IN THE SUPREME COURT OF FLORIDA

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JUN 25 1999

CLERK, SUPREME COURT
By ____________

ALLEN LEE DAVIS,

Appellant,

vs. CASE NO 95,845

STATE OF FLORIDA,

Appellee.
______________________/

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

CORRECTED ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar No. 300179

CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

On the morning of June 21, 1999, Davis filed an "Emergency Motion to Vacate Judgment and Sentence, And Request for Evidentiary Hearing And Stay of Execution," ostensibly raising four claims for relief: (1) execution in Florida's electric chair in its present condition would constitute cruel and unusual punishment because it does not result in instant death and inflicts severe mutilation upon the body of the condemned prisoner; (2) judicial electrocution is unconstitutional because it violates the evolving standards of decency; (3) public records have not been disclosed in violation of Chapter 119, Florida Statutes, and Brady v. Maryland; and (4) a PET scan might corroborate a defense theory that Davis committed the murder of Nancy, Kristina and Katherine Weiler while suffering from a seizure disorder.

Within hours of the filing of the 3.850 motion, the State filed a written response. That response included a detailed procedural history of this case since Davis' arrest; since that document is part of the record on appeal in this case (RIV 568-86), that lengthy procedural history will not be repeated here. The State would note, however, that this is the defendant's fourth 3.850 motion.

The facts of the crime, as presented at trial, are also recounted in some detail in the State's response filed in the court below (RIV 562-68), and likewise will not be repeated here.

The trial court heard arguments from both parties on the afternoon of June 21. The next day, the trial court issued a written order denying all relief (RVI 993-999). Claim 1, the trial court found, has already been decided, adversely to the defendant, in Jones v. State, 701 So.2d 76 (Fla. 1997), and Davis had presented nothing which make the Jones findings suspect. The trial court found Claim II both procedurally barred (because it could have been raised on direct appeal or in his prior postconviction motions) and meritless under Jones v. State, supra. Davis' third claim was meritless because Davis' counsel had in fact been provided with the records to which he was entitled and also because these records could not in any event support a claim as to which Davis would be entitled to relief. Finally, the court found, Davis' newly-discovered evidence claim was procedurally barred because PET scans have been around for more than two years and because any PET-scan claim could and should have been raised in Davis' third motion for post-conviction relief filed over a year ago, on April 15, 1998. In addition, the claim is speculative and factually meritless.

SUMMARY OF THE ARGUMENT

It is anticipated that Davis will contend that he merits a stay of execution and an evidentiary hearing in regard to his claim involving the electric chair; Davis' claim involving the alleged need for a PET scan is procedurally barred and speculative in the extreme. Davis' electric chair claim, for the most part, is barred by this Court's decision in Jones v. State, 701 So.2d 76 (Fla. 1997), and Davis' attempts to evade the holding of that case must be rejected, especially in light of the fact that four executions have taken place, without incident, since rendition of that opinion. The only claim which Davis can properly present in this regard would relate to the "new" electric chair, *i.e.*, the recent substitution of the wooden portion of the chair, and, as the court below correctly recognized, no constitutional claim can be fashioned in this respect; Davis' other attacks upon the electric chair, electrocution in general, as well as his contention that his particular obesity is relevant as to any scheduled execution, all represent matters which should have been raised long before and are barred, as well as conclusively without merit, at this juncture. The fact that Davis, like so many others similarly situated, has engaged in an eleventh hour public records foray does not mandate a stay of execution, as the court below correctly recognized, as many of these records should likewise have been sought long ago and those in Davis' possession present no valid basis for relief.

ARGUMENT

ISSUE I

THE TRIAL COURT'S DENIAL OF RELIEF AS TO DAVIS' CHALLENGE TO THE ELECTRIC CHAIR WAS NOT ERROR.

In his postconviction motion below, Davis contended that he was entitled to an evidentiary hearing on his contention that Florida's electric chair allegedly would not function constitutionally at his scheduled execution next month. Davis recognizes, of course that his biggest obstacle in presenting such claim is this Court's decision in Jones v. State, 701 So.2d 76 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 335 (1998), as well as the four subsequent executions which took place without incident, over a year ago in 1998. As Judge Fryefield correctly found, Davis presented no compelling case why this Court's holding in Jones should not also bar Davis' challenge, and further concluded that permitting protracted endless rounds of public records litigation would serve no valid basis. The court likewise was correct in finding that Davis' contentions concerning alleged changes and improvements in the electric chair represented correct interpretation and adherence to the protocols approved in Jones, rather than the opposite. Judge Fryefield also correctly rejected Davis' speculative and conclusory allegations, based upon a very selective and also inaccurate usage of the public records which he has recently received, to the effect that the protocols

are not being followed or are somehow under question. Judge Fryefield also correctly concluded, in accordance with this Court's recent decisions, that Davis' speculative complaints concering the 1998 executions were insufficient to merit further inquiry or relief. The circuit court's order should be affirmed in all respects.

