 5) (App. 9). In fact, as discussed in the 3.850 motion, current electric chair skull cap designs involve synthetic sponges. South Carolina, Indiana and Tennessee all utilize synthetic sponges in their electric chair helmets and South Carolina has carried out four successful executions with synthetic sponges unaccompanied by the macabre specter attendant to the execution of Mr. Tafero. The manner by which the sponge used on Mr. Tafero was procured by the DOC was sheer stupidity, but the problem was not the sponge.

Jesse Joseph Tafero was burned alive in Florida's electric chair. There is no assurance that Judy Buenoano will also not be

burned alive.⁴ The eighth amendment, however, forbids the unnecessary infliction of cruel, excessive and unusual punishments. And the punishments that the DOC will likely inflict have not been sanctioned by any court. To state the obvious, the circuit court did not rule that Ms. Buenoano should be tortured and burned when it sentenced her to death.

The eighth amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Furman v. Georgia, 408 U.S. 239, 242 (1972), citing Trop v. Dulles, 356 U.S. 86, 101 (1958). As Furman made clear:

The basis of the concept underlying the [cruel and unusual punishment Clause] is nothing less than the dignity of man. While the state has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards.

* * *

...[T]he primary principle is that a punishment must not be so severe as to be degrading to dignity of human beings. The infliction of an extremely severe punishment will often entail physical suffering yet the framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.' Even though '[t]here may be involved no physical mistreatment, no primitive torture, severe mental pain may be inherent in the infliction of a particular punishment.

* * *

⁴Ms. Buenoano is currently housed at Broward Correctional Institution. She will be transported prior to her scheduled execution to the Florida State Prison. Florida has only one electric chair at one facility. This is the same chair at the same facility in which Mr. Tafero was executed -- the Florida State Prison.

...[But more than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, punishments which inflict torture such as the rack, the thumb screw, the iron boot, the stretching of the limbs, and the like, are, of course, 'attended by acute pain and suffering.' When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity.

Furman, supra, 408 U.S. at 271-3 (citations omitted) (emphasis added). It is against this backdrop that the Appellant's request for an evidentiary hearing should be considered.

At approximately 7:00 a.m. on the early morning of May 4, 1990, Jesse Tafero was escorted into the Death Chamber at the Florida State Prison to be executed. Inside the chamber with Mr. Tafero were: Superintendent Tom Barton; L. E. Turner, Assistant Superintendent for Operations; Lt. Don Davis, Administrative Officer; A. D. Thornton, Chief Correctional Officer; Dr. Frank Kilgo, Chief Medical Officer; Bill Mathews, Physician's Assistant; Ron Thornton, Maintenance Construction Supervisor; and Al Martin, Assistant Maintenance Construction Supervisor. (DOC Report at 1) (App. 9). In the witness room were the official witnesses, including two former Florida Highway Patrol officers, in addition to various other law enforcement officers and Department of Corrections personnel. Also in attendance were the designated members of the National and Florida Media Corps,

including: Cynthia Barnett of the Gainesville Sun; Ellen McGarraghan of the Miami Herald; Bruce Ritchie of the Florida Times Union; Mark Davis of the Tampa Tribune; Ronald Word of the Associated Press; and Larry Keller of the Ft. Lauderdale Sun Sentinel. Other individuals including Gary McClain of the Inspector General's Office of the Department of Corrections and the Rev. Robert Baker were also present to witness. The "unfortunate circumstances . . . result[ing] in the rather bizarre visual accounts of the execution" (App. 9, DOC report), were now only six minutes away. Cynthia Barnett described what happened next:

People told me what executions would be like. They used adjectives like sterile, clinical.

Another reporter who had seen one told me a toddler could be standing in the middle of the death chamber during an execution at Florida State Prison and never know what happened.

But a toddler would have known what happened to Jessie Joseph Tafero, a man whose execution was far from sterile.

Tafero was led into the death chamber Friday morning at 7:02. His eyes were wide, perhaps with fear, but he appeared brave -- making eye contact with the almost 40 witnesses who were crowded behind a large Plexiglas window, waiting to watch him die.

He nodded to several, smiled at a few. Maybe he had heard the same adjectives I had.

He looked straight ahead as five men fastened him to the three-legged, oak electric chair with leather straps across his chest, hips and arms. A leather boot containing an electrode was fastened to his shaven right leg.

After his final statement, Tafero closed his eyes as a guard strapped his mouth tightly. Next, a skullcap and black leather mask were fastened around his head.

At that time, a small sponge attached to his skullcap to conduct electricity was the last thing I was thinking about. But now I can't stop thinking about it. It turned out to be the wrong kind of sponge, so wrong it changed the reputed sterility of the electric chair into a scene that more than bordered on the grotesque.

When the first, automated surge of electricity pumped through Jessie Tafero, the time was 7:06 a.m. His body lifted against its leather confines and contracted violently.

Department of Corrections officials said later that Tafero died at that point. I thought he had died at that point, and when I saw what came next, I hoped he had.

Fire began to jump from the top of his leather hood as if he had hair styled in a bizarre punk fashion and colored orange. Smoke began to surge from his head also as he clenched his fists and continued to breathe.

The executioner's face was hidden with a black hood, but you could see his eyes through a slot in his hiding place. They were large and round and shocked, maybe even as shocked as mine.

After a full minute, Tafero began to move his head. Shortly after that, the prison superintendent signaled the executioner to apply a second jolt -- this time manually. Something obviously had gone wrong.

Tafero's head stopped moving with jolt No. 2, but his body did not. It kept pushing up against the leather straps, the chest growing large in what appeared to be a sharply drawn breath. The flames shot up again, this time about 6 inches above his head. The smoke piping up from beneath his hood now had reached the ceiling of the death chamber, which was beginning to resemble the

set of a freakish 1950s science-fiction thriller.

And it still wasn't over. At 7:09, I noted on my pad, "The fists are clenched and there's another deep chest movement...and another...another about 40 seconds later...now a really big chest movement. He's moving."

At 7:10 a.m., the executioner produced the third and final surge of power. The surges sound like you would expect them to. They zap. I don't remember panicking, but my notes, written in a badly shaken scrawl, indicated I was close.

"They've done it again...flames coming out of the head...lots and lots of smoke."

Tafero's fists were still clenched, but not as tightly. Just before 7:12, a doctor emerged to check his heartbeat.

All was clinical once again. Jessie Tafero was pronounced dead at 7:13 a.m.

Inside the death chamber, prison officials waited patiently next to Tafero's erect, dead body for the witnesses to leave. For several seconds, no one in the witness room moved.

(The Gainesville Sun, Saturday, May 5, 1990, at 1)(App. 2).

Ellen McGarraghan reported the events as follows:

**FLAMES AND SMOKE SPEW FROM FACE MASK AS
POLICEMEN'S SLAYER SITS IN THE CHAIR**

Starke, Fla. -- The electrocution of Jessie Tafero in the big chair at Florida State Prison went awry Friday morning. Flames and smoke rose from his head as the headset conducting the killer current to his body caught on fire.

For four minutes, Tafero continued to breath and slowly nod his head as his executioners repeatedly turned the current on and off. Each time they turned the switch back on, flames shot out and smoke rose from underneath the black mask covering his face.

. . .

Tafero, . . . died a messy, violent death.

Ordinarily, state executions turn on current to the chair just once to immobilize and kill the condemned prisoner who is strapped in with leather bands and wired head and leg. But Tafero withstood two jolts -- still visibly breathing and moving his head -- before a third try, at 7:10 a.m., rendering him motionless.

"There was a fault in the headpiece," Department of Corrections spokesman Bob Macmaster said later.

Nevertheless, Macmaster maintained that Tafero -- despite his breathing -- died during the first administration of electricity. The breathing, prison officials assert, was involuntary, a motion undertaken by Tafero's nervous system after his death.

The fault in the headpiece was a sponge, soaked in saline and strapped to Tafero's skull, that caught fire as current passed through it, Macmaster said.

