IN THE SUPREME COURT OF FLORIDA

CASE NOS. 95,959; 95,973

THOMAS PROVENZANO, MILFORD BYRD, EDUARDO LOPEZ, MCARTHUR BREEDLOVE, JERRY HALIBURTON, GREGORY KOKAL, AND TOMMY GROOVER,

Petitioners/Appellants,

v.

MICHAEL MOORE, ET. AL.,

Respondents/Appellees.

ORIGINAL PROCEEDING -- ALL WRITS

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PRELIMINARY STATEMENT

This reply brief addresses Argument One of Petitioners' initial brief. Due to page and time limitations, Petitioners rely upon the initial brief as to the remaining arguments.

References to the initial brief will be designated as "IB [page number]." References to the answer brief will be designated as "AB [page number]."

CERTIFICATION OF TYPE SIZE AND STYLE

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REPLY TO THE STATEMENT OF THE CASE AND FACTS

Rule 9.210(c), Fla. R. App. Pro., provides:

> The answer brief shall be prepared in the same manner as the initial brief: provided that the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified.

The Answer Brief completely disregards this rule. The Statement of the Case and Facts contained in the Answer Brief does not specify areas of disagreement; it is simply a second long and largely redundant summary of the evidentiary hearing.

ARGUMENT IN REPLY

ARGUMENT I

A. INTRODUCTION

Despite arguing the lower court's order should be upheld if supported by competent substantial evidence (AB 54), see Jones v. State, 701 So.2d 76, 80 (Fla. 1997), Respondent provides no definition of "competent substantial evidence" and makes no effort to show that Respondent's evidence satisfies this definition. "Competent substantial evidence" is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred ... [or] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028, 1031 (Fla.1980). This phrase means "an order which bases an essential finding or conclusion solely on unreliable evidence should be held insufficient." Brinkley v.

Brinkley, 453 So.2d 941, 943 (Fla. 4th DCA 1984). Expert opinion does not satisfy this standard when the expert did not rely on test results or studies, but based his opinion on suppositions. Young-Chin v. City of Homestead, 597 So.2d 879 (Fla. 3rd DCA 1992). Petitioners' briefs establish that the lower court's conclusions are not supported by competent substantial evidence, and that the evidence upon which Respondent relies does not satisfy this standard.[1]

Moreover, many of the lower court's conclusions to which Respondent wishes this Court to defer are not factfindings but conclusions of law to which this Court owes no deference. For example, several times Respondent points to the lower court's conclusion that the mouth strap caused discomfort, but not unnecessary and wanton pain. The only fact-finding in this conclusion is that the mouth strap caused discomfort. The question of whether this discomfort is unnecessary and wanton

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[1]Respondent offers the disingenuous and unfounded argument that Petitioners have somehow defaulted this appeal (AB 56). Petitioners' initial brief addresses in detail the facts presented in the lower court and states numerous times that the lower court's order is contrary to the facts and not supported by competent substantial evidence. The inadequacy of factual support for the lower court's order is what the entire initial brief is about. Unlike Respondent's brief, the initial brief fully sets forth the facts. The initial brief further states that Jones is the applicable law, and Jones clearly applied a competent substantial evidence standard. Respondent asserts the conclusion to Petitioners' brief contains no requested relief (AB 56). The headings to Petitioners' arguments, as well as the arguments themselves, make clear that Petitioners contend the Florida electric chair is unconstitutional.

pain is a question of law. "Unnecessary and wanton" pain is the legal definition of unconstitutional pain. Jones. In Jones, this Court stated that the trial court's conclusion that the electric chair "did not wantonly inflict unnecessary pain" was a conclusion of law. 701 So. 2d at 77-78. Whether or not what the court characterized as "discomfort" was "unnecessary and wanton" pain is a question of law. See also Porter v. State, 723 So. 2d 191, 196 (Fla. 1998) (question whether facts establish trial judge's impartiality is a question of law).

Further, many of Petitioners' contentions are based upon undisputed facts or unrebutted evidence about which the lower court made no factfindings. These matters are discussed below.

Respondent argues that Petitioners are not entitled to rely upon the former "cruel or unusual" clause. Respondent ignores this Court's decision in Brennan v. State, No. 90,279 (Fla. July 8, 1999), in which the Court applied the "cruel or unusual" clause to a claim brought by a criminal defendant charged and convicted before the new "cruel and unusual" clause was enacted. Petitioners are likewise entitled to rely upon the "cruel or unusual" clause, which implicates a substantive right.

At several points, Respondent argues that any per se challenge to electrocution is barred (AB 59, 67-68). However, the lower court addressed the per se use of electrocution (Order

at 14-28, 31).[2] In its order staying Provenzano's execution, this Court allowed amendment of the all writs petition without limitation, directing the lower court to conduct an evidentiary hearing "on all issues in respect to the functioning of the electric chair which are alleged in petitioner's Petition ... or any amended writ." Provenzano v. State, slip op. at 2 (Fla. July 8, 1999) (emphasis added). Additionally, Justice Pariente's concurring opinion in Provenzano v. State, ___ So. 2d ___, 1999 WL 462600 (Fla. July 1, 1999), stated, "I find nothing in our prior opinion in Jones that would preclude this Court from revisiting that decision, should the factual predicate upon which the opinion was based change as a result of subsequently developed evidence." Provenzano, 1999 WL 462600 at 5. As Petitioners' briefs set forth in detail, the factual predicates of Jones have been undermined. The issue regarding per se use of electrocution is properly before this Court.

B. THE UNDISPUTED FACTS AND THE COMPETENT SUBSTANTIAL EVIDENCE ESTABLISH THAT ALLEN DAVIS SUFFERED UNNECESSARY AND WANTON PAIN DURING HIS EXECUTION.

1. The Nose Bleed and Mouth Strap

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[2]Indeed, in closing argument at the hearing, Respondent agreed that the per se use of electrocution "was an issue that was contained in the pleadings, and that's why we put on [Wilder's] testimony" (T. 1404). Further, Respondent did not file a cross-appeal regarding this issue, despite this Court's direction in its July 8, 1999, order that "[a] party seeking review of the order entered following this hearing shall file its brief no later than August 9, 1999." Provenzano v. State, slip op. at 2. Respondent's argument is barred.