On April 3, 1997, in response to the circumstances of the execution of Pedro Medina, Leo Jones filed a petition in this Court seeking a determination whether electrocution in Florida is cruel and unusual punishment. This court ordered the circuit court of Duval County, Judge A.C. Soud presiding, to conduct a full evidentiary hearing regarding the present working condition of Florida's electric chair. Jones v. Butterworth, 691 So.2d 481 (Fla. 1997). Ultimately, two separate 4-day hearings were conducted, at which numerous witnesses testified, including personnel from the Department of Corrections and expert witnesses such as Dr. Oren Devinsky, Dr. Theodore Bernstein, Dr. Deborah Denno, Dr. Jonathan Arden, Dr. Robert Kirschner, Dr. David Price, Dr. Michael Morse, and engineer Jay Weichert. Thereafter, Judge Soud issued a 26-page order denying the claim that Florida's electric chair in its present condition was unconstitutional. This Court summarized Judge Soud's factual findings as being:

> 1. The procedures used in the last seventeen Florida executions have been consistently followed, and no malfunctions occurred until the execution of Pedro Medina.

> 2. The flame and smoke observed during Medina's execution were caused by insufficient saline solution on the sponge in the headpiece of the electric chair.
>
> 3. Medina's brain was instantly and massively depolarized within milliseconds of the initial surge of electricity. He suffered no conscious pain.
>
> 4. Consistent with 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."
>
> 5. Florida's electric chair--its apparatus, equipment, and electric circuitry--is in excellent condition.
>
> 6. Florida's death chamber staff is qualified and competent to carry out executions.
>
> 7. All inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain.

Jones v. State, supra, 701 So.2d at 77. This Court summarized Judge Soud's conclusions of law as follows:

> 1. Cruel or unusual punishment is defined by the Courts as the wanton infliction of unnecessary pain. [Cits]
>
> 2. Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain, and therefore, did not constitute cruel or unusual punishment.
>
> 3. Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment.

> 4. Florida's electric chair in its present condition does not constitute cruel or unusual punishment.
>
> 5. During the hearing it has been strongly suggested and inferred by Jones that Florida's electric chair as the method of judicial execution should be abandoned in favor of judicial execution by lethal injection. Such a move to adopt lethal injection is not within the constitutional prerogative of the Courts of this State, but rather lies solely within the prerogative of the Legislature of the State of Florida.

Jones v. State, supra, 701 So.2d at 77-78. This Court affirmed these findings, holding "that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment." Id. at 80.

Since this decision was issued, Gerald Stano, Leo Jones, Judy Buenoano and Daniel Remeta have been executed, and many of them, as well as Eduardo Lopez, made similar claims for relief, relying -- like Jones -- upon the circumstances of the Medina electrocution and upon the declarations of many of the same experts who had testified at the Jones hearings. In addition, however, they also -- like Davis -- relied upon alleged circumstances of executions carried out since Jones was decided. For example, Remeta relied upon alleged circumstances of the Jones execution and, as well, the executions of Buenoano and Gerald Stano. Lopez relied upon alleged circumstances of all these post-Medina executions and, as well, upon alleged circumstances of the Remeta execution. See the attachments to the State's response, filed in the circuit court.

RIV 613-748). In short, all of these death-sentenced prisoners made the same kind of allegations Davis makes in this case. All were denied evidentiary hearings on these claims for relief, and these summary denials were affirmed by this Court. Remeta v. State, 710 So.2d 543, 546 (Fla. 1998)(Court concluded, "as we recently have in other cases," that Remeta was entitled to neither hearing nor relief on claim that the manner in which Florida proposes to carry out his electrocutions violates cruel and unusual punishment provisions of both state and federal constitutions); Remeta v. State, 717 So.2d 536 (Fla. 1998)(summarily affirming denial without hearing of additional electric-chair claim based upon executions subsequent to Medina); Buenoano v. State, 717 So.2d 529 (Fla. 1998)(summarily affirming denial of similar claim); Lopez v. Singletary, 719 So.2d 287 (Fla. 1998)(summarily denying -- without requiring response from State -- an all-writs petition raising similar electric-chair claim). Just as the electric-chair claims of Remeta, Buenoano and Lopez were properly denied summarily, so was Davis' claim properly denied without evidentiary hearing.