The sponge rests on a condemned prisoner's shaved head underneath a leather and metal headset strapped and bolted into place. The damp sponge conveys the 2,000 volts and 14 amps of current into the prisoner's skull, killing him.

In each of the 21 other executions carried out in Florida since the resurrection of the death penalty in 1979, the same natural ocean sponge has been used to convey the deadly current. But for Tafero's execution, the prison bought a new sponge, probably synthetic, and it burst into flames each time the current was turned on, Macmaster said.

"It was not the appropriate sponge," he said.

. . .

At 5 a.m., prison officials shaved Tafero's head, shaved his right leg, and dressed him in a pale blue shirt and dark

blue trousers. He was lead into the death chamber at 7 a.m.

Tafero, wan, thin, his brown eyes piercing and angry, had these last words before the executioners fixed the faulty headpiece to his skull:

"Well, I'd like to say that the death penalty, as applied in the states, is very arbitrary and capricious.

"I think it's very unfair. I think it's time that everyone wakes up to see that the same laws that can go against crime can go against you **tomorrow.**"

When the fire and smoke subsided, Tafero's body was rigid in the big oak chair, his fists clenched, flesh flushed. There was a sore on his right pinkie finger where it had dug into the wood.

Two flecks of black ash had fallen from the headset to his shoulders, staining the new dress shirt he will be buried in.

(The Miami Herald, Saturday, May 5, 1990, at 1) (App. 5). Ronald

Word's account for the wire service was similar:

FLORIDA EXECUTION BECOMES GRUESOME DISPLAY

Gov. Martinez requests an investigation after jolts of electricity cause flames and smoke to rise from the hooded head of a condemned inmate during an execution.

(AP) STARKE -- A man who murdered two police officers 14 years ago was executed Friday with three jolts of electricity that produced flames, sparks and smoke from his masked head.

Death penalty opponents described the execution as a torture, and Florida Gov. Bob Martinez immediately requested an investigation of the technical problems carrying out the sentence.

Jessie Joseph Tafero, 43, condemned for the shooting deaths of Highway Patrol Trooper

Phillip Black and visiting Canadian constable Donald Irwin, died in the electric chair at 7:13 a.m. at Florida State Prison near Starke.

The complications from the execution immediately brought controversy.

The governor, who has made support of the death penalty a part of his re-election campaign, instructed Department of Corrections officials to prepare a report on the technical problems. But he defended the use of the death penalty, saying that Tafero coldly took the lives of the two officers.

"It is unfortunate that this incident affected the execution, but it is far more unfortunate that it took 14 years to bring to justice a man who killed two police officers," Martinez said.

Flames rose about 6 inches from the top of Tafero's hooded head as the power was applied, and a cloud of smoke hung near the ceiling.

He lunged back in the oak chair, his hands tightening into balls, during the first two jolts, but his left leg twitched and he still appeared to be breathing afterward in the most gruesome execution at the prison in recent years.

Standard procedure for executions is to administer one two-minute, 2,000-volt electrical cycle. In Tafero's case, however, the executioner interrupted cycle because of the smoke and flames.

* * *

"We believe he was dead after the first couple of **seconds**," Macmaster said.

Mark Olive, an Atlanta lawyer who represented Tafero, said Martinez should ask for an independent investigation and suspend further executions until the problems at Florida State Prison have been resolved.

"The state cannot bring a person to justice by torturing **them**," said Olive.

"Torture, is per se, cruel and unusual punishment."

Jon Peck, spokesman for Martinez, said the Corrections Department thought the report would be completed before Wednesday's scheduled execution of Bennie Demps.

(St. Petersburg Times, May 5, 1990, at 1A) (App. 3). Mr. Word's account to his fellow journalists also noted, revealingly:

"This is the first time I've ever seen visible sparks and flames coming from the **head**," said veteran Associate Press reporter Ron Word, who has witnessed 11 executions. "In addition, this is the first time I've seen them turn on the power three times."

(Miami Herald, May 5, 1990, at 1) (App. 5). Another veteran observer of Florida executions, Bruce Ritchie, wrote:

I watched smoke and flames rise from the head of Jessie Tafero yesterday during his execution. After the first two jolts of electricity, I saw him breathe, and I thought he might be alive. But after the third jolt, I knew he was dead.

It was the third execution I have watched. I don't know if I want to watch another.

I looked at Tafero after the first jolt of electricity. His body slowly relaxed into the chair. This was unlike the other executions I had watched. Then I noticed his heart beating through his blue dress shirt, which was tight against his chest. It appeared to be a rapid, fluttering beat.

Then his shoulders rose, but I didn't know why. Then I realized he was inhaling deeply. Then he exhaled. A pause. Then another deep inhale, and a slow exhale. Pause. Then another.

The current was applied again and, after it ended, Tafero still appeared to be breathing. A third jolt and it was over. Tafero was pronounced dead.

As in past executions, I could not see the faces of the condemned nor the executioner. But I could see the face of Florida State Prison Superintendent Tom Barton, and this time -- for the first time -- I saw him betray a slight trace of emotion.

Barton, whose expression remained firmly unemotional in the two previous executions I witnessed, seemed to show consternation and then pain as an electrical malfunction three times caused smoke and flame to rise from Tafero's head.

The death chamber is separated by plexiglass from the witness room. So there is no sound except for the last statement given by the inmate over a microphone and sound system and the scribbling sound of reporters.

In previous executions, I could tell when the electrical current began because there was the sound of a mechanical thump and a hum from somewhere. Then the inmate's body would instantly stiffen upright in the chair.

A small puff of smoke would rise from an electrode attached to the inmate's lower right calf. In one execution, the inmate's flattened hand instantly tightened into a fist after the current was applied.

Barton would remain impassive throughout the application of the electrical current, which usually lasted about one minute. His face offered only an expression of firm duty.

But yesterday was different.

Tafero's body did not just stiffen upright when the electricity was applied at 7:06 a.m., it seemed to reel backward.

Smoke rose from the inmate's head not his leg. Within seconds, small sparks or flames appeared from the right side of the shroud that hid his face.

The electrical current ended quickly -- quicker than usual, it seemed -- and the flame disappeared. "Had one minute passed **already?**" I thought to myself. I looked at

the clock, but it seemed that less than 30 seconds had elapsed.

I looked to Barton to see what he would do.

Barton did nothing except stare at Tafero, then past him. He appeared to be glaring in consternation in the direction of Ronald Thornton, prison maintenance chief.

Thornton was wearing rubber electrician's gloves. He had applied the skullcap to Tafero's head.

Then I looked to Lt. Don Davis, who had remained on the telephone to the Governor's Office. Davis was speaking into the receiver. Then he said something to Barton that I couldn't hear.

There was the humming sound again, and Tafero's body reeled backward again. The clock on the wall showed 7:08 a.m.

This time, 3-inch flames shot from the left side of the facial shroud, and there was more smoke.

Quickly the current ended, perhaps in about 20 seconds this time. Again the body slowly came to a rest.

After the pause, there was the heartbeat again. Another deep inhale and an exhale. Another inhale and an exhale.

Tafero's left hand was clenched into a fist except for the little finger, which was straight. But the hand had the same ashen color I had seen in the two inmates whose executions I had witnessed.

I looked to Barton and saw a face that had lost its tightness and seemed to sag. Duty and frustration seemed replaced by pain and uncertainty, but he gazed straight ahead.

Barton said something to Thornton, and Thornton spoke back. Then Barton paused, and he swallowed.

Davis spoke again into the telephone, listened, and then turned to Barton and said

something. Barton turned and nodded to the executioner in the booth behind him.

There was the hum again, and the body reeled again. Five-inch flames quickly burned from the left side of the shroud, and smaller ones burned to the right. It was 7:10 a.m.

The hum was gone again, perhaps in 30 seconds. But the body did not relax this time. The little finger on the left hand was now part of the fist.

There was no breathing or visible heartbeat. After a pause, one prison doctor, then another, checked for the inmate's pulse and heartbeat.

