**IN THE SUPREME COURT OF FLORIDA**

LEO ALEXANDER JONES,

Appellant,

v. CASE NO. 90,231

ROBERT A. BUTTERWORTH, and
HARRY K. SINGLETARY, JR.,

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

Appellee does not accept Appellant's Statement of the Facts and Case, which is entirely devoid of the former, and comprises essentially nothing more than Jones' assignments of error. Accordingly, the State sets forth the following summary of the testimony and proceedings below. Initially, the testimony of five (5) defense experts will be summarized, followed by a summary of three of the State's experts. The testimony presented at the April hearing, most particularly that of Jay Wiechert, Dr. Michael Morse and Dr. William Hamilton, is also relevant to this appeal and Appellee would incorporate their prior testimony as part of the facts relied upon in support of the trial court's findings denying relief.

***Dr. Jonathan Arden***

Dr. Arden is a physician and a forensic pathologist in New York (SR I 27-28).[1] The witness received training on the effects of electricity on the human body as part of his general training, and stated that he had performed "just a few" autopsies on those who had died from electrical trauma, involving voltage of less than 880 volts (SR I 33-34, 38-39); Dr. Arden has never performed an autopsy on one executed by judicial electrocution (SR I 38). Dr.

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[1] (SR __ __) is a citation to the supplemental record on appeal filed on or about July 24, 1997, whereas (R __ __) is a citation to the original record filed on or about April 21, 1997.

Arden stated that he was not qualified to evaluate the electrical functioning of the electric chair and that he was opposed to electrocution, as well as the death penalty itself (SR I 107-108). The witness stated that in the fall of 1996, "probably September, October," he had been contacted by Hunter Labowitz of CCR, and asked to perfect an autopsy protocol for use following judicial electrocution (SR I 51). He likewise testified he had reviewed the prior testimony in this case, as well as the autopsy report on Pedro Medina and slides of his brain (SR I 68, 76).

Dr. Arden testified that, in his view, Medina had been alive at the time that the burns appeared on his body, given the fact that witnesses had observed what was perceived as "breathing" motions, as well as an agonal pulse, after the current had been turned off (R I 73, 83-84). The witness also stated that Medina's brain had not shown any effects of electricity, although he also noted that it was "certainly conceivable to have electricity pass through an organ and not see microscopic effect." (SR I 78); the witness later stated, even more positively, "many people who are electrocuted do not show necessarily anatomical evidence of the passage of electricity or they do not show it internally." (SR I 131). Dr. Arden, however, did not have an opinion within a reasonable medical probability as to whether Medina did or did not feel pain, although, on proffer, he stated that it was "possible" that he did at some point (SR I 85-87).

On cross examination, the witness testified that he did not disagree with the substance or findings of Dr. Hamilton's autopsy report, and he also acknowledged that a medical expert with experience in autopsying those executed in Florida's electric chair would have more knowledge of the typical findings to expect (SR I 94, 107). Dr. Arden also stated that in his opinion 9½ amps could, under certain circumstances, be sufficient to depolarize the brain, although the witness consistently refused to offer any definitive conclusion as to the effects of various amounts of current (SR I 98). Dr. Arden testified he had drawn up certain protocols for the Medina execution, based upon his "base of knowledge" and "the type of information that I would want if I were doing this autopsy myself"; he did not draw upon any published authorities (SR I 125).

The protocols were followed, and no bone fractures, skull fractures, muscle hemorrhages or tearing was discerned, nor was any significant amount of carbon monoxide found in Medina's lungs (SR I 120). The witness also stated his belief that electricity follows the path of least resistance, and that, in an electrocution, it would preferentially follow the blood vessels (SR I 129). Dr. Arden testified that it was his opinion that it was most likely that Medina was not conscious or feeling pain at the time of any agonal pulse or respiration, and said that if Medina's pupils had been fixed or dilated at this time, such fact would likewise be consistent with the likelihood that he was not

conscious or feeling pain (SR I 132-133), a view which he later repeated (SR I 149). Finally, the witness stated that agonal pulse or respiration would very likely also be detected in an execution carried out by lethal injection (SR I 151).

***Dr. Robert Kirschner***

Dr. Kirschner is a forensic pathologist in Illinois, and presently the Director of the International Forensic Program of Physicians for Human Rights, with an expertise in the documentation of torture (SR I 163-167). The witness stated that he had conducted autopsies on victims of both high and low level accidental electrocutions, but had not autopsied anyone executed by judicial electrocution (SR I 170-171). Dr. Kirschner is opposed to the death penalty, and believes that it is a violation of medical ethics for any physician to participate in the execution process, including simply for the purpose of declaring an inmate dead (SR II 218-222, 244). Dr. Kirschner stated that he was not an electrical engineer and was not familiar with the design of the electric chair (SR II 212). The witness was unable to say how much current was necessary to depolarize the brain, but stated that less than an amp was sufficient to cause the heart to go into ventricular fibrillation (SR II 210-211).

On direct examination, the witness testified that there was "no way" to prove whether a person being judicially electrocuted is not conscious or not feeling pain, because there was no testing

that could be done (SR I 193-194). Kirschner stated that he had reviewed materials concerning Medina's execution, including the prior testimony in this case and the autopsy report (SR I 195-196). The witness stated that the existence of agonal breaths or pulse indicated that Medina was still alive but in the process of dying at the time that the current was discontinued (SR II 198-199). Kirschner stated that he had "no way" of knowing whether Medina experienced pain and suffering during his execution, but stated that such was "certainly possible" (SR I 200).

On cross-examination, Kirschner stated that the amount of current which reached the brain during electrocution could not be determined (SR II 215). The witness also testified that if Medina's brain had been destroyed by the voltage and current applied to it, he would be unconscious and unable to feel pain (SR II 216), and, subsequently in his testimony, the witness affirmatively stated that Medina had been unconscious and incapable of feeling pain by the time the current was turned off (SR II 237). Kirschner stated that the fact that Medina's pupils were fixed and dilated at the time that he was examined after the current had been turned off was an indication that he was dying or dead (SR II 216-217), and the witness recognized that the medical personnel actually present were in a better position to report what occurred during the execution (SR II 218).

***Dr. Donald Price***

Donald Price is a neurophysiologist at the University of Virginia; he does not have a medical degree and is not a physician (SR III 310-311, 323). His speciality is pain. He is a member of the American Pain Society and the International Association for the Study of Pain, and has submitted articles to the Pain Forum, as well as a journal called, "Pain"; Price has published a book entitled, "Psychological and Neuromechanisms of Pain" (SR III 311-316). Much of Price's research has involved stimulating portions of the brains of animals, and witnessing the effects of electric current on the human brain and stimulation of the spinal cord (R III 319). Price stated that none of his experiments had involved the application of 2,300 volts or 9.5 amps, but rather had involved 250 volts or less (SR III 323-324), and that he had conducted no research into the effects of high voltage electricity on the human body (SR III 324). Dr. Price has not performed any electroconvulsive therapy (SR III 411). He is opposed to electrocution as a means of execution (SR III 424).

On direct examination, Price stated that he had received materials concerning the Medina execution, including prior testimony, and that he had also examined histological sections of the Medina's brain (SR III 327, 359). Price stated that, in his opinion, there was a very high likelihood that judicial electrocution was intensely painful and produced feelings of horror

and dread (SR III 351-352); in reaching this conclusion, the expert considered a report from the 1930's in which victims of lightening strikes or accidental electrocutions had related their experiences (SR III 352-353). Dr. Price stated that, applying the "scientific approach", he believed that death during an electrocution, the current actually activated, stimulated or "excited" certain portions of the brain, as opposed to depolarizing or deactivating them, resulting in the experience of pain (SR III 361-369); Price believed that because alternating current was involved, the activation would occur with every cycle of the 60-current cycle (SR III 362, 373). The expert also stated that in his opinion the initial current surge in a judicial execution would not instantly and permanently depolarize the brain, because the alternating current would not allow the cells to remain depolarized (SR III 376-379).

Dr. Price stated that the regions of the brain which controlled arousal and consciousness were deep within the brain and most likely to be far removed from the current (SR III 384-385). The witness stated that his examination of Medina's brain had indicated no abnormalities or signs of "cooking" (SR III 389-390). Price testified that he believed the only 1/20th of the current applied to the head actually reached the brain during an electrocution, basing this upon his experience with E.E.G.'s in which the amount of current traveling from the brain to the skull

(usually in the microvolt range) was measured (SR III 392-399); the witness stated that current tended to follow the path of least resistance (SR III 395, 429). Dr. Price said that the current administered during a judicial electrocution would also cause painful muscle contractions, as well as cardiac arrest, which itself could be painful (SR III 405-406).

On cross-examination, Dr. Price testified that the electrodes which he used in his research were less than a millimeter in size, and that the voltage and amperage used in his experiments ranged from 2 to 3 milliamps, administered for "several milliseconds" (SR III 415-416); the witness recognized that this was "substantially less" than the current utilized during a judicial electrocution (SR III 417). Asked how many milliamps would cause a person to lose consciousness, the witness could not answer (SR III 417-418). The witness also recognized that there were differences between random lightening strikes and judicial electrocution (SR III 420-421), and that high and low voltage current could penetrate the body, or a resistive surface, differently (SR III 430-431). Dr. Price testified that electricity traveled faster than pain (SR III 433-434). The witness also agreed that the heart functioned independently of the brain (SR III 436), and, further, that a person would lose consciousness within fifteen seconds after the heart went into ventricular fibrillation (SR III 438). Dr. Price stated that he did not know with certainty what path current

travels in a judicial electrocution (SR III 457), and also acknowledged that pathologists who had performed numerous autopsies on those executed through judicial electrocution would know best what types of injuries to typically expect (SR III 457-458). He likewise testified that pathologists would be in a better position to testify as to whether ventricular fibrillation would occur within milliseconds upon application of the electricity during an execution (SR III 460). Dr. Price testified that his testimony would have been the same had the Medina execution gone forward without incident, and that his testimony was based, not upon any tests which he had actually performed, but rather upon "multiple indirect converging lines of evidence that are part of the scientific method." (SR III 447-448).

***Dr. Theodore Bernstein***

Dr. Bernstein is an electrical engineer and retired professor of electrical and computer engineering (SR IV 515). He has, for almost twenty-five years, studied electrocution and electrical death and injury, and has examined electric chairs in Alabama, Florida and Louisiana (SR IV 517-518). Dr. Bernstein, however, is not a biomedical engineer, and has received no training on the effects of electricity upon the human brain (SR IV 520), and has never designed an electric chair (SR IV 531-532). He is opposed to the death penalty, and has never witnessed an electrocution (SR IV 582, 605).

On direct examination, the witness stated that he had reviewed the chart recordings for the Medina execution, and that such reflected that the voltage had climbed rapidly to 2,200 volts, and then tapered off to 700 volts for a longer period before returning again to 2,150 volts (SR IV 541-546); the amperage chart showed an initial reading of 4 to 4½ amps, and then rose to 9; as the voltage declined, the amps similarly declined to 3 amps, and then rose to 9½ (SR IV 546-550). Dr. Bernstein testified that the current did not travel along the path of least resistance, but "will go through all paths." (SR IV 557). The witness testified that he had observed a test of Florida's electric chair on June 30, 1997 (SR IV 561), and photographs of the test were introduced (SR IV 563). Dr. Bernstein testified that it was his belief that the sponge had not completely covered the leg electrode at this time (SR IV 565-566), and that the chart recorder had initially not functioned, necessitating a second test (SR IV 567). Dr. Bernstein was shown the Department of Corrections' testing procedure, and asked if the recommendations therein had been followed (SR IV 571). The witness stated that the recommendation concerning the chart recorder had not been followed, given the fact that such had not been calibrated for time, and that the protocols did not specify the size of the sponges to be utilized (SR IV 571-572). Likewise, the protocols did not specify the specific voltage for the reactor switch gear, and, in Bernstein's opinion, the schematic was out of date and

inadequate (SR IV 572-573); the witness stated that he had asked two individuals at the test the purpose of two knobs on the control panel, and was told that "someone else would know" (SR IV 573-574). In Bernstein's opinion, the use of the conductive gel during an electrocution was unnecessary (SR IV 574). In general, the witness believed that the protocols were "too general" (SR IV 575). As to the execution-day protocols, Bernstein felt that these should have been more specific as to how wet the sponges should be and how much the sponges should cover the electrodes (SR IV 576-577). Bernstein did not feel that the written protocols and procedures would guarantee that the problems experienced during the Medina execution would not reoccur (SR IV 577-578).