Davis attempts to bring his claim outside the ambit of this Court's prior decisions, however, by claiming that he now has information unavailable previously which calls into question the Jones findings and conclusions; to the extent that any of these claims relate to matters which could have been discovered through

due diligence more than one year prior to the filing of the motion, they are procedurally barred. Mills v. State, 684 So.2d 801, 804-5 (Fla. 1996). He contends that we now know, as Jones allegedly did not, that the wooden chair itself was not in good condition, that the DOC's protocols as to the amount of volts and amps cannot be followed, that humans vary in their resistance, and that the electrical circuitry has needed maintenance since the Jones hearing. Finally, he contends that, unlike Jones, he is extremely obese. None of his allegations are sufficient to render Jones inapplicable, or to require a hearing.

Although Davis contends that the recent replacement of the wood chair demonstrates that the old chair was not in "excellent condition" at the time of the Jones hearing, he fails to demonstrate any basis for relief even if it was not. The State would note, first, that Davis has not cited any testimony from the Jones hearing that says anything one way or the other about the condition of the wooden chair itself. Thus, there is no basis for his insinuation that the State or the DOC misled anyone about the condition of that wooden chair. (The State would note that one of his expert witnesses, Dr. Bernstein, was given the opportunity to examine the "electric chair," including, presumably, the wooden chair itself. Transcript, hearing of July 10, 1997, Vol IV at

561).[1] Second, the State would note that four persons were successfully electrocuted since the Jones hearing, including Jones himself. The fact that, following these executions, it was determined that the old chair may not have continued to be structurally sound hardly establishes that the chair was not sufficiently sound in 1997 for its intended purpose -- which is simply to provide a seat for the prisoner. As the testimony presented at the 1997 hearing makes clear, despite the appellation "electric chair," there is in fact *no* electrical circuitry in the chair itself. The prisoner is merely strapped into the chair. The electricity is administered through electrodes attached to the prisoner's head and leg. Wires run from these electrodes to the electrical equipment. Davis has not alleged how the condition of the wooden chair could affect the transmission of electricity through the body of the prisoner. Furthermore, regardless of the condition of the old chair, he has not alleged that the new chair will be inadequate to support someone of his size and weight. On the contrary, as the court below correctly recognized, the very

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[1] Davis contends vigorously that Jones is inapplicable because the State presented false testimony and/or testimony inconsistent with facts that have come to light since Jones. He relies on the Jones transcript and cites to it at numerous places both in his written motion (RI 52, 55, 56, 59, 60, 89), and in his oral argument to Judge Fryefield (RVII 34, 35, 37, 40, 41, 89, 90, 91, 92, 93, 94, 97). While mindful of this Court's admonition in Johnson v. State, 660 So.2d 648, 653 (Fla. 1995), the State, under these circumstances, must ask this Court to take judicial notice of its records and files in Jones v. State, Florida Supreme Court Case No. 90,231.

documents he has presented in support of his claim demonstrate that the new chair *will* support him. See the "Barkley report," Appendix B to Davis' motion. (RI 151-158). Nothing disclosed about the condition of the old wooden chair or its new replacement provides any basis for hearing or relief.

Davis also contends that he has new, heretofore unavailable information that DOC's electrocution-day protocols cannot be followed. He relies upon a memorandum from engineer Ira Whitlock dated October 23, 1998, which Davis attached to his motion as Appendix F (RI 166-168). In this memorandum, Whitlock discusses the present language of the protocols (the execution day protocols are attached to the Davis motion as Appendix GG, RII 370-376) concerning the electrocution cycle. The protocols state:

> 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.

(RII 375). Whitlock notes that under Ohms law, the current will be affected by the resistance in the circuit, and different people have differing resistances. Thus, the recorded amperage may vary from these figures during an electrocution. Furthermore, line to line figures are nominal and can vary up to 10 percent of the indicated 2,300 volts. Appendix F (RI 168). Davis contends this is new information, not presented at the Jones hearing, and renders the Jones findings suspect. This is not, however, new information, and would surprise none of the electrical experts who testified at

the Jones hearing, all of whom were familiar with Ohms law. Dr. Morse, for example, explicitly acknowledged that "Human beings are very highly variable machines," and that there "certainly [is] variance among human beings in terms of their resistance." Jones transcript, April 17, 1997, Volume VIII at 43. Engineer Jay Weichert, testified that, in figuring amperage:

> I would need to know the resistance of whatever the load would be, test cell or human body, and the voltage, and then I could compute the current. In other words, we have three variables. If you know two, you can calculate the third.

