IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,374

ALLEN LEE DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

APPELLANT'S BRIEF
AND APPLICATION FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

"R." -- record on 3.850 appeal to this Court (Volumes I through VI, 1 - 1014 numbered pages);

"T." -- transcript of the June 21st hearing (Volume VII, numbered pages 1 through 108);

"App." -- appendix to Rule 3.850 motion.

"Att." -- attachment to this brief.

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REQUEST FOR ORAL ARGUMENT

An oral argument has been scheduled for 9:00 a.m. on June 29, 1999.

STATEMENT OF CASE

A. Procedural History

On May 8, 1999, the *Miami Herald* reported that "'Ol Sparky' replaced" (App. A). On May 19, 1999, Mr. Todd Scher with CCRC-South thereupon made a public records demand upon the Department of Corrections (DOC hereinafter) seeking all records regarding "the electric chair that was recently built and placed at Florida State Prison" (App. RR). Mr. Scher was taking the lead for the three CCRC offices in following up on the *Miami Herald* article (T. at 8). In a letter dated June 8, 1999, Susan Schwartz, Assistant General Counsel for DOC, responded to Mr. Scher's request saying it "was not properly made." Nevertheless, in order to "avoid a court hearing, I have enclosed the final structural report conducted by Barkley engineering" (App. SS). Mr. Scher received this letter by mail on June 10, 1999.

In late May of 1999, DOC received a public records request from counsel for Allen Davis (T. 75). On June 9, 1999, the Governor signed a warrant setting Mr. Davis' execution for July 8, 1999. On June 10, 1999, DOC received another public records request from Mr. Davis (App. TT; T. 76.). On June 14, 1999, Assistant General Counsel for DOC responded:

> Dear Mr. Brody:
>
> In response to your request for all records on the electric chair, I have enclosed

a report dated May 18, 1999 from Barkley Engineering analyzing the wooden chair's structure. . . . I have enclosed two preliminary reports from Barkley engineering.

In response to your request for execution protocols, I have enclosed copies of execution day procedures and testing procedures.

* * *

I believe information on the electrical components was provided to your office prior to April, 1998. No changes have been made.[1] There are a series of electrical blueprints and chart recordings at Florida State Prison that are difficult to reproduce. We can make arrangements for you and/or your expert consultant to view the original at Florida State Prison. I have enclosed from my files the following documentation:

November 1, 1995 memorandum from D.R. Lehr on electrical components.[2]

Affidavit dated July 23, 1990 by Michael Morse

Examination of Execution Equipment by Jay Wiechert dated April 8, 1997

Report on Findings by Michael Morse dated April 8, 1997

Memorandum of Testing dated October 6, 1998 [3]

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[1]Subsequent disclosures have revealed that this representation simply was not true. As is explained infra, many changes to the electrical system have been made since April 1, 1998.

[2]This memorandum appears as App. N. It states "In 1993/1994 the entire electrical system was replaced with new electrical breakers and restoring the electrical switch gear to comply with all applicable electrical codes." It was presented to the circuit court in the proceedings in Jones v. State, and thus constituted evidence supporting the circuit court's finding that "Florida's electric chair - its apparatus, equipment, and electric circuitry - is in excellent condition." 701 So. 2d at 77. However, disclosures on June 16th and June 21st establish that this memorandum is false; the breakers were in fact not replaced and have been described as "obsolete." App. M.

[3]This memorandum addressing the October 6, 1998, testing of the electric chair represented that "The test was uneventful and no

(continued...)

> I have asked Florida State Prison top [sic] forward more recent test results to my attention. When I receive these, I will forward them to you. I am also in possession of an electrical engineers memorandum dated October 23, 1998. This memorandum was prepared at my instruction in anticipation of litigation. I am consulting with the Florida Attorney General's Office to determine if it qualifies under the work product exception. I can assure you that it does not include any information of Brady evidence.

(App. J). The letter does not refer to the existence of any other records.

On June 15, 1999, Ms. Schwartz wrote:

> Dear Mr. Brody,
>
> In my correspondence dated June 14, 1999, I indicated that a memo dated October 23, 1998 might be considered attorney work product. After consulting with the Attorney General's office, it was determined that the memo should not qualify as work product since litigation was concluded. I am attaching a copy of the memo in question. Please call me if any other records are in dispute.

(App. K).[4]

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[3](...continued)
discrepancies were noted" (App. Q). However, a disclosure from June 16th indicated that the October testing of the electric chair was not as described. According to Ira Whitlock, the electrical engineer under contract with DOC to maintain the electric chair: "The left cubicle breaker had a alignment problem", "The spare breaker will not trip. This needs to be addressed on a priority basis", "The transformer in the right cubicle feeding the rectifier for the breaker charging motor has experienced some damage in the past," "A relay contactor in the right cubicle needs to be attached to the switchgear. It presently is hanging loose," "The 5KV cable on the right side of the ABS going back to the switchgear needs to be monitored for possible replacement if it continues to deteriorate" (Appendix P).

[4]Contrary to Ms. Schwartz' representation that this memorandum did not contain Brady evidence, it revealed that according to the (continued...)

Meanwhile, this Court had entered its order directing all proceedings in the circuit court in Mr. Davis' case to be completed by June 22, 1999. As of June 15th, Mr. Davis' counsel understood that all DOC records regarding "the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair" (App. TT) had been disclosed by DOC except for those items specifically mentioned by Ms. Schwartz as not disclosed ("blueprints and chart recordings" and "more recent test results").

However, the DOC public records disclosures had identified Barkley Engineering and Consolidated Power Services (Ira Whitlock) as sources for additional records. Accordingly, public records requests were made upon those firms under contract to DOC to provide services. On June 16, 1999, Ira Whitlock on behalf of Consolidated Power Services released approximately one hundred pages of material. Of that material, only the October 23rd memorandum had been disclosed by DOC; however, the documents themselves indicated that DOC would have had a copy in its

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[4](...continued)
electrical engineer under contract to maintain the electric chair, the prescription for amps and volts to be administered in the execution day protocol could not be followed. The reason for this, according to Mr. Whitlock, was the variation in resistance between human bodies. Mr. Whitlock indicated that a human body would have between 200-500 ohms of resistance. This specifically contradicted the experts relied upon by the State in the proceedings in Jones v. State which caused the circuit court there to conclude that "Florida's electric chair, as it is to be employed in future executions pursuant to testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment." 701 So. 2d at 78.

possession. Moreover, the disclosed documents established that the previously disclosed DOC records were factually not true.

At 4:30 pm., Friday, June 18, 1999, Barkley Engineering finally disclosed some records. After previously indicating that there was a box of material that would take time to copy (R. 116), he disclosed seventeen pages of records (R. 118).[5]

On the morning of June 21, 1999, Mr. Davis filed his 3.850 motion, an accompanying appendix and motion to compel. In the motion, Mr. Davis argued that his judgment and sentence which prescribed death by electrocution was unconstitutional in that Florida's electric chair in its present condition constituted cruel or unusual punishment. Mr. Davis based this claim on the disclosures made since May 8, 1999, when the *Miami Herald* first reported the change in the electric chair. Mr. Davis' motion relied upon the substantial changes made in the electric chair since the decision Jones v. State[6] and upon the disclosures that the State had presented false evidence at that hearing[7] and upon the disclosure that the electrical engineer under contract with DOC

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[5]Under this Court's well recognized precedent, allegations in a 3.850 must be taken as true unless refuted by the record. Lightbourne v. Dugger, 549 So. 2d 1314 (Fla. 1989). Therefore, Mr. Davis will cite to the 3.850 for factual allegations contained therein.

[6]The decision in Jones concerned whether Florida's electric chair in its present condition constituted cruel or unusual punishment. Clearly, the condition has been changed.

[7]This Court concluded in Jones that the circuit court's finding that Florida's electric chair in its present condition was not cruel or unusual was supported by substantial evidence. The recent disclosures has now shown the evidence presented by the State to have been false in significant ways.

had made statements demonstrating significant disagreement with the two State experts relied upon in that case.[8]

Counsel had originally been advised that the hearing on the 3.850 and motion to compel would be on Tuesday, June 22, 1999. However, that rescheduled to Monday afternoon, so that the judge could have twenty-four hours after the hearing to prepare his order.

At 1:00 p.m. prior to the hearing, undersigned counsel received a copy of public records disclosures made to Todd Scher regarding the electric chair. Counsel orally advised the circuit court of the new information:

> At this point in time -- well, in addition, with reference to Mr. Scher's representation of Mr. Lopez, there had been a mandamus action filed in Florida Supreme Court. The Florida Supreme Court remanded it in Lopez to the Circuit Court for further proceedings on the 119 questions and on Friday apparently the Department of Corrections filed in Circuit Court -- excuse me for just a moment. Filed in Circuit Court in Dade County in that case some materials that have not been provided to Mr. Brody on behalf of Mr. Davis.
>
> Included in that -- and we just obtained

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[8]To some extent, Jones was a battle of the experts. The State relied upon the testimony of Jay Wiechert and Michael Morse as to the cause of the previous malfunction and the prescription for avoiding the problem in the future. Mr. Wiechert testified that he knew the human body electrically and that it contained two hundred fifty to sixty ohms of resistance (R. 56). Similarly, Dr. Morse drafted the language now contained in the protocol which assumes 240-50 ohms of resistance. Mr. Jones challenged their expertise, their knowledge and their conclusions. Now, it has been revealed that Ira Whitlock, the electrical engineer hired by DOC to maintain the chair also disputes their knowledge of the human body electrically. He indicated in his October 23rd memorandum that there is great variance in the electrical resistance of human bodies. He estimates the resistance varies between 200 and 500 ohms.

these records actually at noon. Somebody from Tallahassee drove these over and handed -- actually, it was 1:00 o'clock, handed them to me.

One of the documents is a May 20th, 1998 memorandum from Carl Hackel, who works at Florida State Prison, to the superintendent, James Crosby, and the subject is the electric chair replacement.

This document, which is not included in the appendix because we didn't have it until an hour ago, indicates that due to the age, and many repairs to the original electric chair at Florida State Prison it was decided to replace the original red oak chair with another chair using the same pattern and materials as the original chair, and this is dated May 20th of 1998.[9]

So that's reflecting when the decision was made. Also indicates the amount of lumber that's necessary and estimates that the total cost will be $400.

THE COURT: I am sorry. What is the date of that memo?

MR. MCCLAIN: May 20th, 1998. And I submit, Your Honor, that's significant because, again, as is clear in the 3.850, one of the big issues in this case is the effect of the decision in Leo Jones, where Judge Soud conducted an evidentiary hearing that spanned eight days over a three month time period and determined that the electric chair and the electric circuitry were in excellent condition.

And that conclusion was reached in July of '97, which is merely ten months before this memorandum indicating that there was concern about the condition of the chair itself.

Also disclosed to Mr. Scher -- it's a notice of filing dated Friday, but I believe he received it this morning in the mail, is a purchase request dated May 7th of 1998. And it

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[9]This is the first time DOC released any information regarding when the decision was made to replace the electric chair and why. It establishes that DOC personnel had noticed the deteriorated condition of the electric chair within seven months of this Court's decision in Jones v. State, finding that Florida's electric chair in its present condition was not cruel or unusual. During Jones, DOC did not advise the parties or this Court of the chair's deteriorated condition.

is, again, for red cypress of various widths and lengths. It is the red cypress that's to be used in constructing the new chair.

And the purchase order has do not delay written on it and underscored, immediate requirement per James Crosby written on it, indicating -- and it's $706 on this purchase request. And so this is obviously the materials that were used to build the new chair, and it's dated May 7th, 1998.[10]

Another document that had not been disclosed to Mr. Brody on behalf of Mr. Davis is, again, just another memo regarding the cost. It's a cover memo and then an attachment that shows the actual purchase order for the $706 to purchase the lumber.

Then attached to that is a document that -- again, that had never been disclosed to Mr. Davis' counsel, which also suggests that maybe that this is something that is kept on a regular basis. It's a printed form that's called Florida State Prison E. C., dash repairs and maintenance purchases, and it has a 10:30 a.m. September 28th, 1998 date on it.

I am assuming that must be when it was printed out from the computer, and it reflects repairs and maintenance purchases in connection with the electric chair from February 11th, 1998 through June 24th of 1998 totaling $43,913. On this it indicates the new sponges were bought February 11th, 1998.

It also shows that Consolidated Power tested and calibrated volt and meter on switch gear on February 24th, 1998. Now that's significant, because according to the records we received from Mr. Whitlock, his contract started June 8th of 1998. So this would indicate that there must -- perhaps there was another contract or there was some arrangement that predates that contract that we have not been provided.

In addition, it indicates March 11th, 1998 testing of high voltage gloves. March 15th, 1998, switch gear repair. March 17th, '98 on site visits. These are all Consolidated Power, so they were apparently -- they had some sort of arrangement with Consolidated

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[10]Thus, prison officials in May of 1998 viewed the need to replace the electric chair as an urgent matter. Yet, the change was not made for over a year.

Power, Ira Whitlock prior to June of 1998.

And then there is also a March 18th Consolidated Power eastern angus pins for recorder and a testing and calibration of the voltage meter.

Then March 25th, 1998 more sponges were purchased, and then April 1st of '98 -- and just for the record, there were four executions in Florida's Electric Chair the end of March of 1998. So on April 1st would be after those four executions.[11]

There was purchased a new amp recorder that was $14,000, and that was apparently purchased through Consolidated Power. On April 2nd of 1998 there was a Florida Electric -- there is an A.L. in front of Florida Electric, I am assuming that's abbreviation, for something, installed the recorder, and that was a $4,883 charge.[12]

Then April 20th is a Consolidated Power -- that's Ira Whitlock consulted with the superintendent and legal and that was $705 and, actually, what it has over -- okay. What I neglected to point out is there is also a remark column, and when the lumber was purchased, which was April 1st, in the remark column it has malfunction or change in technology was the reason that the $14,000 was spent on a new recorder, and- the same thing is said when Florida Electric installed the recorder on April 2nd. The reason given was malfunction or change in technology.[13]

Then there is the consultation with

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[11]This was the first time DOC disclosed that the chart recorders were replaced immediately after the March 31, 1998, execution of Daniel Remeta who had petitioned this Court on March 30th, saying the chart recordings from the Stano and Jones executions showed that the State was not administering the prescribed voltage during an execution. However, it was revealed in records disclosed after the June 21st hearing that DOC had been told in May of 1997 that the chart recorders needed to be replaced. Thus, DOC waited eleven months until after the next four executions to act.

[12]Records disclosed after the June 21st hearing establish that new chart recorder was installed on April 22, 1999.

[13]Again subsequent disclosures show that DOC had been advised that the chart recorders needed to be replaced in a letter from Ira Whitlock dated May 7, 1997.

Superintendent and legal, and it just says variable per each death warrant, then has to the lumber, which is purchased on May 7th, 1998 and which is referred to in the other documents. In the other documents we already discussed what the remarks are, malfunction or change in technology for that purchase as well.

Then there is also May 15th, water proof resin. May 20th, leather straps with buckles. It just says variable per each death warrant on that. Then there is June 10th of 1998, repair of Westinghouse breakers and the vender was Industrial Electric and that was $9,000.[14]

Then on June 15th, Consolidated Power -- and we know Consolidated Power had the contract starting June 8th -- maintenance and service on Westinghouse switch gear, and then there is also a call on June 16th to check repaired breakers. On June 17th, to check trip and closed circuit and on June 24th, checked repaired breakers.

