

IN THE SUPREME COURT OF FLORIDA

NO. SC00-1351

CHARLES W. FINNEY

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Joseph T. Hobson
Florida Bar No. 0507600
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Finney's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Finney was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ____" followed by the appropriate page number. The postconviction record on appeal will be referred to as "PC-R. ____" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

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INTRODUCTION

Significant errors which occurred at Petitioner' capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Petitioner. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights.

As this petition will demonstrate, Mr. Finney is entitled to habeas relief.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Finney's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Finney' direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Finney to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Finney's claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Finney asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Appellant was charged by indictment dated February 13, 1991, with first degree murder, sexual battery and dealing in stolen property (R.16-19). The sexual battery charge was nolle prossed. (R.143).

The case proceeded to trial on September 14-18, 1992. The jury returned verdicts of guilty on all counts (R-93). In the penalty phase, appellant, over a defense objection was shackled (R. 815). The jury by a vote of 9-3 recommended the death penalty (R.98). On November 10, 1992, after denying as legally insufficient appellant's motion for disqualification, the trial judge imposed a death sentence for the murder conviction, a sentence of life imprisonment for the armed robbery conviction and a fifteen-year sentence for the conviction of dealing in stolen property (R.143).

On direct appeal, the Florida Supreme Court affirmed Mr. Finney's convictions and sentences, Finney v. State, 660 So. 2d 674 (Fla. 1995).

On April 16, 1999, Mr. Jack Crooks, then of Capital Collateral Regional Counsel Middle, (CCRC-M), filed on behalf of

appellant a thirty-page final amended motion for postconviction relief. This motion contained five claims.

The circuit court held a Huff hearing on appellant's 3.850 motion on May 26, 1999, (PC-R. 272-297).

As a result of this Huff hearing, an Order was entered on June 9, 1999, by the Circuit Court granting an evidentiary hearing on only one of appellant's five claims (PC-R. 190). The court did not, in this ruling, delineate any reasons for denial of the other four claims. Postconviction counsel Mr. Crooks, then filed on May 4, 2000, a "Motion for Rehearing and To Grant an Evidentiary Hearing" (PC-R. 212). The circuit court denied his motion for rehearing on May 17, 2000.

On June 4, 2000, Mr. Crooks then filed a notice of appeal of this order which denied his motion for rehearing (PC-R. 236).

During the pendency of this appeal, Mr. Crooks left the employ of CCRC-Middle and undersigned counsel assumed the case. Undersigned counsel immediately filed a motion to remand jurisdiction from this court to the circuit court so that it could render a final order in which it actually explained its reasons for the denial of appellant's various claims. While this motion was pending, the trial court, upon prodding from the Office of State Attorney which was aware of this problem,

produced a written final order denying appellant's claims on October 31, 2000, nunc pro tunc to the date of the Huff Hearing, May 26, 1999.

This Court denied appellant's motion to remand the cause back to the trial court and this petition for writ of habeas corpus ensues, alongside the appeal of the denied postconviction motion.

ISSUE I

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT ALLOWING, OVER DEFENSE OBJECTION, THE ADMISSION INTO EVIDENCE OF CERTAIN PHOTOGRAPHS OF THE VICTIM, SANDRA SUTHERLAND.

In the presentation of the state's case against the petitioner, the assistant state attorney introduced a series of photographs of the victim into evidence. The nature of these photographs was graphic. They depicted the ankles, wrists and neck and face of the victim and, specifically, the ligature marks and wounds left by their having been tied and bound. Petitioner's defense attorney objected to these photographs being admitted.

Ms. Pittman: I would like the court to consider whether it is necessary to introduce all these photographs.
(R. 326)

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors.

The admission of these photographs permitted the state to elicit the passion of the jurors by shocking them with graphic pictures. The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses and stressed by the state in the penalty closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Finney's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Finney a fair trial in violation of Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution. Relief is proper and should be granted. To the extent that trial or appellate counsel failed to raise this issue, Mr. Finney was denied effective assistance of counsel. An evidentiary hearing is warranted.

ISSUE II

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT ALLOWING RUTH SUTHERLAND, THE MOTHER OF THE VICTIM, TO REMAIN IN THE COURTROOM TO OBSERVE THE TRIAL AFTER SHE HAD COMPLETED HER TESTIMONY.