Respondent contends that the lower court's conclusions that Davis's nose bleed was not caused by application of the current, that Davis was not asphyxiated by the mouth strap, and that the strap caused discomfort are supported by competent substantial evidence (AB 59). First, Respondent both misstates Petitioners' allegations and the lower court's order.

Petitioners did not contend that the nose bleed was caused by application of the current, but presented evidence that the nose bleed began before the electric current was applied and resulted from the tightness of the mouth strap. The lower court found that the nosebleed began before the electric current was applied (Order at 31-32). Petitioners also did not contend that the mouth strap asphyxiated Davis, but that the placement and tightness of the mouth strap caused a partial asphyxiation before the electric current was applied. The lower court found that "[t]he death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap" (Order at 31), but made no finding regarding Petitioners' actual allegation, i.e., that the mouth strap caused partial asphyxiation before the electric current was applied. Petitioners did contend that the mouth strap caused what the lower court characterized as "discomfort" (Order at 32).

In closing argument below, Petitioners argued pain occurred during Davis's execution based on the undisputed facts that Thomas saw blood before the current was applied, that Seryutin

(DOC's attending physician at the execution) opined the manner in which the mouth strap was affixed could have caused the bleeding and could have caused Davis difficulty in breathing, that all the medical opinion presented at the hearing recognized the congestion in Davis's face at the end of the execution was consistent with some blockage of his breathing,[3] that the photographs of Davis accurately depict how the mouth strap was affixed, that Davis emitted moans, groans, screams or squeals after all the straps were affixed, that the straps should not be affixed in a manner that causes pain, that no DOC employee responded to the bleeding or sounds made by Davis, and that the specific kind of mouth strap used was unnecessary (T. 1384-90). The lower court made no findings contrary to these contentions (see Order at 31-32), perhaps because they were undisputed.

However, during the hearing, the court made numerous comments regarding what the evidence showed. During closing, when Respondent contended there was no evidence showing the mouth strap was pushing Davis's nose up before the current was applied

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[3]Kirschner testified the mouth strap caused a partial asphyxiation (T. 747-48). Respondent's witness Sperry agreed that the congestion was present on Davis's face, agreed that the mouth strap prevented Davis from breathing through his mouth, and opined that the congestion was caused by Davis holding his breath (T. 866-68, 872, 927-28, 989). Respondent's witness Bullard testified that the congestion on Davis's face indicated "increased pressure in this area" (T. 1322), that there were petechiae on Davis's face which would be consistent with asphyxia (T. 1323), and that the congestion was caused by Davis being unable to exhale (T. 1322).

(T. 1405-06), the court looked at the photos and stated:

> **THE COURT:** If that mask had not been pushing hard up against that nose as it is shown there at the time -- all this time, wouldn't the blood have leaked below the mask and come down instead of from the very top of the mask and all down in front of it?
>
> It's leaking right on top of the mask and down the front of it. If that hadn't been up against the [nose], it wouldn't have done it, would it?
>
> **MR. NUNNELLEY:** I don't know, Your Honor. And I would point out . . . it is not heavy leather. It fits fairly tightly. . . .
>
> **THE COURT:** The problem with the mask is that you've got people with big chins, you've got people with just a little bit of flesh between their nose and the top lip and some with a lot of space between the nose and the top lip. It's hard to get one size mask to fit everybody. That mask is in my opinion, at least an eighth of an inch thick. I looked at it.
>
> . . . .
>
> **[MR. NUNNELLEY:]** Your Honor, and, again, in response to your question about the -- your comment about the mask, Mr. Davis was the 44th person executed by the State of Florida. And this is the first time we have ever heard anything about the mask.
>
> **THE COURT:** Well, it's the first time they've ever had bleeding. . . .
>
> **MR. NUNNELLEY:** Yes, sir, that's true. . . .

(T. 1406-08). During Thomas's testimony the court examined Petitioner's Exhibit 1-I, a photograph of Davis, and noted, "If you look at that picture, you'll see that the mask covering his mouth is so tight against, it's pushing the nose up to the side, and the blood is then coming directly down on the strap" (T. 328). The court asked Thomas, "Was it tightened like that?" and

Thomas responded, “Yes, sir” (T. 328).[4] The court also questioned Sperry, noting the illogic of Sperry’s opinion that the mouth strap had nothing to do with the nosebleed:

> **THE COURT:** Let me see 1-I. I want to ask you about this.
>
> **THE WITNESS:** Yes, sir.
>
> **THE COURT:** This, of course, is the photograph that’s been discussed a lot showing the face strap in place --
>
> **THE WITNESS:** Yes.
>
> **THE COURT:** -- pushing up under the nose to the point that the nose is crimped up in there, plus the chin strap is in place. It shows the blood bleeding straight down on top of the strap under his nose. Tell me what your opinion is the cause of the bleeding.
>
> **THE WITNESS:** There is someplace up inside the left side of his nose that spontaneously ruptured. . . .
>
> . . . .
>
> **[THE COURT:]** Mr. Thornton put this up here first. Mr. Thomas put his hand on it and held it there, and there was no blood whatsoever. They then come around, and Mr. Thomas said he tightened this thing as tight as he could tighten it. Then they put this thing down, he hears two moans, he looks over and sees the nosebleed.
>
> . . . .
>
> **THE COURT:** In fact, those things occurred just like that. You think it has no significance in the bleeding?
>
> **THE WITNESS:** As far as the bleeding being caused

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[4]Thomas was the only person in the execution chamber who could see under the face mask after the headpiece was applied. Thus, Thomas was the only person who could know the position of the mouth strap after the headpiece was applied.

by the placement of that strap, no. . . .

THE COURT: Very fortuitous time to bleed, huh?

THE WITNESS: Timing is everything.

(T. 1004-06).

Although the court's order makes no specific findings regarding the placement of the mouth strap and its impinging upon Davis's nose, the court's comments about the evidence, as well as the photographs and the strap itself, establish the strap was very tight, was stiff and thick, was pushing up against Davis's nose, and was linked to the nosebleed.