At 7:13 a.m., Frank Kilgo, the prison's chief health officer, spoke in Barton's direction.

Then Davis walked across the room, lifted a microphone which was wired to the witness booth, and said, "The sentence of Jesse Tafero has been carried out at 7:13 a.m."

As I exited the room with other witnesses and reporters, I noticed Barton standing against the wall. His expression was somber and his hands were clasped down in front of him, and he was slowly twiddling his thumbs.

I never had noticed him twiddling his thumbs before.

(Florida Times-Union, May 5, 1990, at 1) (App. 1).

Affidavits from the Department's own employees were no less "bizarre". Secretary Dugger found them to be an "accurate assessment of the problem" (Secretary Dugger's letter to the Hon. Bob Martinez, May 8, 1990, at 1) (App. 9). They are as follows:

Before me this day personally appeared Gary L. McLain, Deputy Inspector General, Florida Department of Corrections, who being duly sworn, deposes and says:

I arrived at the institution at approximately 5:20 a.m. on Friday, May 4, 1990. I proceeded directly to the Administration Building where I remained until a roll call was taken of all witnesses and we were escorted into the institution. After verifying identification and signing the visitors' log, I was escorted to the Staff Dining Room.

After the transfer of the electrical power to generator, we departed the Staff Dining Room, under escort, to vans behind the institution. I entered the second van and was driven to the Death Chamber. After entering the Witness Room, I took a seat in the center of the second row, immediately behind Mr. Rankin Brown. The inmate (Jessie Tafero) was escorted into the Death Chamber and was secured into the chair. He gave a brief statement and the final restraints were applied. The order was given to carry out the final sentence.

As the electric current was flowing, a blue-orange flame appeared from both sides of the mask. It extended approximately twelve inches on both sides. When the power stopped, the flames disappeared. I observed what appeared to be deep breaths taken by Tafero and, after a few seconds, another charge was given.

When the power was started again, the flames reappeared. I observed movement by the right index finger of Tafero and, after the power stopped, the flames disappeared. Once again, I observed what appeared to be a couple of deep breaths from Tafero. The power was administered the third time and, once again, the appearance of the flames. When the power ended, so did the flames. A cloud of smoke filled the upper space of the Chamber after each power surge. The head attachment appeared to be leaning slightly to the inmate's left. The two Medical staff checked for pulse and at 7:13 a.m., Tafero was pronounced dead.

We were ordered to depart the Execution Witness Room.

(Affidavit of Gary L. McLain, Deputy Inspector General)

(Attachment 7 to DOC Report) (App. 9). Other Department of Corrections personnel gave remarkably similar accounts of the execution:

Before me this day personally appeared C. G. Strickland, Jr., Superintendent of Community Facilities, Region 11, who being duly sworn, deposes and says:

On Friday morning, May 4, 1990, I witnessed the execution of Inmate Jessie Tafero.

When the execution began, everything appeared to be normal as to the entrance into the chamber, strapping-in procedure, last statement and placement of head gear.

When the electricity was applied, smoke and flames appeared around the headpiece. After a few seconds, it appeared that the current was cut off and, in a few more seconds, was applied again. Smoke and flames appeared again around the headpiece. It appeared that the current was cut off again and in a few seconds, was applied again. Again, smoke and flames appeared around the headpiece. In between the cycles, there appeared to be more movement from Tafero than in the other twenty-one (21) executions that I have witnessed in the past. Having seen as many as I have, I believe it would be a fair statement to say that there was some malfunction with the equipment.

Although this execution was not as normal as the ones I have witnessed in the past, I still feel Superintendent Barton and his staff should be commended, as they did not panic and the execution was carried out to the best of their ability.

(Affidavit of C. G. Strickland, Jr.) (Attachment 8 to DOC Report)

(App. 9). To the same effect was the affidavit of William Mathews:

Before me this day personally appeared William F. Mathews, Physician's Assistant-Certified, Florida State Prison, who being duly sworn, deposes and says:

I have participated in approximately twenty-plus (20) elective executions in the State of Florida as a Medical professional. As such, I have witnessed a variety of bodily responses to the electrocution process.

On the morning of May 4, 1990, I was in the Death Chamber at Florida State Prison during the execution of Inmate Jessie Tafero. The execution process was proceeding in a usual fashion until approximately 7:05 a.m. At the moment of initiating the electrical current, noise (similar to that of an arc welder), smoke, and an electrical arc came out from under the electrical connection on the headpiece. The duration of electrical impulse was approximately six (6) seconds.

After the electrical current was turned off, the body began to exhibit fasciculations (motor movement) of the left lower leg and the body sighed approximately twice, making a gurgling noise. The electrical current was reapplied at approximately 7:07 a.m. and the same headpiece phenomenon described above occurred. Again, after the electrical current was turned off, the body sighed approximately twice with a gurgling noise.

After the third electrical current application, the same similar sights occurred at approximately 7:09 a.m. The body did not move at all or manifest any noises after the electricity was turned off.

At approximately 7:11 a.m., I approached and examined the body of Inmate Tafero. At no time during my examination was any evidence of heartbeats, respirations, muscle movements or any recognizable signs of life. The body was pronounced dead at approximately 7:13 a.m. by Dr. Frank D. Kilgo.

(Affidavit of William Mathews) (Attachment 6 to DOC Report) (App.

9). Rankin L. Brown's affidavit provided:

Before me this day personally appeared Rankin L. Brown, Regional Director, Region 11, who being duly sworn, deposes and says:

On Friday, May 4, 1990, I traveled to Florida State Prison for the purpose of

witnessing the execution of Jessie Joseph Tafero. I arrived at the institution at approximately 5:15 a.m.

At 6:45 a.m., I was transported to the witness room of the Death Chamber. At 7:00 a.m., Tafero was brought into the Death Chamber and secured in the electric chair. Shortly thereafter, Superintendent Barton nodded to the executioner and, almost immediately, smoke and flames were observed at the left side of the headpiece. Within a matter of seconds, the smoke and flames ceased. The inmate appeared to take several breaths. I then glanced at Superintendent Barton and observed him once again nod to the executioner and, for the second time, smoke and flames were noted. This procedure was repeated for the third time with the same results.

Tafero was pronounced dead at 7:13 a.m.

(Affidavit of Rankin L. Brown) (Attachment 3, DOC Report) (App. 9).

The "bizarre" spectacle witnessed by all in attendance immediately triggered questions from the media. Only minutes after this spectacle, and without any examination of the electrical generating or transmission devices, the Department put together its explanation of the events. Not surprisingly, the overnight explanation sought to exonerate DOC and foreshadowed the results of the "investigation" that was to follow.⁵ That the

⁵ Q. Governor, do you think this is a whole lot of noise over nothing?

A. No as I say when something as serious as carrying out the death sentence occurs that appears to be out of the ordinary, I think you need to look at it. That's why I instructed the Secretary Dugger to immediately look at it and verify what occurred. I must say that orally before the

(footnote continued on following page)

DOC investigation left a lot to be desired is not surprising: the executioner was purporting to "investigate" his own botched execution. But the facts pled in this action demonstrate that the malfeasance and incompetence goes a great deal further than the use of the wrong sponge. Cynthia Barnett explained the atmosphere in the witness room immediately after the execution:

Inside the death chamber, prison officials waited patiently next to Tafero's erect, dead body for the witnesses to leave. For several seconds, no one in the witness room moved.

After the state witnesses -- all law enforcement officials -- began to file out, I thought perhaps I was the only one stunned. It was my first execution. But then I looked around at my colleagues. Their faces were pale. Finally, someone said we had to find out what went wrong, and we started to move.

(Gainesville Sun, May 5, 1990, at 1) (App. 2).

The Department's Spokesman, Bob McMasters, quickly became the point man in deploying the Department's version of events, as Ellen McGarraghan reported for the Miami Herald:

Nevertheless, Macmaster maintained that Tafero -- despite his breathing -- died during the first administration of electricity. The breathing, prison officials assert, was involuntary, a motion undertaken by Tafero's nervous system after his death.

