IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 65,663

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

TABLE OF CITATIONS (CONTINUED)

STATEMENT OF THE CASE AND FACTS

On August 1, 1983, two officers of the Orlando Police Department arrested Thomas Provenzano for disorderly conduct after he was observed making obscene gestures at oncoming traffic (R 869-870, 1289-1297).[1] Provenzano was placed in a chokehold, taken to the ground and his nose broken when he resisted being handcuffed (R 891, 902, 906-908).

The resisting arrest charge became an obsession with Provenzano. He would often go twice a day to the clerk's office to check his file (R 1392-1394). He followed the police officers who arrested him (R 874-875, 904) and occasionally threatened them (R 901, 905, 908, 878).

On November 4, 1983, Provenzano bought a .38 caliber "Rossi" revolver from a pawn shop (R 823-825). On December 13, 1983, a 12 gauge pump shot gun was purchased and the barrel shortened approximately 2½ inches (R 828-831). Just before Christmas of 1983, Provenzano had a jacket altered in order to conceal the weapons (R 816-820). His personal hygiene deteriorated and he began wearing combat boots and army fatigues (R 832, 841, 847, 912-913, 924).

A .45 caliber "Commander" semi-automatic assault rifle was purchased January 3, 1984 (R 838-840). On January 4, 1984, he stated, "Come Monday this city will be sorry; it's treason!" (R 912-915).

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[1] (R) refers to the Record on Appeal of the instant cause, Supreme Court Case No. 65,663.

He appeared at the Orange County Courthouse on January 9, 1984, wearing black combat boots, army fatigue pants, a long olive drab army coat, a red bandana, and a shoulder bag (R 574). He was told that he had come in a day early, that his trial was not until the next day and to return then (R 547). He left without incident. On January 10, 1984, he checked in with the public defender's office and appeared to be in a cheerful and pleasant mood (R 922). He asked whether his attorney was present, and when told that he was not, Provenzano stated, "Good. I can't wait. I have got it beat. I can't wait until those two policemen walk in. I'll show them." (R 922-923).

A high school student in the hallway of the Orange County Courthouse saw Provenzano pacing up and down the hallway muttering to himself, stating words to the effect of, "I'm going to do it. I'm going to do it. This is where guys get their ass kicked." (R 865). At this time Provenzano was carrying the knapsack (R 865). He became agitated at a woman who glanced his way, and screamed, "Don't look at me that way. That's the way they looked at Jesus!" (R 1407).

He thereafter entered Judge Conser's courtroom on the 4th floor of the Orange County Courthouse (R 547, 582). Correctional Officer Mark Parker informed him that he would have to have the knapsack searched or leave it outside the courtroom (R 585). Accordingly, he left the courtroom and returned approximately 45 minutes later (R 586-587). Parker was told by Bailiff Harry Dalton to keep an eye on the defendant (R 587). In this regard, Bailiff Dalton had asked for and obtained

permission from Judge Conser to search Provenzano the day before (R 615, 521-524). An assistant state attorney who also had observed the combat garb the day before brought a hand gun to the courtroom in his briefcase, just in case (R 527-528). Provenzano was being described as a "signal 20" ...a crazy person (R 1784).

When Provenzano's case was called, the defendant approached Judge Conser, his hand in his pocket (R 612). Because his defense attorney was not present at that time, he was told by Judge Conser to return to the spectator portion of the courtroom to await his attorney (R 612). Bailiff Dalton was instructed to search Provenzano, so Dalton approached him saying that he was going to have to be searched and that he was his friend (R 588-590). Corrections Officer Parker exited the courtroom through a side door, then came in behind the defendant. As the defendant reached in his pocket, Dalton went to grab him and was shot in the face by Provenzano, who screamed, "You're not my friend, m----- f-----!" (R 551, 526, 576-578, 588-590, 595).