So we have this disclosure, but then that raises more questions about presumably there is going to be a similar forum for other time periods. This only covers purchases between February 11th, 1998 and June 24th, 1998, and it also contains significant information given that Susan Schwartz, in her June 14th letter, had indicated that all information regarding the electric circuitry had been disclosed prior to April of 1998 and so she wasn't going to reproduce it and that there had been no changes made since then.

And this would indicate that in April of 1998 the recorders were changed and that the -- also that the breakers apparently broke and were repaired in June of 1998.

Again, this -- oh, and then there is one

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[14]Records disclosed by DOC after the June 21st hearing show that the prison possessed three Westinghouse breakers. These breakers rotated through the execution chamber as they each in turn continued to break down. After the June 10th work when the breakers were reinstalled, the one first placed in the execution chamber did not work, so the one then designated a spare was placed in the execution chamber. Records show another breakdown in July, problems in October, a breakdown in January, and a recommendation that they all be replaced, which according to the disclosed records has not yet occurred.

> more memorandum that is included in the disclosures from an hour ago. A memorandum from James Crosby to Stan Czerniak, dated February 22nd, 1990. It indicates several months ago, at the instruction of the secretary, we built a new [electric] chair to replace the chair presently being used for executions.
>
> Once the chair was built we instructed to send it to the central office for the museum and not to install it at the institution. The reason was not given, but there was an insinuation that it could have legal ramifications.[15]
>
> The present chair, built 75 years ago, does show stress, and our maintenance superintendent has expressed concern, particularly if we executed someone weighing 300 pounds or more, which is a possibility. If it's not a legal problem, I would recommend exchanging the old chair with a new chair. Your consideration is appreciated and, again, despite requests last week this wasn't disclosed.
>
> These -- these disclosures sort of are troubling, in that it raises the question of what else is out there that hasn't been disclosed.

(T. 14-23).

During the June 21st hearing, the State's representative asked to let Susan Schwartz address the court. Thereupon, the following occurred:

> THE COURT: Mr. McClain, what would your pleasure be in that regard? Would you rather hear from the lady, now?
>
> MR. MCCLAIN: I am not sure I understand. I mean, is the State agreeing an evidentiary hearing is required on Claim 3, as to the

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[15]Again, the prison records reflect that it was believed that building a replacement chair was an urgent matter. The obvious override of that recommendation suggests that the Governor's Office believed that replacing the electric chair would require a new evidentiary hearing to determine whether Florida's electric chair in its present condition is cruel or unusual.

public records?

MR. MARTELL: No. The State's position is Ms. Schwartz has the best knowledge of the public records compliance to date and she simply is here as a service to the Court to relay what has occurred from her office.

MR. MCCLAIN: Under the rule 3.850 the files and records refute our allegations that not everything has been disclosed or they don't. If they are wanting to present Ms. Schwartz to present additional evidence, they are conceding an evidentiary hearing is required. If they want to concede an evidentiary hearing is required, we should have a stay and should conduct the evidentiary hearing in the proper fashion.

THE COURT: All right. I think what we will do at this point is take a five minute recess and then, Mr. McClain, I will allow you to conclude your argument.

[recess taken]

THE COURT: Gentlemen, I have reconsidered, and if Ms. Schwartz wishes, she may make a statement on the record about the compliance, in light of the allegations from the defense side of the table.

(T. 74-75).

Thereupon, Ms. Schwartz addressed the circuit court and provided her version of the sequence of events since late May. She made factual assertions in conflict with allegations in the 3.850 and specifically her letters to Mr. Brody which were included in the appendix to the 3.850. She indicated that on June 16th, she orally advised Mr. Brody "that there were things at Florida State Prison, did he want to go and view them" (T. 78). She also claimed to have advised Mr. Brody in a fax on June 16th, that he was "welcome to review the documents at the prison during normal

business hours upon reasonable notice" (T. 78). She indicated that she went to the prison herself on June 17th and assisted in accumulating some documents; she returned to her office after 5:00 p.m. (T. 78-79). "The next morning I received a fax from Mr. Brody, again, claiming [sic] about public records in our possession. I took from that that he wanted the records and that he was not going to pick them up, so I had them mailed to him" (T. 79). She indicated that the documents Mr. Brody asked for "should have been received today, and I have copies of them with me today" (T. 79).

Ms. Schwartz did not have the documents in her hand when she said this. She made no showing for the record what documents she was talking about. Undersigned counsel had just explained on the record that he had received at approximately 1:00 p.m. documents that Todd Scher had received in the mail that morning, June 21st (T. ___). Undersigned counsel understood that those were the documents that Ms. Schwartz was referring to when she said she had mailed records out on Friday.

At the conclusion of Ms. Schwartz' statement the following occurred:

> THE COURT: Thank you.
>
> MR. MCCLAIN: Just for clarification purposes, I mean, to the extent that there are factual representations being made, if we are going outside the record then we would like the opportunity to be able to call witnesses. We didn't anticipate this would be an evidentiary hearing. Not all the witnesses are here.
>
> THE COURT: I don't really consider this an evidentiary hearing. You have made certain

> allegations in your statement that I think it's only fair to let the person who was in charge of those documents respond to.

(T. 79).

At the conclusion of the hearing on June 21st, the judge indicated he would rule by 5:00 p.m. on June 22nd. After proceedings were recessed and the judge had left the courtroom, Ms. Schwartz approached Mr. McClain at 4:30 p.m. and handed him a box with, as it has turned out, 1200 pages of public records.[16] This would seem to prove that public record compliance had in fact not previously occurred.

On June 22, 1999, Mr. Davis filed a Renewed Motion for Stay based upon DOC's disclosure after the 3.850 had been filed, after a hearing on the 3.850 had been heard, and at the end of the day before this Court had directed the circuit court proceedings to be completed.

Nearly twenty-four hours after the conclusion of the June 21st proceedings, the circuit court issued its order denying the 3.850. In the order, the circuit court announced that the proceeding on June 21st had in fact been an evidentiary hearing. The circuit court found based upon the evidentiary hearing that all public records had been disclosed to Mr. Davis. As to the claim that Mr.

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[16]Undersigned counsel has had insufficient time to review and digest the records while preparing this brief. Nonetheless, counsel has endeavored to discuss some of what was disclosed and to provide the records discussed in the accompanying attachments. However, time constraints have made it impossible to adequately discuss and brief the issues raised. This problem is directly attributable to the actions of DOC in responding to Mr. Davis' public records request.

Davis' sentence by electrocution was cruel or unusual, the circuit court also indicated that the State had submitted the order in Jones at the June 21st evidentiary hearing.

The circuit court also denied the Renewed Motion for Stay. The circuit court indicated that because it had denied the 3.850 there was nothing in the new records that could warrant relief. Further, the circuit court denied the newly discovered evidence claim as procedurally barred.

B. Statement of Facts as to Chair Claim

In 1997, this Court determined that an evidentiary hearing was required to decide if "electrocution in Florida's electric chair in its present condition is cruel or unusual punishment." Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997). An evidentiary hearing was held. The factual findings following that hearing were in part: "Florida's electric chair -- its apparatus, equipment, and electric circuitry -- is in excellent condition." Jones v. State, 701 So.2d 76, 77 (Fla. 1997). "Consistent with the recommendations of experts appointed by the Governor following Medina's execution, the Department of Corrections has now adopted as a matter of policy written 'Testing procedures for Electric Chair' and 'Electrocution Day Procedures.'" Id. The legal conclusion was: "Florida's electric chair, as it is to be employed in future executions pursuant to testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment." Id. at 78.

However, some of the evidence presented in support of the electric chair in Jones was false. Time has shown some of the evidence to have been false or misleading. And some of the expert testimony presented by the State and relied upon by the circuit court has been discarded by the State as invalid.

1.

Firstly, false evidence was contained in a memorandum dated November 1, 1995. This memorandum by D.R. Lehr to Everett Perrin stated: "In 1993/1994 the entire electrical system was replaced with new electrical breakers and restoring the electrical switch gear to comply with all applicable codes" (App. N). The State in proceedings below recognized that the information contained in App. N was presented to Judge Soud in Jones v. State ("Mr. Wiechert, in fact, at the page citation that they refer to in their motion, is reading from the exact same document which they have in their appendix, regarding this change which has allegedly been made" T. 72). The false information was also contained in the French Report which was admitted into evidence before Judge Soud in Jones v. State. The French Report appears as App. O. The French Report at page 8 provides: "It should be noted that Mr. Hopkins was involved in replacing the entire electrical system for the execution chamber approximately seven years ago and is familiar with the equipment."

Disclosed on June 16, 1999, by Ira Whitlock was his February 19, 1999, letter to Superintendent Crosby in which Mr. Whitlock specifically described the breakers as "obsolete" and "in excess of forty years old":

19 February 1999

Mr. James V. Crosby, Jr., Superintendent
Florida State Prison
P.O.Box 747
Starke, Florida 32091

Re: Electrical breakers in the death house

Dear Mr. Crosby:

On 1-14-99 Mr. Jackie McNeill called and stated that the upcoming 5KV breaker at the death house would not operate.[17] I immediately responded and we investigated the cause. It was another failure of the shunt trip coil that created the failure. I replaced the breaker with the one that I had repaired and we ran several tests to assure proper performance. You were in attendance for one of these tests.

While discussing this failure along with some parts missing on other breakers, Mr. Hackle instructed me to research and provide a list of parts necessary to completely rebuild these breakers and to maintain three sets of necessary parts in stock.

My investigation revealed that no spare parts for these Westinghouse DH breakers are available. See attached letter from Mr. Mark Riffle, senior sales engineer for Cutler-Hammer who merged with Westinghouse and maintains spare parts for these breakers.

I have kept in constant contact with Mr. McNeill updating him of the progress (or lack thereof) to assure you that everything is being done to maintain the Electrocution Process in the most reliable condition

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[17]In the circuit court's order denying the 3.850, the judge indicated that Mr. Davis had failed to offer proof that the breakers at issue were anything but "spare breakers." This document appeared as App. M and quite clearly indicates that the "obsolete" breakers are used in the execution chamber. Obviously, the circuit court failed to read this document. Other records disclosed after the June 21st hearing further explain that the breakers in question are the ones used in executions.

> possible so that if needed it will perform as required.
>
> I have written to Mr. McNeill on 2-12-99 that to assure reliability you should purchase at a minimum two replacement breakers style DH-VR manufactured by Cutler-Hammer as a substitute for these obsolete breakers.
>
> I have asked Mr. Jeff Thrift of Smith & Royals to provide you with a quotation directly.
>
> Most importantly if you should need the use of this facility, be assured that it can and will function.
>
> I will continue to monitor this situation for you and keep you apprized through Mr. McNeill unless you instruct my [sic] otherwise.
>
> I further indicated to Mr. McNeill that depending on the cost of these breakers, I could breakdown two of the units for parts to keep the third unit in satisfactory condition for a spare breaker. Bear in mind that your existing breakers are in excess of forty years old.
>
> Attached is some of the correspondence along with catalog date of the replacement breakers.
>
> Thank you for your continued confidence, I remain.

(App. M)(emphasis added). A document disclosed after the June 21st hearing is the invoice from Ira Whitlock for his services on January 14, 1999. It described this services as "01-14-99 Respond to request from Mr. McNeill for bad breaker" (Att. 1).

Also disclosed after the June 21st hearing is the following handwritten faxed note from Ira Whitlock to Jackie McNeill dated 2-12-99: "letter attached from Mr. Mark Riffle stating why I couldn't get parts to rebuild/ stock for your old breakers-I recommend purchasing at least 2 & if price is reasonable a spare. If not I

can take the three old breakers & make one good one with the others used for spare parts" (Att. 2).

One of the documents disclosed after the June 21st hearing was a handwritten note stating:

> On Monday morning Feb 22, 1999 at approximately 8:30 AM Mr. Crosby had a meeting concerning the memo received from Mr. Ira Whitlock at Consolidated Power Services. The different items was [sic] discussed and Mr. Crosby decided to order two replacement breakers [illegible] Cutter hammer 50DH-VCR-250 that were recommended by Consolidated Power Services. [The memo lists those present at the meeting]
>
> On Tuesday Feb 23, 1999 a bill was received from Consolidated Power Service for approx $1600.00 and I was ask to sign off on the invoice. I looked the invoice [sic] and took it to Mr. Arocho and told I [sic] that I think the invoice was right and he ask me to show it to Mr. Crosby. Mr. Crosby was not pleased with invoice and called Consolidated Power and had it changed.
>
> Later that day Cutter-hammer informed purchase that the 50DH-VCR-250 would not interchange with the 50DH75 breakers we are using. I talk with Mr. Crosby about this and he instructed me to find a company that could rebuild the bad breaker. I contacted Mr. Nat Crews field engineer with A.B.B. Services and he sent a break down. [sic] of what services his company performs on rebuilt breakers and a quote stating the price to rebuild our 50DH75 breaker. After discussing these possibilities with Mr. Crosby he instructed Mr. Arocho to seek other prices to complete the breaker project.

(Att. 3).

Another handwritten note disclosed after the hearing on June 21st provides:

> 3-31-99 0850 hr.

> Meet with Nat Crews of ABB eng. Concern updating west house switch gear in excu. Chamber and switchgear room. It is Mr. Crews recommendation that we use the old cabinet and update all controls and breakers. His [sic] to give me a est first week of April. At this time he figures approx 250,000.00 to 300,000.00 to do this project. After part are made it will take approx 30 days to install and certify.

(Att. 4).

Another document provided after the hearing on June 21st provided:

> April 12, 1999
>
> Mr. Jackie McNeill
> Florida State Prison
> P.O. Box 747
> Starke, Fl 32091
>
> REF: ABB NEGOTIATION NO. JAX-Q0446
>
> Dear Mr. McNeill;
>
> Per your request, ABB Services is pleased to submit our proposal to replace existing 5KV switchgear with new ABB vacuum breakers consisting of:
>
> 3-5KV, 1200 amp vacuum breakers.
> 1-Switchboard lineup with reactor, PT's, CT's, metering and voltage switching.
> 1-Installation, testing and startup.
>
> ABB will supply all labor, tools and materials to complete this project.
>
> **PRICING: $265,000.00** (est. pricing only)
>
> The service and prices as stated herein are subject to the terms and conditions of ABB Services, Inc. form B411f, dated 11/1/94 and price list B4253-5, dated 1/1/98.

(Att. 5). There are no documents disclosed to indicate that in fact DOC has gone ahead with the "breaker project." Thus at this

point, the execution chamber is equipped with "obsolete" breakers which the electrical engineer has recommended need to be replaced. These breakers broke down during testing in June, July, October, and January.

The history or the breakers in question can be pieced somewhat together from other documents first turned over after the June 21st hearing. A handwritten, undated note provided:

> Perform Repair, Clean & Test
> Westinghouse 5KV - DH Breaker.
> Certify as to proper operation.
>
> Justification:
>
> Due to the age and avibilate [sic] of part for the breaker that prest [sic] time frame Industrial Electronics Group, Inc. has been selected based upon the recommendation of our consulting engineer. Repair is of the essence since these breakers are required to perform tests & electrocution required by law.