Despite these facts, Respondent argues the nosebleed was meaningless (AB 59-60). Although Kirschner specifically testified the nose bleed resulted from the positioning of the mouth strap, and although the photographs and the court's comments clearly bear this out, Respondent argues there was no evidence the nose bleed was connected to the mouth strap (AB 60). Respondent points to Hamilton and Sperry as establishing there was no connection between the mouth strap and the nose bleed (Id.).[5] While Respondent argues these witnesses established that pressure from the mouth strap would not have caused the nosebleed and that the nosebleed was likely caused by hypertension (id.),

[5]The Answer brief's statement of the facts refers to Hamilton as a "fact witness," not an expert (AB 30). Thus, Respondent appears to have abandoned any reliance upon Hamilton as an expert.

the court made no such findings.[6] As the court's questions of Sperry establish, Sperry's testimony was totally illogical and not accepted by the court.[7] Sperry's testimony is not "competent substantial" evidence, but is wholly unreliable, as recognized by the court.

Kirschner's opinion, on the other hand, which is supported by reason and the facts, is competent substantial evidence that the mouth strap caused the nose bleed. Kirschner testified Davis's nose bleed was "caused by the mechanical effects of this face mask pressing upward on his nose" (T. 752). Kirschner explained the evidence supporting his opinion:

> First of all, we have the temporal relationship of the nose bleed being associated with the placement of a face mask and the -- to suggest that this nose bleed is due to, in fact, that he's been using -- he's been taking nonsteroidal anti-inflammatory drugs and coincidentally this occurs at this time is asking a lot and it just doesn't make sense.
>
> If he was going to bleed from the use of his medications, he would have had nose bleeds or

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[6]In fact, Respondent's own witnesses could point to no evidence indicating that Davis's hypertension caused the nose bleed. Although he examined Davis's medical records, Sperry did not know what Davis's blood pressure was in the week before or day of his execution, and there was no evidence in the medical records that Davis had ever had a nose bleed (T. 995-96, 1001).

[7]As to Hamilton, while Respondent asserts that he testified he found no abrasion on the nose to account for the bleeding (AB 60), Respondent cites to no such testimony from Hamilton, perhaps because Hamilton made no effort whatsoever to determine the cause of the nosebleed (T. 1075) and in fact testified that he believed "if [Davis] hadn't received the electrical current at the time, he would not have had the nosebleed" (T. 1076, 1118).

gastrointestinal bleeding sometime earlier.

> So the -- and we have a very good explanation of why his nose began to bleed at this particular time based on the -- based on the photographs that we have here from the execution chamber.

(T. 753-54). Kirschner's analysis took into account the location of the bleeding, the photographs showing the mouth strap pressing on Davis's nose, and the context in which the bleeding occurred.

For some reason, Respondent separates the nose bleed from the problems with the mouth strap, thus arguing that Petitioners' witnesses did not testify that the nose bleed established the occurrence of unnecessary or wanton pain (AB 60). However, Kirschner clearly testified that the mouth strap caused pain by restricting Davis's ability to breathe (T. 758). Further, Price provided unrebutted testimony that Davis experienced conscious pain which could have resulted from the straps (T. 466). The nosebleed and the mouth strap are both evidence that Davis experienced conscious pain.

As to the mouth strap, Respondent argues that although a mouth strap has been used in all Florida electrocutions, this is the first time any issue has arisen about the mouth strap (AB 61). Of course, this is also the first time there have been admissions by execution team members that the straps are applied "[a]s tight as I can get them" (T. 316), that the straps have always been applied this way (T. 340), that the mouth straps used in other executions were the "same as in design, purpose and

function" as that used on Davis (T. 74, 86-87), and that groans, screams or moans from the condemned during strapping and before application of current are not out of the ordinary (T. 358-59, 398-99). This is also the first time blood has been observed during an execution, as the court pointed out.

Respondent next argues regarding the mouth strap that the lower court found against Petitioners' contentions that the strap caused pain (AB 61). Respondent is wrong about the meaning of the lower court's conclusions.

The lower court stated that Davis's death "did not result from asphyxiation caused by the mouth strap" (Order at 31). Petitioners never contended Davis did asphyxiate from the mouth strap. Rather, Petitioners contended that Davis was experiencing a partial asphyxiation before the electric current was begun.[8] The court's findings are not contrary to this testimony, and, in fact, the court's comments during the hearing establish the reasonableness, substantiality and competence of Kirschner's opinions.

The court did find that the mouth strap caused discomfort, but not unnecessary and wanton pain (Order at 32). The only

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[8]Kirschner specifically testified that Davis was suffering from "partial asphyxiation" from the mouth strap (T. 747), that the bloody bubbles observed by Thomas indicated Davis was having "difficulty breathing" (T. 748), and that Davis was experiencing a "feeling of suffocation" (T. 758). Kirschner testified that the medical cause of Davis's death was "electrocution and association of partial asphyxiation" (T. 752).

fact-finding in this conclusion is that the mouth strap caused discomfort. The question of law then is whether this "discomfort" was “unnecessary and wanton” pain. The evidence establishes it was. The evidence showed the straps were applied as tightly as they could be, although even Crosby admitted this was unnecessary and could cause pain or injury. The evidence showed the mouth strap was applied so tightly it dug into Davis’s face and nose. The evidence showed the execution team members were indifferent to this “discomfort,” ignoring Davis’s bleeding nose and his groans, moans and screams. The evidence showed Davis had difficulty breathing, whether the difficulty was in exhaling or inhaling, as all medical opinion was that the congestion in Davis’s face resulted from some interference with his breathing. The evidence showed that the specific design of the Florida mouth strap was unnecessary, in that Georgia uses a strap which does not cover the mouth or push on the nose. None of these facts were or can be disputed. None of these facts are contradicted by the lower court’s order.

These facts establish “unnecessary and wanton” pain. The tightness of the mouth strap was unnecessary, and Respondent has not offered any argument to the contrary. The design of the mouth strap was unnecessary, and Respondent has not offered any argument to the contrary. The execution team’s ignoring Davis’s bleeding, moans, groans and screams establishes wanton disregard,

and Respondent has not offered any argument to the contrary.

The lower court also found that the mouth strap was not part of the electrical operation of the electric chair (Order at 32). Respondent says this finding is "correct" (AB 61). However, strapping a person to the electric chair is part of the electrocution process. The question of pain in this process is not limited to the pain of electricity. Respondent's position appears to be that the process can cause pain without being unconstitutional if the pain does not result from electricity.