Jones transcript, July 14, 1997, Volume VII at 1135. Thus, Weichert testified, although the figures in the protocols were "essentially correct," they were still "approximate numbers." Jones transcript, April 16, 1997, Volume VI at 208. Dr. Bernstein also testified about Ohm's law as it describes the relationship between voltage, current (amps) and resistance, stating: "If you know any two of those, you can always get the third." Jones transcript, July 10, 1997, Volume IV at 539. Dr. Bernstein agreed that the numbers set programmed into the "automatic cycles" were not the exact numbers you would get during an electrocution. Jones transcript, July 10, 1997, Volume IV at 577. Finally, DOC electrician Jackie McNeill testified that the amperage would vary during an electrocution, depending on the person. Jones transcript, April 15, 1997, Volume IV at 133.

Nevertheless, the numbers in the protocol were described by Weichert as being "essentially correct," Jones transcript, April 16, 1997, Volume IV at 207. Weichert testified that the relationship between volts, ohms and amps is biased by a "saturable core reactor" built into the circuitry, which can regulate current flow to compensate for variable resistance--for example, if "we have an extremely stocky person." Jones transcript, April 16, 1997, Volume VI at 258. See also, Jones transcript, July 10, 1997, Volume IV at 594 (Bernstein testifying about the control circuitry).

Thus, Whitlock's October 23, 1998 memorandum contains nothing new. Furthermore, it does not indicate, as Davis contends, that the protocols cannot be followed. The protocols simply state that an automatic cycle begins with certain volts and amps programmed in. The language in the protocols, as Whitlock states, are "technically correct" and "absolutely true." (RI 167). Furthermore, Whitlock's concluding statement was:

> These figures are normal and constant with the physical properties of basic electricity and by no means what-so-ever indicate a malfunction of the electrocution process.

(RI 168). This statement--contained in the very memo which Davis claims demonstrates that the protocols are not being followed--certainly fails to support Davis' claim that this memo indicates some sort of malfunction in the process. Furthermore, the four successful executions that have occurred since the Jones hearing

refute Davis' claim that the DOC has not followed proper protocols, as Judge Fryefield correctly noted.

Davis also contends the State presented false evidence at the 1997 Jones hearings about the age of the electrical circuitry, including, especially, some of the breakers. He points first to a memo from a D.R. Lehr, who in 1995 was an Assistant Superintendent for Operations at Florida State Prison, Appendix N to the Davis petition (RII 261), in which Lehr 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." Davis then cites subsequent memoranda indicating allegedly that, contrary to the implication in the Lehr memo, at least some of the breakers in the circuitry are 40 years old, and contends the state presented false evidence regarding the age of the breakers and/or other portions of the circuitry at the 1997 hearings.

The first difficulty with Davis' position is that the State did not present any evidence at the Jones hearing, or contend, that all new breakers had been installed. Jay Weichert did not testify to that effect, and certainly did not do so at the behest of the State. What actually happened is that Martin McClain (representing Jones) cross-examined Weichert about the five cycles referred to in a document identified as Exhibit H. Weichert (and others) had previously testified that although five cycles were programmed into

the system, only three cycles were actually used; DOC personnel would manually shut down during the third cycle. Mr. McClain presented Exhibit H (containing the language identical to that in Appendix N) to Weichert and asked him if the memo was consistent with information Weichert had been given about the cycles. Weichert -- who did not recall having ever seen the document -- asked if he could read it, and did so out loud, including the part about replacing the "entire" electrical system in 1993 and 1994. Weichert then answered the question:

> Okay. This first paragraph describes manually controlling that shut down and this is what was described to me on the 8th. It was explained to me that five cycles would happen automatically if it weren't terminated, but normal procedure was to terminate after this third cycle, so I guess I don't see a conflict there.

Jones transcript, April 16, 1997, Volume VI at 288-89. Counsel in fact never asked any question about the newness of the equipment, and Weichert never addressed it, except that he simply read a document he did not recall ever having seen before, including a part not relevant to the question. There is no other reference to this document in the transcript, and no witness testified that all the electrical breakers had been replaced with new ones. Furthermore, no expert based his opinion about the condition of the electrical circuitry on the basis of any representation that all the electrical breakers were new. Weichert's opinion about the ability of the electrical circuitry to function properly was based

upon his tests of that equipment, not upon its newness or upon some memorandum he had never seen. Jones transcript, April 16, 1997, Volume V at 171, 186. Because the system, when tested, functioned properly, there was no need to "interrogate each little piece," Jones transcript, April 16, 1997, Volume VI at 255-56, and he did not; nor did he ever testify that "each little piece" was brand new. Nor did he contemplate that the system would never need maintenance or repair. In fact, that is why he recommended testing the system a *month* before the execution: to give the DOC time to order any necessary replacement parts and perform any necessary repairs. Jones transcript, April 16, 1997, Volume V at 188, 190.