(Att. 6).[18]

Another handwritten note disclosed after the hearing on June 21st, provided:

> 6-16-98 8:30 AM
>
> I.E.G. delivered Westinghouse breakers to F.S.P. and helped unload into the switch gear room.
>
> 9:30 AM
>
> Consolidated Power (Ira Whitlock) arrived at F.S.P. with tec. Mr. McNeill + C.P.S. went to death house wher [sic] Westinghouse breakers

[18]Clearly, this document shows that the breakers at issue are necessary for "electrocution required by law." This document was disclosed after the June 21st hearing and specifically refutes the circuit court's finding that problem breakers were only "spare" breakers.

> were installed in switch gear. One breaker that was repaired by I.E.G. would not work. Installed spare breaker and Mr. Whitlock performed two (2) exc. Test everything work good. [sic]

(Att. 7).

Another handwritten note disclosed after the hearing on June 21st, provided:

> I am concerned about work being done in excu. Chamber to the point I have talk to Mr. Hackel and he told me not to worrie [sic] about it because Mr. Wittlock is a P.E. evertime [sic] work is done something is tore up and it cost extry [sic] money to fix the broken part which is all so [sic] preformed [sic] by Mr. Wittlock. Some of of [sic] the work to be done such as the amp meter the charge $2500.00 for a project just the materials cost would not be over $100.00 but the charge is high because of him being a P.E.

(Att. 8). On this page were other notes with June 1998 dates.

Another handwritten note disclosed after the June 21st hearing provided:

> 7-9-98
>
> Called Neal Carmichael after quarterly test of excu. equiment [sic]. He is on vacation for two weeks. [sic] will call back on 7-20-98 concerning exc [sic] line breaker.
>
> 7-20-98 call I.E.G.I. Neal out on job
>
> 7-23-98
> called Neal at I.E.G.I. and talk with him about problem with excu [sic] line breaker. [sic] denying on the excu. test. He ask if I would test the breaker on 7-24-98 (Friday) and call him back with the results. If the breaker does not work right we will then set up a date and time for him to come to F.S.P.

(Att. 9).

Yet another undated typewritten document that was disclosed

after the June 21st hearing discusses the Westinghouse switch gear and breakers. The document makes reference to a purchase request turned in on May 1, 1998, thereby giving a time frame:

> After researching the Westinghouse switch gear file, the following Maintenance items were noted:
>
> 1. Westinghouse blueprints and manuals were sent to the Legal Department in the Central Office in or about April, 1997, and have not been returned. This information was received from Ms. R. Horler.
>
> 2. Westinghouse switch gear, breakers and the relays were serviced, tested and cleaned on May 1, 1990 by General Electric Apparatus Division.
>
> 3. Westinghouse breakers and relays were tested by P.D.S. testing contracting firm during the high voltage renovation. The breakers were serviced in 1993 and the relays were serviced in 1994.
>
> 4. One blueprint of Westinghouse switch gear modification, to accept the recording system, was supplied by Wilson & Associates Engineering Firm during the high voltage renovation in 1994.
>
> 5. One line blueprint on the Westinghouse switch gear, furnished by Wilson & Associates Engineering Firm, can be utilized for a preventive maintenance program.
>
> 6. The Department of Management Services suggests cleaning and servicing medium and high voltage switch gear every three years.
>
> 7. Westinghouse recommends cleaning and servicing switch gear and related equipment each year.
>
> 8. General Electric recommends the switch gear and related relays and reactors be cleaned and serviced at least once every twelve months
>
> 9. Fred Wilson & Associates Engineering Firm recommended that all contractors perform

> servicing and cleaning according to the Institute of Electric and Electronic guidelines. IEEE C37.09 power circuit breakers, IEEE C37.90 relays.
>
> 10. Fred Wilson & Associates Engineering Firm recommended verbally that the Westinghouse switch gear and related systems be exercised monthly.
>
> 11. A purchase request was turned in on May 1, 1998 for cleaning, testing and servicing the Westinghouse switch gear. Prices are to be received from Miller Electric; however, Cogburn Brothers Electric, Inc., will be unable to submit one at this time because of workload.

(Att. 10).

2.

Secondly, in Jones, the State adopted written protocols for testing and execution day procedures. The State's experts suggested that this was a way to avoid a future malfunction. The protocols were in conformity with Dr. Morse and Mr. Wiechert's recommendations. And they both testified to the soundness of the protocols that were actually adopted. However, in the four executions in March of 1998, the prescribed amps and volts were not administered. Following Mr. Remeta's petition complaining about the prison's failure to follow the protocol in the Stano, Jones and Buenoano executions, this Court ordered DOC to follow the protocol in Mr. Remeta's execution (App. G). However as was alleged in the 3.850, the protocol was not followed in the Remeta execution (R. 91).

New documents have been disclosed since the June 21st hearing which demonstrate that the failure to follow the protocol was not

lost on DOC. One handwritten note indicates that the Stano execution had in fact deviated even further from the protocol than had been alleged. The note indicated that in cycle 1 the volts at their highest were 1550 and the amps 9; in cycle 2 the volts at their highest were 600 and the amps 3; and cycle 3 the volts at their highest were 1500 and the amps were 9 (Att. 11).

Prior to these four executions in May of 1997, Ira Whitlock had advised Mr. McNeill that the chart recorders needed to be replaced:

> Dear Mr. McNeill:
>
> We have researched the use and application of your recording meters that are presently used to record the voltage and amperage during the electricution [sic] process. Your present equipment is the Esterline-Angus recorders model A601C. We repaired these meters in April of this year. Based upon our observations during repair, it is our opinion that the reliability of the meters cannot be assured. The availability of parts for this particular style of mete is a long lead item and the cost to supply backup units is extremely high ($28,054.00 plus freight). Attached is a copy of the quotation for backup metering identical to the existing equipment from Van & Smith company showing our cost as indicated.

(Att. 12). This letter dated May 6, 1997, existed at the time of the Jones hearing, but was not disclosed. Moreover, the records disclosed by DOC after the June 21st hearing establish that despite the stated need to replace the chart recorders it was not until April 1, 1998, that action was taken. This was the day after Mr. Remeta's execution, and two days after he raised a claim that the chart recordings from the Stano and Jones executions demonstrated

something was awry. It was disclosed in the documents received by Mr. Scher on the morning of June 21st, which he provided to undersigned counsel one hour before the June 21st hearing, that the new recorder was purchased on April 1, 1998 (T. 20). This occurred after the four executions even though new documentation shows a purchase request form dated March 5, 1998 (Att. 13). So DOC was advised in May 1997 that the recorders needed to be replaced. A purchase request was dated three weeks before the next scheduled execution, but the recorder was in fact not purchased until after the executions despite the fact that the chart recordings from the executions were made an issue.

According to a document released after the June 21st hearing, the new recording device was installed on April 29, 1998:

> On Wednesday, April 29, 1998, while witnessing the installation of a new recording device for the execution reactor in the death house, it was obvious to all present that something was burning in or around the recorder. I feel that this needs to be checked before the final installation of the recorded is complete.
>
> My concern is that All-Florida Electric, the installers are not sure where the burning smell was coming from. I think we should be provided with detailed information about this problem.

(Att. 14).

However, newly released documents indicate that even after the replacement of the chart recorders, DOC still agonized over the problem of its failure to follow its established protocol. A newly released confidential memorandum from Superintendent McAndrew to Secretary Singletary dated April 14, 1997, explains very succinctly

where the protocol came from:

> To conform with 100% of both Dr. Michael Morse's and Mr. Jay Wiechert's recommendations to the Governor, we are submitting three draft documents and a list of actions already taken. Herewith are:
>
> 1. Draft- Execution Day Procedures
> 2. Draft- Test Procedures
> 3. Draft- Required Equipment Use
>
> Actions taken include:
>
> 1. Leg electrode has been repaired, lead removed and replaced with brass.
> 2. The chart recorder has been repaired and fully calibrated in inches per second by registered professional engineers on chart paper.
> 3. The voltmeter and ammeter have been fully calibrated by registered professional engineers.
> 4. We are fabricating a repeatable resistive load bank for testing head and leg pieces for stable measured voltage and current.
> 5. The electrical schematic of equipment is permanently placed in the execution equipment case and will be in-hand during executions/tests. This case is assigned to the electrician.
> 6. Extra cables, leather straps, salt, leg piece and leather head piece will be purchased as spare parts. We are also attempting to purchase a new, more modern, digital chart recorder to upgrade this technology.
> 7. We are in the solicitation process to hire a professional electrical engineer to service and calibrate the chart recorder (on-site) prior to each execution.

(Att. 15).

A newly released confidential memorandum from Superintendent Crosby to Secretary Singletary dated September 1, 1998, proposed changes to the execution day procedure:

> **Present Language**
> 7:00 AM 1. The automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for

8 seconds: 1,000 volts, 4 amps for 22 seconds, and 2,300 volts, 9,5 amps for 8 seconds. When the cycle is complete, the equipment is manually disconnected by the Electrician. The safety switch is then opened by the Assistant Superintendent for Operations.

Proposed Language

7:00 AM 1. The automatic cycle begins with the programmed 2,300 volts for 8 seconds; 1,000 volts for 22 seconds; and 2,300 volts for 8 seconds. When the cycle is complete, the equipment is manually disconnected by the Electrician. The safety switch is then opened by the Assistant Superintendent for Operations.

Rationale for Change

The "amps" should not be referred to because they are not "programmed," but are variable since the body acts as a resistor. Different bodies will cause different readings, since each creates a different resistance.[19]

The proposed language has been discussed with Mr. Ira Whitlock, Electrical Engineer with Consolidated Power, Jacksonville, who agrees with this recommendation.

(Att. 16). There is no indication that the proposal was adopted. In fact, the October 23rd Whitlock memorandum to Susan Schwartz seems to have been the final word:

Date: 23 October 1998

To: Ms. Susan Schwartz, Florida Department of Corrections

From: Mr. Ira E. Whitlock, P.E.

---

[19]There is no indication that DOC ever adopted these proposed changes and perhaps the best explanation of why is that the chart recordings and the newly disclosed memo regarding the voltage administered to Stano show that the problem is that the voltage level is not reaching or maintaining the appropriate levels. Thus, deleting reference to the amps does not cure the problem. DOC can not figure out how to administer the prescribed voltage.

Re: Variations in recorded data during the electrocution process

This memo is sent to you to address the language contained in paragraph I of the "Electrocution day Procedures" effective for executions after 16 April, 1997.

Present language is as follows:

7:00 A.M. I. the automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds ..... This language was adopted verbatim from the language developed in the April 16, 1997 testing procedures for the chair, specifically paragraph "C".

Although this language is technically correct (and is correct in terms of voltage and current during testing with a fixed resistance load bank) it may tend to confuse someone who expects these same results during the electrocution process.

It is absolutely true that the same preprogrammed conditions that are used in the test are indeed used in the electrocution process. However the recorded results during the electrocution will be different because of the different characteristics of the inmates; i.e. weight, muscle tone, fat content, skeletal configuration, size, body build etc. These characteristics combine to determine the body resistance of the inmate, which will be different for each individual.

The most fundamental equation in electricity is Ohms law, which was based upon experiments conducted by George Simon Ohm in 1826 which showed for a constant voltage when resistance increased current decreased and when resistance decreased, current increased. This is reflected in his equation $E=(I)(R)$ where E = voltage, I = current and R = resistance. Rewritten it becomes $I = E/R$ which means current is the voltage in the circuit divided by the resistance.

During cycle 1 in the test procedure we connect a 260 ohm load bank into the 2,300

volt supply. By ohms law this gives u 8.85 amperes in the circuit. During the execution process the current by ohms law will depend upon the inmate body resistance which normally will vary between 200 - 500 ohms. With this variation you could expert to see currents from 4.6 to 11.5 amperes reflected on the chart recorder. Cycle 3 will be the same as just described for cycle 1.

During testing in cycle 2 a 400 ohm reactor is inserted in series with the 260 ohm load bank. By ohms law the current in the circuit now becomes 2,300 volts / (400 + 260 ohms) or 3.49 amperes.[20] The recorder during this cycle only measures the voltage drop across the load bank, or in the case of the execution process, across the inmate.

During cycle 2 in the electrocution process you can expect relative figures of 2.5 to 3.9 amperes (using the 200 - 500 ohms as the projected standard deviation of the human body resistance)[21] Again using ohms law the voltage indicated on the chart recording and the actual voltage differential across the inmate will vary from approximately 750 volts to 1250 volts.[22]

These figures and normal and constant with the physical properties of basic electricity and by no means what-so-ever indicate a

---

[20]The testing described by Mr. Whitlock is not in conformity with the testing protocol adopted by DOC. This memo thus reflects that the proper testing procedure is not being followed.

[21]This representation of the variance between human bodies in the amount of resistance is at odds with the testimony of Mr. Wiechert and the prescribed protocol written by Dr. Morse. Mr. Wiechert said he knew the human body electrically and its resistance was between 250 and 260 ohms. Dr. Morse's work assumed between 240 and 250 ohms.

[22]According to DOC's recently disclosed calculations, Stano in cycle received 600 volts. This is below the normal range set out by Whitlock. The chart recordings for Jones shows the voltage was in 550 range for cycle 2.

malfunction of the electrocution process.[23]

I might also add it is understood in Electrical Generation line to line voltages are nominal figures and can vary. Industry norm can be up to 10 percent of the indicated 2,300 volts.

(App. F).

Another DOC document disclosed after the June 21st hearing provides:

ELECTRIC CHAIR/ EXECUTION ISSUES

A. The Chair
  1. Build/Buy a new chair
    a. Check Georgia and/or other state designs
    b. How will it set up, etc., with lethal injection table

B. Lethal Injection
  1. Develop plans/design room, etc.
    a. Trip to Texas?

C. Electrocution Day Protocol
  1. Rewrite voltage/amperage
  2. Do we want it backed up by science or not?[24]

D. Consultant Service Contract

E. Develop equipment "upkeep" procedures (Mr. Whitlock can develop plan)
  1. Clean switch equipment in chamber
    a. Old boxes
  2. Generator Maintenance/Relays
    a. Breakers check by certified outside company
    b. Calibrating relays

---

[23]The circuit court took this sentence out of context and implied that it was referencing the actual chart recordings from the four executions in March of 1998. When this sentence is compared to the chart recordings it is clear that the voltage administered was not in the expected range; the voltage administered was too low.

[24]Of course this statement is troubling to say the least.

c. Check switch wiring, etc.

F. Witness Room
1. Reduce number of people allowed in on executions

(Att. 17). There is no date on this document, but it reflects consideration of changing the protocol as to the amperage/voltage.

3.

Thirdly, DOC has substantially altered the condition of the electric chair since October of 1997 due to undisclosed defects in its condition then. The Barkley report disclosed on June 8th, provided:

STRUCTURAL EVALUATION

OF

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
WOOD CHAIR
(NEW AND EXISTING)

Introduction

Barkley Consulting Engineers was required to perform a structural analysis of the new 1996 chair and the 1923 chair. This analysis consists of complete field measurements of the chairs, entering these measurements into Auto Cad format, Non Destructive Testing (NDT) and engineering calculations.

No analysis of any part of the chair's electric system was conducted.

This report presents the findings on both chairs.

Analysis - New chair

The new chair was constructed by F.D.O.C. employees in 1996. It's design was based on the existing chair, with some improvements. The chair is constructed using red oak, as was the original chair.

The engineering calculations are based on the measurements taken during an on site

inspection. These analyses are based upon a 750 pound point load and a 600 pound uniform load being applied to all portions and structural members of the chair. The rationale for the loading assumptions is that a 300 pound person will apply a dynamic loading condition, which will apply twice the weight as a force on the structural members. We have then applied a 25% increase safety factor on top of the 600 pound force, resulting in a 750 pound total load. The main structural members (the four legs) were analyzed as being braced by the seat. The four floor bolts were analyzed using a 3000 psi concrete floor strength. This concrete strength is a conservative assumption.

