IN THE SUPREME COURT OF FLORIDA

THOMAS PROVENZANO,

Petitioner/Appellant,

v. CASE NO. 95,973

MICHAEL MOORE, Secretary,
Florida Department of Corrections,

Respondent/Appellee.
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ANSWER BRIEF OF RESPONDENT/APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee does not generally accept Appellant's Statement of the Case and Facts (Initial Brief at 2-62), which is both argumentative and incomplete, and makes no reference to the detailed findings of fact made by Judge Johnson following the evidentiary hearing. Accordingly, the State presents the following summary of the testimony of the thirty-three (33) witnesses who testified below:

Provenzano presented twenty (20) witnesses in support of his contention that execution in Florida's electric chair is violative of the state and federal constitutions. These included seven (7) witnesses who had witnessed executions of inmates prior to the Davis execution; six (6) individuals who had witnessed the Davis execution, as well as three (3) employees of the Department of Corrections who had participated in the execution itself; and four (4) expert witnesses, including two - Drs. Price and Kirschner - who had previously testified in the Leo Jones litigation in 1997. The State presented the testimony of thirteen (13) witnesses, including the testimony of five (5) eyewitnesses to the Davis execution, including three (3) employees of the Department of Corrections who had participated in the execution; three (3) non-expert witnesses and five (5) expert witnesses. The testimony of each will be summarized.

A. Provenzano's witnesses concerning executions prior to Davis

Provenzano initially called seven (7) witnesses who had observed executions prior to that of Allen Lee Davis (R I 37-151; 187-8), and such witnesses often testified over the State's objections on the grounds of relevancy (R I 38, 40, 64-5, 76). Ellen McGarrahan, a former reporter with the Miami Herald, testified that she had witnessed the execution of Jesse Tafero in 1990. She stated that a mouthpiece comparable to that utilized today was employed then, and that after the current was engaged, flames and smoke appeared at the headpiece (R I 42). She stated that, in her view, the power was then turned off, and she observed Tafero's head and chest move (R I 43). The witness said that the electricity had then been turned on again, and that flames and smoke had again appeared; when the power was turned off, she again saw Tafero appear to nod or "breathe" (R I 44). When the power was engaged the third time, there was again smoke and fire, but no movement from Tafero (R I 45). Tafero was declared dead, and Miss McGarrahan testified that as she left the chamber, she noted that one of his fingers had rubbed itself raw against the arm of the chair (R I 46).[1]

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[1] Provenzano also introduced an investigative report concerning the Tafero execution (Pet. Ex. #24, No. 40; X I 1817-1848). The report stated that the flames and smoke were caused by usage of a synthetic sponge, as opposed to a natural sponge, in the headpiece, and that after the initial sight of flames, the "automatic two minute cycle" had been twice interrupted. The

Michael Minerva, former head of the Office of the Capital Collateral Representative, stated that he had observed the execution of Jerry White in December of 1995, and that he had seen White stiffen and thrust against the straps and against the back of the chair after the power was engaged (R I 69). The witness also stated that he had heard what sounded like an "intake of breath" after the mouth strap had been secured (R I 70-1).

Glenn Dickson testified that he was Pedro Medina's spiritual advisor and that he had witnessed the Medina execution in 1997. He said that during the execution, he had seen smoke and flame at the headpiece (R I 79). When the medical personnel examined Medina's body, Dickson saw them loosen the chest strap, and then saw Medina take "two breaths" (R I 80). The witness estimated that after the mouth strap had been secured, between one and two minutes had passed before the smoke and flame appeared (R I 85-6). On cross-examination, Dickson stated that he had no medical training and did not know for a fact that Medina was breathing (R I 90-1).

Gregory Smith, Capital Collateral Regional Counsel for the Northern Region of Florida, testified that he had witnessed the

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report also stated that despite this event, Tafero had experienced "instant death" (R XI 1818), and Dr. Frank Kilgo, the chief medical examiner in attendance, stated that Tafero had been rendered brain dead after the initial surge of electricity and that any "spasmodic respiratory activity," observed by witnesses led to "no connotation that life existed." (R XI 1823). This Court cited to Kilgo's statement, as well as to medical examiner Hamilton's statement that "the first jolt obliterated consciousness," in its opinion in Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990).

execution of Judy Buenoano in March of 1998. He stated that when the chest strap had first been secured, it "looked too tight," and that Miss Buenoano had grimaced; the corrections officer had then loosened the strap (R I 95-6). Smith stated that after the current was engaged, he had seen Buenoano's body stiffen, and that white smoke or steam had risen from the leg electrode; when the current was disengaged, the body had slumped (R I 105-6).

Rabbani Muhammed testified that he was Leo Jones' spiritual advisor and that he had witnessed Jones' execution in March of 1998. The witness stated that when the chin strap had been secured, it had been tied tightly, in that Jones' flesh had "bulged" (R I 117). When the current was engaged, Muhammed saw Jones' body contract, and, after the electricity started, Jones' chest made spasmodic movements as if it were breathing (R I 127). The witness stated that Jones was pronounced dead ten to twelve seconds after the current was turned off (R I 128-9). Muhammed stated that he preserved the body for burial later that day, after it had been taken to the medical examiner's office (R I 129-131, 149). At this time, he took various photographs which indicated, *inter alia*, wounds to portions of Jones' body (R I 131-9).[2]

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[2] The State introduced by stipulation a body diagram of Jones done by Dr. Hamilton, the Medical Examiner for that circuit; while no formal autopsy was conducted due to Jones' religious beliefs, an external examination of the body was performed (R IV 535-6). This document demonstrates that at the time that Dr. Hamilton examined the body, there were no puncture wounds to the head, leg or chest or any burns anywhere other than the scalp and calf (Petitioner's

Provenzano also called Larry Spalding, the original Capital Collateral Representative, who testified that he had witnessed fourteen executions in Florida and had never seen any blood appear on the inmate (R I 188). Additionally, Petitioner read into the record the prior testimony of Patricia McCusker, a witness to the Medina execution, who had seen a flame in the headpiece and contractions of Medina's chest muscles, as the medical personnel were examining the body (R II 235-43).

B. Provenzano's witnesses concerning the Davis execution

The first witness to testify as to the Allen Davis execution was John Moser, the Capital Collateral Regional Counsel for the Middle Region. Moser stated that he saw Davis wheeled into the execution chamber at 7:03 a.m., on July 8, 1999 (R I 154). Moser witnessed Davis being strapped into the electric chair, and stated that around 7:10 he noted a tensing in Davis' body; prior to that point, he stated that he had heard two screams from Davis, after the securing of the mouthpiece and chin strap (R I 163-4). Within seconds of the tensing, Moser stated that he observed a trickle of blood dripping below the veil onto Davis' collar, and then the appearance of an irregular diamond shaped blood stain on the chest area of Davis' shirt (R I 164-8). Prior to Davis' examination by the medical personnel, Moser saw Davis' chest move back and forth several times (R I 168-83). Moser testified that he was not sure

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Composite Exhibit #25).

at what point the current had been engaged, but stated that the chest movements had occurred at 7:13 and that Davis had been pronounced dead at 7:15 (R I 177, 183-84).

Mark Lazarus, a DOC employee, testified that he witnessed the Allen Davis execution. The witness observed Davis being strapped into the chair, and stated that he saw water from the sponge in the headpiece running down around the back and sides onto Davis (R I 195); he observed one of the execution team members wipe water off of the floor (R I 196). After the mouthpiece had been affixed, the witness stated that Davis had attempted to yell out twice (R I 197). Shortly thereafter, there was a clanging noise and the circuit was engaged, and Davis' body tensed (R I 197-8). After the power was turned off, Lazarus saw blood dripping from the behind the face mask onto Davis' shirt, spreading rapidly (R I 198-9). At this time, the witness observed one muscle spasm or "shudder" of Davis' chest (R II 201-2). When the face mask was removed by the medical personnel, Lazarus stated that he could see that the blood had come from Davis' nose (R II 205).

Sheila McAllister, another DOC employee, likewise testified that she witnessed the Davis execution. Miss McAllister observed Davis being strapped into the electric chair, and testified that he did not appear to be in any pain as a result of the straps (R II 212). The witness observed the affixing of the mouthpiece, and, several seconds later, the securing of the headpiece and chin strap

(R II 214). Miss McAllister heard the sound of a generator, and saw Davis' body tense (R II 216-17). Prior to this time, she had heard Davis make a couple of moaning sounds (R II 217). When the execution was about over, the witness observed blood dripping from behind Davis' mask (R II 217-18). As the medical personnel were examining Davis, the witness saw Davis' chest move three to four times, movements which she expressly described as muscle spasms (R II 225-6). She also testified that Davis' face had appeared to have a slight red discoloration from the time that he had sat in the electric chair (R II 226).

Michael Collins, a nurse at FSP, also attended the execution. He stated that after the mouthpiece was affixed, he had heard a loud high-pitched noise from Davis (R II 278). After the current was engaged, he saw Davis' body tense, and, after the current stopped, Collins observed blood on Davis' collar, and then on his chest (R II 283-4). The blood stopped dripping before Dr. Seryutin went over to examine Davis (R II 285).

Steve Wellhausen, an official witness escort, testified that he had also observed the Davis execution, and that he had witnessed ten prior executions (R II 289). The witness stated that after the mouthpiece was affixed, he heard a muffled moan from Davis, and that when the current was engaged, he saw the body move slightly backwards and tighten, consistent with other executions which he had witnessed (R II 290-1). After the execution, Wellhausen

noticed blood dripping from below Davis' face mask onto his shirt (R II 292-3). A few seconds after the current was disengaged, the witness observed chest movements, which he described as muscle contractions, again comparable to matters which he had observed during other executions (R II 294-6); Wellhausen expressly stated that the movements did not appear to be breathing (R II 297).

Dr. Victor Seryutin was the doctor on duty at the Davis execution, and stated that he had witnessed six prior executions (R II 298). Seryutin testified that he was surprised to have observed blood on Davis' shirt, and that after he had lifted the face mask, he could see blood in one of the nostrils and realized that the blood was from a nose bleed (R II 298-9). The witness speculated on the number of different causes for the nose bleed, including Davis' hypertension and possible injury from the mouth strap "because he possibly couldn't get any air." (R II 296-300). The doctor, who was standing to the right of Davis, stated that he thought that the blood had first appeared before the electricity, and that movement of the body had made it appear suddenly on the white shirt (R II 300-1). Seryutin said that the blood had not represented "serious bleeding", and had in fact been a very, very small amount, "maybe one teaspoon" (R II 301-2). The doctor confirmed that he had pronounced Davis dead at 7:15 a.m., and that he had seen Davis' chest move "a little bit" (R II 303).

William Dotson, an inspector supervisor with the Department of Corrections, testified that he had attended the Davis execution as an official witness. Although Dotson stated that he was not familiar with the formal protocols, he said that the instructions which he had been given to attend and witness an execution were consistent with them (R II 245, 258-9). The witness stated that he had inspected the equipment prior to the execution and that afterwards, he had taken the sponges used into custody (R II 262, 246). Dotson testified that, on his own initiative, he took photographs of Davis after the execution, given the existence of the nose bleed, which was unusual (R II 248, 253), but stated that he had not conducted a formal investigation (R II 256). Dotson testified that the photographs taken had been consistent with the directive in the protocols that "the specific electrical contact points" be photographed if an unusual incident/problem occurred (R II 262-5).

Robert Thomas, assistant maintenance supervisor at FSP, was a member of the execution team at Davis' execution. Thomas testified that one of his specific assignments was to assist in strapping an inmate into the electric chair, such responsibility shared by John McNeill and Carlton Hackle (R II 313). Thomas initially positions the waist strap and McNeill buckles and tightens it, and both individuals are involved in the strapping of the chest, elbow and wrist (R II 315). Thomas straps the left arm, while McNeill straps

the right arm, and Thomas testified that the protocols provided that the straps be tightened “as tight as I can get them.” (R II 316). Thomas also participates in the securing of the mouth strap, with Hackle, who actually tightens the strap, and with Assistant Warden Thornton; this strap covers the mouth (but not the nose) and buckles on the other side of the electric chair (R II 318, 341). Thomas testified that he had seen no reaction “out of the ordinary” when the mouthpiece was secured on Davis (R II 320); Thomas testified that he had heard Davis moan at this point. At this juncture, the headpiece (which holds the head electrode, and which has a strap which goes under the chin) was affixed; the headpiece goes on top of the saturated sponge (R II 320-1). Thomas testified that Hackle had placed the sponge on Davis’ head, and that it had been dripping wet at that time; after the sponge was in position, the headpiece was placed on over it (R II 323). Thomas testified that he tightened the chin strap and made it “tight” (R II 323-6). The witness stated that ten to twenty seconds elapsed between the securing of the mouthpiece and the tightening of the chin strap (R II 324); Thomas testified that, after the Warden had gone over to the telephone to tell the Governor that Davis was strapped in, and before any current was employed, he had observed two bubbles of blood “like [Davis] was breathing” coming out of Davis’ left nostril (R II 329, 332). Thomas was in a position to see behind the face mask which covered Davis’ face (R II 327). The witness

stated that he did not say or do anything at this time, because he knew from experience that the executioner would be throwing the switch within five to ten seconds (R II 339), and because Davis was suffering at most from a nose bleed (R II 328). Thomas testified that after the current was disengaged, he saw Davis' body slump in the chair, and that, as the medical personnel examined the body, he saw the body "heave one time." (R II 334).

