IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,231

LEO ALEXANDER JONES,

Petitioner/Appellant,

V.

ROBERT BUTTERWORTH, ET AL.

Respondent/Appellee.

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

BRIEF OF PETITIONER/APPELLANT

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(904) 487-4376

COUNSEL FOR PETITIONER/APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order denying Leo Jones' claim that judicial electrocution in Florida's electric chair in its present condition is cruel or unusual punishment. Mr. Jones' claim was brought pursuant to Fla. R. App. P. 9.100(a). This appeal follows.

The following symbols will be used to designate references to the record in this appeal:

"R. at _____" -- Volumes 1-11 of the record on direct appeal to this Court;

"Tr. at ——, 4/ /97, _____ session" -- Volumes III-X of the record on appeal to this Court, which constitutes all of the transcribed testimony from the evidentiary hearing held in this case on April 15-21, **1997.**

"All Writs Appendix Exh. _____" -- For reference to the Appendix to Petitioner's Petition Seeking to Invoke this Court's All Writs Jurisdiction, filed April 3, **1997.**

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT. i

TABLEOFCONTENTS ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE FACTS AND CASE 1

ARGUMENT 15

ARGUMENT I

THE HEARING CONDUCTED BY THE LOWER COURT DID NOT CONFORM TO THIS COURT'S DIRECTIVE TO ASSESS THE "PRESENT CONDITION" OF FLORIDA'S ELECTRICCHAIR 15

ARGUMENT II

THE EVIDENTIARY HEARING WAS NOT FULL AND FAIR 24

A. THE CIRCUIT COURT ERRED IN DENYING PETITIONER ACCESS TO NECESSARY EVIDENCE 25

1. Denial Of Access To Tangible Evidence Indicating That The Recommendations Of Dr. Morse And Mr. Wiechert Had Been Implemented 25

2. Denial Of Access To The Electrocution Equipment And Of Notice Regarding When The Equipment Would Be Tested **25**

3. Denial Of Records Regarding The Medina Execution And Other Public Records 27

B. DENIAL OF OPPORTUNITY TO PRESENT EXPERTTESTIMONY 33

1. Judge **Soud** Wrongly Ruled That Petitioner's Experts Were Collectively Irrelevant To The Issues In The Case 36

2. Judge Soud Wrongly Ruled That Petitioner's Experts Were Individually Irrelevant To The Issues In The Case **44**

3. Judge Soud Wronalv Prohibited Petitioner's Experts From Testifying Because Of Their Alleged Stance Against Capital Punishment **48**

4. **Judge** Soud Wrongly Barred The Testimony Of Petitioner's Experts Because They Were Not Under Subpoena., ... **49**

5. Judge Soud Wrongly Ruled That, Even If Petitioner's Experts Were To Testify, When Considered Together. They Could Not Carry The Petitioner's Burden Of Proof 50

C. ERRONEOUS RULINGS PRECLUDING TESTIMONY OF PETITIONER'S WITNESSES AND ALLOWING IMPROPER TESTIMONY BY THE STATE'S WITNESSES **52**

1. Judge Soud Wrongly Prohibited Doug Martin, A News Reporter, And Other Reporters From Testifying 52

2. Judge Soud Wrongly Ruled That The Testimony Of Various Florida Elected And Appointed Officials Was Not Relevant To The Issue Of Whether Judicial Electrocution In Florida's Electric Chair In Its Present Condition Constitutes Cruel Or Unusual Punishment *157*

3. Judge Soud Wrongly Allowed The Respondents' Experts To Testify Regarding Matters Outside Their Area Of Expertise 62

4. Judge Soud Wrongly Converted One Of Petitioner's Fact Witnesses Into An Expert And Allowed The Witness To Testify About Matters Upon Which He Was Not Qualified 63

5. Judge Soud Wrongly Refused To Admit The 1990 Testimony Of A Department Of Corrections Official 64

6. Judge Soud Wrongly Directed Presentation Of The State's Case And Thus Became An Advocate 66

7. Judge Soud Wrongly Denied A Continuance To Allow Mr. Jones' Counsel To Prepare For Cross-Examination Of The State's Experts 68

D. FAILURE TO "REASONABLY CONDUCT" THEHEARING 71

ARGUMENT III

THE CIRCUIT COURT VIOLATED MR. JONES' DUE PROCESS RIGHT TO A FAIR HEARING WHEN IT EXCLUDED RELEVANT EXPERT TESTIMONY AND PREVENTED HIM FROM PRESENTING EVIDENCE RELEVANT TO THE COURT'S CONCLUSIONS. MR. JONES WAS DENIED AN ADVERSARIAL TESTING AND, AS A RESULT, THE CIRCUIT COURT ORDER WAS BASED SOLELY ON THE RESPONDENTS' EVIDENCE 74

A. THE CIRCUIT COURT'S CONCLUSIONS ABOUT THE PAINLESSNESS OF DEATH IN FLORIDA'S ELECTRIC CHAIR ARE BASED SOLELY ON THE RESPONDENTS' EVIDENCE BECAUSE JUDGE SOUD PREVENTED MR. JONES FROM PRESENTING EVIDENCE ON THIS ISSUE IN VIOLATION OF HIS DUE PROCESS RIGHTS 76

1. Mr. Jones was denied due process when his experts were not permitted to testify about the pain inflicted by judicial electrocution in his case in chief. to assist counsel in cross-examination of the Respondents' witnesses, and to present rebuttal evidence 77

a. Mr. Jones was denied his right to due process when he was prevented from presenting relevant expert testimony in his case in chief 77

b. Mr. Jones' expert witnesses were necessary to provide him an adequate opportunity to cross-examine the Respondents' experts 80

c. Mr. Jones' experts were essential to his rebuttal of the Respondents' evidence. The exclusion of their testimony violated his due process rights 81

2. Judge Soud's order relies solely on the Respondents' evidence in violation of Mr. Jones' due process rights 86

3. The Respondents' evidence is unreliable because the witnesses offered opinion testimony beyond their areas of expertise and because contradictions within their testimony undermine the reliability of their conclusions 88

B. JUDGE SOUD'S FINDING THAT THE EXECUTIVE BRANCH HAS CORRECTED ANY PROBLEMS WITH FLORIDA'S ELECTRIC CHAIR IS BASED ONLY ON THE RESPONDENTS' EVIDENCE. MR. JONES WAS PRECLUDED FROM PRESENTING RELEVANT EVIDENCE ON THIS ISSUE IN VIOLATION OF HIS DUE PROCESS RIGHTS 92

C. MR. JONES' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE CIRCUIT COURT CONCLUDED THAT ELECTROCUTION IN FLORIDA'S ELECTRIC CHAIR IS NOT UNUSUAL WITHOUT HEARING ANY EVIDENCE OFFERED BY MR. JONES REGARDING THE UNUSUALNESS INQUIRY 103

ARGUMENT IV

JUDGE SOUD IS INCAPABLE OF CONDUCTING .. FULL AND FAIR HEARING ON THE ISSUE OF THE CONSTITUTIONALITY OF ELECTROCUTION IN FLORIDA'S ELECTRIC CHAIR. ACCORDINGLY, THIS COURT SHOULD APPOINT A SPECIAL MASTER TO RECEIVEEVIDENCE 106

CONCLUSION 112

TABLE OF AUTHORITIES

Page

Allen v. State,
636 So. 2d 494 (1994) 104

Branzburg v. Haves,
408 U.S. 665 (1972) 54

Buenoano v. State,
565 So. 2d 309 (Fla. 1990) 92

CBS. Inc, v. Jackson,
578 So. 2d 272 (Fla. 1991) 53, 55

Cherry Lake Farms v. Love,
176 So. 486 (1936) 103

Coker v. Georgia,
433 U.S. 584 (1077) 38, 104

Dudley v. Harrison, McCredy & Co.,
173 So. 820 (Fla. 1937) 38

Eddinas v. Oklahoma,
455 U.S. 104 (1982) 38

Enmund v. Florida,
458 U.S. 782 (1981) 104, 105

Farmer v. Brennan,
511 U.S. 825
114 S. Ct. 1970 (1994) 44, 58

Fierro v. Gomez,
856 F.Supp. 1387 (N.D. Cal. 1994) 104

Gold Coast Publications v. State,
669 So. 2d 316 (Fla. 4th DCA 1996) 56

Gregg v. Georgia,
428 U.S. 153 (1976) 38, 76

Hamblen v. Dugger,
748 F.Supp. 1498 (M.D. Fla. 1990) 79

Helling v. McKinney,
113 S. Ct. 2475 (1993) 58

Johnson (Marvin) v. Singletary,
647 So. 2d 106 (Fla. 1994) 37, 40, 74

Jones v. Butterworth. et al.,
No. 81-4953-CF
Supreme **Court** No. 90,231
(Fla. 4th Cir. Ct. Apr. 11, 1997) **3**

Jones **v. Butterworth,**
No 90,231 (Fla. Apr. 10, 1997) 103

Louisiana **ex** rel. Francis v. Resweber,
329 U.S. 459
67 S. Ct. 374 (1947) 76, 79

Malloy v. South Carolina,
237 U.S. 180 (1914) 105

McCleskey v. **Kemp,**
481 U.S. 279 (1987) 104

Miami Herald Publishing Co. v. Morejon,
561 So. 2d 577 (Fla. 1990) **54**

Moore v. State,
452 So. 2d 559 (Fla. 1984) **38**

Morgan v. State,
337 So. 2d 951 (Fla. 1976) 54

Murray v. State,
So.2d
No. 83,556 (Fla. April 17, 1997) 62

Penry v. Lynaugh,
492 U.S. 302 (1989) 104, 106

Ramirez v. State,
651 So. 2d 1164 (Fla. 1995) 62

Saudi Arabian Airlines. Corp. v. Dunn,
438 So. 2d 116 (Fla. 1st DCA 1983) 66

Smith v. State,
319 So. 2d 14 (Fla. 1975) 33

Squires v. Dugger,
794 F. Supp. 1568 (M.D. Fla. 1992) 79

Stanford v. Kentucky,
492 U.S. 361 (1989) 104, 106

Stano v. Singletary,
No. 90,230 (Fla. Apr. 23, 1997) 111

State v. Lewis,
656 So. 2d 1248 (1994) 74

Tampa Television. Inc. v. Norman,
647 So. 2d 904 (Fla. 2d DCA 1994) 56

Tillman v. State,
591 So. 2d 167 (Fla. 1991) 103

Tribune Co. v. Huffstetler,
489 So. 2d 722 (Fla. 1986) 54

Trop v. Dulles,
356 U.S. 86 (1958) 38

Wardius v. Oregon,
412 U.S. 470
93 S. Ct. 2208
37 L.Ed.2d 82 (1973) 33

Williams v. Florida,
399 U.S. 78
90 S. Ct. 1893
26 L.Ed.2d 446 (1970) 33

Wilson v. **Seiter**,
501 U.S. 294 (1991) **59**

STATEMENT OF THE FACTS AND CASE

On March 25, **1997,** Pedro Medina was executed in Florida's electric chair. After the electrical current was turned on, smoke and flames arose from Mr. Medina's head. The Department **of** Corrections (hereinafter DOC) launched an internal investigation in order to determine the cause of the smoke and flames. Paul French, Correctional Officer Senior Inspector, conducted the investigation. Mr. French completed his report on March 27, 1997. Mr. French concluded that the cause **of the smoke** and flames was the failure of prison personnel to properly and regularly clean the copper screen in the headpiece which is placed on the head of the condemned. See Defendant's Exhibit 10.

The Governor's Office released the French Report on Monday, March 31, 1997 and accepted its conclusion as to the cause of the smoke and flames during the Medina execution. Governor Chiles announced that changes would be made to the electric chair in light of the French Report.

When undersigned counsel examined the French Report, he for the first time learned from the statement of Patricia Mecusker, which was included in the report, that Mr. Medina's chest moved three times after the electrical current was turned off in a manner consistent with breathing. Follow up investigation revealed that other witnesses had observed the movement of Mr. Medina's chest in a fashion described as breathing.[1] Medical experts

[1] Undersigned counsel found that **Doug** Martin, a reporter with the Gainesville Sun who had witnessed the Medina execution, had reported: "Medina's chest heaved three times in what appeared to be spasmodic breaths." (All Writs Appendix Exh. **30).** Undersigned counsel also spoke with Mike Griffin, a reporter with the Orlando Sentinel who counsel knew had been present at the Medina execution. Mr. Griffin confirmed that he had seen the chest movement noted by Patricia Mecusker and Doug Martin. **In** addition, counsel learned (continued,..)

advised undersigned counsel that such movement established that Mr. Medina's death was not instantaneous. See, e.g., All Writs Appendix Exh. 9, ¶3. It in fact was evidence of brain activity. See, e.g., All Writs Appendix Exh. 10, 79-11.

Undersigned counsel also learned after consulting with electrical experts that the conclusion contained in the French Report as to the cause of the smoke and flames was probably not correct.

Based upon this information, undersigned counsel filed on April 3, 1997, a petition on behalf of Leo Jones seeking to invoke this Court's all writs jurisdiction in order to challenge the conclusions contained in the French Report and to prevent the State of Florida from executing Mr. Jones by a method of execution which violates state and federal constitutional prohibitions on cruel and/or unusual punishment.

Following the filing of the all writs petition, news accounts reported that the electrical engineer, relied on by Mr. French for the conclusion that the problem was the copper screen, believed that his opinion had been misconstrued by the DOC and the Governor. The electrical engineer indicated that his position was more a suggested possible cause than a definitive conclusion. After these news accounts appeared, Florida Governor Lawton Chiles, on April 4, ordered further investigations into Mr. Medina's execution.

On April 10, 1997, this Court issued an order "relinquish[ing] jurisdiction to the trial court which is presiding over petitioner's postconviction proceedings to conduct an

---

[1](...continued)
that the Reverend Glenn Dickson who had been a witness at the Medina execution had also seen Mr. Medina's chest move as he took three deep breaths ("as I watched all of a sudden Pedro took a breath, he went, I mean, a deep breath like that.") (Tr. at 83, April 15, 1997, morning session).

evidentiary hearing on the petitioner's claim that electrocution in Florida's electric chair in its present condition is cruel or unusual punishment."[2] Jones v. Butterworth, et al., **No. 90,231** at 1 (Fla. Apr. **10, 1997).** This **Court's** order specifically provided that "in the event the Governor stays the execution, the hearing shall be postponed until the execution is rescheduled." **Id**.

On April 11, **1997,** at 10:00 a.m., Circuit Court Judge **A.C. Soud** held a telephonic status hearing. Pursuant to the Florida Supreme Court's order, Judge Soud set a hearing for Tuesday, April **15, 1997,** at 9:30 a.m. See Jones v. Butterworth, et al., No. 81-4953-CF, Supreme Court No. **90,231** (Fla. **4th** Cir. Ct. Apr. **11, 1997)(R.** at **124-125).** During that status hearing, Mr. Jones' counsel indicated he was "trying to line both engineering and medical experts up," but "I have not been able to get actually through to the people I've had since the opinion has come out to find out about their availability. Obviously that's an important factor" **(R. 156). Mr.** Jones' counsel also pointed out that he was "going to be wanting to have some discovery of some **of** the documents **of** the autopsies **of** Mr. Medina," but that additional materials regarding that autopsy would not available before Monday, April **14** (R. **157).** Mr. Jones' counsel further pointed out that Mr. Jones' experts **had** not had access to the electric chair (R. 159) and that he would want to issue subpoenas duces tecum

---

[2] Of course, Mr. Jones' claim was that the condition **of** the electric chair following the French Report was cruel and/or unusual. It was on this claim that the evidentiary hearing was ordered to be conducted. However, as explained infra, the condition of the chair was in the process of being changed during the evidentiary hearing because the State **of** Florida conceded that the French Report reached an erroneous conclusion and that, without further alterations, Mr. Jones' position in the all writs petition was indeed correct.

for documentary evidence unless something could be worked out with the State (R. 161). Counsel reiterated that he did not yet know the availability of his experts (R. 160, 164).

At approximately 4:30 p.m. on April 11th, undersigned counsel learned from the media that the Governor had issued a press release announcing that his appointed "experts" had concluded that the French Report was in fact wrong as to the cause of the smoke and flames during the Medina execution. Instead, these "experts" found a new and previously unidentified cause of the smoke and the flames, These "experts" concluded that the smoke and the flames were caused by the use of a dry sponge sewn into the head piece and by the use of a saline solution with insufficient salt content. Having concluded that the problem was the result of human error arising from changes made in procedure that was not written down but instead passed down from generation to generation, these "experts" made a list of recommended changes which the Governor ordered adopted.[3] These recommendations

---

[3] Michael Morse and Jay Wiechert were the two experts that the Governor obtained to review the electric chair. Dr. Morse had examined the electric chair after the Tafero execution in 1990. Mr. Wiechert had no previous connection to Florida's electric chair, They concluded that the use of the sewn-in dry sponge and the improper saline solution were new developments which could have been prevented had a standard, written procedure been previously adopted and followed. ("It is not known at what point or by what process a decision was made to use a dry sponge or at what point or by what process a decision was made to use .9% saline. Such procedural changes **must** be avoided in the future." State's Exhibit 3, Morse Report at 3 (emphasis in original). At the evidentiary hearing, it was learned that Mr. Wiechert did not obtain any information about the use of the dry sponge in previous executions in Florida. (Tr. at **278,** April 16, 1997). At the evidentiary hearing, Dr. Morse professed lack of memory as to whether in 1990 he knew that a dry sponge was sewn into the head piece and that the wrong saline solution was being used. He also did not remember his 1990 testimony in federal court expressing his opinion that the Florida electric chair should "operate flawlessly the next time you use it." (Tr. at **42,** April 17, 1997, morning session).

addressed both the specific causes **of** the smoke and flame in the Medina execution and the need for a written and standardized procedure in the future.

Included in the recommendations was a requirement that the electric chair be tested at least thirty **(30)** days prior to an execution. In light **of** that recommendation, undersigned counsel sought to learn when the Governor planned to reschedule Mr. Jones' execution. He **was** advised that **Mr.** Jones was taken **off** Phase II status at the prison, indicating that an execution was not scheduled within the next seven days. Because Mr. Jones was not on Phase 11, counsel could not have telephonic access to Mr. Jones over the weekend **of** April 12-13. The obvious meaning was that the Governor decided not to reschedule the execution as soon as the stay expired on April 18, **1997.**

Prior to the start of the evidentiary hearing, Petitioner Jones filed six motions seeking: (1) **proof** that the recommendations of Respondents' expert witnesses regarding alleged improvements to Florida's use of judicial electrocution have been adopted (R. at **1); (2)** access to evidence relating to the judicial electrocution of Pedro Medina (R. at **32); (3)** production **of** public records needed for a full and fair hearing (R. at *36);* **(4)** the opportunity to take pre-hearing depositions of people who possess information relevant to Petitioner's claim (R. at **42);** *(5)* access to Florida's judicial electrocution equipment by Petitioner's counsel and Petitioner's relevant experts for purposes **of** conducting tests similar to those conducted **by** Respondents' experts (R. at **49); and** *(6)* a continuance of the evidentiary

hearing to allow for a reasonably conducted hearing (R. at 78).[4] Judge Soud denied all six of Petitioner's motions. (R. at 31, 35, 41, 48, 69, 123).[5]

Judge Soud then received testimony for approximately 36 hours over the course of four days from April 15, 1997 to April 18, 1997. After beginning each day at 9:30 a.m., court remained in session until approximately 8:30 p.m. on April 15 and until approximately 9:15 p.m. on April 16, and until approximately 6:30 p.m. on April 17, 1997. On April 18th, court convened at the usual time and heard evidence until approximately 3:00 p.m.

The first witness called by Mr. Jones was the Reverend Glenn Dickson.[6] Reverend Dickson testified that he observed someone with a stethoscope loosen the straps around Mr. Medina's body. Then "as I watched all of a sudden Pedro took a breath, he went, I mean, a deep breath like that. And I remember thinking, oh my God, he's still alive." (Tr. at 83, April 15, 1997, morning session), Reverend Dickson then testified some period of time

---

[4] In seeking a continuance, undersigned counsel in particular relied upon this Court's April 10th order which provided in pertinent part: "[i]n the event the Governor stays the execution, the hearing shall be postponed until the execution is rescheduled." Jones v. Butterworth, et al., at 1. Since the Governor had decided that Mr. Jones' position in the all writs petition was correct, that the French Report reached an erroneous conclusion, and that further alterations were necessary, and because the execution was being delayed further by the Governor's action, undersigned counsel argued that this Court obviously meant for the hearing to be continued until such time as the alterations had been made and a hearing could be held after fair notice and reasonable opportunity to be heard. (Tr. at 16-18, 20-22, April 15, 1997, morning session).

[5] Judge Soud did grant the part of Petitioner's motion to compel production of public records that related to documents from the judicial electrocution of Pedro Medina. However, the records Judge Soud ordered Respondents to turn over were provided to counsel in a piecemeal fashion throughout the hearing. In fact, the chart recordings from Mr. Medina's execution were not disclosed until Monday, April 21, 1997, after the evidence was closed and when Judge Soud was announcing his decision.

[6] The transcript erroneously spells Reverend Dickson's name as "Dixon."

passed and Mr. Medina "took another deep breath like so. And as I watched he took yet after roughly another 30 seconds or interval he took another deep breath." (Id. 84). This all occurred while the man with the stethoscope was still bending over Mr. Medina. "At some point after that third breath, another roughly 30 seconds or so, as I watched his body just slumped down like that." (Id.).

After Reverend Dickson's testimony, Mr. Jones called the various DOC personnel who had given Mr. French sworn statements regarding the procedure used in Mr. Medina's execution. These witnesses testified that there was no written procedure regarding the preparation of the condemned and the chair for an electrocution. They also testified that they had heard written procedures were being prepared, but had not yet been finalized and distributed. They also identified various documents and records which had not been provided to either Mr. Jones or his counsel.

At ten till 4:00 p.m. on April 15, 1997, the State noted for the record that the DOC had turned over "the documents requested by Mr. Jones' attorney."[7] (Tr. at 97, 4/15/97, afternoon session). Mr. Jones' counsel responded that the documents had been, in numerous places, completely blacked out and were thus illegible. Judge Soud said he would conduct an in camera review overnight.

On April 16, 1997, Mr. Jones began calling witnesses who had been in the witness room for Mr. Medina's execution. After three of these individuals had testified, the judge required undersigned counsel to talk to the over twenty other witnesses and determine

[7] As the week wore on, it became clear that the disclosure was not of all the documents requested by Mr. Jones' counsel. Some documents were not disclosed until Monday, April 21, 1997, after the evidence was closed and the judge was announcing his decision.

whether any of them had matters to cover in their testimony that was 'hew". (Tr. at **43,** April **16, 1997).**

Subsequently, Mr. Jones called Harmon Smith as a witness. Mr. Smith is a correctional officer who was an official witness at the Medina execution. While Mr. Medina was being examined by medical personnel, Mr. Smith observed Mr. Medina's abdomen expand. He saw this happen twice, maybe "ten to fifteen seconds" apart. (Tr. at 65, **4/16/97).**

After the noon recess, which lasted one hour, counsel for **DOC** turned over new, previously undisclosed documents. In addition, Judge Soud ordered the release of some of the redacted material which had been provided to the judge for in camera review overnight, When releasing the previously redacted material, Judge Soud noted that the documents were inconsistent with testimony heard the previous day, "[s]o **I'm** going to want an explanation in the record of why we have only heard in court about three cycles and when I read this document dated November of last year it talks about five cycles of administration." (Tr. at 92, **4/16/97).**

Mr. Jones' next witness was William Mathews, the physician's assistant who attended Mr. Medina's execution. Mr. Mathews revealed in his testimony the previously undisclosed fact that when he examined Mr. Medina after the electrocution, Mr. Medina had "an agonal pulse."' (Tr. at **104, 4/16/97).** Mr. Mathews also testified that when he listened to Mr.