The new chair has been bolted to the foundation with four (4) half inch anchor bolts which secures a stainless steel angle bracket, which is lag bolted with two (2) screws to each leg.

Conclusions - New Chair

The new chair is structurally adequate for a 350 pound person under a dynamic load. To reiterate, the chair is structurally sound for its intended use.

Analysis - 1923 Chair

The existing electric chair (Old Sparky) was constructed by inmate labor in 1923. It consists of red oak wood members screwed together and bolted to the concrete slab with brass angles. The chair has been used intermittently since that time.

The 1923 chair differs from the 1996 chair in the following manner. The seat is not as thick as the 1996 chair and therefore does not offer as much structural diaphram support. The rear legs do not angle to the rear to the same degree as the 1996 chair. The chest straps are connected to the legs, not an additional cross brace as in the 1996 chair.

The following deficiencies were found in the chair during an on site inspection. The seat is cracked and separated in two locations. This limits the structural capacity of the seat to provide diaphram action and bracing of the main structural supports (legs). The left rear leg (facing

chair) is cracked at the bottom to a length of 4 inches. This limits the capacity of the leg, especially in a rear thrusting type movement. The left arm support is weak and very loose. There is only one screw connecting the arm to the seat, where there are two screws on the right arm. The right arm Is loose, but does not have nearly the freedom of movement that the left arm does.

Repairs - Existing Chair

These deficiencies are consistent with a sudden, forceful rear thrusting movement. Potential repairs would include removing the seat and replacing it with a thicker, single member seat similar to the new chair. It would be difficult to modify the leg and arm structures for a thicker seat member. These members would have to be cut to allow the seat to properly fit. The arms would need to be rescrewed with a minimum of four screws to adequately secure them to the main body. The left rear leg would need to be repaired with wood glue and screws.

Conclusions

The existing chair is showing many signs of age, wear and tear. Any wood structure over 70 years old would be subject to needed repairs. The left arm and/or left rear leg will be broken or further damaged in the future. There is no conclusive way to predict with total precision when the chair will suffer a structural failure during use. But we can conclude that it will fail in the near future. The left arm will continue to move and work its way free until it suffers a complete failure and snaps off. The left rear leg will eventually break at the crack point, but not before the left arm breaks off. The seat may eventually fail but more importantly structurally is that it will not provide the required diaphram action that is needed to distribute the high stresses to all the main structural members.

We recommend that the existing chair be repaired or replaced with the new chair. This will insure no chance of structural failure or problems in the future. To reiterate, the existing chair should be repaired or replaced.

(App. B).

A DOC document disclosed after the June 21st hearing provides:

> TO: Central Office
> FR: FSP Outside Maintenance Tool Room
> RE: Electric Chair
>
> This certifies that the undersigned accepts full responsibility for the newly built electric chair that is being received from Outside Maintenance Tool Room on June 25, 1998.
>
> This document relinquishes Florida State Prison from all responsibilities of the above mentioned electric chair.

(Att. 18). Thus, Florida State Prison personnel specifically referred to the new chair as "the newly built electric chair." This specifically refutes the State's contention below that the "electric chair" has not been replaced, just the wooden chair used in electrocutions. The State has engaged in semantics in trying to dodge public record requests and in failing to acknowledge that Florida's electric chair is now in different condition than in October of 1997 when this Court last addressed it.

Similarly, A document disclosed by DOC after the June 21st hearing reveals other changes:

> MEMO TO: James V. Crosby, Jr., Superintendendent
> FROM: Carl Hackle
> DATE: July 23, 1998
> SUBJECT: Redesign of Leg Piece
>
> Due to excessive salt concentration to the metal eyelets while preparing the leg piece for testing and executions, the eyelets are rusting and corroding. Due to the possibility of a failure with the eyelets on the leg piece during an execution, I have attached a drawing for the design of a new leg piece using a strap and stainless steel buckle to replace

> the existing eyelets being used for the attaching of the leg piece. The leg piece physical size will remain the same.

(Att. 19).

Another DOC handwritten document disclosed after the June 21st hearing indicates that a recommendation had been made by Mr. Wiechert to obtain new head and leg electrodes:

> Ken Nunley
> Mary Ellen McDonald 5-5-98
> S.C. 278-2326
>
> Mr. McDonald instructed me contact Jay Wiechert and discuss items needed for death house. 5-4-98, 11:50 AM.
>
> Call Mr. Wiechert 1:35 AM 5-4-98
>
> Mr. Wiechert return my call 3:50 P.M. 5-4-98 and discussed what was needed by him to build the item that we wanted
>
> (1) photo and mes. of leg peice [sic]
> (2) photo and mes. of head peice [sic]
> (3) if it would be possible he would like for us to send a old head & leg peace [sic] so he could use them as a patern [sic] and then return them.
> (4) Jay is concern about the area of conduct in head peace [sic] and expressed the need for enlargement.
> (5) discussed the leg peace [sic] being inlarged [sic]. Stated that we needed to be careful and not to make it to [sic] big.
> (7) we need to make sure the sponge would cover the electrod [sic] when increasing size of conductor
> (8) discussed make 1 each of leg peace [sic] 1-lace up 1-buckel [sic] + strap
> (9) discused [sic] using velcro strap on leg peace [sic]. I told Jay that personaly [sic] I liked strap & buckel [sic] better because under a strain I felt that might come loose.

(Att. 20).

Documents disclosed after the June 21st hearing show that Jay

Wiechert offered to build the new electrodes (two head pieces and two leg pieces) for $3,800.00. He explained in his June 16, 1998, proposal that: "Head electrode will be rectangular with approximately twice the area of present circular screen. This will reduce the current density and therefore tissue damage" (Att. 21). A purchase request was made on June 18, 1998, to have approval for Mr. Wiechert's proposal (Att. 22). However, the documents do not show that approval was received, so that by July the proposal was down to simply replacing the eyelets in the leg piece.

4.

DOC also has disclosed documents suggesting that death in the electric chair is not instantaneous. A January 28, 1977 memorandum provides:

> On the morning of January 28, 1977, Westinghouse was contacted regarding two issues which were posed on January 24, 1977. I was referred to an unidentified Westinghouse Consultant who indicated he was present at the last execution (May, 1964) and was familiar with our equipment. [The unidentified consultant then recommended execution cycles] The Consultant indicated that the M.D. wait one to two minutes before checking vital signs to allow for involuntary heart spasms to conclude. It was also pointed out by the Consultant that the above recommendations were his feelings based on his personal experiences with executions and his recommendations should not be construed as the official Westinghouse advice. [The memo indicated that the unidentified consultant's suggestions would be followed].

(Att. 23). DOC has disclosed a document which appears to be an excerpt from the Virginia execution procedures. It indicates that "Five minutes after completion of second cycle, a physician will

determine if the prisoner is dead" (Att. 24). This suggest that death is not instantaneous.

5.

Newly disclosed DOC records also disclose that there was a previously undisclosed problem with a 1992 execution. A memo dated September 14, 1992, indicated: "It was noted that during the last execution that sparks were coming from the right front leg of the electric chair" (Att. 25). Additionally, information is not available and there is insufficient time to try to get follow up public records, particularly since the circuit court ruled there was full compliance even before the last 1200 pages of records were disclosed.

ARGUMENT I

A. DUE PROCESS APPLIES IN CAPITAL POST-CONVICTION.

Postconviction proceedings in Florida are governed by the principles of due process no less than trial or sentencing proceedings. This court has long recognized that a 3.850 petitioner is entitled to due process. State v. Reynolds, 238 So. 2d 598, 600 (Fla. 1970)("due process requires that [pro se] petitioner be produced so that he may confront all of the witnesses, interrogate his own witnesses and cross-examine those of the State")(emphasis added). Eby v. State, 306 So. 2d 602, 603 (Fla. 1975)("the presence of the petitioner is not always required, nevertheless it is a matter within the discretion of the trial court which must be exercised in the light of other applicable principles of law including the requirements of due

process")(emphasis added); Clark v. State, 491 So. 2d 545, 546 (Fla. 1986)(in a capital case arising from a pro se 3.850 this Court noted there must be "a judicious regard for the constitutional rights of criminal defendants" when dealing with pro se motions because prisoners in 3.850 proceedings were entitled to due process)(emphasis added); Rose v. State, 601 So. 2d 1181, 1182 (Fla. 1992)(order denying 3.850 vacated on petitioner's claim "he was denied due process of law because the trial court without a hearing and as a result of ex parte communication adopted the State's proposed order denying relief")(emphasis added); Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)("we agree with Huff that his due process rights were violated")(emphasis added); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996)("While it is within the trial court's discretion to determine whether or not a prisoner should be present at a postconviction relief hearing, this discretion must be exercised with regard to the prisoner's right to due process")(emphasis added); Smith v. State, 708 So. 2d 253, 255 (Fla. 1998)("We reject the State's argument that Smith's due process rights were not violated by the ex parte communications because he had ample opportunity to object to the substance of the proposed order.")(emphasis added).

In Johnson v. Singletary, 647 So. 2d 106, 111 n. 3 (Fla. 1994), the defendant appealed the denial of his motion to vacate his conviction, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had

confessed to the crime for which Mr. Johnson was convicted and sentenced to death. This Court remanded for an evidentiary hearing because the circuit court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the circuit court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights.[25] This Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n. 3.

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

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[25]These are the identical circumstances presented here. Mr. Davis sought to present evidence but was advised that by the judge "I don't really consider this an evidentiary hearing." Transcript of June 21st hearing at 79.

in rebuttal." Id. at 112. See also Jones v. Butterworth, 695 So. 2d 679, 681 (Fla. 1997)(ordering the circuit court to reopen the evidentiary hearing after denying the petitioner the opportunity to present his expert witnesses); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995)(reversing conviction because defendant's due process rights were violated when he was deprived opportunity to rebut State's scientific evidence).

In Skull v. State, 569 So. 2d 1251 (Fla. 1990), this Court recognized the particular importance of affording due process in a death case:

> The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. Tibbetts v. Olson, 91 Fla. 824, 108 So. 679 (1926). Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. State ex rel. Munch v. Davis, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Id. at 1252.

Certainly, the most basic principles of due process are notice and opportunity to be heard. "Procedural due process, therefore, requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.' Boddie v. Connecticut, 401 U.S. 371, 378 (1971)." Jones v. State, ___ So. 2d ___, Slip Op. at 6 (Fla. June 17, 1999).

B. THE PROCEEDINGS BELOW VIOLATED DUE PROCESS.

Mr. Davis was advised that the proceeding on June 21, 1999, was not an evidentiary hearing when he specifically asked for the opportunity to present witnesses:

> THE COURT: I don't really consider this an evidentiary hearing. You have made certain allegations in your statement that I think it's only fair to let the person who is in charge of those documents respond to. And I will certainly be glad to hear your response to what Ms. Schwartz just had to say.

(T. at 79-80).

Under well established law, allegations even in a successor Rule 3.850 motion are taken as true unless refuted by the record. Lightbourne v. Dugger, 549 So. 2d 1314 (Fla. 1989). "[T]he state's admitted inability to refute the facially sufficient allegations [] without recourse to matters outside the record" establishes that the files do not conclusively refute the allegations and evidentiary hearing is warranted. McClain v. State, 629 So. 2d 320, 321 (1st DCA 1993).

Here, undersigned counsel specifically asked if the State was seeking to concede an evidentiary hearing by attempting to present matters outside the record (T. 74, 79, 103-04). The State asserted that it was not conceding an evidentiary hearing was warranted (T. 74). Counsel was advised by the court that the proceeding was not an evidentiary hearing (T. 79). Having been specifically told that the proceeding was not an evidentiary hearing, counsel relied upon that representation. However, when the circuit court issued its order it stated: "At the evidentiary hearing, this Court determined that most, if not all, of the documents that the defendant

complains about have been provided to him." Order at 2. As to the defendant's claims regarding mutilation of the body, the State tendered to this Court at the evidentiary hearing the trial court's order in Jones v. State." Order at 2. Surely, due process envisions notice that the proceeding at hand is an evidentiary hearing if it is to be considered one by the presiding judge. This is all the more so where the defendant specifically asks if the proceeding is an evidentiary hearing because he has witnesses he would like to call.

Certainly, this Court's decision in Johnson v. Singletary controls. Mr. Davis was not given adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Jones v. State, Slip Op. at 6. The proceeding below should not be considered an evidentiary hearing; the circuit court's order should not be found to contain findings made after a full and fair hearing.

C. CHAPTER 119 AS CONSTRUED BY DOC VIOLATES DUE PROCESS.

On June 24, 1999, the State filed in Lopez v. Bush, Dade County Case No. 83-11553, a Motion to Dismiss Petition for Writ of Mandamus (Att. 26). In that motion, the State alleges:

> While the basis for the Petition is 'Chapter 119' public records requests, that statute specifically prohibits the instant requests. See Fla. Stat. 119.19(8)(e)(1998)("If, on the date that this statute becomes effective, the defendant has had a Rule 3.850 motion denied and no Rule 3.850 motion is pending, no additional [public records] requests shall be made by the capital collateral regional counsel or contracted private counsel until a death warrant is signed by the Governor and an execution is scheduled."); see also Fla. Stat.

> 27.708(3)(1998)("Except as provided in s. 119.19, the capital collateral regional counsel or contracted private counsel shall not make any public records request on behalf of his or her client.")[emphasis in Motion].

(Att. 26 at 3).

As to Mr. Davis in circuit court, the State argued:

> So the question is: Where has Mr. Davis been since then and why hasn't he made any public records demands, which he now contends are so critical to his claim? Because from the listening to him it seemed as if a lot of the material which he is getting are dated 1998, which certainly could have been secured at least one year in advance of this proceeding.

(T. 56).[26] So in Lopez, the State's position is collateral counsel for a death sentenced client who has lost one 3.850 motion cannot make public records requests on behalf of his client until a death warrant is signed. Yet in Mr. Davis' case, the State has argued that Mr. Davis is procedurally barred because he did not make public records requests sometime in the year before his warrant was signed.

Ms. Schwartz' position below was that after receiving a public records request on behalf of Mr. Davis in late May before the warrant was signed "I was a little bit confused because the request came in under a 119 Request and since the new enactment of rule 3.852 and changes to Chapter 27, C.C.R. is not supposed to ask for records under Chapter 119. Nonetheless I proceeded to honor the

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[26]The State's position is that it is under no obligation to reveal the existence of records that may establish that the electrical chair in its present condition is cruel or unusual. See App. L ("Additionally, although your letter makes reference to Brady v. Maryland, I can see no application of such precedent to this situation.").

request" (T. 76). Yet in Lopez, Ms. Schwartz signed the Motion to Dismiss saying Mr. Lopez was not entitled to public records. Thus according to DOC: a request made before the warrant is signed may or may not be honored; and whatever is provided is all that can be obtained because DOC will oppose any court proceeding to enforce a right, because there is no right. Collateral counsel are thus left with no guidance and a big Catch-22: You can make the request and break the law, be subject to sanctions, but you might get some records. If you do not make the request, you will (according to Mr. Martell's argument) be procedurally barred from presenting what you get once a warrant is signed because you did not try to prevail upon Ms. Schwartz' good graces.