John McNeill, utility supervisor at FSP, was likewise presented at the Davis execution, and offered additional testimony concerning the maintenance of the electric chair and its apparatus. McNeill testified that he assisted in the strapping of Davis, along with Hackle, Thomas and Thornton, being responsible for, *inter alia*, the right forearm and bicep straps and in assisting the attachment of the leg electrode (R II 350). McNeill stated that it was his responsibility to tighten the waist strap, and said that there was no single "tightness" for every inmate, as "different body size determines it." (R II 351-2). The witness said that after he had tightened the waist and chest straps, he had to re-strap and re-tighten them "because some of Davis' fat had rolled over and loosened them" (R II 352). Although McNeill did not participate in the securing of the mouth strap, he could see the process from his vantage point; when shown one of the post-execution pictures of Davis, he stated that the mouth strap's position had changed, and that when it had been secured it had not

been against the nose (R II 355). McNeill testified that he had heard Davis grunt when the waist strap and chin strap had been secured, which was "normal" (R II 358-9, 399). He estimated that five to six seconds elapsed from the time that the headpiece had been secured and the current engaged (R II 399). The witness stated that he had seen some chest heaves in other executions after the current had been turned off, but that he had not seen any in this case (R II 361-2). As to the tightness of the straps, McNeill testified that he was concerned that the straps be tight enough to secure the inmate but that he did not wish to make them so tight that the inmate was cut; he said that he examined the straps particularly to determine whether they were too tight (R III 403-4).

McNeill also testified about the chart recorders and electrical equipment. He stated that previously a Newell TA11 chart recorder had been utilized, which had been replaced in April of 1998, after the four executions (R II 362-3). He testified that it had been recommended in May of 1997 that the former chart recorder be replaced, as one of the pins "didn't want to work and record and rewind" and there was a "wheel that was stripped out" (R II 365-6); there was no way to obtain parts for the old chart recorder as it was obsolete (R II 366). The old chart recorder was replaced so that the department could take advantage of new technology (R II 367); the chart recorder, however, plays no part

in an actual electrocution (R II 397-8). McNeill testified that Ira Whitlock had contracted with the Department of Corrections for maintenance of the electrical system, and that he cleaned and tested the equipment on a regular basis (R II 369). Although a bid had been made for formal replacement of the three breakers on April 12, 1999, for the sum of two hundred and sixty-five thousand dollars ($265,000.00), McNeill testified that this was an alternative plan, and had never been implemented (R II 370-3); he stated that, instead, maintenance and refurbishment of the breakers had taken place between February 26 and March 16, 1999 (R II 377-8). The witness identified a letter which he had written to Jay Weichert about possible replacement of the head electrode, but stated that the decision had been made not to go forward with that purchase (R II 385-6); he stated that he saw no reason to replace any portion of the leg electrode (R II 393). He did state, however, that all three breakers had been refurbished since June of 1998 (R II 387), adding that, if a breaker failed, “you would not have an execution” (R II 387-8); the breakers were 1,200 amps which would trip if their load exceeded that amount (R II 395-6). McNeill also described the role of the various personnel in the execution process (R II 399-400). The witness stated that, once Warden Crosby indicated that all were ready to proceed, Assistant Warden Thornton threw the switch, and nodded to McNeill. At this juncture, McNeill turned on the incoming line breaker, which

provided power to the executioner. The executioner in turn engaged his breaker, and McNeill signaled to Hackle as each cycle began; when Hackle nodded to him, McNeill turned off the executioner's breaker, and the incoming line breaker, and Thornton opened his breaker (R II 400).

C. Provenzano's expert witnesses

The first expert called by Provenzano was David Price, a neurophysiologist and psychologist, who also testified in the Leo Jones litigation; Price is, however, not a medical doctor (R III 417). Dr. Price has, for many years, specialized in the study of pain, and, although studying the effects of electrical current on the nervous system, has never studied or researched high voltage electricity, instead utilizing current in the amount of milliamps (R III 418, 499). Price testified that he had read autopsy reports, printed materials concerning electrical trauma and eyewitness accounts of electrocution, and that, in his opinion, judicial electrocution resulted in excruciating pain and "other negative emotional experiences such as fear and dread and things of that nature." (R III 423). Price opined that there were three ways in which pain was likely to be experienced, through the tightness of the straps, activation of the pain centers of the brain and stimulation of body tissue by burning (R III 424). Dr. Price testified that it was his view that the initial current surge in a judicial electrocution was highly unlikely to instantly and

permanently depolarize the brain; the witness further opined that, in his view, only a small portion of the current actually reached the brain and that the use of alternating current caused the brain cells to “repolarize” (R III 425-30). Dr. Price stated that, in his view, the presence of a pulse after the conclusion of an execution meant that the heart was still pumping blood (R III 433). He said that the heart was protected from the current by the lungs, as the brain was protected by the skull, which directed the current towards the spinal fluid (R III 433-4). Price identified a number of “pain centers” in the brain, some deep inside and some close to the surface, and stated that the former centers would not be depolarized by the current (R III 435-40). Price said that his study of histological brain slides had revealed no gross anatomical abnormality after the passage of current, which, to him, meant that the current had not permanently depolarized the brain (R III 441-6). Price also testified that he had studied electrical impulses which were produced by the brain and which crossed the scalp (R III 446-7). Based on these studies, Price opined that, during an execution (when the current traveled in the exact opposite direction), only one twentieth of it would reach the brain, given the resistance of the intervening tissues (R III 447-8, 510-11); if 9.5 amps were administered through the head electrode, only 450 milliamps would reach the brain under Price’s hypothesis (R III 510-11). Price also testified that the presence of current in the

brain would activate the pain centers and that the current itself would cause peripheral pain, through muscle contractions and burning of the skin (R III 450-1); the witness stated that observations of executed persons confirmed this, and that those executed manifested some classic signs of pain or discomfort, such as moaning, screaming, gasping for breath and writhing (R III 451-2). Price stated that a specific study had been made concerning facial expressions of pain, called the Ekman Scale, published in 1978 (R III 453-4); Price was then shown photographs of Davis immediately after the execution, and pointed out what he perceived to be facial expressions of pain, such as the tightening of the eyes, wrinkling of the muscles at the tip of the nose and dropping of the jaw (R III 455-65).

On cross-examination, Dr. Price conceded that his theory to the effect that Davis and others suffered conscious pain during electrocution was not generally accepted within the scientific community (R III 419, 476-7). The witness stated that current as low as 100 milliamps would cause fibrillation of the heart, and that several milliamps to the brain would be sufficient to render one unconscious (R III 481, 496-7). Price stated that blood was one of the most conductive portions of the body, and acknowledged that blood was present in the brain in large diffuse quantities (R III 485-6). The witness further stated that if the entire brain was permanently depolarized as a result of the application of high

voltage electricity, an individual would lose consciousness instantly, within the first second. Price likewise agreed that when one is unconscious, pain is not experienced (R III 491-2). Price likewise agreed that a single breath, regular pattern breathing, a heartbeat or even a spasmed muscle or twitching muscle, in and of themselves, would not indicate consciousness (R III 492). The witness testified that pain traveled at a slower rate or speed than electricity (R III 498), and that nose bleeds were not necessarily painful (R III 501). He also stated that the Ekman study had never been applied to facial expressions on dead bodies (R III 501).

Provenzano's next expert was J. Patrick Reilly, a part-time physics professor and consultant. Although Reilly had made a study of the effects of high voltage on humans, his experiments had lasted for only a microsecond or millisecond, and had not reflected the duration of Florida's execution cycle (R III 543, 546-7); while Reilly had some experience with electrical accidents, none involved a head to leg electrode path or, again, the duration of Florida's execution cycle (R III 547-9). Reilly testified that he had read the transcripts of the Leo Jones litigation, as well as autopsy reports and photographs, and that he had reached the opinion that the effect of judicial electrocution on the tissues of the human body involved a constellation of reactions, including the excitation of sensory neurons throughout the body, the excitation

of neurons within the brain, the excitation of motor neurons throughout the body, burning at certain portions of the body, non-thermal destruction of other portions of the body and excitation of the heart (R III 552-3); the witness then detailed each phenomenon. Reilly testified that he had sought to determine the current density during an electrocution, and had concluded that the current density of the face would be two thousand times higher than the threshold for high tolerance of pain; he also stated, however, that he could offer no opinion as to whether the individual would be conscious at the time or able to suffer pain (R III 563-5). Reilly testified that the current density would vary throughout the body, given the ununiform conductivity of the various tissues (R III 567). In determining the difference between the current density in the brain and on the skin on the outside of the skull, Reilly relied upon two case studies, one involving a monkey and the other a human skull, in a saline bath (R III 570). Extrapolating from the monkey study, the witness opined that current density would be fifty times higher in the scalp than within the brain, and that if 9.5 amps were administered to the scalp, the current in the brain would be forty (40) milliamps per square centimeter or 1.2 amps (R III 571-2; IV 604-6). The witness also testified that the currents employed during a judicial electrocution would excite the motor neurons within the brain, as well as cause muscle contractions throughout the body leading to tetanus (R III 573-5). Dr. Reilly

stated that the current density determined the thermal effect and the existence of burns on the skin, opining, however, that the temperature rise within the brain was insufficient to thermally damage the tissues of the brain and thus depolarize it (R III 582-3); conversely, however, based upon animal studies and accounts of open heart surgery, the witness stated that the current was too strong to guarantee fibrillation of the heart (R III 591-3). On cross-examination, the witness did state that application of ten (10) amps would result in cardiac asystole or standstill (R III 597). He also stated that he had reviewed Florida's execution protocols and that the amounts of amps and volts therein presumed a certain resistance; he further agreed that in electrocution the amperage was the lethal portion of the electricity (R III 602-3).

Provenzano's next expert was John Wikswo, a physics professor from Tennessee, with specialities in biological physics and biomedical engineering; Dr. Wikswo, however, is not an electrical engineer or a physician (R IV 618). The witness stated that he had been asked to determine whether judicial execution in Florida's electric chair led to instantaneous and painless death, and that his conclusion was that it did not; he also stated that the threshold of current or voltage for instantaneous or painless death was unknown (R IV 623). The witness based this conclusion upon accounts of agonal breaths or heartbeats in electrocutions, as recounted by witnesses, as well as upon articles involving

accidental electrocutions (R IV 633-7). In this latter respect, Wikswo recounted in some detail the eleven (11) articles upon which he relied, none of which, he later conceded, had the same variables in regard to current path or duration of current as a judicial electrocution (R IV 639-47; 687-9). The witness stated that it would be possible for an inmate to maintain consciousness for fifteen to thirty seconds into an electrocution, and that during this time, the muscles would be contracting and tetanizing, and the respiratory muscles would be paralyzed, raising the level of carbon dioxide and causing intense pain (R IV 652-8). Wikswo said, however, that he did not know how many milliamps proceeding through the brain would cause unconsciousness, and that he could not say whether an unconscious person could perceive pain (R IV 633-4). As to the chart recordings and circuitry of the electric chair, Wikswo testified that Florida's electrical system was one of current-regulated voltage, meaning that the machinery "senses the electric current that is being delivered to the inmate and adjust[s] the voltage to maintain the current near the desired value"; if the current were too high, the circuit breakers would trip, meaning that the device was current limited (R IV 659-60). The witness stated that he had reviewed the chart recordings of the last five executions, and that a constant amperage was reflected (R IV 661). Wikswo disagreed with the contention that the voltage was preset, and also stated that he could not explain the fact that the

recordings showed full voltage and no current at the beginning and end of each execution (R IV 662-71). When asked whether the design of Florida's electric chair was to provide current throughout the body, Wikswo stated that the chair was "designed to kill people by the equivalent of beating them to death with a sheet of plywood," an answer later stricken (R IV 652-3).

Provenzano's final witness was Robert Kirschner, a pathologist who presided over the second autopsy on the body of Allen Davis; Kirschner, however, has no specialized training in the effects of high voltage electricity on the body (R IV 735). The witness stated that an external examination of the body had revealed "halo" burns on the scalp, as well as "accessory burns" on the face and "arching" burns on the lower abdomen or suprapubic region, as well as on the inner thigh and calf (R IV 740-1). Kirschner stated that he had observed the presence of petechial hemorrhages around the eyes, on the eyelids and on the eye itself, which were consistent with asphyxiation (R IV 741, 776-7). The witness also said, however, that the "mechanism of execution" would itself cause some asphyxiation, although Kirschner posited that the petechiae were also attributable to the fact that the mouth strap had allegedly partially obstructed Davis' breathing (R IV 747-9). The pathologist stated that asphyxiation would irreversibly damage the brain within two to four minutes and that some persons would lose consciousness in several seconds or up to a minute (R IV 757-8).

Kirschner, however, acknowledged that petechiae were not specific to asphyxiation, and that asphyxiation was part of the process of every death, no matter what the cause (R IV 779-81). The witness stated that one could moan while being asphyxiated but that the presence of two moans could suggest that inhalation was necessary and that the individual was getting some air, as air was passing over the vocal cords (R IV 781-3). Likewise, the presence of the bubbles of blood in Davis' nose would indicate that some breathing was going on (R IV 790-1). Kirschner further acknowledged that the photographs indicated that the chest strap on Davis had been released, and that at least to some extent, the body could have slouched or slumped in reaction thereto (R IV 784-6). Kirschner testified that Davis' nose bleed had been caused by the "face mask" protruding upwards and pushing upwards on the nose, although the witness also testified that the specific source or cause of the nose bleed was never found (R IV 752, 772, 787). Kirschner stated that Davis's nasal cavity looked perfectly normal and that there was no reason to believe that he was predisposed to nose bleeds or that any medication was responsible (R IV 752-3). Although actual bleeding after the current had been turned off could indicate that the heart was still pumping, the witness also acknowledged that blood can spontaneously ooze from tissues after death and that the slumping of the body could cause oozing (R IV 749; V 805-6).

Kirschner testified as to the burns and stated that those on the lower part of the body had not been caused by a strap (R IV 756-7).