---

[8] Undersigned counsel first learned of this information the morning of April 16th during the interview of Mr. Mathews in the courthouse pursuant to Judge Soud's direction that all witnesses be interviewed. (Tr. at **37-38,** April 15, **1997,** morning session). The State had never previously disclosed that Mr. Mathews found both an agonal pulse and agonal heart sounds.

Medina's chest he heard "agonal heart sounds." (Tr. at **116, 4/16/97). Only** after Mr. Mathews can no longer hear a heartbeat or find a pulse does prison procedure provide for Mr. Mathews to return to his original position thereby signaling the attending physician to go to the condemned and declare him dead. (Tr. at **107, 4/16/97).** That procedure was followed in Mr. Medina's execution, Mr. Mathews was attending Mr. Medina for "a five to ten minute period." (Tr. at **106, 4/16/97).** Mr. Mathews testified that he had only seen the chest movement he observed in Mr. Medina two or three times out of the thirty (30) executions he had attended. (Tr. at **115, 4/16/97).** He also testified that he had found **an** agonal pulse previously in about two or three of the thirty (30) executions he had worked. (Tr. at **104, 4/16/97).** Mr. Mathews also testified that he heard "[a] moan" from Jerry White during his execution. (Tr. at. **108, 4/16/97).**

After the direct, cross, and redirect examination of Mr. Mathews regarding his observations of Mr. Medina's execution, Judge Soud, over objection from undersigned counsel, asked Mr. Mathews his opinion as to whether "you believe Mr. Medina was conscious or sensitive to any external stimuli?" (Tr. at **118, 4/16/97).** Mr. Mathews was thereby allowed over objection to answer that "[i]n my opinion, . .it was an extremely sane and painless death."[9] (Tr. at 119, **4/16/97).** Judge Soud refused to allow undersigned counsel to ask leading questions because "he's your witness." (Tr, at **122, 4/16/97).**

Petitioner was prohibited from questioning the Florida executioner. The judge ruled that undersigned counsel could not learn the identity of the executioner in Mr. Medina's case and thus could not talk to him to learn what he had observed. (Tr. at **94, 4/15/97,** morning

---

[9] In fact the word that undersigned counsel heard instead of "sane" was "humane".

session). Additionally, Judge Soud prohibited Petitioner from presenting the testimony of a variety of experts, including medical doctors and engineers, to support his contention that judicial electrocution in Florida's electric chair in its present condition is cruel or unusual punishment. (Tr. at **18-31, 4/18/97).** Judge Soud found the proffered testimony not credible and not relevant, even though this Court had ordered an evidentiary hearing on the basis of the proffered expert testimony.

Further, Judge Soud prohibited Petitioner from presenting the testimony of Doug Martin, a media witness to Pedro Medina's execution, to the effect that Mr. Medina was still breathing some minutes after the application of electrical current.[10] (Tr. at 34, **4/18/97).** Also, Judge Soud prohibited Petitioner from presenting the testimony of various State of Florida elected and appointed officials on the issue of whether they were deliberately indifferent to the well-being of persons facing judicial electrocution, thereby making judicial electrocution in Florida's electric chair in its present condition cruel or unusual punishment. (Tr. at **64, 4/18/97).** Finally, Judge Soud prohibited Petitioner from calling witnesses to rebut the testimony of Respondents' witnesses. (Tr. at **59, 4/18/97).**

Judge Soud allowed Respondents to present the testimony of an engineer, Dr. Michael Morse (Tr. at **10-114, 4/17/97,** morning session; Tr. at **5-74, 4/17/97,** afternoon session) and an electrician, Jay Wiechert, to refute Mr. Jones' contention that judicial electrocution in Florida's electric chair in its present condition is cruel or unusual punishment. (Tr. at 160-**349, 4/16/97). Counsel** objected to being forced to conduct cross-examination of both Dr.

---

[10]The basis of this ruling was that the testimony was cumulative even though in his order denying relief, Judge Soud found that there was no testimony that Mr. Medina was breathing.

Morse and Mr, Wiechert because he had not had an opportunity to consult with Petitioner's experts **to** determine what particular questions to ask and the constitutional significance of the new information provided during the hearing. (Tr. at **218-221, 4/16/97).** Judge Soud threatened Mr. Jones' entire legal team, consisting of three attorneys, with contempt of court if they refused to conduct the cross-examinations. (Tr. at **224-25, 4/16/97).** In the face of contempt proceedings, counsel proceeded with the cross-examination. **(Tr.** at **231, 4/16/97).** Judge **Soud** denied additional continuances counsel requested in order to consult with experts. **(Tr.** at **231, 4/16/97; 26, 4/17/97,** morning session).

Dr. Morse, one of the Respondent's experts, had inspected Florida's electric chair in **1990** after Jesse Tafero's electrocution, (Tr. at **14, 33, 4/17/97,** morning session). He stated then that there would be no similar reoccurrence. (Tr. at **42, 4/17/97,** morning session). Dr. Morse blamed the Medina fire on a dry sponge in the electrocution headpiece. (Tr. at 25, **4/17/97,** morning session). Under cross-examination, Dr. Morse had no memory of whether a dry sponge was in the headpiece he examined in **1990.** (Tr. at **34-35, 4/17/97,** morning session). He stated that if there were, he would have told officials to remove it. **(Tr.** at **37, 4/17/97,** morning session).

Judge Soud refused to take judicial notice of testimony from a **1990** federal court hearing by an Assistant Secretary for the Florida Department **of** Corrections that there was a dry sponge in the headpiece during Mr. Tafero's execution. (Tr. at **179, 4/17/97,** afternoon session). Additionally, **Judge Soud** would not allow counsel to call this official, David Brierton, **to** testify about the dry sponge. (Tr. at 58-59, **4/18/97).**

The Respondents intended to limit their case to simply introducing into evidence two autopsy reports, (Tr. at 66, **70, 4/18/97),** but Judge Soud ordered Respondents to call two medical doctors to further their case. One of these doctors was William Hamilton, the pathologist who had examined Mr. Medina's body.[11] Even though undersigned counsel had not objected to the introduction of Dr. Hamilton's written postmortem exam (State's Exhibit 3), Judge Soud ordered the Respondents to produce Dr. Hamilton, saying "I'm not medically trained to interpret some of these findings." (Tr. at 72, **4/18/97).** Mr. Jones objected because the judge had ruled that Mr. Jones could not call experts to testify regarding the meaning of the postmortem exam and give medical expert opinion. (Tr. at **72-73, 4/18/97).**

After Respondents' direct examination of Dr. Hamilton, Judge Soud did his own examination. One of his questions was: "Are you able, from the autopsies that you all perform, are you able to determine the moment of death?" (Tr. at 98, **4/18/97).** During undersigned counsel's cross-examination, follow up was done on Dr. Hamilton's answer to Judge Soud's question set forth above: "Now, I believe you indicated in response to a question from the Judge that there's general consensus that consciousness is obliterated immediately. Have you yourself done any testing in that regard?" (Tr. at **111, 4/18/97).** Dr. Hamilton responded: "No, sir." **(Id.).** He indicated that he relied on his reading in stating that there was a consensus. (Tr. at **111, 4/18/97).**

---

[11]Dr. Hamilton had an opportunity to examine Mr. Medina's brain slides prior to testifying. (Tr. at **109,** April **18, 1997).** These samples were not provided to Petitioner until April 17, **1997,** the third day of the hearing. Dr. Hamilton also testified that the tests of the charred material found on the crown of Mr. Medina's head after his execution had not yet been received. (Tr. at **101,** April **18, 1997).**

Thereafter, Judge Soud asked more questions regarding the significance of an agonal pulse, with or without breathing. Finally, Judge Soud asked: "Do you have an opinion, based on reasonable medical probability or certainty, do you have an opinion as to whether or not consciousness can exist with the insertion of **2000** or **2200** to **2400** volts of electricity into the head such as in a judicial execution? Can consciousness exist, in your opinion, or do you have an opinion?" (Tr. at **117, 4/18/97).** Dr. Hamilton gave an opinion that "[i]t's like turning **off** the light switch."[12] (Tr. at **118, 4/18/97).** Mr. Jones objected to the presentation of this evidence in light **of** the Court's refusal to permit Mr. Jones to present contrary expert testimony. **(Tr.** at **72, 119, 4/18/97).** Judge Soud denied Petitioner's request to consult with experts and to present experts to respond to Dr. Hamilton's conclusions. (Tr. at **120, 4/18/97).**

Judge Soud also ordered the Respondents to call Belle Almojera, the attending physician at Pedro Medina's execution. (Tr. at **120, 4/18/97).** Judge Soud denied Mr. Jones' objection to calling witnesses that the Respondents did not intend to call. (Tr. at **123, 4/18/97). Dr.** Almojera testified that he approached Mr. Medina's body only after Mr. Mathews was done with his examination.[13] (Tr. at **128, 4/18/97). Mr.** Mathews' examination took "about three to five minutes." (Id.). Upon examination, Dr. Almojera

---

[12] Again, this was the very issue about which Judge Soud ruled that Mr. Jones could not call his experts to testify. Thus, Judge Soud ordered the introduction of evidence on whether judicial electrocution renders the condemned unconscious, but refused to let Mr. Jones present expert testimony that conflicted with the opinion of the Respondents' witnesses.

[13] In fact **Dr.** Almojera testified that, pursuant to standard procedure, the attending physician does not examine the condemned until after the physician assistant has determined that the condemned is dead. (Tr. at **136,** April **18, 1997).**

heard a "gurgling" sound in Mr. Medina's lungs, (Tr. at 130, **4/18/97),** and observed one additional movement of Mr. Medina's chest. (Tr. at **131, 4/18/97).** When undersigned counsel attempted to ask Dr. Almojera whether he would expect to find visible brain damage in someone who had been electrocuted, the judge on his own found the question going to a matter outside the witness' expertise. (Tr. at **139, 4/18/97).**

After the close of the Respondents' case, Mr. Jones indicated he had numerous witness he wished to call in rebuttal. (Tr. at 142, **4/18/97).** Specifically, he sought to call the experts identified in the all writs petition and Mr. Brierton, the **DOC** official who had conducted an investigation into the Tafero execution and had testified in **1990** regarding the standard practices used in a Florida execution, including the use of a dry sponge sewn into the head piece. Judge Soud refused to allow the testimony. (Tr. at **142, 4/18/97).**

On April 21, **1997** Judge Soud issued an order denying Petitioner's claim, concluding that "Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment."[14] (R. at 223). Judge Soud specifically referred to and relied on the testimony of Dr. Morse and Dr. Hamilton, who both opined that the voltage administered during an execution would render anyone unconscious and thus unable

[14] At the time that Judge Soud issued his order in open court, the State finally delivered to undersigned counsel a copy of the chart recording from Mr. Medina's execution. This was the chart recording that Dr. Morse testified he considered and relied upon in reaching his conclusions. However, the chart recording provided by the State on April **21, 1997,** did not correspond to Dr. Morse's testimony. (Tr. at **61,** April **17, 1997,** morning session).

to "consciously experience anything." (R. at 218).[15] Judge Soud found that "[n]o witness -- expert or lay -- offered any testimony that the movements observed were an effort by [Mr.] Medina to breathe."[16] (R. at 220).

On April 21, 1997, this Court reassumed jurisdiction of the case, ordered Petitioner to file a brief by 5:00 p.m. Monday April **28,** 1997, and set the case for oral argument on Tuesday, May 6, 1997.

When this Court reassumed jurisdiction of the case the same day Judge Soud issued his order, it thereby precluded Petitioner from filing a motion for rehearing with Judge Soud, Petitioner notes that all new exhibits attached to this brief would have been included in Petitioner's motion for rehearing and thus would have been a part of the record on appeal.

ARGUMENT

ARGUMENT I

THE HEARING CONDUCTED BY THE LOWER COURT DID NOT CONFORM TO THIS COURT'S DIRECTIVE TO ASSESS THE "PRESENT CONDITION" OF FLORIDA'S ELECTRIC CHAIR.

In its order directing the circuit court to hold an evidentiary hearing, this Court stated that the subject of the hearing was the "present condition" of Florida's electric chair. However, because of the haste with which the hearing was conducted, the "present

---

[15] Of course, Judge Soud refused to allow Mr. Jones to call his experts who did not agree with the testimony of Dr. Morse or Dr. Hamilton. (Tr. at 120, April 18, 1997).

[16] This completely overlooked the fact that the judge had ruled that Doug Martin's testimony was cumulative and thus precluded because Reverend Dickson had testified regarding his observations of Mr. Medina taking three deep breaths while the physician's assistant was bending over Mr. Medina.

condition" **of** Florida's electric chair was not known during the hearing and, in fact, still is not known.

This Court issued its order on Thursday, April 10, **1997.** At that time, the only official pronouncement from the Department **of** Corrections regarding the condition of Florida's electric chair was the French report, which blamed the malfunction during Pedro Medina's execution on a corroded copper screen in the headpiece.[17] On Friday, April 11, **1997,** the circuit court set the evidentiary hearing to begin on Tuesday, April 15, **1997.** Late on Friday, April **11,** Florida's Governor issued a press release stating that two experts, Dr. Michael Morse and Mr. Jay Wiechert, had examined Florida's electric chair apparatus and had determined that the problem during Pedro Medina's execution resulted from a dry sponge sewn into the headpiece **of** the electrocution equipment and the use of a .9 percent saline solution to *soak* another sponge which sits on the executed person's head. The reports of Dr. Morse and Mr. Wiechert, which were only disclosed at the time of the Governor's press release, recommended numerous changes in Florida's execution procedures. The Governor announced that all recommendations made by these two experts would be implemented **by** the Department **of** Corrections.

Thus, between the time that this Court ordered an evidentiary hearing on the "present condition" **of** Florida's electric chair and the time the evidentiary hearing began, the "present condition" of the electric chair changed. The Governor rejected the French report and ordered that the recommendations of his experts **be** implemented.

---

[17]**During** the evidentiary hearing it was established that the screen was brass and not copper.

In its order directing an evidentiary hearing, this Court further stated, "[I]n the event the Governor stays the execution, the hearing shall be postponed until the execution is rescheduled." This sentence was in the Court's order to address precisely what occurred here. Mr. Jones' All Writs petition had been based upon the erroneous conclusions of the French report. However, before the hearing based on that petition occurred, everything changed. Basically, the Governor agreed with Mr. Jones that the French report was in error and therefore ordered additional measures. Although the Governor had not technically "stayed" Mr. Jones' execution, he had done so de facto by ordering his experts' recommendations implemented. In this situation, this Court's order directed the circuit court to postpone the evidentiary hearing. That is, this Court's order stated that if the hearing was to be on the French report, then the hearing should go forward. However, pursuant to this Court's order, if the hearing would have to be on something new, the hearing should be postponed in order to determine what was new.

On Monday, April 14, 1997, Mr. Jones filed a motion in the circuit court requesting production of any tangible evidence indicating that the recommendations of Dr. Morse and Mr. Wiechert had been adopted. Mr. Jones' motion pointed out that the issue at the evidentiary hearing was the "present condition" of the electric chair and that the "present condition" of the electric chair is the condition with all of the recommendations implemented (R. 21), as Governor Chiles indicated they would be, On April 15, 1997, the circuit court denied Mr. Jones' motion, stating that Mr. Jones' counsel would have the opportunity to cross-examine Dr. Morse and Mr. Wiechert (Tr. at 32, 4/15/97, morning session). As the evidentiary hearing progressed, it became clear that the circuit court's denial of this motion

meant that no expert, including the State's, had tested the "present condition" of Florida's electric chair[18] and that the "present condition" of Florida's electric chair was not known because that condition had changed since Dr. Morse and Mr. Wiechert had examined the equipment and was continuing to change.[19]

During the testimony of the first member of the execution team to testify, it became apparent that the hearing would not reveal the "present condition" of Florida's electric chair, Robert Thomas, assistant maintenance superintendent at Florida State Prison, testified that he assisted during Mr. Medina's execution, as he had in several others (Tr. at **94-96,** 4/15/97, morning session). Mr. Thomas's duties included running tests on the equipment, soaking the head sponge in saline, and securing the straps on the left side of the chair to the prisoner during an execution (Tr. at **96-139, 4/15/97,** morning session). Mr. Thomas testified that there was no written procedure regarding his duties **(Id.** at **109, 131).** However, Mr. Thomas testified that he understood that there would be written procedures regarding his duties in the future but he had not seen them **(Id.** at 133).[20] Mr. Thomas also testified that a load test using a new load bank had been conducted on the electric chair on Monday, April

---

[18]**In** using the term "electric chair" Mr. Jones is referring to all of the electrocution apparatus and procedures, including the headpiece, the head electrode, the legpiece, the leg electrode, the generator, the sponges, the procedures for preparing and testing the equipment, the **tasks** to be performed by each member of the execution team, the procedure for choosing and preparing sponges and saline solution, the chart recorder, the test load, etc.

[19]"Neither Mr. Wiechert nor Dr. Morse had examined the electric chair after April **8th** and thus neither had examined the chair after numerous changes were made. (Tr. at **328, 4/16/97;** Tr. at **82, 4/17/97,** morning session).

[20]One recommendation of the Governor's experts was that written procedures be created regarding all aspects of the execution procedure, including testing the equipment, preparing for an execution and carrying out an execution.

14, 1997 (Id. at 152),[21] but that Mr. Thomas had not been provided any written procedures for conducting that test (Id, at 158).

Mr. Jones' counsel asked that the State be required to produce the written procedure which Mr. Thomas testified were supposed to be forthcoming (Id. at 131). Mr. Jones' counsel objected that he was not able to examine Mr. Thomas regarding the "present condition" of the electric chair because Mr. Thomas did not know the written procedures that were apparently in the process of being promulgated: "I also have questions of the witness regarding the written procedures, since I don't have them it makes me sort of in an awkward position to be asking about a document I haven't seen" (Id. at 132). The court directed counsel to proceed (Id.). Mr. Jones' counsel also objected that Mr. Thomas's revelation that a load test with a new load bank was conducted the previous day was precisely why counsel had requested production of evidence regarding any implementation of the Governor's experts' recommendations prior to the hearing:

> I never knew that a load test was done yesterday, this is the first I learned of it and it's follow up to his questions about a load test, that I have now learned for the first time that a load test was done yesterday. This is why I want discovery to find out because the load test is what Mr. Wiechert and Doctor Morse recommended --

(Id. at 153).

During the testimony of the succeeding witnesses, Mr. Jones' counsel was placed in the same position. Carlton Hackle, construction maintenance superintendent at Florida State

---

[21] The Governor's experts recommended that rather than using a bucket of water as the load bank during tests of the electric chair, the Department of Corrections should obtain and use a more standardized load bank.

Prison, testified that his job includes assisting in executions, including Pedro Medina's (Tr. at 6-7, **4/15/97,** afternoon session). Mr. Hackle learned his job from oral instructions; no written procedure was ever provided to him (Id. at 7). Like Mr. Thomas, Mr. Hackle had been informed that a written procedure was forthcoming, but he did not know when it would be ready **(Id. at 14).** Mr. Hackle had assisted in preparing a part of the draft of that written procedure on Sunday, April 13 (Id. at 15). Mr. Hackle received new oral instructions from Dr. Morse regarding how to prepare the saline solution in which the head sponge is soaked, but had not seen these instructions in writing yet **(Id.** at 78-79).

John McNeill, chief of utilities at Florida State Prison, testified that he has assisted at eight or nine executions (Tr. at 104, **4/15/97,** afternoon session). Mr. McNeill learned his role during executions from being told by his predecessor; he had no written procedures **(Id.** at **108).** Mr. McNeill's duties regarding the electric chair include testing the apparatus, participating in walk-throughs, and assisting at executions **(Id.).** Mr. McNeill also understood that written procedures for carrying out executions had been developed since the testing done by Dr. Morse and Mr. Wiechert, but he had not seen those written procedures **(Id.** at 161). During Mr. McNeill's testimony it was revealed for the first time that Mr. McNeill had replaced the conductor in the leg piece on April 10 **(Id.** at 168), after Dr. Morse and Mr. Wiechert had conducted their examinations. Mr. McNeill also revealed for the first time that another test of the equipment was run on Friday, April 11, when the chart recorder was reinstalled after being checked **(Id.** at 173-74).[22]

[22]The Governor's experts had recommended that the chart recorder be serviced and calibrated so that it would perform accurately.

Harry Tison, a member of the preparation team for executions (Id. at 196), testified that he applies the gel to the prisoner's head and leg (Id. at 202). Mr. Tison has never seen any written instructions regarding the amount of gel to apply (Id. at 205). Mr. Tison had not been advised of any new or written instructions affecting his duties for future executions (Id. at 207).

A.D. Thornton, Assistant Superintendent for Operations at Florida State Prison, testified that he had assisted in about 21 executions, but that there were no written procedures for how people assisting in executions are supposed to perform their functions (Id, at 250). Mr. Thornton testified that prison officials were working on some changes to the execution procedure and on preparing written procedures (Id. at 266, 268-71). Mr. Thornton had not seen the final report, but believed it had been forwarded to Secretary Singletary on Monday (Id. at 271-72). Those preparing the written procedures were the maintenance superintendent, assistant maintenance superintendent, the electrician, the colonel, the administrative secretary, the superintendent and himself (Id. at 272-73). As far as Mr. Thornton knew, those procedures were still in a draft form (Id. at 273).

Finally, at the conclusion of the first day's testimony, the court asked Assistant Attorney General Nunnelley to find out the posture of the drafted procedures by noon the next day, stating: "I don't like these procedures floating out here and remaining drafted and unfinalized and we don't know what's in them" (Id. at 274). After the noon recess on Wednesday, April 16, the State provided the new written protocols governing the electric chair which had just been signed by Secretary Singletary that day (Tr. at 93, 4/16/97).

Later on April **16,** the State was allowed to call one of its expert witnesses, Mr. Wiechert, out of turn in order to accommodate Mr. Wiechert's travel schedule. During his examination, the State began to ask him about the procedures set forth in the written protocols just adopted by Secretary Singletary that day. Mr. Jones' counsel argued:

> I haven't read the document at this point in time, I don't know what it says, but my gut tells me that I'm going to want it in the record and **I'm** going to want to show it to my experts and I want testimony regarding all the procedures and I do not want to be limited. That's my gut, but I have not read it.

(Tr. at 205, **4/16/97).** Mr. Wiechert himself had only seen the written protocols that afternoon and testified, "I've just seen them briefly" (Tr. at **197, 4/16/97).**

While Mr. Wiechert was on the witness stand in the course of his direct testimony, Judge Soud ruled that Mr. Jones' counsel was not entitled to an unredacted version of the new written Execution Day Procedure, Undersigned counsel objected that the redaction precluded disclosure of the times to be followed in the execution day procedure which was critical to determining whether the procedure would work. The redactions also precluded disclosing whose job it was to do what. Mr. Wiechert testified that he was relying on the individuals he had met at the prison to carry out their duties, but as a result **of** the redactions undersigned counsel could not ask questions regarding this portion **of** Mr. Wiechert's opinion (Tr. at **214-15, 4/16/97).** In fact, undersigned counsel has since consulted with an expert who has explained that redactions precluded complete review of the adequacy of the written procedure (see Declaration **of** Dr. Theodore Bernstein, Attachment 5)(hereinafter "Bernstein Declaration").