Respondent argues that the lower court's conclusions regarding the effects of the mouth strap are supported by competent substantial evidence (AB 61). Respondent first argues that Kirschner's opinions regarding the effects of the mouth strap are contradicted by Sperry (AB 61-62). As noted above, however, Kirschner's opinions regarding Davis's partial asphyxiation are based upon reason and logic and upon the context in which it occurred, while Sperry's opinion that the mouth strap was not a problem were illogical, unreliable and contrary to the facts, as the court's questioning Sperry indicates.[9]

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[9]Sperry believed that "obviously with the mouth strap on, he could not breathe through his mouth, but the nostrils are unoccluded" (T. 994). Sperry could not say to what extent the mouth strap might have caused pain or discomfort (T. 995). Sperry agreed that the photographs show white lines on Davis's face at the edges of the mouth strap, indicating that the mouth strap was applying pressure to Davis's face, and agreed that the right nostril was touching the mouth strap (T. 922-24).

Respondent contends Kirschner's opinion was "largely based" on the presence of petechiae (AB 61). Kirschner did not base his opinion solely on the presence of petechiae, but also upon the context in which they appeared--i.e., on a person whose mouth and nose were occluded by a stiff leather strap. As with Sperry's illogical and unsupported opinion that the mouth strap was not impinging on Davis's nose, his opinion that the petechiae did not mean anything is contrary to logic and common sense.[10] As such, Sperry's opinion is not competent substantial evidence.

Respondent also contends Kirschner's reliance on the photographs of Davis to support his opinions is a "problem" because Sperry testified the photographs did not show the mouth strap was impinging on Davis's nose and because other witnesses testified the mouth strap was not in the position in the photographs when it was first applied (AB 62-63). Again, Sperry's opinion of the photographs is totally illogical, as the court's questioning of Sperry and the photographs themselves revealed. Such illogic is not competent substantial evidence.

As to witnesses who testified the mouth strap was not originally positioned as in the photographs, these witnesses

[10]Sperry did not dispute Kirschner's testimony that petechiae were present in the numbers and distribution that Kirschner described (T. 918). Sperry also agreed that the presence of petechiae, the location of petechiae and the number of petechiae are all clues which must be considered along with the circumstances of the death in determining the meaning of the petechiae (T. 918-21, 864).

could not see the mouth strap after the headpiece was applied. The hood of the headpiece covered Davis's face as soon as the headpiece was placed on his head, after which the chin strap of the headpiece was strapped tightly over the mouth strap. The only person with a view under the hood was Thomas, who testified that the mouthpiece looked as it does in the photographs. The lower court's comments during testimony, as quoted above, establish that the mouth strap was indeed impinging on Davis's nose, and the court made no contrary findings in its order.

Respondent contends the "most likely explanation" for the position of the mouth strap in the photographs is that at the end of the execution, the chest strap was loosened and Davis's body slumped (AB 63). Respondent relies on the testimony of Mathews that the mouth strap was the only thing holding Davis upright (Id.).[11] Petitioner's Exhibit 1-I, in which the mouth strap is still fastened, shows Davis's shoulders are against the back of the chair, not leaning forward and being restrained only by the mouth strap. More importantly, Petitioner's Exhibit 1-E shows the mouth strap has been unfastened, Davis's head is still erect, and Davis's body is still sitting upright with his shoulders up against the back of the chair, even though the mouth strap is

[11]When asked on direct examination whether Davis's body slumped when he loosened the chest strap, Mathews testified, "I can't recall his body slumping" (T. 1028). Then, miraculously, on cross-examination, Mathews testified, "The more I sit here and think about it, I would have to say, yes" (T. 1039).

providing no support. As the court pointed out, if the mouth strap had not been pushing up against Davis's nose when the blood was coming out of his nose, the blood would not have flowed down the outside of the mouth strap (T. 1406-08). Mathews' testimony is not competent substantial evidence, and the lower court's order does not indicate the court relied on it.

Respondent argues Kirschner's reliance on Davis's facial congestion was "countered by other witnesses" (AB 63). The lower court made no findings as to the cause of the congestion. Respondent relies on Sperry to argue congestion is part of the dying process. However, Sperry testified that the congestion was present as described by Kirschner and, most importantly, that congestion is an active process, requiring a functioning body, and does not occur after death (T. 866-67). Sperry also testified congestion could occur if a person held his breath (T. 927-28, 989). Thus, Sperry agreed that the congestion was a result of Davis not being able to breathe properly.

Respondent also relies on Bullard's testimony the mouth strap would have caused difficulty with exhaling, rather than inhaling (AB 63). Whether the mouth strap impeded exhaling or inhaling, the effect is the same. If one cannot exhale carbon dioxide, one cannot inhale oxygen, and carbon dioxide builds up

in the body, causing a feeling of suffocation.[12]

Respondent next argues there was evidence indicating Davis was able to breathe after the mouth strap was affixed (AB 63-64). This misses the point: Petitioners' contention is that Davis was partially asphyxiating before the current. "Partial asphyxiation" means what it says, i.e., "partial," not total. It is correct that Davis made sounds after the straps were affixed and that Thomas observed two bloody bubbles coming from Davis's nose. As Kirschner and Price testified, these matters support, rather than contradict, the conclusion that Davis was partially asphyxiating and suffering pain (T. 747, 748, 758, 451-52). All of the medical opinion, including Respondents' witnesses Sperry and Bullard, was that the congestion in Davis's face resulted from an impairment of his ability to breathe, regardless of the cause. However, contrary to his own experts, Respondent relies upon Mathews' testimony that Davis was breathing after the straps were affixed (AB 63-64). Mathews admitted he was unable to see Davis's face after the headpiece was put on (T. 1033-34). The competent substantial evidence in the record establishes that the mouth strap caused partial asphyxiation.

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[12]Respondent also asserts that a witness to the execution testified Davis's face "seemed to redden prior to the affixing of any mouth strap" (AB 63). The witness actually testified that Davis's face was "kind of red" when he entered the execution chamber, but not as red or purple as it appears in Petitioner's Exhibit 1-F (T. 226-27).