The people in the courtroom took cover. (R 553). Officer Parker wheeled around and ran from the courtroom in order to get help, and as he exited the courtroom he heard someone exit behind him (R 590, 607). Officer Parker heard one shot and was struck in the head as he turned a corner in the hallway, and he proceeded a little further when he was struck in the back by a bullet shot from Bailiff Wilkerson's pistol (R 591).

Bailiff Wilkerson was relieved from duty and exited Judge Coleman's courtroom. Shortly thereafter, gun shots were heard (R 630-633). A bullet came through the window of the courtroom door (R 632, 674-675, 684). A deputy fire chief (un-uniformed) and his wife were in the hallway when they heard shots fired, and they observed Bailiff Wilkerson with his gun drawn (R 656-660, 663-664). The couple got up against the wall when a gunman ran past, mumbling, "I'm going to kill you m----- f------. I'm going to kill all of you." (R 660, 665). He was seen to take a "military stance" toward the doorway holding a "rifle" out in front of him (R 666). A loud discharge followed (R 667).

Provenzano then took shelter in a cafeteria area (R 635-638). Corporal Al Jacobs of the Orange County Sheriff's Office observed the defendant holding a shotgun, and Deputy Jacobs shot him in the back through a window (R 649-655). The defendant was armed with a 12 gauge pump shotgun loaded with .00 buck shot, a .45 caliber V.E. Commando Mark 45 assault rifle with a 30 round clip, a Rossi .38 caliber 5 shot revolver (R 710-712), a box of .38 caliber ammunition, a box of .45 caliber ammunition, and an extra clip of .45 caliber ammunition (R 686-690).

Parker was shot in the back by Wilkerson's pistol (R 725). An orthopedic surgeon examined Parker and testified that Parker was a quadriplegic due to spinal cord injury (R 806-808). Similarly, a neurosurgeon who examined Dalton found that Dalton had received a gun shot wound in the head and as a result lost

his right eye and suffered paralysis to the left side (R 857-860). Bailiff Wilkerson was killed. An autopsy showed that Wilkerson was injured primarily in the neck area and right hand with six shotgun pellets, the trajectory of which was essentially parallel to the floor (R 742-749). One pellet entered the larynx and tore a major blood vein in the left side of Wilkerson's neck, causing aspiration of blood and asphyxiation (R 749-754). The distal part of the finger of Wilkerson's right hand was severed (R 756-757).[2]

Provenzano was taken to the Orlando Regional Medical Center for the gun shot injury to his back. After preliminary treatment and x-rays, he stated, "Shirley and Epperson arrested for me resisting. They stopped me for no reason. I have been angry at them since that time. I wanted to get rid of them, get them out of my sight. I was scared. I always carried a gun with me. I'm not saying anything further anymore." (R 950).

Provenzano was charged by Indictment dated January 17, 1984, with two counts of attempted first-degree murder and one count of murder in the first-degree (R 2726-2727). The Indictment, as brought, was signed by Robert Eagan, State Attorney of the Ninth Judicial Circuit of Florida (R 2727).

Several motions to dismiss the Indictment were filed by Mr. Provenzano's defense counsel, the motions based primarily on the conflict of interest existing between the State Attorney's

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[2] The cylinder release latch from Bailiff Wilkerson's Smith and Wesson revolver was apparently blown from the revolver by the single shot gun blast. There were four (4) spent cartridges in Wilkerson's gun (R 679, 713-714, State's Exhibit 42).

Office of the Ninth Judicial Circuit and the prosecution of Mr. Provenzano (R 2741-2750). Accordingly, on January 23, 1984, Governor Graham, issued Executive Order Number 84-17 assigning Ed Austin "to discharge the duties of the Honorable Robert Eagan... as they relate to the investigation, prosecution, and representation of the State of Florida and all matters pertaining to or arising from the indictment of Thomas Harrison Provenzano, as previously described herein." (R 2752-2753).