(footnote continued from previous page)

engaging investigation they already felt they knew what it was and I think their investigation of it just validates that conclusion.

(Transcript of Gov. Martinez's press conference, May 7, 1990, at 2) (emphasis added).

The fault in the headpiece was a sponge, soaked in saline and strapped to Tafero's skull, that caught fire as current passed through it, Macmaster said.

The sponge rests on a condemned prisoner's shaved head underneath a leather and metal headset strapped and bolted into place. The damp sponge conveys the 2,000 volts and 14 amps of current into the prisoner's skull, killing him.

In each of the 21 other executions carried out in Florida since the resurrection of the death penalty in 1979, the same natural ocean sponge has been used to convey the deadly current. But for Tafero's execution, the prison bought a new sponge, probably synthetic, and it burst into flames each time the current was turned on, Macmaster said.

"It was not the appropriate **sponge**," he said.

(Miami Herald, May 5, 1990 at 1) (App. 5). As discussed in the 3.580 motion, dead people do not "**involuntarily**" breathe in this manner (See Affidavit of Cook County, Ill., Deputy Chief Medical Examiner Robert H. Kirschner, App. 19). The explanation, however, initially had the appearance of plausibility. As we now know, the Department's "**sponge**" explanation was simply not factual.

By nine a.m., almost two hours after the botched execution, the Department realized that its attempts at damage control were proving insufficient. The media had by this time already contacted Mr. Tafero's attorney, Mark Olive, to report their observations and to request his comment. Other members of the media corps contacted undersigned counsel's office, which in turn prompted the first of numerous inquiries and public records requests to Florida State Prison, the Department of Corrections

and the Medical Examiner's Office of Alachua County. Mr. Tafero's attorney demanded an investigation into the execution independent of the DOC. Within 24 hours the story of the botched Tafero execution would become front page news across Florida (See Apps. 1, 2, 3, 4, 5, 6, and 7). Subsequently, the Legislature would look into the matter, and many of the facts disclosed by its inquiry are presented in this action.

Notwithstanding all this, Florida State Prison Superintendent Thomas Barton's opinion was that an investigation was unnecessary (The Gainesville Sun, May 5, 1990, at 1) (App. 2). On the afternoon of May 4th, the Governor ordered an investigation that was far from independent of the DOC -- it was to be conducted by the same people responsible for the execution:

GOVERNOR CALLS FOR REPORT ON TAFERO EXECUTION

Governor Bob Martinez today instructed the Department of Corrections to provide him with a full report on this morning's execution of Jessie Joseph Tafero, in which mechanical problems complicated the execution process.

Corrections officials have notified the Governor's Office that the use of a synthetic sponge resulted in smoke seen in the execution chamber. They reported that none of the difficulties affected the electrocution of Tafero, who died instantly. However, the Governor said he wants a full accounting to ensure that similar problems do not occur in the future.

"It is unfortunate that this incident affected the execution, but it is far more unfortunate that it took 14 years to bring to justice a man who killed two police **officers,"** Governor Martinez said.

The Governor's Office will make the Corrections report available once it is

received.

The investigation was politically motivated from its inception. The Governor himself candidly admitted that it began with a preordained conclusion. The results of the "investigation", given the facts, do not hold up. But some of the things noted by the investigation are revealing.

The DOC investigation stated:

Two problems emerged as central to this set of circumstances:

1. What could have caused the flame and smoke?
2. What effect did it have on the inmate being executed?

(DOC Report at 3) (App. 9). With respect to the former question, the investigation concluded:

either the situation was human error or it was caused by some mechanical failure or deficiency.

An initial inspection of the circuits proved that equipment works the same today as it did prior to May 4th.

(DOC Report at 4) (App. 9).⁶ The Department of Corrections

⁶This finding is flatly inaccurate. At an evidentiary hearing, Ms. Buenoano will establish that on the afternoon of May 7th, during "chair tests" at Florida State Prison (a mere 24 hours prior to the issuance of the DOC investigation), Florida State Prison lost power completely for a period of forty five minutes. Ms. Buenoano shall also call numerous witnesses who have been present during previous tests and who will testify that on these prior occasions the Florida State Prison had never lost power for more than a few seconds during switchover and had never before experienced an inability to go back on line with Florida Power and Light. This obviously belies the Department's conclusion that "the equipment works the same today as it did prior to May 4th." The equipment does not work properly, and the DOC has taken no steps to assure that it will function properly.

continued:

(T)he next step was to review those variables which were present at the actual execution but not intrinsic to the circuitry itself. The most obvious was the sponges [sic] used during the execution. During the interview^[7] of Allan Martin, Assistant Maintenance Supervisor (see Attachment 5), it became apparent that the sponge used in the headpiece had been recently changed just prior to May 4th. (Attachments 11-14 are comparisons of the original sponge previously used, to the new sponge actually used in the Tafero execution and a third piece of sponge from which the new sponge had been cut.) Upon examination, it became quite clear that the newly acquired sponge is synthetic and not the natural "elephant ear" variety that has been historically used. Mr. Martin freely admits in the interview that at the time he (Martin) elected to change the sponge after a conversation with his supervisor but no thought was given to acquiring a natural sponge. Mr. Martin went to a local store in Starke and purchased a sponge which proved to be of synthetic composition.

(DOC Report at 4) (App. 9).

The method selected to test the hypothesis must bear some rational relationship to the phenomena desired to be tested, but the DOC apparently does not realize this:

It is important to demonstrate whether or not the newly acquired sponge would produce the amount of smoke that was present on May 4th, so a piece was cut from [the already burned sponge ⁱⁿ] the headset and subjected to 120 volts^[8] of heat [sic] by

⁷Although specifically requested, collateral counsel has never been provided copies of this interview. Cf. Fla. Stat. 119.10 (1989) (Public Records Act).

⁸The Department maintains that 2000 volts were administered to Mr. Tafero.

placing it in a common household toaster.^[9]
It took only five seconds^[10] to begin smoking
and produced a noxious odor which became more
intense as the sponge burned.

Although the sponge was only in the
toaster for ten seconds, it produced a large
amount of smoke and reduced **ed in size by**
approximately two thirds.^[11]

(DOC Report at 4) (App. 9). From this "experiment", the DOC
investigation concluded:

It is reasonable to conclude that
problem was due to human error by replacing
the natural sponge with a synthetic sponge.^[12]

(DOC investigation at 4) (App. 9) (emphasis in original).

Ms. Buenoano has alleged, an allegation supported by the
facts proffered in the 3.850 motion and its appendix, that agents
of the Department of Corrections were in fact aware of the poor
and/or broken electrical connections in the head electrode and
failed to make repairs, making it reasonably foreseeable that the

⁹Volts do not measure heat. Voltage properly understood is
the volume of current which in turn is measured in amperes. See
Webster's Ninth New Collegiate Dictionary (1983).

¹⁰Mr. Tafero was executed by three bursts, each two minutes
in duration.

"Scientific testing is not done with a toaster. Indeed, an
eminently qualified expert on the design and operation of
electric chairs will testify at the evidentiary hearing that this
claim requires (see, infra, discussing Fred Leutcher's account).
He will explain that using a synthetic sponge only moderately
saturated with saline solution he was unable to replicate these
results after exposing the sponge to five minutes of heat. The
DOC never used a saline solution when the sponge was put in the
toaster. A saline solution is used with the sponge when an
execution is being carried out.

"Having thus accounted for the smoke, the DOC investigation
made no attempt whatsoever to account for the sparks and flames
viewed by the witnesses at Mr. Tafero's execution.

temperatures generated during an execution would burn synthetic or natural sponges, melt solder connections, burn human flesh, and otherwise inflict unnecessary pain and suffering.

Furthermore, Ms. Buenoano has pled and shall establish at an evidentiary hearing that pre-existing conditions known to the DOC made it reasonably foreseeable that a high resistance connection could effectively reduce the actual intended voltage from 2,000 to as little as 90 to 300 volts --insufficient to inflict death, but more than sufficient to cause unnecessary pain, suffering, and mutilation.