Since the electric chair was undergoing alterations as the hearing progressed, neither Dr. Morse nor Mr. Wiechert had tested the "present condition" **of** the electric chair. Both Dr. Morse **and** Mr. Wiechert conducted their testing on April **8, 1997,** and neither had returned to Florida State Prison since then (Tr. at **328, 4/16/97;** Tr. at **82, 4/17/97,** morning session). In particular, Mr. Wiechert had not seen the new leg electrode, had not seen the chart recorder since it was calibrated, and had not seen any new sponges (Tr, at **328, 4/16/97).** Mr. Wiechert had not contracts with Florida State Prison to conduct any further tests **of** the electric chair or to assist in any future executions **(Id,** at **329).** Dr. Morse did not know whether any of the new headpieces or legpieces had been tested (Tr. at **80, 4/17/97,** morning session). Dr. Morse recommended testing all **of** the equipment, including the headpiece, legpiece and sponges, with the new load bank, but that testing had not yet occurred **(Id.** at **82).**

The evidentiary hearing thus established that the "present condition" of the electric chair has not been tested and was not evaluated at the evidentiary hearing. Since Dr. Morse and Mr. Wiechert conducted their examinations, **DOC** personnel have altered the leg electrode and the chart recorder has been serviced and recalibrated. Only after the evidentiary hearing was well under way and after numerous witnesses had already testified did Secretary Singletary adopt any written protocols in response to the Governor's directions that Dr. Morse's and Mr. Wiechert's recommendations be implemented. Mr. Jones' counsel had no opportunity to consult with experts regarding the adequacy of the new written

protocols.[23] Pursuant to this Court's order, the circuit court should have postponed the evidentiary hearing until the "present condition" of the electric chair could be fully and fairly evaluated. A new evidentiary hearing is required.

ARGUMENT II

THE EVIDENTIARY HEARING WAS NOT FULL AND FAIR.

As explained in Argument I, the evidentiary hearing was premature in light of the evolving nature of Florida's electric chair. Throughout the hearing, Petitioner learned of new changes to the electric chair. The constant flux of the electric chair made it impossible to present evidence on the constitutionality of its "present condition" and resulted in a hearing which was not full and fair.

The evidentiary hearing was not full and fair for numerous other reasons as well. The circuit court denied all of Petitioner's motions requesting access to evidence and the opportunity to present expert and other testimony. The circuit court allowed the State's experts to provide opinions well beyond their areas of expertise. The circuit court precluded Mr. Jones from presenting relevant testimony and then directed the presentation of the State's case. The circuit court's actions violated due process. A new evidentiary hearing is required.

---

[23]Had counsel had the opportunity to consult with an expert, counsel could have presented evidence that the new written protocols are entirely insufficient and will not forestall future errors in carrying out executions. See Bernstein Declaration.

A. THE CIRCUIT COURT ERRED IN DENYING PETITIONER ACCESS TO NECESSARY EVIDENCE

Prior to the hearing, Petitioner made requests for access to various kinds of evidence, all of which was necessary for Petitioner to prepare and present his case challenging the constitutionality of Florida's electric chair. The circuit court's denial of these requests denied Petitioner due process and a full and fair hearing.

1. Denial Of Access To Tangible Evidence Indicating That The Recommendations Of Dr. Morse And Mr. Wiechert Had Been Implemented

Petitioner requested production of tangible evidence indicating that the recommendations of Dr. Morse and Mr. Wiechert had been implemented (R. 1). As explained in Argument I, none of this evidence was disclosed until the hearing was under way, and even when some was disclosed, it came out in bits and pieces. As Petitioner's counsel explained, this procedure was insufficient because it did not allow Petitioner's counsel to consult with experts regarding the significance of any of this evidence or to prepare a coherent, comprehensive presentation supporting Petitioner's claim.

2. Denial Of Access To The Electrocution Equipment And Of Notice Regarding When The Equipment Would Be Tested

Petitioner also requested access to Florida's electrocution equipment by Petitioner's counsel and experts for purposes of conducting tests similar to those conducted by the State's experts (R. 49) and for notice regarding when the equipment would be tested (R. 49). The circuit court denied these requests, stating, "I'm not aware of any other rule or statute or order that the Governor has to consult with CCR whenever they do testing or getting results

of tests or being there when the electric chair is tested" (Tr. at 24, 4/15/97, morning session),

However, contrary to the circuit court's ruling, due process required that Petitioner be given such access and notice. The State had three experts who conducted tests on the equipment and had one of its attorneys present for the testing. Besides the two experts who testified for the State, Respondent's counsel had the assistance throughout the proceedings of Jim Luther, a South Carolina Department of Corrections official who was also present at the testing (Tr. at 48, 4/17/97, morning session). Clearly the State found it valuable for one of its attorneys to be present for the testing, as the Assistant Attorney General present at the testing is the attorney who examined the State's experts. The State conducted its testing secretly, without any prior notification, and the results of the State's testing were not revealed until approximately 4:30 p.m. on Friday, April 11, after an evidentiary hearing had been scheduled for the following Tuesday. The State was in complete custody and control of the equipment. The State's experts were allowed to testify as to their conclusions regarding the equipment, Petitioner's counsel could not effectively cross-examine the State's experts in part because counsel had not been permitted to examine the electrocution equipment and because Petitioner's experts had not had similar access to the electrocution apparatus, and thus Petitioner's counsel could not seek advice from Petitioner's experts regarding the testing done by the State's experts. See Section B, infra.

3. Denial Of Records Regarding The Medina Execution And Other Public Records

Petitioner requested access to ten pieces of evidence regarding the execution of Pedro Medina (R. 32) and for production of other public records regarding the electric chair (R. 36). In denying these motions, Judge Soud stated

> [f]or reasons recited on the record, for reasons discussed at the previous motion for -- to compel discovery, this motion is in the form of discovery, I'm going to deny the motion. And I'm not sure frankly, I understand, I think where you're going, Mr. McClain, but I'm not sure exactly that it bares on the issue before us about the operation of the chair and its current condition.

(Tr, at 53, 4/15/97, morning session).

Despite this ruling at the beginning of the hearing, as the hearing progressed Judge Soud occasionally directed Respondents and their agents to turn over some of the requested material. When making these rulings, Judge Soud did not state that the material was not discoverable. Thus, on April 15, Judge Soud directed the Department of Corrections to provide its records regarding Pedro Medina's execution to Mr. Jones' counsel by 5:00 p.m. that day (Tr. at 60, 4/15/97, morning session). When the State purported to comply with this order, many pages of the records provided were blacked out and unreadable (Tr. at 97, 4/15/97, afternoon session), The unredacted documents had to be submitted to Judge Soud for an in camera review (Id. at 100). The judge conducted the in camera review that night and the next day disclosed some of the unredacted documents to Mr. Jones' counsel (Tr. at 5, 4/16/97). At that time, Judge Soud ordered the State make one of the witnesses from the previous day available for further testimony, saying, "[s]o I'm going to want an explanation in the record why we have only heard in court about three cycles and when I need this

document dated November of last year it talks about five cycles of administration." (Tr. at 92, 4/16/97). Further, despite the DOC's unsupported claim that all these documents had been previously provided,[24] the documents provided late on April 15 contained new materials not previously disclosed to Mr. Jones' counsel (Tr. at 215, 4/15/97, afternoon session). Counsel for DOC did not contest this. In the evening of April 15, Mr. Jones' counsel requested that court adjourn for the day so that counsel could review the newly disclosed documents: "I would, frankly, would like the opportunity to be able to further review the documents that have been disclosed to me today so that I can make sure that I'm asking all the questions that need to be asked and I would prefer to take a break for the evening at this point in time" (Tr. at 245, 4/15/97, afternoon session). The court directed that testimony continue (Id. at 247).

At the end of the proceedings on April 15, Mr. Jones' counsel pointed out that the last witness had referred to an execution time-line regarding Mr. Medina's execution and that Mr. Jones' counsel had not been provided such a document (Tr. at 275, 4/15/97, afternoon session). On April 16, 1997, the DOC provided a document in apparent response to this request, but that document had been redacted and also had to be examined in camera (Tr. at 82, 88-90, 4/16/97).

"Counsel for DOC stated several times that Mr. Jones' counsel had been informed several times in the previous week that documents were available to be picked up. However, Mr. Jones' counsel pointed out that the invoices on the documents received on April 15 were dated April 11 and April 14 and thus were not previously available to counsel. Counsel for DOC did not contest this.

Additionally, DOC counsel stated on April 15 that DOC had disclosed all information regarding Mr. Medina's execution, However, all that Mr. Jones' counsel had received from DOC prior to the evidentiary hearing was the French report (Tr. 229, 4/16/97).

On April **16,** Mr, Jones' counsel requested that certain witnesses be recalled because documents had been disclosed since those witnesses testified that required reexamining the witnesses:

> [T]he reason I'm making this request is because despite my request to have all public records before the hearing started, I was not provided those records and I had to commence the hearing without those records and as the past day and a half has progressed, records have been provided and in light of the records that have been provided, I felt it necessary to ask for permission to recall individuals regarding records that have been provided to me.

(Tr. at **99, 4/16/97).**

During the hearing, Mr. Jones' counsel learned for the first time that chart recordings were kept of tests of the electrocution equipment and requested access to those records (Tr. at **218, 4/15/97,** afternoon session). During the hearing, Mr. Jones' counsel learned for the first time that a load test using a new load bank had been conducted on April **14** and thus requested the chart recordings from that test (Tr. at **155, 4/15/97,** morning session), This chart recording was not provided until Thursday, April **17 (Tr.** at **131-36, 4/17/97,** afternoon session). After renewed requests on April **17** (Tr. at **194, 4/17/97,** afternoon session), other requested chart recordings of tests and executions were finally provided on Friday, April **18** (Tr. at **40-47, 4/18/97).** Even then, however, the chart recording of Mr. Medina's execution was not provided **(Id.** at **47).** The records custodian for Florida State Prison, who had been directed by the court to bring all records regarding Mr. Medina's execution, did not have those chart recordings at the hearing (Tr. at **98, 4/17/97,** afternoon session). Mr. Jones' counsel repeatedly requested the chart recordings from Mr. Medina's execution, arguing that he needed to provide those recordings to his experts so the experts could "tell me what it

means, particularly Dr. Bernstein, for him to look at it, tell me what it means and help me evaluate both Mr. Morse and Mr. Wiechert's testimony" (Tr. at 48, 4/18/97). Mr. Jones' counsel also objected that the failure to timely provide the chart recordings impaired his ability to cross-examine the State's experts:

> I made a request for the chart recordings before proceedings began and I've made a request each day of these proceedings for the chart recordings from Mr. Medina's execution. Susan Schwartz has been here representing DOC. She has known of that request and those recordings have not been made available. They were not made available to me prior to Mr. Morse' testimony or Mr. Wiechert's testimony and both indicated they had examined and considered the chart recordings. My ability to cross-examine them was impaired by the absence of timely disclosure of those chart recordings.

(Tr. at 51, 4/18/97). Counsel also pointed out that he had specifically objected to cross-examining Dr. Morse and Mr. Wiechert because counsel had not been provided relevant documents:

> I did make a specific statement saying I was not prepared because I didn't have sufficient information. I had not been able to review the documents that had been disclosed and I have not been provided all documents that had been requested from the Department of Corrections and I asked for a continuance on that basis.

(Tr. at 52, 4/18/97). The court finally determined, "[o]ut of precaution," to require that the Medina chart recordings be disclosed (Id. at 53). The chart recordings from Mr. Medina's execution were not provided until Monday, April 21 (Tr. at 4-5, 4/21/97), just before the judge issued his final ruling.[25]

---

[25]In fact, the chart recording from the Medina execution does not correspond to the testimony from Dr. Morse and Mr. Wiechert regarding the chart recording they relied upon. (continued.,.)

During the hearing, Mr. Jones' counsel requested legible copies of the photographs taken of Mr. Medina after he was executed but was still in the electric chair, and Judge Soud ordered those photographs provided (Tr. at **37-38,** 4/15/97, afternoon session). These photographs were provided late on April **15 (Id.** at **158).**

As explained in Argument I, the new written protocols signed by Secretary Singletary were not completed or provided until after the noon recess on April **16.** These protocols consisted of two documents, Testing Procedures and Execution Day Procedures (State's Exs. **4, 5).** The **DOC** requested that the document entitled Execution Day Procedures be provided only in a redacted form (Tr. at 200, **4/16/97),** and the court granted that request **(Id.** at **213).** Mr. Jones' counsel objected to the redactions:

> The problem is what's being redacted is not the name of the person, but the position a person occupies and what they do and when they do it in the course of an execution.
>
> At this [point] in time as to Mr. Medina's execution, all I have is the French report and that was what I used for discovery to find out who to call to this hearing, I've never had the list of people and what they did and when they did it. And in examining these people, I've never known what time they were supposed to be doing something in order to find out if they were doing it at the time they were supposed to be doing it and I have been unable to locate other witnesses to talk to, presuming that I would have time to talk to anybody, to find out if they have any additional pertinent information.

---

[25](...continued)
Both testified that they reviewed the chart recording and relied on it in reaching conclusions (Tr. at **58, 4/17/97,** morning session [Morse]; Tr. at **348, 4/16/97** [Wiechert]). The chart recording, however, shows that the amperage during Mr. Medina's execution was significantly different from the testimony of Dr. Morse and Mr. Wiechert. Of course, since Mr. Jones' counsel was not provided the chart recording of the Medina execution until the hearing was over, counsel could not question Dr. Morse and Mr. Wiechert about it.

> Moreover, this witness [Mr. Wiechert] has testified that part of his opinion is based upon particular people in the particular positions that he's talked to and their ability to carry out their role. It seems to me that since he's relying on the people he's worked with and the position they occupied to black-out and delete those positions and what roles they function and when they do it, renders this document worthless and if it's going to be in this form, I mean I'm not sure what form **I'm** supposed to show my experts, in the redacted form or in an unredacted form. **I** object to the redaction.

(Tr. at 214-15, **4/16/97).** The court overruled the objection **(Id**. at 215). Counsel later renewed the objection to the redactions (Tr. at **171, 4/17/97,** afternoon session).

Although some materials were provided in bits and pieces during the evidentiary hearing, other materials were never provided. Petitioner requested and has still not received access to: (1) blood samples from the body of Pedro Medina; **(2)** the entire, actual headpiece used during the judicial electrocution of Pedro Medina; **(3)** the back-up headpiece available during the judicial electrocution of Pedro Medina; **(4)** any and all sponges used as part **of** the electrocution apparatus during the judicial electrocution of Pedro Medina; and ***(5)*** the actual electrodes used during the judicial electrocution **of** Pedro Medina. Moreover, Respondents specifically successfully moved for an order directing undersigned counsel not to inquire regarding the identity **of** the "executioner," the person who was present for the execution and flipped the switch to start the flow of electrical current. Undersigned counsel thus was never able to question this person as to his or her observations in the death chamber.

Judge Soud's failure to require timely disclosure of the requested materials, his failure to order disclosure of all materials examined in camera, his allowing the **DOC** to provide redacted documents, and his failure to order disclosure of materials Petitioner never received violated Mr. Jones' right to due process of law. All of the evidence requested was

specifically relevant and indispensable to Mr. Jones obtaining a full and fair hearing on the issue of whether "electrocution in Florida's electric chair in its present condition is cruel or unusual punishment," Jones v. Butterworth, et al., No. 90,231 at 1 (Fla. Apr. **10,** 1997). Mr. Jones' experts required this evidence a reasonable time in advance of their testimony in order to fully, fairly and completely testify to the issues before the Court. Respondent's experts relied upon much of this material in support of their testimony. (See, e.g., Tr. at 109, 4/18/97 [Hamilton]; Tr. at 15-16, 4/17/97, morning session [Morse]; Tr. at 167-69, 4/16/97 [Wiechert]). Judge Soud then relied upon their findings in denying Petitioner relief. Allowing Respondents to have discovery of relevant, integral evidence to the issue before the Court but not Petitioner violates due process, See Wardius v. Oregon, **412** U.S. 470, 93 S. Ct. 2208, 2211, 37 L.Ed.2d 82 (1973); Williams v. Florida, 399 U.S. 78, 82, 90 S. Ct. 1893, 1896, 26 L.Ed.2d 446 (1970). See also Smith v. State, 319 So. 2d **14,** 16 (Fla. 1975)(holding that discovery must be a two-way street).

Because Mr. Jones did not receive this information, he was denied a full and fair hearing. As is set forth in Argument 111, infra, had the requested materials been timely provided, Mr. Jones could have presented expert testimony refuting the testimony of the State's experts. Expecting Petitioner to have his counsel and experts adequately analyze this received material while the hearing was going on is fundamentally unfair.

B. **DENIAL OF OPPORTUNITY TO PRESENT EXPERT TESTIMONY**

Before and throughout the evidentiary hearing, Mr. Jones' counsel repeatedly requested the opportunity to present expert testimony in support of Mr. Jones' contentions. Counsel explained that the experts were not presently available because the hearing was

scheduled on such short notice, because materials necessary to the experts' conclusions had not been provided, and, because between the time the All Writs petition was filed and the time of the hearing, the State's position regarding what caused the malfunction during Mr. Medina's execution had changed. The court repeatedly denied counsel's requests to present expert testimony, denying Mr. Jones due process and a full and fair hearing.

On Thursday, April **17, 1997,** toward the end of the day's proceedings, Judge Soud asked counsel for Mr. Jones whether he had called all the witnesses he planned to call (Tr. at **194, 4/17/97,** afternoon session). Counsel indicated that none of the experts retained by Mr. Jones were available (Tr. at **196, 4/17/97,** afternoon session). Counsel then asked Judge Soud to "hold open the hearing, to call them to testify when they are available" because counsel "asked the Florida Supreme Court for an opportunity to present their testimony, [and] they gave it to me" (Tr. at 196, **4/17/97,** afternoon session). After taking the Petitioner's request under advisement overnight (Tr. at **201, 4/17/97,** afternoon session), Judge Soud denied the Petitioner's request to allow each of seven experts to testify (Tr. at **19, 4/18/97).**

After having denied Mr. Jones' requests for the production of relevant documents and for access to the electrocution equipment, Judge Soud found that Mr. Jones' experts could not offer relevant testimony because they had not reviewed relevant information or examined the electrocution equipment:

> The issue in this case . . . is whether Florida's electric chair in its present condition is cruel and unusual. In reading the affidavits of the proffered witnesses, expert witnesses, none have conducted examinations on the electric chair of Florida, none have studied any documentations on the electric chair of Florida, none have participated in any tests on the electric chair

> in the State of Florida, and I would add that since I've already ruled the discovery Rules of Criminal Procedure or even 3.850 do not apply, that I'm not -- that I would rule since discovery procedures do not apply that these individuals do not have any present, current knowledge on the Florida electric chair and its current condition.

(Tr. at **20-21, 4/18/97).** Mr. **Jones'** counsel objected to the court's precluding the testimony of Mr. Jones' experts, arguing:

> The all writs petition was filed on April 3rd, Your Honor. At that point in time the State's position was that the copper screen was the cause of the problem in Mr. Medina's execution and at that time we did not have, for example, the information regarding the agonal pulse, the testimony of Mr. Mathews regarding what he heard in the chest.
>
> * * * *
>
> I also would submit that the testimony of these experts would refute the testimony of the experts called by the State. . . .

(Tr. at **28-29, 4/18/97).** Mr. Jones' counsel repeatedly requested the opportunity to present expert testimony (R. **78;** Tr. at **72, 4/18/97;** Tr. at **120, 4/18/97).** Indeed, when the State had rested its case after placing Medical Examiner Hamilton's report into evidence (Tr. at **70, 4/18/97),** the court required the State to call Dr. Hamilton as a witness because the court needed assistance from an expert: "I'm not medically trained to interpret some of these findings" **(Id.** at 72). Mr. Jones' counsel renewed his request to have his experts explain Dr. Hamilton's report:

> If the State is able to present an expert to do that, I should be able to do that. My problem is they're not here and they're not available at this particular moment, but if Your Honor believes that's important enough to warrant actual testimony, I think I should have the right to also present testimony regarding that matter as well.

(**Tr.** at **73,** 4/18/97). The court denied the request (Id.).

Generally, Judge Soud barred Petitioner's experts from testifying for four reasons: **(1)** their testimony was collectively and individually irrelevant to the issues in this case; **(2)** they demonstrated opposition to the death penalty; **(3)** they were not under subpoena; and **(4)** their testimony, even if accepted, could not satisfy Petitioner's burden of proof. All four bases of Judge Soud's ruling are legally and factually incorrect.

1. Judge Soud Wrongly Ruled That Petitioner's Experts Were Collectively Irrelevant To The Issues In The Case

For a variety of reasons, Judge Soud wrongly ruled that the Petitioner's seven expert witnesses collectively did not offer information relevant to the issues before the Court. Initially, Judge Soud indicated that Petitioners experts were not generally relevant because they had not inspected the equipment Florida uses in judicial electrocution:

> In reading the affidavits of the proffered witnesses, expert witnesses, none have conducted examinations on the electric chair of Florida, none have studied any documentations on the electric chair of Florida, none have participated in any tests on the electric chair **of** Florida, and I would add that since I've already ruled the discovery Rules of Criminal Procedure or even 3.850 do not apply, that I'm not -- that I would rule since discovery procedures do not apply that these individuals do not have any present, current knowledge on the Florida electric chair and its current condition.

(Tr. at **20-21, 4/18/97).**[26]

Of course, Judge Soud denied Mr. Jones' request to have his relevant experts examine the equipment. Essentially, Judge Soud rendered some **of** Mr. Jones' experts irrelevant by

[26] Of course, Dr. Morse and Mr. Wiechert had not inspected the electric chair after numerous changes were made to its condition; yet Judge Soud relied upon their testimony in his order denying relief.

placing a condition precedent on their testimony and then prohibiting them from fulfilling that condition, which they were willing and able to do. While the State had exclusive control over the electrocution apparatus, Mr. Jones' witnesses were all barred because they were denied the opportunity to inspect the relevant apparatus. Mr. Jones' right to due process **of** law was violated. See Johnson (Marvin) v. Singletary, 647 *So.* 2d **106** (Fla. **1994);** Art. I, § **9,** Fla. Const.[27]

Next, Judge Soud stated that the experts were not relevant because

> [i]n examining the affidavits cumulatively in the issue of whether Florida's electric chair as in its current condition is cruel or unusual, citing the Florida Constitution, or cruel and unusual under the U.S. Constitution, that when it addresses the word "cruel" the case law would support that -- in even discussing the matter of cruelty and whether in its current condition it **is** cruel, it goes to the area of consciousness of suffering or consciousness **of** pain. None **of** the affidavits, not one of the proffered affidavits **of** these experts expresses any opinion that, as best I can read them, that Mr. Medina was conscious after the initial jolt of electricity.

(Tr. at **22, 4/18/97).**[28] Judge Soud not only ignored much relevant caselaw on what

---

[27] This **Court's** order in Jones v. Butterworth. et al., No. 90,231, **at** 1 (Fla. April 10, 1997) stated that Judge Soud was to "receive the testimony of engineering and **medical experts** and **such other witnesses as may be presented by the parties. . .."**

[28] However, in his order denying relief, Judge Soud relied upon Dr. Hamilton's and Dr. Morse's testimony indicating "that Medina and any other inmate executed through the introduction **of 2200** to 2350 volts of electricity into the head is rendered unconscious within milliseconds." (Order at 9). **As** a result, Judge Soud concluded, "Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain, and therefore, did not constitute cruel or unusual punishment." (Id. at 14). Thus, Judge Soud did not limit the inquiry to Mr. Medina's execution or whether Mr. Medina was conscious and felt pain, but instead considered whether "any other inmate" would have been rendered unconscious and not able to feel pain. Judge Soud thus refused to hear Mr. Jones' experts on the very issue he subsequently decided.

(continued...)

constitutes "cruel" punishment under the Florida and United States Constitutions, but also misread the affidavits of Petitioner's experts with respect to his narrow definition.