The mother of the victim, Ruth Sutherland, testified for the state. At the time the state announced it was going to call her, it also stated that it did not anticipate needing her for any type of recall and requested of the Court that it allow her to remain in the courtroom for the rest of the trial after her testimony (R. 242).

Petitioner's counsel objected to this proposed arrangement, adding unequivocally that it had no intention to call Ms. Sutherland as a witness in their case (R. 243). The court overruled this objection and allowed Mrs Sutherland, the mother of the victim, to remain in the

courtroom for the rest of the trial after her own testimony was completed. Mrs. Sutherland was one of the first witnesses called by the state so she was observed by the jury for nearly all of petitioner's trial.

It was ineffective assistance of appellate counsel not to have raised this issue on appeal. Unquestionably, the prejudicial impact of allowing the victim's mother to remain in the courtroom during the entire trial in full view of the jury, as they decided petitioner's culpability and punishment, deprived the petitioner to his rights to a fair trial under the Fourteenth Amendment to the United States Constitution.

This allowance by the trial court was especially egregious where Mrs. Sutherland remained, as she did here, after she had testified to the same jury who now had to perform its duties under her observation. This jury unquestionably could feel nothing but undivided sympathy for Mrs Sutherland. Her presence during their performance of the their duties undermined the fairness of the trial.

Generally a trial judge may permit a witness to remain in the courtroom even though a rule of sequestration and exclusion has been invoked, but such discretion is subject to being abused and, if abused, it must be decided whether sufficient harm results to require a new trial. A trial court should not, as a matter of course, permit witnesses to remain in the courtroom when they are

not on the stand, unless it is shown that it is necessary for the witness to assist counsel in trial and that no prejudice will result to the accused and a hearing to determine these matters has been conducted particularly if the rule sequestering and excluding jurors has been invoked. See Randolph v. State, 463 So. 2d 186 (Fla. 1985), Thomas v. State, 372 So. 2d 997 (Fla. 4th DCA 1979).

No inquiry under Thomas was ever conducted. In fact, all which occurred involved the state announcing its request, the defense objecting to same and the court overruling said objection. Had such appropriate inquiry and analysis occurred, Mrs. Sutherland would not have been allowed to remain, and this prejudice would not have inured to petitioner's cause thus compromising the integrity of his judgment and sentence. Thomas involved the presence of a police witness, which is roughly analogous to the case at bar. Both such witnesses, a police officer and victim's mother, are going to be highly sympathetic in the eyes of a jury. If anything, Mrs. Sutherland would be more sympathetic so, at the very least, the standard applied to police witnesses should certainly, as matter of logic, apply to her. In Thomas, the Fourth DCA made the following analysis which is very applicable in this case:

"While it may be helpful, even necessary in some complex cases, to have a police witness to remain in the courtroom during trial and thus be excluded from the witness rule, we deem it proper to advise the trial court to make a finding no real prejudice would result from this procedure if the accused objects after invoking this rule. A hearing to determine if the police witness'

presence is necessary and indispensable and non-prejudicial would be the way to accomplish a proper finding. As was said in Richardson " ' the (trial) court's discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances' ."

Id. At 999

See Also Cubie v. State, 345 So. 2d 1061 (Fla. 1977); Ramirez v. State, 241 So. 2d 744 (Fla. 4th DCA 1970).

ISSUE III

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT NEVER RULING ON TRIAL COUNSEL'S MOTION FOR SEQUESTRATION.

At the beginning of petitioner's trial, his counsel requested that the jury be sequestered for the entire trial (R. 244).

The Court: All right the sequestration of the jury you mean, during the course of the trial Ms. Pittman?

Ms. Pittman: Yes Ma'am

(R. 244)

The court acknowledged the requests and intimated that it will need to consult with the appropriate rule and presumably rule on the request. An examination of the trial record reveals that the trial court apparently never ruled on this request.

Absent a fair determination by the trial court on this motion, Mr. Finney's right to a fair and impartial jury, unaffected by extensive media coverage, was impaired.

