

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,231

LEO ALEXANDER JONES,

Petitioner/Appellant,

v.

ROBERT BUTTERWORTH, ET. AL.,

Respondents/Appellees.

ORIGINAL PROCEEDING -- ALL WRITS

REPLY BRIEF OF PETITIONER/APPELLANT

PETER WARREN KENNY
Florida Bar No. 351105
Capital Collateral Regional Counsel
Southern Region

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
Office of the CCRC - Southern Region

GAIL E. ANDERSON
Florida Bar No. 0841544
Special Assistant CCRC
Office of the CCRC

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
1444 Biscayne Boulevard, Suite 202
Miami, FL 33132-1422
(305) 377-7580

COUNSEL FOR PETITIONER/APPELLANT

PRELIMINARY STATEMENT

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

"R2. ____" -- the record following the July 1997 hearing;

"R. at ____" -- Volumes I-II of the record following the April 1997 hearing;

"Tr. at , ____ 4/ __/97, _____ session" -- Volumes III-X of the record following the April 1997 hearing; 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;

Exhibits introduced at both hearings will be referred to as "Def. Ex. ____" or "St. Ex. ____".

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REPLY TO RESPONDENTS' STATEMENT OF THE FACTS

Petitioner does not accept Respondents' Statement of the Facts. Respondents' statement is no more than a one-sided summary of some of the witnesses presented in circuit court. On the issues presented by Petitioner, the facts should be viewed in the light most favorable to Petitioner.¹ Respondents, instead of employing this standard, used its Statement of the Facts to mislead through omission and mischaracterization the testimony of the experts called by Petitioner.

For **example**², Respondents, in their brief, indicate that Petitioner's experts disagreed on whether electrical current follows the path of least resistance. **See** Answer Brief (hereinafter "**AB**") at 3 (Dr. Arden); at 8 (Dr. Price); at 10 (Dr. Bernstein). However, in fact, Dr. Bernstein, the electrical engineer, made clear that more current does go where there is less resistance; in fact, this is a product of Ohm's Law (**R2**. 558). Though some current will go throughout the body, most of it travels the paths of least resistance.

Another example of the misleading nature of the Answer Brief is the representation that Dr. Bernstein is opposed to the death penalty (**AB** at 9). Dr. Bernstein's testimony was in fact: "I am opposed to it, yes, I guess I am, but it should be done properly if it is being done. " (**R2**. 582). Respondents also omitted completely the testimony that after the execution of Pedro Medina, the Governor of Florida's Office sought to hire **Dr.** Bernstein to

¹Respondents concede that the standard of review is that found in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). **See** Answer Brief at 35.

²**There** is not sufficient space in this reply brief to go through all of the omissions and mischaracterizations. Petitioner herein cites a few representative examples,

evaluate Florida's electric chair. Dr. Bernstein turned down the offer because CCR had already retained him (R2. 5 19).

Respondents' Brief also asserts that "[Dr.] Bernstein testified that he had seen no arcing in connection with the leg electrode during the test, despite his belief that the sponge had not adequately covered it" (AB at 12). Respondents omitted Dr. Bernstein's testimony that a human body has give to it while a metal cylinder does not have (R2. 566, 592). Thus, the fact that there was no arcing during the test is not significant. In an execution, human flesh will move in ways a metal cylinder will not when the electrode is tied to it and thus arcing may occur.

Respondents' statement of the facts omits a large amount of evidence presented in the lower court. Although Respondents appear fond of pointing out supposed deficiencies in Mr. Jones' experts' knowledge regarding judicial electrocution, Respondents have utterly omitted any reference to the huge gaps in knowledge or study done by their own experts. (See Initial Brief at 44-46). Further, although Respondents somehow find it significant that Mr. Jones' experts had not performed autopsies on persons who had been judicially electrocuted (AB at 1, 4), Respondents do not point out that neither Dr. Morse nor Dr. Wilder had performed autopsies on judicially electrocuted persons (Tr. at 49, 4/17/97, afternoon session; R2. 1038). Respondents also neglect to mention that the experts agreed that the moment of unconsciousness or death cannot be determined from an autopsy (R2. 80, 144 [Arden]; R2. 1038 [Wilder]; Tr. at 98, 4/18/97 [Hamilton]),

Respondents also omitted some important parts of Dr. Goldman's testimony. He testified that after electrical current was turned off in Pedro Medina's electrocution: "If, in

fact, it was a pulse, then it would have to be caused by a beating of the heart, pumping of the heart, not just electrical beating, and pumping of blood that was able to flow.” (R2. 783, 798). Dr. Goldman had treated patients who survived contact with high voltage lines where the current path “would have been across the chest.” (R2. 785). Dr. Goldman also testified that on occasion, patients with a fibrillating heart who were not already unconscious reported pain associated with the electrical current administered through a defibrillator (R2. 786). Dr. Goldman also testified that more current was necessary when applied externally than internally to have the same effect. The reason was that the resistance of the body would reduce the current reaching the heart (R2. 788). Dr. Goldman’s testimony in this regard corroborated Drs. Price and Devinsky .