On cross-examination, the witness suggested that a cycle be utilized in which the current would taper off to zero and not rise again, but acknowledged that no state has, or ever had, utilized such cycle (SR IV 580-581). Bernstein continued to criticize the schematic, but acknowledged that he had been able to determine what components were contained within the system from the diagram (SR IV 583-584); he later conceded that a schematic was not critical to the proper functioning of the electric chair and its apparatus (SR IV 623). The expert also testified that while it was "silly" to use the electroconductive gel, it likewise had no effect upon the functioning of the electric chair (SR IV 584-586). Bernstein testified that he had seen no arcing in connection with the leg

electrode during the test, despite his belief that the sponge had not adequately covered it, and also testified that the head electrode had performed perfectly at the time (SR IV 591, 619); the witness testified that the first test conducted on June 30 would have been a lethal amount of current (SR IV 595). The witness also testified that any malfunction of the chart recorder had no effect upon the voltage and current flowing through the system, and that, in fact, the chart recorder was separate and distinct from the chair's operation; Bernstein stated that the system would work without a chart recorder, and noted that Florida is the only state to have one (SR IV 595-596). The witness testified that he had not observed any smoke or flame during the test of the chair on June 30 (SR IV 605-606). The witness also testified that change did occur in the body's resistance during an electrocution at the site of the electrode contact (SR IV 613-614). Dr. Bernstein, in response to the court's questions, acknowledged that the apparatus of the chair included controlled circuitry, meaning that the voltage would automatically rise to a preset level, without the need for human manipulation (SR IV 626-627).

***Dr. Orrin Devinsky***

Dr. Devinsky is a neurologist, as well as a physician, in New York, and, in the treatment of epilepsy, has utilized the application of electric current (SR V 644-649); he has also treated the victims of electrical trauma (SR V 649-650). Dr. Devinsky has

never performed any testing on an electric chair, and the equipment which he utilizes involves fifteen milliamps of current (SR V 701-702). He is opposed to the electric chair as a means of execution (SR V 701). The expert reviewed a number of materials in preparation for his testimony, including the prior testimony in this case (SR V 654). Dr. Devinsky states that he has stimulated his own brain with a magnet (SR V 660).

On direct examination, the witness testified that it can very difficult to determine, from outward appearance, whether a person is unconscious (SR V 663). Dr. Devinsky testified that, in his opinion, current did not instantly depolarize the brain during a judicial electrocution (SR V 674-675); he likewise was of the opinion that persons who were electrocuted can experience pain (SR V 676). In reaching these opinions, Devinsky drew upon his experience in treating victims of accidental electrocution, including one individual who had survived over 3000 volts to the back of the head (SR V 679-680). The witness testified that, in his opinion, only a fraction of the electrical current entered the brain during an electrocution, given, *inter alia*, the resistance of the skull (SR V 691-692). Devinsky also stated that one amp or less could cause the heart to stop, whereas one thousandth of an amp could cause fibrillation (SR V 695). In regard to the Medina execution, Devinsky stated that the "breathing" movements observed by witnesses suggested that the lower brainstem of the brain had

been functioning (SR V 696); he further stated that this suggested that not all of Medina's brain had been depolarized (SR V 697). The witness likewise noted the testimony concerning any agonal pulse, and stated that, from his review of certain literature, this could indicate pain (SR V 699-700).

On cross-examination, the witness stated that his testimony would be the same, even if the events of the Medina execution had not taken place (SR V 700). Dr. Devinsky testified that he believed that, in some states, the current during an electrocution traveled from head to leg and then back again; he "believed" that in Florida the current entered through the head (SR V 703-704). The witness stated that Florida's electric chair was not instantly lethal, and stated that no apparatus could cause immediate death, if death did not occur "within the first second" (SR V 709-710). Dr. Devinsky testified that pain traveled "much slower" than electricity (SR V 715), and that current traveled the path of least resistance (SR V 718). He likewise testified that current in the milliamp range could cause dysfunction which could lead to death (SR V 718), and that a brain cell could not repolarize while under a continuous high voltage current (SR V 721). The witness stated that the electrodes which he used were one centimeter in diameter, the size of a small fingernail (SR V 731). Dr. Devinsky also testified that the fact that Medina's pupils were fixed and dilated after the current was turned off was consistent with a brain-dead

state (SR V 731-732). In further questioning from the judge, Devinsky stated that his opinion was that Medina probably suffered conscious pain (SR V 748-749).

***Dr. Daniel Goldman***

Dr. Goldman is a physician, specializing in cardiac electrophysiology, practicing in Jacksonville (SR V 757-758). As part of his practice, he uses current to stimulate the heart (SR V 760-762). The witness said that current as low as 9 volts, if applied directly to the heart, can cause ventricular fibrillation, and stated that the 2,300 volts used during an electrocution would cause that condition as well (SR V 770). Dr. Goldman stated that, during an electrocution, the inmate's heart would be fibrillating while the current was being administered and, at this time, blood could not be pumped; he also said that the current would cause acute changes in the electrical currents across the membranes which, if persisting long enough, would cause the cells to die (SR V 770-771). The witness testified that an individual does not experience pain during ventricular fibrillation (SR V 773), and that fibrillation would lead to lack of consciousness in less than 10 seconds because of the absence of blood being sent to the brain (SR V 785-786). Dr. Goldman testified that, based upon his experience, he saw no difference between the effects of direct or alternating current upon the heart (SR V 776-777). When asked about agonal heart beats, the witness stated that such term was not

frequently used, and that irregular electrical impulses of the heart could be generated by the depolarization of the heart muscle itself, as opposed to any "direction" from the brain (SR V 790-793). The witness likewise testified that agonal respiration referred to inefficient short breaths which would not be sufficient to cause the lungs to take in oxygen (SR V 798). Dr. Goldman stated that the longer current was directed toward the heart, the less likely it was to recover, and that a couple of pumps by the heart would not indicate that everything "is working okay" (SR V 799).

***Dr. Kris Sperry***

Dr. Sperry is a physician and forensic pathologist in Georgia (SR V 808). Dr. Sperry has performed over three thousand autopsies, including several involving inmates executed by electrocution (SR VI 917-918). Dr. Sperry participated in the autopsy of Pedro Medina at the request of CCR (SR V 814). The witness testified that the autopsy revealed an amount of charring upon the scalp, and discoloration of the face, representing a steam burn; the eyelashes and fine hairs were intact, indicating that no thermal burning had occurred (SR VI 915-917). Sperry testified that this steam burn was unique to the Medina autopsy, but that the thermal burns on the scalp and leg were consistent with other autopsies (SR VI 917). According to the witness, the internal examination of the organs of the body, including the brain, was

unremarkable (SR VI 922). Sperry testified that there were no outward signs of damage from heat or electricity, which was again consistent with the autopsies of other persons executed through electrocution (SR VI 923-924); he specifically stated that he had found no evidence of muscle hemorrhage or fractions (SR VI 926-927). Dr. Sperry testified that the burns on the scalp, face and leg were all postmortem, meaning that they had occurred after Medina was dead (SR VI 927-928). The witness testified that, during an electrocution, the body acted as a resistor, and that the body temperature would rise rapidly, including the temperature in the brain. Prior to this temperature rise, however, the current would have caused the brain to depolarize or short circuit (SR VI 928-929). This elevated temperature, however, does not cause any visible structural change to the brain (SR VI 929). Dr. Sperry testified that 75 milliamps would be sufficient to stop the heart and to cause ventricular fibrillation and death (SR VI 962). The witness further testified that in his opinion death by electrocution was painless, and that Medina had not experienced or perceived pain during his electrocution (SR VI 930).

On further examination, Sperry testified that there was no evidence that the current had been diverted from its intended course during Medina's execution (SR VI 935-936), and specifically noted that there had been no charring on the body, outside of the site of the electrodes (SR VI 938, 958); he indicated that he would

have expected to see charring at any other site, had current traveled through such location (SR VI 958). Dr. Sperry testified that the testimony concerning certain movements on Medina's part after the current had been turned off did not indicate that his brain was still functioning, in that involuntary respiratory movements were produced in persons who were recently dead and were part of the dying process "after the brain is shut down" (SR VI 943); Sperry noted that the brainstem would continue to function after all the rest of the brain could not (SR VI 944). The witness testified that the rise in temperature in the brain would not lead to "cooking", as it would still be below the boiling point of water (SR VI 946). Dr. Sperry also testified that the cells of the brain would not "depolarize" during the administration of alternating current, in that the excessive current would override the cells and prevent them from recovering (SR VI 948-949); he also testified that the brain itself could not feel pain (SR VI 950). The witness stated that, upon introduction of the current to the scalp, the heart would be effected within milliseconds and could stop entirely (SR VI 962-963). Dr. Sperry stated that when he had referred to death as "instantaneous", he was speaking in terms of brain function, meaning that the current during a judicial electrocution would cause an immediate cessation of consciousness and perception with no interruption to allow for the brain to recover until the temperature was elevated and the brain was dead; vestiges of life,

such as agonal pulse or involuntary respiration, could follow (SR VI 964, 967).[2]

***Dr. B. J. Wilder***

Dr. Wilder is a physician and neurologist, practicing in Jacksonville, and specializing in neurophysiology and epilepsy (SR VII 981-983). In his practice, he has had occasion to treat victims of lightning strikes or accidental electrical shocks, and his study of epilepsy has involved the use of electrical stimulation of the brain (SR VII 983-988). Dr. Wilder testified that when an external electrical current is introduced into the brain, it causes depolarization of the cells, which in turn results in a convulsion (SR VII 999-1000). As to the amount of current involved in the cycles of Florida's electric chair, the witness testified that such current would massively depolarize virtually every cell in the brain, and that, within a millisecond, no perception of pain could be processed (SR VII 1003-1004). The doctor noted that electricity travels substantially faster than pain, and testified that one receiving 2,200 volts and 9½ amps would not experience pain, dread or horror (SR VII 1006-1007). Dr. Wilder likewise testified that one executed by electrocution would not be capable of feeling pain after the current was turned off

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[2] In all material respects, Dr. Sperry's testimony was comparable to that of Dr. Hamilton offered at the April hearing (R IX 73-118), as well as that presented in July (SR IX 1245-1252).

because the brain would have stopped functioning and the heart would be in fibrillation (SR VII 1007-1008). The witness noted that the heart could function independently of the brain (SR VII 1010). As to explaining what had been described as "breaths" by Medina after the current had been disengaged, Dr. Wilder noted that "gasping type respiration" often followed interruption of the nervous system, and that such "gasps" represented contraction of the intercostal muscles; no effective air exchange would be taking place (SR VII 1011-1012). Dr. Wilder testified the use of alternating current could not lead to the "repolarization of any cells" (SR VII 1013). The expert stated that there are blood vessels permeating the skull and that such would be conductive of current, when such was administered to the head (SR VII 1016).

On further examination, Dr. Wilder testified that an agonal heartbeat could represent a noneffective or instantaneous beat even after a period of fibrillation (SR VII 1030-1031); he also stated that the heart could beat after current is turned off during an electrocution, but that he did not think these beats could supply the brain with oxygen, so as to allow it to revive (SR VII 1032). Dr. Wilder testified that, in situations like Medina's, the brain would not restart itself, given its lack of oxygen and the massive depolarization caused by the prolonged current flow (SR VII 1032-1033). The witness later testified that, in his opinion, Medina's brain could not have survived 34 seconds of high voltage

electricity (SR VII 1056), and described the voltage involved as sufficient to "flood" or "overwhelm" the brain (SR VII 1059).

## SUMMARY OF ARGUMENT

In this appeal following remand for further evidentiary hearing, Jones presents seven (7) claims of error. Appellee respectfully contends that none is compelling, and that the order on appeal should be affirmed in all respects. The two points relating to the admission of certain testimony from the State's biomedical engineer are largely rendered moot by the fact that the finder of fact did not expressly consider this testimony in reaching his decision, and the final order clearly indicates adequate and independent grounds for the denial of relief. The next point presents a number of specific attacks upon the judge's findings, but is essentially doomed from the start, in that it is premised upon an inapplicable legal standard. Likewise, Jones' claim that the court below should have admitted evidence which related to an attack upon electrocution *per se* is meritless, inasmuch as such would have constituted an expansion of the scope of the hearing. Jones' claim that it was error for the court to have allowed the State to call one of the pathologists present at the Medina autopsy is likewise without merit, as is the next point which simply represents a hodgepodge of evidentiary rulings which Jones claims were unfair. The final point, yet another attack upon the competence of Judge Soud, is patently baseless. Reversible error has not been demonstrated, and Jones is entitled to no relief.

## ARGUMENT

### *ISSUE I*

DENIAL OF APPELLANT'S UNTIMELY MOTION TO STRIKE CERTAIN TESTIMONY WAS NOT ERROR.

Jones initially contends that he is entitled to another evidentiary hearing because Judge Soud denied his motion to strike certain testimony from Dr. Michael Morse, a biomedical engineer. At the July hearing, Morse testified that subsequent to his testimony in April, he had conducted further research into the electrical characteristics of judicial execution and had utilized a report by another individual, Dr. Wikswo, to develop a "model" regarding the path which current would follow through the head during a judicial electrocution (SR VIII 1145-1155). The next day, following testimony of another witness, counsel for Jones moved to strike this testimony, on the grounds that the State had not demonstrated that such testimony complied with the test set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (SR XIII 1916-1921; SR IX 1243). Following response by the State (SR XIV 1924-1944), and argument of counsel (SR IX 1255-1271), Judge Soud found that counsel's motion was untimely, and further noted that any objection went toward the weight of the testimony, and not its admissibility (SR IX 1271-1274). The State respectfully suggests that the trial court's ruling was correct, and should be affirmed in all respects.