It was ineffective assistance of appellate counsel not to have raised this glaring omission in the record for consideration on direct appeal. To the extent that trial or appellate counsel failed to raise this issue, Mr. Finney was denied effective assistance of counsel. An evidentiary hearing is warranted.

ISSUE IV

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT EXCUSING TWO JURORS FOR CAUSE.

The trial court struck without justification two jurors for cause.

One juror, herein designated as Juror J, was a female who had initially made some statement, casting doubt on her ability to discharge her prospective duties as a juror in a fair and impartial manner. Juror J had been convicted of a felony and had been incarcerated in Florida State Prison (R. 217).

Juror J, when questioned, had stated that she was treated fairly by the state attorney and the sheriff and that, overall, her experiences would not affect her deliberations as a juror. Nonetheless, the court struck her for cause (R. 231).

Another Juror, who shall be designated as Jurors S, had expressed an initial reservation about the death penalty. Yet even the state attorney expressed the view that this juror had been rehabilitated on that issue (R. 220). Again the court inexplicably struck Juror S for cause (R. 221).

In assessing a juror's competence, the test is whether the juror can lay aside any bias and render his verdict solely upon the evidence presented and the instructions on the laws given to him by the court. See Franco v. State, 2001 WL 87826 (Fla. App. 4 Dist.) Bryant v. State, 765 So. 2d 68 (Fla. 4th DCA 2000).

Both jurors clearly indicated that they could be fair and impartial. It was an abuse of discretion on the part of the trial court to have struck them for cause.

To the extent that trial or appellate counsel failed to raise this issue, Mr. Finney was denied the effective assistance of counsel. An evidentiary hearing is warranted.

ISSUE V

APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE THE ISSUE OF THE TRIAL COURT REFUSING TO INSTRUCT THE JURY TO DISREGARD THE COMMENT MADE BY THE STATE ATTORNEY IN CLOSING ARGUMENT THAT NO SEMEN WAS FOUND IN THE VICTIM EITHER VAGINALLY OR ANALLY.

The trial court denied petitioner's motion for a new trial which cited as error the trial court's refusal to instruct the jury that the state attorney, Ms Vogel, improperly argued that the evidence showed no semen was found on the victim either anally or vaginally. This comment came in the state's rebuttal closing (R. 692-693). It was an attempt by the state attorney to discount the theory put forth by the petitioner's counsel that the incident between he and the victim might have had a passionate aspect.

This was a crucial misstatement by the state attorney and the court's declination to issue an appropriate instruction was a very significant appellate issue, especially where one of the issues rejected on the direct appeal was that the state had not presented

evidence inconsistent with the defendant's hypothesis of innocence. See Finney v. State, 660 So. 2d 674 (Fla. 1995).

There was no basis in the evidence for the statement of the state attorney that no semen was found either vaginally or anally on the victim. The trial court's actions in refusing to instruct the jury, as requested by petitioner's counsel, warranted appellate scrutiny.

To the extent that trial or appellate counsel failed to raise this issue, Mr. Finney was denied the effective assistance of counsel. An evidentiary hearing is warranted.

ISSUE VI

**MR. FINNEY'S EIGHTH AMENDMENT RIGHT AGAINST
CRUEL AND UNUSUAL PUNISHMENT WILL BE
VIOLATED AS MR. FINNEY MAY BE INCOMPETENT AT
THE TIME OF EXECUTION.**

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Petitioner acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, petitioner acknowledges that before a judicial review may be held in Florida, the defendant

must first submit his claim in accordance with Florida Statutes.

The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted] Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, petitioner raises this claim now.

Petitioner has been incarcerated since 1990. Statistics show that incarceration over a long period of time will diminish an individual's mental capacity. Because petitioner may well be

incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

For the last eight half years, petitioner has lived on Florida's death row, in a cell approximately 6 feet wide, 9 feet long, and 9.5 feet high. Petitioner is allowed yard time only twice a week and showers every other day. The majority of petitioner's fellow death row inmates, the people with whom he can routinely talk and associate, also suffer various forms of mental illness and personality disorders. Petitioner's already fragile mental condition could only deteriorate under these circumstances. His mental condition may well decline to the point that he is incompetent to be executed.