ARGUMENT

ARGUMENT I

Respondents, in addressing Petitioner’s Argument I, ignore the constitutional significance of what is at stake in these proceedings. At issue is whether Florida’s electric chair in its current condition is cruel or unusual. As a result, it is important to follow those rules of evidence which promote a reliable result. The Frye test as this Court has repeatedly acknowledged is designed to promote reliable factual resolution of judicial inquiries. Brim v. State, 695 So. 2d 268, 271 (Fla. 1997).

Respondents assert, “Jones has cited no case in which Frye has been applied in a non-jury context, see, e.g., Mitchell v. Department of Corrections, 675 So. 2d 162, 164 (Fla. 4th DCA 1996)(“no Florida [court] has decided whether the Frye test applies in the administrative context, or whether such a stringent test is needed when the evidence is not

being adduced to prove guilt or innocence. ’). " The cite to Mitchell is shockingly misleading. At issue in Mitchell was whether Frye should be applied to evidence “admitted for the purpose of establishing reasonable suspicion to conduct later searches and testing.” 675 So. 2d at 164. It “was not admitted as substantive evidence of complainants use of drugs.” Id. Thus, clearly Mitchell has no relevance here where the evidence in question bore directly on the ultimate issue -- does the electrical current in a judicial electrocution pass through the human body in such a way as to result in instantaneous unconsciousness.

Other than Mitchell, Respondents cite to not one case to support any contention that the Frye test should not be applied here. Certainly, such an argument was never made in circuit court. This is the first time, Respondents have asserted that Frye does not apply in a non-jury context. Reliability is just as important in a non-jury case as in a jury case. Respondents’ argument is ridiculous.

Moreover, this Court in Brim v. State, 695 So. 2d 268 (Fla. 1997), recognized that the United States Supreme Court had lowered the Frye standard in federal court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Daubert opinion was issued in a civil tort action and concerned the Federal Rules of Evidence. The Daubert opinion made clear that the issue concerned solely a rule of evidence, Yet in Brim, this Court specifically rejected Daubert and indicated the higher Frye standard would be maintained in Florida. 695 So. 2d at 271. This Court cited Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). And this Court in Ramirez cited Page v. Zordan, 564 So. 2d 500, 502 (Fla. 2d DCA 1990). In Page (a civil case), it was held that “before any such new procedure and its results are admissible, a trial court must determine that the new test being

presented has some reasonable degree of recognition and acceptability among the spectrum of scientific or medical experts who study, diagnose, test, and otherwise dealt with the particular subject which is sought to be examined and diagnosed by the proffered test.” Id. at 502. Thus, it is clear that Frye is a rule of evidence which applies to all judicial proceedings in Florida.

Here the issue is the constitutionality of Florida’s electric chair. The Frye test does apply to the judicial resolution of that constitutional question. A reliable result is as important here as in all the other cases that this Court has found controlled by Frye.

In summarizing Dr. Morse’s testimony in July, Respondents omitted the pertinent testimony:

Q Subsequent to your April testimony, Dr. Morse, have you done any further research into the electrical characteristics of judicial electrocution?

A Yes, as a matter of fact, I have. I --

Q What is that research and how did you go about conducting it, sir?

A Well, I’ve been looking at the question which has, I guess, been a nagging question, the one of whether or not -- where the current goes when it leaves the head piece. I’ve been trying to develop some sort of a -- a procedure or protocol, a method, if you will, for analyzing the problem and determining which way the current will go, and I’ve done basically two things that have led me to comparable -- reach, although preliminary, comparable results.

(R2. 1145).

Q Okay. I guess at this point in time -- did you say your results are preliminary at this point in time or how did you describe them? I’m not sure I caught that.

A Being -- I guess being a scientist, not wanting to overstep the bounds of what I have done, I would describe the results of the independent

preliminary -- the independent work I've done as preliminary. The work I did with Dr. Wixswow's material, I did, like I said, sometime back, and that's less preliminary.

Q Okay. When did Wixswow do his research originally, sir?

A I couldn't tell you the date on it. It was fairly recent, I believe.

Q Is it more than two years old?

A Again, I -- the first time I saw it was within the last year or two.

Q Okay. And, Dr. Morse, I guess for our purposes, left [sic] me ask you to -- ask you this question: What's the bottom line about how much current flow is actually going through the brain during a judicial electrocution, in percentage terms?

A In percentage terms somewhere between more than 30 percent or more than -- somewhere between more than a third, more than 33 percent, and less than 66 percent. Somewhere -- it's a large ballpark there, but there's no question that a significant percentage is being shunted through the brain.

Q And I guess for the less adept at math among us, is that sufficient, given the cycle of energy employed by Florida's electric chair, to cycle current -- to flow current through the brain that is sufficient to cause instant depolarization?