The second problem with Davis' position is that, in fact, evidence *was* presented at the 1997 hearing indicating the presence of 50-DH-75 breakers in the electrocution circuitry. During Dr. Bernstein's inspection of Florida's electric-chair system, he asked for and received a schematic diagram of the electrical system, which dated "from 1960." Jones transcript, July 10, 1997, Volume IV at 573. This schematic, although in Dr. Bernstein's opinion not complete because it showed the different parts of the equipment but not how it is all connected together, did show an item described as a Westinghouse "indoor metal clad switch gear, 50DH75 BKR" which Dr. Bernstein described as "probably a breaker," and concluded that the death-house circuitry "has that." Jones transcript, July 10, 1997, Volume IV at 609. Interestingly, the breaker which Davis

contends we now for the first time realize remains in the circuitry is in fact a "Westinghouse . . . 50-DH-75" breaker. Appendices M (RII 258-259), and R (RII 277) to the Davis motion. In other words -- the very same breaker identified by Dr. Bernstein in 1997 as being in the electrical circuitry. Furthermore, Dr. Bernstein had no problem with the existence of such a breaker in the system, and acknowledged that tests conducted in his presence demonstrated that the electrical circuitry worked properly and delivered the intended current through the circuitry. Jones transcript, July 10, 1997, Volume IV at 161.

Thus, no witness relied upon any representation in the Lehr memo of November 1, 1995 that all the electrical breakers in the system had been replaced, and no evidence to that effect was introduced.[2] In fact, the testimony presented is not inconsistent with Davis' new allegations. Furthermore, there is absolutely nothing in Judge Soud's order or in this Court's opinion to indicate that any court relied upon any representation that the electrical equipment was all new.

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[2] The State would suggest that the memo in any event is ambiguous on this point. The relevant sentence could mean that only enough breakers were replaced to comply with the applicable codes. Furthermore, the "new" breakers could have been unused, new-in-the-box spares on DOC's shelf that were forty years old (i.e., what is known in the antique-car business as N.O.S., or new old stock). Regardless of what the memo means, nothing in the 1997 hearing turned on it.

Finally, the problem identified with the Medina execution was the presence of a second sponge in the headpiece which had not been sufficiently saturated with saline solution. In the entire history of judicial electrocutions in Florida, there has never been a problem with the electrical equipment. Put another way, the electrical equipment has always been able to deliver a sufficient current to cause instantaneous death to the condemned prisoner. All Davis can show is that since the Jones hearing, DOC has performed testing and maintenance on the electrical system, consistent with the very protocols that contemplate and require such testing and maintenance. Notably, the very documents he relies upon to demonstrate the presence of old circuitry fails to support his claim that this circuitry will fail to work properly. In his Exhibit M, Ira Whitlock had assured us: "everything is being done to maintain the Electrocution Process in the most reliable condition possible so that if needed it will perform as required . . . if you should need the use of this facility be assured that it can and will function." (RII 258).

Nothing Davis has presented calls into question the validity of this Court's Jones decision, or merits hearing or relief. In fact, since nothing Davis presents now is inconsistent with what Jones presented at his hearing, Davis has presented nothing new, and is procedurally barred from raising these claims now.

Finally, Davis contends he is entitled to a hearing on the issue of the effect his obesity might have on the protocols. This claim -- like the other bases presented for attempting to circumvent this Court's Jones decision -- is procedurally barred. A motion for postconviction relief in a capital case must be filed within one year after the judgment and sentence become final unless the facts upon which the claim is predicated were unknown to the defendant or his attorney and could not have been ascertained by the exercise of due diligence, in which case the claim must be presented within one year of the discovery of evidence upon which avoidance of the time limit is based. Fla. R. Crim. P. 3.850 (b); Mills v. State, 684 So.2d 801, 804-05 (Fla. 1996). As his own counsel conceded (RVII 92), Davis has been obese for many years, and he has offered no explanation for failing to raise his obesity as an issue in carrying out his death sentence until the "eleventh" hour.

The circuit court correctly denied all requested relief as to Davis' first claim. Although not determinative of this Court's resolution of this matter, it is the State's position that the applicable constitutional standard to be applied in the resolution of any claim by Davis is that contained within the Eighth Amendment to the Constitution of the United States, in light of the recent amendment to Article I, Sec. 17 of the Florida Constitution which requires identical construction of the state and federal

constitutional provisions in this regard, and provides for retroactive application in circumstances such as this.

ISSUE II

THE TRIAL COURT'S DENIAL OF RELIEF AS TO DAVIS' PROCEDURALLY BARRED AND/OR MERITLESS CLAIM INVOLVING EVOLVING STANDARDS OF DECENCY WAS NOT ERROR.