*A. Relevant Facts of Record.*

The record reflects that Dr. Michael Morse was initially called as a state witness at the April hearing, and, at such time, specifically qualified as an expert in the field of electrical engineering with particular reference to biomedical engineering; biomedical engineering is the application of engineering science to the human body (R VII 10-114; R VIII 5-74). At this time, Morse testified that he had conducted tests of Florida's electric chair, and that, if a single saturated sponge were used, the events of Pedro Medina's execution would not reoccur (R VII 25). Morse also testified that it was his opinion that Medina had been rendered instantly unconscious and unable to feel pain (R VII 16-17). The witness subsequently set forth in some detail his reasons for so concluding, stating that the amount of current in a judicial electrocution was so significantly high "that it is going to instantly and immediately disrupt the activity of the brain as to such an extent that the brain in essence is no longer functioning." (R VII 107). Morse noted that electricity traveled faster than pain and stated that if enough sufficiently strong current depolarized the brain, there would be no ability to sense pain (id. at 108). The witness further stated that "extremely small current on the order of thousandths of an amp to hundredths of an amp" was sufficient to cause muscle and/or nerve depolarization, and said that he was absolutely certain that the administration of twenty-

two hundred volts to an inmate, even with the resistance of a dry sponge, would cause instantaneous loss of consciousness (R VII 109-110). Morse also testified that 4.5 amps would be sufficient to cause instant depolarization of the brain (R VIII 7).

On recross examination, Jones' counsel specifically asked Morse if he had actually studied the human body in such a way to determine the course of ions through the body during an electrocution, and Morse answered that he had recently submitted a paper on a related subject (R VIII 38). The following then took place:

> Q. Has anybody studied specifically the path of ions through the body?
>
> A. Yes, I've seen -- I've seen a study that was done.
>
> Q. How was that study done?
>
> A. A finite element analysis which is a type of mathematical simulation was done in two dimensions to try and determine what pathways current would follow and given each of the different types of dimensions of tissues available.
>
> Q. So it's sort of a theoretical study? Would that be fair to say?
>
> A. It is -- it is theoretical based on real parameters.

(R VIII 38-39).

Morse was then asked about how current would flow through the body during an electrocution, and the witness stated that the path

would depend, on large part, upon the resistivity and/or area of the matter (tissue, etc.) involved, stating:

> . . . if you have a quarter inch of bone versus a mile of soft tissue, the quarter inch of bone will probably be less -- less resistive than the mile of soft tissue and as a result you'll probably get greater percentage of current going through the bone than through the soft tissue.

(R VIII 40).

The witness stated that he had recently been involved in using data which had recently become available to model the current pathways that would be followed by electrical current, and stated that he had done some analysis upon a limb, which was "kind of crude" (R VIII 41-42). The expert stated that although he could not say "with a hundred percent certainty" how current distributed itself, he knew "more about how current distributes itself than probably most other people." (R VIII 42).

Pursuant to this Court's order, Jones v. Butterworth, 695 So.2d 679, 681 (Fla. 1997), the State arranged for Dr. Morse to be present at the reconvening of the hearing in July, so that Jones' counsel could further cross-examine him; in the preliminary witness list filed June 13, 1997, Jones listed Morse as a state's witness who testified at the prior hearing whom Jones desired to have present for further questioning (SR XII 1585F). At the close of proceedings on July 9, 1997, counsel for the State asked Jones's counsel when Morse would be needed as a witness, and counsel

stated, "Monday" (SR II 300-301). At the commencement of proceedings on Friday, July 11, 1997, however, counsel for Jones announced that he did not need Dr. Morse brought back for any further cross-examination by Jones (SR V 642) "based on and following" the testimony of "his experts." Accordingly, it was only the State who called Morse to the stand during the July hearing.

On direct examination, Morse testified concerning his observations of the June 30, 1997, test of Florida's electric chair (SR VII 1140-1145, 1159-1160), including his conclusion that the chair was presently in proper working order. Morse was then asked if, subsequent to his April testimony, he had done any further research into the electrical characteristics of judicial electrocution (SR VII 1145). The witness testified that he had been trying to develop a protocol for analyzing "where the current goes when it leaves the headpiece", and that he had done two things which had led him to two preliminary results (SR VII 1145); two of Jones' experts had testified that only a fraction of the current actually entered the brain during an electrocution (SR III 1391-1399; SR V 691).

As to the first thing, Morse stated that this was something which he had "been doing previously," and that he had taken a report involving a "finite element analysis of a legal electrocution" by one John Wikswo, and had utilized such document

to ascertain a "set of voltages" for different portions of the body during an electrocution, in order to determine any "voltage drop" (SR VII 1146). Morse stated that he had taken the result of Wikswo's work and "carried it forward," determining that the voltage drop inside the skull as one hundred and fifty volts (SR VII 1146-1147). Taking these numbers, and "applying some very basic physical sic [phyics] principles," Morse was then able to determine roughly which way the current would go inside the skull during an electrocution, and what amount would go outside through the exterior tissues (SR VII 1147). The witness stated that he had also developed a concept of his own which he had tested and which had produced somewhat similar results (SR VII 1147).

Morse then went into some detail as to his findings, specifically discussing, among other things, the resistivity of bone and the "high of a current divider," which provides that current will split itself inversely proportional to the resistance along available pathways (SR VII 1147-1153). Morse stated that, in his opinion, somewhere between more than a third and less than two thirds of the current flow actually went through the brain during a judicial electrocution (SR VII 1154-1155); he stated that there was no question that such amount was sufficient to cause instant depolarization (SR VII 1155). Morse also testified concerning his calculations as to the thickness and resistivity of bone (SR VII 1157-1160). One of Jones' experts, Dr. Devinsky, had testified

that the resistivity of the skull as fifty thousand ohms (SR V 735), and Morse demonstrated that such figure was incorrect, in that, in order for the skull to have such a resistance factor, it would have to be thirty five feet long (SR VII 1160-1166). No objection of any kind was interposed in regard to the above testimony.

Jones' counsel cross-examined the witness concerning these matters (SR VII 1167-1174; SR VIII 1180-1181, 1187-1189, 1196-1205). Thus, on cross-examination, Morse testified that although Wikswo had used one seventy six (176) as the resistivity value for bone, he had used one fifty (150) (SR VII 1167); he stated that using the lower figure did not create any substantial change in his findings (SR VII 1167-1168). Jones' counsel, however, continued to press Morse on this matter, and he was unable to cite any other specific study or source which had utilized one fifty (150) as the rho value of bone (SR VII 1168). Counsel for Jones specifically questioned Dr. Morse as to his prior testimony in April, concerning his work at that time (SR VII 1169). On cross-examination, Morse stated that his work represented "an application of basic principles of physics" (SR VII 1170), although he conceded that his article had not yet been accepted for peer review (SR VII 1170). Morse stated that he had obtained Wikswo's report from the State of Tennessee, and that he was not certain as to whether it had been published; Morse could not, at that time, describe Wikswo's

background (SR VII 1172-1173). On redirect, Morse recalled that the Wikswo article had been co-authored by Dr. Sepulveda of Tulane University (SR VII 1183).

On recross examination, Morse stated that Wikswo had listed the source which he had used for the resistivity of bone, and that Morse himself had gone back to that source as well (SR VIII 1188); Morse agreed that his work in this area was preliminary (SR VIII 1189). As his did in April, Morse emphasized that in determining the current pathway, one had to look not only at the resistance or resistivity of any matter, but also its "geometry". (SR VIII 1193). Counsel for Jones again recrossed the witness after this testimony (SR VIII 1196-1205). No formal objection was made to this testimony, nor was any motion to strike made at this time.

### *B. Appellant's Objection Based Upon **Frye v. United States**, 293 F. 1013 (D.C. Cir. 1923), Was Untimely and Not Well Taken.*

Judge Soud held, *inter alia*, that the motion to strike the above testimony of Michael Morse was untimely, because it was not made until the next day, after the witness (and yet another witness) had finished testifying (SR IX 1271-1274). The ruling is correct, and should be affirmed, in that the arguments presented on appeal are simply not convincing. It should require no lengthy citation of authority for the proposition that the purpose of the contemporaneous objection rule is to require a party to object at the time that the grounds for any objection become known and/or at

the time that any evidence deemed objectionable is presented or admitted. See, e.g., Terry v. State, 668 So.2d 954, 959 (Fla. 1996) (to preserve an issue for review, an appropriate objection must be made at trial when the evidence is offered). While it is true that this Court held in Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), that an objection need not always be made at the moment that an examination "enters impermissible areas of inquiry," such objection, as Jackson itself went on to hold, still must be made "during the impermissible line of questioning."

The fact that, at some point in the circuit court proceedings, a party voices dissatisfaction with potential evidence offered by the other side does not comply with the requirements of the contemporaneous objection rule. See, e.g., Parker v. State, 456 So.2d 436, 440-441 (Fla. 1984) (in-trial motion to suppress untimely, where defendant knew of basis for objection previously); Teffeteller v. State, 495 So.2d 744 (Fla. 1986) (defendant's failure to object when certain testimony was admitted not excused by voicing of "concern" earlier in the process); Correll v. State, 523 So.2d 562 (Fla. 1988) (defendant's failure to object to certain collateral crime evidence at the time of admission waived review of matter, even where defendant had previously filed unsuccessful motion in limine in circuit court). As noted below, this Court held in Jordan v. State, 694 So.2d 708, 716, n.8 (Fla. 1997), that Frye objections are subject to the contemporaneous objection rule,

and the record in this case indicates no contemporaneous objection interposed as to the above testimony of Michael Morse, on Frye grounds. Accordingly, the trial court was correct in denying Jones' motion to strike as untimely, and no relief is warranted.

The above precedents apply to this case. The fact that no jury was present is not insignificant, but still does not excuse Jones' counsel from complying with the contemporaneous objection rule, and the issue is not the amount of prejudice which might have occurred had the motion to strike been entertained or granted, but rather the lack of justification for its untimeliness. Any claim of "surprise" or lack of notice is particularly unconvincing. As noted above, Morse testified in April that a finite element analysis study had been done which specifically involved a two dimensional study of the pathways which current would take through the human body (R VIII 38-39). Given the fact that this testimony was elicited through examination by Jones' own counsel, it would certainly seem that Jones' counsel was on notice of the existence of this study, despite the fact that its author's name was not expressly enunciated at that time. Likewise, the fact that Morse was working on a model of his own in April certainly put counsel on notice that it was foreseeable that he would continue to do so prior to his testimony in July.

Additionally, while it is true that there were no discovery depositions authorized in this case, it must be remembered that

Morse was brought back to Florida, at considerable expense and inconvenience, simply to afford Jones' counsel the opportunity to conduct further cross-examination shich was not exercised. Even more interestingly, counsel never requested any opportunity to speak with Morse prior to his testimony, although Jones had provided Morse's earlier testimony to his experts for their scrutiny and input. Finally, and most significantly, all of the grounds of Jones' later motion to strike came to light during July cross-examination of Morse, and counsel for Jones did not need an actual copy of the Wikswo article in order to assert that the State had not complied with Frye. Because counsel for Jones had all of the grounds necessary for an objection by the time recross examination ended on July 14, 1997, the motion to strike filed the next day was untimely, and such untimeliness has not been excused.

Further, it is the State's position that Jones' Frye objection was not well-taken, in that Morse's testimony did not represent "novel" scientific testimony. Morse had previously been qualified as an expert in the field of electrical engineering, with a specialty in biomedical engineering, meaning the interaction of engineering science and the human body; he stated that for years he had taken a particular interest in the effects of electricity on the human body (R VII 14). Although the particular subject of Morse's study may not be one which others have greatly written upon or expounded, Morse specifically testified that the analysis which

he employed had involved the application of well-established principles of physics (SR VII 1147, 1170). Testimony is not "novel" for purposes of Frye where well-established principles are simply applied to a new or relatively untrodden field of inquiry.

Moreover, Morse's testimony was certainly no more "theoretical" than that offered by Jones' experts. For instance, Dr. Price, a neurophysiologist who specializes in pain, testified that in his opinion only one twentieth of the voltage applied to the head during a judicial electrocution actually reached the brain, based upon a study which he had done with EEG's involving microvolts of power; Price reasoned that because only one twentieth of the power sent from the brain to the skull actually reached the latter destination, then the converse must be true, even when the current magnitude involved was astronomical in comparison (SR III 391-399).