The witness also stated that Davis had electrical burns on his forehead from saline solution dripping down from the headpiece (R IV 759). Kirschner stated that the brain was probably depolarized during a judicial electrocution by amperage as low as 1.2, and that depolarization led to unconsciousness; once one was unconscious, one could not feel pain (R IV 793, 797). Likewise, unconsciousness would follow fibrillation of the heart, and such fibrillation could be caused by several hundred milliamps of current (R IV 793-4). Kirschner also testified that if in fact Davis' chest moved twice after the current was turned off, such would indicate that there was still some brain activity and that his brain had not been immediately depolarized; on cross-examination, however, the witness acknowledged that he had not been advised that several witnesses had testified that Davis' chest movements were spasms, as opposed to attempts to breath (R IV 751-2, 767-8). He also stated that agonal pulse and respiration were part of every dying process, and that the individual would "likely" be unconscious by this time (R IV 795, 798). Although Kirschner criticized Dr. Hamilton for not removing Davis' tongue and testes, he stated that such were not relevant to the cause of death, which he determined to be electrocution and partial asphyxiation (R IV 752, 788). Kirschner did not provide a formal written report of the autopsy which he

performed, and, although photographs were taken at the time, such were never produced to the court or to counsel (R IV 771).

D. State's eyewitnesses to the Davis execution

The State first called William Muse, a DOC employee, who had witnessed the Davis execution. Muse testified that he was in the execution chamber itself, and that he heard a groan from Davis after the mouth strap had been affixed (R IV 706, 712). After the current was turned off, he observed blood on Davis' shirt, and two "possible breathing" or heaves from his chest (R IV 708, 714-5).

The next witness was Thomas Varnes, another DOC employee, who stated that after the execution, he had seen blood on Davis' shirt (R IV 719). The witness believed that the blood had been the product of a nose bleed, because he himself had been taking high blood pressure medication for twenty years and it was not unusual for him to have a nose bleed; he stated that such nose bleeds were not painful (R IV 721). After the face mask was affixed, Varnes stated that he heard two moans (R IV 722). He testified that the sounds occurred less than a minute before the current was engaged and that, by 7:11, the strapping process was underway, with death being declared at 7:15 (R IV 725).

The State also called Assistant Warden A.D. Thornton, who testified that part of his execution duties was to position the mouth strap while Carlton Hackle and Robert Thomas buckled it (R V 811-13). The mouth strap buckles behind the chair and actually

securely positions the head against the chair (R V 830-1). Shown photographs taken after the execution itself, Thornton stated that the mouth strap had changed position, in that it was higher up on the face and closer to the inmate's nose than when it was positioned prior to the execution (R V 814-15). Thornton testified that Davis' face had begun to turn red as the mouth strap was affixed and that he did not appear to have any trouble breathing (RV 818-19). He stated that he had also heard Davis moan (R V 820). The witness testified that he would not have expected a DOC employee to have reported to him or to Warden Crosby observation of blood from Davis' nose prior to the execution (R V 839-40).

The State also called William Matthews, a physician's assistant who examined Davis after the current was disengaged. The witness stated that he had attended most executions since 1981 (R VI 1021). He stated that he had observed the mouth strap being affixed to Davis and that the strap had not impinged on his nose in any way or pushed his nose up; the witness affirmatively stated that Davis did not appear to have any difficulty breathing (R VI 1024, 1046). Matthews stated that "a half a minute" passed between the time that the mouth strap was placed on Davis and the head piece shroud covered his face (R VI 1047). Matthews testified that, after the shroud covered Davis' face, he could still tell that Davis was breathing, in that he observed "rhythmic movement of the chest expanding and contracting." (R VI 1048); he also stated

that he heard two groans after the mouth strap was secured (R VI 1035). Matthews testified that he approached the body within seconds of the current being disengaged and checked for signs of life; he detected no pulse, no heart sounds and no lung sounds (R VI 1037, 1025-7). The witness also stated that, after he loosened the chest strap, the body had slumped forward (R VI 1039, 1067). Shown one of the post-execution photographs, Matthews testified that the mouth strap was the only thing holding Davis' body up at that time (R VI 1040, 1047). Matthews testified that he observed two muscular movements in the chest area, like a shrug; he stated, however, that he did not detect any signs of life at this time (R VI 1027).

Warden James Crosby also witnessed the Davis execution. Crosby testified that he observed the mouth strap being secured on Davis (R VII 1360-3). Just before the execution, Davis made two muffled sounds and the headpiece was affixed (R VII 1363-4). Crosby expressly testified that the chin strap of the headpiece was to be pulled snug enough to be tight, but not so tight as to cause unnecessary pain, as such was not part of the process (R VII 1365-6). The witness stated that the intention was to put the "cap" of the head electrode on the crown of the head, although the protocols did not expressly mandate such (R VII 1366); he also testified that there should be drops of water showing underneath the sponge on the head, but not necessarily running down the face, in order to ensure

that the sponge was adequately wet (R VII 1331, 1371). Crosby testified that he had discussed with his staff the necessity that they report anything unusual during the course of an execution process to him, and that he would have expected Thomas to have told him about the blood at the time that he observed it (R VII 1334, 1370); on the other hand, because there had never been any prior discussion about blood, Crosby stated that Thomas might not have known that he needed to call attention to such matter (R VII 1370). The warden likewise testified that he would not necessarily expect Dr. Seryutin to have reported anything to him, as he was not a formal member of the execution team (R VII 1368). Crosby did state, however, that if an inmate appeared to need medical attention, he would seek the doctor's advice, and that if an inmate fainted, or anything like that, he would have the doctor examine him (R VII 1368-9, 1338). The warden expressly testified that Thomas' failure to advise him of the sight of blood during the Davis execution was a problem which needed to be fixed (R VII 1339).

Warden Crosby also testified extensively as to the execution protocols and the chart recorder. The witness stated that he had been warden at Florida State Prison for only a short time prior to the four executions which occurred in 1998, and that he had expended great effort to make himself familiar with the protocols and process (R VII 1326-8). He stated that they had conducted a

number of “walk throughs” of an execution, and that he had discussed with members of the execution team their specific roles as well as all relevant procedures (R VII 1328-9). Crosby testified that he participated in and observed testing of the electric chair, going over the protocols at such time to ensure that the desired or anticipated results ensued (R VII 1329-30). Crosby stated that after an inmate was totally strapped in, he would advise the Governor of that fact and ask if there were any stays of execution (R VII 1335). If there were not, Crosby would look to both Thornton and Hackle to advise him of anything awry; if he were not advised of anything, Crosby would nod to Thornton who would then release the initial switch (R VII 1335-6). Crosby would then look to the electrician and executioner who would likewise sequentially open their switches; all of this would occur in less than ten seconds (R VII 1336-7). Crosby stated that, after the executions in 1998, he had noted that the figures on the chart recordings had not corresponded to the exact amounts of amperage and voltage set forth in the protocols (R VII 1334-5). Crosby had discussed this matter with the electrical engineer, as well as with management and legal staff, and had concluded that essentially the matter was one of semantics and that the protocols did not need to be revised (R VII 1344-54); Crosby stated that the engineer had advised him that the figures set forth in the protocols did not take into account variance caused by the resistance of the executed

inmate, despite any preprogramming (R VII 1346-47). Crosby testified that, following the 1998 executions, he had replaced the chart recorder with a more modern one, as the former machine had seemed more prone to error or giving false readings (R VII 1354-56). The warden acknowledged that while engineer Whitlock had recommended making this change in 1997, he had only become warden in early 1998 (R VII 1355-6); Crosby stated that he had no indication that the former chart recorder had been inaccurate (R VII 1357). Warden Crosby testified that to the best of his knowledge and ability, he had carried out the protocols set by the State of Florida for execution in the electric chair (R VII 1339-40).

E. State's other non-expert witnesses

The State also called Walter Zant, the former superintendent of Georgia's Department of Corrections. Zant testified that he had overseen eighteen executions by electrocution in Georgia, and that Georgia utilized an execution cycle of between 1.2 and 4 amps, in a cycle comprising two minutes, with 2,000 volts administered for 4 seconds, 1,000 volts for 2 seconds and 208 volts for the remainder of the time (R VII 1291, 1293-4); the actual amperage would vary given the resistance of the executed inmate (R VII 1294). Zant testified that Georgia utilized two chin straps and no formal mouth strap (R VII 1292-3). The purpose of the straps was to prevent movement in the electric chair and to carry out the

execution in a humane manner (R VII 1292). Like Florida's mouthpiece, one strap secured the inmate's head to the chair itself, and was fastened to the back of the chair, whereas the other went underneath the chin, like a football helmet, and was designed to keep the head electrode in place (R VII 1292-3). Zant testified that the straps were affixed "very tight" to prevent movement and to keep the equipment from being dislodged from the head (R VII 1293). Although neither strap formally covered the mouth, both straps forced the inmate's mouth closed (R VII 1301-2).

Although both William Hamilton, the pathologist who conducted the initial and official autopsy on Davis, and Ira Whitlock, the electrical engineer under contract with DOC, were qualified as experts, each provided essentially "fact" testimony, and their testimony will be summarized herein. Dr. Hamilton (whose deposition was formally read into the record) testified that he was the medical examiner for the Eighth Circuit and that he had personally conducted autopsies on thirty (30) inmates who had been executed through electrocution (R VI 1058). The witness stated that an external examination of Davis' body had revealed electrical burns on the crown and forehead, on the suprapubic region, on the right thigh and on the calf region (R VI 1069). Prior to his death, Davis had not been in good health, in that he was markedly obese and had a history of hypertension (R VI 1073). The blood on Davis' face and shirt was attributed to an ordinary nose bleed, and

Dr. Hamilton stated that if Davis had not received the electrical current at the time, he would not have had the nose bleed (R VI 1075-6). The witness likewise testified that, while the burn rings on the scalp were somewhat more prominent than others he had seen, they were consistent with those observed within the last five or six years (R VI 1076-7); Hamilton stated at one point that the burns were postmortem, but later stated that he could not tell (R VI 1077, 1082). Hamilton testified that the current path in a judicial electrocution in Florida was from the top of the head through the brain and brain stem, through the trunk of the body and out the leg; administration of the current in this fashion would result in immediate loss of consciousness and death, as well as immediate massive depolarization of the nervous system (R VI 1079). The witness stated that the administration of either 10 or even 4 amps would result in immediate death (R VI 1081). Hamilton stated that he had noticed vascular congestion or discoloration of Davis' face, which he described as an agonal event (R VI 1091). Dr. Hamilton testified that he had seen burn rings in other inmates which had shifted from the top or crown of the head (R VI 1105). The witness stated that, in his opinion, the burns to the groin area had been caused by the metal buckle of a strap (R VI 1109-1112); Hamilton also stated that Davis' obesity would have contributed to the location of some of the burns, given the fact that his belly had lapped over the belt (R VI 1112, 1122). The

witness did not recall seeing blood on any prior electrocuted inmate, but stated that the volume of the nose bleed had not been dramatic (R VI 1109, 1118).

Ira Whitlock, an electrical engineer under contract with the Department of Corrections, testified that he had originally been contacted by FSP in 1997 about servicing a chart recorder, and that he subsequently developed a preventative maintenance program for the execution apparatus and circuitry (R VII 1207). This maintenance schedule was comparable to and based upon national guidelines, and was likewise comparable to that utilized in other industries (R VII 1218-1220). Whitlock stated that all of the work which he had done on the machinery could be characterized as maintenance, and that when he had in fact begun the program, the equipment had still operated, but was in a state of disrepair simply from neglect; he expressly stated that all problems had been addressed (R VII 1251). Whitlock testified that he had examined and tested the electric chair, and, further, that he had tested the electrical circuitry periodically (R VII 1207-8, 1222). The witness gave a detailed explanation of how the circuitry operated, stating that the generator had a capacity of 2400 volts and that when the generator was engaged, 2400 volts would be sent to the incoming line breaker (R VII 1210). The circuitry continued on to the execution breaker, which applies a potential across the inmate which introduces a current (R VII 1212). As soon as the in line

breaker is closed, the chart recorder is initialized and will reflect a voltage of 2400 volts, even while the other breaker is still open and no current is flowing (R VII 1215); amperage will not be registered until the other breaker is closed and the circuit completed (R VII 1215). Whitlock testified that there are a total of three breakers, the additional one being an interchangeable spare. The production of these breakers ceased in 1967 (R VII 1211). However, all three of the breakers had been repaired or refurbished within the last thirteen months, and all were in excellent operating condition (R VII 1211-12).

As to the amps and volts set forth in the protocols, Whitlock testified that such figures assumed a known resistance (R VII 1216). Whitlock testified that the generator was a constant voltage device, whereas the apparatus was a current controlled device, meaning that if the current had to be decreased, resistance would be added; the saturated core reactor was the part of the machinery which limited the current to the predetermined phase (R VII 1216-17). Whitlock testified that he calibrated both the meters and the chart recorder, and added that the chart recorder had nothing to do with the operation of the circuitry, and that the equipment would function perfectly without it (R VII 1221-2). Whitlock testified that he was present at the testing of the electric chair on July 7, 1999, the day before the Davis execution, and that the system had operated as intended with no anomaly (R VII

1223); the witness likewise testified that he had been present during the Davis execution itself and that the chart recorder "indicated circuitry operated as it was designed and intended" (R VII 1224). Whitlock also observed the amperage and voltage meters themselves during the electrocution, as well as the chart recorder, and stated that the readings were consistent (R VII 1226). The witness stated that he had recommended replacing the prior chart recorder, and that the language of the protocols could be rewritten to reflect that the specific figures utilized presumed a resistance of 260 ohms (R VII 1243). The witness stated that, as an engineer, he felt that the language could be erroneous, but that it was still correct (R VII 1245, 1243); he also stated that the language had been written by a lay person, as opposed to an engineer, and that, by it very nature, it was going to be erroneous (R VII 1250). Whitlock testified that when he had attested that the machinery had operated as intended and that no anomaly had occurred, he had been referring to the electrical equipment (R VII 1249).