On February 15, 1984, three expert psychiatrists were appointed to determine Provenzano competency to stand trial (R 2784-2785). That same day, by order of the Supreme Court of Florida, the Honorable Clifford B. Shepard, Chief Judge of the Fourth Judicial Circuit Court of Florida, was assigned to hear, conduct, try, and determine the case of the State of Florida versus Thomas Harris (sic) Provenzano, Case No. CR84-835 (R 2786). The three court-appointed psychiatrists found Mr. Provenzano competent to stand trial (R 2790-2798, 2795, 2798), and the court entered an order of competency in this regard (R 2809-2810).

A motion to dismiss indictment was filed by Provenzano's defense attorney, which motion alleged that the indictment had been tainted by intense pre-indictment publicity by the media, tainted by presentation by a prosecutor who had removed himself from the case due to a Fitzpatrick v. Smith [432 So.2d 89 (Fla. 5th DCA 1983)] type conflict, and further that the defendant's motions to voir dire the grand jury had been denied

(R 2817-2818). A second motion to dismiss the indictment filed by defense counsel alleged that the state had extended an invitation to the defendant to present exculpatory evidence to the grand jury prior to their returning an indictment, and this invitation had not been honored prior to the return of the indictment (R 2820-2821). The motions to dismiss the indictment were denied (R 2863).

The Office of the Public Defender for Orange County was permitted to voluntarily withdraw, and Mr. Jack Edmund, Esquire was appointed (R 2850). A notice of intent to rely on the defense of insanity was thereafter filed (R 2852-2853), and another motion to dismiss indictment was filed, which motion alleged, inter alia, that Section 921.141, Florida Statutes is procedural in nature and not substantive law, and that the statute violates the separation of powers between the law making function of the state legislature and the rule making function of the judiciary, violating Article 5, Section 2 of the Florida Constitution.[3] The motion further alleged that Section 921.141 violated the 5th, 8th and 14th Amendments to the Constitution of the United States and Article I, Section 2, 9, 16 and 17 of the Constitution of the State of Florida, in that it allowed the trial judge to overrule a jury recommendation of a life sentence. The motion further averred that death by electrocution as provided by Section 922.10, Florida Statutes is cruel and unusual

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[3] See Morgan v. State, 415 So.2d 6 (Fla. 1982), cert. denied 459 U.S. 1055 (1982).

punishment in violation of the 8th and 14th Amendments to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida (R 2929).[4] The motion to dismiss was denied (R 2938). A motion to suppress evidence seized and an unlawful search (R 2884-2892) was similarly denied (R 2936).[5]

The matter proceeded to trial on June 11, 1984, 152 days after the shooting incident. Prior to the commencement of selection of jurors, Provenzano notified Judge Shepard that he had been under the impression that his jurors would not be residents of Orange County (R 3-5). He was adamant that he did not want to be tried by the residents of Orange County (R 10).

An oral motion for change of venue was thereafter made by defense counsel and joined in by the state to the extent that the court should attempt to select impartial members of Orange County to serve on the jury. In the event that it then appeared impossible to obtain an impartial jury, then and only then should the court grant the motion for change of venue (R 18-21). The court deferred ruling on the motion to change venue (R 21-22). A jury was selected, sworn (R 372), and thereafter sequestered prior to opening argument or introduction of any evidence (R 431-434).

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[4] See Booker v. State, 397 So.2d 910 (Fla. 1981), cert. denied 454 U.S. 957 (1981).

[5] It should be noted that the search was conducted pursuant to a search warrant issued by the Honorable Rom Powell, Circuit Court Judge of Orange County (R 2886-2892).

The evidence presented by the State, viewed in a light most favorable to the verdict, established that on January 10, 1984, Provenzano went to the Orange County Courthouse intending to shoot Officers Shirley and Epperson (R 950). Those officers were not in the courtroom, however, and when the bailiffs surrounded the defendant and informed him that he was to be searched, Provenzano shot Bailiff Dalton in the face at a distance of approximately 2 feet (R 576-578). Parker ran out into the hallway and was shot once by Provenzano and once by Wilkerson (R 589-591, 603-607). Wilkerson was then shot in the neck with a 12 gauge shotgun and killed as he pointed his service revolver at Provenzano (R 660, 632, 665-667, 749-760).