In this claim Davis contends that evolving standards of decency dictate that his death sentence must be vacated, as Florida is one of only a number of states still conducting executions by electrocution. The circuit court found this matter procedurally barred, as well as meritless, in light of this Court's decision in Jones v. State, 701 So.2d 76, 79 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1297, 140 L.Ed.2d 335 (1998).

It is the State's contention that the above ruling is correct. To the extent that this claim raises any matter arising more than one year prior to the filing of the motion below, it is procedurally barred under Mills v. State, 684 So.2d 801, 804-5 (Fla. 1996). To the extent that anything "new" is presented, such should be no basis for relief under this Court's decision in Jones v. Butterworth, 691 So.2d 481, 482 (Fla. 1997), and Jones v. State, supra. See also Pooler v. State, 704 So.2d 1375, 1380-1 (Fla. 1997) (rejecting identical claim). Further, precedent is clear that the "evolving trend" analysis is not a recognized basis for an attack upon a method of execution. See, e.g., Campbell v. Wood, 18 F.3d 662, 682 (9th Cir.), cert. denied, 511 U.S. 1119, 114 S.Ct.

2125, 128 L.Ed.2d 682 (1994) ("The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.") (cited in Jones v. State); Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 724 (1996) (fact that "more humane" means of execution existed does not render contested method cruel or unusual) (cited in Jones); Langford v. Day, 110 F.3d 1380, 1393 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 208 (1997).

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

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

This language was cited with favor more than a decade later in Harris v. Alabama, 513 U.S. 504, 510-11, 115 S.Ct. 1031, 1034 (1995), when the United States Supreme Court upheld Alabama's unique jury override provision. Davis' claim cannot serve as a

basis for relief in any court, see, e.g., In re: Jones, 137 F.3d 1271, 1273-4 (11th Cir. 1998), and the circuit court's denial of relief as to this procedurally barred and meritless claim was not error, and should be affirmed.

ISSUE III

THE COURT BELOW DID NOT ERR IN DENYING RELIEF, OR ANY STAY OF EXECUTION, IN REGARD TO DAVIS' PUBLIC RECORDS CLAIMS.

As in many of the cases in which executions have occurred after decades of litigation, see Buenoano v. State, 708 So.2d 941, 952-3 (Fla. 1998), Remeta v. State, 710 So.2d 543, 546-8 (Fla. 1998), the defendant herein contends that he was entitled to a stay of execution, due to eleventh hour public records requests and litigation, in this instance involving the electric chair; it is anticipated that Davis will argue that a stay is warranted because, allegedly, he has not yet received all public records from the Department of Corrections or because he has not yet had an opportunity to fashion claims for relief based upon records recently received. The court below properly found that Davis had in fact been provided the records to which he was entitled, and that none of the claims which Davis wished to support with any allegedly withheld records would have entitled him to any relief. This ruling is correct, and, as in Buenoano and Remeta, all relief should be denied.

It is anticipated that Davis will argue that the recent amendments to Fla.R.Crim.P. 3.852, and enactment of Sec. 119.19, Florida Statutes (1998), effective October 1, 1998, somehow precluded him from requesting public records earlier. First of all, even if this were true, it would only excuse Davis from seeking public records between October 1, 1998, and the signing of the death warrant on June 9, 1999, and this is relevant because many of the documents allegedly relevant to Davis' electric chair claim were generated prior to that time period. Further, any contention that Davis was "inhibited" from seeking public records prior to the signing of the death warrant is flatly contradicted by his own actions as reflected in this record. Thus, on May 21, 1999, counsel for Davis made a public records request upon the Department of Corrections, noting in such document that Davis' last request had been made in 1992 (RI 8-9). Davis has not demonstrated why he failed to make a public records request on the Department of Corrections between 1992 and 1999, a significant omission, given the fact that, as represented by collateral counsel below, Davis had sought to intervene in the Jones litigation in 1997 (Transcript of Proceedings of June 21, 1999, at 40-1). While it is certainly not the State's position that Davis failed to exercise due diligence in his quest for any records relating to the "new" electric chair, it is the State's position that he had more than ample time to seek records to "impeach" the Jones holding, not only

within the course of the Jones litigation itself or thereafter. Further, it can be said that Davis' plight is not quite as dramatic as may be represented, in that his counsel is receiving public records generated in the Lopez case pursuant to requests made by another CCR attorney, Todd Scher (Transcript of Proceedings of June 21, 1999, at 8-9, 15, 43). As evidenced by the documents in this record, Attorney Scher made public records requests to the Department of Corrections, as to the electric chair, in May of 1999, despite the fact that no 3.850 motion was then pending in Lopez's case (See Appendix RR to motion). Given the lack of due diligence in earlier seeking public records, Davis merits no relief. See Buenoano, supra; Remeta, supra; Zeigler v. State, 632 So.2d 48 (Fla. 1993); Agan v. State, 560 So.2d 222 (Fla. 1990); Demps v. State, 515 So.2d 196 (Fla. 1987).