ISSUE VII

EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES Mr. Finney'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The trial court erred in not granting an evidentiary hearing so petitioner could prove that death by electrocution is cruel and/or unusual punishment which violates his rights under the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

A. The Death Penalty Reform Act of 2000 is unconstitutional, so electrocution remains the mandated form of execution.

Though the Death Penalty Reform Act of 2000 purports to change all death sentences to death by lethal injection, that act violates ex post facto laws, the Eighth and Fourteenth Amendments of the United States Constitution, and this Court's decision in Washington v. Dowling. Washington v. Dowling, 109 So. 588 (Fla. 1926). In Sims v. Florida, this Court held that Washington v. Dowling is distinguishable from the current legislation because the new legislation retains the option of death by electrocution. In fact, the Florida legislation is significantly different from the legislation this Court used to support its holding. The statutes in the Montana, Mississippi, Delaware, and Arizona cases that this Court cited changed the method of execution from one that was arguably unconstitutional to one that the courts found constitutional, but preserved the old method of execution unless the person sentenced to die affirmatively chose the new method of execution. See Vickers v. Stewart, 144 F3d 613, 617 (9th Cir. 1988); DeShields v. State, 534 A.2d 630, 639 n.7 (Del. 1987); Wetzel v. Wiggins, 85 So.2d 469, 471 (Miss. 1956); State v. Fitzpatrick, 684 P.2d 1112, 1113 (Mont. 1984). The Florida statute however, changes all executions to lethal injection, the new method of execution, unless the person sentenced to die affirmatively chooses to have the State use the electric chair to kill her.

Thus, when it enacted the Death Penalty Reform Act of 2000, the legislature affirmatively took the choice other states left to people sentenced to die, and chose for them death by lethal injection. That action violated Petitioner's Eighth and Fourteenth Amendment rights under the United States Constitution. In Boykin v. Alabama, the United States Supreme Court held that an effective waiver of the federal constitutional privilege against self incrimination, right to a jury trial, and the right to confront one's accusers require an affirmative showing that the waiver was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238 (1969). In Carnley v. Cochran, the United States Supreme Court stated that the waiver of the Sixth Amendment right to counsel must be an affirmative waiver. Carnley v. Cochran, 369 U.S. 506 "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U.S. 506, 516. Likewise, this Court held that an accused may waive a jury recommendation during the penalty phase only if the record supports a knowing and voluntary waiver. State v. Hernandez, 645 So.2d 432 (Fla. 1994); Lamadline v. State, 303 So.2d 17 (Fla. 1990).

Accordingly, a person's decision regarding the means of death imposed by the state is protected by the Eighth Amendment and the Fourteenth Amendment. The legislature cannot waive a person's choice to die by the means to which they were sentenced. Such a waiver must be made by the person sentenced to die, and it must be supported by a record that indicates an intelligent and voluntary choice. The Death Penalty Reform Act violates ex post facto law, Washington v. Dowling, and the Eighth and Fourteenth Amendments. An evidentiary hearing and 3.850 relief are necessary.

Execution by judicial electrocution was mandated by Florida Statute § 922.10. Hence, the sentence imposed by this Court is unconstitutional because it subjects Petitioner to judicial electrocution which constitutes cruel and unusual punishment.

B. Death by electrocution is cruel and/or unusual punishment which violates Petitioner's rights under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section Seventeen of the Florida Constitution.

The Constitution of the United States prohibits punishment that is cruel and unusual. U.S. Const. Amend VIII. The Florida Constitution bars any punishment that is either cruel or unusual. Fl. Const. Art. I, § 17. Judicial electrocution is constitutionally cruel under Florida and Federal Constitutional

standards because it involves the unnecessary and wanton infliction of pain and is an affront to human dignity. Petitioner can demonstrate that judicial electrocution violates both the state and federal standards.

Experts can clearly establish by scientifically reliable evidence that judicial electrocution results in extreme pain and suffering. The electrocuted person remains conscious for a significant period of time, during which his brain continues to process pain signals. The pain results from burning flesh, massive muscle contractions, and heat related distension of internal organs.

Petitioner challenges the assumption that judicial electrocution, if carried out properly, results in instantaneous and painless death. His experts would have testified that judicial electrocution always involves extreme pain and suffering because the condemned person remains conscious for a variable amount of time.