Surely, this violates due process. There is no reason to preclude a public records request before the signing of warrant and then allow it after a warrant, except to inhibit counsel's ability to provide effective representation. The result is to deprive Mr. Davis notice of what he is supposed to do. Will the State turn over evidence which either establishes that the electric chair in its present condition is cruel or unusual or which impeaches the State evidence that the chair is fine? We do not know. How can Mr. Davis obtain access to those records which the State may possess but believe it is not obligated to turn over? We do not know.[27] According to the State in Lopez, he does not have an

[27]A similar problem arises as to evidence of a defendant's incompetence to be executed. Public records may exist which collateral counsel (according to Ms. Schwartz) has no entitlement to obtain.

enforceable right like every other citizen of this State. According to the State in Mr. Davis' case, the failure to previously make a public records request erects a procedural bar once the warrant is signed as to any evidence that is discovered. Of course, there is an argument to be made against each of the State's assertions,[28] but until a case reaches this Court which causes this Court to address this collateral counsel are in the dark as to how to proceed and protect the client's rights. This means that right now there is no adequate notice of what counsel can and cannot do and what the risks are for the client. The bottom line is simply that Chapter 119.19 is chilling collateral representation (as it was meant to). Without adequate notice in these circumstances, there can be no due process.

ARGUMENT II

THE STATE'S OBLIGATION TO DISCLOSE EVIDENCE WHICH ADVANCES A CONSTITUTIONAL CHALLENGE TO A SENTENCE OF DEATH BY ELECTROCUTION CONTINUES THROUGHOUT THE POST-CONVICTION PROCESS.

Because Mr. Davis was one of the many condemned inmates who sought to intervene in the Jones case, see Motion to Intervene,

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[28]For example, the right to seek public records is a substantive right. It attaches to every citizen of this State. There is no valid reason for singling out death sentenced individuals after their initial 3.850 is denied who are to poor to hire an attorney for extinguishment of the right. Secondly, the right was extended to every individual sentenced to death before 1998 and cannot be taken away in an ex post facto manner. Thirdly, equal protection precludes distinctions made on ability to pay to obtain the access to the information which will be used to gain access to the courts. Fourth, the purpose behind the rule is to render collateral counsel ineffective by denying him the ability to conduct investigation and preparation before a warrant is signed. Fifth, it is a way of attempting to deny a successor capital defendant access to the courts.

Jones v. Butterworth, Case No. 90,231, filed June 17, 1997, and despite the denial of that motion, the State was on notice that Mr. Davis wished to challenge the constitutionality of Florida's electric chair. Accordingly, evidence that supports his challenge or impeaches the State's case in favor of the chair is exculpatory evidence as to Mr. Davis.[29] "[T]he State is under a continuing obligation to disclose any exculpatory evidence," even in post-conviction proceedings. Johnson v. Butterworth, 713 So. 2d 985, 987 (Fla. 1998). Here, the State has either not understood its obligation to disclose or has chosen to ignore that obligation.[30]

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[29]Further, Mr. Davis was specifically sentenced to death by electrocution (R. 1875-76).

[30]DOC, through Ms. Schwartz, did not disclose the February 19, 1999, letter to James Crosby from Mr. Whitlock discussed infra. The letter also contains evidence impeaching the State's case at the 1997 Jones hearings and other previously disclosed information regarding the maintenance and testing of the electric chair. Similarly, Ms. Schwartz did not disclose the November 13, 1998, letter from Mr. Whitlock to Jackie McNeill, or the October 9, 1998, letter to Jackie McNeill, both of which are inconsistent with DOC's disclosures regarding the outcome of tests of the electric chair. Nor did Ms. Schwartz disclose the fact that in May 1997 while the Jones hearing was going that an electrical engineer recommended that the chart recorders be replaced because of their age and poor condition. Nor did she disclose that despite this recommendation that DOC did not replace the chart recorders until after the March of 1998 executions. Nor did she reveal that DOC officials recognize that the voltage administered to Gerald Stano was too low. Nor did she reveal that in May of 1998 prison employees indicated that the replacement of the old and structurally unsound electric chair was an urgent matter which DOC officials delayed for one year. Nor did she reveal that the obsolete electrical breakers have repeatedly failed during the past twelve months and that the electrical engineer has recommended the replace, but due to the estimated cost the obsolete breakers have not been replaced. Nor did she reveal that Jay Wiechert recommended replacing the head piece with one that would double the amount of the condemned's head in contact with the electrode and that due to the cost this change was not made. Nor did she reveal that DOC officials considered (continued...)

Ms. Schwartz either does not understand Brady's application to this situation or she thinks as Richard Martell does that it does not obligate the State to disclose evidence in its possession which would provide a basis for presenting a challenge to Mr. Davis' sentence by electrocution.

In light of the position taken by the Assistant Attorney General in this case and in light of Ms. Schwartz' statement that she did not have possession of information which qualified as a Brady material, this Court needs to address this issue. Undersigned counsel believed the issue has been resolved in Johnson v. Butterworth and relies upon this Court's ruling therein. However, given the State's contrary position revealed herein, resolution of the application of Johnson v. Butterworth to Mr. Davis' claim that his sentence of death is unconstitutional is warranted. Particularly given, the State's position in Lopez that a successor capital defendant is not entitled to public records and the position taken here that failing to make a public records request sooner erects a procedural bar now. This Court should hold the State to an obligation to reveal evidence supporting a claim that the electric chair is unconstitutional.[31]

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[30](...continued)
amended the execution day protocol to change the amperage and voltage prescription designed by Dr. Morse to delete reference to the amperage because it is supposed to vary depending upon the resistance of the inmate's body.

[31]A parallel situation is a claim that a death sentenced individual is not competent to be executed. As with the electric chair claim, evidence may arise years after the conviction and direct appeal giving rise to the claim. Is the State's position (continued...)

ARGUMENT III

DOC AND THE STATE OF FLORIDA FAILED TO PROVIDE MR. DAVIS WITH THE PUBLIC RECORDS HE REQUESTED AND THEREBY FAILED TO COMPLY WITH APPLICABLE PUBLIC RECORDS LAW.

It is well recognized that capital 3.850 litigants can assert in a 3.850 motion a state agency's failure to comply with public the records laws. This is true even when the defendant is litigating a successor 3.850. Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(error found as to public records issue when circuit court did not decide certified questions from public records depositions). Here, the error is much greater than that found in Roberts.

Mr. Davis properly pled his claim that the State and DOC, in particular, had failed to disclose public records. The court, as explained in Argument I, indicated that the proceeding was not evidentiary in nature; but in denying Mr. Davis' motion indicated he had in fact conducted an evidentiary hearing. The order must be treated as a denial without an evidentiary hearing for the reasons explained in Argument I.

Firstly, the Attorney General's Office turned documents over for an in camera review. The court did not conduct the in camera review as required. When similar error occurred in Thompson v. State, ___ So. 2d ___, Slip Op. No. 81,927 (Fla. Dec. 24, 1998), the

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[31](...continued)
that it has no obligation to disclose a prison psychologist's conclusion that a death sentenced individual is not competent to be executed? Surely this Court believes under Johnson v. Butterworth that the State has an obligation to disclose evidence that a defendant has become incompetent to be executed.

Assistant Attorney General confessed error and sought a relinquishment so that the in camera inspection could occur. The circuit court's order is rife with error. Given the other errors outlined in this Argument and elsewhere in this brief, the matter must be remanded for new proceedings.

Mr. Davis pled in his 3.850 motion that certain agencies had not complied with public records laws. Mr. Davis asserted that DOC had not fully complied with Chapter 119 of the Florida Statutes or with Rule 3.852 of the Florida Rules of Criminal Procedure. Collateral counsel learned from the records of agents of various agencies and from the Department of Corrections, Barkley Engineering and Douglas Barkley, and Ira Whitlock and Consolidated Power Services, Inc. that there are other materials in existence which are possessed by DOC, by Barkley, and by Whitlock, and probably by other governmental agencies that have not been released to counsel for Mr. Davis.

On June 10, 1999, Mr. Davis duly served a Chapter 119/Rule 3.852(h)(3) request on DOC for files and documents concerning, inter alia, the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair (App. TT). On the morning of June 11, counsel for Mr. Davis spoke to Susan Schwartz, counsel for DOC. Counsel for Mr. Davis was advised to route requests through Ms. Schwartz and that Ms. Schwartz would expedite production pursuant to the June 10, 1999 request and to an outstanding unfulfilled request from May 21, 1999 for medical and

inmate records (R. 114-115).

On the morning of June 14, 1999, counsel for Mr. Davis spoke with Ms. Schwartz and that afternoon received a facsimile transmission from Ms. Schwartz which consisted of a letter and two "preliminary reports" from Barkley Engineering (App. III) and five other documents. The June 14 letter from DOC to Mr. Davis' counsel states that "information on the electrical components" was provided to "your office" in April, 1998. In a subsequent conversation, Mr. Davis' counsel advised Ms. Schwartz that he had no record of such production and requested confirmation of such production or production of the "information." The information was not produced.[32]

The October 6, 1998 memorandum from James V. Crosby, Jr. to Harry K. Singletary, Jr. regarding a "Test of Execution Equipment" is a bare bones statement that the "Fourth Quarter" test was performed. However, no other quarterly tests were provided, and a copy of the identified attachment, a Chart Recording, was not produced. Further, the memorandum did not identify which chair was tested (App. Q).

Upon receiving the Barkley Engineering report from DOC, Mr.

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[32]The June 14, 1999 letter from Ms. Schwartz to counsel identifies "an electrical engineers memorandum dated October 23, 1998." This memorandum was not provided pending a work-product privilege review by the Attorney General's Office. On June 15, 1999, the memorandum was produced. This delay, aside from depriving the Defendant of time for follow-up investigation, is also disturbing because of the conflicting positions taken by DOC. First, DOC asserts that the memo was "prepared in anticipation of litigation." The next day the memo is provided because litigation was concluded (App. K).

Davis' counsel called Douglas Barkley, and he agreed to produce his files. He indicated that, in total, he might have a box of documents and stated that DOC employees had indicated to him that the new chair was built for Mr. Davis. He asked that counsel provide him a formal request. On June 15, attorneys hand-delivered a request to Mr. Barkley's Tallahassee office. He stated that he was going to redo his notes because no one could follow them. He stated he would need until Friday. Mr. Davis' counsel subsequently called him and advised that time was of the essence and he agreed to produce his file by noon on Thursday (June 17). At this time, he added he was also preparing an "addendum" at the direction of DOC and that the delay was in part being caused by preparation of the "addendum."

On June 17, 1999, Mr. Hazen, an attorney for Mr. Davis, went to Mr. Barkley's Tallahassee office, but Mr. Barkley indicated that the documents were not ready, but would be later, and that he'd call the attorney for Mr. Davis in Tampa when the documents were ready. That afternoon, the Attorney General's Office furnished a copy of the "addendum" to Mr. Hazen as part of its production. The "addendum" is dated June 15, 1999 (App. C). Before leaving Tallahassee to return to Tampa that evening, Mr. Hazen called Mr. Barkley, who explicitly stated that DOC was advising him what to produce and what not to produce.

On June 16, 1999, Mr. Davis served a 119/3.852 request on Ira E. Whitlock of Consolidated Power Services in Jacksonville. After obtaining the permission of DOC, Mr. Whitlock released documents to

Mr. Davis' investigator.

On June 16, 1999, DOC's counsel belatedly furnished Mr. Davis' counsel with a memo, "Test of Execution Equipment", dated January 14, 1999. Identified attachments were not provided. No explanation was provided as to why the production was late, but the accompanying correspondence cavalierly mentions that there are other "test results" and that DOC counsel may provide them.

On June 17, 1999, Mr. Davis requested medical records from DOC for medical treatment Mr. Davis received after a fall, for modification on the shower area to accommodate Mr. Davis' physical condition and disabilities, for a full disclosure of all documents regarding testing of the electric chair (like the belated disclosure of the June 16, 1999 "Test of Execution Equipment" memorandum), and for documentation and information on the diet Mr. Davis has been placed on (App. LLL).

On June 18, 1999, having been advised of Mr. Barkley's statements and after reviewing the "addendum," Mr. Davis' counsel called Mr. Barkley's office and was advised he was out. He didn't return the call. Counsel then faxed him a demand for the records (App. MMM). At 4:30 p.m. on Friday, June 18, 1999, Mr. Barkley called Mr. Davis' counsel and said the documents were ready. The documents were immediately picked up. Surprisingly, Mr. Barkley produced only 17 pages of new documents, including five (5) poor copies of photographs of an electric chair. Mr. Davis's counsel has not been provided an opportunity to view the photographs nor were they afforded the reasonable opportunity to replicate the

original photographs in a manner that could be useful to their structural engineers. None of the notes Mr. Barkley "redid" were produced.

DOC withheld documents and directed its agent, Barkley, to withhold documents. Although Whitlock's response was prompt, the face of his production establishes that it too was partial.[33]

Mr. Barkley's, Mr. Whitlock's, and DOC's records make reference to numerous documents which were not produced. Mr. Whitlock's contract shows on its face that his compensation maximum was increased from $23,000 to $52,290 in the middle of the contract term (March 4, 1999). However, no documentation of consideration or explanation for the increase was produced by either party. Whether DOC contracted with someone prior to June 8, 1998, to provide the services Mr. Whitlock was contracted to provide for a one-year period starting that date has not been disclosed. Further, Mr. Whitlock revealed documents reflecting work performed for DOC prior to June 8, 1998, although the contracts cite statutory authority for a one-year limitation on such contracts. Mr. Barkley's contracts were not produced at all.

Mr. Whitlock's time sheet showed numerous instances of work performed on the electric chair for which no documentation was produced nor any explanation given. Billing was made for documents

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[33]Mr. Barkley's delays in producing records, orchestrated by DOC's directive regarding the "addendum", hindered the effective analysis of Barkley's reports by the defendant's structural engineers. The reports that were originally provided to Mr. Davis' counsel did not contain sufficient data for a structural engineer to analyze his accuracy or methodology.

sent, but no such documents were produced. Correspondence was identified, but not produced. Mr. Barkley's billing was withheld.

A February 19, 1999 letter to Mr. Crosby from Mr. Whitlock was not produced by DOC. That letter also referred to other documents which were produced by neither DOC nor Mr. Whitlock. For instance, Mr. Hackle requested a list of parts to rebuild breakers, but no list was produced. Mr. Whitlock's investigation was not documented. An attached letter from Mr. Riffle was not produced. "Constant contact" with Mr. McNeill was not documented. Quotations were not included.

The responses of DOC and its contractors were, at best, careless and, at worst, in bad faith in the apparent hope that no court will have the courage to call them for flagrant fouls before time expires.

A review of Mr. Whitlock's production, Mr. Barkley's production, and DOC's production dispositively demonstrated the withholding of documents about testing, maintenance, and failure of the electric chair.

Taking the allegations as true, the files and records do not refute the allegations. In fact, the appendix provided below supported the allegations. The circuit court erred in not requiring compliance with public records requests. Certainly in other successor cases, motions to compel and 119 claims have been taken seriously. In Jerry White's case, the circuit court ordered depositions. Similarly, depositions occurred in Rickey Roberts. See Roberts v. State. Public records were ordered disclosed in

Jones v. State. Yet here, Mr. Davis' public records allegations were ignored and after the hearing DOC dumped 1200 pages of additional material on his counsel, thereby proving that the allegations had been made in good faith.