Further, despite any anticipated attempt by Davis to vilify the Department of Corrections, this record reflects compliance by that agency, compliance rendered under extreme time constraints and in the face of an equally extremely broad public records request. Thus, on June 10, 1999, Davis requested from DOC,

> . . . any and all files or documents concering the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair. By 'electric chair,' we mean both the 1923 and 1996 (sic) chairs, the current chair, if different, and all electric systems that have been or are used therewith. Also, we request copies of guidelines, all protocols, or other

> documents related to execution and post-execution procedures, both as to the electric chair and the condemned inmate. In sum, we seek any and all documents (regardless of form of memorialization, and including photographs, sound or video records, physical evidence, and electronic mail and/or files) relating to the electric chair and its use.

(RI 12).

As evidenced by the correspondence in the record, and DOC attorney Susan Schwartz' representations on the record at the June 21, 1999, hearing (see Attachment J to motion; Transcript of Proceedings at 75-8), DOC physically provided copies of the requested records and/or made them available for inspection at FSP itself, an option which Davis' counsel would not seem to have exercised. To ensure compliance, it would appear that Ms. Schwartz provided further copies of the requested documents, which apparently were already in transit to collateral counsel, at the hearing below (Id., at 79). Any contention that collateral counsel was entitled to a formal "hearing" on this matter or that counsel was not prepared to examine Ms. Schwartz, is refuted by the fact that Davis filed a motion to compel, naming Ms. Schwartz, which he failed to call up for a hearing before the court below; the State, in fact, ensured Ms. Schwartz's presence at the hearing of June 21, 1999. Judge Fryefield's ruling in regard to this claim was neither error nor an abuse of discretion, and, to the extent that any claim is presented regarding the court's failure to make *in camera* inspection of the exempt records of any agency other than DOC, such claim would be

procedurally barred, as counsel for Davis made no such request below.

ISSUE IV

THE CIRCUIT COURT'S DENIAL OF RELIEF AS TO DAVIS' PROCEDURALLY BARRED CLAIM INVOLVING A PET SCAN WAS NOT ERROR.

In this claim, collateral counsel contend that newly-discovered evidence of "advanced medical technology" in the form of a positron emission tomography scan or "PET scan," establishes that Davis is innocent and that his convictions and sentences are constitutionally unreliable. The basis for this claim is a June 17, 1999, letter from a forensic psychologist, Robert Berland, which is included as Appendix NNN to Davis' postconviction motion filed June 21, 1999. Apparently, Dr. Berland has never met or examined Davis, and relies simply upon background materials utilized in prior proceedings; Dr. Berland places great reliance upon statements from Davis' brother and sister relating to Davis' early life and history of head injuries, prior to his incarceration for these murders. The most that Dr. Berland can say at this juncture is that, in light of these materials which have always been available, a PET scan could "portray the residuals of these injuries." Dr. Berland affirmatively states, "It cannot be guaranteed that a PET scan will verify one, or both of these apparent injuries." (Berland Letter at 7). In Davis' 3.850, collateral counsel contend that Dr. Berland's view that a PET scan

could be helpful constitutes "newly-discovered evidence," under the standard set forth in Jones v. State, 591 So.2d 911 (Fla. 1991).

In its response below, the State contended that this matter was procedurally barred, as one which should have been raised earlier, and further contended that it was too speculative to present a basis for relief, citing Card v. State, 497 So.2d 1169, 1175 (Fla. 1986) (court states that it views letters by mental health experts dated shortly before a scheduled execution "with great suspicion," and rejects as speculative contentions that "substantial issues concerning defendant's competency are unresolved" and that "defendant may have psychiatric disturbance, possibly of organic origins," as insufficient for relief). In reliance upon its procedural bar argument, the State relied upon Hoskins v. State, 703 So.2d 202, 208-210 (Fla. 1997), decided in October of 1997, in which this Court held that it had been error for the sentencing judge to have denied defense counsel's request for his client to have a PET scan, for use in mitigation; in its subsequent opinion, however, this Court pointed out that the sentencing court could conduct a hearing under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), prior to the formal admission of any PET scan results at a resentencing proceeding. Hoskins v. State, 24 Fla.L.Weekly S211 (Fla. May 13, 1999). It was, and remains, the State's position that the Hoskins decision demonstrates that PET scan technology has been available at least

since 1997 (and in all likelihood much before that), and that Davis' failure to raise this issue, at least, within one year of the Hoskins decision in 1997, renders this claim procedurally barred. See Mills v. State, 684 So.2d 801, 804-5 (Fla. 1996) (claim raised in successive postconviction motion procedurally barred where defendant failed to demonstrate that basis for claim could not have been discovered earlier through the exercise of reasonable diligence and that the motion had been filed within one year of the discovery of the basis for the claim); Henderson v. Singletary, 617 So.2d 313, 316 (Fla. 1993) (defendant procedurally barred from presenting claim in successive motion relating to public defender's status as special deputy, where basis for claim had been public knowledge for several years previously, in light of Florida Supreme Court decision discussing matter).