Ms. Buenoano has alleged further, and shall establish at a hearing, that the DOC to date have failed to correct these conditions -- there have been no corrective or remedial steps whatsoever. The DOC does not even employ a licensed electrician. Ms. Buenoano will be subjected to torture because the DOC has yet to clean up its act.¹³

Persuasive evidence that the Department's negligence created a high resistance connection within the electrode during Mr. Tafero's execution comes from several sources. First, there are

¹³Ms. Buenoano also pled *res ipsa loquitur* before the lower court. She is precisely the type of party who can invoke the doctrine. Here, the instrumentality of harm, the electric chair and its devices, are under the exclusive control of the Department of Corrections. The events surrounding the electrocution of Mr. Tafero are such that should not happen in the ordinary course of events without negligence on the part of the Department of Corrections. And the Department of Corrections has prohibited Ms. Buenoano's attorneys or even independent experts from conducting a physical examination of the electric chair and its electrical generating or transmission devices (see App. 22) (Letter from Superintendent Thomas Barton to Jerome H. Nickerson, Esq., May 15, 1990). Cf. Burns v. Otis Elevator Company, 550 So. 2d 21 (Fla. 3rd DCA 1989).

the consistent witness accounts of flames and sparks which shot out from underneath Mr. Tafero's death shroud upon each application of current.¹⁴ The affidavits of Mr. Donald G. Davis and Mr. William Mathews (Attachments 4 and 6 to DOC Report) (App. 9) are particularly enlightening in showing that a high resistance connection within the head electrode existed. Mr. Davis noted that:

At 7:00 a.m. on Friday may [sic] 4, 1990, Inmate Jessie Tafero was led into the Death Chamber at Florida State Prison and subsequently strapped into the electric chair. At 7:06 a.m., the switch was engaged and, almost spontaneously, an arcing flame approximately two and one-half to three inches evolved from the leather hood for seven to eight seconds.

(Attachment 4 to DOC Report) (App. 9) (emphasis supplied). Mr. Davis also noted the same phenomena during the two subsequent jolts administered. More specific is the account of William E. Mathews:

¹⁴The DOC has done nothing to look into the flames and sparks. As previously discussed, synthetic sponges have been used successfully in executions in the past without the flames, sparks and smoke attendant to the execution of Mr. Tafero. Furthermore, no sponge, either synthetic or natural, conducts the transmission of electric current. This is precisely why the sponge is soaked in a saline solution. The sponge composition is thus irrelevant to conductivity, a fact well known to the Department at the time of the investigation (as demonstrated by its own internal operating procedures which call for soaking of the head electrode sponge for 24 hours prior to execution). Indeed, between the two, a synthetic sponge is superior to a natural sponge as its shape is uniform throughout affording better contact with the surface of the condemned's head. Thus, assuming that Mr. Tafero's synthetic sponge was soaked with a saline solution, it could not, as a matter of simple physics, be the source of the high resistance connection.

{ }At the moment of initiating the electrical current, noise (similar to that of an arc welder), smoke, and an electrical arc came out from under the electrical connection on the headpiece.

(Attachment 6 to DOC Report) (App. 9). Of course the principle upon which an "arc welder" is based is precisely what the allegations in this case involve -- a high resistance connection. Here, instead of a welder's rod generating the arc, it was the broken connections in the head electrode: the resistance caused thereby generated sufficient heat to evaporate all moisture, igniting the sponge, and ultimately burning and mutilating Mr. Tafero.

Furthermore, a high resistance connection, such as the one which occurred during Mr. Tafero's execution, is capable of substantially reducing the 2,000 volts intended to be administered to as low as 90, 100, or 200 volts, insufficient to cause "instant death" or "**unconsciousness**", but sufficient to cause burning and pain. The truth of the matter is that the DOC does not know how many volts of electricity were actually administered to Mr. Tafero on any of the three applications of current, precisely because of the high resistance connection in the head electrode. Neither has the DOC taken any steps to assure that this **will** not happen again. Florida's DOC, among other deficits in equipment and procedures utilized in executions, and unlike other states, does not have a readily obtainable device which measures on a continuous bar graph the amount of voltage actually administered to the condemned inmate's body (this device is known as a chart or strip recorder). Thus

the Department, contrary to the conclusions of its report, does not know and cannot know (because of the high resistance connection) the actual amount of current administered to Mr. Tafero. Neither can it tell how much current will actually be administered to Ms. Buenoano, or whether it will be enough for **"instantaneous death."** The electrode needs repairs.

The botched execution of Jesse Tafero not only aroused the interest of the media within Florida but the national media as well. Specifically, the producers of ABC's Prime Time television show quickly dispatched reporters to Florida to cover the breaking story. On May 10 at 10:00 p.m. Prime Time's piece regarding Mr. Tafero ran on national television -- the facts there developed are worthy of note. Relevant portions of the transcript of the piece are produced below:

DIANE SAWYER: There was an execution in Florida last week that was at once riveting and horrifying. Jessie Joseph Tafero convicted of killing two police officers became the 217th person in Florida's electric chair. But last week at the State Penitentiary in Florida it took not one but three jolts of 2,000 volt electricity before prison officials were done and each time the flames shot out from the electrodes strapped to the prisoner's head. Governor Bob Martinez ordered an investigation.

GOVERNOR MARTINEZ: On Friday, May 4th we did carry out the death warrant on Jessie Joseph Tafero.

DIANE SAWYER: It was a few minutes after 7 in the morning at the prison in Starke, Florida. Inside 43 year old Jessie Joseph Tafero was buckled into the oak chair. His face hooded. Newspaper reporter Bruce Ritchie as part of his job is there to witness.

BRUCE RITCHIE: As soon as it hit the body reeled back in the chair. It seemed like a little bit more than usual it slammed back against the back of the chair. And there was some reddish -- dark reddish flames coming from the left side of his head. Then they stopped and then all of the sudden the body just rose/waved and the shoulders lifted and he just let out a breath and he did it again and let out a breath. And I noticed that his heart seemed to be beating.

DIANE SAWYER: In a seven minute period there would be two more deadly charges. And each time it would be flames. The State says the problem was the sponge a 30 years old natural sponge attached to the head electrode had been replaced with a synthetic and it turns out flammable sponge. Even so, Department of Corrections Secretary, Richard Dugger, says Tafero didn't suffer. That heart beat or not he was dead after the first jolt.

SECRETARY DUGGER: In my opinion death occurs instantly when you apply high voltage directly to the brain of someone. I don't believe there is any way to avoid an instant death.

BILLY NOLAS: You're basically dealing with what would at least appear to be incompetence.

DIANE SAWYER: Billy Nolas is the attorney for convicted murderer Bennie Demps. **Who** was going to be executed in that same chair until it was postponed two days ago.

BILLY NOLAS: We don't torture people in this country. Presumably we don't burn people at the stake in this country.

DIANE SAWYER: According to a poll 79% of Americans favor the death penalty. Very few of us stop to contemplate the deadly specifics. The levers pulled, the toxins injected, coursing electricity. Yet what happened in Florida last week started us thinking about the people who do just that . . . in particular a man in Boston who is the nations foremost expert on execution. If you're expecting someone dour and grim you

are probably going to a little bit unsettled by Fred Leutcher. Who's business is death.

FRED LEUTCHER: If the equipment is not up to par, if the equipment does not have the right voltage. You do not have the proper tight fitting electrodes, you will cause pain, undue trauma to the individual's body prior to his death.

DIANE SAWYER: It's just another problem to be solved. Another day at the office for Fred Leutcher a man who makes his livelihood perfecting the instruments of death.

* * *

DIANE SAWYER: Leutcher has . . . designed and installed equipment for electric chairs.

FRED LEUTCHER: As an individual who is familiar with all types of execution procedures and hardware. If I had my druthers I would prefer to be electrocuted. It's faster than all of the other systems. It's just as effective and every bit as much painless.