F. The State's expert witnesses

Dr. Kris Sperry is the chief medical examiner for the State of Georgia, has performed autopsies on individuals executed by electrocution, and has additionally witnessed two executions; he participated in the second autopsy of Allen Davis with Dr. Kirschner (R V 844-8). Sperry testified that the purpose of this autopsy was to determine the cause or source of the nose bleed, but

stated that such was never truly found; although the bleeding occurred up inside the left nostril, Sperry did not feel it had originated in the septum (R V 857). The witness testified that he saw no abrasions which could have caused the nose bleed and saw no evidence of pain associated with it (R V 858-9). Sperry specifically stated that Davis' history of hypertension played a role and that nose bleeds were common with individuals with high blood pressure (R V 850, 872); the presence of blood did not mean that the heart was still beating, as "blood will drain from someone who is dead and can drain sometimes for hours very slowly." (R V 915). Sperry was shown photographs of Davis in the electric chair immediately after the execution, and expressly testified that the mouth strap had not pressed over Davis' left nostril and had not pushed his nose up or made it bleed (R V 922, 993). Sperry repeatedly testified that he had examined the nose for any sign of abrasion possibly caused by the mouth strap which, in turn, could have caused the nose bleed, and found absolutely no evidence, and further stated that even if the strap had pushed upward on the nose, it would not have caused bleeding where it occurred (R V 993; VI 1006, 1011). The witness testified that the nose bleed represented a spontaneous rupture in the left nostril and that the most probable cause was high blood pressure related to the immediate stress that Davis was under (R VI 1004-5); Sperry testified that fear raises blood pressure (R VI 1010-11). The

witness also expressly testified that the mouth strap had not occluded Davis' breathing, in that his nasal passages were open and he could breathe, even if the strap probably produced some discomfort (R V 994-5). Sperry testified that while petechiae were in fact associated with asphyxiation, too few were found in Davis' eyes to be consistent with the death truly attributable to such cause (R V 849-65). The witness stated that he had observed one or two on the inside of the eyes, none within the mouth or on the lips, and some around the eyes or on the inside of the upper cheek areas (R V 862). Sperry stated that it was unusual for so few to be found in the eyes, in the context of an asphyxiation death, and said that death from such cause typically resulted in fifty hemorrhages in the eyeball itself; the witness testified that finding up to twelve (12) petechiae was not in and of itself an absolute diagnosis of asphyxia as "they can be seen in anyone who dies of anything." (R V 862-5). Sperry also testified that the fact that Davis could make audible noises after the mouth strap had been secured meant that he had to have the ability to breathe and that his chest was moving air (R V 874-5). Sperry stated that the congestion of blood in the face was a common observation in deceased individuals, and that it had occurred during the dying process or as a result of the Valsalva Maneuver, a voluntary holding of the breath (R V 866-9); Sperry testified that the mouth

strap would not have affected the flow of blood to either the brain or the heart (R V 869).

Sperry testified that the arcing burns on Davis' thigh and abdomen were attributable in part to his obesity, in that the skin folds of his abdomen could create a space which would cause the current to arc. Additionally, due to Davis' size, the witness stated that he would have expected him to be sweating profusely and that the accumulation of sweat on the skin surface would conduct current; Sperry did not believe that the burns were attributable to the buckle of the strap (R VI 1001-3). Sperry also expressly testified that all of the burns on Davis' body were postmortem, meaning that they had occurred after his brain was dead; such being the case, Davis would not have felt any pain (R VI 1007). The witness expressly noted that Davis' eyebrows had not been singed (R VI 1008). Sperry testified that the administration of 10 amps of current to the brain would cause instantaneous depolarization and obliteration of the brain cells, and that such would occur "faster than the snap of a finger." (R V 849); he noted that electricity traveled at 186,000 miles a second, so fast "that it's actually impossible, really, to conceive it in the course of human experience." (R V 849). Sperry testified that the same result would obtain if 1.2 amps were administered, as "that amount is more than enough to overcome the normal electrical activity of the brain." (R V 849-50). This level of current, additionally, would

produce instantaneous unconsciousness, and an unconscious person cannot feel pain; pain, however, travels at a rate of 4 miles per hour (R V 850-1). The mechanism of death in a judicial electrocution is heating of the brain, which causes irreversible damage, and the current will cause the heart to stop and will also paralyze all of the nervous functions in the body (R V 851-2). When the current is stopped, some spontaneous heart movement may begin, but the heart has been irreversibly damaged, and the brain is well above the temperature from which it could recover (R V 852). Sperry testified that he would not expect to see visual evidence of the thermal heating in the brain tissue in a histological slide, and disagreed with the contention that the thermal heating had to constitute "cooking" of the brain in order to be effective (R V 873-5; 895). As low a current as 75 milliamps also would cause heart fibrillation, meaning that the heart was irrevocably damaged (R V 875-7). Sperry also testified that muscle spasms were not unusual during the dying, or agonal, process (R V 878-9). On cross-examination, Sperry testified that the brain itself had no intrinsic pain sensors, which is why "neurosurgery can be done on people who are awake and can talk to the neurosurgeon." (R V 889). Sperry disagreed with any contention that the usage of alternating current during an electrocution would allow a cell to "repolarize" itself, because the initial current of depolarization would have been "like a tidal wave" (R V 890-1). As

to the current pathway through the body during an electrocution, Sperry testified that such would largely be determined by the conductivity of the various tissues (R V 895-8).

The State's next expert witness was Jay Weichert, an electrical engineer who manufactures execution equipment, and who has previously tested and examined Florida's electric chair. Weichert testified that the specific amounts of amperage and voltage specified in the protocols were "average numbers," and that it was expected they would vary with the size or resistance of the executed inmate (R V 943). The figures represented a known resistance of 242 ohms (R V 944). Weichert explained that Florida's electrical circuitry was current regulated, meaning that it limits current by reducing the voltage level; he said that instead of the circuit "going quite high as it would with a fixed 2,300 volts, the current drops down because the regulatory circuitry tells it to." (R V 944). The witness said that the electric chair was tested with a bank of resistors with a known ohmic value; given the known resistance, the same results would be expected and anomalies could be easily detected (R V 946). Weichert testified that the testing equipment utilized in Florida was the same design as he had fashioned for use in other states (R V 946); the parts utilized were standard within the electrical industry (R V 947-8). Weichert examined the chart recordings for the July 7, 1999, test, noting that each "block" on the chart

recording represented 150 volts (R V 950). The chart recordings showed an initial reading of 2,400 volts, prior to energizing the last of the switchgear and release of the current, a result attributable to the placement of the chart recorder within the circuitry (R V 951, 965). The results obtained were identical to those set forth in the protocols, whereas the chart recording for the Davis execution itself showed a dropping to 1,500 volts from 2,400, and a slightly higher amperage, given Davis' relatively low resistance (R V 955-9).

Weichert testified that this result did not mean that the machinery was not functioning correctly or as designed, and, indeed, reflected the exact opposite (R V 955-8, 987). Weichert calculated Davis' resistance as 150 ohms, which he testified was lower than average, but not unusual (R V 958). The witness stated that the voltage reflected in the chart recordings from the Davis execution was not the level specifically provided for in the protocols, but noted that the cycle had begun with the programmed 2,300 volts, which was set forth in the protocols (R V 967-8). He stated that due to Davis' resistance and the regulatory mechanism of the machinery, the actual voltage and amperage administered was 1,500 volts, 9.5 to 10 amps with the first cycle, 600 volts, 4 amps with the second cycle, and 1,500 volts, 10 amps for the final cycle (R V 978-9). He stated that the equipment "knew" what the desired level of current or amperage was, in the 9 to 10 amp range, and

that, if necessary, the regulatory circuit would reduce the voltage to obtain that result, exactly as the machinery had been designed to do (R V 967-8). Weichert examined a proposed amendment to the protocols, and stated that he disagreed with its language (R V 971), but added that the protocols themselves were not well written, in that both voltage and amperage should not have been expressly specified (R V 983); if the equipment was controlling voltage, the "inmate would be controlling current" (R V 983). Weichert stated that when he was asked to examine the original chart recorder in 1997, he thought that one of the representations made was that it was suspect, given that it has to have been replaced for some reason (R V 975-6).

The State's next expert witness was B.J. Wilder, a professor emeritus of neurology at the University of Florida, as well as a physician; Wilder testified for the State in the Leo Jones litigation. Wilder has specialized in the study and treatment of epilepsy and convulsive disorders, and testified that electrical stimulation of the brain was used very often in the study of epilepsy (R VI 1128, 1135); Wilder also had participated in both animal and human studies. The witness stated that electroconvulsive therapy involved the administration of 100 to 120 volts and 250 to 300 milliamps, and that such administration produced unconsciousness in the patient, who later reported an absence of pain (R VI 1148-9). Asked about the result of the

administration of 1,500 volts and 10 amps of current to the human body, by head to leg current pathway, Dr. Wilder testified that such would result in the loss of consciousness "within a matter of milliseconds," and that the administration of Florida's full execution cycle would cause massive or complete depolarization of every cell in the cerebral cortex, brain stem and thalamus, to such an extent that the cells would never recover; an individual receiving such amount of current flow could not receive any sensation of pain "within a few thousandths of a second" (R VI 1152). Wilder affirmed that electricity travels faster than pain and that an unconscious person cannot perceive pain (R VI 1153); he also stated that Florida's execution cycle would not induce fear or dread (R VI 1153). Dr. Wilder specifically disputed the notion that alternating current could repolarize a cell, in that a neuron could not be repolarized by shocking it again, and repolarization could not occur if the cell had initially been massively stimulated (R VI 1154, 1173). Wilder testified that the brain could die before the body, and that the criteria for pronouncing death was an absence of a pulse, respiration and blood pressure (R VI 1154, 1157). The witness said that a tremendously stressful event, such as impending execution, could result in an elevation of blood pressure (R VI 1158). On cross-examination, the witness specifically rejected the contention that his conclusions or opinion rested solely on his work with epilepsy (R VI 1160-1). He

also stated that he had read articles about survivors of high voltage accidents, but cautioned that single incidents could not equate with normal physiological experiments, given the magnitude of differences (R VI 1161-2, 1173-4). Wilder said that while the brain could be "fooled," pain did not originate within the brain (R VI 1166-7). As to current density or the pathway between the head, brain and skull, Wilder testified that the bone of the skull was membranous, which meant that there were blood vessels within it; blood, of course, is a highly conductive fluid (R VI 1180-1). Wilder also testified that after pronouncement of death, it was not unusual for there to be spontaneous movement of the chest, sometimes described as agonal breaths; such movement did not mean that effective breathing was going on (R VI 1196).

The State's next expert witness was Robert Hallman, an electrical engineer. Hallman testified that he was familiar with safety standards throughout the industry and that the preventative maintenance schedule established by Ira Whitlock for Florida's electric chair and its circuitry was even more comprehensive than industry standards (R VII 1256). The witness expressly testified that Whitlock's testing of the breakers was consistent with industry standards and that what Whitlock performed was standard maintenance and general upkeep, as opposed to any "major overhaul" (R VII 1270, 1272). Hallman had examined the chart recordings for the four executions in 1998, as well as those from the Davis

execution and the test immediately beforehand (R VII 1256, 1268). The witness stated that those from 1998 were not in actual time and sometimes were hard to read (R VII 1264). Hallman calculated the resistance of each of the inmates executed in 1998, and set forth all of the relevant amperage and voltage throughout the execution cycles. Buenoano's body resistance was between 224 and 202, with amperage of 9.4, 2.9, 9.4, and voltage of 2,000, 650, and 1,900; Remeta's body resistance was between 232 and 208, with amperage of 9.2, 2.9, 8.9, and voltage of 2,100, 675 and 1,850; Stano's body resistance ranged from 166 to 189, with amperage of 9.1, 2.9, 9.0, and voltage of 1,600, 550 and 1,500; Jones' body resistance was between 157 and 175, with amperage of 9.1, 2.9, 9.2, and voltage of 1,600, 500 and 1,450 (R VII 1257-68). The witness stated that, in all instances, the recordings indicated that the machinery was functioning as intended (R VII 1258-63, 1273). As to the 1999 chart recordings, Hallman testified that the test results from July 7, 1999, were in accordance with other results, whereas the chart recording for the Davis execution showed slightly higher amperage, but an amount within the order of magnitude, such figure indicating low resistance of the inmate (R VII 1268). The voltage amounts of a beginning 2,400, then 1,500, 600 and 1,500 were consistent with prior results (R VII 1268-9). All of the findings gave Hallman no reason to question the circuitry's overall reliability, and the chart recorder was in the correct position to measure voltage and

amperage (R VII 1269, 1272-5). On cross-examination, Hallman testified that amperage and voltage results from the 1998 executions were lower than those set forth in the protocols (R VII 1280-1, 1283). Although Hallman testified that there was no indication from the 1998 chart recordings that the recorder had malfunctioned, he also stated that he "would not presume that anyone would change a chart recorder out that's working properly." (R VII 1265-6, 1284).