A There's no question that that's sufficient.

(R2. 1154-55).

This testimony was clearly introduced to dispute the testimony by Dr. Price that about one twentieth (1/20) of the current would reach the brain, and Dr. Devinsky's testimony that the skull possessed 50,000 Ohms of resistance. No other witness called by Respondents contested this evidence. ³ For example, Dr. Wilder specifically testified that he did not know

³At no time, did Respondents register a Frye objection to the testimony of Drs. Price and Devinsky. Had such an objection been made, Petitioner easily could have and would have

(continued...)

how much current reached the brain or how much resistance would have to be overcome (R2. 1051-53).

In contending that Petitioner's objection was not timely, Respondents completely ignore the fact that Dr. Morse was not released as a witness until the Dr. Wikswo manuscript was handed over to Petitioner's counsel in court the morning after Dr. Morse testified, Petitioner's counsel read Dr. Wikswo's manuscript which one witness testified for approximately fifteen minutes. Thereupon, the Frye motion to strike was filed, Respondents ignore the fact that Dr. Morse was still present and available at that time, and that he continued to be present and available until 4:00 p.m., some six and one half hours after the motion to strike was filed.

Respondents demonstrated absolutely no prejudice arising from the filing of the motion to strike on Tuesday morning at 9:30 a.m. as opposed to Monday afternoon at 4:30 p.m. Respondents do not even make an attempt to show prejudice. Yet once the matter was raised in circuit court, Respondents needed three hours recess to prepare a response and argue against the Motion to Strike. Oddly, the only argument they could come up with was that Petitioner should have been prepared the moment Dr. Morse began testifying to his previously undisclosed "preliminary" work on developing a "method. "

³(... continued)

met the Frye test. Both Doctors were prepared and in fact did explain the basis for the opinions. Neither relied on novel procedures, methods or models.

Not one of the five cases cited by Respondents involve the situation here -- non-jury proceeding where undisclosed Frye testimony⁴ is presented and the Frye objection is made immediately after the witness is released but while the witness is still available. Respondents do not discuss the purpose of the contemporaneous objection rule or show why it was not satisfied here. See Castor v. State, 365 So. 2d 701 (Fla. 1978). Respondents simply continue to play the game of “gotcha.”

Moreover, Respondents never attempt to explain how the Frye test could have been met here where Dr. Morse testified to his “preliminary” work developing a “method” for determining the path of the current in a judicial electrocution. The simple fact is that Respondents could not meet the burden; Dr. Morse’s testimony in this regard was unreliable under Brim and Ramirez.

As to the harmless error analysis, Respondents, although citing to State v. DiGuilio, fail to actually apply it. Petitioner presented evidence from Dr. Price and Dr. Devinsky that insufficient electrical current will reach the brain in a judicial electrocution to result in instant unconsciousness and death, None of Respondents’ witnesses refuted Dr. Price’s testimony that one twentieth of the current reached the brain except Dr. Morse. None of Respondents’ witnesses refuted Dr. Devinsky’s testimony that the skull possesses 50,000 Ohms of resistance other than Dr. Morse. Dr. Morse’s testimony refuting these experts was premised solely on his “preliminary” work in developing a “method” or a “model” of the path of electrical current in a judicial electrocution. Dr. Morse admitted his “preliminary” work had

⁴See Rule 3,220 of Florida Rules of Criminal Procedure (b)(1)(J); Rule 1.280(b)(4) of Florida Rules of Civil Procedure, In either a criminal or civil proceeding, Dr. Morse’s use of a “preliminary ” method would have been discoverable.

not passed peer review and thus implicitly was not accepted in the scientific community. But for this novel testimony, nothing refuted Dr. Price or Dr. Devinsky regarding the amount of electrical current reaching the brain (see R2. 1053).

Respondents used selective quotes from Judge Soud's order to argue that Dr. Morse was not that important of a witness. In fact, Judge Soud stated: "Doctors Hamilton, Sperry, and Dr. B.J. Wilder, a neurologist at the University of Florida School of Medicine, as well as the biomedical engineer, Dr. Michael Morse, all concurred in the conclusion that Medina and any other inmate executed through the introduction of 2,200 to 2,350 volts of electricity into the head is rendered unconscious within milliseconds, therefore, does not consciously experience anything" (R2. 1955). However, only Dr. Morse made any attempt to determine the amount of current which reached the brain. For example, Dr. Wilder testified as follows:

Q Do you know in a judicial electrocution the amount of amperage that actually reaches the cortex?

A No.

Q Have you done any calculations to determine the amount of resistance that that amperage would have to -- or the electricity would have to travel through in order to reach the cortex?

MR. NUNNELLEY: It's been asked and answered. I object.

THE COURT: I'll overrule.

A Do I know how much resistance it would have to overcome?

BY MR. MCCLAIN:

Q How much resistance the electricity would have to travel through in order to reach the cortex.