The United States Supreme Court has held as constitutionally "cruel" all punishments that involve "the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976)(opinion of Stevens, Powell, and Stevens, JJ.), penalties which are an affront to "nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958), or punishments which fail to minimize the risk of unnecessary pain, violence and mutilation. Eddings v. Oklahoma, **455** U.S. 104, 118 (1982)(O'Connor concurring)(holding that Eighth Amendment requires all feasible measures be taken to minimize the risk of problems in administering capital punishment). See also Coker v. Georgia, 433 U.S. **584,** 592 (1977)(holding that punishment is unconstitutionally excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"). This standard should apply to any analysis of the constitutional cruelty of judicial electrocution.[29] A punishment is constitutionally cruel if it wantonly inflicts pain, denigrates human dignity, and/or creates a

---

[28](...continued)

Moreover, at the time the declarations and affidavits were prepared, Mr. Jones' experts did not have access to the fact that Mr. Medina had an agonal pulse and agonal heartbeat after the electrical current was turned off. The experts did not have access to the brain slides from Mr. Medina showing no brain damage. In light of this new, previously unavailable evidence, the experts can now give expert testimony about Mr. Medina's consciousness specifically,

[29] Florida courts *are* silent on the Art. I, § 17, Fla. Const., definition of "cruel." When the state courts have not ruled on the meaning of a constitutional term, they should look to federal law to provide guidance. See, e.g., Moore v. State, 452 So. 2d 559 (Fla. 1984)(in construing a section of Florida evidence code which was patterned after Federal Rules of Evidence, the Florida Supreme Court construes the State rule in accordance with federal court decisions interpreting the federal rule); Dudley v. Harrison, McCredy & Co., 173 So. 820 (Fla. 1937)(federal decisions construing provision of federal Constitution guaranteeing right of trial by jury are persuasive in construing state constitutional provisions of like import).

substantial risk of pain, violence, and mutilation. **In** limiting the inquiry to conscious pain and suffering only, Judge Soud ignored the extensive caselaw finding punishment "cruel" where it denigrates human dignity, and creates a substantial risk of pain, violence, and mutilation.

Furthermore, even if this Court accepts Judge Soud's standard for constitutional "cruelty," his statement that none of Petitioner's experts indicate that **Mr.** Medina was conscious after the initial jolt **of** electricity demonstrates an incomplete examination of the proffered testimony, Judge Soud ignored clear statements in the proffers about the conscious pain experienced by persons subject to judicial electrocution.

For instance, Dr. Donald Price stated that "multiple sources **of** evidence strongly indicate that people do not immediately lose consciousness during a judicial electrocution, but rather there is a significant likelihood that they suffer intense horror, dread and excruciating pain." Affidavit of Dr. Donald Price, ¶ 30 (All Writs Appendix Exh. 4). Further, Dr. Orrin Devinsky stated that "[judicial] [e]lectrocution can be intensely painful," and "it is likely that some individuals who are intentionally electrocuted experience great discomfort and pain." Affidavit of Orrin Devinsky, ¶ 10 (All Writs Appendix Exh. **2).** It is fundamental that if one is experiencing pain, one is conscious. Additionally, Dr. Robert Kirschner stated that "a person [being judicially electrocuted] may very well be conscious and experience intense pain, especially in the case of a 'botched' execution. Because there is always a risk of a botched electrocution, there is thus always a risk of an extremely painful, lingering death." Kirschner Declaration, **¶¶ 8-9** (All Writs Appendix Exhibit **1).** Finally, Dr. E.B. Ilgren's affidavit in the All Writs Petition stated quite clearly that "execution by

electrocution does not cause instantaneous death nor does it cause the brain to cease functioning immediately. Therefore, the person being executed feels excruciating pain for an indeterminate, variable period of time." Ilgren Affidavit, ¶ **12** (All Writs Appendix Exh. **12).**

Although the statements submitted by Petitioner's experts in conjunction with the All Writs Petition discuss consciousness generally, they certainly raise the specter that Mr. Medina, himself subject to the very same judicial electrocution upon which Petitioner's experts base their opinions, experienced conscious pain and suffering. If the statements of Dr. Price, Dr. Ilgren, Dr. Kirschner and Dr. Devinsky were not relevant to the Mr. Jones' case because they do not comment about Pedro Medina specifically, then Dr. Morse and Dr. Hamilton should not have been able to testify for the Respondents either because both men based their conclusions about Pedro Medina on general studies and readings involving the effects of electricity on the human body (Tr. at **111, 4/18/97** [Hamilton]; Tr. at 50, **4/17/97,** afternoon session [Morse]). To the extent that two witnesses testified for the Respondents without satisfying one of Judge Soud's relevancy requirements, and Mr. Jones' witnesses were all barred because they did not, Mr. Jones' right to due process of law was violated. See Johnson (Marvin) v. Singletary, **647** So. 2d **106, 111-112** (Fla. **1994);** Art. I, § 9, Fla. Const. See also infra Argument III.

More importantly, at the time Petitioner submitted the affidavits and declarations, on April **2, 1997,** crucial evidence necessary for Petitioner to make a determination about the pain and suffering experienced by Mr. Medina was not yet available. For example, brain samples were not available nor was "medical" testimony about Mr. Medina's condition

following the current application. It would be quite hard to make a statement about the pain suffered by Pedro Medina without having some evidence of what happened to him.

Mr. Jones specifically requested evidence relating to Mr. Medina's judicial electrocution so that his experts could genuinely assess what happened to Mr. Medina. Now that they have had an opportunity to review relevant material, Petitioner's experts are in an even better position to testify to the conscious pain and suffering experienced by Mr. Medina. For instance, Dr. Price now states that

> [m]y overall interpretation of these observations is that the areas of the brain from which these histological sections were taken did not undergo electrically induced structural damage. The nerve cells, glia, and the blood vessels were not damaged by the electrical currents during the execution. This is a critically important finding because it provides direct evidence against the hypothesis that Mr. Medina's brain was immediately destroyed during a judicial electrocution. If his brain was not instantly and permanently incapacitated, then the possibility exists that he experienced conscious pain and suffering. My conclusions based on observations of Mr. Medina's brain are consistent with everything I have observed in my scientific practice.

Declaration of Dr. Donald Price, at ¶ 3 (Attachment 1)(hereinafter "Price Declaration"). Additionally, Dr. Kirschner, having now had an opportunity to review the testimony of Respondents' medically-trained experts, states that

> a. William Mathews' detection of an agonal pulse in Mr. Medina and observations of approximately three chest movements over a five to ten minute period are most suggestive of the agonal respirations experienced by persons during their final moments of life. This agonal respiration is inconsistent with instantaneous death. In other words, Mr. Medina was still alive when Mr. Mathews examined him for signs of life.
>
> b. Dr. Belle Almojera's detection of gurgling in Mr. Medina's lungs after Mr. Mathews completed his examination is most suggestive of the agonal respirations experienced by

persons during their final moments of life. This agonal respiration is inconsistent with instantaneous death. In other words, Mr. Medina was still alive when Dr. Almojera examined him.

c. The physiological reactions noted by Mr. Mathews, Dr. Almojera and lay witnesses, including Reverend Glenn Dickson, raise the possibility that Mr. Medina experienced conscious pain and suffering during the execution.

Declaration of Robert Kirschner at ¶ 7a, b, c (Attachment 3)(emphasis added)(hereinafter "Kirschner Declaration"). Dr. Arden agrees with Dr. Kirschner's conclusions. Having reviewed the hearing testimony and examined autopsy photographs and microscopic slides, he states that: "[a]ny burning or scalding of Mr. Medina's skin could only have occurred while the electrical current was being applied to Mr. Medina's body. The fact that Mr. Medina was still alive while Mr. Mathews and Dr. Almojera examined him after the current was turned **off** means that he was alive when the burning and scalding of his skin occurred." Declaration of Johnathan Arden, at ¶ 3c (Attachment 2)(hereinafter "Arden Declaration").

Mr. Jones' counsel has also spoken with Dr. Kenneth Casey, a neurophysiologist with a special interest in pain caused by diseases **of** the nervous system. Based on his familiarity with the effects of electricity on the human body, specifically the brain, and research he has conducted in this area, Dr. Casey would offer his expert opinion on the conscious pain and suffering experienced by persons executed by judicial electrocution. Affidavit of Hunter **S.** Labovitz, at ¶ 7 (Attachment 6).

Now that **Dr.** Price, Dr. Arden and Dr. Kirschner have had an opportunity to specifically view Mr. Medina's brain slides, which were not available at the time of the **All** Writs Petition, and consider the testimony of Respondents' medically-trained experts, their

opinion that Mr. Medina experienced conscious pain and suffering is more reliable than the contrary opinions of Dr. Morse and Dr. Hamilton, which are based on general theories in no way specific to Mr. Medina's case.

Judge Soud next stated that Petitioner's experts were not relevant because "[n]ot one affidavit that I've read refutes the fact that death occurs even after the administration of the second or third jolt of electricity." (Tr. at 22-23, **4/18/97).** Of course, it is beyond objection that a punishment can be cruel and/or unusual under both the Eighth Amendment and the Florida Constitution even if the punishment ultimately results in death.

Finally, Judge Soud stated that the Petitioner's witnesses were not collectively relevant because

> none of the affidavits state that the defendant was breathing. The affidavits address the central nervous system, muscle contractions and audible sounds emanating from one who is dying. Not one of the affidavits assert that a defendant, after the ones they've studied, Tafero or Medina or White, was breathing.

(Tr. at 23, **4/18/97).** Again it appears that Judge Soud did not read Petitioner's proffered affidavits and declarations. For instance, Dr. Kirschner states that "virtually all witnesses [to the Tafero execution] reported physical movements, breathing activity, and other signs of life prior to the third application of current, activity that cannot be dismissed as 'involuntary' movements of a brain-dead individual." All Writs Appendix Exh. 1, at ¶ 7i n. 1. Dr. Price states that "eyewitness accounts of executions report **that** the prisoners are sometimes seen to continue to breath after the first jolt of electricity." All Writs Appendix Exh. 4, at ¶ 22. Dr. Arden agrees that "observations of what some witnesses described as irregular breathing by Mr. Medina or muscle contractions in his chest are most suggestive of the agonal

respirations experienced by persons during their final moments of life." All Writs Appendix, Exh. 9, at ¶ 3.

Additionally, new information, which was unavailable at the time Mr. Jones filed his All Writs Petition, refutes Judge Soud's contention that Mr. Medina was not breathing after the cessation of the electrical current. Dr. Arden states: "[b]ecause there were at least three and possibly four observed movements of Mr. Medina's chest, it is medically implausible that the observations were of muscles relaxing; it is more suggestive of attempts by Mr. Medina to breathe." Arden Declaration, at ¶ 5c. Dr. Kirschner agrees that "[i]t is improbable for muscle relaxation following a judicial electrocution to be observable more than once. Because there were at least three and possibly four observed movements of Mr. Medina's chest, it is medically implausible that the observations were of muscles relaxing; it is more suggestive of attempts by Mr. Medina to breathe." Kirschner Declaration, at ¶ 9c.

2. Judge Soud Wrongly Ruled That Petitioner's Experts Were Individually Irrelevant To The Issues In The Case

After ruling that Petitioner's experts were collectively irrelevant, Judge Soud then ruled on the relevance of each expert individually. His reasons for prohibiting the testimony of each of Petitioner's seven experts were entirely incorrect.

With respect to Dr. Robert Kirschner, Judge Soud first ruled that Dr. Kirschner could not testify because he only talked about a likelihood of pain and suffering from a judicial electrocution. (Tr. at 24, 4/18/97). Of course, that satisfies Petitioner's burden of proof under Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994)(Eighth Amendment violation is established where State officials are deliberately indifferent to risk of unnecessary pain). Judge Soud also ruled that Dr. Kirschner does not address the current conditions of the

Florida electric chair. (Tr. at **24,** 4/18/97). Of course, information necessary for Dr. Kirschner to do so was unavailable at the time the All Writs Petition was filed.

With respect to Dr. Orrin Devinsky, Judge Soud first ruled that he does not state whether a person retains consciousness for some period during a judicial electrocution. (Tr. at **25,** 4/18/97). This is clearly an erroneous reading of Dr. Devinsky' affidavit. He states that "[judicial] [e]lectrocution can be intensely painful," and "it is likely that some individuals who are intentionally electrocuted experience great discomfort and pain." Devinsky Affidavit at ¶ 10. It is fundamental that if one is experiencing pain, one is conscious. Judge Soud also ruled that Dr. Devinsky was specifically irrelevant because

> [h]e deals with tests and experiments of people who have survived lightning. Surviving lightning is so substantially different than not surviving the electric chair.

(Tr. at **25,** 4/18/97). First, Judge Soud's conclusion is based entirely on the testimony of Respondents' witness Dr. Morse to the effect that a lightning injury "is so much different than a judicial electrocution." (Tr. at 51-52, 4/17/97, afternoon session). Instead of letting Dr. Devinsky testify to explain the relevance of lightning strikes to the Petitioner's case, Judge Soud ruled it irrelevant based on one-sided testimony. This violated Mr. Jones' right to due process of law. See Johnson, 647 So. 2d at 111-112 (Fla. 1994); Art. I, § 9, Fla. Const. See also infra Argument III. Additionally, even if Judge Soud's statement were true, Dr. Devinsky's conclusions are not based simply on the study of lightning strike victims; rather he clearly states that his opinion is based on "the four major forms of external electrical trauma to the brain including trauma from lightning, industrial and accidental

electrocution, electroconvulsive therapy, and electrocution as a means **of** execution." Devinsky Affidavit at ¶ **8.**

Additionally, Dr. Hamilton **(Tr.** at **96, 4/18/97)** relied upon lightning strikes and Dr. Morse conceded that part **of** his hypothesis regarding lack of pain was based on articles involving lightning strike victims. (Tr. at **51, 4/17/97,** afternoon session). To the extent that Judge Soud permitted two witnesses for the Respondents to testify to the significance of lightning strikes to the case, and Dr. Devinsky was barred from such, Mr. Jones' right to due process of law was violated. See Johnson, **647 So. 2d** at **111-112; Art. I, §** 9, Fla. Const. See also infra Argument III. Finally, Judge Soud ruled that Dr. Devinsky had not addressed the current condition **of** Florida's electric chair. (Tr. at **25,** 4/18/97). **Of** course, the current condition was changing throughout the hearing. ***See* supra** Argument I.

With respect to Dr. Theodore Bernstein, Judge Soud ruled his testimony to be irrelevant because it was not based on reasonable medical certainty. (Tr. at 25, **4/18/97).** Of course, Dr. Bernstein has a Ph.D. in engineering; he was retained to assist Petitioner in assessing the electrical integrity of Florida's judicial electrocution apparatus and to determine if the State **of** Florida can carry out future executions without inflicting cruel and unusual punishment. His testimony is based on generally accepted scientific, not medical, principles.

With respect to Dr. Price, Judge Soud specifically ruled that his testimony was not relevant because Dr. Price discusses the pain inflicted by a judicial electrocution and "[plain is not necessarily an issue in this case. . . ." (Tr. at **26, 4/18/97).** However, in denying Petitioner's claim, Judge Soud concluded that

> Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written

> testing procedures and execution day procedures, **will result in death without inflicting wanton and unnecessary pain,** and therefore, will not constitute cruel or unusual punishment.

(R. at 223)(emphasis added), Thus, in denying the crux of Mr. Jones' claim, Judge Soud made pain the issue. Certainly, Dr. Price's testimony could not be any more relevant.

With respect to Dr. E.B. Ilgren, Judge Soud ruled **that** his opinions are "not based on reasonable medical probability or certainty." (Tr. at 26, 4/18/97).

With respect to Professor Deborah Denno, Ph.D., Judge Soud specifically ruled her testimony would be irrelevant because

> [s]he goes through numerous individuals who have been electrocuted by what eyewitnesses have described. Once again, death by electrocution is not the issue in this case; the current condition of Florida's electric chair is. **She's not a witness. In fact, she is not an expert in engineering or electricity.**

(Tr. at 26-27, 4/18/97)(emphasis added). Judge Soud clearly did not understand the significance of Professor Denno's findings to the issue before the Court. Mr. Jones retained Professor Denno as a criminologist and social scientist to testify to relevant facts regarding the use of judicial electrocution. She was not retained to be an expert in engineering or electricity. This Court, however, did not require that one be an engineer or an electrician to testify. Rather this Court stated that Judge Soud "may receive the testimony of engineering and medical experts and **such other witnesses** as may be presented by the parties...," at the evidentiary hearing. Jones v. Butterworth, et al., No. 90,231, at 1 (Fla. Apr. 10, 1997)(emphasis added). Professor Denno's testimony was entirely relevant to both the cruelty and the unusualness of judicial electrocution in Florida's electric chair. See infra Argument III.

Judge Soud also exhibited unwarranted bias toward Professor Denno when he stated that "her affidavit **clearly** takes the position and -- of course, she's entitled to -- that death by electrocution in an electric chair is cruel and unusual. That's the thrust of her affidavit." (Tr. at 26, 4/18/97)(emphasis added). On the contrary, a clear reading of Professor Denno's affidavit indicates that she is simply relating factual, reported information about judicial electrocution and not making legal conclusions.

Finally, with respect to Dr. Jonathan Arden, Judge Soud ruled that his testimony would be irrelevant because his declaration was unsigned. As counsel explained at the evidentiary hearing, Dr. Arden's original signature was not available because of time constraints. However, Dr, Arden confirmed over the telephone that he had signed the originals. The "/s/" was put in place after the discussion with Dr. Arden to signify his approval and signature. As an officer of the Court, counsel represented to Judge Soud that Dr. Arden's original signature was unavailable at the time the All Writs petition was filed. (Tr. at 30, 4/18/97).

3. Judge Soud Wrongly Prohibited Petitioner's Experts From Testifying Because Of Their Alleged Stance Against Capital Punishment

Judge Soud indicated that

> the thrust of all the affidavits and the declarations taken individually and cumulatively are that they are anti-death penalty affidavits, anti-death penalty by electrocution affidavits; that when they are considered and studied, the opinions expressed in them, they would all support the fact that the death penalty by electrocution is inappropriate for the various reasons they've stated.

(Tr. at 19-20, 4/18/97). The personal views of Petitioner's experts, which are in no fashion made clear in their affidavits and declarations submitted with Mr. Jones' All Writs Petition,

are issues bearing on the credibility of their testimony, not the admissibility of their testimony. Therefore, even if Judge Soud's unsupported assumption was correct, it was improper to bar Petitioner's experts on this ground.

It appears that Judge Soud believed that because some of Petitioner's experts expressed their medical and scientific professional opinion that judicial electrocution inflicts conscious pain and suffering on condemned persons, they were therefore against capital punishment and thus prohibited from testifying. Of course, **if** Judge Soud's ruling has any legal merit, then Respondents' experts Mr. Wiechert, Dr. Morse and Dr. Hamilton should not have been allowed to testify because they express the opposite opinion that judicial electrocution is painless. To the extent that Petitioner's experts were barred from testifying because of their opinions about judicial electrocution and Respondents' experts were allowed to testify to the counter position, Mr. Jones' right to due process of law was violated. See Johnson, **647 So.** 2d at **111-112;** Art, **I, §** 9, Fla. Const. See also infra Argument III.

4. Judge Soud Wrongly Barred The Testimony Of Petitioner's Exwerts Because Thev Were Not Under Subpoena

Judge Soud ruled that "further, in support of the order denying the motion, **[I]** would state that none of the witnesses that [Petitioner] ha[s] proffered have been subpoenaed for this hearing and it's been represented to me that they have been subpoenaed or served with subpoenas." (Tr. at 21, **4/18/97).** The April 15th hearing was scheduled during an April 11th telephonic status. The experts in question were all out of state. To obtain an out of state subpoena, one must first obtain a certificate of materiality from the presiding judge. It is clear from Judge Soud's ruling that such a certificate would not be forthcoming. Moreover, the process for obtaining an out of state subpoena takes longer than the time that

undersigned counsel was allotted. Of course, an expert witness **does** not have to first be subpoenaed in order to testify in court. Additionally, none of the Respondent's expert witnesses -- Dr. Morse, Mr. Wiechert, Dr. Hamilton, and Dr. Almojera -- were subpoenaed. Thus any prohibition to testifying should have applied to Respondents' experts as well. To the extent that Petitioner's experts were barred from testifying because they were not under subpoena and yet Respondents' experts were allowed to testify despite not being subpoenaed either, Mr. Jones' right to due process of law was violated. See Johnson, 647 So. 2d at 111-112; Art. I, § 9, Fla. Const. See also infra Argument III.

5. Judge Soud Wrongly Ruled That, Even If Petitioner's Experts Were To Testify, When Considered Together, They Could Not Carry The Petitioner's Burden Of Proof

Judge Soud's exclusion of Petitioner's experts prevented Mr. Jones from meeting his burden of proof in this case and deprived him of an adversarial testing, in violation of his due process rights, Based upon the affidavits and declarations accompanying the all writs petition, this Court ordered an evidentiary hearing. Yet, Judge Soud reviewed the proffered affidavits and declarations of Petitioner's expert witnesses and made the following conclusion:

> In examining the affidavits cumulatively on the issue of whether Florida's electric chair as in its current condition is cruel or unusual, citing the Florida Constitution, or cruel and unusual under the U.S. Constitution, that when it addresses the word "cruel" the case law would support that -- even in discussing the matter of cruelty and whether in its current condition it is cruel, it goes to the area of consciousness of suffering or consciousness of pain. None of the affidavits, not one of the proffered affidavits of these experts expresses any opinion on that, as best as I can read them, that Mr. Medina was conscious after the first jolt of electricity.

(Tr. at **21-22, 4/18/97).** This ruling completely disregarded this Court's order requiring the evidentiary hearing. This ruling reveals Judge Soud's bias against Petitioner because it is clearly different from the standard applied to Respondents' witnesses. **Judge** Soud's summary dismissal of Petitioner's experts based on the content of their affidavits and declarations ignores that their live testimony would have a significantly different impact on the proceedings. Most importantly, the experts' presence at the hearing would enable them to respond to the testimony of the Respondents' witnesses. The affidavits and declarations summarize the experts' education and experience and briefly state their familiarity with the subject matter and their expert opinions. However, they are by nature static while the opportunity to testify allows witnesses to respond to the other evidence presented; this was especially important in this case because much of the evidence was unknown to Mr. Jones' counsel prior to the hearing.

Judge Soud's ruling on Petitioner's experts does not account for new information contained in their declarations that was not available when Mr. Jones' petition was filed. Much of this new information is based on the testimony at the hearing and Mr. Medina's brain slides which were not provided to Mr. Jones' counsel until after the hearing had begun. In addition, Judge Soud prevented Petitioner's experts from gathering information that would have enabled them to assist Mr. Jones in meeting his burden of proof, See infra Argument **IIA.**

Finally, Judge **Soud's** ruling is in stark contrast to his treatment of Respondents' witnesses. The Respondents attempted to rest their case after presenting two autopsy reports; however, Judge Soud ordered them to call Dr. Hamilton and Dr. Almojera as witnesses, In

regard to Dr. Hamilton, Judge Soud indicated that he was not learned enough to draw conclusions from Mr. Medina's autopsy report and required the live testimony to explain its significance. (Tr. at **71-71,** April **18, 1997).** Judge Soud showed no such concern about his ability to understand the equally complex information contained in Petitioner's experts' declarations; rather, he assumed without having them explain their conclusions and opinions that their cumulative testimony would not satisfy Petitioner's burden. In regard to Dr Almojera, **Judge** Soud stated: "**I** feel like to complete the record that **I'm** required to do that **I** ought to hear from the attending physician of Mr. Medina." (Tr. at **120,** April **18, 1997).** Judge Soud revealed no similar desire for completeness when Petitioner requested the opportunity to present his expert witnesses. When considering the testimony of Respondents' witnesses, Judge Soud would not even allow the testimony to be taken by telephone because he stated: "I would prefer to do it in person, I can think better." (Tr. at **122,** April **18, 1997).** Yet, he was able to dismiss Petitioner's experts based solely on their declarations.

C. ERRONEOUS RULINGS PRECLUDING TESTIMONY OF PETITIONER'S WITNESSES AND ALLOWING IMPROPER TESTIMONY BY THE STATE'S WITNESSES

1. Judge Soud Wrongly Prohibited Doug Martin, A News Reporter. And Other Reporters From Testifving

Petitioner sought to call Doug Martin to testify that he observed Pedro Medina's execution and saw Mr. Medina take three spasmodic breaths after the electric current **was** turned off. However, an attorney for Doug Martin appeared and objected to Mr. Jones' efforts to call Doug Martin as a witness. (Tr. at **13, 4/18/97).** Objections were made to all of Mr. Jones' **efforts** to subpoena news reporters to testify regarding the Medina and Tafero executions. (Tr. at **6, 4/15/97,** morning session). Judge Soud ruled that reporters could not

be forced to testify where their testimony would be cumulative. Judge Soud said Doug Martin could not be called because his testimony would be cumulative to Reverend Dickson's testimony. However, Judge Soud subsequently ruled that no one testified that they saw **Mr.** Medina breathing, Doug Martin would have done so, as would Mike Griffin with the Orlando Sentinel. It was wrong to prohibit the testimony on cumulativeness grounds and then find no breathing, If Doug Martin is cumulative, then the "no breathing" conclusion was wrong; to the extent that the "no breathing" conclusion is correct, Doug Martin should have been able to testify.