Respondent next argues that the lower court's finding that the mouth strap did not cause unnecessary pain is supported by competent substantial evidence (AB 64-66). The question of whether the discomfort caused by the mouth strap was "unnecessary" is a question of law, not fact, and thus this Court owes no deference to the lower court's conclusion in this regard.

Respondent argues that the only evidence supporting Petitioners' argument that the mouth strap caused pain is Price's testimony (AB 65). However, Kirschner specifically testified that the partial asphyxiation created by the mouth strap caused pain (T. 758). Further, Price's testimony was unrebutted, and Respondent's brief points to nothing to rebut it. Price is a well-recognized expert in the measurement and assessment of pain (IB 37 n.11). Respondent argues Price testified the Ekman scale of facial expressions has never been applied to dead bodies, but Price actually testified, "Ekman never used it on dead bodies, but the expression to me looks very similar to those of live bodies" (T. 501). Earlier, Price testified that the Ekman scale is effective in analyzing dead people as well as living people (T. 468). Respondent presented no rebuttal to this testimony.

Respondent agrees that Georgia does not use a mouth strap like Florida's, but argues the mouth strap is nonetheless necessary (AB 65). Respondent does not explain why the Florida mouth strap is necessary when Georgia accomplishes an

electrocution without using such a device.

Respondent argues that the fact that Georgia's straps do not cover the mouth is "a distinction without a difference" (AB 65). However, as Zant's testimony establishes, this distinction creates a huge difference. Zant testified none of the straps used in Georgia obstruct breathing (T. 1299). When asked whether either chin strap used in Georgia "inhibit[s] the lips opening to be able to breathe through the mouth," Zant responded, "Neither strap touches the lips" (T. 1303). Thus, even if the Georgia chin straps keep the person's mouth closed, the person can still open his lips to breathe.

Respondent argues that Thomas's testimony about tightening the straps "as tight as I can get them" is not "dispositive" (AB 65-66). Thomas has been a member of the execution team since 1992, performing the same duties at each execution. If Thomas does not know how things are done in an execution, who does? Respondent tries to make something out of Petitioners not calling Hackle as a witness, but if Hackle had something to say different from Thomas's testimony, why did Respondent not call him?

Respondent falsely argues that McNeil testified he "checked the straps to ensure that they were not too tight" (AB 66, citing T. 351-52). McNeil actually testified he "snugged down" the waist strap (T. 351) and that after tightening the chest strap, "I had to then retighten the waist strap" (T. 352) (emphasis

added). While Crosby testified he would not expect the straps to be pulled as tightly as they could be because that could cause pain or injury (T. 1365-66), he did not testify that the straps were not pulled as tightly as they could be and did not contradict Thomas's testimony to that effect. While there was testimony that the chest strap on Ms. Buenoano was loosened after she grimaced, the execution team simply ignored Davis's groans, moans and screams as being nothing out of the ordinary.

Respondent characterizes the pain caused by the straps as "necessary suffering" and argues the mouth strap "served a valid purpose" (AB 66). According to Respondent's reasoning, the non-electric part of the execution process does not have to be constitutional as long as Respondent avers that it serves a valid purpose. However, Respondent never once explains the necessity or validity of the Florida mouth strap in light of the fact that Georgia finds such a strap unnecessary.

Respondent finally argues that any discomfort caused by the mouth strap is "minimal or transitory," occurring only "in the seconds before the circuit was engaged" (AB 66). The evidence established that the period from when the mouth strap was affixed and the current was engaged was one to five minutes, hardly a "transitory" period of time. It was certainly enough time for Davis to start bleeding and to scream, moan or groan at least twice. Respondent's argument that this "transitory" time period

does not establish a constitutional violation amounts to an argument that bleeding and screams can be ignored, as they were in Davis's execution, because the electrocution is about to commence. This reasoning is unconstitutional.

No competent and substantial evidence supports any conclusion that the mouth strap did not cause unnecessary and wanton pain. The lower court in fact determined that the mouth strap caused "discomfort." The evidence and the lower court's comments on the evidence during the hearing establish that this "discomfort" occurred. Respondent relies upon Sperry's far-fetched and illogical opinions, which are unreliable, based on supposition and contrary to the undisputed facts.

It is up to this Court to determine whether these facts establish unnecessary and wanton pain. Under Jones, they clearly do. In Jones, the Court upheld use of the electric chair in part because "executions in Florida are conducted without any pain whatsoever" and because there was no evidence "suggesting deliberate indifference to a prisoner's well-being on the part of state officials." Jones, 701 So. 2d at 79. See Farmer v. Brennan, 511 U.S. 825 (1994). Here, the competent substantial evidence establishes that Davis experienced extreme pain and that the execution team was indifferent to his suffering, ignoring his bleeding and screams.

2. Pain During Electrocution

Respondent argues that Petitioners' experts' opinions that extreme pain occurs during judicial electrocution are "unconvincing" (AB 67-70). Respondent wishes the Court to rely on suppositions by Respondent's experts when those suppositions ignore critical studies and data.[13]

Respondent first contends Petitioners' experts are not medical doctors and relied on animal studies and accounts regarding survivors of high voltage electrical accidents in forming their opinions (AB 67). Respondent does not explain why only a medical doctor should be allowed to express an opinion in this area or why a medical doctor should be presumed to have some special knowledge relevant to the issue. This argument is

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[13]Respondent wishes this Court to accept opinions with no basis in science, just because Respondent was able to find witnesses willing to state these unsupported opinions. American jurisprudence contains pernicious decisions, long since recognized as wrong, which were at the time premised on a baseless but commonly accepted fact. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court adopted the doctrine of separate but equal based on the then-accepted fact that "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." 163 U.S. at 552. In Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court overturned Plessy, noting "[w]hatever may have been the extent of psychological knowledge at the time of Plessy," segregation has a detrimental effect minority children. "[T]his finding is amply supported by modern authority." 347 U.S. at 494-95. The authority cited by the Court was psychological publications. 347 U.S. at 495 n.11.

The question is not just whether an expert mouthed the words Respondent wanted and whether the circuit court ruled in Respondent's favor. This Court is not merely a rubberstamp. This Court must analyze whether factual determinations were supported by competent substantial evidence and separate out factfindings from mixed determinations of law and fact.

particularly perplexing in light of the enormous lack of knowledge regarding electrocution demonstrated by Respondent's medical doctor witnesses. Petitioners' initial brief sets forth these gaps in knowledge in detail (IB 57-59 [Sperry]; 60-62 [Wilder]; 62 n.16 [Hamilton and Bullard]).