A Well, the current flow is a -- and I'm certainly not an engineer, electrical engineer, but the current flow has to do with voltage and resistance, so resistance would be a factor in determining current flow. I think, if I recollect, the equation is amperage is equal to voltage, divided by resistance. So certainly the higher the resistance, the less current would flow, So if resistance were very high, there would be less current flow, if resistance were lower, there would be greater current flow, and I don't know that I can answer your question other than that a certain amount of current has to flow to depolarize neurons.

In the case of electroshock convulsive therapy, we think it's about three hundred milliamps, or perhaps less. In the case of animals 50 milliamps will suffice to provoke the convulsion, but in the currents of electrocution I don't know how much current has to flow.

Q But it is fair to say that the voltage is divided by the ohms of resistance to determine the amperage that actually reaches --

A Actually flows, that's correct. That's the formula.

Q And is it fair to say from your studies and your preparation today you don't know what the resistance level is before the current reaches the cortex.

A No.

(R2. 1051-53).

Mr. Weichert testified that in a judicial electrocution he believed current density was .5 amps per square inch (R2. 1135, 1137), which called into question Dr. Wilder's conclusions premised upon 9 amps being delivered. Dr. Wilder's lack of knowledge of either current density or the resistance levels of the tissue current had to pass through to reach the brain left his testimony unable to refute either Dr. Price or **Dr. Devinsky**. Again, only Dr. Morse attempted to refute that evidence.

But for Dr. Morse, who Judge Soud specifically referred to and relied upon, Petitioner's experts were unrefuted regarding the resistance of the skull and the amount of current actually reaching the brain. Respondents have not addressed the testimony of

Petitioner's experts as it relates to the harmless error analysis. Respondents cannot and have not proven the error is harmless beyond a reasonable doubt.

ARGUMENT II

Respondents argue that any error raised in Mr. Jones' Argument II is harmless and that Dr. Wickswow's report attached to Mr. Jones' brief should not be considered (AB at 39). As to the latter argument, this Court has denied the State's motion to strike Dr. Wickswow's report. As to the State's first argument, the State has not demonstrated that the error was harmless beyond a reasonable doubt. State v. DiGuilio.

First, Respondents do not contest that Dr. Morse purported to answer questions in July that he could not answer in April.' Second, it must be noted that Respondents do not address Mr. Jones' argument that Dr. Morse's own calculations produced misleading results and misleading conclusions (Argument IIB, Initial Brief at 28-30). Dr. Morse had done two things since April to attempt to answer the "nagging" question of "where the current goes when it leaves the head piece" (R2. 1145). The first approach relied on Dr. Wickswow's manuscript (R2. 1145-47). The second thing Dr. Morse did was to develop his own formula to calculate the resistance of the skull which would presumably allow him to determine how much current reaches the brain during an execution (R2. 1147-49). Dr. Morse's calculation was performed with the following equation: resistance (R) equals resistivity (ρ) times length (l) divided by area (A) (R2. 1149). Dr. Wickswow's report explains that this formula is a "one-dimensional equation" which is not valid for "three dimensional situations" such as

'Interestingly, Respondents' statement of the facts does not refer to Dr. Morse's July testimony (see AB at 1-21), although it does refer to Dr. Morse's April testimony (Id. at 1).

are involved in a judicial electrocution (Attachment A at 9- 11). Since Respondents offer no argument that Dr. Morse's testimony about his own calculations was not misleading, Mr. Jones relies upon his initial brief.

Respondents argue that "everything that Morse said about the Wikswo article was true and accurate" (AB at 42). Respondents are wrong. For example, Respondents argue that Dr. Morse "simply utilized certain figures contained in the [Wikswo] article in his research" (Id.). However, Dr. Morse testified that he used Dr. Wikswo's work to answer the question of "where the current goes when it leaves the head piece" (R2. 1145). Dr. Morse testified that "what . . . fell out of using Dr. Wixswo's [sic] work was the fact that there's a hundred and 50 volt drop inside the skull" (R2. 1152). Dr. Morse then testified that this 150 volt drop meant "that you get a fairly high current flow" in the brain: "once you get inside [the brain] you have a hundred and 50 voltage drop -- volt drop and the result is that -- and this is with a fairly small resistance, and the result is that you have a fairly large current" (R2. 1153). Dr. Morse was then asked by the State, "The voltage drop you've talked about indicates heavy current in the brain, is that correct?" (R2. 1153). He answered, "Taken in context with the resistance, it would be correct, because the current, by ohms law, is equal to voltage divided by resistance so you have a hundred and 50 volt drop and the small resistance, so voltage divided by a small resistance is going to give you a large current" (R2. 1153-54). Dr. Morse did not simply "utilize certain figures" from Dr. Wikswo's manuscript as the State argues, but testified that those figures indicated a "large current" entered the brain during a judicial electrocution.