Similarly, Mike Griffin should have been allowed **as** a witness. Mr. Griffin also observed Mr. Medina's chest movements. (Tr. at **38, 4/18/97).** Ron Word, a reporter with the Associated **Press,** who had witnessed both the Medina and Tafero executions should have also been permitted to be called as a witness. Mr. Jones also sought to call Cynthia Corzo, a reporter with the Miami Herald. Undersigned counsel proffered the newspaper stories written by each reporter. However, Judge Soud ruled that a reporter's privilege precluded their testimony about their observations. Judge Soud's ruling was in essence that given the reporter's privilege, a balancing **of** the parties' respective interest precluded the testimony. However, the threshold issue is whether the reporters were even entitled to the protections of the qualified reporters privilege under the circumstances of this case. **If** they were not, the balancing test does not apply. CBS. Inc. v. Jackson, **578 SO.** 2d **698,** 700 (Fla. 1991)("Because the qualified privilege does not apply under the circumstances of this case, we need not balance the respective interests involved"). Mr. Jones submits, in accordance

with numerous established precedents discussed below, that the reporters here were not entitled to assert the privilege under the unique circumstances of this case.

In Miami Herald Publishing Co. v. Morejon, **561 So.** 2d **577** (Fla. **1990),** this Court observed that, since the issuance of Branzburg v. Hayes, **408 U.S. 665** (1972), by the United States Supreme Court, it had twice addressed the existence and scope of the reporter's privilege in Florida. First, in Morgan v. State, **337 So.** 2d 951 (Fla. **1976),** the Court had recognized for the first time a limited or qualified reporter's privilege against forced revelation **of** confidential sources. Morejon, **561 *So.*** 2d at 579-80. Later, in Tribune Co. v. Huffstetler, **489 *So.*** 2d **722** (Fla. **1986),** this Court held that the limited reporter's privilege applied because there was a confidential source implicated, and "the limited and qualified privilege that a reporter has to protect his sources of information outweighed the public interests in prosecution for a violation of a statute which basically amounted to a private interest in reputation." Morejon, **561 *So.*** 2d at 580.

In More-ion, the Court was faced with a situation where a Miami Herald journalist Achenbach, while researching for an upcoming news article, obtained permission from law enforcement to accompany the officers while on duty at the Miami International Airport. Id. at 578. While on duty, officers arrested Morejon and a companion after a search of their luggage revealed four kilos of cocaine. Id. Achenbach witnessed the episode, and later reported in the newspaper about certain details of the search and arrest, details which were allegedly inconsistent with the officers' account of the incident, Id. Morejon later issued a subpoena duces tecum to the reporter for a discovery deposition. Id.

This Court noted that "we must first inquire whether Achenbach has any privilege whatsoever to refuse to testify." Id. at 580. The Court held that "there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent proceeding." Id. The Court further noted that "the fact that the reporter in this case witnesses the event while on a newsgathering mission does not alter our decision," id., and further explained:

> While we are mindful of the importance of a vigorous and aggressive press, we fail to see how compelling a reporter to testify concerning his eyewitness observations of a relevant event in a criminal proceeding in any way "chills" or impinges on the newsgathering process. Unlike the factual situations on Branzburg, Morgan, and Huffstetler, there is no confidential source involved in this case which may "dry up" of revealed. The only source for Achenbach's article was his own personal observations.

Id. at 580-81. In Mr. Jones' case, the reporters were not being asked to reveal the name of a source, or even communications with a confidential source, Rather, they were only being asked to testify about their observations of an event each had reported on.

This Court next addressed the issue of the reporter's privilege in CBS. Inc. v. Jackson, 578 So. 2d 272 (Fla. 1991). There, a CBS news team had videotaped portions of the defendant's arrest for cocaine possession, and showed excerpts from the videotapes on television. Id. at 699. The defendant Jackson then sought production of those portions of the video that were not broadcast on television. Id. In finding that the reporter's privilege did not apply, the Court noted that the requested information "does not implicate any sources of information," id. at 700, and concluded that "[a]lthough the media may be somewhat inconvenienced by having to respond to such discovery requests, mere inconvenience neither

eviscerates freedom of the press nor triggers the application of the journalist's qualified privilege." Id. As with Morejon, the Jackson opinion establishes that the reporters here were not entitled to any First Amendment protection against testifying in Mr. Jones' case. There is "no realistic threat of restraint or impingement on the news-gathering process," id. at 700, by compelling the reporters to testify in this cause.

Various district courts of appeal have similarly refused to permit reporters/journalists to claim protection under the First Amendment in circumstances analogous to the situation at bar. Most recently, in Gold Coast Publications v. State, 669 *So.* 2d 316 (Fla. 4th DCA 1996), the Fourth District Court of Appeal addressed the following factual scenario. A criminal defendant, George Blancett, was charged with second-degree murder and was interviewed by a reporter, Jeffrey Harrell. Id. at 317. The article was published and included several direct quotations from the Blancett. Id. After the article was published, the State issued a subpoena for the journalist to give a statement. The trial court denied a motion to quash, and Harrell sought certiorari review. Id. The Fourth District observed that "[t]he courts in Florida have generally . . . exten[ded] [First Amendment] protection only to confidential news sources and materials." Id. at 317 (citing Tampa Television. Inc. v. Norman, 647 So. 2d 904, 905 (Fla. 2d DCA 1994)). The Fourth District also noted that the Florida Supreme Court on Jackson had determined that a balancing test was not required if the information sought was not confidential to begin with. Id. at 318. The Fourth District refused to apply the reporter's privilege under these circumstances:

> In the instant case, . . . the source of information provided to the journalist was known by all who read the article or viewed the broadcast--in each case it was the defendant

> himself. Under these circumstances, no persuasive claim for the protection of confidential **news** sources can be made.

Id.

Mr. Jones' case is indistinguishable. Here, there is no confidentiality or source problem. **Mr.** Jones is not asking the reporters to divulge any confidential information, but rather only verify the accuracy **of** the information that has already been reported and disseminated to the general public, **As** in Gold Coast Publications, "no persuasive claim for the protection of confidential news sources can be made."

In **Tampa** Television, Inc. v. Norman, the Second District Court of Appeal addressed the issue of whether the reporter's privilege applied "not only to a reporter's confidential sources, but also to the entire yield of the reporter's newsgathering efforts." Id. at 905. The Second District held that Jackson controlled, and that the privilege did not apply to nonconfidential information. Id. Both Norman and Jackson control the situation presented in Mr. Jones' case.

Assuming arguendo that the reporters were entitled to the protection of the qualified privilege, Mr, Jones could still compel the disclosure **of** the information if **Mr.** Jones can show that the information is relevant to the proceedings, that there is a compelling need for disclosure, and that there are no alternative sources for the information.

2. Judge Soud Wrongly Ruled That The Testimony Of Various Florida Elected And Appointed Officials Was Not Relevant To The Issue Of Whether Judicial Electrocution In Florida's Electric Chair In Its Present Condition Constitutes Cruel Or Unusual Punishment

Judge Soud incorrectly ruled that Mr. Jones could not present the testimony of Florida state officials regarding their attitudes and statements following Mr. Medina's execution.

Although he ruled that such testimony is irrelevant and beyond the scope of the hearing ordered by this Court, Judge Soud clearly relied on the absence of such evidence when he concluded that past, present, and future use of Florida's electric chair does not constitute cruel or unusual punishment because it does not "wantonly inflict unnecessary pain." In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994), the Supreme Court explained the burden on prisoners bringing Eighth Amendment conditions of confinement claims:

> [O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment. To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. In prison-conditions cases that state of mind is one of deliberate indifference to inmate health or safety.

Id. at 1977 (internal quotation marks and citations omitted). Judge Soud's use of "wanton" in his order reveals that the evidence offered by Mr. Jones concerning state officials' deliberate indifference was central to the inquiry; in preventing the presentation of this evidence, Judge Soud denied Mr. Jones a fair hearing.[30]

Mr. Jones' counsel sought to present the testimony of state officials to demonstrate their deliberate indifference to Mr. Jones and other prisoners condemned to die in Florida's electric chair. Because deliberate indifference should be determined "in light of the . . . authorities' current attitudes and conduct," Helling v. McKinney, 113 S. Ct. 2475, 2482 (1993), inquiry into the state of mind of Florida officials is the proper method for Mr. Jones

---

[30]As Mr. Jones argued in his Petition Seeking to Invoke this Court's All Writs Jurisdiction, his claim is a conditions of confinement claim because he is challenging the manner in which Florida carries out judicial electrocution because it poses a substantial risk of harm to him and other inmates condemned to die in Florida's electric chair. Therefore, Mr. Jones is required to prove the deliberate indifference of those state officials who have the authority and ability to avert that risk or harm.

to prove their deliberate indifference. Wilson v. Seiter, 501 **U.S.** 294, 302 (1991)("Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind.") In Farmer, the Supreme Court held that state conduct demonstrates deliberate indifference if "an official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 114 S. Ct. at 1978. Clearly, the statements of state officials offered by Mr. Jones' counsel meet this standard.

Speaker of the Florida House Daniel Webster commented that, "I assume there have been unfortunate incidents with any type of execution. I would assume there is a reason we came to the conclusion (of using the chair) that we did," Jeffrey Brainard, ***Faulty Execution*** Renews ***Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flumes Erupt From the Inmate,*** ST. PETERSBURG TIMES, March 26, 1997, at 11A (All Writs Appendix Exh. 20). Florida Senate President Toni Jennings stated that "[w]e need to make sure [judicial electrocution] is an appropriate way to handle executions, but a malfunction can happen at any point." Jeffrey Brainard, ***Faulty Execution*** Renews ***Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flames Erupt From the Inmate,*** ST. PETE. TIMES, March 26, 1997, at 11A (All Writs Appendix Exh. 20). Stating his support for retaining judicial electrocution instead of switching to lethal injection, Florida Senate Majority Leader Locke Burt stated that "[lethal injection] appears to be a medical procedure and a painless death is not punishment. I think it's important that there is a deterrent and a punishment element." Jackie Halifax, ***Execution Method Debated:***

Legislators Defend Electrocution, **FLA. TIMES-UNION,** March **27, 1997,** at B7 (All Writs Appendix **Exh. 18).** State Senator Charlie Crist noted that "obviously the thing works. It did what it was designed to do. It put [Medina] to death . . . ." Peter Wallsten, ***Medina Felt*** No ***Pain,*** *Say* ***Doctors,*** ST. PETERSBURG TIMES, April 1, **1997,** at **1B** (All Writs Appendix Exh. **24).** Finally, Alan Gutman, Chair of the Senate Criminal Justice Committee, said that "all those in Florida understand that if they kill someone, they're going to go through the same process." Id. at **5B** (All Writs Appendix Exh. 24).

In addition, Governor Lawton Chiles has twice expressed his belief that any problems with Florida's electric chair have been corrected. After Mr. Medina's execution, the Department of Corrections contracted with J. David Hopkins of Fred Wilson & Associates, an engineering firm in Jacksonville, Florida, to examine the electric chair to determine what had caused the malfunction. Mr. Hopkins' report suggested that the deteriorated condition of the copper screen inside the execution headpiece was a "possible cause" of the flames and smoke that occurred during Mr. Medina's execution. See French Report, All Writs Appendix **Exh. 15,** No, **27.** Upon receipt of this report, Governor Chiles stated that the screen would be replaced for every execution and concluded: "It looks like . . . we fixed the problem," ***Executed Man:*** No ***Pain From Flames,*** Docs ***Say,*** MIAMI HERALD, April 1, **1997.** After further examination of the electric chair by Mr. Wiechert and Dr. Morse revealed that the headpiece screen was not the cause of the malfunction, Governor Chiles expressed similar confidence in the different recommendations presented in their reports. The Governor stated:

> I have directed the Florida Department of Corrections to immediately put into place all the recommendations contained in

> both the Wiechert and Morse reports. This will ensure Florida will follow a strict written protocol in future executions. Based on the information these experts have provided, I'm confident the electric chair is working properly and is not a road block to carrying out the law.

Statement by Governor Lawton Chiles Regarding Diagnostic Test on Florida's Electric Chair (Attachment 7).

In addition, the refusal of Florida legislators to adopt another method of execution in light of at least two botched executions in this state reveals their deliberate indifference to the risk posed to Petitioner Jones and other inmates condemned to die in Florida's electric chair. If permitted to testify, Mr. Jones' expert witness Professor Denno would have testified to the responses of other state legislatures to botched executions in the electric chair. Following the botched execution of John Louis Evans in Alabama in April 1983, Illinois rejected judicial electrocution entirely in favor of lethal injection. Declaration of Deborah Denno, Ph.D., at ¶7 (Attachment 4)(hereinafter "Demo Declaration"). Indiana similarly rejected judicial electrocution in favor of lethal injection in response to the botched execution of Gregory Resnover in December 1994. Id. Following a September-October 1990 article in the prison magazine THE ANGOLITE on botched judicial electrocutions in Louisiana, that state rejected judicial electrocution in favor of lethal injection, Id. After a series of botched judicial electrocutions, including that of Derick Lynn Peterson in August 1991, Virginia changed to lethal injection, while retaining electrocution as a choice, in 1995. Id. The indifference of Florida officials to the substantial risk presented by electrocution in Florida's electric chair is evident by their refusal to follow the national trend that has rejected judicial electrocution.

3. Judge Soud Wrongly Allowed The Respondents' Experts To Testify Regarding Matters Outside Their Area Of Expertise

Jay Wiechert, an electrician, was improperly qualified as an expert in "the area of judicial electrocution equipment as an electrical engineer." (Tr. at 166-167, 4/16/97). Counsel for Mr. Jones objected to this qualification on the basis that such an area of expertise does not exist. (Tr. at 165, 4/16/97).

Mr. Wiechert should not have been qualified because Respondents could not satisfy this Court's test for admitting into evidence the testimony of a witness concerning a new scientific principle. In Murray v. State, ___ So.2d , No. 83,556, at 4 (Fla. April 17, 1997), this Court reiterated that

> [T]he burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. . . . The general acceptance under the Frye test must be established by a preponderance of the evidence.

Murray, No.83,556, at 4 (quoting Ramirez v. State, 651 So.2d 1164, 1168 (Fla. 1995)(emphasis in original). To satisfy the Frye/Murray/Ramirez test, a trial court must determine in relevant part "whether such testimony is based on a scientific principle which has gained general acceptance in that particular scientific community; and . . . whether the expert witness is sufficiently qualified to render an opinion on the subject."

Respondents did not establish by a preponderance of the evidence that Mr. Wiechert's testimony about judicial electrocution equipment is based on a scientific principle which has gained general acceptance in the engineering community. Accordingly, Mr. Wiechert's testimony did not satisfy the Frye/Murray/Ramirez test and therefore was improperly admitted by Judge Soud.

Additionally, Dr. Michael Morse, an electrical engineer, was permitted by Judge Soud to testify about medical matters. However, he admitted that he was not qualified to testify about this area. Thus Judge Soud impermissibly allowed Dr. Morse to testify outside the scope of his expertise, As a result of the error in allowing both Mr. Wiechert and Dr. Morse to testify to matters for which they were not qualified, Mr. Jones was denied a full and fair hearing.

4. Judge Soud Wrongly Converted One Of Petitioner's Fact Witnesses Into An Expert And Allowed The Witness To Testify About Matters Upon Which He Was Not Qualified

Petitioner called Mr. William Mathews, a physician's assistant at Florida State Prison, to testify to observations he made of Pedro Medina's chest and pulse during his examination of Mr. Medina following the application of electrical current to Mr, Medina. Counsel did not seek to qualify Mr. Williams as an expert in any field. Following direct examination, cross-examination and redirect examination limited to Mr. Mathews' observations, Judge Soud treated Mr. Mathews like an expert in the pain associated with judicial electrocution. Over counsel's objection, (Tr. at 118-119, 4/16/97), the **Court** asked Mr. Mathews whether

> [i]n your **opinion and experience** in dealing with over 30 executions, was Mr. **Medina conscious or sensitive to any external stimuli** at the time you examined him.

(Tr. at 119, 4/16/97)(emphasis added). Mr. Mathews answered that Mr. Medina was dead within milliseconds of current application, and that he died an extremely painless death. (Tr. at 119, 4/16/97).

Mr. Mathews was not qualified to answer this question. He is not a medical doctor (Tr. at 114, 4/16/97). Accordingly, Mr. Mathews lacked the expertise to reach specific

conclusions about the effects of judicial electrocution on Pedro Medina. See Arden Declaration, at ¶5a; Kirschner Declaration, at ¶9a. (noting that "in order to render the opinions Mr. Mathews gave about the effects of judicial electrocution on Pedro Medina, one need at least be a physician or a Ph.D. in physiology."). As a result of the error in allowing Mr. Mathews to testify to matters for which he was not qualified, Mr. Jones was denied a full and fair hearing.[31]

5. Judge Soud Wrongly Refused To Admit The 1990 Testimony Of A Department Of Corrections Official

Dr. Morse, Respondents' expert engineer, inspected Florida's electric chair in 1990 after Jesse Tafero's electrocution. (Tr. at **14,** 33, 4/17/97, morning session). He stated then that there would be no similar reoccurrence. (Tr. at **42, 4/17/97,** morning session). Dr. Morse blamed the Medina fire on a dry sponge in the electrocution headpiece. (Tr. at 25, **4/17/97,** morning session). Under cross-examination, Dr. Morse had no memory of whether a dry sponge was in the headpiece he examined in **1990.** (Tr. at **34-35, 4/17/97,** morning session). He stated that if there were, he would have told officials to remove it. (Tr. at 37, **4/17/97,** morning session).

Judge Soud refused to consider evidence that contradicted the Respondent's theory as to the role of the dry sponge in creating a botched judicial electrocution. The evidence was important to demonstrate a conflict in Respondents' theory that the dry sponge was the cause

---

[31] Although Judge Soud did not specifically cite Mr. Mathews' testimony in his order denying Petitioner relief, his conclusion that Pedro Medina was rendered immediately unconscious, (R. at 221), tracks the language used by Mr. Mathews. To the extent Judge Soud relied on improper opinion testimony to deny Petitioner's claim, Mr. Jones' right to due process of law was violated as well.

of Pedro Medina's botched judicial electrocution: in 1990, the Respondents asserted that the dry sponge was not a problem for the foreseeable future, but in 1997, they claimed that the dry sponge is the problem.

First, Judge Soud refused to take judicial notice of testimony from a 1990 federal court hearing by an Assistant Secretary for the Florida Department of Corrections, David Brierton, that there was in fact a dry sponge in the headpiece during Mr. Tafero's execution. (Tr. at 179, 4/17/97, afternoon session). Judge Soud refused to take judicial notice in part because he believed there were hearsay problems with the testimony. (Tr. at 178-179, 4/17/97, afternoon session).

The following day, counsel sought to admit the relevant portions of the transcript of the hearing under § 90.803(18) of the Florida Rules of Evidence, a hearsay exception in which the availability of the declarant is immaterial. § 90.803(18)(b) states that a statement that is otherwise hearsay is admissible regardless of the declarant's availability if the statement is "offered against a party and is . . . **[a]** statement of which the party has manifested an adoption or belief in its truth."

Judge Soud denied Petitioner's request, ruling that §90.803(18)(b) did not apply because "the Evidence Code . . . it's very restrictive, it's not -- it is not as easy as one would get the impression of at first . . ." (Tr. at ***58,*** 4/18/97).

His ruling was erroneous. In 1990, in the evidentiary hearing in Buenoano v. Dugger, the very same Respondents offered Mr. Brierton's testimony to support their theory that the dry sponge was not the cause of Jesse Tafero's botched execution. They relied on that testimony in trying to win the case; this constitutes an adoption or belief in its **truth.**

Thus the testimony should have been admissible at Mr. Jones' hearing. See Saudi Arabian Airlines. Corp. v. Dunn, 438 So. 2d 116 (Fla. 1st DCA 1983)(holding that deposition of a third party admissible as adoptive admission against a party who in a previous interlocutory appeal had relied upon the deposition testimony in support of its position and subsequently relied upon it again as a basis for moving for summary judgment). See also McCormick, *Evidence*, §§ 269-270 (2nd ed. 1972)(noting that if A makes a discrediting statement about B, in the presence of B and under circumstances that would call for a protest, silence by B would manifest a belief in the truth of the statement and constitute an admission by conduct). Now that they are claiming the dry sponge is the cause of the Medina botch, their prior conflicting theory should be admissible.

Additionally, Judge Soud would not allow counsel to call Mr. Brierton to testify in court about the dry sponge because "we're now in our fourth day." (Tr. at 58-59, 4/18/97). However, Mr. Brierton's testimony did not become relevant until the third day of the proceedings, when Dr. Morse testified. Counsel tried to introduce the testimony on April 17, following Mr. Morse's testimony (Tr. at 173, 4/17/97, afternoon session); when that failed, counsel moved as expeditiously as possible to call Mr. Brierton as a rebuttal witness.

6. Judge Soud Wrongly Directed Presentation Of The State's Case And Thus Became An Advocate

When the time arrived for the Respondents to put on their case, counsel for the Respondents stated that "our case could be resolved simply by the introduction of [the autopsy reports of Dr. William Hamilton and Dr. Stephen Nelson]." (Tr. at 66, 4/18/97) Instructed by the Judge to address the documents individually, counsel for Mr. Jones stated that "I have no objection to Dr, Hamilton's report. I do object to Dr. Nelson's report."

(Tr. at 68, 4/18/97). The Court received Dr. Hamilton's report as State's Exhibit No.6. (Tr. at 69, 4/18/97). Thereupon, counsel for the Respondents stated that "[i]n that case that would conclude the State's presentation." (Tr. at 70, 4/18/97).

Despite the Respondents resting their case, Judge Soud "question[ed] whether I should have witnesses called . . .." (Tr. at 70, 4/18/97). Judge Soud then decided that "I'll accept [Dr. Hamilton's] report into evidence, **but I'm going to require the [Respondents] to produce Dr. Hamilton for this report. I don't want something thrust in front of me that may or may not -- I'm not medically trained to interpret some of these findings.**" (Tr. at **72,** 4/18/97)(emphasis added). Dr. Hamilton then testified.

By ordering the **State** to call Dr. Hamilton despite the willingness of Mr. Jones' counsel to accept his report into evidence, Judge Soud did not act as a neutral, detached magistrate. Rather he became an advocate for the Respondents, assisting them in important litigation tactics. Judge Soud's abandonment of neutrality prevented Mr. Jones from receiving a full and fair hearing.

Mr. Jones' right to due process of law was further undermined when Judge Soud specifically refused to allow Petitioner's medical experts to testify in order to help Judge Soud interpret Pedro Medina's autopsy findings. (Tr. at 73, 4/18/97; Tr. at 120, 4/16/97). Petitioner's request to present experts like Dr. Hamilton was denied both before and after Dr. Hamilton testified. (Tr. at 73, 4/18/97; Tr. at 120, 4/16/97). Thus Judge Soud only heard evidence from one of the parties on an important issue. Because Judge Soud mandated that the Respondents present the testimony of a pathologist to interpret autopsy results, but twice prohibited Petitioner from presenting his own expert testimony on this

issue, Mr. Jones' right to due process of law was violated, See Johnson, 647 So.2d at 111-112; Art. I, § 9, Fla. Const. See also infra Argument 111.