As to Petitioners' experts' reliance upon animal studies and reports of survivors of high voltage accidents, Price explained the scientific approach requires looking at all available data, not relying upon assumptions (T. 423). The relevant data includes animal studies and reports of survivors of high voltage accidents, because there have been no scientific experiments conducted on judicial electrocution.[14] Respondent criticizes Price for not having studied high voltage electricity (AB 14). However, Respondent's medical doctor witnesses have conducted no such study, and even considered other data such as animal studies and high voltage accidents to be "insignificant." Respondent has pointed to no scientific arena in which these doctors'

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[14]As Price explained, there is no scientific literature on the specific issue of judicial electrocution (T. 419), because "[t]here is no scientific area called judicial electrocution. There is no journal that publishes research articles on judicial electrocution. There are only a few witnesses that have spoken with scientific expertise to this issue" (T. 476). Later in the brief, Respondent cites to this testimony by Price to argue Price's opinions are not generally accepted in the scientific community (AB 69). However, there is no scientific community on judicial electrocution. Further, Respondent's experts' opinions are not even based upon sound scientific principles and data, much less accepted in the scientific community. See infra.

suppositions about electrocution have been accepted. Indeed, the court recognized that the people who have been judicially electrocuted are dead and thus "[t]he ability to measure that pain objectively is apparently not available to anybody" (T. 420).

Respondent's own medical doctor witnesses testified they would have to defer to experts in other fields regarding the effects of electricity on the human body. Sperry testified that the polarization process of brain neurons is "an element of neurophysiology that is beyond my own particular study" (T. 891). Price is a neurophysiologist. Wilder testified he could not assess the significance of people surviving high voltage electrical accidents, including those in which the electrical current entered through the person's head, because "I'm no physicist. I'm not sure" (T. 1161-63). Wikswo is a physicist.

Respondent seems to believe considering animal studies and other data is irrelevant because such data have "absolutely no relationship to a controlled judicial electrocution in Florida" (AB 67). However, Respondent's own witness Wilder testified that even in the highly controlled setting of electroconvulsive therapy, doctors are unable to "guarantee a certain [current] pathway" (T. 1189).[15] If a specific current pathway cannot be

[15]In this therapy, two electrodes are placed on a person's head, either on the temples or on the front and back of the head. The purpose is to stimulate specific parts of the brain. Wilder

guaranteed in this highly controlled setting, there can be no such guarantee in a judicial electrocution, which is not conducted by specially trained technicians and which involves many more variables than electroconvulsive therapy.[16] Respondent presented no evidence establishing the current pathway during a judicial electrocution besides the suppositions of experts who had not considered relevant studies and data.

Respondent next argues that Petitioners' witness Reilly offered "no relevant opinion" (AB 68).[17] However, Reilly offered critically important testimony explaining the concept of current density (IB 46-49), an understanding of which is essential to any analysis of what happens to a person who is being judicially

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testified that scientists had conducted studies to determine how to guarantee a specific current pathway during this therapy, but these studies had been unsuccessful (T. 1189).

[16]For example, in Davis's execution, water from the head sponge dripped onto Davis, causing burns on his face, and Davis's body also showed arcing burns. Both of these kinds of burns indicate current passed outside Davis's body. Thus, contrary to Respondent's simplistic assumption, there is no guaranteed current path in a judicial electrocution.

[17]According to Respondent, Reilly offered "no relevant opinion" because he did not give an opinion regarding consciousness during electrocution. First, Reilly's opinions provided a foundation for the opinions of Price and Wikswo. More importantly, however, Respondent's argument means that Respondent's witness Bullard had "no relevant opinion" because he expressly testified he had no opinion as to what effect current would have on the brain (T. 1312).

electrocuted.[18] None of Respondent's medical doctor witnesses understood current density, and thus their opinions lacked any scientific foundation.[19] Without knowing how much current would reach the heart or brain--which neither Sperry nor Wilder knew--there is no basis for opining about the effects of the current on those organs. Sperry, for example, expressed the opinion that electrocution results in instantaneous unconsciousness despite his recognition that the skull has 50,000 ohms of resistance and despite not knowing how much current would reach the brain.[20]

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[18]Respondent argues Reilly's calculations of the current density show there is enough amperage to cause instant unconsciousness and death "as verified by other witnesses" (AB 68, 70, citing T. 597, 571-72, 604-06, 481, 496-97, 448-49). The meaning of Respondent's argument is unclear, and the citations do not help. These are citations to various parts of Reilly's and Price's testimony which point out that only a very small amount of current reaches the brain and that the amount is insufficient to cause instant unconsciousness.

[19]Wilder was "not terribly familiar with" the concept of current density (T. 1178) and "would have no way of knowing" how much current reaches the brain during an electrocution (T. 1179).

[20]Sperry testified the skull possesses 50,000 ohms of resistance (T. 1008). Under ohms law, amperage equals voltage divided by resistance. 2300 volts (the voltage administered very briefly in the Davis execution before it dropped to 1500 volts) encountering 50,000 ohms will allow .046 amps of current to pass. At the 1997 Jones hearing, Dr. Devinsky, a witness for Jones, testified the skull possessed 50,000 ohms of resistance. Respondent called Dr. Morse in those proceedings to testify that, based upon some unpublished work by Dr. Wikswo, Dr. Devinsky was wrong. See Jones, 701 So. 2d at 78 ("He said he had utilized a document prepared by Dr. John Wikswo and carried it forward to conclude that in his opinion somewhere between one-third and two-thirds of the current would flow to the brain during an execution in the electric chair.").

Now in 1999, Respondent did not call Morse and instead

The competent substantial opinions--those of Price and Wikswo--are those based upon a valid scientific foundation.