An insanity defense was presented. It was established that Thomas Provenzano was born June 6, 1949 (R 970). He grew up in a suburb in Chicago (R 992). His mother deserted him when he was 2½ years old, and thereafter he and his sister lived with grandparents (R 992). His mother was not seen again until Thomas was 12 years old (R 993). His father remarried, and thereafter Thomas lived intermittently with his sister and father (R 994). He led a checkered childhood, stealing and using drugs (R 994-995).

When 19, Provenzano married and moved to Florida (R 998). His wife bore him a son [Tommy, Jr.] in 1969, and that turned his life around (R 999). He quit stealing, got off drugs and obtained a job with the railroad (R 999).

Two years later his wife informed him that she wanted a divorce because she had fallen in love with her employer (R

1000-1006). Though he tried, Provenzano was unable to obtain custody of his son (R 1006-1009). He became "cold" and stopped talking, ignored his family, and turned to studying the Bible (R 1009). The sole exception seemed to be his attitude toward his nephew, whom he treated like a son (R 1011).

An amateur minister counseled Provenzano about the Bible, but the friendship ended abruptly when the minister made homosexual advances (R 1012, 1015). A short stint in the Air Force in 1972 ended in an undesirable discharge when Thomas went A.W.O.L. to see his son (R 1016-1023).

Provenzano remarried in 1973, and though his wife became pregnant, the child [another son] was still born (R 1031). Thomas blamed his wife for the death. He became even more reclusive, and he studied the Bible and dictionary constantly (R 1032-1034). Working entirely on his own, he became a licensed master electrician in 1976 (R 1035).

In March of 1976 he went to Chicago to attend the funeral of a friend who had died from a drug overdose, and upon returning he related to his (the defendant's) sister that the police in Chicago had ejected him from town, placing an undercover officer on the plane to escort him back to Florida (R 1041-1046).

After his return from Chicago, Thomas began flinching and became jumpy (R 1048). He stopped eating at his sister's house, thinking the food was poisoned (R 1048). He carried the Bible with him constantly. He believed that his sister's husband [who was in reality a truck driver] was an undercover policeman assigned to watch him (R 1049).

In 1982, the defendant's nephew required thyroid surgery (R 1053). Thomas argued that the surgery was unnecessary, and that instead the nephew would be healed by him with the Lord's power (R 1053-1054). The required surgery was performed and thereafter Thomas terminated all relationships with his sister (R 1055-1057). He continued to come to her house in order to visit the nephew but would only drive up outside the house and honk the horn for the nephew to come outside and talk. He refused to enter the house (R 1057-1060).

Thomas told his nephew that he (the nephew) had to be stronger in his mind and soul than "they are" (R 1102). He further stated that the christians would have to unite in order to fight the bad people (R 1103). The nephew was told to always eat at home, and to watch out for people who rule the city and the world (R 1103-1104). In 1981, he expressed a belief that he was Jesus Christ (R 1159-1160, 1172-1173).

In 1982, Provenzano rented a large-sized bedroom and lived exclusively by himself for approximately 1 year (R 1124-1127). His landlady described him as a good tenant who was nice, always paying his rent on time (R 1128). He kept to himself, did not talk much, and had few or no visitors (R 1126). From August of 1982 until January of 1984 Thomas found and rented a different 9x11 room (R 1131-1132). He paid his rent weekly, never talked much, and dressed cleanly and neatly (R 1133).

Provenzano usually ate at the same restaurant, and ordered the same meals (R 1152-1156). He always watched the food being prepared (R 1088-1089, 1670). He never talked to or bothered anyone (R 1152-1156).

In 1983, he went to the Orlando Police Department and turned in a bottle of wine, believing that he had been poisoned (R 1207-1210). He developed a fascination with the Susan Assad case (R 1136, 1232), and contacted the assistant coordinator at the Seminole County Courthouse (R 1388-1390). In late April of 1983, he completed doing research in the Assad case and gave Ms. Assad's defense counsel the research he had done (R 1235-1237). Thereafter, at the Assad sentencing hearing conducted on June 16, 1983, Provenzano stood up and addressed the judge, attempting to speak in behalf of Ms. Assad (R 1240). He was directed by the trial judge to direct his assistance to defense counsel (R 1241).