The State's final witness was Timothy Bullard, an Orlando emergency physician. Dr. Bullard testified that he had observed victims of electrical trauma and had seen patients die from various causes (R VII 1307); he described dying as a process (R VII 1308). The witness stated that it was not unusual for there to be movement of muscles at the time of death or for a minute or two afterwards (R VII 1309). Dr. Bullard described both heart asystole, in which the heart stands still, and fibrillation of the heart, in which it quivers, beats erratically and cannot effectively distribute blood throughout the body (R VII 1309-10). A person can remain conscious for only five to ten seconds during fibrillation, and current as low as fifty to 100 milliamps can produce fibrillation (R VII 1310, 1317); likewise, an individual experiencing cardiac standstill could remain conscious for only five to ten seconds (R VII 1314). Administration of voltage and amperage in accordance with Florida's execution cycle would produce ventricular fibrillation, standstill

or complete respiratory depression (R VII 1311-12). An individual such as Davis, who manifested two movements of the chest, at a time when there was no pulse, no heart sounds and no lung sounds, would simply be manifesting agonal movements (R VII 1312-13). Shown pictures of Davis in the electric chair, the witness stated that blood flow could still exist even after the heart had stopped beating, as there would still be blood in the tissues (R VII 1321). Bullard also testified that the increased pigmentation in the face would indicate increased pressure in the area which could have been caused by Davis holding his breath or by an exhalation blockage, as opposed to an occlusion of his ability to inhale (R VII 1320-2). Bullard stated that a person having a nose bleed could breathe at the same time, and that it would be the exception if they could not (R VII 1324). He also stated that an EEG or electroencephalograph was not necessary in order to pronounce death (R VII 1324-5).

G. The circuit court's order

Judge Johnson rendered a comprehensive order on August 2, 1999, denying Provenzano's claims for relief, and discussing, in detail, the evidence presented (R XIII 2267-99). The court noted that it had stricken the attempted joinder of Milford Byrd, Eduardo Lopez, McArthur Breedlove, Jerry Haliburton, Gregory Kokal and Tommy Groover, whose names had first appeared as putative petitioners in the amended petition filed on July 22, 1999, in that "no valid procedural route for intervention was followed" (R XIII

2268). The court addressed each of Provenzano's primary arguments - that Florida's electric chair was unconstitutional because it did not result in instantaneous death and created a risk of pain and inflicted severe mutilation and that use of judicial electrocution violated evolving standards of decency - and set forth in detail the sub-arguments contained within the first claim - that representations in the Leo Jones litigation to the effect that the electric chair was in excellent condition, and the legal conclusion that electrocution itself was not unconstitutional, were incorrect; that DOC has failed to follow and cannot follow the execution protocols; that testing of the electric chair is not being conducted in accordance with the testing procedures; that the resistance created by an inmate's body is different from the representations made during the Jones proceeding; that death by electrocution is not instantaneous or painless and that an inmate will suffer disfigurement and mutilation; and that the Department of Corrections has exhibited indifference towards those inmates who have been executed in the electric chair (R XIII 2269-70). Citing to such precedents as Jones v. State, 701 So.2d 76 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 335 (1998), the court expressly held that the second claim - that involving evolving standards of decency - was outside the scope of the hearing and otherwise without merit (R XIII 2296). Citing to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and

Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed.2d 422 (1947), as well as Jones (which had relied upon the above cases), the court noted that the correct legal standard to be applied was whether execution in Florida's electric chair would involve "torture or a lingering death" or the infliction of "unnecessary or wanton pain," and also noted the observation in Resweber to the effect that "the cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." (R XIII 2271-2).

The court made the following findings of fact, and conclusion, based upon the greater weight of the evidence:

> 1) During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function. Although the breakers and other components of the electrical circuitry are old, the electric circuitry is adequate to assure the proper functioning of the electric chair.
>
> 2) The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court. The execution protocol merely states: 'The automatic cycle **begins** with the programmed 2,300 volts, 9.5 amps, for 8 seconds....' (emphasis added). The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed.
>
> The execution protocol does not take into account the varying levels of resistance created by each and every inmate. The

resistance created by each executed inmate's body, or ohms, can be determined by dividing the number of volts administered by the number of amps administered. Since the level of resistance varies from inmate to inmate, these figures must necessarily vary. The variations in these figures do not violate the execution protocol.

3) The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.

4) Allen Lee David did not suffer any conscious pain while being electrocuted in Florida's electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.

5) The nose bleed incurred by Allen Lee Davis began **before** the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis. This Court is unable to make a finding regarding the exact cause or situs of the initial onset of the nose bleed because that information was not determined during either of the autopsies performed on Davis' body.

6) The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.

7) The use of a mouth strap to secure an inmate's head to the electric chair may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.

8) Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing

> straps around the head and body to secure the head and body the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained.
>
> **CONCLUSION**
>
> Execution by electrocution in Florida's electric chair as it exists in its present condition as applied does not constitute cruel or unusual punishment, and therefore, is not unconstitutional.

(R XIII 2297-8) (emphasis in original).

SUMMARY OF ARGUMENT

Provenzano raises four points on appeal, in regard to the circuit court's denial, following evidentiary hearing, of his challenge to Florida's electric chair, three of which merit no mention in this summary. Petitioner's primary contention - that Judge Johnson erred in finding that electrocution in Florida's electric chair in its present condition does not violate the Constitution - has essentially been defaulted in this Court, in that Provenzano fails to acknowledge, let alone challenge, any of the specific findings of fact made by the court below in support of this ruling; Provenzano also offers no challenge to the legal analysis applied by the circuit court. As Provenzano has failed to demonstrate that the findings of fact lack the support of competent substantial evidence in the record, and, as this Court has frequently held, that it will not substitute its judgment for a trial court on a specific question of fact, affirmance is mandated.

The evidence presented below indicates that Allen Davis was executed in a manner in accordance with the Constitution. Although, due to his hypertension, he suffered a nosebleed during the course of his execution, he suffered no wanton or unnecessary pain, either from the usage or positioning of the mouth strap or administration of the electrical current, as Judge Johnson expressly, and correctly, found. To the extent that the hearing below encompassed yet another *per se* attack upon the process of

electrocution, such was improperly presented, as Provenzano was not authorized to re-present matters previously rejected in the Leo Jones litigation or to present evidence which could and should have been presented therein.

Judge Johnson's findings concerning the operating condition of the electric chair and its circuitry are likewise supported by the record, as was his finding that any variance in the actual amperage or voltage utilized in the last five executions did not constitute an express violation of the protocols, given the fact that the protocols as written do not take into account the individual resistance of each inmate. The record indicates beyond any doubt that the Department of Corrections scrupulously adheres to the protocols, and this Court should reject the unwarranted attacks of inmates such as Provenzano, who have previously exhausted every permissible challenge to their convictions and sentences, seek to utilize such document as an "escape hatch" from Death Row. The order on appeal should be affirmed in all respects.

ARGUMENT

POINT I

THE CIRCUIT COURT'S FINDINGS OF FACT AND CONCLUSION OF LAW, TO THE EFFECT THAT EXECUTION IN FLORIDA'S ELECTRIC CHAIR IN ITS PRESENT CONDITION IS NOT UNCONSTITUTIONAL, ARE SUPPORTED BY THE RECORD AND IN ACCORDANCE WITH CONTROLLING PRECEDENTS OF THIS COURT AND THE SUPREME COURT OF THE UNITED STATES.

A. Introduction

This court remanded this cause to the circuit court for an evidentiary hearing on July 8, 1999, and, as directed, Judge Johnson conducted such hearing between July 27 and July 30, 1999. As described in the preceding Statement of the Case and Facts, over thirty witnesses testified and numerous documentary exhibits were introduced. Following this presentation, Judge Johnson set forth a detailed order, including numerous express findings of fact in support of his conclusion that electrocution in Florida's electric chair in its present condition is not unconstitutional. These findings of fact include, *inter alia*, the following: (1) the electrical circuitry is adequate to ensure the proper functioning of the electric chair and that during the execution of Allen Lee Davis, the electric chair functioned as it was intended to function; (2) the cycle of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol approved by the Florida Supreme Court; while the figures

will necessarily vary given the individual resistance of every inmate, a factor not taken into account in the protocols, this variation does not violate the protocols; (3) Davis did not die as a result of asphyxiation caused by the mouth strap; (4) Davis did not suffer any conscious pain while being electrocuted, and, rather, suffered instantaneous and painless death once the current was applied to him; (5) the nose bleed incurred by Davis occurred prior to application of the current and its precise cause is unknown; (6) the mouth strap and chin strap may have caused Davis some discomfort, but did not cause unnecessary or wanton pain, and the mouth strap is not part of the electrical apparatus of the electric chair and (7) any pain associated with the affixing of the straps to the head and body is necessary to ensure the integrity of the execution process, and fear is inherently part of any execution (R XIII 2297-8).

It was, of course, Provenzano's burden below to demonstrate that he was entitled to the relief requested, and, in this Court, it is his burden to demonstrate that the presumption of correctness attendant to Judge Johnson's order has been overcome, and that reversible error exists. See, e.g., Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (1979). It is also his burden to demonstrate that the above findings of fact are not, in fact, supported by competent substantial evidence in the record, as this Court has repeatedly held that, as an appellate court, it is not a

fact-finder, and that it will not substitute its judgement for that of the trial court on a question of fact. See State v. DeConingh, 433 So.2d 501, 504 (Fla. 1983) ("A trial court ruling comes to a reviewing court with the same presumption of correctness that attaches to jury verdicts and final judgments . . . A reviewing court should defer to the fact-finding authority of the trial court and should not substitute its judgment for that of the trial court."); Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989) ("Appellate courts are reviewing, not fact-finding, courts."); Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) ("As long as the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact"); Jones v. State, 709 So.2d 512, 514-15 (Fla. 1998) (". . this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion"); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.") Additionally, to the extent that any of Judge Johnson's ruling or findings constituted an exercise of discretion, such ruling or finding cannot be reversed unless, after viewing the evidence as a whole, no reasonable person would agree with the trial court's ruling or adopt the view taken by the court. See, e.g., Huff v.

State, 569 So.2d 1247, 1249 (Fla. 1990); Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997); Allstate Ins. Co. v. Manasse, 707 So.2d 1110, 1111 (Fla. 1998).

Having stated the above, it is the State's position that Provenzano's appeal was essentially over as soon as it began, in that the Initial Brief makes absolutely no reference to any of the above findings of fact entered by Judge Johnson in his final order. While this omission no doubt represents a concession that in fact all of these factual findings are more that adequately supported by competent substantial evidence in the record, Provenzano has nonetheless defaulted this appeal, by failing to present any meaningful advocacy on this point, simply presenting his view of the facts in support of a desired *de novo* review by this Court. As the above precedents clearly demonstrate, Provenzano has misconstrued this Court's role on appeal, and while the State will address the factual support for the circuit court's findings, as well as any pertinent argument made by Provenzano, the Initial Brief in this cause essentially presents this Court with no basis to do anything other than affirm the order on review, a result which is, in any event, the correct one. Indeed, the conclusion to the Initial Brief contains absolutely no requested relief (Initial brief at 100). Before turning to the above, the State will briefly address the applicable law.

As noted in the preceding section, Judge Johnson utilized the same legal analysis as did this Court in Jones v. State, 701 So.2d 76 (Fla. 1997), cert. denied, ____ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 335 (1998), citing to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 29, 49 L.Ed.2d 859 (1976) and Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 675 S.Ct. 374, 91 L.Ed. 422 (1947), for the proposition that, in order for a punishment to constitute cruel or unusual punishment, it must involve torture or lingering death or the infliction of unnecessary and wanton pain (R XIII 2271-2). Provenzano apparently has no quarrel with the court's view of the applicable law, as he has presented no argument to this effect on appeal, and does not contend that any other precedent or legal analysis should have been applied; apparently, any view that Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) should apply to circumstances such as that sub judicia, a contention raised and rejected by this court in Jones, 701 So.2d at 79, has been abandoned.

While Judge Johnson (as did this Court in Jones,) evaluated the challenge to the electric chair under the former language of Article I, Section 17 of the Florida Constitution, which precludes "cruel or unusual punishments," the State contends, as it did below (R X 1637), that the amended language of this constitutional provision applies in this litigation; this provision, effective prior to the date of the litigation, provides that Florida's bar on

cruel or unusual punishments shall be construed in accordance with the United States Constitution's bar on cruel and unusual punishments. As this constitutional amendment specifically provides for retroactive application, such precedents as State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), are not applicable. While Petitioner's failure to demonstrate any basis for relief under what may be view as the more stringent standard essentially predetermines the outcome of this case, the State respectfully contends that the Florida Legislature, which initiated the amendment, as well as the public, who overwhelmingly ratified it, clearly intend that this constitutional amendment be applied to this cause. Additionally, the State would contend that the legal analysis set forth by Justice Lewis in his concurring opinion in the earlier appeal in this cause, Provenzano v. State, 24 Fla.L.Weekly S314, S316-17 (Fla. July 1, 1999) (Opinion of Lewis, J, concurring), likewise has application, specifically that portion holding that an evidentiary nexus is required between any violation of the Department of Correction's execution protocols and the existence of unnecessary pain, as a predicate for any postconviction relief.

B. The circuit court's findings, to the effect that Allen Lee Davis suffered no unnecessary or wanton pain prior to and or during his electrocution, are supported by competent substantial evidence in the record and should be affirmed.

In the court below, as well on appeal, Provenzano contended that Allen Davis suffered unnecessary and/or wanton pain prior to

and during his execution in Florida's electric chair on July 8, 1999. In setting forth his claims, Provenzano points to the fact that Davis experienced a nose bleed during the electrocution, that the mouth strap allegedly partially asphyxiated him and that he allegedly suffered pain during the passage of the electrical current. While the individual circumstances of Davis' execution were properly presented below, and are properly before this Court, the State respectfully contends that anything resembling a per se challenge to the process of electrocution has been barred by this Court's prior opinions in Jones v. Butterworth, 691 So.2d 481 (Fla. 1997), Jones v. State, supra, Provenzano v. State, supra. Stated another way, the fact that Allen Davis suffered a nose bleed during the process of his electrocution on July 8, 1999, does not call into question the conclusion that the initial surge of current in Florida's execution cycle results in immediate depolarization of the brain and unconsciousness, such that an inmate, (such as Davis), is unable to feel pain, the ultimate conclusion of the Jones litigation. Judge Johnson's findings that Davis' nose bleed was not caused by application of the current, that he was not asphyxiated by the mouth strap, and that, at most, the straps caused discomfort, are supported by competent substantial evidence in the record. Each of Davis' contentions will be addressed.