New circumstances have diminished the Eighth Amendment stature of electrocution as a means of judicial execution. The nation's evolving standards of decency have made death by electrocution an increasingly rare punishment. Legislative acceptance or rejection of a particular practice is the standard judicial measure of unusualness. Death by judicial electrocution

is constitutionally unusual under Florida and Federal Constitutional standards because only four of the thirty eight states that authorize executions mandate execution by judicial electrocution. In the past years five states have rejected the practice (Connecticut, Indiana, New York, Pennsylvania, South Carolina), and four states abolished electrocution as a means of execution in the last decade (Virginia 1994, Ohio 1993, Louisiana 1991, Pennsylvania 1990). Thus, electrocution has become an unusual means of judicial execution.

The violation of petitioner's constitutional rights which results from prospective death by electrocution is not harmless error. An evidentiary hearing was warranted. The trial court erred in denying this claim without an evidentiary hearing.

ISSUE VIII

EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES Mr. Finney'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death

. . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890).

Despite the perception that lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, no evidence clearly demonstrates that they become unconscious to their pain and impending death. Indeed, a significant number of the persons executed by lethal injection in other states have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary pain.

The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits punishments that "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg, 428 U.S. at 183; citing Gamble, 429 U.S. at 103). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation,"

id. at 366, or to "circumstances of *terror, pain, or disgrace*" "superadded" to a sentence of death. *Id.* at 370 (emphasis supplied). See In re Medley, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary confinement induces "further terror," while "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment." See also Trop v. Dulles, 356 U.S. 86, 101 (1958).¹ A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" Gregg, 428 U.S. at 173 (citing Trop , 356 U.S. at 100). The court must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. Compare Maynard v. Cartwright,

¹See Hudson v. McMillian, 503 U.S. 1, 16-17 (1992) Blackmun, J., concurring) ("As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' not 'injury.' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today.").

486 U.S. 356 (1988), with Lewis v. Jeffers, 497 U.S. 764 (1990).²

Even if petitioner is killed by lethal injection without suffering severe pain, any mutilation that occurs such as multiple, crude, excessive, unnecessary, gaping wounds, offends notions of basic human dignity underlying the Eighth Amendment. 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 draw 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).

²Farmer v. Brennan, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an "objectively intolerable risk of harm").

Studies show that lethal injection often results in terror, pain and disgrace because the procedure required to kill by lethal injection quickly and painlessly is often too technical for the executioners to follow or willingly ignored. Professor Radelet concluded, "Lethal injections are far more likely to be botched than any other modern method of execution."³ DOC has already bungled one execution, resulting in unconstitutional pain and mutilation.

Finally, Florida's lethal injection procedure violates the Supremacy Clause of the United States Constitution as the State has not received an exemption from the Controlled Substances Act, 21 U.S.C. §§ 812, 829, 353, and 21 C.F.R. § 329 & 1328, for the prescription, possession, or administration of the drugs used in the lethal injection.

Petitioner respectfully urges this Court to grant habeas corpus relief.

³Professor Michael Radelet has testified that there have been at least sixteen executions by lethal injection that have been botched.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the following has been
has been furnished by United States Mail, first class postage
prepaid, to all counsel of record on this _____ day of February,
2001.

Joseph T. Hobson
Florida Bar No. 0507600
Assistant CCRC-Middle
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

Joseph T. Hobson
Florida Bar No. 0507600
Assistant CCRC-Middle

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Petitioner

Copies furnished to:

The Honorable Chet A. Tharpe
Circuit Court Judge
Hillsborough County
Courthouse 317 Tower
801 East Kennedy Blvd.
Tampa, Florida 33602

800 East Kennedy Boulevard
Tampa, Florida 33602

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney
General
Westwood Building, Seventh
Floor
2002 North Lois Avenue
Tampa, Florida 33607

Charles Finney
DOC# 516349; P4226S
Union Correctional
Institution
Post Office Box 221
Raiford, Florida 32083

Sharon Vollrath
Assistant State Attorney
Office of the State Attorney
Hillsborough County
Courthouse Annex