Further, Respondents do not address Dr. Morse's testimony that his own calculations and Dr. Wikswow's work produced "comparable results" (R2. 1145). Respondents do argue that "Morse's conclusion that between one and two thirds of the current administered during a judicial electrocution actually entered the brain is in fact 'somewhat similar' to the statement in the Wikswow report that a majority of the current was shunted along the scalp" (AB at 42). First, Respondents' quotation that Dr. Morse said his and Dr. Wikswow's numbers was "somewhat similar" is inaccurate. Dr. Morse testified that his and Dr. Wikswow's work produced "fairly similar numbers" and that he came up with a "very similar number" to Dr. Wikswow (R2. 1152).

Additionally, Respondents are grossly misrepresenting Dr. Wikswow's manuscript in arguing that his and Dr. Morse's results were "somewhat similar." Dr. Morse testified that "somewhere more than 33 percent, and less than 66 percent" of the current reaches the brain during an execution (R2. 1155). Dr. Wikswow's manuscript did not just say that "a majority of the current was shunted along the scalp" (AB at 42). Rather, Dr. Wikswow's manuscript states, "the brain is partially shielded from the applied current by the low-conductivity skull" (Def, Ex. JJ at 2), "there is high power dissipation in the scalp and skull beneath the electrode, and over the remainder of the scalp through the neck" (Id. at 7), "the majority of the electric current delivered to the body from the scalp electrode will flow along the scalp and superficial cranial muscles, rather than directly entering the brain" (Id. at 8), "[t]he shielding from the brain of the externally-applied electrical current, caused by the conducting properties of the scalp acting in concert with the insulating properties of the skull, is the identical effect that causes significant attenuation of the electrical signals from the brain as

recorded on the surface of the scalp during electroencephalography” (Id.), “a substantial fraction of the power is dissipated in the scalp, neck, and in the vicinity of the leg electrode(s)” (Id. at 13), and “[t]he high electrical resistivity of the skull insulates the brain from much of the potential gradients in the scalp” (Id.).

Thus, Dr. Wikswo’s manuscript indicates that not only is current shunted along the scalp, but that the interface between the sponge in the head piece and the scalp “presents a region of high electrical resistance. As a result, a substantial fraction of the electrical power dissipated during electrocution is in fact dissipated at the electrode-scalp tissue interface and in the tissue immediately adjacent to the electrode” (Def. Ex. JJ at 6). That is, a large amount of current is dissipated before current even travels through the body. Thus, the amount of current entering the brain is reduced not only by the resistance of the skull but also by the fact that a substantial amount of current is dissipated at the sponge/scalp interface before current even begins traveling through body tissues.

Dr. Wikswo’s manuscript also states, “The shielding from the brain of the **externally-**applied electrical current, caused by the conducting properties of the scalp acting in concert with the insulating properties of the skull, is the identical effect that causes significant attenuation of the electrical signals from the brain as recorded on the surface of the scalp during electroencephalography” (Def. Ex. JJ at 8). This is precisely the evidence about which Dr. Price testified to show that only a small fraction of the current actually enters the brain. Dr. Price testified that measurements made during electroencephalographs (EEG) indicate that one-twentieth of the voltage on one side of the skull passes through the skull to the other side (R2. 391-95). Dr. Price explained that this measurement indicates that the

same amount of voltage--one-twentieth--would cross the skull from the other direction, going from the scalp to the brain (R2. 395-99). Thus, Dr. Wikswo's manuscript does not simply state that a "majority" of the current is shunted around the brain (AB at 42), but that only a small fraction of the current actually enters the brain.

Respondents argue that the argument in Mr. Jones' initial brief that Dr. Wikswo's manuscript concludes that death by electrocution is not instantaneous and that the heart beats frequently following a judicial electrocution is incorrect (AB at 41, referring to Initial Brief at 26). Respondents are apparently referring to Mr. Jones' counsel's argument in the circuit court (See Initial Brief at 26, quoting R2. 1259). Interestingly, in the circuit court, Respondents objected to Mr. Jones' counsel arguing about the contents of Dr. Wikswo's manuscript and offered no argument as to whether or not Dr. Morse's testimony about that manuscript was accurate (R2. 1260). Further, Respondents' argument in its brief that Mr. Jones' counsel's argument was incorrect is flatly wrong. Dr. Wikswo's report states, "[I]t is often assumed that the current densities applied during execution will lead to instant death, but there have been no measurements of the currents that are actually delivered to the brain, spinal cord or heart, and anecdotal reports of a detectable heartbeat and spontaneous breathing after successive shocks indicate that death may not be instantaneous" (Def. Ex. JJ at 2-3). Later in the manuscript, Dr. Wikswo states that the voltage gradients in the vicinity of the heart "are not sufficiently strong to guarantee fibrillation of the heart, which is consistent with anecdotal reports of a detectable heartbeat after multiple shocks during execution by electrocution" (Id. at 13). Thus, Dr. Wikswo's manuscript clearly states that

the common assumption of instant death is incorrect and that heartbeats have been reported after judicial electrocutions.