The disorderly conduct offense involving Officers Shirley and Epperson occurred in August, 1983, two months after the Assad fiasco. On December 16, 1983, Provenzano was involved in a traffic accident handled by the Florida Highway Patrol (R 1641-1645). No citations were issued, and Provenzano behaved "normally" towards the highway patrol officer (R 1649, 1650).

Dr. Barbara Marra, a clinical psychologist, administered tests to Thomas Provenzano on January 26, 1984 (R 1299-1310). Dr. Marra analyzed each of Provenzano's responses to the different aspects of the tests (R 1310-1334), and in summary felt that Provenzano suffered from loose thinking, a thought disorder, low self-concept, a homosexual preoccupation, and rigid thinking patterns (R 1335). These test results were turned over to Dr. Pollack, a clinical psychiatrist (R 1512-1518).

Dr. Pollack examined Provenzano on January 20, 1984 and again on January 26, 1984 (R 1518-1519). Dr. Pollack reviewed the initial offense reports, the investigative reports, the psychologist report prepared by Dr. Marra, and interviewed Dr. Marra prior to coming to an opinion as to Provenzano's sanity on January 10, 1984 (R 1531-1532). Dr. Pollack believes that Provenzano had a mental defect that caused him to lose his ability to understand or reason accurately, and that accordingly he did not understand that his acts were wrong at the time because of the mental defect (R 1532-1533). The doctor concluded that Provenzano was and is a dangerous person, that his illness is so severe that given identical or similar circumstances he would react the same (R 1542-1543).

Dr. Henry Lyons, a board certified psychiatrist (R 1419-1426, 1438), examined Provenzano on June 8, 1984 (R 1440). Prior to the doctor's evaluation he was provided extensive material (R 1440-1442). His opinion was also that Provenzano was insane at the time of the shooting (R 1462).

Several lay people testified that, in their opinion, Provenzano was sane on or about January 10, 1984 (R 1613, 1618, 1627, 1633, 1645, 1649, 1661). Dr. Robert Kirkland, a board certified psychiatrist who testified for the state (R 1680-1683), interviewed the defendant on February 20 and 22, 1984 for approximately 2 hours. (R 1684). At that time Thomas appeared delusional (R 1687). Dr. Kirkland stated that, based upon the limited information received from the defendant and from the state attorney's office, Thomas Provenzano was legally sane on January 10, 1984 (R 1689-1690).

Dr. Gutman, also a board certified psychiatrist, testified on behalf of the state (R 1743-1746). Dr. Gutman had treated Provenzano in September of 1982 in reference to a workman's compensation matter, and at that time described Thomas as having some disability with a chronic pain associated with the industrial accident, and that he had a mixed character and behavior disorder with obsessive, compulsive, paranoid, and passive/aggressive personality traits[6] (R 1747). In September of 1982 Provenzano had a tendency to be accusatory, obsessive, compulsive, preoccupied with himself, very meticulous, litigious, and concerned for the law and exactitude in righting any wrongs that might have been done him (R 1748). Although the doctor did not examine him for that purpose at that time, the doctor opined that in 1982 Thomas was legally sane (R 1748).

Pursuant to court order, Dr. Gutman examined Thomas on February 17, 1984 for approximately an hour and a half and found that Thomas displayed the same mixed character and behavior disorders. "They were, were a paranoid personality, obsessive, compulsive personality and a passive aggressive personality. Inadequate handling of adult situations. So he had those same features. I did feel that he was, there was evidence of for a period of time leading up to this event and adjustment reaction and stress reaction that he was under." (R 1748-1753). The doctor felt that the defendant had the ability to premeditate on

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[6] A character disorder is a long-term chronic developmental behavioral pattern in which a person displays certain patterns and traits that consistently come up all the time (R 1748).