Then, after Judge Soud had ordered Respondents to present the live testimony of Dr. Hamilton, he stated that "I want to hear from the physician attending the -- attending the Medina execution, which is doctor -- it begins with an A I know." (Tr. at 120). Thus, despite the fact that Respondents had no intention of presenting Dr. Almojera's testimony, (Tr. at 70), Judge Soud required them to present Dr. Almojera.

By ordering the State to call Dr. Hamilton despite the willingness of Mr. Jones' counsel to accept his report into evidence, Judge Soud did not act as a neutral, detached magistrate. Rather he became an advocate for the Respondents, assisting them in important litigation tactics. Judge Soud's abandonment of neutrality prevented Mr. Jones from receiving a full and fair hearing.

Mr. Jones' right to due process of law was further undermined when Judge Soud specifically refused to allow rebuttal of Dr. Almojera's testimony. (Tr. at 142, 4/18/97). Thus Judge Soud only heard evidence from one of the parties on an important issue. Because Judge Soud mandated that the Respondents present the testimony of a pathologist to interpret autopsy results, but twice prohibited Petitioner from presenting his own expert testimony on this issue, Mr. Jones' right to due process of law was violated, See Johnson, 647 So.2d at 111-112; Art. I, § 9, Fla, Const. See also infra Argument 111.

7. Judge Soud Wrongly Denied A Continuance To Allow Mr. Jones' Counsel To Prepare For Cross-Examination Of The State's Experts

After the State was permitted to call Jay Wiechert out of order during Mr. Jones' case so that Mr. Wiechert's schedule could be accommodated, undersigned counsel sought a

continuance in order to consult with experts in order to prepare to cross-examine Mr. Wiechert. At that juncture, undersigned counsel had just been provided the new written procedures adopted by DOC on April 16, 1997, a mere few hours before the cross-examination was to begin, The new written procedures were adopted in part due to Mr. Wiechert's recommendations. Undersigned counsel had not had an opportunity to even read the new written procedures.

Mr. Wiechert in reaching his conclusions had relied on a chart recording made during Mr. Medina's execution regarding the volts and amps being administered. At the time of the cross-examination, DOC had not turned over to undersigned counsel the chart recording of the Medina execution despite repeated requests. In fact, undersigned counsel would not receive the chart recording until Monday, April 21, 1997, long after the State had arranged for Mr. Wiechert to depart the State of Florida and long after the judge had closed the submission of evidence.

Just prior to the commencement of Mr. Wiechert's testimony, undersigned counsel received previously undisclosed documents regarding the electrical cycle during an execution in Florida's electric chair. The new documentation showed that Florida employs a five cycle protocol. The first cycle is for eight seconds at 2300 volts; the second is for 22 seconds at 1200 volts; the third is for 8 seconds at 2300 volts; the fourth is 22 seconds at 1200 volts; and the fifth is 60 seconds at 2300 volts. This documentation contradicted the testimony from the DOC witnesses the day before that a three cycle protocol was followed. It also contradicted testimony from 1990 proceedings following the Jesse Tafero execution, when evidence was presented from a DOC employee that the first cycle was a minute in duration at

2400 volts and 8 amps; the second cycle was 25 seconds at 1200 volts and 4 amps; the third cycle was 30 seconds at 2400 volts and 8 amps; the fourth cycle was 45 seconds at 1200 volts and 4 amps; the fifth cycle was another minute at 2400 volts and 8 amps. The conflicting evidence as to the number of cycles and the duration of the cycles left undersigned counsel unprepared to cross-examine Mr. Wiechert.

Undersigned counsel had received shortly before Mr. Wiechert's testimony sign-out sheets reflecting the days and the reasons some of the electric chair apparatus had been checked out for repairs. Undersigned counsel was not in position without the assistance of his experts to determine the significance of the documentation reflecting changes both before and after Mr. Wiechert's examination of the electric chair.

The testimony of DOC employees preceding Mr. Wiechert's testimony revealed the existence of chart recordings in addition to the one made during the Medina execution. These included chart recordings of the tests conducted by Mr. Wiechert. Undersigned counsel was not provided access to these recordings until Friday, April 18th, and copies were not furnished until Monday, April 21st.

Due to the circumstances occasioned by the noncompliance with Chapter 119, undersigned counsel was left completely and totally unprepared to conduct a cross-examination of Mr. Wiechert. Counsel sought a continuance. The denial of the continuance was a denial of due process and permitted the state to engage in improper ambush tactics. Judge Soud ordered counsel to proceed under threat of criminal contempt.

The same circumstances occurred the next day when the State was permitted to call Dr. Morse out of turn to accommodate his schedule. Undersigned counsel was equally

unprepared to cross-examine Dr. Morse. Counsel was ambushed. Disclosure had not occurred of critical material. An opportunity to consult with experts was denied. Dr. Morse was able to characterize one of undersigned counsel's questions as "the most absurd thing I've ever heard." (Tr. at **43, 4/17/97,** afternoon session). The judge denied Mr. Jones his due process rights by forcing an unprepared counsel to be sacrificed to the State's ambush.

D. **FAILURE TO "REASONABLY CONDUCT" THE HEARING**

In its order directing an evidentiary hearing, this Court stated that the circuit court could further stay Mr. Jones' execution if "additional time is required to reasonably conduct" the hearing. Rather than follow the procedure outlined by this Court, the circuit court forced the hearing to proceed at an unreasonable pace and schedule. The manner in which the hearing was conducted cannot be relied upon to have produced reliable results and denied Mr. Jones due process.

The proceedings began on April **15** at 9:30 a.m. and continued that day until approximately 8:30 p.m., with less than a one hour lunch recess and a twenty-minute dinner recess so that counsel could get something to eat from a vending machine (Tr. at **192, 4/15/97,** afternoon session). During recesses on April 15, the court directed Mr. Jones' counsel to interview witnesses in the hall (Tr. at 37-38, 4/15/97 morning session). The proceedings resumed on April 16 at 9:30 a.m. and continued that day until approximately 9:00 p.m.

On April **17,** after again resuming at 9:30 a.m., Mr. Jones' counsel objected that the schedule imposed by the court was preventing Mr. Jones from receiving a fair hearing:

> MR. MCCLAIN: Well, Your Honor, one matter I was going to bring up this morning which would be related to this is I was

> going to renew my motion for continuance that on Tuesday we went from 9:30 until 8:30, I think it was 8:30 that night, that was 11 hours of Court time. And yesterday we went from 9:30 in the morning until it was sometime after 9:00 o'clock, I didn't notice.
>
> THE COURT: Right at 9:00 o'clock.
>
> MR. MCCLAIN: 9:00 o'clock. That I'm exhausted, and at this point and time the execution is not scheduled, the Governor's Office has advised my office that the execution will not be rescheduled until after Your Honor has ruled. News media accounts indicates that the Governor's Office has indicated it will not be rescheduled until after the Florida Supreme Court has had a chance to view Your Honor's ruling,
>
> There's absolutely no reason to force this hearing on at this juncture, And under the circumstances the working hours that I'm having to work I'm simply not able to spend any time preparing for the next day's testimony. And I'm not prepared for Doctor Morse any more than I'm prepared for anybody else at this juncture.
>
> For that reason I would ask for a continuance. And I would also -- my objection is to continuing on with the proceeding whether it's Doctor Morse or anybody else, I'm equally unprepared for all of them.

(Tr. at 5-6, 4/17/97, morning session).

> You know, yes, Your Honor, given my objection that I'm not prepared for this witness at this juncture, nor am I prepared to proceed at this juncture because of the time parameters that I've been operating under and because I am physically exhausted given the schedule, that's my objection and as I've stated.

(Id. at 9). The court overruled the objections (Id. at 6, 9).[32]

---

[32]Despite the court's ruling on the afternoon of April 17, 1997, Judge Soud stated "I'm just exhausted." (Tr. at 192, 4/17/97; afternoon session.)

Because of the schedule kept by the court, Mr. Jones' counsel were not able to prepare for testimony.[33] Before the hearing began, Mr. Jones filed a motion seeking to depose 65 individuals who possessed information relevant to the issue of whether electrocution in Florida's electric chair in its present condition is cruel and unusual (R. at 42). Judge Soud ruled that

> for the purposes of this hearing . . . the discovery rules will not be applicable absent some -- absent some real critical showing that it should be which it has not been the question. It has not been made manifest to me yet that discovery rule [sic] should apply.
>
> I believe that is such a nature that had the Supreme Court wanted to provide the opportunity for discovery they would have said so in the order. , ,. **So I do not believe from anything that I'm familiar with and aware of that the rules of discovery shall pertain to this hearing at this time.**

(Tr. at **36, 4/15/97;** morning session)(emphasis added). This ruling was wrong for at least three reasons,

Pre-hearing depositions were entirely appropriate discovery. Mr. Jones filed an All Writs Petition with this Court seeking a hearing on the constitutionality of judicial electrocution in Florida's electric chair. Petitioner did not file this claim pursuant to Fla. R. Crim. P. 3.850. Because Mr. Jones was not proceeding under Fla. R. Crim. **P.** 3.850 and because his claim was **most** analogous to a conditions of prison confinement case, the Florida

---

[33] In fact, the State on one occasion objected to undersigned counsel's cross-examination of Dr. Morse. Specifically, the State argued that counsel was asking Dr. Morse about matters on "which he has had no opportunity to prepare for today." (Tr. at **67,** 4/17/97; morning session.)

Rules of Civil Procedure should have governed pre-hearing discovery in Jones v. Butterworth. et al.

The Florida Rules of Civil Procedure allow for pre-hearing depositions **of** lay and expert witnesses who possess information relevant to the subject matter of the pending action. **See** generally Fla. R. Civ. P. 1.280; Fla. R. Civ. **P.** 1.310; **Fla.** R. Civ. **P.** 1.320; Fla. R. Civ. P. 1.390. Additionally, even if this **Court** rules that the proceedings below should have been governed by the Fla. R. Crim. **P.** 3,850, State v. Lewis, 656 **So.** 2d **1248, 1256 (1994),** allows for discovery in Fla. R. Crim. **P.** 3.850 proceedings.

Second, regardless of whether criminal or civil procedure applied to the evidentiary hearing, Mr. Jones' right to fundamental due process was violated by the Judge's ruling.

Third, this Court's order stated that Judge **Soud** should conduct a reasonable hearing. Requiring no leave for depositions but instead requiring counsel to hurriedly interview potential witnesses in the hallway outside the courtroom cannot be considered fair.

ARGUMENT III

THE CIRCUIT COURT VIOLATED MR. JONES' DUE PROCESS RIGHT TO A FAIR HEARING WHEN IT EXCLUDED RELEVANT EXPERT TESTIMONY AND PREVENTED HIM FROM PRESENTING EVIDENCE RELEVANT TO THE COURT'S CONCLUSIONS. MR. JONES WAS DENIED *AN* ADVERSARIAL TESTING AND, AS A RESULT, THE CIRCUIT COURT ORDER WAS BASED SOLELY ON THE RESPONDENTS' EVIDENCE.

In Johnson **v.** Singletary, **647 *So.*** 2d **106** (Fla. 1994), the defendant appealed the denial of his motion for a new trial, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits

stating that another prisoner had confessed to the crime for which Mr. Johnson was convicted and sentenced to death. This Court remanded for a hearing because the trial court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description **of** the perpetrator given at the trial; however, the court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights. The Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n. **3.**

Justice Overton in his concurring opinion noted that Mr. Johnson must be given an opportunity to present evidence corroborating the affidavits; he explained: "This is especially true given that the trial court allowed the State to present evidence that the affidavits were unreliable but did not afford Johnson the **same** evidentiary hearing opportunity." Id. at **111.** Justice Kogan, also concurring, agreed that "[s]ince the trial court effectively had commenced an evidentiary hearing, it was obligated to grant Johnson's request to present testimony of his own in rebuttal." Id. at **112.**

This Court's decision in Johnson confirms that accepting evidence from one party while denying a reciprocal opportunity to the other denies that party's due process right to a fair hearing. Judge Soud similarly accepted evidence from Respondents and repeatedly denied Petitioner's requests to present evidence on the same subjects. Judge Soud's obviously biased rulings on Petitioner's evidence deprived Mr. Jones of an adversarial testing

and resulted in an order based solely on one side of the evidence. The evidence excluded by Judge Soud was essential to allow Mr. Jones to meet his burden at the hearing, as well as to provide adequate opportunity for cross-examination of the Respondents' witnesses and rebuttal of the Respondents' case. Under the dictates of Johnson, a new hearing must be ordered on Mr. Jones' claim.

A. THE CIRCUIT COURT'S CONCLUSIONS ABOUT THE PAINLESSNESS OF DEATH IN FLORIDA'S ELECTRIC CHAIR ARE BASED SOLELY ON THE RESPONDENTS' EVIDENCE BECAUSE JUDGE SOUD PREVENTED MR. JONES FROM PRESENTING EVIDENCE ON THIS ISSUE IN VIOLATION OF HIS DUE PROCESS RIGHTS

Judge Soud's order closes with four conclusions of law regarding Florida's electric chair. He first defines cruel and unusual punishment as "the wanton infliction of unnecessary pain." (R. at 223)(citing Gregg v. Georgia, 428 U.S. 153 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947)). Judge Soud then made the following conclusions about Florida's electric chair:

> Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain, and therefore, did not constitute cruel and unusual punishment.
>
> Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment.
>
> Florida's electric chair in its present condition does not constitute cruel or unusual punishment.

Id. The basis for Judge Soud's conclusion that electrocution in Florida's electric chair does not constitute cruel or unusual punishment is that its use does not result in the wanton infliction of pain, Id.

1. Mr. Jones was denied due process when his experts were not permitted to testify about the pain inflicted by judicial electrocution in his case in chief, to assist counsel in cross-examination of the Respondents' witnesses, and to present rebuttal evidence

Mr. Jones' expert witnesses would have presented relevant evidence on the subject of the pain experienced during judicial electrocution. Their assistance was also necessary for Mr. Jones to have an adequate opportunity to cross-examine the Respondents' witnesses and to present rebuttal evidence, Judge Soud's ruling denying Mr. Jones this right violated his due process rights and deprived him of a fair hearing. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

a. Mr. Jones was denied his right to due process when he was prevented from presenting relevant expert testimony in his case in chief

Dr. Donald Price, a physiologist and Director of Research at the Medical College of Virginia, has specialized training in the field of electrophysiology of pain, which is the branch of neurophysiology that studies the electrical properties of nerve cells, including the effects of electrical stimuli on nerve cells. If Judge Soud had permitted him to testify, see supra Argument II, Dr. Price would have testified that "there is a significant likelihood that Pedro Medina experienced conscious pain and other forms of unnecessary conscious suffering during his judicial electrocution." Declaration of Dr. Donald Price, at ¶ 9.

His conclusion is supported by his examination of Mr. Medina's brain cells which were not available to Mr. Jones' counsel until after the hearing. Dr. Price's study shows "no abnormalities whatsoever in the structure of brain nerve cells or glia cells. If the brain is immediately destroyed in a judicial electrocution, I would have observed abnormalities in my examination, but I found none." Id. at ¶10. If permitted to testify, Dr. Price would explain

the significance of his observation: "This is a critically important finding because it provides direct evidence against the hypothesis that Mr. Medina's brain was immediately destroyed during a judicial electrocution. If his brain was not instantly and permanently incapacitated, then the possibility exists that he experienced conscious pain and suffering." Id. Because Dr. Price was barred from testifying about the conscious pain experienced by a person subject to judicial electrocution but Respondents' experts were allowed to testify to the counter position, Mr. Jones' right to due process of law was violated. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

Additionally, Dr. Robert Kirschner, a board-certified forensic pathologist and international human rights expert, would have testified that

> [t]he physiological reactions noted by Mr. Mathews, Dr. Almojera and lay witnesses, including Reverend Glenn Dickson, raise the possibility that Mr. Medina experienced conscious pain and suffering during the execution.

Declaration of Robert Kirschner, at ¶ 7c. (Attachment 3)(hereinafter "Kirschner Declaration"), Because Dr. Kirschner was barred from testifying about the conscious pain experienced by a person subject to judicial electrocution but Respondents' experts were allowed to testify to the counter position, Mr. Jones right to due process of law was violated. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

Aside from the medical and scientific testimony about pain Petitioner was prevented from presenting, Judge Soud also prohibited Mr. Jones from presenting relevant, historical evidence about the risk of pain during a judicial electrocution in Florida's electric chair. Deborah Denno, a criminologist and social scientist, would have testified that judicial electrocution in Florida carries a significant risk of malfunction. See Declaration of Deborah

Demo, at ¶ 6 (describing history of botched judicial electrocutions in Florida dating from 1979 to 1997)(hereinafter "Demo Declaration").

Caselaw supports the notion that judicial electrocution is constitutionally cruel if it entails a significant risk of problems in its administration. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S. Ct. 869, 878 (1982)(holding that Eighth Amendment requires all feasible measures be taken to minimize the risk of problems in administering capital punishment)(O'Connor, J., concurring); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S. Ct. 374, 376 (1947)(holding that the Eighth Amendment protects against cruelty inherent in the method of punishment); Squires v. Dunner, 794 F. Supp. 1568, 1580 (M.D. Fla. 1992)(holding that "[a]bsent a showing establishing a pattern of malfunctions . . . the Court cannot conclude that unnecessary pain is being inflicted during **executions in the Florida electric chair.**")(emphasis added); Hamblen v. Dunner, 748 F.Supp. 1498, 1504 (M.D. Fla. 1990)(holding that "[i]f a pattern of malfunctions develops, perhaps even as few as two consecutive or nearly consecutive executions, then it may become appropriate to consider **whether the application of electrocution in Florida** is infected with an 'element of cruelty.'")(emphasis added)

Regardless of the caselaw, Judge Soud made the issue of risk of malfunction relevant when he found that "[i]f the [Respondents' recommended] procedures are adopted and followed, all executions in the electric chair will be carried out with the reasonable certainty of no malfunctions in the future." (R. at 222). Thus, based on either legal precedent on what constitutes "cruel" punishment or on the standard announced by Judge Soud, Professor Demo should have been permitted to testify about the botched judicial electrocutions that

have occurred in Florida's electric chair, These malfunctions taken together constitute a risk of future malfunction, in violation of constitutional standards. Because Professor Denno was not permitted to testify to the issue of future malfunctions when Respondents' experts were able to give their contrary opinion, Mr, Jones' right to due process of law was violated. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

b. Mr. Jones' expert witnesses were necessary to provide him an adequate opportunity to cross-examine the Respondents' experts

Dr. Price would also have assisted Mr. Jones' counsel in cross-examining the Respondents' witnesses regarding their testimony that judicial electrocution results in a painless death. With regard to Dr. Morse's testimony about the immediate disruption of brain activity, Dr. Price would have informed Mr. Jones' counsel that this testimony was not based on empirical evidence about brain tissue but on an invalid analogy with muscle tissue. Price Declaration at ¶¶11a and 12a. Dr. Price would also have instructed Mr. Jones' counsel that Dr. Morse's testimony regarding the painlessness of electrocution by lightning reveals a lack of knowledge of the relevant literature. Id. at ¶11b.

With respect to Mr, Mathews, Dr. Price and Dr. Arden would have informed counsel to question the basis of his opinion that Mr. Medina was dead "within milli-seconds," that Mr. Medina experienced an "extremely sane and painless death," and that the brain is "instantly done" in a judicial electrocution. Id. at ¶11c; Declaration of Dr. Jonathan Arden, at 74a (Attachment 2)(hereinafter "Arden Declaration"). In addition, Dr. Arden would have informed Mr, Jones' counsel that Mr. Mathews was permitted to testify beyond his field of expertise. Arden Declaration at ¶5a. He would have explained the basis for this conclusion: "(1) Mr. Mathews is not a neurologist or a pathologist; (2) Mr. Mathews lacked the expertise

to reach specific conclusions about the effects **of** judicial electrocution on Pedro Medina; and **(3)** Mr. Mathews was describing findings that would only be visible to a pathologist conducting an autopsy or examining results of an autopsy." Id.

Dr. Price would also have instructed Mr. Jones' counsel to cross-examine Dr. Hamilton regarding the following issues: what empirical data supports his conclusion that the brain can be stopped with electricity without causing any physical damage; how much current actually reaches the brain during a judicial electrocution and the basis for his answer; how much current is required to incapacitate the brain and the source of his information; and how much current is diverted around the brain because of the fluids surrounding the brain and the source of his information. Price Declaration, at ¶11d. Dr. Arden would have instructed Mr. Jones' counsel to question Dr. Hamilton concerning the basis for his opinion that the burns on Mr. Medina's head and legs occurred post-mortem. Arden Declaration, at ¶4b.

In addition, Dr. Arden would have assisted Mr. Jones' counsel in their cross-examination of Dr. Almojera. **Dr.** Arden would have alerted counsel to ask Dr. Almojera the basis for his opinion that the chest movement he observed during his examination of Mr. Medina was muscle relaxation. Arden Declaration, at ¶4c.

c. Mr. Jones' experts were essential to his rebuttal of the Respondents' evidence. The exclusion of their testimony violated his due process rights

Dr. Price would have informed Mr. Jones' counsel that the certainty expressed by Dr. Morse, Mr. Mathews, and Dr. Hamilton about the painlessness of death by judicial electrocution is completely lacking in credibility due to the absence **of** any objective,

scientific evidence proving the immediate loss of consciousness during executions in the electric chair. Price Declaration at ¶12b. According to Dr. Price, whose opinions are based on his **own** research about the response of nerve cells and the central nervous system to pain, the testimony of the Respondents' witnesses regarding the painlessness of judicial electrocution **is** completely lacking in credibility. **Id**. at ¶12b and **12d.** Dr. Price would have offered the following testimony:

> In the absence of any objective, scientific evidence for immediate loss of consciousness during an electrocution in the electric chair, such as **electroencephalographical,** morphological-pathological, or behavioral evidence, the only evidence bearing on the issue is that of patient reports of effects **of** electrical stimulation of sites within the brain, reports **of** victims of other types of electrocution, physiological evidence, and histological evidence. These multiple sources of evidence strongly indicate that people do not immediately lose consciousness during a judicial electrocution, but rather there is a significant likelihood that they suffer intense horror, dread, and excruciating pain, and it is likely that this is what happened to Mr. Medina.

Price Declaration, at ¶12f. These conclusions are supported by Dr. Price's review of Mr. Mathews' testimony, and an examination of recently-received brain samples from Pedro Medina's autopsy. Regarding the observations of the physician's assistant, Dr. Price has stated:

> **I** would have testified that [Mr. Mathews'] detection of an irregular heartbeat in Mr. Medina upon examination strongly supports my conclusion that Mr. Medina likely experienced conscious pain and suffering during his judicial electrocution. The fact that the stoppage of the heart is by no means immediate, and can take as long as several minutes (as apparently was the case with Mr. Medina), is critically important evidence that the electrochemical functioning **of** the brain is not immediately destroyed during an electrocution. The beating of **the** heart, like the functioning of the brain, requires that impulses travel throughout the cells **of** the heart. The

> impulses of the heart cells, like nerve cell impulses of the brain, require depolarization followed by repolarization. If the electrical current during Mr. Medina's judicial electrocution was not sufficient to stop the flow of impulses in the heart, what reason do we have to conclude that impulses in the brain were stopped? If impulses in the brain were not prevented from occurring, then it is likely that pain and suffering occurred during the period of time that electrical currents were applied to Mr. Medina's body.

Price Declaration at ¶12e.