By reference to its arguments as to Mr. Jones' Argument I, Respondents argue that any error is harmless beyond a reasonable doubt because, according to the Respondents, Dr. Morse's testimony "was never referred to in the final order" (AB at 42).⁶ Respondents have failed to show beyond a reasonable doubt that the error was harmless. Under a proper harmless error analysis, Respondents must show that the error had no effect on the outcome. State v. DiGuilio. Simply stating that the final order does not refer to Dr. Morse's testimony does not satisfy this test and is also incorrect.

The circuit court's order states, "Doctors Hamilton, Sperry, and Dr. B.J. Wilder, a neurologist at the University of Florida School of Medicine, as well as the biomedical engineer, Dr. Michael Morse, all concurred in the conclusion that Medina and any other inmate executed through the introduction of 2,200 to 2,350 volts of electricity into the head is rendered unconscious within milliseconds, and therefore, does not consciously experience anything" (R2. 1955). Clearly, the circuit court relied upon Dr. Morse's testimony that his calculations and Dr. Wikswo's work established that a "large current" enters the brain during judicial electrocution and that "[t]here's no question" this amount of current is sufficient to cause instant depolarization of the brain (R2. 1153-55). Dr. Morse's conclusion about instant depolarization is dependent upon his July testimony about his new calculations and about Dr. Wikswo's work because in April, Dr. Morse testified he did not know the path

⁶Respondents themselves rely on Dr. Morse's July conclusions later in its brief (AB at 53).

current takes during a judicial electrocution and did not know how much current reaches the brain during a judicial electrocution. In a proper harmless error analysis, the single fact that the circuit court explicitly relied upon Dr. Morse's testimony is sufficient to establish that the error was not harmless beyond a reasonable doubt, regardless of **the** fact that the circuit court also referred to the testimony of **other** state experts,

Further, in particular context of **this** case, the circuit court's reference to other state experts to support the conclusion **that** judicial electrocution causes instant unconsciousness does not establish that **the** error regarding Dr. Morse's testimony was harmless beyond a reasonable doubt. Dr. Morse was the only State witness who purported to have studied the path of electrical current during a judicial electrocution and thus was the only Respondents' witness who purported to provide a basis for **the** conclusion **that** judicial electrocution results in instant unconsciousness. The other state experts did not know any data and had not undertaken any study relevant to answering this question. (See Initial Brief at 45-46). Thus, since Dr. Morse was the only state expert to testify to a purported basis for the conclusion **that** judicial electrocution results in instant unconsciousness and since that conclusion depends upon Dr. Morse's new calculations and his review of Dr. Wikswo's work about which he testified in July, Respondents have not established beyond a reasonable doubt **that** the error in considering his testimony was harmless.

The circuit court also stated that Mr. Jones presented Drs. Price and Devinsky "to contradict the widely accepted scientific opinion that judicial electrocution results in massive and instantaneous depolarization of the brain with **the** onset of the initial surge of high voltage electricity" (R2. 1956). Again, Dr. Morse could be the only source of this "widely

accepted scientific opinion. " Experts from both sides agreed that the electrical activity of the brain during a judicial electrocution has not been and cannot be measured (R2. 408 [Price], 677 [Devinsky], 1039 [Wilder]). The experts also agreed there have been no scientific experiments conducted applying 2300 volts to a human being (R2. 422, 465 [Price], 711 [Devinsky], 1038 [Wilder]). Further, there are no published scientific studies regarding the path electrical current follows through a person's body during a judicial electrocution (R2. 476 [Price], 677, 705-06 [Devinsky]). Further, as set out above, none of the state's experts knew any data or had performed any study regarding the current path during a judicial electrocution, Thus, the circuit court's reference to a "widely accepted scientific opinion" could only refer to Dr. Morse, who was the only state expert who purported to provide a basis for concluding that judicial electrocution results in instant depolarization of the brain. Since Dr. Morse's conclusion in this regard depends upon his July testimony about his new calculations and his review of Dr. Wikswo's work, Respondents cannot establish beyond a reasonable doubt that the error in refusing to allow Mr. Jones to present Dr. Wikswo's testimony was harmless.

Respondents never addresses the substance of Dr. Wikswo's report (Attachment A to Initial Brief). Thus, Respondents do not contest the fact that Dr. Wikswo's report shows that Dr. Morse's testimony was misleading and inaccurate. Nor do Respondents address Mr. Jones' argument that the circuit court's refusal to allow Mr. Jones to present Dr. Wikswo's testimony resulted in the consideration of inaccurate and misleading testimony and violated due process. Mr. Jones relies upon his initial brief.