However, the after-the-fact disclosures do not cure the defect. Certainly undersigned counsel has endeavored in this brief to advise this Court of some of the newly released information; however, just as clearly the disclosures are not complete. The new documents indicate other documents exist which have not yet been disclosed.

The only way to determine the full extent of the documents withheld and the reasons for the State's conduct in withholding exculpatory evidence is to order depositions of Mr. Barkley, Mr. Whitlock, Mr. Crosby, Mr. McNeill, Mr. Singletary, Mr. Moore, Ms. Schwartz, and Mr. Vargus, and of such others as evidence obtained may indicate have knowledge of the issues raised herein.

Mr. Davis' case has been severely prejudiced by the failure of the DOC and its agents to produce documents and the Court should stay the execution, permit orderly discovery by deposition, and hold an evidentiary hearing to determine compliance by the State and its contracting agents.

Unless and until counsel has had a full opportunity to review all of the records and fully develop all his claims, Mr. Davis will be denied his rights under Florida law and the Eighth and Fourteenth Amendments. See Porter v. State, 653 So. 2d 375 (Fla. 1995).

ARGUMENT IV

FLORIDA'S ELECTRIC CHAIR CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT AND IS THUS UNCONSTITUTIONAL.

A. INTRODUCTION.

Judicial electrocution is constitutionally "cruel" if it entails deliberate indifference to the risk of unnecessary pain. Deliberate indifference of state officials to the risk of pain violates the Eighth Amendment. In Farmer v. Brennan, 114 S. Ct. 1970, 1978 (1994), the Court held that a state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment in violation of the Eighth Amendment if the official shows "deliberate indifference" to the prisoners' well-being. State conduct evinced "deliberate indifference" if an official knows of and disregards a risk of unnecessary pain.

Caselaw supports the notion that judicial electrocution is unconstitutional if it entails a disregard of significant risk of inflicting unnecessary pain. The risk can arise from a previous pattern of malfunctions. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), the Supreme Court held that an unforeseeable accident during an execution does not make the execution unconstitutional. Where, however, the risk of pain inflicted by a method of execution is foreseeable, Resweber proscribes the use of that method. 329 U.S. at 464; id. at 471 (holding that a series of abortive attempts raises constitutional concerns).

Second, the risk of pain can be endemic to the method of execution employed. In Fierro v. Gomez, the Ninth Circuit Court of

Appeals ruled that a finding that "there is a substantial risk that consciousness may persist [during a lethal gas execution]" is relevant to the conclusion that the method of execution violates the Eighth Amendment. Fierro, 77 F.3d 301, 308 (9th Cir.), vacated on other grounds, 117 S. Ct. 285 (1996).[34] As the Court in Fierro further noted:

> Presumably there could be some instances in which a method of execution that produced even very rapid unconsciousness could be unconstitutional. For instance, extreme or torturous pain during those moments of consciousness could conceivably render a mode of execution unnecessarily cruel; some other surrounding circumstance might also evince the sort of wanton cruelty or utter lack of regard for the dignity of man that would render the process unconstitutional. See Campbell, 18 F.3d at 702, 706 (Reinhardt, J., dissenting).

Fierro, 865 F. Supp. at 1411 n. 28.[35]

This Court has an obligation to protect Mr. Davis' right under the Florida Constitution to be free from cruel or unusual punishment and it has the power to enter orders assuring that such

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[34]See also, Glass v. Louisiana, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting from denial of certiorari) (stating that "the Eighth Amendment requires that, as much as humanly possible, a chosen method of execution minimize the risk of unnecessary pain."); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (holding that Eighth Amendment requires all feasible measures be taken to minimize the risk of mistakes in administering capital punishment); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that punishment is unconstitutionally excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); Resweber, 329 U.S. at 464 (holding that the Eighth Amendment protects against "cruelty inherent in the method of punishment").

[35]Photographs of those executed in Florida's electric chair provide graphic evidence of "the utter lack of regard for the dignity of man" being displayed by the use of Florida's electric chair.

protection is forthcoming. See Allen v. State, 636 So. 2d 494, 497 (Fla. 1994)(holding that the Court was required under Article I, § 17 of the Florida Constitution to strike down the death penalty for persons under sixteen at time of crime); Shue v. State, 397 So. 2d 910 (Fla. 1981)(holding that this Court was required under Article I, § 17 of the Florida Constitution to invalidate the death penalty for rape); Makemson v. Martin County, 491 So. 2d 1109 (1986)(noting that "[t]he courts have authority to do things that are essential to the performance of their judicial functions. The unconstitutionality of a statute may not be overlooked or excused"); Rose v. Palm Beach City, 361 So. 2d 135, 137 n.7 (1978)(stating that "[i]t is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court."); State ex rel. Young v. Duval County, 79 So. 692 (1918)(holding that "[i]t is the duty of the court to declare a legislative enactment to be inoperative if it plainly violates the Constitution").

Additionally, this Court is required to protect Mr. Davis' Eighth Amendment rights under the federal Constitution. Under the Eighth Amendment to the United States Constitution, this Court must make an independent determination of whether Florida's electric chair in its present condition is cruel and unusual. Contemporary Eighth Amendment jurisprudence upholds the authority of the courts to review a state legislature's decision generally, and

specifically to review a legislature's enactments regarding criminal punishment. See Rummell v. Estelle, 455 U.S. 288, 304 (1980); Coker v. Georgia, 433 U.S. 591, 602 (1977). See also Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir.), cert. denied, 408 U.S. 942 (1972). The fact that a state statute authorizes capital punishment does not conclusively establish the punishment's constitutionality because the Eighth Amendment is a limitation on both legislative and judicial action. Robinson v. California, 370 U.S. 660 (1962).

Thus, it is firmly within the "historic process of constitutional adjudication" for this Court to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out capital punishment is barbaric and unnecessary. Furman, 408 U.S. at 238, 420 (1972)(Powell, J., dissenting). This Court has previously recognized its obligation to apply Eighth Amendment analysis to challenged Florida law. See, e.g., Jackson v. State, 648 So. 2d 85 (Fla. 1994)(holding that Florida's "cold, calculated, premeditated" aggravator is unconstitutionally vague under Eighth Amendment principles). Consistent with that duty, the Court must independently evaluate Florida's use of judicial electrocution under Eighth Amendment principles.

Essentially, where constitutional rights - whether state or federal - of individuals are concerned, this Court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this Court is required to

exercise its independent power of judicial review. Ford v. Wainwright, 477 U.S. 399 (1986).

Although deference to the executive branch is proper in some situations, in others it constitutes the abdication of the judiciary's responsibility to uphold the constitution and offer protection to those whose constitutional rights have been violated. The courts must intervene if the executive branch in the performance of its duties violates the constitution. Ford v. Wainwright, 477 U.S. at 411; Getzen v. Sumter County, 103 So. 104 (1925). In Ford, the Court rejected Florida's procedure for determining an inmate's competency to be executed, noting that "[i]n no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal." 477 U.S. at 416. Ford is instructive in this case because it similarly concerned the enforcement of a constitutional limitation on executions.[36]

In 1990, this Court denied Judias Buenoano's request for an evidentiary hearing on the basis that one malfunction in carrying out an execution does not justify judicial interference with the functions of the executive branch. Buenoano v. State, 565 So. 2d

[36]The newly disclosed evidence from DOC raises substantial concerns about the executive branch's ability to carry out electrocutions in a manner which conforms with constitutional limitations. The DOC records smack of ineptitude, ignorance, fear of judicial proceedings, and callous disregard for the condemned. This alone warrants judicial intervention.

309 (Fla. 1990).[37] This Court presumed that the Department of Corrections was competent to carry out executions. Id. at 311. (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947)(assuming that state officials "carried out their duties under the death warrant in a careful and humane manner in the absence of evidence to the contrary")). However, that presumption of competence has been overcome by the persistent malfunctioning of Florida's electric chair as this Court held in Jones v. Butterworth, 691 So. 2d 482 (Fla. 1997).

B. RULE 3.850.

Mr. Davis filed a Rule 3.850 motion challenging whether his sentence of death by electrocution is constitutional. His factual allegations must be taken as true.[38] Mr. Davis alleged in circuit

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[37]On the basis of Buenoano, this Court denied similar petitions in Hamblen v. State, 565 So. 2d 320 (Fla. 1990); Squires v. State, 565 So. 2d 318 (Fla. 1990); and White v. State, 565 So. 2d 322 (Fla. 1990).

[38]Counsel recognizes that DOC had not disclosed to Mr. Davis at the time of the filing of his 3.850 the wealth of the materials that were disclosed after the June 21st hearing. Nevertheless, Mr. Davis has pled those documents in this brief because it was DOC's action in not disclosing those documents sooner that precluded their inclusion in the motion to vacate. Undersigned counsel sympathizes with the position that he places opposing counsel in by including reference to materials that were not included below because undersigned counsel was placed in exactly the same situation when DOC chose to hand the 1200 pages of documents to him when the hearing was over (not during or before the hearing started). Because opposing counsel repeatedly sought to obtain permission for Ms. Schwartz to speak on the record, undersigned counsel assumes that opposing counsel had spoken to Ms. Schwartz prior to the hearing and had learned of DOC's possession of an additional 1200 pages of material that were to be turned over after the hearing. Certainly, undersigned counsel would have no objection to a remand if the State believes that these new documents are significant enough to warrant a remand for new proceedings in circuit court.

court and alleges in this brief that the Florida's electric chair in its present condition is cruel or unusual punishment. He has asserted that DOC has made changes in the electric chair since the decision is Jones v. State. He has asserted that new evidence has revealed false and misleading evidence was presented by the State in Jones v. State which wash away the factual underpinnings. He has asserted that DOC has revealed documents that impeach the State's experts in Jones v. State.[39] He asserts that new documents reveal that protocols adopted during the Jones incorporating "100% of both Dr. Michael Morse's and Jay Wiechert's recommendations" are not be followed and cannot being followed.[40]

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[39]In the circuit court order in State v. Provenzano issued June 24, 1999, the judge addressed the nearly identical issue being raised by Mr. Davis. The judge there made an interesting point, which, though technically correct, caused him to get confused. Judge Johnson stated: "Whitlock's memo indicates that the variation in the recorded data regarding the level of current passes through an individual's body during electrocution varies, based upon a basic premise of electricity law. This premise of electricity law has, apparently, been in existence for over one hundred and fifty years. Therefore, through the exercise of reasonable diligence, one could have easily ascertained that the voltage differential across each individual inmate's body would vary based upon the resistance created by that inmate's body" (Provenzano order at 9). Of course, that misses the point. The State's experts testified in Jones that the variance of the resistance between human bodies was small (240 ohms to 260 ohms). And Judge Soud and DOC accepted this false information as true. Moreover, Mr. Davis was not a party to the proceeding even though he sought to intervene; so it is not a question of his diligence. It is a question of the fact that DOC has recognized that the language in the protocol is a problem because it is based upon false information provided by the State's two experts that provided the basis for Judge Soud's conclusion that the electric chair was constitutional.

[40]It is interesting that when DOC considered amending the protocols with the problematic language, the suggestion was to delete reference to amps "because they are not 'programmed.'" (Attachment 16). This means that the programming is to provide the

(continued...)

New documents have revealed that Mr. Wiechert a year ago recommended replacing the head and leg electrodes. However, DOC has chosen to ignore its own expert's recommendation. In May of 1997 during the Jones proceedings, DOC was advised by an electrical engineer (Ira Whitlock) that the chart recorders needed to be replaced. DOC ignored the recommendation for eleven months until after four executions had occurred, although it had been pointed out right before the last one that the chart recordings showed a problem. The next day a new chart recorder was purchased. During the past year the "obsolete breakers" have regularly been breaking down. Ira Whitlock urged DOC in February of 1999 to replace them. However, when the cost estimate arrived showing a projected cost of $265,000.00, movement on the project stopped according to the newly disclosed document.

As a matter of fact, Mr. Davis has alleged that the "electric chair"[41] has been replaced since the hearing in Jones v. State. As a matter of fact, Mr. Davis has alleged that false evidence regarding the electrical circuitry was presented in Jones. As a matter of fact, Mr. Davis has alleged that the State's experts in Jones have been shown to have been ignorant of basic knowledge of the resistance of the human body by the language they prescribed

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[40](...continued)
voltage in conformity with the protocol. The problem with this is that voltage levels have been at times less than half of what they are supposed to be. And no one has come up with an explanation why other than the suggestion that the system isn't working correctly.

[41]DOC officials referred to the "newly built electric chair" when custody of it was transferred from to FSP to the museum. (Attachment 18).

for the protocol. Now DOC wishes to discard or at least ignore this language. Mr. Davis has alleged that the letters from DOC counsel demonstrate utter confusion at DOC regarding the condition and operation of the electric chair. Ms. Schwartz represented on June 14, 1999, that no changes have been made to the electrical circuitry for the electric chair since prior to April of 1998. Documents show that new chart recorders were installed on April 29, 1998. Documents show that the "obsolete" breakers failed in June, July and October of 1998, and again in January of 1999. Ms. Schwartz makes similar representation about the finality of Mr. Barkley's report, even as DOC scrambles to get him to delay production of records while he prepares a baseless "addendum."

Further, Mr. Davis has alleged as a matter of fact that the four executions, though resulting in four dead inmates, were not successful. After a one-year moratorium on executions, Gerald Stano was executed in the Florida electric chair on March 23, 1998. Despite the State's assurances that there would be no further malfunctions with their electric chair, recordings of the execution current indicated that Mr. Stano received an electrical shock at a current far below the amount that the execution day procedure indicated was necessary to insure in an instantaneous death. The lack of an instant death makes Florida's operation of its electric chair unconstitutional. See In re Kemmler, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 474 (1947)(same).

During Leo Jones' execution on March 24, 1998, *The Florida Times Union*, the Jacksonville paper, reported the eyewitness observations of John Boney, an employee of the Jacksonville Sheriff's Office, during Boney's observation of Mr. Jones' execution:

> After a 17-year wait, John Boney didn't feel the elation he expected yesterday when he watched the execution of the man who killed his best friend.
>
> "It wasn't the feeling I thought I would have had, like 'Yea, we got him!' It was more just a relief to know it's over now, and we don't have to think of this anymore," said Boney, now a Jacksonville Sheriff's Office lieutenant.
>
> Boney watched as Leo Jones was strapped into the electric chair at Florida State Prison, repeatedly mouthing a prayer in Arabic.
>
> * * *
>
> Boney watched Jones' hand curl into fists when a hooded executioner turned a dial that sent 2,300 volts of electricity through his body.
>
> And finally, he saw Jones pronounced dead at 7:11 a.m. after one last heave from his chest.

(App. EE)(emphasis added).[42]

Mr. Boney's observations are corroborated by another witness to Mr. Jones' execution:

> 9. When the electrical current was stopped, I observed Leo [Jones'] left thigh

[42]Predictably, the chart recordings show that 2300 volts were not delivered in conformity with protocol. In fact, DOC records show that the control knob is preset to deliver 2300 volts, but for whatever reason it repeatedly fails to do so.

> jittering almost as if in spasm. I also observed Leo [Jones'] chest heave three seperate [sic] times after the electricity was disengaged. Having observed these things, I was deeply concerned that the process of determining that Leo was in fact dead took 5 to 7 minutes.

(App. FF).

Additional accounts of the Leo Jones execution corroborate these reports:

> 2. I was sitting in the third row and had a clear view of Mr. Jones. After the power had been turned off, a doctor approached Mr. Jones. As the doctor was in the process of placing a stethoscope on Mr. Jones' chest, Mr. Jones' chest heaved. After the execution other [persons] were remarking that it looked as if Mr. Jones was trying to breath [sic].