When the State objected to Dr. Price's testimony, Judge Soud allowed the testimony into evidence, but noted that he would consider the objection as going towards the weight (SR III 394). Judge Soud similarly ruled that Jones' objections to Morse's testimony would go toward its weight (SR IX 1273), and no error has been demonstrated in regard to this logical and even-handed ruling. Additionally, Jones has cited no case in which Frye has been applied in a non-jury context, see, e.g., Mitchell v. Department of Corrections, 675 So.2d 162, 164 (Fla. 4th DCA 1996) ("no Florida

has decided whether the Frye test applies in the administrative context, or whether such a stringent test is needed when the evidence is not being adduced to prove guilt or innocence."), and the cases relied upon by Jones, such as Murray v. State, 692 So.2d 157 (Fla. 1997), and Ramirez v. State, 651 So.2d 1164 (Fla. 1995), are clearly distinguishable. Error has not been demonstrated.

*C. Any Error was Harmless Beyond a Reasonable Doubt.*

Finally, should any error be perceived, such was truly harmless beyond a reasonable doubt, as the judge's final order of July 18, 1997, makes no reference to the testimony now at issue (SR XIV 1945-1970). Unlike the usual situation in which the test set forth in State v. DiGuilio, 491 So.2d 1129 (Fla. 1996), is applied, one need not speculate as to what evidence a jury, which simply returns a general verdict, might or might not have relied upon. Because it is beyond question that the finder of fact in this case did not rely upon any of the evidence now at issue, and because, other adequate and independent evidence exists, cited in the order, which justifies the denial of relief below, reversible error has not been demonstrated. Cf. Grossman v. State, 525 So.2d 833, 845-846 (Fla. 1988) (presentation of erroneous victim impact evidence to sentencing judge harmless error, where judge's sentencing order contained no reference to or reliance upon such testimony, and where death sentence clearly would have been imposed absent evidence in question).

Although, as noted in the Initial Brief, Judge Soud's order does make reference to Dr. Morse (Initial Brief at 19), the order does not make any specific reference the testimony now at issue in July, and, indeed, simply names Dr. Morse as one of several witnesses in support of the same conclusion; the portion of the order referred to by Jones reads, in its entirety, as follows:

> Doctors Hamilton, Sperry, and Dr. B.J. Wilder, a neurologist at the University of Florida School of Medicine, as well as the biomedical engineer, Dr. Michael Morse, all concurred in the conclusion that Medina and any other inmate executed through the introduction of 2,200 to 2,350 volts of electricity into the head is rendered unconscious within milliseconds, and therefore, does not consciously experience anything.

(SR XIV 1955).

The above clearly demonstrates that Judge Soud had other sources, independent of Dr. Morse, for his conclusion that those inmates executed by means of the introduction of 2,300 volts of electricity to the head would immediately be rendered unconscious and unable to feel pain. Further, the order's reference to Dr. Morse may in fact refer to his testimony in April, when, prior to any of the testimony and/or "calculations" now at issue, he testified that one such as Medina, executed by means of voltages such as 2,300 volts, would instantly be rendered unconscious and unable to feel pain (R VII 108-110).

Further, the order of July 18, 1997, indicates beyond per-adventure that Judge Soud did not rely on this particular portion

of Dr. Morse's July testimony in rejecting the testimony concerning "current path" presented by Jones' experts. Rather, Judge Soud expressly stated that he relied upon the testimony of another state witness, Dr. Wilder, in this regard. In pertinent part, the final order reads:

> Through Dr. Devinsky, Jones presented the theoretical possibility that the electrical current does not pass through the skull and the brain. Dr. Devinsky suggested that because the resistance of the skin of the head and face is less than the resistance of the bones of the skull, the current would pass through the skin of the head and face to the neck and then down to the leg electrode on the calf of the right leg. Dr. Devinsky testified that in his opinion only a small fraction of the current initially reaches the brain through the skull, and therefore, massive depolarization of the brain would not immediately occur, thus permitting the inmate to perceive pain. Dr. Devinsky testified that the inmate could perceive pain for 2 to 5 seconds, and possibly for as long as 10 seconds. Dr. Devinsky admitted that pain impulses travel considerably slower than electricity and that electricity travels at the speed of light.
>
> Dr. Wilder testified that, due to the blood vessels and blood spaces within the bones of the skull as well as the 9% saline fluid in the cranial cavity, all of which are highly conductive of electricity, the bones of the skull would provide minimal resistance to the passage of electricity from the head electrode to the brain, particularly when one is talking about the magnitude of the electricity being used during judicial electrocutions. Dr. Devinsky and Dr. Wilder testified that neurosurgeons use electrical currents in the range of 1 - 15 milliamps, in durations of a few milliseconds, to stimulate various parts of the brain during surgery. Several of the

nervous system experts testified that the brain produces a natural constant electrical current, which current is in the range of millivolts (thousandths of a single volt of electrical current). Dr. Wilder and Dr. Devinsky testified that through the use of an electroencephalograph (E.E.G.) doctors are able to record the electrical activity of the human brain through the skull. The E.E.G. recording is made by placing electrodes on various parts of the scalp of the head. The electrical currents of the brain, which have to pass through the bones of the skull, are recorded by those electrodes. Dr. Wilder and Dr. Devinsky also testified regarding the medical profession's use of Electroconvulsive Therapy (E.C.T.) to treat patients suffering from epilepsy and severe depression. Dr. Wilder testified that E.C.T. is carried out by placing electrodes on either the sides of the skull, or the front and back of the skull, and then administering 300 milliamps of electricity for a duration of a few milliseconds. This procedure results in immediate depolarization, unconsciousness, and convulsion of the muscles of the body. Finally, the physical evidence provided by Medina's body - the burn ring at the top of Medina's skull - demonstrates that the path of the electrical current passed from the head electrode through the top of Medina's skull and brain. The totality of the evidence and credible testimony negates any suggestion to the contrary.

11. The Court finds that Medina's brain was instantaneously and massively depolarized within milliseconds of the initial surge of electricity into his head - 2,250 volts for 8 seconds - and that his heart went into instant fibrillation all of which caused him to lose consciousness and permitted his death to occur within 34 seconds of the initial jolt of electricity. He suffered no conscious pain. This can be said for all inmates who will be executed in Florida's electric chair hereafter.

(SR XIV 1959-1961).

To the extent necessary, harmless error has been demonstrated, and the order on appeal should be affirmed in all respects.

## *ISSUE II*

FUNDAMENTAL ERROR HAS NOT BEEN DEMONSTRATED IN REGARD TO THE TESTIMONY OF DR. MICHAEL MORSE.

In a related issue, Jones next claims that the testimony of Dr. Morse cited in Issue I was "misleading," in that it, in fact, was contrary to the views of Dr. Wikswo. There are essentially two "prongs" to this argument - first, that Morse mischaracterized the report of Dr. Wikswo upon which he purposed to rely for his calculations, and, secondly, that Dr. Morse's testimony was "misleading", as evidenced by an affidavit authored by Dr. Wikswo on August 5, 1997, and appended by collateral counsel to the Initial Brief (Attachment A to Initial Brief). Although the first matter would largely seem to be rendered moot, given the fact that, as demonstrated in Point I, the finder of fact did not consider any of this testimony in rendering his final order, such matter will be addressed below. As to the second matter, the State files concurrently a motion to strike the appendix to the Initial Brief, inasmuch as none of the matters contained therein were before the court below, and, as such, the affidavit is improperly presented on appeal. See, e.g., State v. Barber, 301 So.2d 7, 9 (Fla. 1974). In any event, reversible error has not been demonstrated.

During his testimony in July, Dr. Morse stated that he was aware of a report by Dr. Wikswo, in which the latter had conducted "a finite element analysis of a legal electrocution," in which he had modeled all of the tissues of the body "as what they are called elements," and determined the voltage gradiants or "voltage drops" (SR VII 1145-1146); Morse stated that he had used Wikswo's article to obtain "a set of voltages starting at the top of the head" and working down (SR VII 1146). The witness testified that he had taken this work and "carried it further" (SR VII 1146). Morse testified that the article had indicated that the voltage at the top of the head during electrocution would be 2,400 volts, whereas the voltage at the bottom of the head would be 1,100 volts, indicating a voltage drop inside the skull of 150 volts (SR VII 1146-1147). Utilizing these numbers "which previously were not available" and "applying some very basic physical principles," Morse then set to determine the current pathway through the skull during a judicial electrocution (SR VII 1147). Morse stated that he had come back with numbers "fairly similar" to those obtained by Wikswo (SR VII 1152), and that he had determined that "a significant percentage", between one third and two thirds, of the current was "shunted through the brain" (SR VII 1155). Subsequently, Morse stated that the Wikswo article had indicated that the "rho" or resistivity value of bone was one-seventy six (SR

VII 1167), and that the article had been co-authored by Nester Sepulveda (SR VIII 1183-1184).

The article co-authored by Wikswo and Sepulvedra, "A Finite Element Model For Execution By Electrocution," is contained in the record on appeal as Defendant's Exhibit JJ. It does, in fact, contain a chart setting forth the resistivity or rho value of various portions of the body, including that of bone, and sets the latter as one-seventy six (id. at 18). It likewise contains several diagrams of the body setting forth isopotential contours and power density distribution, as well as a chart showing the average power densities of various portions of the body (id. at 19-26). Contrary to the Initial Brief (Initial Brief at 26), the article does not state that death during electrocution is not instantaneous or that the heart beats "frequently" following the application of current in a judicial electrocution; rather, it simply states, in its introduction, that death "may" not be instantaneous (id. at 2-3). As to current flow, the report states that the majority of the electric current delivered to the body from the scalp electrode will flow along the scalp and superficial cranial muscles, rather than directly entering the brain (id. at 8). As did Morse, the article states that in determining the flow of current, one must look not only to the resistivity of the various regions of the body, but also to their shape (id. at 7).

Contrary to the rhetoric of the Initial Brief, everything that Morse said about the Wikswo article was true and accurate, and it must be remembered that Morse simply utilized certain figures contained in the article in his research; Morse specifically testified that he "carried further" what was found in the Wikswo article, and at no time offered, or was asked, Wikswo's conclusions. Morse simply acted as any scientist would, and utilized this treatise for certain research materials, before going out and doing his own calculations. Morse's conclusion that between one and two thirds of the current administered during a judicial electrocution actually entered the brain is in fact "somewhat similar" to the statement in the Wikswo report that a majority of the current was shunted along the scalp.[3] To the extent that any error is perceived, it is, for the reasons set forth in Point I, *infra*, harmless beyond a reasonable doubt, given the fact that this testimony was never referred to in the final order.

Finally, to the extent that Appellant contends that it was error for the court below to have denied Jones' request for an opportunity to "get in touch" with Dr. Wikswo and to present his testimony, such request made as proceedings were recessing (SR X 1500), no error has been demonstrated, as there has been no showing

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[3] Obviously any divergence between Morse's testimony of July 14, 1997, and the views expressed by Dr. Wikswo in his April 5, 1997, article, which did not exist at that time, is irrelevant.

that counsel for Jones, with due diligence, could not have discovered Wikswo earlier. As noted previously, Morse specifically testified about the "finite element analysis" study in April, and counsel for Jones could have followed up on the matter then. Further, according to Jones' counsel, the Wikswo article was utilized by a death row inmate in a Tennessee proceeding involving the constitutionality of the electric chair (SR IX 1217). It must be noted that all of the experts called by Jones - Drs. Arden, Kirschner, Price, Bernstein, Devinsky and Denno - are from out of state, and that many previously offered testimony, or sworn affidavits, in proceedings attacking the use of the electric chair in other jurisdictions (SR II 223 (Kirschner, affidavits submitted in Alabama); SR III 321 (Price, prior testimony in Virginia); SR IV 519 (Bernstein, prior testimony in Alabama and Louisiana); SR V 702 (Devinsky, affidavits submitted in Virginia and Louisiana)). It would have been no harder for Jones' counsel to have located Wikswo, than it was for them to locate all of their other experts, and reversible error has not been demonstrated. This proceeding has already been reopened once to allow Jones to present expert testimony, and further relief in this vein is not warranted. The order on appeal should be affirmed in all respects.

## *ISSUE III*

JUDGE SOUD APPLIED THE CORRECT LEGAL STANDARD IN REJECTING JONES'S CLAIM FOR RELIEF.

Having been afforded essentially two hearings on his claim, and having failed to prevail in either, Jones now argues that Judge Soud "simply employed an erroneous legal standard" (Initial Brief at 39). Citing absolutely no legal authority for this proposition, Jones maintains that "electrocution is consistently 'cruel' if it entails deliberate indifference to the risk of unnecessary pain" (Initial Brief at 37), and then proceeds to contend that, relief is warranted because the evidence presented below established that "the State of Florida is deliberately indifferent to the risk of pain" (id. at 39). Appellee disagrees with all of the above.