Respondents only argument about the circuit court's refusal to allow Mr. Jones to present Dr. Wikswo's testimony is the incredible argument that Mr. Jones has not shown his counsel could not have discovered Dr. Wikswo earlier through the exercise of due diligence. First, Respondents fail to mention that the subject of Dr. Wikswo came about through Respondents' presentation of a witness who purported to rely upon Dr. Wikswo's work and who misrepresented the conclusions of Dr. Wikswo's work. Respondents do not explain why Mr. Jones' counsel had some obligation to find a witness that Respondents injected into the proceedings and who Mr. Jones' counsel had no reason to **anticipate**.⁷

Respondents also argue that since Dr. Morse testified in April that someone had done a finite element analysis, Mr. Jones' counsel could have discovered Dr. Wikswo (AB at 43). Of course, in April, Dr. Morse did not mention Dr. Wikswo's name. Further, Respondents do not contest the fact that Dr. Wikswo's manuscript has not been published. But most importantly, in April, Dr. Morse did not testify that he was relying upon this **finite** element analysis. In July, Dr. Morse testified that his testimony was based on work he had done since April (R2. 1145). At the July hearing, Mr. Jones' counsel did not call Dr. Morse for further cross-examination after presenting their experts and rebutting Dr. Morse's April testimony. Then Respondents chose to present Dr. Morse to answer questions he could not answer in April. Mr. Jones' counsel had no reason to anticipate that Dr. Morse had come

⁷Of course, although it is clear that Dr. Wikswo's manuscript is consistent with the testimony of Drs. Price and **Devinsky**, whose affidavits Respondents have possessed since April, and clearly supports Mr. Jones' position, Respondents never informed Mr. Jones' counsel about Dr. Wikswo. Rather than have the evidentiary hearing be a fair proceeding which might result in ascertaining true facts about judicial electrocution, Respondents choose to play games.

up with answers to questions he could not answer in July or would be relying upon a study he did not rely upon in April.

Finally, Respondents present the preposterous argument that since the experts presented by Mr. Jones had previously testified or presented affidavits in other states, Mr. Jones' counsel should have located Dr. Wikswo. Thus, according to Respondents, Mr. Jones' counsel is held to a standard of knowing everything that is going on in other states, while Respondents -- who injected Dr. Wikswo's work into the proceedings -- are not even held to a standard of simple fairness to disclose evidence which supports Mr. Jones' position. First, Mr. Jones' counsel stated in the circuit court that counsel did not know about Dr. Wikswo's work (R2. 1267). Respondents proffered then and proffers now no facts to the contrary. Respondents' argument that counsel should have known about Dr. Wikswo requires an evidentiary hearing. Further, the standard to which Respondents want Mr. Jones' counsel held is even higher than the performance prong of Strickland v. Washington, 446 U.S. 668 (1984), although in innumerable proceedings before this Court and others, Respondents have argued that capital post-conviction defendants are not even entitled to competent counsel, Respondents' absurd due diligence argument must be rejected.

What should be of concern is whether Mr. Jones received a full and fair hearing with a reliable resolution of the issues presented. Instead of addressing those concerns, Respondents continue to try to assert legal technicalities in their game of "gotcha."

ARGUMENT III

Respondents argue that Mr. Jones' presents "absolutely no legal authority" to support his position that Judge Soud applied an incorrect legal standard to Mr. Jones' claim (AB at

44). Respondents are absolutely wrong. The law supporting Mr. Jones' position is set forth at pages 37 to 39 of his initial brief.

Respondents argue "that the Campbell analysis is much more persuasive than that set forth in the cases relied upon by Jones, such Farmer v. Brennan. " (AB at 46). Respondents even argue at one point that Campbell specifically rejected the "deliberate indifference standard" (AB at 45). What Respondents neglect to observe is that Campbell was decided February 8, 1994, while Farmer was decided June 6, 1994. A later United States Supreme Court decision is binding upon this Court while a contrary Ninth Circuit opinion predating the Supreme Court is not binding. Further, Campbell did not reject the deliberate indifference to a risk of pain standard but found that the petitioner had not proven the risk. Campbell v. Wood, 18 F.3d 663, 687 (9th Cir. 1994)(the court held that Campbell had "failed to establish that the risk of either [painful] result is more than slight"),

Regarding the evidence showing that Pedro Medina was still alive after the electricity was turned off (Argument IIIA), Respondents simply miss the point of that evidence. There can be no doubt that Mr. Medina had an agonal pulse when Mr. Matthews examined him and that Mr. Medina's chest moved upward three times during that examination. The experts testified that a pulse cannot occur unless the heart is pumping blood. The experts also testified that the chest movements--regardless of whether they produced an effective air exchange--meant that at least Mr. Medina's brain stem was still functioning. The significance of this evidence is that Mr. Medina's heart still maintained enough electrical activity to beat and that Mr. Medina's brain stem also maintained enough electrical activity

to make his chest move. Thus, the current did not instantly defibrillate Mr. Medina's heart nor instantly depolarize his entire brain.