The Nose bleed: Although it was, in all likelihood, the existence of the nose bleed (subject of much media hyperbole) that

provoked the stay of execution and evidentiary hearing in this cause, it must be noted that none of Davis' witnesses, lay or expert, offered any testimony to the effect that the existence of the nose bleed established the existence of unnecessary or wanton pain on the part of Allen Lee Davis. And as Judge Johnson correctly found, the evidence presented was to the effect that the specific cause of the nose bleed was unknown, but that it had nothing to do with application of the current (R XIII 2297-8). While Provenzano's pathologist, Dr. Kirschner, opined that the nose bleed had been caused by the positioning of the mouth strap (R IV 752), both Dr. Hamilton, the original pathologist, and Dr. Sperry, the pathologist who had assisted Dr. Kirschner with his autopsy, testified that they saw no abrasion on the nose which could account for the bleeding, and specifically testified that any pushing of the nose by the mouth strap would not have resulted in actual bleeding where it occurred (R V 858-9, 922, 993, VI 1006-1011); the most likely cause of the nose bleed was Davis' hypertension (R VI 1004-5). In fact, the failure of Dr. Kirschner to ascertain the origin of the nose bleed speaks volumes, as does the ultimate lack of significant argument regarding that event in either this Court or the Court below. Additionally, the presence of blood did not mean that the heart was still beating (R V 915; IV 749; V 805-6; VI 1321), and a nose bleed is not necessarily painful (R III 501; IV 721; V 858-9). Judge Johnson's findings concerning the nose bleed

are supported by the competent substantial evidence in the record and should be affirmed.

The Mouth Strap: While, as best as can be determined, all forty-four inmates who have been executed in Florida's electric chair since 1979 have had their heads secured to the chair by means of a mouth strap, Provenzano contends that usage of the strap violates the Constitution, in that, allegedly, Allen Davis partially asphyxiated as a result of the mouth strap. The primary basis for this claim would seem to be the testimony of Dr. Kirschner, as well as that of Donald Price, the pain expert. Judge Johnson expressly found to the contrary, finding that, in fact, while the design of the mouth strap may have left something to be desired, Davis had not asphyxiated from the strap, and that, at most, the strap had caused him some discomfort, not unnecessary or wanton pain; the court also correctly observed that the mouth strap was not part of the electrical apparatus of the electric chair (R XIII 2297-8). These facts are supported by competent substantial evidence in the record.

Dr. Kirschner's belief that Davis suffered from partial asphyxiation was largely based upon the presence of petechiae or pinpoint hemorrhages around his eyes, on the eyelids and in the eye itself, such petechiae consistent with asphyxiation (R IV 741, 776-9). The problem with this theory is that, as Kirschner himself admitted; (1) petechiae are not specific to asphyxiation and (2)

asphyxiation is part of any death, no matter what the cause; further, Kirschner expressly testified that, in his view every judicial electrocution (presumably with or without a mouth strap) would cause some asphyxiation (R IV 747-9, 779-781). Dr. Sperry testified that, while he agreed with Kirschner as to the existence to some petechiae, their relative paucity was highly significant (R V 849-865); Sperry stated that there were only one or two petechiae in Davis' eye, while up to fifty would ordinarily be expected in a true asphyxiation death, (". . . little red spots all over the place."). As had Kirschner, Sperry testified that some petechiae would be present in the body "of anyone who dies of anything," noting that petechiae were often seen in those who had died of heart attacks (R V 863).

Kirschner, as did Price, also grounded his asphyxiation theory on the belief that the post-execution photographs of Davis showed the mouth strap occluding his ability to breathe. According to the former, the photos showed facial congestion or discoloration consistent with partial asphyxiation, whereas, according to the latter, the photographs showed facial expressions consistent with pain (R V 742-3, 747; R III 455-465). The problem with Provenzano's witnesses' reliance upon the photographs is that: (1) Dr. Sperry viewed the same photographs and testified that the mouth strap did not impinge upon Davis' ability to breath through his nose (R V 922, 993-5) and (2) witnesses who were actually present

at the Davis execution testified that the position of the mouth strap was different in the photographs from its position when it was secured to Davis (R II 355; V 814-15). The most likely explanation for this change in position was that after death, when the chest strap had been loosened as the body was being examined by Matthews, Davis' body had "slumped" or "slouched" forward; one witness expressly testified that the photographs showed that the mouth strap was the only thing holding Davis's body upright (R VI 1039, 1040, 1047, 1067). Additionally, as to Kirschner's reliance upon the facial congestion, such testimony was again directly countered by other witnesses. Sperry expressly testified that congestion of the blood was a common observation in deceased individuals and occurred during the dying process, or possibly as a result of one holding one's breath (R V 866-9); Dr. Bullard, who was also shown the photographs, testified that the facial congestion or pressure was not consistent with one who was unable to inhale (R VII 1320-2). An eyewitness to the execution also testified that Davis' face had seemed to redden prior to the affixing of any mouth strap (R II 226).

Perhaps most tellingly, however, there was also affirmative evidence in the record that Davis was not only able to breathe, but that he did in fact breathe after the securing of the mouth strap. Physician's Assistant Matthews expressly testified that, after not only the mouth strap but also the chin strap had been affixed, he

could see Davis' chest move, rhythmically, expanding and contracting (R VI 1048). Additionally, many witnesses testified that after the mouth strap was affixed, Davis made audible noises (R I 163-4, 197; IV 722, VI 1035; VII 1364-65), and Dr. Sperry expressly testified that Davis' ability to make more than one sound indicated that he had to be able to breathe and that his chest was moving air (R V 874-75), a view not entirely contradicted by Dr. Kirschner (R IV 781-3). Further, the existence of the nose bleed itself, including "bubbles of blood in the left nostril," indicated an ability to breathe (R II 329, 332; IV 790-1; VII 1324). Judge Johnson's finding that Davis' death was not the result of asphyxiation caused by the mouth strap is more that amply supported by competent substantial evidence in the record and should be affirmed.[3]

The circuit court's findings that the strap did not cause unnecessary pain, and that to the extent that it caused discomfort, some minimal pain or discomfort may be "necessary to ensure that the integrity of the execution process is maintained," are likewise supported by competent substantial evidence in the record. The

[3] To the extent that Provenzano also relies on the testimony of Dr. Seryutin (Initial Brief at 67), it must be recognized that this witness's testimony was speculative. While the doctor testified that the nose bleed "possibly" could have been the result of injury from a strap while Davis "possibly" struggled because he "possibly" couldn't get any air, he also stated that the nose bleed was "possibly" caused by hypertension (R II 299-300). Seryutin, additionally, was never advised that the cause of the nose bleed could not be determined.

only affirmative evidence presented by Provenzano to the effect that Davis suffered pain as a result of the mouth strap was that of Dr. Price, who stated that, pursuant to the 1978 Ekman Standard or Study, he would opine that Davis' facial expressions were consistent with pain; the problem for Dr. Price is that, as he acknowledged on cross-examination, the Ekman Standard has never been applied to facial expressions on dead bodies, as opposed to living human beings (R III 501). While it is true, as Provenzano notes, that Georgia does not utilize a formal mouth strap, instead utilizing two chin straps (Initial Brief at 71), the fact remains that the straps are necessary to secure the inmate in the electric chair and to ensure that the head electrode is properly and securely placed (R VII 1292-3). Although Georgia's straps do not formally cover an inmate's mouth, they do force it closed (R VII 1301-2), in all likelihood, a distinction without a difference. Of course, other methods of execution, such as lethal injection, similarly utilize restraints.[4]

The responsibility for strapping an inmate into Florida's electric chair is shared by a number of members of the execution team, and the fact that Robert Thomas testified that he "believed" that the straps should be tightened "as tight as you can get them,"

[4] Interestingly, Provenzano introduced a document which demonstrates that one of the most common problems encountered with the process of lethal injection involves "tightness of leather straps which prevented the flow of chemicals into veins." (R IX 1565).

cannot be dispositive of any claim, given the fact that it was Carlton Hackle (who was not called by the defense and did not testify below), who actually buckled Davis' mouth strap behind the electric chair and who, according to Thomas, "determined how tight to make it." (R II 316-319). Additionally, the other members of the execution team testified that the straps were to be "snug" or "secure," but not so tight as to cause injury, and John McNeill testified that he expressly checked the straps to ensure that they were not too tight (R II 351-352; III 463-4; VII 1365-6). There was additionally testimony presented below that when Judy Buenoano grimaced and indicated to a corrections officer that the chest strap was too tight, the strap was loosened (R I 95-6). As Judge Johnson noted below, citing to Resweber, the Constitution does not bar "the necessary suffering involved in any method employed to extinguish life humanely" (R XIII 2271-2) (also cited by this Court in Jones, 701 So.2d at 79). The mouth strap utilized in the Davis execution, while not a formal part of the electrical circuitry of the chair, served a valid purpose in the execution process, and the minimal or transitory discomfort which may have resulted in the seconds before the circuit was engaged does not provide a valid constitutional basis for affording relief to Thomas Provenzano. Certainly, it goes without comment that the failure to adequately secure the inmate and/or the electrodes would give rise to a much greater risk of unnecessary and wanton pain.

Pain During the Electrocution: Provenzano also contends that Allen Davis suffered conscious pain during the 34 seconds that current was administered to him, based upon the theory of his experts to the effect that the voltage and amperage employed in Florida's execution cycle does not result in an instantaneous loss of consciousness. The primary basis for Provenzano's argument is the testimony of Drs. Price, Reilly and Wikswo, none of whom, it must be noted, hold a medical degree, and all of whom apparently rely at least in part upon either animal studies or accounts or anecdotes involving the survivors of high voltage electrical accidents, under circumstances bearing absolutely no relationship to a controlled judicial electrocution in Florida (Initial Brief at 72-7). While Judge Johnson correctly found that Davis did not suffer any conscious pain during his electrocution, and, in fact, suffered "instantaneous and painless death once the current was applied to him," (R XIII 2297), the State respectfully questions whether that matter was properly before him. When Justice Pariente wrote in her concurring opinion in Provenzano v. State, 24 Fla.L.Weekly S314, S316 (Fla. July 1, 1999) (Opinion of Pariente, J, Concurring), that Jones could be revisited, "should the factual predicate on which the opinion was based change as a result of subsequently developed evidence," it is doubtful that it was intended that future litigants, such as Provenzano, simply re-present some of the same evidence presented and rejected in Jones

(i.e., the testimony of Dr. Price), or other evidence which was surely available in 1997. It should be noted that while Dr. Wikswo did not formally testify in Jones, Jones' counsel did present to this Court during the course of Jones' appeal affidavits executed by that expert, and, from Dr. Reilly's testimony below it would not appear that any of his conclusions are based upon an event occurring since 1997. Provenzano is improperly seeking to utilize this proceeding for yet another per se attack upon the constitutionality of electrocution, a matter which has already been long settled.

To the extent that any further argument is necessary, it is clear that the positions and opinions of Provenzano's experts are unconvincing in the extreme, and, indeed, Reilly offered absolutely no relevant opinion in this regard, expressly stating that he had no opinion as to whether an individual during the electrocution process would be unconscious or able to feel pain (R III 563-5). Under Reilly's calculations, in any event, the amperage received by an individual during the execution cycle would result in cardiac standstill and, as verified by other witnesses, immediate unconsciousness and death (R III 597, 571-2; IV 604-6). Dr. Wikswo's opinion that electrocution does not result in painless and instantaneous death (a higher standard than the Constitution requires) must be read in light of the fact that he testified that the threshold of current or voltage causing instantaneous or

painless death was “unknown”, and that he himself could not say whether an unconscious person could feel pain (R IV 623, 633-4); of course, all of even Provenzano’s other experts could address this latter matter (R III 491-2; IV 793, 797). The witness, as noted a non-physician, placed great emphasis not only upon the unrelated accounts of accidental electrocution (reading such into the record), but also upon lay person hearsay accounts concerning the observations of alleged “breathing” by inmates during the execution process (R IV 633-7, 639-647, 687-9). Of course, not only the state’s experts, but also defense expert Kirschner, testified that agonal respiration was part of the dying process and was not an indication of consciousness (R IV 795, 798; V 878-9; VII 1312-13). While Dr. Price opined that those electrocuted felt conscious pain, he also acknowledged that his testimony was not generally accepted within the scientific community, and could cite to no reliable authorities for his theory (R III 419-476-7).

The opinions of Drs. Price and Reilly, as to the current pathway during a judicial electrocution, are bizarre, even to a lay person, such as undersigned counsel. Although the head electrode is affixed to the scalp, with a saturated sponge in between, and although the scalp is the initial point of entry for the current, both Price and Reilly opined, albeit with various internal and external contradictions, that only a small portion of the current actually reaches the brain (R III 425-430; 571-2). Reilly’s theory

is based upon one study involving a monkey (R III 570-2), whereas Price's theory is based on reversing the data derived involving electroencephalograms, in which the current travels in the opposite direction (R III 447-8, 510-1). Under Reilly's view, in any event, enough milliamps from the 10 amps administered would still reach the brain to depolarize it, as his own testimony, as well as that of others, demonstrated (R III 481, 496-7; VI 448-9). Once in the brain, the current would seem to take a particularly contrary pathway, failing to knock out some "pain centers" of the brain, "exciting" others (ignoring the "pleasure" centers entirely), and failing to cause the heart to fibrillate or to stand still due to the fact that, at all operative times, the level of amperage is either too high or too low (R III 433-4, 435-440, 450-1, 573-5, 582-3, 591-3). To the extent necessary, Judge Johnson did not abuse his discretion in rejecting this testimony.