DIANE SAWYER: Unless you're James Joseph Tafero who was burned by flames in that Florida execution. No one will ever know if he felt pain. But Leutcher looked at the photographs and told us he thinks the prison diagnosis of the problem is wrong.

FRED LEUTCHER: The burning that we have on sponge number 2 at least as far as I'm able to tell from the photographs is consistent with the type of burning that we would get from a broken or defective electrode and that would indicate that it was not the sponge. There's a good possibility that this will happen again in the future. Maybe not on the next one but on a subsequent execution. . . .

(App. 21) (emphasis supplied).

Shortly after the Prime Time broadcast undersigned counsel's office contacted Mr. Leutcher. We first learned of him through the above-quoted interview. Mr. Leutcher reviewed the autopsy

report, photos from Mr. Tafero's post mortem examination, photos of Mr. Tafero, taken two days after his execution, and a number of other documents concerning the DOC's procedures. Mr. Leutcher also reviewed the autopsy reports and photos from the last nine executions, including Mr. Tafero's, conducted at Florida State Prison. (Mr. Leutcher is an eminently qualified expert in the design, construction and operation of the electric chair and death by electrocution. He built complete electric chair systems or components for no less than three states.) Mr. Leutcher will testify at an evidentiary hearing that there is no possible explanation for the events surrounding Mr. Tafero's execution other than a head electrode that was either in poor repair or broken. Mr. Leutcher will also testify that the defective condition of the electrode created a high resistance connection which in turn created a resulting voltage drop which may have reduced the actual voltage administered to 90 or 100 volts during the applications of electricity to Mr. Tafero. Mr. Leutcher will also explain that the injuries sustained by Mr. Tafero as reflected in the autopsy photos of Mr. Tafero's calf, in comparison to the photos of other inmates executed at the Florida State Prison, substantiates the fact that Mr. Tafero did not receive the full voltage administered. 90/100 to 200 volts does not cause "instantaneous death" -- but it does cause unnecessary pain. Finally, Mr. Leuchter will testify that the DOC contacted him about the problems with the electrode as early as in 1986. Then, representatives of the Florida State Prison, including Mr. Rob Adair and Mr. Thomas Barton contacted Mr. Leuchter expressing

concerns regarding a defective leg electrode and defective head electrode in the electrocution equipment at the Florida State Prison. When Mr. Leuchter (whose expert account was proffered in the Motion to Vacate) was contacted by the Department of Corrections the DOC expressed its concerns regarding its electric chair deficiencies, deficiencies even then known to the Department of Corrections, and as a result Mr. Leuchter provided a bid for the delivery of a properly functioning execution system (the bid is attached hereto). Mr. Leuchter's suggestions were ignored. Instead, it was suggested that Mr. Leuchter fashion a leg electrode from an "old army boot."

Explaining that an electrode fabricated from an old army boot was inadequate for a competent execution, I declined further participation in these efforts.

(Affidavit of Fred Leuchter, p.2).

Mr. Leuchter called Mr. Barton's office at the Florida State Prison on May 5, 1990, after the date of Mr. Tafero's execution, offering his services to correct the defective equipment originally discussed in 1986. At that time Mr. Paul Decker of the Department of Corrections advised Mr. Leuchter that the problems in the last execution had not been corrected. As also discussed in Mr. Leuchter's affidavit, this information was unavailable to Ms. Buenoano earlier -- the DOC did not tell anyone about it. Mr. Leuchter's affidavit noted:

My name is Fred A. Leuchter, Jr. and I live in Boston, Massachusetts. I am a consulting engineer, working under the company name of Fred A. Leuchter Associates, Inc. I design and construct electric chairs.

I have designed the electric chair for three states.

I was contacted by Mr. Jerome Nickerson of the Office of the Capital Collateral Representative and asked to give my opinion on the design and operation of the electric chair operated by the State of Florida at Florida State Prison. I provided to Mr. Nickerson my views concerning these issues and I am aware that a proffer of my testimony on these issues has been provided by Mr. Nickerson's office to the courts of Florida. When I spoke to Mr. Nickerson previously I did not inform him that I had been contacted in the past by representatives of the Florida State Prison, first in 1986 concerning problems in Florida's electric chair. On June 12, 1990, I called Mr. Nickerson and relayed this information, and he asked me to provide an affidavit detailing my recollection of events in 1986. I regret not providing this information previously.

In 1986 the name of my company was American Engineering. During that year, I was contacted by representatives of the Florida State Prison, including Mr. Robin Adair and Mr. Thomas Barton. Mr. Adair told me that the leg electrode they were using in the electric chair in Florida had proved defective on their last execution and that the condition of the head electrode was questionable. He asked me to submit a bid for a new leg electrode and headpiece for the electric chair housed at Florida State Prison.

I sent a price quote of \$3,425 to Mr. Adair. This quote included a leg stock, including two leg electrodes, and a replacement helmet for an electric chair, along with the shipping cost. The letter including my price quote was dated December 12, 1986. I also during that time explained to Mr. Adair that in my expertise I did not believe that a single leg electrode was capable of properly conducting the electricity during an execution, and that the system that I had designed included two leg electrodes. The system in place at Florida State Prison simply was not functioning appropriately.

Mr. Adair responded that my price quote was too high, and that he and Mr. Barton wanted me to fabricate a leg electrode from an old army boot and a copper strip. At this juncture it became apparent to me that the Department of Corrections was not competent to design electric chair components as no one there seemed to fully apprehend the principles involved. Explaining that an electrode fabricated from an old army boot was inadequate for a competent execution I declined further participation in these efforts.

Mr. Adair later told me that he had fabricated his own army boot electrode and that it had worked on the next executee. I failed to report this interaction with the Department of Corrections to Mr. Nickerson.

After hearing that there were unusual circumstances involved in the execution of Jesse Tafero, I contacted Mr. Barton's office on May 5, 1990, and inquired again as to the defective equipment originally discussed in 1986. At that time Mr. Decker advised me that the problems in the last execution had not been corrected, and that the Department of Corrections was once again interested in retaining my services. Mr. Decker also told me that I should call back in a few days and we would discuss the possible purchase of electric chair components.

When I called Mr. Decker back a few days later, he told me that that there was no need for my services. To my knowledge, the problems have not been repaired to date.

(Affidavit of Fred Leuchter, Jr.). Mr. Adair was also contacted, after his involvement came to light. His affidavit explains:

My name is Robin Adair and from 1986 to 1987 I was employed by the Florida Department of Corrections at Florida State Prison in the electrical shop, in the position of electrical supervisor.

My duties encompassed all electrical systems and the maintenance of those systems within the prison, including the electrical generating and transmission devices associated with the electric chair.

During my employment at Florida State Prison, I participated in numerous "walk **throughs,**" tests of the electrical chair which were conducted in anticipation of imminent executions. As a result, I became intimately familiar with both the procedural aspects and the electrical hardware utilized in executions at Florida State Prison. In addition, I am also familiar with the electrical training and education of numerous employees of Florida State Prison who are currently involved in the maintenance and operation of the electric chair, including Mr. Al Martin, the current Assistant Maintenance Supervisor.

Much to my disbelief, I found that the prison did not have -- nor have they ever employed to my knowledge -- a licensed electrician at the prison. I soon found out that I, by virtue of my completion of basic and advanced electrical courses and prior on the job experience, along with several of the prisoner helpers, were the only individuals at Florida State Prison with any comprehension of electrical principals, wiring and circuitry.

It was my experience during my employment that Mr. Martin was completely ignorant of the most rudimentary principles of electricity and secured his position as head of the power plant at the prison through political patronage within the Department of Corrections. Mr. Martin's incompetence with respect to the principles of electricity were amply demonstrated on several occasions. I distinctly recall Mr. Martin bringing me a common 120 volt outdoor light explaining that he had tried to install the light in his home but could not make the light work and asked me to explain how he should go about wiring it. I simply could not believe that this man, who could not even wire a 120 volt light, was in charge of the electrical generating plant at Florida State Prison.