In denying relief, Judge Soud expressly cited to Gregg v. Georgia, 428 U.S. 153, 173-174, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (SR XIV 1945-1946). These cases hold that in order for a punishment to constitute cruel and unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain," and, as the Court observed in Resweber, "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Id. 329 U.S. at 464. As will be demonstrated below, the evidence presented by Jones did not

demonstrate under the above precedents that electrocution in Florida's electric chair in its present condition would involve torture or the infliction of unnecessary and wanton pain. Accordingly, Judge Soud committed no error in denying relief.

Although the "deliberate indifference" standard may seem to have much to recommend itself from Jones' point of view, it is has never been employed in any case challenging, under the Eighth Amendment, a method or means of execution. Indeed, in Campbell v. Wood, 18 F.3d 662, 682-683, n.12 (9th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994), the Ninth Circuit, in rejecting a constitutional challenge to hanging, specifically stated that the deliberate indifference standard "is not directly applicable either to proportionality or to methodology questions." Although the Campbell case involved a challenge to hanging *per se*, the analysis applied by the court therein is interesting in several respects.[4] In rejecting Campbell's arguments, the court of appeals looked to the evidence presented at the federal district court level, including the testimony of expert witnesses and the specific protocol adopted by the State of Washington in regard to how hanging should be carried out. The court stated that the legal

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[4] For one thing, the Ninth Circuit expressly rejected Campbell's argument that "evolving standards of decency" indicated that hanging was cruel and unusual, because only two states employed it. The court found that such analysis was irrelevant to the inquiry before it. Campbell, 18 F.3d at 682. See Point IV, *infra*.

issue before it was whether the method of execution involved the unnecessary and wanton infliction of pain (as opposed to any risk thereof), and specifically held, "The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." Campbell, at 687. Appellee respectfully suggests that the Campbell analysis is much more persuasive than that set forth in the cases relied upon by Jones, such as Farmer v. Brennan, ___ U.S. ___, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

In his brief, Jones presents seven (7) specific subclaims. Although many of them are rendered moot by the recognition that, in fact, the correct law was applied below, each will be addressed.

### *A. The Finder Of Fact Did Not Err In Finding That Medina's Brain Was Instantly Depolarized By The Initial Surge Of Current.*

Jones initially claims that he is entitled to relief because he presented evidence below to the effect that Medina was not "dead" and his brain did not cease to function until minutes after the current was disengaged. The fact that Medina was not declared legally dead until, at most, five minutes after the current had been disengaged has never been disputed (SR VII 1115), but this point focuses upon the evidence adduced below as to alleged agonal pulse and respiration on the part of the Medina during this five minute period. Although Appellee contends that this evidence is not relevant to any proper constitutional inquiry, especially given

the fact, as will be demonstrated in Point C, *infra*, that Medina was unconscious and incapable of feeling pain at this point, this matter will nevertheless be addressed below.

At the evidentiary hearing in April, Physician's Assistant Matthews, who had been present for thirty (30) Florida executions, testified that, after the current was disengaged, he had examined Medina and had felt an irregular or "agonal" pulse, which, in his opinion was not unusual; Matthews testified that an agonal pulse represents a dying heart and that no blood was being pumped or circulated (R V 104, 113). He also observed approximately three chest movements or "shrugs" (R V 106), which he likewise stated was not unusual under the circumstances (R V 111-112); Matthews testified that Medina was not alive at this time, and that he was not getting any exchange of air (R V 112). Matthews testified that he heard extremely irregular heart sounds, but no lung sounds, through the stethoscope (R V 113). The witness stated that, in his opinion, Medina had been dead within milliseconds, and that such had been a painless death (R V 119). Dr. Almojera, a physician, also testified at the April hearing, and stated that he had examined Medina after Matthews (R IX 128). Almojera stated that Medina's pupils had been fixed and dilated at that time, and that he had heard no heart sounds; although he stated that he heard initially some lung sounds, he testified that these stopped and that he heard no breathing and detected no pulse, agonal or

otherwise (R IX 129-132). During this examination, Almojera observed two "chest movements" on the part of Medina, which he attributed to muscle relaxation, as there was no respiration at that time (R IX 131, 135).

At the hearing in April, Jones called a number of eyewitnesses to the Medina execution, who are not physicians or physician's assistants, to testify as to their observations of the chest movements; although these witnesses were more physically removed from Medina than Matthews and Almojera, and were separated from Medina by a partition, some of these witnesses described Medina's chest movements as "breathing" (Initial Brief at 39-40). Likewise, at the July hearing, a number of Jones' experts accepted this testimony, as well as that relating to the agonal pulse, in support of their view that Medina had survived the electrocution and that his brain and heart had not been depolarized by the current; at least one of the experts recognized, however, that those actually present at the autopsy would be in a better position to testify as to Medina's condition (SR II 218). Appellee respectfully suggests that Judge Soud was not required to accept this testimony, in light of that from Matthews and Almojera set forth above, as well as the expert testimony of Drs. Morse, Hamilton, Goldman, Sperry and Wilder.

Thus, at the April hearing, Dr. Morse, a biomedical engineer, testified that it was not unusual for involuntary muscle movements

to occur following the cessation of current during an electrocution (R VII 111-112). Dr. Hamilton, the Gainesville pathologist who performed Medina's autopsy, as well as that of twenty-seven (27) other inmates executed in Florida's electric chair, testified that an agonal pulse indicated the aberrant and ineffective heart function which occurred during the process of dying, and that, as to agonal respiration, it was not uncommon for someone who was brain dead to "still have a few respiratory movements before the whole system finally shuts down." (R IX 113). Hamilton emphasized that this "respiration" did not involve the lungs "filling up with air" (R IX 115).

At the July hearing, the State presented the testimony of Drs. Goldman, Sperry and Wilder. Dr. Goldman testified that agonal respiration would be inefficient "gasps" which would not be sufficient for any exchange of air and which would occur at the time of death (SR V 798). Dr. Sperry testified that involuntary respiratory movements are commonly present in the dead or dying and are part of the dying process of the rest of the body "after the brain is shut down" (SR VI 943). He also stated that when he had described electrocution as an "instantaneous" method of execution, he was referring to it in regard to the brain, and that he was referring to an instantaneous cessation of consciousness and perception; involuntary respiration or pulse could continue as the final vestiges of life disappeared (SR VI 964-967). Dr. Wilder

testified that sudden interruptions of the nervous system could lead to the discharge of neurons which, in turn, could cause the intercostal muscles to contract or expand, even resulting in a "gasping type respiration"; this "gasp" would not result in any meaningful air exchange (SR VII 1010-1012).

The finder of fact did not err in relying upon the evidence presented by the State to the effect that Medina's brain had been instantly depolarized, and that the presence of any agonal pulse or respiration did not suggest the existence of consciousness or pain (SR XIV 1951-1952, 1954-1955, 1961). The evidence cited by Jones does not establish that electrocution in Florida's electric chair in its present condition constitutes cruel or unusual punishment, and no relief is warranted as to this claim.

### *B. The Evidence Relating To The Tafero Execution Is Irrelevant.*

Jones next argues that he presented evidence establishing that Tafero was not instantly killed, or his brain incapacitated, at his execution in 1990; this evidence consists of the testimony of one eyewitness and a report conducted by the Department of Corrections after the incident. It is uncontroverted that the events of the Tafero execution were caused by usage of a synthetic sponge in the headpiece (SR III 498-499), and that such was not the cause of the events at the Medina execution; it is also uncontroverted that sixteen (16) executions occurred without incident between the 1990

execution of Tafero and the 1997 execution of Medina (SR XIV 1947, 1966). The State respectfully suggests that the evidence pertaining to the Tafero execution has no bearing upon whether electrocution in Florida's electric chair in its present condition is cruel or unusual punishment, especially in the absence of any affirmative evidence that either Tafero or Medina suffered conscious pain. No relief is warranted as to this claim.

### *C. The Finder Of Fact Did Not Err In Finding That Medina Suffered No Conscious Pain.*

Jones next contends that he should prevail because "indirect evidence indicates that judicial electrocution may be painful" (Initial Brief at 44). As demonstrated, a risk of pain is not the relevant inquiry for a claim such as this, in that, in order to be unconstitutional, a method of execution must actually involve the infliction of unnecessary or wanton pain. Gregg, supra; Resweber, supra; Campbell, supra. Additionally, even if Jones proved what he claims to have proven, he is still entitled to no relief. The record in this case indicates, in any event, that Judge Soud did not err in finding that Medina suffered no conscious pain during his electrocution.

The four non-engineering experts presented by Jones had a number of things in common. None were from Florida or had any familiarity with the Florida electric chair or its functioning. Of the three physicians who testified, none had ever performed an

autopsy on an individual who had been executed through electrocution, and none had attended an electrocution. All were opposed to electrocution as a means of execution, if not to the death penalty itself in its entirety. None had ever performed experiments with voltages comparable to that used in an actual electrocution, and those who did perform electrical experiments usually utilized current in the milliamp or millivolt range. While some of the experts had treated victims of lightning strikes or accidental electrocutions, for the most part the voltage involved was not known or discernible. Two of the experts - Price and Devinsky - acknowledged that their testimony had nothing to do with the Medina execution, or whether execution in Florida's electric chair in its present condition would be cruel or unusual, inasmuch as they stated that their testimony would have been the same, even if Medina's execution had occurred without incident (SR III 447-448; SR V 700).

Notwithstanding their lack of relevant experience to the subject of the hearing, all four had varying opinions as to whether Medina had suffered conscious pain during his execution. Dr. Arden, the New York pathologist, felt that it was "possible" that he did (SR I 85-87). Dr. Kirschner, the Illinois President of the International Forensic Program of Physicians for Human Rights, stated that he had "no way" of knowing, but that he believed that it was "certainly possible" that Medina had experienced pain and

suffering (SR I 200). Dr. Price, the Virginia neurophysiologist specializing in pain, concluded, not based upon any tests which he had personally performed but rather upon "multiple indirect converging lines of evidence that are part of the scientific method," that there was a very high likelihood of intense pain during judicial electrocution (SR III 351-352, 447-448). Dr. Devinsky, the New York neurologist, stated that he felt that it was probable that Medina had suffered conscious pain (SR V 749).

In his order denying relief, Judge Soud set forth, in some detail, his reasons for not crediting, or assigning weight, to the above testimony (SR XIV 1955-1961), and no purpose would be served by simply repeating them herein. Appellee would simply note that the State presented substantial contrary evidence, from witnesses familiar with the execution process and its effects. Thus, both at the April and July hearings, Dr. Michael Morse, a biomedical engineer specializing in the effect of electricity upon the human body, testified that he believed that Medina had been immediately rendered unconscious and unable to feel pain at the time of the initial surge of current (R VII 17; SR VII 1155). Likewise, Dr. Hamilton, the pathologist experienced in autopsying those executed through electrocution, testified that, in his opinion, consciousness would be obliterated immediately by the initial surge of current in a judicial electrocution (R IX 117-118). At the July hearing, Dr. Sperry, another pathologist experienced in the

autopsies of those persons executed through electrocution and a participant in the Medina autopsy, testified that Medina had had no perception of pain after the current was turned off, and that judicial electrocution is, in fact, painless (SR VI 930). Finally, Dr. Wilder, an experienced Florida neurologist, testified that Medina's brain could not have survived 34 seconds of high voltage electricity, and that judicial electrocution is painless because the initial surge of current depolarizes the brain, such that no ability to feel pain exists (SR VII 1056, 1003-1006).

All of the State's experts reached their conclusions based upon the same information, *i.e.*, that the current utilized during a judicial electrocution is so powerful that the brain cells are depolarized and the brain itself "flooded" or "overwhelmed" within a millisecond, such that no ability to perceive pain survives; all of the State's experts maintained these opinions, with full knowledge of the testimony concerning agonal pulse and alleged respiration on Medina's part. Judge Soud credited this testimony in his final order (SR XIV 1954-1955, 1956-1961), and, in so doing, did not abuse his discretion. While Jones' experts had their own reasons as to why they chose to differ with the above (*i.e.*, a belief that insufficient current actually reached the brain in order to depolarize it or a belief that alternating current somehow "repolarized" the depolarized cells *ad infinitem*), Judge Soud had no obligation to accept such. Cf. Walls v. State, 641 So.2d 381,

390-391 (Fla. 1994) (expert opinion testimony not necessarily binding, even if uncontested); Hunter v. State, 660 So.2d 244, 247 (Fla. 1995) (it is the function of the trial court to resolve conflicts in expert testimony). No error has been demonstrated, and no relief is warranted as to this claim.