In contrast, the State presented the testimony of four experts, all of them physicians, including pathologists who had examined inmates executed by judicial electrocution in Florida and Georgia, and a neurologist and emergency physician; three of the four testified for the State in the Leo Jones litigation, and their testimony was found credible by Judge Soud. The consensus of these witnesses was that the administration of amperage and voltage in accordance with Florida's execution cycle, or even significantly below those levels, would result in instantaneous depolarization of

the brain cells, resulting in immediate unconsciousness and the inability to feel pain (R V 849-851; VI 1079-1081, 1152). The experts stated that pain travels much more slowly than electricity, and all rejected the defense theory that the use of alternating current somehow allows cells to recover or "repolarize" (R V 850-1, 890-1; VI 1150-54, 1173). The amount of time between administration of the current and unconsciousness was described as "a matter of milliseconds" (R VI 1152) or "faster than the snap of a finger." (R V 849). The method of death in a judicial electrocution is heating of the brain, which leaves no physical traces, and the cessation of normal heart function through asystole and/or fibrillation (R V 851-2). The existence of what may appear to be "breathing" on the part of a recently executed inmate, is in fact muscular contractions, which, in the experience of the State's experts, are simply part of the dying process and do not demonstrate that consciousness is present (R IV 795, 798; V 878-9; VI 1196; VII 1312-13). The physician's assistant who examined Davis within seconds of the disconnection of the current testified that he detected no pulse, no heart sounds, and no lung sounds, and Dr. Sperry expressly testified that all of the burns on Davis' body were post-mortem, meaning that they had occurred after he was able feel any pain (R VI 1025-7, 1037; VI 1007). Judge Johnson's findings of fact in this regard are more than adequately supported

by the record, and no basis for any appellate relief to Provenzano has been demonstrated.

C. The Circuit Court's findings, to the effect that the electric chair functioned as intended during the Davis execution, that the circuitry is adequate to ensure proper functioning of the chair and that the Department of Corrections did not violate the execution protocols, are supported by competent substantial evidence in the record and should be affirmed.

Judge Johnson also found that during the Davis execution, the electric chair had functioned as intended, that the electrical circuitry was adequate to ensure its proper functioning and that the Department of Corrections had not violated the execution protocols (R XIII 2297-8). In the Initial Brief, Provenzano initially contends that this Court was misled in Jones, because Ira Whitlock testified below that when he began his maintenance of the electric chair and its circuitry of 1997, the equipment, while operational, had been neglected and was in a state of disrepair (Initial Brief at 77-8); as Judge Johnson pointed out in his order, he was unable to appreciate Provenzano's arguments concerning the Jones record, as Provenzano failed to supply any portion of it (R XIII 2272). This claim is much ado about nothing. Whitlock's entire testimony reflects that he initiated the maintenance program, because the equipment needed maintenance (R VII 1251); Dr. Hallman, an electrical engineer who studied Whitlock's maintenance records, testified that Whitlock's actions constituted maintenance and general upkeep of the electric chair equipment, as opposed to any "major overhaul" (R VII 1270-2). The unrebutted testimony

below was to the effect that the maintenance program initiated by Whitlock is more demanding than industry standards, and that all equipment is functioning as it was intended (R VII 1256, 1270, 1272; 1218-1220, 1207-8, 1211-12, 1222-1251). Despite the misleading impression created earlier in this litigation, it is clear that the breakers, as well as all other components of the electric chair circuitry, are in perfect repair[5], which no doubt explains why opposing counsel chooses to focus upon the alleged condition of the chair in the past, rather than the present. Judge Johnson's findings of fact in this regard are supported by competent and substantial evidence in the record and should be affirmed.

As to the protocols, Provenzano contends that the evidence below demonstrated that DOC and the State of Florida "have neither taken the protocols nor this Court's concern that the protocols be followed seriously" (Initial Brief at 82), and sets out four primary areas of concern -- alleged violation of the language of the protocols prescribing precise voltage and amperage during an execution; the fact that the protocols do not specify how tight the straps should be; the fact that the protocols do not specifically address the exact placement of the head electrode and the fact that

[5] Moreover, it would appear Provenzano would have the functioning of the electrical apparatus be in a state of litigative limbo -- a failure to act gives rise to a claim for relief, as does every action by the Department in doing maintenance.

various DOC personnel allegedly ignored the protocols. Thus, the Department of Corrections is faulted for not following the protocols as written and for not writing the protocols to memorialize further details desired by collateral counsel (such subsequent memorialization no doubt to be the object of future litigation). Provenzano's complaint that DOC and the State did not take the protocols seriously is, of course, directly refuted by the record below, which, to the contrary, demonstrates that all State personnel have expeditiously addressed anything which could be perceived to constitute a violation of the protocols. In light of Provenzano's argument, however, that the protocols "do not guarantee that there will be no pain" in an execution (Initial Brief at 88), it is perhaps worthwhile to examine what the protocols were intended to do and what they were not intended to do.

The protocols were intended to memorialize the most pertinent aspects of the conduct of an execution in Florida, and to set forth, where appropriate, specific guidelines or parameters for matters which had previously been a subject of discretion. Despite the often technical and detailed language of some of its provisions, however, the protocols (which are quoted in their entirety in Provenzano, 25 Fla.L.Weekly at S317-18), were not intended to enshrine in perpetuity every contingency which could arise during the course of an execution; obviously, no one document

could do so, and, given the circumstances of the Medina execution, it is not surprising that the protocols address themselves in the most detail to matters concerning the saturation of the sponges. The protocols constitute concrete proof that this Court's presumption that members of the executive branch will properly perform their duties in the conduct of the execution of condemned prisoners, see Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990), was justified. The protocols were not intended, however, to be the constrictive straight-jacket envisioned by opposing counsel nor the basis for endless litigation by inmates such as Provenzano, who after prior decades of capital collateral litigation involving all conceivable legal matters (including any claim of actual innocence), simply wish to further prolong matters by attacking the method of execution.

Provenzano's primary allegation concerning the protocols involves the alleged variance between the amperage and voltage figures set forth in the protocols and those figures actually reflected in the chart recordings for the past five executions. As demonstrated below, the amperage and voltage figures for the Stano, Jones, Buenoano, Remeta and Davis executions involved figures not expressly set forth within the scope of the paragraph of the protocols describing the execution cycles (R VII 1280-3).[6] Judge

[6] The reason for this is simple, the protocols address what the cycle voltage will begin with, not what the voltage will be during the 34 seconds the current flows through a condemned inmate.

Johnson, however, found that any variation did not constitute a violation of the protocols, because the protocols themselves did not take into account the variable resistance of each inmate to be executed, and because this resistance, based on the current regulated machinery, would lead to a variation of amperage and voltage; the judge specifically found that the protocols simply provided that the cycles begin at a certain level, adding, "The protocol does not state the voltage and amperage levels set forth therein are the precise voltage and amperage levels that must be administered to the inmate who is being executed." (R XIII 2297). Provenzano, who makes no reference to this finding, has failed to demonstrate any basis for overturning it.

The testimony from all witnesses below, including those called by the defense, was to the effect that Florida's electrical execution circuitry is current regulated and voltage limited (R IV 659-660; V 966-7; VII 1216-17). This means that, in order to ensure the desired level of amperage, the circuitry can reduce the voltage, if necessary; the circuitry is, in any event, limited to 2400 volts (R VII 1210). The figures set forth in the protocols presupposed a known resistance of 242 ohms for testing purposes, allegedly corresponding to an "average" inmate (R V 944). The

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The voltage during the 34 seconds is totally dependent upon the ohms of resistance generated by a unique individual. No two persons are identical regarding the resistance they might generate and one cannot look at a person and know how much resistance their person would have been.

resistance of various individuals will, of course, cause fluctuation from the initial preprogrammed levels, but, as all witnesses testified, the chart recordings for all five of the executions demonstrated that the machinery was functioning as it was intended (R IX 955-8, 987; VIII 1258-1263, 1268, 1273); the voltage level in the Davis execution was less than that provided for in the protocols, in that despite Davis' obesity (and contrary to the prior representations of his counsel), his resistance was lower (R V 955-59). To the extent that the variations in amperage and voltage did in fact constitute a violation of the protocols, Provenzano has failed to demonstrate, as required by Justice Lewis' concurrence, that any violation of the protocols created an unconstitutional breach, to such extent that unnecessary or wanton pain was inflicted. None of the experts called by the defense premised their theories upon the actual amperage and voltage administered during these executions, instead presenting what must be read as per se attacks upon the process of electrocution. Conversely, all the experts called by the State testified that the levels of amperage utilized in these executions, as well as significantly lower levels, would result in instantaneous death without pain. Accordingly, no basis for relief has been demonstrated.

As to opposing counsel's contention that the State and the Department of Corrections do not take the protocols seriously or

that some sort of nefarious clandestine conspiracy exists to subvert the protocols or mislead this Court, the truth is infinitely less dramatic. The record reflects that shortly after his appointment as warden, James Crosby set out to familiarize himself with all aspects of the protocols, and participated in numerous tests of the electric chair and "walk-throughs" of the execution process; at all times he was concerned that the protocols be followed to the letter (R VIII 1326-8, 1329-1330). Crosby noted, however, that while the test results always corresponded to the figures in the protocols (which of course presupposed a known resistance), the chart recordings for the four executions in 1998 had resulted in different figures (R VII 1350). Rather than sweeping this under the rug, Crosby immediately consulted the Department's retained engineer, Whitlock, as well as other personnel (R VII 1344-1354).

Crosby stated that no change was made in the protocols because, after the matter of variable resistance had been explained to him, it "ended up being a matter of semantics . . . The way I was reading it versus the way it was intended" (R VII 1344); similarly, engineer Whitlock testified that, while from an expert's point of view the language in the protocols could be erroneous, given its failure to take into account the variable resistance of individual inmates, the language was also correct but misleading (R VII 1243). The Department's view that it is, in fact, proceeding

in accordance with the protocols cannot be so unreasonable as to justify relief to Provenzano, given the fact that Judge Johnson has expressly found that no violation has occurred. Provenzano has failed to demonstrate that he merits any relief based upon alleged violation of the protocols in regard to the precise figures of amperage and voltage.[7]

Provenzano's other attacks upon the protocols are equally unavailing. As to the proposed additions to the protocols -- specification as to the tightness of the straps and precise location of the head electrode -- the State respectfully contends that ad hoc amendment of the protocols on a case by case basis is not likely to achieve the objective of a truly standardized procedure, which of course the protocols were created to do. This is particularly true where, as here, the proposed changes would truly involved nothing of substance. The matter of the tightening of the straps has already been addressed, and to the extent relevant, simply represents a matter within the discretion of the

[7] Provenzano also contends that this Court's requirement of pre-execution certification by the Department of Corrections has been rendered meaningless, in light of the above (Initial Brief at 82). This Court in Provenzano specifically required that the Department of Corrections certify prior to any execution "that the electric chair is able to perform consistent with 'Execution Day Procedures' and 'Testing Procedures for Electric Chair'" (Provenzano, 24 Fla.L.Weekly at S315). In fact, none of the evidence presented below calls into question any certification made by the Department to date, as the unrebutted testimony is that all of the test results upon which such certifications have been based reflect that the electric chair and its circuitry was functioning as intended (R VII 1223-6; R V 955-9, 987; R VII 1268).

Department of Corrections. See Buenoano v. State, supra. As to the placement of the head electrode, the record reflects that the precise placement of the head electrode will, in all likelihood, be particularly determined by the shape of each individual inmate's head, as well as his position in the electric chair (R VII 1366-8), and Dr. Hamilton testified that he had seen scalp burn rings in comparable positions to those on Davis in the past (R VI 1105).

As to alleged ignorance of the protocols, it is unfortunate that Investigator Dotson testified that he was not formally familiar with the documents, although by no stretch of the imagination can he be viewed as a member of the execution team. Given the fact that the witness stated that the oral instructions given to him essentially mirrored the written instructions in the protocols, it would appear that no constitutional violation of substance has been proffered (R II 240-5, 258-9), and Provenzano can surely claim no prejudice from the existence of the photographs he took. As to Warden Crosby's alleged ignorance of the fact that the protocols dictate that any dripping saline solution from the sponge in the head piece be wiped with cloth, Crosby in fact testified that he had consulted an engineer as to the extent to which the head sponge should be saturated, and had been advised that the sponge should be well saturated (R VII 1331). To the extent that it is contended that excess saline solution (as opposed to Davis' own sweat (R VI 1001-3)) contributed to the presence of

any electrical burns, it must be noted that Dr. Sperry testified that all burns were post-mortem (R VI 1007). Provenzano has failed to demonstrate any basis for relief, and the circuit court's findings of fact should be affirmed.

D. Conclusion

Provenzano finally repeats many of his complaints concerning the protocols, and its alleged omissions, as well as his allegation that DOC does not follow the protocols, and additionally argues that the Department is to be condemned because Robert Thomas failed to report the sight of blood during Davis' execution, and because the execution team "ignored" the sounds made by Davis (Initial Brief at 87). Opposing counsel do not, however, suggest any alternative course of action which should have been taken, or that the results would have altered the course of the execution. Provenzano also maintains that this Court should be wary of any assertion that "the problems occurring during the Davis execution will be corrected." (Initial Brief at 90), in light of an alleged "pattern of anomalies in judicial electrocutions in Florida," beginning in 1990 with the execution of Jesse Tafero. None of these matters constitutes a valid basis for any relief to Provenzano.