Mr. Martin's knowledge with respect to the workings of the electric chair were even more appalling. The chair is tested prior to an execution by filling a tub with saline solution and placing the wires with lugs crimped on into the tub and administering

current. The saline solution is supposed to simulate the resistance of the prisoner's body: it is the amount of salt added to the water during the test which determines the resistance. Based on the resistance encountered in the bucket, the control panel is then adjusted by two dials which control the amount of voltage and amperage so that during the execution **2400** volts at eight amps is administered to the prisoner.

Chief among other problems with the saline solution simulation is that no one ever measures -- and Florida State Prison has no instruments to measure -- the amount of salinity in the water. Thus, the prison never knows from test to test how much resistance it has created in the bucket and of course it is the resistance created in the bucket by which the prison will calibrate the voltage and current to be administered. Everything is done by sight. Somebody grabs a pinch of salt and throws it in the tub of water.

Ignorant of rudimentary principles of resistance, the first time that Mr. Martin attempted to conduct a saline solution test he tripped out one of the two main breaker boxes in the death chamber by creating a short circuit. Mr. Martin and Maintenance Supervisor Mr. Ron Thornton then looked to me and said we had to fix the chair immediately as the chair was not working. After contacting the only individual who had been trained by the chair's manufacturer, who was not working at Florida State Prison, and who has since retired, I reset the breaker, threw out the water Martin had used, got new water, put in the salt and conducted the test without any problems.

This incident demonstrated not only Mr. Martin's and Mr. Thornton's utter incompetence with respect to the electric chair but also the far greater and continual concern of mine that no one within the prison fully understood either the electrical hardware of the chair or the principles upon which it is based. The only knowledge that anyone has regarding the chair at the prison has been obtained from watching others carry out executions or tests. To my knowledge, it is from "**oral** history" alone that Mr. Martin,

Mr. Thornton or even Superintendent Barton has any appreciation of the chair whatsoever. To them it is nothing more than a black box which kills prisoners.

Another problem which continuously arose was the prison's unwillingness to make any expenditure of funds to obtain professionally made components for the electric chair or to conduct more than limited maintenance and inspection on the chair. Since the chair's installation, the prison has never requested to my knowledge that the manufacturer conduct an inspection of the chair. In fact, I stumbled upon the original blueprints and wiring diagrams of the execution equipment in a closet where someone had thrown them earlier.

When it became necessary to obtain a new leg electrode, I contacted Mr. Fred Leuchter in Boston, knowing that he was one of a few individuals in the country with the experience in the design of leg electrodes. Mr. Leuchter advised me in 1986 that two leg electrodes should be utilized to obtain a uniform passage of current through the body. I informed Maintenance Supervisor Mr. Ron Thornton and the Assistant Maintenance Supervisor of the shortcomings in using only one electrode and also provided them with the price quotes and diagrams for purchasing these components manufactured by Mr. Leuchter. I was later told that the prison was unwilling to pay that amount to purchase professionally constructed components specifically designed for electrocutions and was instructed by my superior officer to fabricate an electrode from materials available at the prison. Accordingly, I obtained a boot and by cutting off the lower portion of the boot and then using aluminum rivets, riveted lead, copper, shim stock, and copper screen (some of these materials were designed to be used as roofing materials) to the interior of the boot, and finally adding a stainless steel bolt from a hardware store to attach the leg electrode to, I fabricated the homemade leg electrode currently being used in executions at Florida State Prison. I should add that I did not use the original electrode provided by the manufacturer of the chair as a model for the design I was instructed to build, but rather copied

another homemade electrode that had previously been made at the prison. I simply could not understand why the prison was not willing to make any expenditure to see that human beings were properly executed.

To my knowledge I have never communicated these facts regarding the operation and maintenance of the electric chair at Florida State Prison to any attorney prior to being contacted by the attorneys from CCR in June of 1990.

The above does not exhaust my knowledge of the electric chair, personnel or procedures used in executions.

(Affidavit of Rob Adair). These facts are quite telling both on the question of the DOC's lack of competence as well as on the question of the DOC's efforts to simply sweep the problem under the rug.

The Department of Corrections' reports that the injury pattern in Mr. Tafero's case is "similar to that of all other executed prisoners" was also grossly misleading. The injuries themselves are roughly similar solely in their locations on the head and leg; but the difference in the severity of the other inmates' injuries when compared to those sustained by Mr. Tafero is what the DOC ignores. A comparison of the photos obtained from Dr. Hamilton's office (the Alachua County Medical Examiner) was included in the Rule 3.850 motion (at pp. 44-52). The photographs graphically demonstrate that the previous head injuries, with the exception of Mr. Tafero's, involved distinct and explosive burn patterns on the skull where the head electrode made contact. Likewise, the burn pattern resulting from the leg electrode on the prior eight executions produced a characteristic rippling disfiguration of the skin and surrounding tissue, the

one exception once again being Mr. Tafero. These differences are readily apparent even to the untrained eye, as the photographs reproduced in the 3.850 motion demonstrate. These differences are important because the condition of Mr. Tafero's body, as compared to that of the others, shows that he did suffer. There is a considerable difference between the required 2,000 volts and the 90 - 200 volts provided to the executee by the electrode now in use. The electrode now in use tortures people -- it does not kill instantly.

Mr. Leutcher explains that the disparity between the injuries received by the prior eight individuals executed and those of Mr. Tafero resulted precisely from the fact that Florida's electric chair no longer functions appropriately: Mr. Tafero did not receive the full 2,000 volts -- because of the high resistance connection in the head electrode. Mr. Tafero received some quantum less than 2,000 and possibly as little as 90 to 200 volts. The DOC has done nothing to correct this malfunction and refuses to even acknowledge it publicly.

The discussion in Dr. Kilgo's affidavit (App. 9) concerning the shifting skull cap in fact demonstrates that a broken electrode was the real problem: the skull cap is strapped on, and it cannot move: what actually moved was the broken head electrode in the skull cap.

Dr. Robert Kirscher, an eminently qualified medical examiner, has reviewed the evidence and explains:

1. My name is Robert H. Kirschner, M.D. I reside in Chicago, Illinois.

2. I am a board-certified forensic pathologist and have been employed at the Office of the Medical Examiner for Cook County, Illinois since 1978. I am presently Deputy Chief Medical Examiner for Cook County and was previously a deputy Medical Examiner. I have performed approximately 5000 autopsies and I have testified in court as an expert in approximately 250-300 cases. I am also on the faculty of the Pathology Department at the University of Chicago. My curriculum vitae is attached to this affidavit.

3. I have special expertise in the documentation of torture and human rights abuses. Related to this expertise I serve on the Committee on Scientific Freedom and Responsibility of the American Association for the Advancement of Science (AAAS). The AAAS, based in Washington, D.C., is the largest scientific organization in the United States and is the publisher of Science magazine, a journal of international renown in the scientific community. The AAAS Committee on Scientific Freedom and Responsibility was created in 1978 as a means for helping scientists, physicians, and engineers around the world who face persecution and physical danger because of their religious, political, or professional views and/or activities. The Committee, through its Science and Human Rights Programs, also organizes special fact-finding missions to investigate torture and other human rights-related issues. I also serve on the board of directors of Physicians for Human Rights, a Boston-based organization of physicians who have undertaken to apply the skills of medicine to the documentation of human rights abuses. As a result of my involvement in these two organizations, I have been called upon to participate in the documentation of human rights abuses in a variety of nations, including Argentina, El Salvador, South Korea, Czechoslovakia, Kenya, and Israel's west bank. Requests for such intervention originate from individuals, human rights organizations, and at times from governments. Both organizations are non-ideological and are not affiliated with any political perspective.