To rebut Dr. Morse's testimony based on analogies to muscle tissue, Dr. Price would testify that "[i]f depolarization of nerve cell membranes, caused by the electrical current, is followed by repolarization, then their functioning does not necessarily terminate during the time that alternating electrical currents are applied during a judicial electrocution. The implication of alternating depolarization and repolarization of nerve cells during electrocution is that the prisoner suffers excruciating pain." Id. at ¶12a. According to Dr. Price, Dr. Morse's opinion, based on muscle tissue, is invalid because muscle tissue, unlike nerve cells, is incapable of repolarization. Clearly, his testimony in this area would have been relevant to the circuit court hearing and his presence was necessary to provide Mr. Jones a fair hearing. Because Judge Soud refused to allow Dr. Price to testify to rebut certainty expressed by Dr. Morse, Mr. Mathews, and Dr. Hamilton about the painlessness of death by judicial electrocution, Mr. Jones right to due process of law was violated. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

Dr. Arden would have refuted the testimony of Dr. Hamilton that the burning and scalding of Mr. Medina's body occurred post-mortem, Dr. Arden would testify that this conclusion is contradicted by the observations of Mr. Mathews and Dr. Almojera: "The

burns and scalding could only have occurred post-mortem if Mr. Medina died within milliseconds. However, because we now have medical confirmation that Mr. Medina was alive between five and ten minutes after the application of electrical current to his body was completed, Dr. Hamilton's conclusions are medically infeasible." Arden Declaration, at ¶5b. Judge Soud's refusal to allow Dr. Arden to testify to rebut Dr. Hamilton's findings about the timing of the burns to Pedro Medina's body violated Mr. Jones' right to due process of law. See Johnson, 647 So. 2d at 111-12; Art. I, § 9, Fla. Const.

Mr. Jones' experts, if permitted to testify, would have refuted the Respondents' attempt to characterize the agonal pulse, the irregular heartbeat, and the chest movements as consistent with an instantaneous death. Dr. Price has reviewed the hearing testimony and concluded that "the fact that Mr. Mathews detected an irregular heart beat in Pedro Medina undermines the entire hypothesis of the Respondent's experts that Mr. Medina was instantly and permanently rendered unconscious." Price Declaration, at ¶12e. Dr. Arden agrees and has stated: "I would have testified that [Mr. Mathews'] statement about Mr. Medina being dead within milliseconds was clearly refuted by his detection of an agonal pulse." Arden Declaration, at ¶5a. Dr. Kirschner agrees about the significance of the agonal pulse: "The detection of an agonal pulse also refutes Mr. Mathews' testimony about the condition of Mr. Medina's heart. Because Mr. Mathews detected an agonal pulse, Mr. Medina's heart, by definition, had to be pumping blood." Kirschner Declaration, at ¶9a.

Dr. Robert Kirschner would also testify that:

> The physiological reactions noted by Mr. Mathews, Dr. Almojera and lay witnesses, including Glenn Dickson, raise the possibility that Mr. Medina experienced conscious pain and suffering during the execution. Mr. Medina's scalp, leg and

> face were burned and scalded while he was still alive. Any burning or scalding of Mr. Medina's skin could **only** have occurred while the electrical current was being applied to Mr. Medina's body. The fact that Mr. Medina was still alive while Mr. Mathews and Dr. Almojera examined him after the current was turned off means that he was alive when the burning and scalding of his skin occurred.

Kirschner Declaration, at ¶7c-d. Dr. Arden agrees with these conclusions that Mr. Medina was still alive after the electrical current was withdrawn: "these observations of what some witnesses described as irregular breathing by Mr. Medina or muscle contractions in his chest are most suggestive of the agonal respirations experienced by persons during their final moments of life. This agonal respiration is inconsistent with instantaneous death." Arden Declaration, at ¶3. Dr. Arden would explain the basis for his conclusion:

> First, Dr. Almojera made his observations at least five minutes after the current was turned off. While muscle relaxation is possible immediately after the current is turned off, it is medically unfeasible to have muscles relaxing five minutes after the current ends. Second, when Dr. Almojera's observations are combined with those of Mr. Mathews, there were approximately four observed movements of Mr. Medina's chest after the current was turned off. It is medically impossible for muscle relaxation following a judicial electrocution to be observable more than once. In other words, any true muscle relaxation would have occurred only once. Because there were at least three and possibly four observed movements of Mr. Medina's chest, it is medically implausible that the observations were of muscles relaxing; it is more suggestive of attempts by Mr. Medina to breathe.

Id., at ¶5c.

Judge Soud concluded that death in Florida's electric chair is instantaneous and painless on the basis of the Respondents' evidence alone. Judge Soud's ruling on Mr. Jones' request to present expert testimony precluded Mr. Jones from presenting any evidence on this

issue and prevented **Mr**, Jones' counsel from effectively cross-examining the Respondents' witnesses. Mr. Jones' expert witnesses would have rebutted the Respondents' evidence that judicial electrocution results in instantaneous death. Failure to allow Mr. Jones' experts to so testify violated Mr. Jones' due process rights. Johnson, **647 So.** 2d at **111-12; Art.** I, § 9, Fla. Const.

2. Judge Soud's order relies solelv on the Respondents' evidence in violation of Mr, Jones' due process rights

In order to reach his conclusion that death in Florida's electric chair is not cruel and/or unusual punishment, Judge Soud relied on the testimony of the following four Respondent witnesses that judicial electrocution results in instantaneous and painless death:

- **Dr.** William F. Hamilton, the pathologist who performed Mr. Medina's autopsy, under questioning by the court, admitted that he could not determine the moment of death based on an autopsy, but stated his opinion that death by judicial electrocution is instantaneous due to massive depolarization of the brain.[34] Dr. Hamilton stated: "**I** can say, and **I** think there's pretty good agreement on that, that when high voltage is applied to the head and passes through the head and then into the body before exiting from either an arm or leg, that consciousness should be obliterated immediately." (Tr. at **98, 4/18/97).** He then explained that the instantaneous depolarization of the brain is "like turning off the light switch." (Tr. at **118, 4/18/97).** Judge **Soud** relied on this comparison in finding that Mr.

[34] Dr. Hamilton was called only after Judge Soud ordered the Respondents to produce him to explain his post-mortem report, which had been introduced without objection. (Tr. at **72,** April **18, 1997). Mr.** Jones objected to Judge **Soud's** order and renewed his request to be permitted to present medical experts. (Tr. at **72-73,** April **18, 1997;** Tr. at **120,** April 18, **1997).**

Medina's death was instantaneous. (R. at **217).** Dr. Hamilton also testified that during his autopsy of Mr. Medina, he observed no physical damage to the brain. He stated that his finding was insignificant because "[o]ne can pass electrical current through the brain and totally stop it without producing any grossly obvious injuries." (Tr. at **91, 4/18/97).** Judge Soud's order specifically refers to Dr. Hamilton's observation in support of his conclusion that Mr. Medina's death was instantaneous. (R. at **217).**

- William Mathews, the Florida State Prison physician's assistant who first examined Mr. Medina, also testified that judicial electrocution results in instantaneous and painless death. When asked by the court whether Mr. Medina was "conscious or sensitive to any external stimuli" when examined, Mr. Mathews stated: "In my opinion, when the electricity from the electrodes, when the current was turned on, he was dead within milli-seconds, thousandths of a second, and it was an extremely sane and painless death." (Tr. at **119,** 4/16/97).[35]

- Jay Wiechert, one of the State's experts who examined and tested the electric chair, testified that four and a half or five amperes was "high enough to perform a painless execution." (Tr. at 295, **4/16/97).** After undersigned counsel established that Mr. Wiechert

---

[35] Mr. Jones called **Mr.** Mathews to testify regarding his observations during the Medina judicial electrocution. He was not qualified as an expert witness in any field, nor was he asked by Mr. Jones to render an expert opinion on any subject. However, over counsel's objection (Tr. at **118-119,** April **16,** 1997), Judge Soud treated Mr. Mathews as an expert in conscious pain and suffering and asked him for his opinion as whether Pedro Medina felt pain during his execution. (Tr. at **119,** April **16, 1997).** Later, Judge Soud refused to allow Mr. Jones' counsel to ask leading questions of Mr. Mathews because "he's your witness." (Tr. at 122, April **16, 1997).**

had no medical training, (Tr. at 296, 4/16/97), Judge Soud granted a motion to strike Mr. Wiechert's opinion as evidence. (Tr. at 296-297, 4/16/97).

- Michael Morse, an electrical engineer who also examined and tested the electric chair, testified that both Mr. Tafero and Mr. Medina died "humane and painless" deaths. (Tr. at 15, 4/17/97, morning session; Tr. at 73, 4/17/97, morning session; Tr. at 105, 4/17/97, morning session). When asked his opinion about Mr. Medina's death, he stated: "I believe that there's no question that he was rendered unconscious immediately and unable to feel pain." (Tr. at 16-17, 4/17/97, morning session). Dr. Morse also testified that 4.5 amps is sufficient to cause instantaneous depolarization of the brain, (Tr. at 7, 4/17/97, afternoon session). This testimony supported Judge Soud's conclusion that Mr. Medina was rendered brain dead and unconscious instantaneously. (R. at 221).

3. The Respondents' evidence is unreliable because the witnesses offered opinion testimony beyond their areas of expertise and because contradictions within their testimony undermine the reliability of their conclusions

Dr. Hamilton admitted that he had performed no personal testing or research to determine that judicial electrocution results in the immediate obliteration of consciousness, rather his opinion on this question was based on his reading. (Tr. at 111, 4/18/97). This testimony is beyond the scope of his expertise as a pathologist and cannot support Judge Soud's conclusions about Florida's electric chair. See Jordan v. Florida, No. 84,252 at 9-10 (Fla. Apr. 17, 1997)(holding that "[s]imply reading large amounts of scientific literature, all of which falls well outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert."). Mr. Mathews, the physician's assistant, described his limited role in the execution:

> I examine the wrist to try to palpate a pulse, if I can find one. And when I can assure myself that I do not feel a pulse, I try to listen to the chest to see if I can hear a heartbeat. I try several locations on the chest and the heart area and if I can no longer hear or do not hear a heartbeat, then at that point my job is through.

(Tr. at 107, 4/16/97).[36] Despite his lack of a medical degree or any education regarding the effects of electricity on the human body, the court allowed Mr. Mathews to offer his opinion that Mr. Medina's death was instantaneous and painless. This testimony is clearly beyond Mr. Mathews' limited expertise. See Arden Declaration, at ¶ 5a; Kirschner Declaration, at ¶ 9a.

Michael Morse, an electrical engineering professor, was also permitted to testify beyond his expertise that death by judicial electrocution is instantaneous. However, Dr. Morse does not have a medical background and is not trained to determine when death occurs. (Tr. at 32-33, 4/17/97, morning session). In addition, he offered an insufficient basis for his opinion that judicial electrocution is painless: "I base this on hypothesis I developed some years ago in which I have been able to test through the availability of technical and scientific literature." (Tr. at 105, 4/17/97, morning session). See Jordan, supra. Dr. Morse also testified that his opinion that it is impossible for someone to be sentient after the initial jolt of electricity is based on his reading. (Tr. at 113, 4/17/97, morning session). Similarly, when asked how many amps are necessary to effect instant

---

[36] Mr. Mathews also testified that judicial electrocution causes all of the individual's blood to coagulate. (Tr. at 118, April 16, 1997). Dr. Hamilton later testified that he had performed autopsies on 27 persons judicially electrocuted in the State of Florida, (Tr. at 79, April 18, 1997), and that he had not seen coagulation in any of these autopsies. (Tr. at 108-109, April 18, 1997).

depolarization of the brain, Dr. Morse responded: "Well, it's a very hard question to answer because this hasn't been something that has been heavily researched, if you will. There's really just history. I can tell you from my readings and from my knowledge of history and from some of the cases that I've looked at it is a value significantly less than what is probably used in a typical electrocution." (Tr. at **7, 4/17/97,** afternoon session). Despite his initial hesitation to answer the question, Dr. Morse willingly concluded that **4.5** amps was sufficient to cause instant depolarization of the brain. Id.

However, Dr. Morse's responses to other questions regarding the effect of electrocution on the body reveal that he is not qualified to give his opinion that death is instantaneous. When asked his understanding of how electrical current distributes itself in the body during a judicial electrocution, Dr. Morse **stated** that most of his analysis of current distribution had been done on a limb only; he then stated: "it's kind of crude and I'm just starting into it on the way current might distribute itself in an execution." (Tr. at **42, 4/17/97,** afternoon session). Dr. Morse also admitted that bone density might have an effect on the distribution **of** electrical current throughout the body, but that he had not studied bone structure variability in regard to resistance to electrical current. (Tr. at **42-43, 4/17/97,** afternoon session). He was also unable to say whether electricity causes the blood to coagulate. (Tr. at **46,** 4/**17/97,** afternoon session).

The testimony of witnesses' observations that undermines the conclusion that **Mr.** Medina's death was instantaneous and therefore painless. Mr. Mathews and Dr. Almojera's observations at the execution reveal that Mr. Medina was still exhibiting signs of life after the electrical current was turned off. Mr. Mathews' testified that during his examination of

Mr. Medina, which lasted for five to ten minutes after the current was turned **off,** he heard both an agonal pulse and "extremely irregular" heart sounds. (Tr. at **113, 4/16/97).** Although Mr. Mathews testified that an agonal pulse is not unusual following an execution, he admitted that it occurred in only two or three out of the thirty executions he has attended. (Tr. at **104, 4/16/97).** In addition, Mr. Mathews testified that he observed Mr. Medina's chest move approximately three times over a five to ten minute period (Tr. at **106, 4/16/97);** Mr. Mathews had observed similar chest movements in two or three other executions out of the thirty that he has witnessed, (Tr. at 115, **4/16/97).** Judge Soud accorded no significance to the agonal pulse, the irregular heartbeats, and the chest movements that Mr. Mathews witnessed.

Dr. Almojera examined Mr. Medina only after Mr. Mathews concluded his three to five minute examination; at that time, there was no pulse or breathing sounds and Mr. Medina's pupils were dilated and nonreactive to light. (Tr. at **130, 4/18/97).** However, Dr. Almojera did observe a "gurgling" sound in Mr. Medina's lungs, which he testified would indicate "air pass[ing] through fluids and some mucous." (Tr. at **129, 4/18/97).** Significantly, despite the time lapse from the cessation of the electrical current and Dr. Almojera's examination of Mr. Medina, the doctor also observed one chest movement during his own examination of Mr. Medina. (Tr. at **135, 4/18/97).**

Judge Soud's order overlooks these first-hand observations and relies on Dr. Hamilton's testimony to conclude that they are consistent with an instantaneous death. Judge Soud states that Dr. Hamilton testified that "an agonal pulse without breathing is clearly indicative **of** brain and respiratory death." (R, at **217).** However, when specifically

questioned about this issue by the court, Dr. Hamilton stated: "That just means that the heart is still pumping ineffectively and its process of dying but that respiratory movement are [sic] not taking place. The lungs are not filling up with air and there's no gasping going on." (Tr. at **115, 4/18/97).** When asked to explain in "layman's terms," Dr. Hamilton continued: "Well, that's the situation of respiratory arrest and regardless of the conditions of the heart, if you have a condition of respiratory arrest the heart is not going to continue beating for very long because it's being depraved [sic] of oxygen and within a very short period of time it will stop." Id. Dr. Hamilton never stated that an agonal pulse without respiratory activity indicated brain death. Therefore, his testimony regarding the presence of an agonal pulse, with or without breathing, does not support Judge Soud's conclusion that Mr. Medina was brain dead and therefore suffered no pain. (R. *at* 221).

B. JUDGE SOUD'S FINDING THAT THE EXECUTIVE BRANCH HAS CORRECTED ANY PROBLEMS WITH FLORIDA'S ELECTRIC CHAIR IS BASED ONLY ON THE RESPONDENTS' EVIDENCE. MR. JONES WAS PRECLUDED FROM PRESENTING RELEVANT EVIDENCE ON THIS ISSUE IN VIOLATION OF HIS DUE: PROCESS RIGHTS

Judge Soud's order states that "the Executive Branch of the State of Florida is undertaking its responsibilities to rectify any concerns or problems with judicial electrocutions in the State of Florida" and that "[t]he Governor in conjunction with the State Department of Corrections, has conducted a full and complete investigation." (R. at 221-222). Judge Soud's reference to this Court's opinion in Buenoano v. State, 565 So. 2d 309 (Fla. 1990), in this regard reveals his misunderstanding of the issues before him. In that case, this Court held that "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." Id. at **311.** In contrast, this Court's order

remanding Mr. Jones' case for a hearing before Judge Soud clearly indicated the necessity of judicial inquiry:

> Due to the fact that flames have erupted on two occasions during electrocutions conducted in Florida's electric chair, we hereby relinquish jurisdiction to the trial court which is presiding over petitioner's post-conviction proceedings to conduct an evidentiary hearing on the petitioner's claim that electrocution in Florida's electric chair in its present condition is cruel or unusual punishment.

Jones v. Butterworth, No. **90,231,** at 1 **(Fla.** Apr. 10, 1997). In Buenoano, deference to the executive branch justified the denial of a hearing on the issue of one electric chair malfunction, but this Court granted Mr. Jones' request for a hearing, indicating the necessity of judicial inquiry in light of the repeated malfunctions of Florida's electric chair. Judge Soud incorrectly relied on Buenoano to justify continued deference to the executive branch.

In support of his conclusion about the responsible activity on the part **of** executive branch officials, Judge Soud cites the fact that the Governor appointed two experts to examine and test the electric chair. These experts, Michael Morse and Jay Wiechert, submitted recommendations that were adopted by the Department of Corrections, allowing Judge Soud to conclude that future **use of** Florida's electric chair "will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment." (R. **223)** However, the new procedures provide no such assurance due to the inadequacy of the tests performed on the electric chair and the unavoidable occurrence of human error. See infra Mr. Jones was prevented from offering evidence relevant to these issues in violation of his **due** process rights.

Over the objection of Mr. Jones' counsel, Judge Soud qualified Mr. Wiechert as an expert based on his experience designing and testing electric chairs. Mr. Wiechert testified to his standard procedure: "One thing we have done in every case, we have furnished an electrical load or test unit which simulates the human body and in every case I have tested these systems after they were installed so I know that they are indeed functioning properly and in most cases they have performed numerous executions." (Tr. at **166, 4/16/97).**

Dr. Morse was qualified as an expert in the field of biomedical engineering, a subset of electrical engineering, which concerns the application of engineering science to the human body. (Tr. at **14, 4/17/97,** morning session). Despite Dr. Morse's testimony that he has "taken a particular interest in the effects of electricity on the human body," (Tr. at **14, 4/17/97,** morning session), his research does not qualify him to render opinions on the procedures or effects of judicial electrocution. Dr. Morse was unable to answer questions on the following subjects: the path of the electrical current through the body during judicial electrocution, (Tr. at 38, **4/17/97,** afternoon session); the effect of variations in bone density on the distribution of the current, (Tr. at **43, 4/17/97,** afternoon session); the burning at the point of contact with the electrodes caused by electrocution, (Tr. at **51, 4/17/97,** afternoon session); and the effect of judicial electrocution on the heart. (Tr. at **64, 4/17/97,** afternoon session). In addition, Dr. Morse testified that "[t]he nature of the electrical machinery is outside my expertise." (Tr. at 62, **4/17/97,** morning session).

When they tested the Florida electric chair, Mr. Wiechert and Dr. Morse attempted to replicate the conditions of Mr. Medina's execution in order to determine what had caused the chair to malfunction. They spoke with **DOC** officials, studied the chart recordings from the

Medina execution, examined the electrodes, and ran several tests **of** the equipment. (Tr. at **16, 4/17/97,** morning session). Although Mr. Wiechert and Dr. Morse apparently agreed that there were no problems with the electrical equipment itself but that the electrodes caused the chair to malfunction, they did not test the leg electrode at all but focused only on the headpiece. (Tr. at 170, 274, 4/16/97). In fact, Mr. Wiechert testified that the tests were unnecessary because he had reached his conclusion about the cause of the problem before they were performed; he stated that "[i]f Dr. Morris [sic] had not **been** present, **I** would not have performed the dry sponge test on my own." (Tr. at **296, 4/16/97).**

Dr. Morse summarized these tests: "The final two test [sic] being run, one with the -- - with the headpiece set **up** very similar to the -- that used in the Medina execution, finally one with the headpiece set **up** using a single saturated sponge." (Tr. at **16, 4/17/97,** morning session). Dr. Morse concluded that there were two problems that caused the fire during Mr. Medina's execution: "the use of a dry sponge on top of a wet sponge -- saline soaked sponge was not an appropriate technique. And the second opinion was that the situation that occurred, that being the admission **of** the dry sponge, would have possibly been exacerbated by the use of .9 percent saline to soak the wet **sponge." Id**. Dr. Morse believes that the recommendations adopted by the Department of Corrections assure that the problems witnessed during Mr. Medina's execution will not reoccur.

Mr. Wiechert similarly expressed his confidence:

> I feel quite sure that there is not a problem with the electrical equipment. I've tested that enough times to know that that's functioning well, the current that we've experienced is in line with executions that have been performed over more than a century. I see no problem electrically. The problem we had

> was one **of** preparation of electrodes. We did not have a problem with the electrical equipment, the switch gear itself.

(Tr. at **171, 4/16/97).** Despite Mr. Wiechert's confidence that Florida's electric chair is functioning correctly, the same tests performed on Virginia's electric chair failed to detect a problem that later resulted in botched executions. **(Tr.** at **166, 168, 4/16/97).** Mr. Jones' counsel attempted to question Mr. Wiechert about his involvement with *the* Virginia electric chair, but **Mr.** Wiechert could not remember when he installed the chair and was unaware of the fact that Virginia switched to lethal injection after its electric chair malfunctioned two times. **(Tr.** at **243, 245, 4/16/97).**

When Mr. Jones' counsel asked **Mr.** Wiechert about the botched execution of Derick Lynn Peterson, Judge Soud objected that counsel was relying on facts not in evidence. Mr. Jones' counsel responded: **"I** have a witness who's not available this week who would be able to testify regarding the problems that occurred in Virginia." (Tr. at 242, **4/16/97).** Correspondence between Mr. Wiechert and the Virginia Department **of** Corrections from April **1991** reveals that Mr. Wiechert warrantied the operation of that state's electric chair for one year, See Defendant's Exhibit **7.** Petitioner's expert Deborah Denno was willing to testify that between **August 1991** and December **1994,** Virginia executed eleven prisoners by judicial electrocution and that at least two of those judicial electrocutions, those of Derick Lynn Peterson on August **13, 1991** and Roger Keith Coleman on **May** 20, 1992, were botched. Denno Declaration, at ¶8e. Judge Soud, however, ruled that Professor Denno's testimony was not relevant to any issue in the case.

Mr. Wiechert's confidence in the future functioning of Florida's electric chair is further undermined by his misplaced reliance on the past century of executions; this is

inappropriate in light of the persistent problems with the electric chair. In fact, the first judicial electrocution in 1890 was terribly botched, and malfunctions with the electric chair have continued until the present despite testing and periodic corrections to execution procedure. Denno Declaration, at ¶6. However, this information was not available to impeach Mr. Wiechert's credibility or qualifications as an expert because Judge Soud ruled that Mr. Jones' expert witnesses were irrelevant to the proceedings.

Mr. Jones' counsel strenuously objected to being forced to cross-examine Mr. Wiechert without the opportunity to consult experts in the same field:

> Your Honor, at this time I'm not in a position to be able to do a reasonable cross-examination of this witness. The Florida Supreme Court remanded to hear medical and engineering or electrical testimony regarding this and indicated that the hearing should be conducted in a reasonable fashion. In the past day and a half I have been overwhelmed with new material that I didn't **know** about before.
>
> * * * *
>
> I'm not in a position at this point in time to be able to consult with any experts to determine what questions **I** should be asking this witness, what this new information, new information never previously available to me before means, how to use it, what it tells me and what it means in terms of the Eighth Amendment violation, and I submit under these circumstances where **I** still don't know whether I have received everything from the Department of Corrections, my desk is covered with documents, some redacted, some not redacted. I'm not able to keep track because it just keeps being handed to me.
>
> I don't know what's going on and at this point in time **I** could not do any kind of adequate cross-examination of this witness. There are many things I would like to talk to him about, but **I** don't have experts available to discuss it with me and I would be inadequate, unprepared and do an inadequate job for my client. I would like to do a cross-examination, but under these circumstances it would be silly and I don't think this is

> what the Florida Supreme Court envisioned, is for me to be basically ambushed with new information coming in as the hearing is going on.