In his order of June 22, 1999, Judge Fryefield accepted the State's assertion of procedural bar, and found presentation of this claim to constitute an abuse of process under Remeta v. State, 710 So.2d 543 (Fla. 1998), and Bolender v. State, 658 So.2d 82, 85 (Fla. 1995); the court also, correctly, noted that any claim of this nature could have been presented in Davis' postconviction motion filed in April of 1998 (certainly true, given the fact that, as noted, the Hoskins opinion was rendered in October of 1997). The court also found that Davis' claim was speculative and factually meritless, in that no probability of a different result

had been demonstrated in light of the alleged new evidence, noting that the prior record and published opinions showed that Davis had never lacked any ability to recall the murders or evinced any lack of intent in committing them.

The court's ruling was correct, and should be affirmed. This matter is procedurally barred, speculative and otherwise insufficient to justify any relief. To the extent that it is contended that alleged lack of collateral funding excuses the belated presentation of this claim, it should be noted that this Court rejected a comparable argument in Remeta, wherein collateral counsel contended that appointment of a forensic expert was necessary to review much of the newly-discovered evidence, and that appointment of an expert on fetal alcohol syndrome was likewise necessary, stating that lack of funding had precluded prior inquiry along these lines. This Court flatly rejected such argument, holding that all of these matters could have been discovered earlier through due diligence, that public records had been available earlier for such purpose, and that the procedural history of the case indicated that the defendant had had ample opportunity to investigate and raise claims in prior petition. It should also be noted that the Eleventh Circuit rejected a comparable allegation of "new technology" in John Mills' final federal habeas action. See In re: Mills, 101 F.3d 1369, 1371 (11th Cir. 1996) (leave to file successive petition denied, despite defendant's claim that

newly-discovered witnesses only available due to "the information superhighway.").

It cannot seriously be contended that, under any applicable state or federal constitutional standard, the newly-proffered matters would render Davis "innocent" of either the crimes of murder or his sentences of death. Cf. Jones; Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 703 (1993); Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). To some extent this is a re-statement of the claim of ineffective assistance of counsel this Court previously found procedurally barred, see Davis v. State, 589 So.2d 896 (Fla. 1991), and it should be noted that the Eleventh Circuit ruled in its opinion that it would have constituted fraud on the court for trial counsel to have asserted a defense of insanity, given Davis' recall of the crimes as well as Davis' confessions to his own attorney; trial counsel arranged for the appointment of a neurologist who thoroughly examined and tested Davis, finding only "reduced hearing due to a large amount of ear wax." Davis v. Singletary, 119 F.3d 1471, 1474-6 (11th Cir. 1997). Given Davis' recall of these murders, as well as his purposeful conduct throughout, it is clear that a PET scan could not uncover any matter which could render him less than culpable of these crimes or less than deserving of, or eligible for, the death penalty; the existence of such amount of brain damage does not, in and of itself, provide any basis for

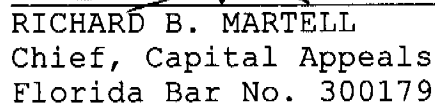
relief. See James v. State, 489 So.2d 737, 739 (Fla. 1986). Davis' position essentially would mean that even convictions and sentences of death final for decades must be held hostage to every advantage of new technology. Under the circumstances of this particular case it is clear that no relief was warranted, and the trial court's denial of relief as to this procedurally barred claim should be affirmed in all respects.

CONCLUSION

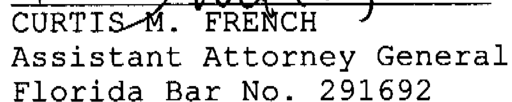
WHEREFORE, for the aforementioned reasons, the circuit court's order should be affirmed in all respects, and any requested stay of execution denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar No. 300179



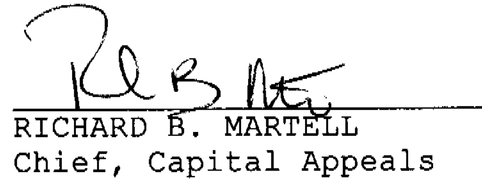
CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~hand~~ fax delivery to counsel for Davis, this 24th day of June, 1999.



RICHARD B. MARTELL
Chief, Capital Appeals