4. Because of my experience and credentials in documenting torture and other human rights

violations, I was contacted by persons representing Mr. Jesse Tafero and asked to examine materials in an effort to determine whether Mr. Tafero's execution in Florida on May 4, 1990, involved conscious pain and suffering. With regard to determining whether the execution included infliction of pain and suffering, I reviewed materials that are normally and regularly relied upon by experts in my field when forming or expressing an opinion. These materials include:

(i) Report of Florida Department of Corrections, May 8, 1990, and accompanying affidavits;

(ii) Postmortem Examination of the Body of Jesse Joseph Tafero, May 4, 1990, and autopsy photographs;

(iii) four newspaper articles purporting to be eyewitness accounts of the execution of Mr. Tafero (Bruce Ritchie, Florida Times-Union; Ellen McGarrahan, Miami Herald; Cynthia Barnett, Gainesville Sun; and Ron Word, Associated Press);

(iv) photographs of Mr. Tafero taken on May 6, 1990, two days after he was executed;

(v) autopsy photographs and autopsy reports on the eight persons executed in Florida's electric chair immediately previous to Mr. Tafero's execution;

(vi) affidavit of Susan Cary, dated May 7, 1990;

(vii) transcribed statements of Mr. Fred Leutcher, designer and ~~servicer~~ of electric chairs, made on ABC program "Prime Time" (5/10/90), and videotape of this program segment.

5. Based on my review of the above referenced materials, I have reached the following conclusions within a reasonable degree of medical and scientific certainty;

(a) Mr. Tafero was not dead until the third application of electricity;

(b) It is not possible to say that Mr. Tafero was "unconscious" after the first and second applications of electricity. Furthermore, it is medically and scientifically irresponsible to reach and articulate such a conclusion based on the observed reactions of Mr. Tafero during the execution. Indeed, it is not unlikely that he was conscious after the first, or first and second applications of current;

(c) Mr. Tafero did not receive the prescribed lethal dose of two thousand (2000) volts of electricity that was reportedly applied;

(d) The failure to administer the requisite voltage combined with the other physiological reactions noted by observers of the execution raises the substantial possibility that Mr. Tafero experienced conscious pain and suffering during the execution.

6. With regard to conclusion (a) above, the evidence supports the conclusion that Mr. Tafero was alive even following the second application of electricity. Virtually all witnesses reported physical movements, breathing activity, and other signs of life prior to the third application (see e.g., affidavits of Messrs, Brown, Martin, Matthews, Strickland, and Thornton and accounts of journalists Ritchie, McGarrahan, and Barnett) activity that cannot be dismissed as "involuntary" movements of a brain-dead individual. I note that Corrections Secretary Dugger's cover letter to Governor Martinez accompanying the May 8, 1990, Department of Corrections report asserts: "the autopsy report and attending physician's account reflect instant death..." I find no such statement in either the autopsy report or the affidavit of the attending physician, Dr. Kilgo. The autopsy cannot possibly determine how rapidly unconsciousness or death occurred in this case.

7. With regard to conclusion (b), it is my opinion that any statement that Mr. Tafero was rendered "unconscious" by the first or second applications of electricity is speculation and lacks any medical or

scientific basis. Affidavits appended to the Department of Corrections report refer to audible "spasmodic respiratory sounds" (Dr. Kilgo) and "**sighing**" (physician's assistant Matthews) following the first and second applications of current. Kilgo and Matthews, apparently unlike most of the other observers, were physically present with Mr. Tafero within the death chamber. Mr. Tafero was thus clearly alive at that time and may well have been conscious.

8. With regard to conclusion (c), there are numerous reasons to conclude that Mr. Tafero received less than the prescribed two thousand (2000) volts of electricity. Among these reasons are:

(i) Mr. Tafero did not respond to the application of electricity in the same way as those persons executed previously who received the appropriate lethal dosage. See e.g., affidavit of Strickland and accounts of Ritchie (body did not stiffen upright as in other executions witnessed) and Associated Press reporter Ron Ward, as quoted in the Gainesville Sun (5/5/90): "Usually we see a surge back in the chair and a tightening of the muscles but never like today when we saw the leg twitching and the apparent breathing."

(ii) The presence of sparks and flames (the latter attributed by the Department of Corrections to a headplate sponge) makes it highly likely that the full two thousand volt charge was not conducted through Mr. Tafero's body, but was reduced due to increased resistance in the sponge.

(iii) A relative lack of burning at the leg contact was reported by observers (e.g. Ritchie) and is evidenced in my comparison of photographs of Mr. Tafero with autopsy photographs of other persons executed in Florida and elsewhere. This too would indicate a failure to effectuate the full requisite voltage.

(iv) The fact that Mr. Tafero survived the first two electrical charges obviously indicates that something less than the necessary dosage was applied.

9. Finally, with regard to conclusion (d), it is my opinion that for all the reasons discussed above, there is a substantial possibility that Mr. Tafero experienced conscious pain and suffering during his execution.

(Affidavit of Robert H. Kirschner, M.D.) (App. 19).

The DOC believes that: ". . . death by electrocution occurs instantly. There's no way to apply 2000 volts directly to someone's brain without killing them instantly and I think they're never conscious of what happens and the medical examiner statements and our own physician statements tend to support that" (Secretary Dugger's statement at the Governor's Press Conference, May 8, 1990). The facts, however, make plain that 2,000 volts of electricity were not applied to Mr. Tafero -- to say so is to say something patently at odds with the known physical evidence, the witness accounts, and rudimentary principles of physics. What Mr. Tafero received was much less than 2,000 volts -- it caused burning and pain.

There is absolutely no assurance that it will not happen again. The Department has not and cannot demonstrate how much voltage was actually administered to Mr. Tafero during any of the three applications of current. The most that can be said with any confidence is that at some juncture during the process sufficient current was administered to cause death, **the** witness accounts uniformly suggesting that the lethal dose administered was the last one. Thus the conclusion that Mr. Tafero was unconscious and therefore felt no pain is rank speculation. The **malfunctions which occurred during Mr. Tafero's execution have not been corrected.** The DOC is unwilling to even fully

investigate the original malfunction. As a result, the same malfunctioning equipment will be used during Ms. Buenoano's execution. She too will be burned and tortured, for the problem has not been fixed.

Indeed, at a test of the electric chair conducted after Mr. Tafero's execution, the Florida State Prison lost complete power for forty five minutes, and had difficulty in going back on line with the Florida Power and Light Company. In prior tests, power has never been lost for more than a few seconds, and there never before has been an inability to go back on line with the Florida Power and Light Company. These facts make DOC's representation that the problem is "**fixed**" questionable, at best. To allow any further executions to go forward given the present set of circumstances would be to reject the fundamental principles of human dignity which underlie the eighth amendment.

This Honorable Court should not allow a woman to be dispatched to her death when there exists every likelihood that she will be burned, abused, and tortured during that execution. Florida's electric chair system no longer functions properly -- and the DOC has taken no steps to address the problem. If as a sovereign people we have decided that the lives of certain individuals should be forfeited for their crimes, at the very least we must ensure that the process by which we extinguish life is consistent with the humanity that we are supposedly seeking to protect. The eighth amendment demands no less. An evidentiary hearing is necessary to resolve these important questions.

CONCLUSION

There is no question that the issue presented by this case is an important one. Confidence in the Department of Corrections' professional competence has been undermined, while the State has never even alleged that the DOC is competent to do its job professionally on Ms. Buenoano's execution date. The claim needs to be resolved expeditiously in an evidentiary forum. The public and the courts must know whether executions in Florida are carried out in a manner that comports with the concerns for human dignity embodied in the eighth amendment's prohibition against cruel and unusual punishments. If, as the Appellant has alleged, they are not, remedial measures must be ordered. One way or the other, findings from a circuit judge who actually hears the evidence are required. The State's protestations to the contrary notwithstanding, this claim simply cannot be ignored.

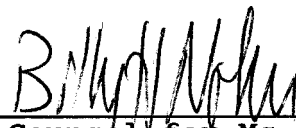
Respectfully submitted,

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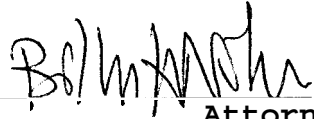
By: _____


Counsel for Ms. Buenoano

CERTIFICATE OF SERVICE

Hand Delivered
BHN

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail! first class, postage prepaid, to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 18th day of June, 1990.



Attorney