While it is true that Warden Crosby testified that he would have expected Thomas to advise him of the sight of blood (although he noted that Thomas may not have known this, given the fact that

blood had never appeared before and he had not received any specific training in this regard), and that he intended to look into the matter immediately (R VII 1339), the fact remains that Allen Davis' execution was unquestionably a constitutional one. Allen Davis was a markedly obese hypertensive man who had been on death row for seventeen years and who had seen two prior death warrants stayed. It is respectfully submitted that when he was finally strapped into the electric chair, and the mouth strap was affixed, Davis realized for the first time that the sentence of death pronounced so many years ago was finally about to be carried out, and that there was truly nothing he could do to prevent it. Understandable fear and emotion coursed through him, causing the nose bleed and any resistance to the straps. Nevertheless, the administration of 34 seconds of high voltage and current immediately depolarized his brain (as had occurred in the prior 43 executions), and when Davis' body was examined by the physician's assistant several seconds after the current was disengaged, no sign of life was detected.

As Justice Barkett observed in her dissent in Buenoano, "The electric chair is not intended to cause a pleasant form of death," Buenoano, 565 So.2d 312, n.1 (Opinion of Barkett, J, Dissenting), and certainly the post-execution photographs of Allen Davis bear that out. In order to be constitutional, however, an execution need not be "pleasant," or even "painless," but rather may not

involve "unnecessary or wanton pain or torture." The factual findings of Judge Johnson clearly support his conclusion that Allen Davis' execution was constitutional, and continued ad hominem attacks upon the Department of Corrections and its individual employees accomplishes nothing, rather it simply serves to distract attention from the proper focus of this proceeding. The State respectfully contends that the statute of limitations has more than run upon the execution of Jesse Tafero (or of Pedro Medina, for that matter), and that the present condition of Florida's electric chair is such that it can withstand constitutional scrutiny of the highest magnitude. The order on appeal should be affirmed in all respects.

POINT II

THE CIRCUIT COURT'S DENIAL OF RELIEF, AS TO PROVENZANO'S CLAIM INVOLVING EVOLVING STANDARDS OF DECENCY, WAS NOT ERROR.

Provenzano next contends that he is entitled to (unspecified) relief based upon his contention that Florida's continued usage of electrocution as its means of execution violated evolving standards of decency. Judge Johnson expressly found this claim to outside of the scope of the issue which this Court had directed him to hear, additionally noting (although opposing counsel does not) that this issue had been expressly decided adversely to Provenzano's position in Jones (R XIII 2296). No basis for reversal has been demonstrated.

As the circuit court correctly noted, this Court rejected this identical claim for relief in Jones. Jones, 701 So.2d at 79. Provenzano has demonstrated absolutely no reason why this holding should not continue to apply, as such as in accord with precedent not only from this Court, but also from others. See also Pooler v. State, 704 So.2d 1375, 1380-1 (Fla. 1997) (rejecting identical claim). Further, precedent is clear that the "evolving trend" analysis is not a recognized basis for an attack upon a method of execution. See, e.g., Campbell v. Wood, 18 F.3d 662, 682 (9th Cir.), cert. denied, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994) ("The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.") (cited in Jones v. State); Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 724 (1996) (fact that "more humane" means of execution existed does not render contested method cruel or unusual) (cited in Jones); Langford v. Day, 110 F.3d 1380, 1393 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 208 (1997).

Additionally, when the United States Supreme Court upheld Florida's usage of its jury override in Spaziano v. Florida, 468 U.S. 447, 463-5, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), it specifically rejected a contention that the practice was

constitutionally suspect because "only" four states utilized it, stating:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.

This language was cited with favor more than a decade later in Harris v. Alabama, 513 U.S. 504, 510-11, 115 S.Ct. 1031, 1034 (1995), when the United States Supreme Court upheld Alabama's unique jury override provision. No relief is warranted as to this claim, especially in light of the recent amendment to Article I, Section 17.

POINT III

REVERSIBLE ERROR HAS NOT BEEN DEMONSTRATED, IN REGARD TO ANY EVIDENTIARY RULINGS BELOW.

Provenzano next contends that he was deprived of a full and fair hearing below, on the basis of several unrelated evidentiary rulings by Judge Johnson - (1) the court's exclusion of two potential defense witnesses; (2) the court's exclusion of testimony, on the grounds of hearsay, regarding a conversation between an inmate, since executed, and his spiritual advisor, and (3) the court's sustaining of a relevancy objection to certain cross-examination (Initial Brief at 94-9). This Court has

repeatedly held that a trial court has wide discretion in rulings upon the admissibility of evidence, as well as the exclusion of witnesses, and that such discretion will not be disturbed on appeal absent a flagrant abuse. See Heath v. State, 648 So.2d 660, 664-5 (Fla. 1994); Larzelere v. State, 676 So.2d 394, 400 (Fla. 1996). A trial court's exclusion of evidence which would have been cumulative cannot serve as a basis for reversal. See Hall v. State, 614 So.2d 473, 477 (Fla. 1993); Muehleman v. State, 503 So.2d 310, 316 (Fla. 1987). In light of the above precedents, Provenzano has entirely failed to demonstrate any basis for relief. Each of his claims will now be addressed.

A. "Preclusion" of witnesses

Provenzano first argues that Judge Johnson erred in precluding him from calling two witnesses - an attorney formally employed with the Governor's Office and a present employee of the Attorney General's Office. Collateral counsel's rationale for being allowed to call the former witness was that he had been present at a meeting at which potential changes in the protocols had been discussed (R III 522); the Governor's Office did not waive confidentiality and/or the attorney/client privilege as to this matter, and Judge Johnson granted the State's motion for protective order (R III 518-24; X 1676-9). On appeal, Provenzano contends that this was error, and further points out that, in the subsequent cross-examination of engineer Whitlock, he was able to elicit

testimony concerning the witness's role and/or remarks at this meeting (R VII 1244-6); such testimony, however, was over the State's objection. In light of this event, it is difficult to see how any claim of prejudice can be sustained by Provenzano on appeal, inasmuch as he would seem to have elicited the testimony at issue, and additionally, his failure to have formally requested leave to call the Governor's counsel after the testimony of Whitlock would seemed to have waived this point. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

As to the other "precluded" witness, collateral counsel contended that they were entitled to call one of their opposing counsel to determine the "good faith basis" for a representation made at a prior oral argument before this Court, concerning the reasons for replacement of the 1997 chart recorder (R III 517-18); Judge Johnson sustained the State's motion for protective order in this regard (R III 517-18; X 1674-5). On appeal, collateral counsel have cited to no legal authority for their proposition that they were entitled to the course of action sought below, and it is respectfully submitted that neither this Court, nor opposing counsel, would benefit from one side being allowed to call its adversary at an evidentiary hearing to determine a "factual basis" for advocacy and rhetoric at oral argument.

In any event, the "issue" of the chart recorder, to which the witness allegedly would have testified, is a non-issue in this

case. Testimony below was to the effect that the chart recorder is not an integral part of the execution process, and that the execution could properly be carried out in its absence (R II 397-8; VII 1247; VII 1221-2). While Warden Crosby did testify that he had had no information that the former chart recorder had been inaccurate (R VII 1357), he also testified that he had replaced the 1997 chart recorder because it had seemed prone to error and giving false readings (R VII 1354-6). This testimony is in accord with that of Jackie McNeill, who testified that the former chart recorder was obsolete and that it had suffered problems with a pin and a "stripped out" wheel; he attributed its replacement to the department's desire for new reliable technology (R II 356-7). Jay Weichert testified that he thought that it had been represented to him that the former chart recorder might have been "suspect", and Robert Hallman testified that, while he found no indication from the 1998 chart recordings that any inaccuracy or malfunction had occurred, he presumed that the prior chart recorder would have been replaced for some reason (RV 975-6; VII 1265-6, 1286). The testimony of those witnesses most familiar with the rationale for replacing the prior charter recorder was more than sufficient to develop a record on this matter, and Provenzano has failed to demonstrate that he was prejudiced by his failure to call any other witnesses in this regard.

B. Other matters

Provenzano's remaining arguments relate to questions which he was not allowed to ask, one to a defense witness, one to a state witness. Provenzano called Rabbani Muhammed to testify as to his observations of the execution of Leo Jones. During the course of direct examination, the witness testified that he had seen Jones move his pinky up and down; he also testified that the straps had been applied to Jones very tightly and that he had seen Jones' flesh "bulge out" around them after the chin strap was applied (RI 117, 120-1). The judge, however, sustained the State's hearsay objection, when the witness attempted to testify that the pinky movement was a prearranged signal indicating that Jones was constrained too tightly in the chair (RI 140-2). On appeal, Provenzano contends that this was error under State v. Weir, 569 So.2d 897 (Fla. 4th DCA 1990). Regardless of the existence of any formal error, it is clear that Muhammed's personal observations were sufficient to convey to the finder of fact Jones' condition during his electrocution, such that the exclusion of any additional or cumulative evidence would be harmless.

As to Provenzano's final claim, that he should have been allowed to ask Assistant Superintendent Thornton whether there was a "code of silence of prison personnel" (RV 840-1), Provenzano has entirely failed to demonstrate the relevancy of such inquiry (which, from his Initial Brief, would seem to stem from newspaper

accounts involving a totally unrelated incident (Initial Brief at 99)). Any contention that Provenzano was denied an adequate opportunity to proffer in this regard, is refuted by the record, which indicates no formal request for proffer was ever made. [8] Reversible error has not been demonstrated, and the order on appeal should be affirmed in all respects.

POINT IV

THE CIRCUIT COURT'S STRIKING OF THE IMPERMISSIBLE INTERVENTION OF SIX UNAUTHORIZED PUTATIVE "PLAINTIFFS" WAS NOT ERROR.

Provenzano finally contends that Judge Johnson erred in striking the attempted intervention of six unauthorized putative "plaintiffs," who made their first attempt at appearance as parties in the amended petition for writ of habeas corpus filed on July 22, 1999; in its response to such pleading, the State specifically moved the court to strike this impermissible attempted intervention (R X 1634). On the first day of the hearing, the judge observed that no additional defendant had "sought to intervene to my knowledge to the Supreme Court or here," and ordered the striking of the additional parties (R I 26); in his final order, Judge

[8] Moreover, the record reflect that Provenzano had available to him and did call a plethora of DOC personnel who testified as to what occurred that day. Indeed a review of their testimony compared to non-DOC witnesses reflects similar observations, which would out of necessity dispel any notion that DOC employees were not forthright in their testimony.

Johnson stated that he had taken this action because "no valid procedural vehicle for intervention was followed" (R XIII 2268). On appeal, Provenzano still presents no viable or valid procedural mechanism for intervention, suggesting rather improbably that Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) somehow authorized his actions, as would Rule 1.250(c) of the Rule of Civil Procedure (Initial Brief at 99-100). Provenzano's arguments are frivolous.

When this Court afforded Provenzano leave to amend his petition, surely such amendment did not contemplate the addition of unrelated parties, and Brown stands for the proposition that "class action" or "joint" petitions for writ of habeas corpus are not to be allowed, especially where the putative petitioners' cases are in different stages of the appellate or collateral process. The six petitioners whom collateral counsel wished to add to this proceeding are not in the same procedural posture as Provenzano. Provenzano has exhausted every available state and federal collateral challenge to his sentence of death, whereas putative petitioners Byrd, Haliburton, Lopez, Breedlove and Groover have pending federal habeas corpus actions in the district courts, whereas Kokal is expected to file such action in the near future; Swafford's case is presently pending before this Court in a successive collateral appeal (Swafford v. State, Florida Supreme Court Case no. 92,173). The only thing that these inmates seem to have in common is that their collateral counsel seem particularly

disinclined to actively litigate their cases, thus further postponing finality for the foreseeable future. No basis for "intervention" has been demonstrated.

Additionally, Provenzano's reliance upon the rules of civil procedure is particularly inappropriate, as such are not applicable to a proceeding of this nature. See, e.g., Steinhorst v. State, 636 So.2d 498, 500 (Fla. 1994) (civil rule of procedure applicable only to civil cases, "not to collateral claims associated with a criminal conviction"). This cause cannot be viewed as a civil proceeding, as to do so would deprive Provenzano's counsel, the Capital Collateral Regional Counsel for the Middle Region, of any authority to pursue it. See, State ex rel Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998) (CCRCs only authorized to bring habeas corpus actions or other postconviction relief proceedings used to challenge the validity of a conviction and sentence). Conspicuously absent from the Initial Brief is any acknowledgment that during the course of the Leo Jones appeal in this Court, collateral counsel, on June 17, 1997, sought this Court's permission for the intervention of well over 100 of their clients, by express motion to such effect, and that such relief was denied

on July 3, 1997 (See Attachment).[9] On the basis of all the above, the ruling on appeal should be affirmed in all respects.

CONCLUSION

Although Provenzano does not specify what, if any, relief he feels should be granted (Initial Brief at 100), the record and pleadings in this cause conclusively demonstrate that he is entitled to none, and that the order on appeal should be affirmed in all respects.

Respectfully submitted,

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[9] To the extent necessary, the State also respectfully requests this Honorable Court to take judicial notice of its own records and files in Jones v. State, Florida Supreme Court Case no. 90,231.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Martin J. McClain, Special Assistant CCRC, Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 Harry P. Brody, Assistant CCRC, Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; Andrew Thomas, Chief Assistant CCRC, Capital Collateral Regional Counsel, Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301 and Gail E. Anderson, Special Assistant CCRC, Capital Collateral Regional Counsel; Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301;, this 16th day of August 1999.

_____
RICHARD B. MARTELL
CHIEF, CAPITAL APPEALS