*D. The Finder Of Fact Did Not Err In Rejecting The Opinion Testimony Of Dr. Bernstein.*

Jones next argues that Judge Soud should have accepted the opinion testimony of Dr. Bernstein, his expert electrical engineer, to the effect that the testing procedures and execution-day protocols promulgated by the Department of Corrections did not "guarantee" that a repeat of the events experienced during the Medina execution would not reoccur (SR IV 577-578). In his order, Judge Soud set forth in some detail his reasons for not crediting this testimony, such reasons set forth herein:

> Dr. Bernstein had essentially five complaints arising from the June 30 test, none having to do with voltage and amperage cycles and output and their sufficiency to cause death.
>
> The complaints were: (a) chart recordings are not calibrated as to time; (b) testing procedures protocol don't specify exact sizes of sponges to be used; (c) testing procedures protocol don't specify what voltage and amperage should be generated; (d) no one on the death chamber team seems to have sufficient knowledge of the electric chair and all of its electrical systems; and (e) schematics for the circuitry date back to 1960 and seem to be incomplete in case some electrical problem should develop.

> None of these complaints were registered by Dr. Morse or Mr. Weichert. None affect the effectiveness of the electric chair to cause death in a proficient manner. They seem to be more of a personal engineering preference of Dr. Bernstein rather than a standard required within the electrical engineering profession and community. The chart recordings are accurate as to electrical output though not calibrated as to time. As observed by this Court during the hearing, the sponges to be used are obviously larger than the electrodes. The electrical output of voltage and amperage is produced by a programmed, controlled circuitry whose performance is recorded for accuracy. In addition, the death chamber staff testified before this Court as to their roles and responsibilities during the execution process, and their knowledge and skill have been observed during the post-Medina testings of the electric chair. This Court agrees with the assessment and evaluation provided by Dr. Morse and Mr. Weichert that the death chamber staff is qualified and competent to carry out judicial executions. Lastly, while the schematics may date back to 1960, there is no evidence whatsoever before this Court of any circuitry problem that updated schematics would be needed to address.
>
> The Florida electric chair - its apparatus, equipment, and electrical circuitry - is in excellent condition. Testimony in this regard is unrefuted.

(SR XIV 1962-1963).

As noted above, it would not have been error for the finder of fact to have rejected Dr. Bernstein's testimony even if uncontroverted, see Walls, supra, but, in light of the contrary testimony cited below, Judge Soud was entitled to resolve any conflicts in the State's favor. Hunter, supra. Initially, Judge

Soud was correct in observing that most of Bernstein's complaints did not relate to the effectiveness of the electric chair, but rather represented his personal preferences or peeves. Bernstein himself acknowledged that his concerns relating to the chart recorder, use of conductive gel, and the schematic had nothing to do with the operation of the electric chair itself or its ability to carry out its purpose (SR IV 584-586, 595-596, 623), and the judge was further entitled to rely upon his own observations, in regard to whether the sponges actually covered the leg electrodes (SR XIV 1963; SR VII 1097-1098); the judge was likewise entitled to rely upon the testimony of Jay Weichert, who testified that the sponges would more than adequately perform their function, in regard to the electrodes (SR VII 1131-1134).

The court was also entitled to consider, and to find more credible, the testimony of Jay Weichert and Dr. Michael Morse, both at the April and July hearings. Weichert is an electrical engineer like Bernstein, but, unlike Bernstein, has actually constructed and maintained electric chairs (R V 165-167). Weichert and Morse conducted a test of Florida's electric chair on April 8, 1997, and Morse participated in another test on July 30, 1997 (R V 167; R VIII 16; SR VII 1140-1144); in their opinion, the chair was functioning properly at the times of these tests (R V 171, 185-186; SR VII 1144). Likewise, the experts were shown the testing protocols and execution-day procedures developed by the Department

of Corrections, and stated that such documents not only embraced their recommendations (R VI 207, 218; R VIII 20-21), but also that the following of such recommendations should prevent any future malfunction (R V 196, 207, 218; R VII 17, 84, 110; R VIII 9; R VIII 152-153, 162, 166, 172). Additionally, Weichert specifically testified that he had confidence that the Department of Corrections would follow these recommendations (R V 186). The judge's findings are supported by the record, and no relief is warranted as to this claim.

### *E. No "Pattern Of Botched Executions" Has Been Demonstrated*

It is next contended that relief should be granted because Jones' final expert, Dr. Deborah Denno, a criminologist and law professor, testified that there had been four "botched" executions in Florida, thus demonstrating a "known substantial risk of pain" (Initial Brief at 55). However, as noted elsewhere in the Initial Brief (Initial Brief at 70), Dr. Denno's testimony was not admitted (SR X 1490-1498). Accordingly, there is no evidence in the record to support a claim of error. Additionally, it must be noted that Dr. Denno acknowledged during her proffered testimony that she lacked any background in electrical engineering (SR IX 1308-1315), and her opinion "as a social scientist" as to the working condition of the electric chair or the existence of a "botched" execution is clearly irrelevant to any issue before this Court. As will be

demonstrated in Point IV, *infra*, her proffered testimony would not have assisted the trier of fact in determining the issue before it, and no relief is warranted as to this claim.

### *F. The Finder Of Fact Did Not Err In Finding That Florida's Electric Chair Will Result In Death Without Inflicting Unnecessary Pain.*

In his final order, Judge Soud concluded, *inter alia*, that Florida's electric chair will result in death without inflicting wanton or unnecessary pain (SR XIV 1968). Although Jones does not attack this finding *per se*, he does contend that the court should not have credited any testimony from Dr. Michael Morse, to the effect that there would be no future malfunctions of the electric chair, given Morse's failure to identify the dry sponge as a problem in 1990 (Initial Brief at 56-57). While continuing to question the relevance of this matter to the legal inquiry before this Court, Appellee would contend that no basis for relief has been demonstrated.

The record reflects, in fact, that Jones' counsel extensively cross-examined Morse at the April hearing regarding his 1990 investigation into the causes for the malfunction at the Tafero execution (R VII 33-44). At this time, the expert stated that he had determined that the cause of the malfunction had been usage of a synthetic sponge in the headpiece (R VII 33-34). In the course of doing so, Morse had tested the chair on a number of occasions (R VII 37, 41-42). Morse testified that he did not recall whether, at

this time, a dry sponge had been sewn into the headpiece (R VII 43; R VIII 17-18). He stated that, if during these tests, there had been a dry sponge in the headpiece which had remained dry and failed to soak the wet sponge, such would be significant (R VII 43), although such apparently was not the case, as his testimony indicates that the chair machinery functioned properly, when a synthetic sponge was not used. Morse testified that the testing which he and Jay Weichert had conducted in 1997 in regard to the Medina execution had indicated that the cause of the malfunction was the usage of insufficiently saturated sponges in the headpiece (R VII 16, 25), and Jay Weichert offered comparable testimony (R V 169-171). Both Morse and Weichert made recommendations to the Governor in order to prevent any future occurrences, and the Department of Corrections, in accordance therewith, developed formal electric chair testing procedures and execution-day protocols; both Morse and Weichert testified that the following of these protocols should prevent future malfunctions (R V 196, 207, 218; R VII 17, 84, 110; R VIII 9; R VIII 152-153, 162, 166, 172).

In reaching his conclusions, Judge Soud was certainly entitled to consider the fact that Dr. Morse, in 1990, may not have observed that a dry sponge had been sewn into the headpiece. Such fact, however, does not entitle Jones to relief. The judge found that Florida's electric chair will function in a constitutional manner, based upon not only the 1997 testimony of Morse, but also the

testimony of Jay Weichert, an experienced electrical engineer and designer of electric chairs. Further, the judge did not simply rely upon their testimony, but also upon the fact that, following the Medina execution, the Department of Corrections, for the first time, developed formal protocols for testing and maintenance of the electric chair, as well as execution-day procedures. Judge Soud was entitled to assign considerable weight to this testimony in denying relief to Jones, and no error has been demonstrated in this regard. No relief is warranted as to this claim.

### *G. The Finder Of Fact Was Correct In Finding That The Existence Of Human Error Does Not Render A Punishment Cruel Or Unusual.*

In his order denying relief, Judge Soud found that the cause of the malfunction at the Medina execution had been the result of unintentional human error with regard to the insufficiency of saline moisture in the dry sponge (SR XIV 1965). Jones contends that because human error was identified as the cause of the incident, there is a risk of future malfunctions "since human error cannot be eliminated with certainty" (Initial Brief at 57-58). Jones also renews his contention that he is entitled to relief because, under Farmer v. Brennan, supra, he demonstrated "deliberate indifference" to this risk, and because he was unsuccessful in his attempt to call certain state officials to further prove the matter (Initial Brief at 58-61).

As asserted previously, the Farmer analysis is not relevant to the issue before this Court. See Campbell, supra. Further, this Court has already rejected Jones' contention that he should have been entitled to call certain state legislators, etc. As noted (Initial Brief at 59, 61), Jones raised this claim in his original appeal, and in its opinion of May 22, 1997, this Court did not expressly order that such witnesses be called at the reconvened hearing. Jones v. Butterworth, 695 So.2d at 681. When Jones called this omission to the Court's attention in his motion for rehearing filed May 29, 1997, this Court, although otherwise modifying its opinion regarding the scope of the hearing, did not expressly address this matter, and stated that the motion for rehearing was denied. Jones, 695 So.2d at 682. Because these matters have already been raised and rejected, Jones cannot relitigate them now. As to Jones' claims regarding "human error," he has failed to suggest an alternative, and, of course, all the institutions of our society, including the judicial system, are subject to human error. Appellee respectfully submits that the protocol and procedures promulgated by the Department of Corrections in light of the Medina execution are strong evidence that the department will ensure that future executions are carried out as professionally and competently as possible. No relief is warranted as to this claim.

## *ISSUE IV*

JUDGE SOUD DID NOT ERR IN EXCLUDING THE PROFFERED TESTIMONY OF DR. DENNO OR IN DECLINING TO TAKE JUDICIAL NOTICE OF CERTAIN IRRELEVANT MATTERS.

Jones next contends, in a lengthy point on appeal (Initial Brief at 61-82), that Judge Soud erred in failing to admit or consider evidence relating to the "unusualness" of electrocution, such evidence comprising the proffered testimony of Dr. Deborah Denno, a criminologist/law professor/social scientist, and certain of the exhibits prepared by her. Jones contends that this was error under this Court's decision, Allen v. State, 636 So.2d 494 (Fla. 1994), as well as under federal precedent (Initial Brief at 63-66). Although Appellant devotes considerable briefing to this issue, Appellee respectfully contends that it is clear that no error has been demonstrated.

As Appellant notes, this Court held in Angrand v. Key, 657 So.2d 1146, 1148 (Fla. 1995), that any expert testimony must be of assistance to the trier of fact in order to be admissible (Initial Brief at 73). Here, the matters which Judge Soud excluded would not have assisted the trier of fact, in that, *inter alia*, they were outside of the scope of the hearing, as, indeed, the judge stated when he ruled (SR X 1490-1498). In the original all writs petition filed in April of this year, Jones sought to raise the issue of the constitutionality of electrocution *per se*, and in support thereof, proffered some of the identical matters now presented in the

Initial Brief, in regard to electrocution's "unusualness" (Petition, filed April 3, 1997, at 45-50). In its opinion of April 10, 1997, Jones v. Butterworth, 691 So.2d 481, 482 (Fla. 1997), this Court expressly held that such claim was procedurally barred and, further, that even if it was not, such would be denied due to lack of merit; in remanding this case for a hearing, this Court stated that such hearing should be held "on the petitioner's claim that electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." When this Court again remanded this cause on May 22, 1997, this Court stated:

> We reiterate that the sole issue to be determined is whether or not electrocution in Florida's electric chair in its present condition is cruel or unusual punishment.

Jones, 695 So.2d at 681.

Dr. Denno, who, as noted, has no background in electrical engineering, had no relevant testimony to offer as to the present condition of Florida's electric chair, and her testimony, if admissible at all, would only relate to an attack upon the constitutionality of electrocution *per se*. Judge Soud did not err in declining Jones' invitation to exceed the scope of the hearing, contrary to this Court's mandate, and no relief is warranted as to this claim.

Additionally, it is highly questionable whether this type of testimony or evidence would be admissible, even if the hearing below had been focused upon the constitutionality of electrocution

*per se*. Although Jones suggests that this Court should be guided by federal caselaw (Initial Brief at 63), he cites no precedent in which a challenge to a method or means of execution was resolved based upon evidence concerning "evolving standards of decency" or legislative trends, and such omission is understandable. In Campbell v. Wood, supra, the Ninth Circuit expressly held that this type of evidence is irrelevant to an attack upon a method of execution, in that "methodology review focuses more heavily on objective evidence of pain involved in the challenged method." Campbell, 18 F.3d at 682. Although only two states permitted execution by hanging, the court rejected Campbell's argument that "when the number of states exacting a given punishment dwindles, the punishment drops beneath the constitutional floor," and found inapplicable many of the precedents cited by Jones - Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). Campbell, 18 F.3d at 682. The court concluded:

> The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.

Id. (footnote omitted).