Respondent argues Wikswo's opinion should be disregarded because he testified the current threshhold causing instantaneous or painless death was "unknown" (AB 68-69).[21] Actually, Wikswo testified that no such threshhold is "known to anyone" (T. 623). This threshhold is also unknown to Respondent's witnesses. Indeed, regarding individuals who have reported retaining consciousness during high voltage accidents, Wilder testified this discussion "is very difficult to pursue because you are talking about massive voltages and currents and you are trying to apply that to a normal physiological situation, and I can't do that" (T. 1173). This admission by Wilder is extremely significant: while opining that electrocution produces instant unconsciousness, Wilder admitted he was unable to assess the impact of high voltage on the human brain. Wilder's testimony is

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presented Sperry who agreed in his testimony with Devinsky's 1997 testimony. Moreover, Petitioners called Dr. Wikswo who also testified that the current penetrating the skull would not result in instantaneous unconsciousness.

[21]Respondent argues Wikswo's opinion that electrocution does not result in painless and instantaneous death is a higher standard than the Constitution requires (AB 68). However, in Jones, this Court upheld the electric chair because such executions "are conducted without any pain whatsoever." Jones, 701 So. 2d at 79. Further, Respondent's position is that electrocution involves instantaneous unconsciousness.

not competent substantial evidence.

Respondent criticizes Wikswo for relying on data regarding breathing motions exhibited by judicially electrocuted persons after the electrocution (AB 69). Respondent misapprehends the significance of this data. Any breathing motion, even one which does not effectively move air and even agonal respiration, requires brain stem activity. Respondent's own experts agreed with this basic scientific fact.[22]

The significance of breathing motions exhibited at the conclusion of an electrocution is that this indicates there is still some activity in the brain stem.[23] Thus the entire brain was not instantly incapacitated. This, therefore, is one piece of data indicating that electrocution does not instantly incapacitate the brain. Respondent's witnesses opined that the

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[22]Sperry testified such motions indicate "at least the brain stem still had some minimal functioning" (T. 999). Wilder agreed that breathing motions at the end of an electrocution "could indicate that in the respiratory center in the brain stem that . . . there was a firing of neurons" (T. 1197), and agreed that an "agonal gasp" indicates brain stem activity (T. 1198).

[23]Here and later in the brief (AB 71), Respondent argues the breathing motions are not important because they do not signify consciousness. That is not the point of this data. Everyone agreed that at the conclusion of the electrocution, the condemned person is unconscious. The question is when does that unconsciousness occur. Breathing motions indicating brain stem activity mean the brain was not instantly incapacitated in the first milliseconds. Instant brain incapacitation is the foundation of Respondent's position that electrocution is painless. If the brain stem retains some (even minimal) function at the end of an electrocution, there is no basis for saying the brain is instantly incapacitated at the beginning.

entire brain, including the brain stem, is instantly incapacitated in an electrocution, but entirely ignored this data in forming their opinions,[24] rendering their opinions incompetent insubstantial evidence.

Respondent argues Price's and Reilly's opinions regarding current pathway are "bizarre" (T. 69-70). To the contrary, these opinions are based upon scientific data, such as animal studies and reports of electrical accidents, and upon scientific principles regarding how electricity works and the resistance of various body tissues. Even Drs. Sperry and Wilder agreed--insomuch as their minimal knowledge allowed--that the current pathway was important to any opinion regarding electrocution and that even in a judicial electrocution current does not travel in a direct line but is diffused according to the resistance of body tissues (IB 58-59 [Sperry]; 61 [Wilder]).[25]

There is no way of knowing what expert testimony the lower

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[24]Sperry had no information about condemned people exhibiting chest movements after the current was turned off and thus could render no opinion about that (T. 998). Wilder had not seen any information about judicial electrocutions in which the current cycle was completed, the person was seen moving, and the current cycle was then repeated (T. 1183). He had not looked into such events (T. 1184). Although Wilder agreed one of the criteria for determining brain death in a clinical setting is turning off a respirator and looking for spontaneous respiratory functions (T. 1156), he believed information about such breathing motions in an electrocution "is not significant" (T. 1199).

[25]Respondent argues the lower court did not abuse its discretion in rejecting Price's and Reilly's testimony about the current pathway (AB 70). This is not the proper standard.

court accepted or rejected. The court's order does not say and simply concludes Davis "suffered instantaneous and painless death once the current was applied" (Order at 31). During the hearing, the court indicated its understanding of "instantaneous" was that unconsciousness or death occurred within the 34 to 38 seconds the electric cycle runs (T. 633, 649).

Respondent spends one paragraph on Respondent's experts' testimony (AB 70-71). Respondent contends "four" experts[26] testified electrocution results in instant brain incapacitation. If Bullard is one of these four, he expressly stated he had no opinion as to what effect electric current would have on the brain (T. 1312). Respondent does not address the enormous lack of knowledge exhibited by Sperry and Wilder and makes no argument that their opinions have any reliable scientific foundation.[27] As explained above and in the initial brief, these experts'

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[26]Respondent does not identify the "four." In the statement of the facts, Respondent referred to Hamilton as a fact witness, abandoning reliance on him as an expert. Respondent relies upon Sperry's testimony that the burns on Davis occurred post-mortem (AB 71), but ignores Hamilton's testimony that he did not know whether the burns were post-mortem (T. 1082).

[27]Respondent argues the cause of death in electrocution is brain heating and asystole or fibrillation (AB 71). The brain heating theory relies on Sperry, who offered no evidence to support it, did not know how fast this heating would occur, agreed heating depended on current density but did not know the current density in the brain. Davis's body was not hot at the end of the execution. As to asystole and fibrillation, Respondent needs to pick one, as these two conditions cannot occur simultaneously. Sperry's testimony was speculation and assumption, not science.

opinions are not competent substantial evidence.

The competent substantial evidence establishes Petitioners' claim that Florida's electric chair inflicts unnecessary and wanton pain. Petitioners' experts and other evidence provided a substantial basis of fact which is more than adequate to a reasonable mind, Duval Utility Co., supra, while Respondent's experts provided unreliable evidence based on suppositions rather than studies and data. Brinkley, supra; Young-Chin, supra.

C. UNCONTESTED FACTS ESTABLISH THAT THE ELECTRICAL APPARATUS WAS NOT IN "EXCELLENT CONDITION" IN 1997

Petitioners' initial brief contends the evidence established the electrical apparatus was not in "excellent condition" in 1997, as this Court was led to believe. Respondent does not contest these facts, agreeing that Whitlock testified that in 1997 the electrical apparatus "had been neglected and was in a state of disrepair" (AB 72). Respondent then argues, "This claim is much ado about nothing" (Id.).[28] However, the condition of the electrical apparatus was one factual predicate underlying Jones, and that factual predicate was false.