Respondents argue that evidence regarding the Tafero execution (Argument IIIB) is irrelevant (AB at 50-51). Respondents ignore the fact that this Court's first order on Mr. Jones' claim directed an evidentiary hearing " [d]ue to the fact that flames have erupted on two occasions during electrocutions conducted in Florida's electric chair. " Jones v. Butterworth, No. 90,231 (Fla. Apr. 10, 1997), slip op. at 1). The "two occasions" referred to were the Medina and Tafero executions, and thus evidence regarding the Tafero execution was clearly relevant. Further, throughout the proceedings, Respondents and the circuit court have consistently taken the position that all judicial electrocutions in the past and future have been and will be painless and result in instant unconsciousness. Thus, evidence regarding the Tafero execution was relevant to countering that position.

As to Mr. Jones' argument that no scientific evidence exists showing that judicial electrocution is instantly lethal or instantly incapacitates the brain and that indirect evidence indicates that judicial electrocution may be painful (Argument IIIC), Respondents argue that the circuit court did not err in accepting the state witnesses' testimony that Mr. Medina did not experience conscious pain (AB at 5 1). Respondents support this argument by pointing out testimony which, according to Respondents, shows that **Mr.** Jones' experts lacked the knowledge necessary to support their opinions (AB at 51-53). According to Respondents, this evidence show that Judge Soud correctly credited the testimony of the state's experts (AB at 53-55). The major flaw in Respondents' analysis is their failure to mention the fact that no scientific studies of the effects of voltages such as those used in judicial electrocution

have ever been conducted or to mention the deficiencies in its own experts' knowledge (see Initial Brief at 44-46). Contrary to Respondents' experts, Mr. Jones' experts based their opinions on the scientific method by considering all available relevant evidence. A finder of fact cannot simply decide to accept any fact he chooses, regardless of its lack of support, yet that is precisely what Judge Soud did.

As to Mr. Jones' argument that the procedures adopted by the Department of Corrections since the Medina execution are insufficient (Argument IIID), Respondents basically say that Dr. Bernstein's criticisms of the DOC's testing procedure and execution day protocol do not matter. However, Respondents' own experts recommended the procedures found lacking by Dr. Bernstein, and the Governor and DOC assured that all of those procedures would be followed. Now, Respondents are taking the position that some of the procedures are unimportant, indicating that in the future Respondents will not even follow their own procedures, but will decide which ones are important enough to follow.

As to Mr. Jones' argument that Dr. Morse's failure to identify the dry sponge as a problem in 1990--**although** he assured at that time there would be no future malfunctions--establishes that there is no assurance that there will be no future malfunctions (Argument IIIF), Respondents simply do not mention the testimony of David Brierton that the dry sponge was part of the equipment in 1990. Mr. Jones relies upon his initial brief,

As to the remainder of Argument III, Mr. Jones relies upon his initial brief.

ARGUMENT IV

Respondents completely fail to address whether the Florida electric chair in its current condition constitutes unusual punishment in violation of the Florida Constitution, In his

Initial Brief, Mr. Jones argued that he had introduced evidence before Judge Soud which established that the electric chair was unusual punishment barred by the Florida Constitution. Mr. Jones also argued that Judge Soud erred in not addressing the unusualness claim in his final order denying relief. Respondents in their brief never address Mr. Jones' contention in this regard. Mr. Jones did also argue that Judge Soud erroneously excluded additional evidence of unusualness. Respondents' brief only addresses these evidentiary rulings and argues that based on federal cases addressing the Eighth Amendment "cruel and unusual" prohibition the evidence was properly excluded, Respondents apparently believe Art. I § 17, Fla. Const. is identical to the Eighth Amendment or has been repealed. However, neither is the case.

Respondents "see[] nothing in Allen v. State, which benefits Jones" (AB at 66), and therefore do not address its holding that Art. I § 17 is not identical to the Eighth Amendment and is in fact broader since it uses "cruel or unusual." Allen v. State, 636 So. 2d 494, 497 n.5 (Fla. 1994). Respondents' complete disregard of the issue under the Florida Constitution of whether the electric chair is unusual punishment is telling. The failure to address the merits reflects the weaknesses of any argument that Respondents could mount.

ARGUMENTS V-VII

Due to page limitations, Petitioner relies upon his Initial Brief.

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 September 2, 1997



PETER WARREN KENNY
Florida Bar No. 351105
Capital Collateral Regional Counsel
Southern Region

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
Office of the CCRC - Southern Region

GAIL E. ANDERSON
Florida Bar No. 0841544
Special Assistant CCRC
Office of the CCRC

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL**
1444 Biscayne Boulevard, Suite 202
Miami, FL 33 132-1422
(305) 377-7580

Attorney for Petitioner/Appellant

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 32399-1050

Susan Schwartz and **MaryEllen** McDonald
Harry Singletary, Secretary
Department of Corrections
2601 Blairstone Road
Tallahassee, FL 32999-2500