Jones has shown no reason why the above ruling should not be followed, and, interestingly, the Ninth Circuit cited Campbell in Fierro v. Gomez, 77 F.3d 301, 308 (9th Cir.), quashed, ___ U.S. ___, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996), when it disapproved the portion of the district court opinion (cited in the Initial Brief at 72, 77), which had looked at "legislative trends." See also Hunt v. Nuth, 57 F.3d 1327, 1337-1338 (4th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 724, 133 L.Ed.2d 676 (1996) (court, in rejecting constitutional challenge to execution by lethal gas, stated that "the existence and adoption of more humane methods [of execution] does not automatically render a contested method cruel and unusual."). Appellee sees nothing in Allen v. State, which benefits Jones (especially its recognition that execution of women, while infrequent, is not unconstitutional, Allen, 636 So.2d at 497-498, n.6), and no relief is warranted as to this claim.[5]

## *ISSUE V*

ADMISSION INTO EVIDENCE OF THE TESTIMONY OF DR. KRIS SPERRY WAS NOT REVERSIBLE ERROR.

In his next claim, Jones contends that reversible error occurred in regard to the trial court's allowance of the State to present the testimony of Dr. Kris Sperry, a pathologist who

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[5] Jones has also attached to his brief (as Attachment B), a "voter poll" apparently conducted on July 30, 1997, after the evidentiary hearing in Jacksonville. Because this matter was never before the court below, its presentation on appeal is improper, State v. Barber, supra, and the State likewise moves to strike it.

attended the Medina autopsy at the request of CCR. As he did below, Jones maintains that the attorney/client privilege should have precluded this action, and cites to a number of this Court's precedents involving confidential psychiatric experts, see, e.g., Lovette v. State, 636 So.2d 1304 (Fla. 1994), Morgan v. State, 639 So.2d 6 (Fla. 1994); Appellant also asserts that such privilege was not waived. Appellee disagrees with all of the above. The record supports Judge Soud's finding that no attorney/client relationship had been demonstrated, such that Sperry's testimony should have been barred on the grounds of privilege and, further, that, in any event, CCR waived any privilege. Reversible error has not been demonstrated, and the order on appeal should be affirmed in all respects.

### *A. Relevant Facts Of Record*

Prior to Sperry's testimony as to the Medina autopsy, Judge Soud allowed both sides to present evidence in regard to Jones' claim of privilege. Dr. Sperry testified that CCR attorney Labowitz contacted him the night before the autopsy was scheduled, and asked if it would be possible for him to attend the procedure the next day (SR V 814, 826). Sperry stated that the only instructions which he received at this time were not to discuss anything with the press or media, but to refer such calls to CCR; he was not given any instructions as to how to conduct himself at the autopsy (SR V 814-815). Upon his arrival in Gainesville, he

was driven to the pathologist's office by a CCR employee (SR V 831). Dr. Sperry testified that he and another pathologist, Dr. Feegel, met with the two CCR attorneys present, Hunter Labowitz and Jennifer Corey, and were shown the autopsy "protocol" drawn up by Dr. Arden (SR V 815-816, 832-834). Because the pathologists had reservations about certain portions of the protocol, a telephone call was placed to Dr. Arden, and a discussion ensued (SR V 816). The four pathologists present - Drs. Hamilton, Nelson, Sperry and Feegel - then put on scrub suits, and entered the autopsy room where, with all four attorneys representing both sides present, the body was viewed (SR V 817). At this point, the attorneys were escorted from the room, and the pathologists actually conducted the autopsy (SR V 817-818).

After the actual autopsy, the four pathologists adjourned to Dr. Hamilton's office where they discussed their findings (SR V 818); Sperry testified that he had never been instructed not to discuss his observations during the autopsy with the other pathologists (SR V 818). The doctors agreed among themselves that they would offer to have one joint meeting with all the attorneys for the presentation of their findings and the fielding of any questions (SR V 819-820). Sperry testified that none of the CCR attorneys had any objection to this proposed arrangement, and that during the group discussion, neither attorney instructed him not to answer any questions (SR V 820); the witness stated that he

believed that he had been questioned by attorneys for both sides and that he had, in fact, answered them, without objection (SR V 820-821). Dr. Sperry testified that the four pathologists had agreed that Dr. Hamilton would submit a draft report, for all of them to sign; Sperry testified that the CCR attorneys were advised of this arrangement and rendered no objection to it (SR V 822-823). The witness identified the autopsy report which he had in fact later signed, and reiterated that he had never been instructed not to do so (SR V 823-824).

On further examination, Sperry testified, that, as per his own understanding, he did not know if he had been hired as a "confidential expert" (SR V 827). He stated that, for purposes of the Medina autopsy, it was his understanding that he would receive twenty-five hundred ($2,500.00) dollars, plus expenses, which he did (SR V 827, VI 847). The witness testified that he had attended Medina's autopsy on behalf of CCR, and that he had never previously attended another autopsy under similar circumstances (SR V 829-830). Dr. Sperry testified that he was unaware if he had been there "on behalf of Mr. Jones" (SR VI 841), and that all he knew was that he was there to observe the autopsy and to give his opinions as far as what happened in that particular case (SR VI 842). He stated that he did not recall receiving a later call from CCR attorney Schardl instructing him not to sign the autopsy report, and stated that, if he had, he would not have signed the

report (SR VI 847). On questioning from the court, Sperry said that, during the meeting with the attorneys, after the autopsy, he had made comments concerning the autopsy, and that no CCR attorney had instructed him not to do that (SR VI 848).

One of the two representatives of the Attorney General's Office present testified concerning the autopsy process, *i.e.*, the meeting held beforehand, and the fact that only the pathologists were present for the autopsy itself (SR VI 853-854). The witness stated that he had never observed the CCR attorneys instruct Dr. Sperry not to speak or make his opinions known during the course of the autopsy (SR VI 854). The witness said that, after the autopsy, all of the attorneys were advised that the pathologists would hold a meeting between themselves, and that afterwards all of the attorneys would be invited in, for an announcement of the findings and a question and answer session (SR VI 854-855). Things proceeded as scheduled, and all four attorneys attended the meeting with the pathologists (SR VI 856-857). Attorneys for both sides asked questions, and Dr. Sperry apparently "volunteered" a remark. Dr. Sperry was also asked a question at this time by one of the State's attorneys, and at no time did the CCR attorneys instruct Dr. Sperry not to answer these questions (SR VI 857-858). The witness testified that all of the attorneys had been present during the earlier telephone call to Dr. Arden (SR VI 858). On further examination, the witness stated that Dr. Sperry had spoken "a fair

amount" during the post-autopsy meeting and that "none of the CCR attorneys indicated that they had a problem with that at all" (SR VI 862).

Jones called CCR attorneys Labowitz, Schardl and Corey (SR VI 864-903). Labowitz testified that he had received a call from Schardl at around 9:00 a.m., on March 25, 1997, and that the latter had told him there had been a problem with the Medina execution (SR VI 866). The witness stated that since the prior fall, CCR had been consulting with Dr. Arden in New York, and had requested him to draw up an autopsy protocol for those executed in the electric chair; Labowitz called Arden to see if he could attend the Medina autopsy (SR VI 867-868). Arden indicated that he was not available, and other CCR attorneys recommended Sperry, whom Labowitz then called (SR VI 868). Asked his reasons for calling Sperry, Labowitz stated, "I was attempting to find a pathologist who could assist us in implementing Dr. Arden's protocol at the Pedro Medina autopsy." (SR VI 868). The witness stated that he called Sperry and asked him if he would be able to do so as a confidential expert, and that Sperry agreed (SR VI 868-869).

The witness also stated that, when Sperry arrived at the autopsy, he showed him the protocol, and all of the doctors then discussed the Arden protocol; Labowitz placed a call to Arden at this time (SR VI 871-872). After the autopsy, there was a meeting with all of the pathologists and all of the attorneys (SR VI 873).

After Dr. Hamilton had announced the findings, the attorneys asked questions, and Dr. Sperry "spontaneously" said that all of the doctors agreed that Medina's death had been instantaneous (SR VI 875). Labowitz testified that when he heard that a draft of the autopsy report was circulating, he had asked Schardl to call Sperry and to instruct him not to sign it (SR VI 876). On further examination, the witness testified that the attorneys for the State had been present during the telephone call to Dr. Arden (SR VI 878). The witness also stated that he had never told Dr. Sperry not to speak during the joint discussion following the autopsy (SR VI 883), although he maintained that Sperry had earlier been told to remain silent (SR VI 883).

Attorney Schardl testified that he had been asked to call Dr. Sperry and to instruct him not to sign the autopsy report (SR VI 889). The witness stated that he had done so, although he could not recall the date of the telephone call (SR VI 890). He said that Sperry agreed not to sign the document (SR VI 891).

Attorney Corey testified that she had been present at the Medina autopsy (SR VI 895). She had had no prior contact with Dr. Sperry beforehand (SR VI 895). The witness stated that she met Sperry at the pathologist's office with the State's attorneys present (SR VI 896). After the autopsy, the attorneys were invited into the meeting room with the pathologists (SR VI 899). The witness stated that Dr. Hamilton had announced the findings of the

autopsy, and that she had asked some questions (SR VI 899-900); she remembered one of the State's attorneys asking questions (SR VI 900). The witness testified that Dr. Sperry had remarked that Medina's death had been instantaneous (SR VI 900). The State's attorney then asked Sperry a question, and the meeting broke up shortly afterwards (SR VI 901). Ms. Corey testified that she had never instructed Dr. Sperry not to voice his opinions or conclusions (SR VI 992-993).

Following this testimony, and the argument of counsel, Judge Soud ruled that he found no attorney/client relationship that would preclude the testimony of Dr. Sperry (SR VI 905). The judge stated that Sperry had received no instructions not to discuss his findings with the other pathologists or the State's attorneys, and, further, that the CCR attorneys had made no objection to his answering questions or speaking up at the meeting (SR VI 905-906). The judge observed that not only Dr. Sperry, but also Dr. Feegel, had signed the autopsy report (SR VI 906-907). Finally, the judge stated that he would find any privilege waived under all of the circumstances (SR VI 908).

*B. Reversible Error Has Not Been Demonstrated*

In resolving this point on appeal, there are essentially two issues involved - whether an attorney/client relationship involving CCR and Sperry existed, to such an extent that "privilege" should have barred his testimony, and, if so, whether the record

demonstrates that any such privilege was waived. As to the first matter, such is not as easy to resolve as it may be under other circumstances. While it is true that CCR retained Sperry, the identity of the "client" is not as easy to fathom, and the purpose of Sperry's retention was not, at least expressly, to assist in any future litigation or to provide a report solely for the use of CCR. Rather, the only testimony presented below was that Sperry was to "ensure that Dr. Arden's protocol was followed at the Medina execution" (SR VI 868, 870-871), and that Sperry did. No precedent has been cited for the proposition that the observations and opinions of this scientist should have been forever barred from the light of day, and Dr. Sperry obviously had nothing in common with a mental health expert who, following his retention by defense counsel, secures confidential information from the defendant himself. Cf. Lovette, supra; Morgan, supra; H.A.W. v. State, 652 So.2d 948 (Fla. 5th DCA 1995). Further, under §90.502, Fla.Stat. (1995), the purpose of any attorney/client privilege is to keep "communications" confidential, and the record *sub judice* fails to demonstrate that any such "communications", confidential or otherwise, ever existed. It was Jones' burden to demonstrate the existence of the privilege, see, e.g., Southern Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377, 1383 (Fla. 1994), and he failed to do so.

Additionally, this case is indistinguishable from Rose v. State, 591 So.2d 195 (Fla. 4th DCA), review denied, 591 So.2d 183 (Fla. 1991). In that decision, the issue was "whether the trial court erred in allowing a medical examiner, Dr. Reeves, to testify for the State when he had originally been hired by the defense but the defense had determined not to call him as an expert." The defense attorney in Rose contended that Reeves could not be called as a witness, because the attorney had discussed "theories, facts and findings" with him, and asserted that the attorney/client relationship should preclude the State in this respect. As occurred below, the trial court held an inquiry into these issues, and only allowed the testimony at issue after determining that no attorney/client confidences would be divulged. The court of appeals concluded that such ruling was not error. The reviewing court specifically noted that no privilege had attached to the information concerning the autopsy itself, and that all of the doctor's opinions rendered in the case had been based upon material supplied by the State and meetings with the pathologist who had actually performed the autopsy, and not upon any conversation or material provided by the defense. Certainly, all of these observations are applicable *sub judice*. See also United States v. Savan, 968 F.2d 55, 63-65 (D.C. Cir. 1992) (not error to allow government to examine defendant's expert witness regarding witness's own observations and opinions, where such did not involve

disclosure of confidential information obtained from client). No error has been demonstrated.