(Tr. at **218-221, 4/16/97).** Mr. Jones' counsel expressed a similar objection to being forced to cross-examine Dr. Morse without the opportunity to consult experts; the request for a continuance was denied. (Tr. at 25-26, 4/17/97, morning session). Mr. Jones' counsel was precluded from consulting with experts to assist in cross-examination of the Respondents' experts because Judge Soud ruled that Mr. Jones' experts were immaterial. However, he allowed the Respondents to present expert testimony regarding the same matters that were ruled irrelevant when offered by Mr. Jones, In addition, Respondents were assisted by a third expert, Jim Luther of the South Carolina Department of Corrections, who was present throughout the hearing assisting the state in the presentation of its case. (Tr. at **48-9, 4/17/97,** morning session). Mr. Luther was also present, along with the Respondents' other witnesses, at the April 8, 1997, testing of the electric chair. Mr. Jones' relevant experts and counsel were excluded from the tests. (Tr. at 344, **4/16/97).** After being threatened with contempt, Mr. Jones' counsel cross-examined the Respondents' experts; however, without the opportunity to consult with their own experts in the same field, this cross-examination was ineffective and deprived Mr. Jones of his right to a fair hearing.

If he had been permitted to testify, Professor Theodore Bernstein would have expressed his opinion regarding the deficiencies in the testing procedures adopted by the Department of Corrections pursuant to Dr. Morse and Mr. Wiechert's recommendations. After studying the new procedures, Dr. Bernstein would have offered his expert opinion:

> Generally, these procedures are fraught with vague language that fails to give specific guidance to the persons testing the

> judicial electrocution equipment. For instance, there is no description of the dimensions of the sponge, or the thickness of the sponge. This lack of specificity is fatal because it leaves crucial decisions up to **human** decision-makers. The procedures also fail to provide the value for "proper voltage" for the reactor switch gear and the execution control panel. In addition, no details or dimensions are provided for the headpiece and legpiece used for testing the electrodes. **No** examples are provided of damage or wear to aid in determining when equipment or material must be replaced. From my previous studies, **I** have learned that technicians who typically perform electrocutions have no experience or training regarding the effects **of** electrical shock on the human body. They are also typically not trained electrical engineers, but rather are more likely to be no more competent than the average electrician. My reading of the relevant testimony in the Jones case does not lead me to conclude differently for Florida's execution personnel. Overall, the vague instructions in the testing procedure can result in the likelihood of unnecessary heating, burning, mutilation **and** the possibility of suffering in future Florida judicial electrocutions.

Declaration of Dr. Theodore Bernstein, at ¶8b (Attachment 5)(hereinafter "Bernstein Declaration").

Judge Soud's finding that future use of the electric chair will not constitute cruel and/or unusual punishment is undermined by his recognition of the unavoidable occurrence of human error. Dr. Morse and Mr. Wiechert testified, and the court agreed, that the flames that erupted from Mr. Medina's head were caused by human error, specifically the failure to allow the dry sponge to absorb sufficient water from the wet sponge. (R. at 221). Mr. Wiechert was questioned about why this arrangement did not cause any problems in the executions between Mr. Tafero and Mr. Medina:

> **A** **I** don't place much significance on that because there's no way for **us** to know exactly how much moisture would transfer from the wet to the dry in any one case. In other words, that may work well in one case, but not

another. The proper technique is quite clear. We know how to do that, but as far as what happened in various executions, there's no way to know how wet or dry a particular sponge was or how much water transferred.

Q But I mean did you try and pursue in the sense of what they did in terms of leaving moisture in the sponge or extracting moisture from the sponge when they were placing it on Mr. Medina?

A Yes, we tried to get a feel for that during our tests, as far as trying to make it as wet as it was during the execution. Of course, that's a subjective thing.

(Tr. at **297, 4/16/97).**

Despite his admission that "a subjective thing" prevented an exact recreation of the conditions under which Mr. Medina was executed, Mr. Wiechert is confident not only that his test accurately determined the cause of the smoke and flames but also that this "subjective thing" can be controlled in future executions. Mr Wiechert believes that human error can be avoided by the adoption of his recommendations; he testified: "We will not have a problem [in the future]. I'm quite sure the next time it will be done right. I've met with the people involved and we're all together as to how we're going to do it, as I've described, and it will work well." (Tr. at **173, 4/16/97).** However, Dr. Morse's recommendations to the Department of Corrections include the following suggestion: "**A** witness should be present during execution that is responsible for noting time and nature of any happening out of the ordinary." (Tr. at **29, 4/17/97,** afternoon session). Despite his assurances that Florida's electric chair will not malfunction in the future, Dr. Morse also seems to be advising the Department of Corrections to be collect eyewitness evidence to explain the occurrence of "any happening out of the ordinary."

Finally, the new procedure recommended by Mr. Wiechert and Dr. Morse does not eliminate the possibility of human error causing another botched execution. The new procedures do not specify how long to soak the sponge, how to determine whether it has absorbed enough saline solution, and how to properly wring it out so that it retains the right amount of liquid. See Bernstein Declaration, at ¶8. The problems inherent in judicial electrocution cannot be solved by correcting one mistake that caused one botched execution while ignoring that other human errors may cause other unforeseen problems. Judge Soud's recognition of the role of human error precludes his conclusion that "the Department of Corrections' newly enacted written procedures . . . contain, in essential form and substance, the criteria that will assure the legal and proper execution of persons in Florida's electric chair." (R. at 223).

Mr. Wiechert's testimony regarding the soaking of the sponge reveals the impossibility of controlling the human factor that has been blamed for the most recent malfunction:

> It's obvious to me that in some cases we get enough transfer of water to have a good conduction, no resistance. In at least one case we did not and I do not find that at all unusual. The proper technique for applying the sponges is well known. There's no mystery there. We know they have to be wet with saturated saline. It's a well-developed art. And as far as getting by with it ten times or a hundred times and getting caught once does not impress me. In other words, I still know what the problem is.

(Tr. at 303, 4/16/97). Mr. Jones' experts, had they been permitted to testify, would have shown that far from being a "well-developed art," the procedure for soaking and wringing out the sponge is still too vague to assure that problems will not reoccur.

Professor Bernstein, after studying the newly adopted **DOC** procedures, would have testified about this issue:

> The Execution Day Protocol is as vague as the Testing Procedures. For instance, there is still a lack of specificity as to the dimensions of the sponges to be used in the electrodes. There is no adequate description of how far past the electrode edge the sponges should extend. This failure is problematic because it may lead to arcing, which raises the likelihood of future incidents similar to that which occurred during Pedro Medina's judicial electrocution. The lack of adequate description is compounded by the imprecise testing protocol. Additionally, there is not an adequate procedure in place to ensure that the sponges in the headpiece and legpiece are sufficiently wet. I note that the length of time for which the sponges are soaked has been redacted from the protocol; this information is quite important in order to determine if the sponges have been soaked long enough, Further, simply stating that the sponges should be "sufficiently wet" without providing guidance as to how to assure this standard raises the likelihood **of** future malfunctions. Overall, the vague instructions in the execution day procedure can result in the unnecessary heating, burning, mutilation and the possibility **of** suffering in future Florida electrocutions.

Bernstein Declaration, at ¶8c.

Finally, the statements by Florida elected officials undermine Judge Soud's conclusion that the Executive Branch "is undertaking its responsibilities to rectify any concerns or problems with judicial electrocution." (R. at 222). In response to Mr. Medina's execution, Florida Attorney General Robert Butterworth stated that "[p]eople who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair." ***Condemned Man's Mask Bursts Into Flames During Execution,*** **N.Y. TIMES,** March **26, 1997,** at A12 (All Writs Appendix Exh. **21).** Harry Singletary, Secretary of the Florida Department **of** Corrections, similarly expressed his lack **of** concern for inmates

condemned to die in the electric chair: "It's not a perfect world. We sent the space shuttle up and blew it up. Do we stop that? It's not a perfect world when human beings are involved." Jeffrey Brainard, Faulty ***Execution Renews Debate: Governor Orders an Investigation Into What Went Wrong With the Chair After Flames Erupt From the Inmate,*** ST. **PETERSBURG** TIMES, March 26, 1997, at A11 (All Writs Appendix Exh. 20). These statements of Florida officials clearly contradict Judge Soud's conclusion that the courts should not intervene because the executive branch has undertaken its responsibility to correct any problems with the electric chair. Rather, these statements reveal an attitude of indifference to the risk that electrocution in Florida's electric chair results in the unnecessary infliction of pain.

C. MR. JONES' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE CIRCUIT COURT CONCLUDED THAT ELECTROCUTION IN FLORIDA'S ELECTRIC CHAIR IS NOT UNUSUAL WITHOUT HEARING ANY EVIDENCE OFFERED BY MR. JONES REGARDING THE UNUSUALNESS INQUIRY

This Court's order remanding Mr. Jones' case for an evidentiary hearing clearly states that the issue before the circuit court is whether "electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." Jones v. Butterworth, No 90,231 (Fla. Apr. 10, 1997). This **Court** has held that use of the word "or" indicates that the Florida legislature intended to prohibit punishments that are either cruel or unusual. Tillman v. State, 591 So. 2d 167, 169 n. 2 (Fla. 1991). See also Cherry Lake Farms v. Love, 176 So. 486, 488 (1936)(holding that "or" usually, if not always is construed judicially in the disjunctive sense, expressing alternatives.). Thus Mr, Jones could satisfy his burden

of proof alone by demonstrating that electrocution in Florida's electric chair in its present condition is unusual.

The Eighth Amendment prohibition on "unusual" punishments "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 101. Accord Fierro v. Gomez, 856 F.Supp. 1387, 1409 (N.D. Cal. 1994)(noting that "[a]s the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual").

The United States Supreme Court has indicated that consideration of the unusualness of a challenged punishment requires the court to review as much objective evidence as possible regarding contemporary society's attitude toward the penalty. See Penry v. Lynaugh, 492 U.S. 302, 331 (1989). See also Stanford v. Kentucky, 492 U.S. 361, 369 (1989); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Enmund v. Florida, 458 U.S. 782, 786-88 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1077). Accord Allen v. State, 636 So. 2d 494, 498 n.7 (1994)(court engaging in legislative trend analysis to determine "unusualness" under Art. I, § 17 of the Florida Constitution). Thus, in determining whether electrocution in Florida's electric chair is constitutionally unusual, the circuit court should have examined objective evidence of the modern acceptability of judicial electrocution. See Fierro v. Gomez, 865 F.Supp. 1387 (1994)(relying on legislative trend away from lethal gas from 1970 to 1992 to support holding that method of execution is unconstitutional).

Judge Soud ruled that the testimony of Mr. Jones' expert Professor Deborah Denno was irrelevant to the proceedings. If the circuit court permitted Professor Denno to testify, Mr. Jones would have had the opportunity to present expert evidence regarding the

unusualness of electrocution in Florida's electric chair, an issue clearly contemplated by this Court when it remanded the case and relevant to Judge Soud's finding that "Florida's electric chair in its present condition does not constitute cruel or unusual punishment." (R. at 223). Judge Soud reached this conclusion without hearing any evidence regarding the unusualness factor in violation of Mr. Jones' due process rights.

Mr. Jones attempted to offer testimony about the legislative history of judicial electrocution. Professor Denno has noted that by 1913, fifteen states had adopted judicial electrocution as a result of "a well-grounded belief that electrocution is less painful and more humane than hanging." Malloy v. South Carolina, 237 U.S. 180, 185 (1914). Denno Declaration, at ¶5d. By 1949, twenty-six states were carrying out executions by this method; however, since that time no state has selected judicial electrocution as its method of execution. Id. at ¶5e. Professor Denno notes that just as a national consensus rejected lethal gas as an acceptable method of execution, the legislative trend reveals a similar rejection of judicial electrocution. Id. at ¶5g. See also, Fierro v. Gomez, 865 F.Supp. 1387.

Professor Denno's research reveals that substantially more "electrocution only" states have switched their method of execution than "lethal gas only" states switched when comparing the peak electrocution and lethal gas years with 1996 statistics. Id. at ¶5i. Altogether twenty states have switched from electrocution to another method of execution; five of these states have done so in the last three years. Id. Currently, only six states mandate judicial electrocution as the method of execution. If permitted, Professor Denno would testify that this is less than the number found constitutionally deficient in Enmund v. Florida, 458 U.S. 782 (1981)(holding the death penalty unconstitutional for some kinds of

felony murder, explaining that only eight of thirty-six death penalty jurisdictions allow capital punishment for such an offense) and far above the number found constitutionally satisfactory in Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989)(rejecting a challenge to the constitutionality of the death penalty for sixteen-year-olds, noting that 22 out of 36 death penalty jurisdictions allow it), and Penry v. Lynaugh, 492 U.S. 302, 334-35 (1989)(rejecting a constitutional challenge of the death penalty for mentally retarded persons, emphasizing that only two states prohibit it), Id. at ¶51. The number of states abandoning judicial electrocution thus represents a sufficient consensus rejecting judicial electrocution. As such, the legislative rejection of judicial electrocution constitutes powerful objective evidence of an evolving standard of decency that prohibits this barbaric practice. Mr. Jones' due process rights were violated when the circuit court ruled that testimony on this issue was irrelevant to the proceedings because this Court's order and Judge Soud's findings indicate that the unusualness of electrocution in Florida's electric chair is a necessary consideration in this case.

ARGUMENT IV

JUDGE SOUD IS INCAPABLE OF CONDUCTING A FULL AND FAIR HEARING ON THE ISSUE OF THE CONSTITUTIONALITY OF ELECTROCUTION IN FLORIDA'S ELECTRIC CHAIR. ACCORDINGLY, THIS COURT SHOULD APPOINT A SPECIAL MASTER TO RECEIVE EVIDENCE.

If this Court agrees with Petitioner that the hearing before Judge Soud violated Mr. Jones' fundamental due process rights, then it must order another evidentiary hearing on the Mr. Jones' All Writs Petition. Accord Johnson, 647 So. 2d at 111. If the Court does order

a new evidentiary hearing, it should not remand the case to Judge Soud. Instead, for the following four reasons, the Court should appoint a special master to hear the evidence.

First, Judge Soud is a juvenile court judge who lacks vital knowledge **of** electricity, neurology, physiology, pathology and constitutional principles regarding cruel and/or unusual punishment. **An** examination of the hearing transcript reveals his obvious deficiency. Throughout the hearing, he continually indicated his lack of familiarity with some of the relevant concepts. For example, Judge Soud indicated a lack of medical training to interpret crucial autopsy information. (Tr. at 72, 4/18/97). Further, he demonstrated an absence of rudimentary knowledge regarding the effects of electricity on the human body. (Tr. at 95, 4/17/97, morning session; Tr. at 85, 4/18/97). Additionally, in ruling that Petitioner's experts were irrelevant, Judge Soud in part relied upon the fact that their affidavits "only address volts, not ampage [sic]." (Tr. at 24, 4/18/97). After three long days of testimony, it should have been quite clear to Judge Soud that amperage is the variable product of voltage and resistance and is therefore readily determinable. Also, Judge Soud specifically found Petitioner expert Deborah Denno, Ph.D. irrelevant because "**she is not an expert in engineering or electricity.**" (Tr. at 27, 4/18/97)(emphasis added). Of course, because she would testify, as a social scientist and criminologist, to the constitutional "unusualness" of Florida's electric chair, it is entirely irrelevant that Professor Denno is not an expert in engineering or electricity. The "unusualness" of Florida's electric chair was an issue squarely placed before Judge Soud; his inability to understand this concept, and Professor Denno's testimony, is further evidence of why a special master should **be** appointed. Petitioner notes these deficiencies only because the situation before this Court "is of grave

societal concern and goes to the very heart of our constitution . . ." Jones v. Butterworth, No. 90,231, at 2 (Fla. Apr. 10, 1997)(Shaw, J., concurring in part, dissenting in part). Accordingly, great care should be taken in selecting the jurist who hears the testimony.

Second, Judge Soud completely misunderstood this Court's directive in terms of burden of proof. In its order, this Court stated that

> [i]f at the conclusion of the hearing the court shall find by the greater weight of the evidence that electrocution in Florida's electric chair in its present condition is cruel or unusual punishment, the court shall stay the execution. . .

Id. at 1. The Court directed that Judge Soud "may receive the testimony of engineering and medical experts and such other witnesses as may be presented by the parties . . ." Id. Because Petitioner had the burden of proof and permission to introduce expert testimony, Judge Soud should not have prohibited Petitioner from calling relevant witnesses. Instead, Judge Soud conducted a one-sided inquisition focused solely on the ability of the competency of Florida's Executive Branch to carry out judicial electrocution. For instance, he essentially took control of Respondents' case: he extensively questioned Respondents' witnesses (Tr. at 95-114; 4/17/97, morning session; Tr. at 94-101, **4/18/97;** Tr. at 139-141, 4/18/97) and, more egregiously, forced Respondents to call two witnesses, Dr. Hamilton and Dr. Almojera, that they had no intention of calling. (Tr. at 72, 120, 4/18/97). Judge Soud conducted this inquiry because he wrongly believed that Buenoano v. State controlled the instant case. See supra. Judge Soud stated that

> [t]hese steps (referring to Governor Chiles' appointment of Respondents' experts Morse and Wiechert to advise Florida officials) establish that the Executive Branch of the State of Florida is undertaking its responsibilities to rectify any concerns or problems with judicial electrocutions in the State of Florida.

> In the case of Buenoano **v. State,** *565* So.2d 309 (Fla. 1990), the Supreme Court of Florida entrusted this responsibility to the Executive Branch and expected it to closely guard and monitor the procedures and process without court intervention.
>
> The Governor in conjunction with the State Department of Corrections, has conducted a full and complete investigation. The Executive Branch has obtained outside experts with specialties in electrical engineering, biomedical engineering involving electricity and the human body, and pathologists experienced in performing autopsies, one of whom has previously performed autopsies on men executed in Florida's electric chair.
>
> Many tests have been conducted on the electric chair, its apparatus, and its consequences and performance. These **tests have involved not only outside experts, but the staff and execution teams of the Department of Corrections and Florida State Prison.**
>
> The result of this undertaking has been the submittal to the Governor of reports recommending the implementation of written procedures to be used by the Department of Corrections for judicial executions in Florida. If the procedures are adopted and followed, all executions in the electric chair will be carried out with the reasonable certainty of no malfunctions in the future.

(R. at 222)(emphasis added).

Noticeably absent from Judge Soud's inquiry is any participation by Petitioner's experts. For example, his conclusion that there will likely be no future malfunctions of Florida's electric chair is based entirely on testimony from Respondents' witnesses. He ignores Dr. Bernstein's contrary conclusion, see supra, simply because he is not a member of the Executive Branch. The clearest example of Judge Soud's one-sided inquiry is his questioning of Florida State Prison Superintendent Ronald McAndrew:

> THE COURT: Mr. McAndrew, sitting here under oath -- this might sound like a trite question, but it's not. Sitting here under

> oath and a superintendent of the Florida State Prison, can you give me your verbal assurance -- not me. Let's start over. Give your verbal assurance to Governor Chiles, Secretary Singletary, the Florida Supreme Court and myself that so long as you're superintendent that you will meticulously follow the testing procedures for the electric chair and the Execution Day Procedure as promised, dated on April 16, 1997, to the ultimate and very best of your ability?
>
> **A** Under oath, Judge, and as my word is my bond, yes, sir.

(Tr. at 172, 4/17/97, afternoon session). This entire exchange was self-serving because it effectively insulated the Executive Branch from the very inquiry that this Court ordered. Basically, Judge Soud was convinced that as long as the Respondents assure him that there will be no future problems, no additional inquiry, including testimony by Petitioner's witnesses is needed. Beginning and ending the judicial inquiry with an examination of Respondents' practices directly contradicts this Court's order in Jones v. Butterworth, et al. See Jones v. Butterworth, No. 90,231, at 1 (Fla. Apr. 10, 1997)(directing that Judge Soud "may receive the testimony of engineering and medical experts and such other witnesses as may be presented by the parties . . .").

Third, Judge Soud is biased in such a way that any future hearings before him on Mr. Jones' All Writs Petition can never be fair.[37] Among other things, Judge Soud seemed to believe that he and Respondents were working together. See Tr. at 22, 4/18/97 (Judge Soud referred to Respondent's experts as "our" experts). Even more importantly, Judge Soud, indicated a clear bias against Petitioner's experts and in favor of Respondents' experts. In

---

[37] Judge Soud's bias toward Mr. Jones would arguably constitute sufficient grounds for disqualification under Fl. R. Jud. Admin. 2.160 and Fla. Code Jud. Conduct, Canon 3E(1).

ruling on the relevance of Petitioner's experts, stated that, "[i]n my view, even if these witnesses were to testify, according to the contents of their affidavit, when considered together they could not carry the burden of proving by the greater weight of the evidence that the electric chair in its current condition is cruel and unusual." (Tr. at 23-24, 4/18/97). That Judge Soud could make a credibility determination without actually listening to the experts' live testimony indicates his clear bias against Petitioner's experts. In fact, Judge Soud forced the Respondents against their wishes to present Dr. Almojera as a live witness because he "can think better" when a witness is before him "in person." (Tr. at 122, 4/18/97). Finally, Judge Soud's favoritism toward witnesses who supported his position was quite clear. For example, he referred to Mr. Mathews as "imminently qualified." (Tr. at 120, 4/18/97). After having had time to consult with experts, counsel can now represent to this Court that Mr. Mathews is no way qualified to render the conclusions he did. See Arden Declaration, at ¶5.e; Kirschner Declaration, at 79.e.

Fourth, this Court's recent order in Stano v. Singletary, No. 90,230 (Fla. Apr. 23, 1997), indicates that the issue of the constitutionality of Florida's use of judicial electrocution is no longer linked exclusively to Petitioner Jones. In Stano, this Court stated that

> [t]he motion for stay of execution on the issue concerning the electric chair is treated as an extraordinary writ and consolidated as to that issue only with Jones v. Butterworth, etc.. et al., Case No. 90,231. These consolidated cases are set for oral argument on Tuesday, May 6, 1997 at 9:00 a.m.

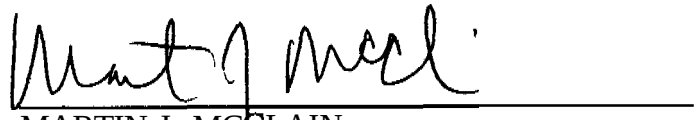
Stano v. Singletary, No. 90,230, at 1 (Fla. Apr. 23, 1997). Essentially, the issue before this Court is of significance to all persons under a final sentence of death in the State of Florida.

Thus there is no reason at this point to remand the case to Judge Soud. Instead, a special master should be appointed to hear this important case.

CONCLUSION

Based on the record, the transcripts of the evidentiary hearing and the arguments presented herein, Mr. Jones respectfully urges this Court to reverse the lower court's order denying Mr. Jones claim and order a full evidentiary hearing before a special master.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April **28, 1997.**



MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
Post Office Drawer **5498**
Tallahassee, FL **32314-5498**
(904) 487-4376
Attorney for Mr. Jones

Copies furnished to:

Richard Martell, Carolyn Snurkowski, Curtis French and Kenneth Nunnelley
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399

Susan Schwartz and Maryellen McDonald
Harry Singletary, Secretary
Department of Corrections
2601 Blairstone Road
Tallahassee, FL **32999**

Angela Corey and Stephen Bledsoe
Office **of** the State Attorney
Fourth Judicial Circuit
Duval County Courthouse
Jacksonville, FL 32202

Brooks C. Rathet, Esquire
Law Offices of Gabel & Hair
76 South Laura Street, Suite **1600**
Jacksonville, FL **32202-3421**
(Counsel for Ron Word)

David **S.** Bralow, Esquire
Law Offices of Holland & Knight
Post Office Box **1288**
Tampa, FL **33601-1288**
(Counsel for Mike Griffin)

Adam Liptak, Esquire
The New York Times Company
Legal Department
229 West 43 Street
New York, NY **10036**
(Counsel for **Doug** Martin)