(App. PP). The photographs of Leo Jones' body (the last six pages of App. QQ) are contained in the appendix.

The observations of witnesses to the Leo Jones execution report observations similar to those during Pedro Medina's execution: multiple breaths following the cessation of the electrical current. These movements indicated that Mr. Jones in fact was not dead when the electrical current was turned off, despite the fact that the State of Florida and the Department of Corrections have blindly maintained that the condemned are instantly killed during a Florida judicial electrocution. That Leo Jones was still alive well after the execution cycle was complete means that Florida's particular manner of judicial electrocution is unconstitutional. See In re Kemmler, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); Louisiana

ex rel. Francis v. Resweber, 329 U.S. 459, 474 (1947)(same).

Moreover, Mr. Davis' counsel is in receipt of the chart recordings of the executions of Mr. Jones as well as those of Gerald Stano, who was executed on March 23, 1998, one day before Mr. Jones. These chart recordings provide the most concrete and objective evidence possible that the Department of Corrections is violating the protocol it established on April 16, 1997, following Pedro Medina's execution. The chart recordings of the executions of Gerald Stano on March 23, 1998 and Leo Jones on March 24, 1998 received by counsel indicate that DOC is disregarding its execution protocol. According to the protocol, which DOC represented to the courts that it would follow from now on, the execution cycle is supposed to be: 2300 volts for 8 seconds; 1000 volts for 22 seconds; and 2300 volts for 8 seconds (App. GG at 5.I.). However, the chart recordings of both the Stano and Jones executions demonstrate that the execution cycle was: 2250 volts for less than 1 second; 1600 volts for less than 8 seconds; 550 volts for 22 seconds; 1500 volts for 4 seconds; and finally a spike up to 2400 volts for less than 1 second. In the executions of both Leo Jones and Gerald Stano, DOC ignored its own protocol.[43] This deviance

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[43]According to the chart recordings, DOC did follow their protocol during the testing of the electric chair on March 22, 1998 prior to the executions. At the testing, the chart recordings indicate voltage in line with the protocol.

The chart recordings also indicate that testing of the electric chair prior to Mr. Stano's execution on March 23 was not entirely successful. For example, one chart indicates that at 9:10 AM on March 16, 1998, there was a "fail test" because "due to no amperage . . . had to call Consolidated Power at 9:20 AM" (App. HH). Also on March 16, the amperage chart indicates "found loose

(continued...)

and indifference is constitutionally troubling because the low voltage raises the risk that the condemned were subject to pain, lingering death and mutilation.

DOC did not fare much better during the executions of Judy Buenoano and Daniel Remeta the following week. On Monday morning, March 30, 1998, Judy Buenoano was electrocuted at Florida State Prison. During her electrocution, an 8" stream of smoke was seen coming from the electrode strapped to Ms. Buenoano's right leg, as described by a witness:

> 2. I was seated in the witness viewing area in the front row seat in front of Ms. Buenoano. As she was brought into the execution chamber and was seated in the chair, she had to slide backs towards the back of the chair because the chair was too large for her body. However, to place her legs in the leg restraints at the base of the chair, she had to slide forward slightly while slouching to allow the top of her back to touch the back of the chair. In this position, she was awkwardly slumped. Ms. Buenoano indicated pain and discomfort as the chest strap and leg electrode were applied to her body. In fact, as the chest strap was tightened, it appeared that her flesh of her breast was pinched in the metal buckle until it was loosened slightly by the correctional officer.
>
> 3. I saw the sponges as they were being applied to her body. The sponge applied to her leg did not appear to be dripping any fluid and it was larger than the leg electrode and could be seen coming from both the top and bottom of the strap containing the electrode. Considerable fluid must have dripped from the sponge as it was applied to her leg because

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[43](...continued)
wire on amperage meter" (App. II). So the electric chair, which the State and DOC assured the Florida Supreme Court worked just fine, has failed tests. And then DOC does not employ the protocol it indicated that it would from now on.

> the correctional officer mopped the floor near the leg electrode with a towel after the leg electrode was attached. The sponge placed inside the headpiece was about the same diameter as the headpiece and it not appear to be dripping fluid. As the leg electrode and the headpiece were applied to Ms. Buenoano, the correctional officer stood between me and Ms. Buenoano.
>
> 4. As electricity was applied to her body, Ms. Buenoano tensed and balled up her hands. About halfway through the application of current, white smoke or steam could be seen coming from the leg electrode. The smoke or steam lasted until after the current was disconnected. The smoke rose about eight to ten inches above the electrode.
>
> 5. This is the first execution I have witnessed. I did not know whether this was unusual or not. Melodee Smith, who was sitting next to me during the execution, asked me when I was leaving if I had seen the smoke. She commented that she had and asked if I was going to report what I had seen.

(App. JJ).

Other eyewitnesses confirm that the smoke lasted between 20 and 30 seconds and rose more than a foot in height (App. KK).

Media reports of Judy Buenoano's execution support the eyewitness accounts. The Associated Press reported that the smoke was observable during the entire 38 seconds of the execution cycle. Reports on the Cable News Network confirmed the observations of a witness and the Associated Press regarding smoke emanating from Ms. Buenoano's right leg.[44] Julie Hauserman with the *St. Petersburg Times* confirmed seeing an approximately foot long plume of smoke

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[44]CNN also reported that the execution involved 5600 volts of electricity. If true, this amount would be contrary to the DOC's execution protocol.

(App. LL). She had indicated that prison officials claimed this was a common occurrence, even though testimony at the Jones electric chair hearing was to the contrary. See infra (testimony of Carlton Hackle).

During the evidentiary hearing in the Leo Jones case, Carlton Hackle, the construction maintenance superintendent of Florida State Prison, testified that at that time,[45] he had been involved with eleven (11) electrocutions. During the course of his testimony, Hackle confirmed that some smoke was seen coming from the leg electrode during the electrocution of John Mills in December 1996. (Jones v. State, April 15, 1997 transcript at 25). He also indicated that in the eleven executions he had witnessed, he only saw smoke coming from the leg in the execution of John Mills:

> Q And had you noticed any smoke from the prior executions, on the leg, besides Mr. Mills, prior to Mr. Mills?
>
> A No, I did not.
>
> THE COURT: You'll have to answer out loud.
>
> A I said no, I did not.

(Jones v. State, April 15, 1997 transcript at 32)(emphasis added). As a result of this "rare" occurrence during the Mills' execution, Mr. Hackle investigated and ultimately changed the size of the sponge used in the leg electrode (Id. at 26).

That smoke emanated from Ms. Buenoano's right leg for the

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[45]The Jones hearing at which Hackle testified occurred on April 15, 1997.

duration of her execution indicates that the Florida electric chair once again malfunctioned. Obviously, whatever problem that happened during Mr. Mills' execution, which the Department of Corrections sought to remedy, reoccurred. There was a malfunction during Ms. Buenoano's execution. According to state agent Hackle, smoke, if it is a problem, should have been corrected for after the execution of John Mills. Obviously it was not.

The smoke coming from Ms. Buenoano's leg raises constitutional concerns. If she was alive, she was subject to pain and torture, in violation of the State and Federal Constitutions. See In re Kemmler, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 474 (1947)(same). If she was dead, then her body was subject to mutilation, which also implicates constitutional considerations.

On March 31, 1998, Daniel Remeta was executed in the Florida electric chair. Prior to his execution, Mr. Remeta petitioned this Court based on the new evidence gathered from the executions of Mr. Stano, Mr. Jones, and Ms. Buenoano. In denying Mr. Remeta's petition, this Court directed DOC to follow its published protocol for carrying out judicial electrocutions. See Remeta v. Singletary, No. 92,679 (Fla. March 30, 1998) (App. G). The chart recordings from Mr. Remeta's execution indicate that DOC once again

did not follow its protocol during Mr. Remeta's execution.[46] This is especially troubling because the Florida Supreme Court specifically ordered the State to follow its protocol when it executed Mr. Remeta. Eyewitness reports also indicate that smoke was coming from the area of Mr. Remeta's leg electrode.

Petitioner has obtained complete autopsy reports for Gerald Stano and Judy Buenoano.[47] These reports indicate extensive mutilation of the bodies of the condemned in the most recent executions in Florida's electric chair. For instance, the autopsy report of Gerald Stano notes an ill-defined burn ring on Mr. Stano's scalp, with a maximum diameter of 7" and a width varying from 1/2" to about 1 1/2". Also on the scalp, the coroner noted peripheral charring and gray tan to brown discoloration surrounded by an area of reddened skin. The autopsy report also indicates that there is a rectangular burn of 7" x 9" on the back of Mr. Stano's right leg beginning at the knee and extending into the mid-calf. The burn, which is full-thickness, is accompanied by peripheral gray to brown charring (App. MM).

The autopsy report of Judy Buenoano notes strikingly similar burns to those on the body of Gerald Stano. There are burns, which are deemed to be electrical in nature, on the head and the back of the right leg. The burn on the scalp has a 7" diameter and a width

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[46]The chart recordings from Ms. Buenoano's judicial electrocution also deviated dramatically from the DOC's protocol.

[47]For religious reasons, Leo Jones and Daniel Remeta did not have an autopsy conducted. Mr. Remeta did have a body diagram prepared by the Medical Examiner, the results of which are discussed infra.

ranging from about 1/2" to 1 1/8". It is a full-thickness burn surrounded by reddened skin. The burn on the right leg is 7" x 5" (App. NN).[48]

Petitioner has also spoken to the individual who prepared Leo Jones' body for burial. His observations indicate that the State of Florida mutilated Mr. Jones:

> 10. As his spiritual adviser, Leo [Jones] entrusted me to arrange for his funeral. As an adherent of Islam, Leo planned on receiving a Moslem burial. As part of his funeral, his body had to be cleansed before burial. It was my responsibility to see this done, as well as to participate in the cleansing.
>
> 11. While washing Leo [Jones'] body, I witnessed the intense burns caused by the execution, particularly around the areas where the electrodes were attached. I noticed that Leo's head was disfigured and swollen. The skin around his right eye was blistered. There were also two deep black burns on Mr. Jones' right leg. The skin in between the legs was blistered and pink flesh was visible on the upper leg burn. Most shockingly, I noticed a hole in his chest directly above the breast bone which had blood flowing from it. This concerned me most due to the fact that it was in the same place where the torso straps were pulled so tightly around his chest prior to execution.

(App. FF).

Mr. Davis has obtained the body diagram of Daniel Remeta made by the Medical Examiner during his external examination of Mr. Remeta's body. The diagram indicates that there is a burn ring on Mr. Remeta's scalp of seemingly similar size to those of Mr. Stano,

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[48]Photographs from other bodies reflect similar burns and mutilation occurring in judicial electrocutions. See Appendix QQ.

Mr. Jones and Ms. Buenoano, and there is a burn on the right leg measuring about 6" x 9" (App. OO).

Even if Mr. Stano, Ms. Buenoano, Mr. Jones and Mr. Remeta were rendered instantly dead by the Florida electric chair, Supreme Court caselaw makes clear that any post-death mutilation that occurred in their cases such as smoke coming from the leg and disfigurement caused by massive burning of the body offends notions of basic human dignity underlying the Eighth Amendment.[49] See Weems v. United States, 217 U.S. 349, 372 (1910)(noting that Eighth Amendment prohibition on cruel and unusual punishment bars punishments that "inflict[] bodily pain or mutilation"); Wilkerson v. Utah, 99 U.S. 130, 135 (1879)(noting constitutional bar on drawing and quartering and on beheading). See also Jones v. McAndrew, No.4:97-CV-103-RH at 34-35 (N.D.Fla. February 20, 1998)(holding that fire about head of judicially electrocuted person implicates Eighth Amendment). Cf. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985)(Brennan and Marshall, JJ., dissenting from denial of certiorari); Furman v. Georgia, 408 U.S. 238, 266 (1972)(Brennan, J., concurring); Jones v. State, 701 So.2d at 84, 88 (Kogan, C.J., Shaw and Anstead, JJ., dissenting). Human dignity "is the basic concept underlying the Eighth Amendment." Trop v. Dulles, 356 U.S. 86, 100 (1958)(plurality opinion).

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[49]Certainly, the newly disclosed DOC records show that DOC could carry out the execution with less mutilation. For example, the current could be turned off sooner. If death is instantaneous, the 38 seconds that current is flowing is unnecessary. Further, Mr. Wiechert's recommendation to increase the size of the head piece would reduce current density and thus burning of flesh. However, DOC has not acted on that recommendation in over a year.

Taking Mr. Davis' allegations as true, a stay of execution and an evidentiary hearing are required.[50] See Lightbourne v. Dugger; and Jones v. Butterworth.

C. THE CIRCUIT COURT'S ORDER.

The circuit court's order is erroneous on many counts. It correctly quoted from Resweber, but completely misunderstood the words, deriving a meaning totally opposite to what in fact was said.

The circuit court said that the Appendix showed that maintenance was in fact being performed on the chair by an outside electrical engineer. However, the documents demonstrate that DOC has refused to follow the engineer's recommendation to replace the "obsolete" breakers which have failed at least four times in the past year. DOC failed to buy and install the new chart recorders following the engineer's recommendation for eleven months until after four executions and the chart recordings from those executions were made an issue in court.

The circuit court said: "The defendant has failed to allege with some basis in support that the *old* seat would not now be, and has not in the past been, adequate to hold a man of his weight" (Order at 3). This sentence is very confusing because the Barkley Report very clearly says the old chair is not structurally sound

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[50]Due to time considerations and undersigned counsel's exhaustion, counsel has not been able to fully synthesize the 3.850 allegations herein along with the newly disclosed evidence. Counsel asks this Court's understanding of the extreme difficulty of trying to absorb 1200 pages of DOC records regarding the electric chair in the three days since he received them. Counsel is writing this in the early morning hours of Friday, June 25th.

and should be replaced (App. B).

Judge Fryefield also stated "this Court will note that the defendant primarily supports this claim with inspection reports regarding the 'Spare Breakers'. The defendant has tendered nothing to show that these spare breakers are anything but spare breakers and not part of the actual circuitry in use in the execution process" (Order at 4). Judge Fryefield simply failed to read App. M, quoted at page 57 of the motion. He also failed to accept the factual allegations in the motion as true. And his failure to order further 119 proceedings or to wait after the Renewed Motion for Stay to learn what information was revealed in the newly disclosed DOC records, caused him to reach an erroneous factual conclusion.

Judge Fryefield's description of the four executions in March of 1998 as "successful" reveals that either he did not read the allegation in the 3.850 that the executions were not successful in a constitutional sense or that he believes executions are successful so long as they result in death.

Finally, Judge Fryefield said: "The defendant has tendered nothing which would support a claim that those four inmates were not rendered unconscious almost instantaneously, as have been all of the inmates previously executed in the electric chair. Therefore, this Court finds this claim to be facially insufficient." Order at 4. This quote again gives undersigned counsel the sense that the Judge Fryefield did not read the 3.850, the supporting Appendix or the proffered report of Dr. John Wikswo.

In fact, Dr. Wikswo stated: "The claims that death as a result of execution by electrocution is painless and instantaneous do not have a scientific basis. I reiterate that there is substantial scientific literature that indicates that the brain is capable of perceiving pain at least during the initial stages of electrocution, that cardiac fibrillation does not occur, and that the prisoner dies of asphyxiation and heating."