Even if it could be said that any "privilege" did exist, Judge Soud also did not err in finding such to be waived. As the court held in Alachua General Hosp. Inc. v. Stewart, 649 So.2d 357, 359 (Fla. 1st DCA 1995), waiver of a privilege is determined by the behavior of the party seeking to assert it. Here, the record reflects that Sperry was never told that he had to keep his opinions to himself, that when he arrived in Gainesville he participated in a meeting and telephone call at which attorneys for the other side were present, that he conducted an autopsy in the company of other pathologists, that he discussed his observations with the other pathologists, that he participated in the question and answer session at which attorneys for both sides were present (something which could, perhaps, be considered the functional equivalent of a deposition), and that he signed the final autopsy report. All of the above actions, except for the last, were conducted in the presence of CCR attorneys, and counsel at no time voiced any objection to Sperry's conduct, or asserted that any "privilege" existed. A clearer example of waiver would be difficult to imagine. See Mobley v. State, 409 So.2d 1031, 1037-1038 (Fla. 1982) (attorney/client privilege waived in regard to conversation between attorney and client, where another individual was present, and where it was clear that client knew that such

conversation was being overheard; court noted that client did not tell other individual that conversation was private or ask him to leave); Tucker v. State, 484 So.2d 1299, 1300-1302 (Fla. 4th DCA), review denied, 494 So.2d 1153 (Fla. 1986) (attorney/client privilege waived where, *inter alia*, defense counsel allowed State to depose confidential expert). The trial court's finding of waiver is supported by the record, and should be affirmed.

Finally, the State would note that, even if "unwaived privilege" could be said to exist, such privilege can be overridden by the public's interest in the administration of justice. See, e.g., Pouncy v. State, 353 So.2d 640, 642 (Fla. 3rd DCA 1977). Judge Soud was charged with the responsibility of determining whether execution in Florida's electric chair in its present condition constitutes cruel or unusual punishment. As one of the participants who conducted the Medina autopsy, Dr. Sperry possessed pertinent information which few others on the face of the globe could offer, and the equities *sub judice* overwhelmingly weighed in favor of allowing the truth seeking process to proceed, unencumbered by any claim of speculative privilege. Even if the admission of this testimony is perceived to be erroneous, such would be harmless beyond a reasonable doubt, as in Lovette, supra or Rose, supra, given the fact that other independent and adequate evidence exists in the record, specifically that of Dr. Hamilton, supporting the denial of Jones' claims. Cf. Grossman, supra.

Reversible error has not been demonstrated, and the order on appeal should be affirmed in all respects.

## *ISSUE VI*

JONES HAS FAILED TO DEMONSTRATE REVERSIBLE ERROR, IN REGARD TO CERTAIN EVIDENTIARY RULINGS.

In his next point on appeal, Jones asserts that thirteen (13) different evidentiary rulings by Judge Soud constitute reversible error. Eleven (11) of these instances involve the exclusion of evidence, whereas the remainder involve its admission; in all of the instances of excluded evidence, the record contains proffered testimony, which is available to this Court. It is, of course, well established that a trial court enjoys wide discretion as to the admission of evidence, and its rulings thereupon will not be disturbed on appeal, absent an abuse of discretion, see, e.g., Heath v. State, 648 So.2d 660, 664 (Fla. 1994), Hardwick v. State, 521 So.2d 1071, 1073 (Fla. 1987); such holdings should be particularly applicable in a nonjury context. Nine of Jones' claims will be addressed below.[6]

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[6] Appellee does not address again Claim F (Initial Brief at 92-93), that relating to Judge Soud's exclusion of testimony from various elected officials, as such matter has already been addressed in Point III, *infra*. Likewise, Appellee does not again address Claims H, I and J, which all relate to the court's ruling regarding the exclusion of the testimony of Dr. Denno and her exhibits (Initial Brief at 93-94), as such matters were addressed in Point IV, *infra*, or are otherwise without merit.

*A. The Claim In Regard To Dr. Kirschner.*

Jones initially contends that Judge Soud erred in precluding Dr. Kirschner from expressing his view as to whether Jesse Tafero had been killed by the first two jolts of electricity during his 1990 execution (SR I 184-189); in his proffered testimony, Kirschner stated that, in his opinion, Tafero was not killed until the third surge of electricity, and stated that it was "possible" that Tafero suffered pain (SR I 192). Jones maintains that this evidence was relevant, because he was allowed to introduce other evidence concerning the Tafero execution (Initial Brief at 87-88). Appellee disagrees, and would contend that reversible error has not been demonstrated. At the time that the objection was interposed, Jones' counsel stated that this evidence was relevant to established "deliberate indifference" under Farmer (SR I 187), and, as has previously been noted, such was not the proper inquiry below. The proffered testimony lacks relevance to the issue before the court, and was surely speculative, given years after the event, from a nonwitness. It should be noted that the report concerning the Tafero execution introduced into evidence (Defendant's Exhibit #16), contains the opinion of the medical personnel at the scene, apparently shared by Dr. Hamilton, to the effect that Tafero would have been brain dead after the initial surge of electricity, and that, any "spasmodic respiratory activity" did not mean that life existed (id. at 5). No relief is warranted as to this claim.

*B. The Claim In Regard To Dr. Arden.*

Jones next contends that Judge Soud erred in precluding Dr. Arden from testifying that it was "possible" that Medina suffered pain (SR I 84-87), such proffered testimony contained in the record. Appellant again argues that this evidence was relevant to his argument under Farmer, relating to "deliberate indifference" (Initial Brief at 89). As noted previously, the standard set forth in Farmer was not the relevant inquiry before the court. Further, this testimony is so speculative and insubstantial that its exclusion could not possibly prejudice Jones. No relief is warranted as to this claim.

*C. The Claim In Regard To Dr. Price.*

It is next argued that Judge Soud committed error in precluding Dr. Price from testifying about what he had "learned" from another expert, Dr. Casey. During his direct testimony, the witness indicated that he had had conversations with Dr. Kenneth Casey, a "world expert on pain" (SR III 328). According to Price, Casey referred him to recent neurological literature, which he then pursued, and the two also discussed some of Casey's patients (SR III 330-331). When Judge Soud asked the witness if "the main thing" that Casey had done was to direct him to a body of literature, Price replied in the affirmative (SR III 333-334). The judge allowed this portion of Price's testimony into evidence, but stated that the State's hearsay objection to the rest, the State

arguing that the witness was simply being used as a "conduit" for another, was well taken (SR III 328-329, 334).

Appellant has failed to demonstrate reversible error in regard to the above ruling, and indeed has failed to cite any case in which it has been held that one expert can parrot conversations with another as part of his testimony. Certainly, Barber v. State, 576 So.2d 825 (Fla. 1st DCA 1991), cited in the Initial Brief (Initial Brief at 90), does not stand for such proposition; in Barber, the court held that it had been error to exclude the testimony of a psychiatric expert in regard to a conversation which he had had with the defendant himself, when the expert had been called to testify as to the defendant's alleged intoxication. While it would seem that, under §90.705(1), Fla.Stat. (1995), the State could have pressed Price as to his sources, it does not appear that the party offering his testimony had similar license; obviously, the State could choose not to conduct this inquiry, as it would be unable to cross-examine the absent expert. Inasmuch as Price was allowed to testify as to the "gist" of his conversation with Casey, reversible error has not been demonstrated, and no relief is warranted as to this claim.

*D. The Claim In Regard To A Treatise.*

Jones next contends that Judge Soud committed reversible error in failing to admit into evidence a treatise by one Frederick Panse, such treatise presently contained in the record as Defense

Exhibit FF. The record reflects that Drs. Price and Devinsky were familiar with this work, and that such comprises a chapter in a textbook, in which Panse has summarized the findings of others (SR III 337, 340; SR V 681-682). When Jones attempted to have Price testify in detail as to the contents of this chapter, the State's hearsay objection was sustained (SR III 338-339, 347); the judge noted, however, that Price was free to testify as to his own opinion, but not "to recite to us what Dr. Panse found out" (SR III 348, 350-351). When Dr. Devinsky likewise indicated familiarity with this chapter of the textbook, Jones attempted to formally introduce the article (SR V 681-682), and Judge Soud sustained the State's objection (SR V 682). Devinsky, nonetheless, was able to testify as to certain portions of the article, upon which he had relied (SR V 684).

Appellant has cited no precedent for the proposition that the above demonstrates reversible error. Again, while it might have been permissible, under §90.706, Fla.Stat. (1995), for the State to have sought to impeach these witnesses with their familiarity, or lack thereof, with this article, it does not appear that the proponent of their testimony could invoke such "treatise", in an attempt to bolster the testimony at issue. Assuming that any error occurred, however, such was truly harmless, as Devinsky was able to testify as the contents of the article, and both experts were free to fully express their opinions. Likewise, Jones' accusation that

Judge Soud was inconsistent in allowing the State to introduce a diagram (Initial Brief at 91), is meritless (the witness in question utilized the diagram in testifying) (SR V 766-769). No relief is warranted as to this claim.

*E. The Claim In Regard To Dr. Wilder.*

It is next asserted that Judge Soud erred in preventing Jones' counsel from asking state witness Wilder whether he had considered the fact that Tafero was "still alive after the first two jolts of electricity" (Initial Brief at 92); the record, in fact, reflects that the question asked was whether the witness had considered the fact "it took three applications of electric current to cause him to stop moving," and the answer, in proffer, was in the negative (SR VII 1048-1049). Although the basis for the State's successful objection was that this matter was outside the scope of direct, it is also clear, for the reasons already stated, that this matter was irrelevant. Reversible error has not been demonstrated, and no relief is warranted as to this claim.

*F. The Claim In Regard To Dr. Hamilton.*

Jones next contends that Judge Soud erred in precluding him from "impeaching Dr. Hamilton regarding bias" (Initial Brief at 93). The record reflects that, on cross-examination, Appellant sought to ask the witness whether an "ethics panel is reviewing your decision to remove the head of a murder victim and provide it

to research assistants at the University of Florida"; the State's relevancy objection was sustained (SR IX 1251-1252). Jones' counsel argued below, and continues to argue on appeal, that this matter was relevant, in that the State had questioned defense witnesses as to their position on the death penalty, and in that the matter allegedly related to the witness's "sensitivity" to the feelings of others. To state Jones' position is to recognize its absurdity. No relief is warranted as to this claim.

*G. The Claim In Regard To Dr. Bernstein.*

It is next contended that Judge Soud erred in prohibiting Dr. Bernstein "from offering his opinion about the competence of Department of Corrections employees to carry out an execution" (Initial Brief at 94); the record, however, reflects that the question at issue was whether, in Bernstein's opinion, the two individuals who had shown him a schematic drawing on June 30, 1997, "seemed to understand" the document, and the State's objection based upon speculation was sustained (SR IV 607). Inasmuch as it was never demonstrated who the two individuals in question were, and/or how Bernstein was competent to assess their understanding, the State's objection was clearly well taken. In all other proper respects, Bernstein was able to testify as to his opinion on the competence of Department of Corrections personnel (SR IV 573, 578), and reversible error has not been demonstrated. No relief is warranted as to this claim.

*H. The Second Claim In Regard To Dr. Bernstein.*

Jones next contends that reversible error occurred when the State was allowed to ask Bernstein whether the cycle of electricity utilized during Alabama executions is instantly lethal (SR IV 600-602); the witness answered that it could or could not be lethal (SR IV 602). As this matter is nowhere detailed in the final order, its significance is unfathomable, and no relief is warranted as to this claim.

*I. The Second Claim In Regard To Dr. Arden.*

It is finally argued that reversible error occurred when the State was allowed to exceed the scope of direct examination and ask Dr. Arden if he was aware of how the electric chair functioned, as well as if he knew the result of the test conducted on June 30, 1997; the witness's answers are contained in the record (SR I 112, 118). These questions were obviously designed to test the witness's understanding of the electrocution process, and reversible error has not been demonstrated. No relief is warranted as to any portion of this claim.

*ISSUE VII*

JUDGE SOUD CONDUCTED A FULL AND FAIR HEARING

As he did in the prior brief filed in this cause, Jones closes his appeal by engaging in an *ad hominem* attack upon Judge Soud. Every previously-discussed evidentiary ruling is now paraded as

evidence of "bias", and the judge is faulted for ignoring the facts and misapplying the law. The brief concludes with what would seem to be opposing counsel's greatest concern - that the judge required the presence of Jones and counsel from both sides at the time that he read his order aloud in Jacksonville on July 18, 1997 (SR XI 1517-1556) (Initial Brief at 100). It is contended that the above demonstrates that Judge Soud "is interested primarily in appearance over substance." (Id.).

The contention that the judge failed to adequately consider the evidence presented at the July hearing, simply giving "lip service to Mr. Jones' witnesses" and conducting "yet another one-sided inquisition" (Initial Brief at 97), is refuted by the detailed and comprehensive final order, which discusses the testimony offered by Jones' witnesses (SR XIV 1955-1963, 1968). All other portions of this claim have either been addressed or do not merit response. The order on appeal should be affirmed in all respects.

## CONCLUSION

WHEREFORE, for the aforementioned reasons, the order on appeal should be affirmed in all respects.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Greg Smith, Office of the Capital Collateral Regional Counsel, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 25th day of August, 1997.

RICHARD B. MARTELL
Chief, Capital Appeals