D. UNDISPUTED FACTS SHOW THE PROTOCOL HAS NOT BEEN FOLLOWED

[28]Respondent repeats the lower court's statement that Petitioners had not provided that court with the Jones record (AB 72). However, the statement which shows this Court was misled in 1997 appears in the Jones opinion. Jones, 701 So. 2d at 77 ("Florida's electric chair - its apparatus, equipment and electric circuitry - is in excellent condition").

Regarding DOC's compliance with the "Execution Day Protocol," Respondent's position basically is that the protocols do not have to mean what they say (AB 73-79). Thus, Respondent begins by discussing what the protocol was and was not intended to do (AB 74-75). Respondent cites to no testimony or other source for the facts alleged in this discussion, but simply attempts to write into the protocol something that is not there and write out of the protocol what is there. While doing this rewriting, Respondent claims the protocols are "concrete proof" supporting a presumption the execution branch will perform its duties correctly (AB 75). If the protocols are so malleable as to allow Respondent's counsel to revise them with no supporting evidence, they are hardly "concrete proof."

1. Language prescribing voltage and amperage

Respondent does not dispute that the amperage and voltage levels recorded during executions are not the same as those set forth in the protocol (AB 75). Respondent argues, "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" (AB 75 n.6). Respondent provides no citation to testimony to support this assertion, but, again, attempts to rewrite the protocol.

Respondent's position appears to be that there is no violation of the protocol because DOC did not previously disclose

what the protocol meant. According to the private meaning DOC gave the protocol--but did not previously disclose to this Court or Petitioners--there was no violation.

Thus, Respondent's reliance upon the lower court's finding that any variation from the amperage and voltage specified in the protocols did not violate the protocols (AB 76) is misplaced. This "finding" just means DOC does not have to have an accurate protocol, despite this Court's reliance on the protocol, because DOC can impute whatever meaning is convenient into the protocol.

Respondent argues since the electric chair circuitry functions "as it was intended," there was no protocol violation (AB 76-79). This argument boils down to saying as long as the machinery functions as it was intended to function, everything is fine, even though DOC did not disclose how it was intended to function. Respondent relies upon Crosby's testimony that the protocol is "semantics" to argue that DOC should be allowed to follow its own "view" of the protocol (AB 78). According to Respondent's circular reasoning, there was no protocol violation because DOC cannot conform to the protocol.

Respondent also makes an end run around the certification requirement. The Court required DOC to certify "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). Respondent asserts DOC has

complied with this because “all of the test results upon which such certifications have been based reflect that the electric chair and its circuitry was functioning as intended” (AB 79 n.7). Respondent addresses only “test results,” not execution results, simply avoiding the question of whether the certifications were accurate as to the “Execution Day Procedures.”

2. Tightness of straps, placement of head electrode, ignorance of protocol

As to the straps, head electrode and ignorance of the protocol, Respondent characterizes these matters as “involv[ing] nothing of substance” (AB 79). Respondent’s position is the strapping procedure “simply represents a matter within the discretion of the Department of Corrections” (AB 79-80). Regarding placement of the head electrode, Respondent basically argues that too is a matter of discretion, contending the placement will depend on the shape of a person’s head (AB 80). According to Respondent, then, the strapping procedure and placement of the head electrode can be done so as to cause unnecessary and wanton pain, at DOC’s discretion.[29]

Respondent finds it only “unfortunate” that Dotson was

[29]The strapping procedure inflicted unnecessary and wanton pain on Davis and the improper position of the head electrode caused burns on Davis down to just above his eyebrows. Respondent’s reliance upon Hamilton’s testimony that he had seen similar burns before (AB 80) does nothing to help Respondent’s position. This just means other people have been subjected to the same painful execution that Davis was.

ignorant of the protocol because Dotson is not a member of the execution team (AB 80). However much Respondent wants to minimize Dotson's function, his presence is required by the protocol and his duties are described by the protocol. According to Respondent's position, this part of the protocol is not important enough to worry about.

Respondent argues Petitioners "claim no prejudice" resulting from Dotson's ignorance (AB 80). However, the intitial brief did claim prejudice because Dotson did not know his duties under the protocol and therefore did not photograph the leg contact point, although this was required by the protocol (T. 265) (IB 85-86). Respondent does not address this failure by Dotson.

Respondent similarly downplays Crosby's ignorance of the protocol's requirement that dripping saline solution should be mopped up. Numerous witnesses testified that saline solution from the head sponge ran down Davis's front and back but was not mopped up, except from the floor. Respondent says nothing about Crosby's ignorance of this protocol requirement. The evidence showed that the excess saline solution resulted in burns and in current passing outside Davis's body.[30]

E. COURSE OF CONDUCT

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[30]Respondent relies on Sperry's testimony that the burns on Davis were post-mortem, but says nothing about Hamilton's testimony that he did not know whether the burns were post-mortem. As demonstrated above and in the initial brief, Sperry's testimony is not competent substantial evidence.

Respondent does not address anything specific about this argument except to say “the statute of limitations has more than run upon the execution of Jesse Tafero (or of Pedro Medina, for that matter)” (AB 83). It is natural that Respondent would want to ignore the anomolies in those executions, but the entire pattern of anomolies and DOC’s response to them is part of the evidence establishing that Florida judicial electrocutions are not carried out free of unnecessary and wanton pain.

Respondent concludes by arguing that an execution need not be “pleasant” and “certainly the post-execution photographs of Allen Davis bear that out” (AB 82). The Court can examine the photographs and the evidence, apply the law and determine whether Davis’s execution was merely unpleasant or unconstitutional.

F. CONCLUSION

As demonstrated in the initial brief and herein, the lower court’s conclusions regarding this issue are not supported by competent substantial evidence and are contrary to the law. Florida’s electric chair in its present condition constitutes cruel and/or unusual punishment.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished either by United States Mail, first class postage prepaid/ Federal Express/ facsimile transmission/ and/or hand delivery to all counsel of record on August 20, 1999.

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