D. CONCLUSION.

Given that Judge Fryefield is simply wrong about the substance of the allegations in the 3.850, and that, if he had read the allegations, he would have been required to grant a real evidentiary hearing. This Court should stay the execution of Mr. Davis, and reverse and remand for an evidentiary hearing on whether Florida's electric chair is cruel or unusual punishment.

ARGUMENT V

FLORIDA'S USE OF THE ELECTRIC CHAIR AS ITS SOLE MEANS OF CARRYING OUT DEATH SENTENCES CONSTITUTES UNUSUAL PUNISHMENT AND IS THUS UNCONSTITUTIONAL.

Within the past year, the states of Kentucky and Tennessee have enacted laws rejecting judicial electrocution as the sole method of execution (App. OO). These states will now provide a lethal injection option for persons sentenced before a certain date and lethal injection only for persons sentenced after that date. At this point, only four states - Florida, Alabama, Georgia and Nebraska - require execution by judicial electrocution. Seven states have rejected use of the electric chair in the last five years (App. OO).

Reports indicate that, to some extent, the legislatures of both Kentucky and Tennessee were motivated by humanitarian concerns: after hearing about the botched execution of Pedro Medina in March 1997, these states did not want their prisoners subject to the same risks of pain, mutilation and lingering death as prisoners in Florida (App. OO). Now that only four states mandate use of the electric chair, it is clear that Florida's continued operation of the electric chair as its sole method of execution is unconstitutional because other states made aware of malfunctions with the Florida electric chair have switched their method of execution. Thus Florida's present use of judicial electrocution is inconsistent with society's evolving standards of decency.

Newspaper editorials in this State have called for the abandonment of the electric chair. The editorial in the Miami Herald on January 21, 1999 stated: "Electrocution reduces the death penalty to rough retribution and diminishes the dignity of law and of life itself" (App. AAA). The editorial in the Fort Lauderdale Sun Sentinel on May 17, 1999 stated: "Florida Supreme Court Justice Leander Shaw is right: 'Execution by electrocution is a spectacle whose time has passed -- like the guillotine or public stoning or burning at the stake'" (App. BBB).

A long line of United States Supreme Court cases clearly states that an inquiry into evolving standards of decency is required as part of Eighth Amendment jurisprudence. See, e.g., Hudson v. McMillan, 503 U.S. 1, 7 (1992)(holding that Eighth Amendment prohibition on cruel and unusual punishment "draws its

meaning from the evolving standards of decency that mark the progress a maturing society")(citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)(quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)(plurality opinion)); Estelle v. Gamble, 429 U.S. 97, 102 (1976)("we have held repugnant to the Eighth Amendment punishments which are incompatible with'the evolving standards of decency that mark the progress a maturing society'")(quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)(plurality opinion)). See also Gregg v. Georgia, 428 U.S. 153, 173 (1976)(joint opinion of Stewart, Powell & Stevens, JJ.)(noting that assessment of contemporary values concerning the infliction of a challenged sanction is relevant to application of the Eighth Amendment); Weems v. United States, 217 U.S. 349, 378 (1910)(holding that the Eighth Amendment is "not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice").

The Supreme Court has indicated that contemporary society's attitude toward a particular punishment should be measured by as much objective evidence as possible. See Penry v. Lynaugh, 492 U.S. 302, 331 (1989). See also Stanford v. Kentucky, 492 U.S. 361, 369 (1989); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Enmund v. Florida, 458 U.S. 782, 786-88 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977). According to the Supreme Court, "[t]he clearest and most reliable [objective] evidence of the contemporary values is the legislation enacted by the country's legislatures." Penry, 492 U.S. at 331. Accord Gregg, 428 U.S. at 181.

The Supreme Court has held punishments to be violative of the

Eighth Amendment based, in part, on evidence of a legislative consensus rejecting the type of punishment at issue. See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 826-30 (1988)(invalidating capital punishment for offender under age 16 where 19 of 37 state legislatures rejected the practice); Enmund, 458 U.S. at 788-796 (holding death penalty unconstitutional for certain type of felony-murder where, of 36 death penalty jurisdictions, "only" eight, a "small minority," allowed capital punishment for such offense); Coker, 433 U.S. at 593-97 (invalidating capital punishment for rape where only one state imposed death for rape of adult victim and only three imposed it for any rape).

Following the recent problems with Florida's electric chair, two additional states using judicial electrocution exclusively rejected the method. Now only four (4) states out of the 38 states that impose capital punishment follow Florida's lead.[51] Three members of this Court have held that the lack of approval in other jurisdictions of Florida's execution method is a "significant" factor to consider in the constitutional analysis. See Jones, 701 So.2d at 85 (Kogan, C.J., Anstead and Shaw, JJ., dissenting). The overwhelming rejection of Florida's method of execution indicates that Florida's current manner of execution by judicial electrocution no longer comports with evolving standards of decency and is therefore unconstitutional.

Therefore, this Court should shut down the electric chair as

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[51]In one of those states, Nebraska, the legislature recently voted for a moratorium on capital punishment.

a relic of the past and declare it unconstitutional.

ARGUMENT VI

THE TRIAL COURT ERRED IN ITS DENIAL OF MR. DAVIS' CLAIM THAT NEWLY DISCOVERED EVIDENCE OF ADVANCED MEDICAL TECHNOLOGY CAN ESTABLISH THAT MR. DAVIS IS INNOCENT AND HIS CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The circuit court found that Mr. Davis is time-barred from asserting his Claim that a PET Scan will confirm Dr. Berland's opinion that there is significant evidence of brain injury in Mr. Davis and that a Positron Emission Tomography (PET) Scan will portray the residuals of this injury (R. 933-999). The Trial Court also found the claim procedurally barred as "an abuse of process"(Id.). Thirdly, the circuit court found the claim speculative because the PET-Scan has not yet been done (Id.). Finally, the trial court found the claim meritless because, according to the court, postconviction testimony by Mr. Davis' trial attorney of crime details could not be overcome by the new evidence, even if true (Id.). These findings were erroneous.

At trial, Mr. Davis' counsel investigated the defense that Mr. Davis had "blacked out" and had no memory of the alleged crime. Davis v. Singletary, 119 F.3rd 1471, 1473-1476 (1997); 853 F. Supp. 1492, 1536-1540; 1542-1548 (1994). In furtherance of this defense his trial attorney retained two mental health experts, Dr. Ernest Miller, a forensic psychiatrist, and Dr. Pohlman, a neurologist, to examine Mr. Davis. Dr. Miller performed neurological screening and testing, including an electroencephalogram, and Dr. Pohlman

performed neurological screening, a CT scan, and an electroencephalogram. The 1982 technology employed in these examinations failed to reveal either brain damage or an associated seizure disorder.

Forensic Psychologist Dr. Robert Berland examined a variety of records, including medical and psychiatric evaluations of Mr. Davis, and interviewed numerous relatives and friends of Mr. Davis (App. NNN). Based on this review, it is his opinion that a PET-Scan performed on Mr. Davis will likely produce positive indications of brain damage and, possibly, of a seizure disorder. These potentially exonerating facts were not heard by the jury, and would certainly cause all medical examiners of Mr. Davis to reverse or revise their opinions. However, the presentation of this evidence is only possible because of new medical technology not available at the time of Mr. Davis' trial, and not recognized by a court until 1999. In fact, in Florida, the test has not undergone Frye scrutiny.

In his June 17, 1999, report Dr. Berland writes

> ...there is significant evidence of brain injury in this defendant. Because of this, there is a substantial likelihood that a PET scan will portray the residuals of these injuries. The PET scan would permit a definitive ruling in, or ruling out of seizure disorder in the defendant...

(App. NNN).

Demonstrable brain damage and an accompanying seizure disorder would have supported either a mental health or innocence defense at the guilt phase of Mr. Davis' trial. Additionally, PET-Scan

results could have been used at his penalty phase in order to develop both statutory and non-statutory mitigation. Ultimately, however, a PET-Scan is the only way to confirm Mr. Davis' brain damage

Despite the fact that all reasonable causes of both brain damage and seizure disorder predate the crimes, the neurological tests administered to Mr. Davis at the time of his trial did not reveal brain damage or a concomitant seizure disorder, and would not have necessarily done so (App. NNN). For example, the CT scan produces a result which depicts physical shape, or structure of the brain tissue. (Id.). Therefore, unless a physical change in the brain is depicted, a CT scan will not reveal damage. (Id.).

Recently, new medical technology has even developed which can confirm brain damage (App. NNN). The PET-Scan measures the level of activity (i.e. how slowly or rapidly radioactive sugar is being metabolized) in various locations throughout the brain. (Id.). Sequential slices throughout the brain are produced which reflect the differing levels of metabolic activity with different colors in the visible light spectrum. (Id.). Comparisons are made between right and left hemispheres of the brain and between potentially deviant PET-Scan results and normal results. (Id.). Based on these comparisons, neurological impairment can be diagnosed.

The PET-Scan technology is new and advanced medical technology which can reveal brain damage. Recently, the Florida Supreme Court recognized the validity of this technology. Hoskins v. State, 702 So. 2d 202 (1997). In Hoskins, the defendant appealed the trial

court's denial of his request for PET scan testing. Hoskins at 204-205. On appeal, the Florida Supreme Court reversed the trial court and remanded the case so that a PET-Scan could be performed and an evidentiary hearing on the issue of brain damage. Id. at 210. After the PET-Scan produced positive indications of brain damage in the defendant, and thus changed Dr. Krops' testimony, the Florida Supreme Court vacated the death sentence and ordered a new penalty phase proceeding. State v. Hoskins, 1999 WL 311321 (Fla.). Thus, the Hoskins opinions can be read to hold that the PET-Scan has only been recently recognized in Florida as a valid technological tool for the purpose of diagnosing brain damage, although the Court did not reach Frye issues. See, Id.; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Until Hoskins, courts have been reluctant to pay for such expensive procedure. However, like DNA, there is a substantial likelihood that the evidence of Mr. Davis' innocence can now be proven by the PET-Scan.

As Dr. Berland states, there is a substantial likelihood that a PET-Scan will definitively show brain damage with an associated seizure disorder. Such a seizure disorder and proof that Mr. Davis was suffering under its effects at the time of the alleged crime is an innocence defense. Bunney v. State, 603 So. 2d 1270 (Fla. 1992); Wise v. State, 580 So. 2d 329 (Fla. App. 1 Dist. 1991). Thus, the PET-Scan, in its ability to prove a seizure disorder in Mr. Davis, is newly discovered evidence of innocence.

Under the standard enunciated in Jones v. State, 591 So. 2d

911 (1991), and its progeny, Mr. Davis is entitled to an evidentiary hearing under Rule 3.850. Jones; Moreland v. State, 582 So. 2d 618 (Fla. 1991); Richardson v. State, 546 So. 2d 1037 (Fla. 1989). Further, the allegation in Mr. Davis' motion should be taken "at face value" and accepted as true, which is "sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990). Thus, the trial court erred in failing to order a PET-Scan for Mr. Davis and failing to hold an evidentiary hearing on the resultant evidence produced by the scan.

The Eighth Amendment mandates that this Court must consider newly discovered evidence of innocence or innocence of the death penalty. Scott v. Dugger, 604 So. 2d 456 (Fla. 1992).

In conclusion, the circuit court's summary conclusion that Mr. Davis' PET-Scan claim is time-barred is erroneous and its statement that "PET-Scans have been around for two years" is not supported by the record. The court's reliance on Remeta v. State, 710 So.2d 543 (Fla. 1998), and Bolender v. State, 638 So. 2d 82 (Fla. 1985) is inapposite.

At the Huff hearing, the State actually argued that Hoskins showed that the PET-Scan has been around for over two years. Both the court's holding and this argument are erroneous because how long a procedure "has been around" is not dispositive of the questions of when such a procedure becomes generally recognizable as a legitimate diagnostic tool within the medical community, becomes economically accessible to the defendant, and becomes

cognizable in a court of law.

Similarly, the circuit court's finding of a procedural bar because the PET-Scan issue was not raised in the April 15, 1998 (FBI) 3.850 Motion is erroneous because this evidence has not been Frye-tested or endorsed until the most recent decision in Hoskins v. State, 658 So. 2d 82, 85 (1999). Therefore, counsel could not be expected to expend limited resources on an expensive procedure that a court might not consider. At the very least, the circuit court's time-bar grounds are premature as Mr. Davis' 3.850 allegations cannot be refuted by the record and questions for resolution at an evidentiary hearing remain. See Lemon v. State, 498 So. 2d 923 (Fla. 1986).

In response to the circuit court's third rationale for its holding, Mr. Davis concedes that he has not presented PET-Scan results as part of his claim. The circuit court, however, overlooked the fact that Mr. Davis has presented an unrefuted competent medical opinion that there is a substantial probability that Mr. Davis has been afflicted with brain damage and, possibly, an associated seizure disorder (App. NNN). This evidence is not refuted by the record. As in Hoskins, the court in Davis should have ordered a PET-Scan to definitively establish evidence of Mr. Davis' brain damage and seizure disorder. To hold otherwise would be to put Mr. Davis in the position of being required to undertake the costly procedure at the earliest possible date to avoid the time-bar without the converse assurance of admissibility under Frye. Thus, the lower court is effectively finding that Mr. Davis

is time-barred and procedurally barred but, nevertheless, that he should have done the test anyway, even before a competent doctor could confidently rely upon it or a court would recognize the results. Such a position is untenable. The defendant has made unrefuted allegations based upon Dr. Berland's report, and the circuit court's rationale, that although Mr. Davis couldn't introduce the test results, he should have done the test anyway, is both logically and legally inconsistent and erroneous.

Finally, the circuit court's fourth rationale for denying relief on the PET-Scan claim is that appellate decisions "on the defendant's various proceedings... utterly negate" his defense that Mr. Davis didn't know what he was doing at the time of the crime. Thus, the circuit court concludes that there is not a reasonable probability that the outcome of the trial would have been different had testimony about his mental state been supported by PET-Scan results. The court bases this conclusion on testimony of the trial attorney, Mr. Tassone, that Mr. Davis told him details about the crime. However, by the time of this attorney-client conversation many details of the crime had been released, and Mr. Davis had been repeatedly interviewed by police. Also, the attorney testimony was presented in postconviction as refutation of the findings of Dr. Krop that Mr. Davis was insane at the time of the crime. However, as in Hoskins, a positive PET-Scan would invigorate Dr. Krop's testimony, and the attorney's testimony of the alleged confession would not be relevant to refute the PET-Scan results.

In sum, the circuit court has erroneously held that this new

evidence would not have changed the outcome of the trial. As when DNA is used to conclusively establish innocence, a PET-Scan of Mr. Davis could conclusively demonstrate that Mr. Davis is brain-damaged and has a seizure disorder. Both of these afflictions pre-date the crimes and constitute evidence of actual innocence if he indeed blacked out or had a seizure at the time of the crime.

Based on the foregoing, Mr. Davis respectfully urges this Court to reverse the circuit court and to order a PET-Scan for Mr. Davis and an evidentiary hearing so that Mr. Davis can produce evidence that his childhood abuse and injuries have left him brain-damaged. A PET-Scan can establish this objectively.

CONCLUSION

Based upon the foregoing, and upon the record, Mr. Davis urges the Court to grant a stay of execution, order an evidentiary hearing, and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial has been furnished by either U. S. Mail, first-class/facsimile transmission/federal express/hand delivery to all counsel of record on June 25, 1999.

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