January 10, 1984, that he knew the difference between right and wrong, and that he was legally sane (R 1753-1754). Provenzano's state of paranoia had increased between 1982 and 1984 (R 1769, 1775).

Dr. Wilder, another psychiatrist testifying for the State of Florida (R 1802-1806), also opined that Provenzano was legally sane on January 10, 1984 (R 1813).

Following the presentation of evidence, a charge conference was had where defense counsel objected to the state's proposed instruction concerning transferred intent on the grounds that the facts of the case are such that the proposed instruction[7] was vague, ambiguous, misleading and not predicated upon the facts of the case (R 1822-1823). The objection was denied (R 1823). In this regard, the jury was in fact given the instruction on transferred intent (R 1970, 3289).

The alternate jurors were excused (R 1987), and following approximately 3½ hours of deliberation, the jury found Provenzano guilty of one count of first-degree murder and two counts of attempted first-degree murder (R 1990-1992, 3314-3316).

The trial portion concluded on June 19, 1984. The penalty proceeding occurred July 11, 1984. Defense counsel presented a motion for new trial and argued, inter alia, that reversible error occurred where the trial court instructed the

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[7] "If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated." (R 1822).

jury on transferred intent over objection (R 2035, 3327). Defense counsel further renewed his motions for judgment of acquittal, arguing that the proof had at most established the offense of second-degree murder in the killing of Arnold Wilkerson (R 2037-2038, 3327). The motion for new trial was denied (R 2038, 3434).

PENALTY PHASE

Provenzano was adjudicated guilty of two counts of attempted first-degree murder and one count of first-degree murder (R 2040-2041, 3435-3436). By stipulation, the state offered into evidence the adjudication of guilt as to the two attempted first-degree murder counts (R 2043). The state offered no other evidence and relied solely upon the testimony and proof presented during trial (R 2043-2044).

Detective John Chisari of the Orlando Police Department testified on behalf of Provenzano (R 2044-2045). The officer recounted briefly the incident where Thomas had come to the police station with a bottle of wine and reported that he had been poisoned (R 2045-2046). Officer Chisari interviewed Provenzano after the shooting incident on January 10, 1984 and was told by Thomas that explosives were in his apartment and he didn't want anybody to get hurt (R 2048). The officer, along with bomb-disposal personnel, went to the apartment and found hand grenades and pipe bombs (R 2048-2049).

Provenzano then testified in his own behalf. Thomas, who is 35 years old, had one conviction concerning theft as a

juvenile (R 2050-2051). He was born in Chicago, Illinois, brought up by his step-mother and grandparents, and rarely if ever saw his father (R 2052). When he was 15 years old, he dropped out of school and began hanging around with some neighborhood kids at a pool hall (R 2053). He worked at many jobs, but was unable to keep them due to poor education (R 2054).

He married in 1968, and moved to Florida in order to work as an apprentice at his in-law's electrical and plumbing company (R 2055). In 1970, his wife obtained a divorce and married her employer, obtaining custody of his son (R 2056-2058). Thomas went back to Chicago to pursue his career in electrical construction, and remarried in 1973 (R 2058). His discharge from the Air Force resulted from renewed association with his old friends in Chicago and use of drugs (R 2058-2059).

He remarried and moved back to Florida (R 2059). After the stillbirth of a child, Thomas' second wife called it quits and moved on (R 2059-2061). Thomas turned to the electrical profession, obtained his master's license and started his own business (R 2061). After the second divorce, he met Teresa Chambers (R 2062). They were both employed by ABC Liquor Co. (R 2063). Thomas took Teresa on a few dates, and fell deeply in love with her, but she did not return his affection (R 2063). She was kind of "playing the field at the time" and chose an old boyfriend over Thomas (R 2063). Even though Teresa did not choose him, he continued to try to court her because she was not married (R 2063).

Thomas related that he returned to Florida from Chicago in 1974 and saw his 3 year old son (R 2065). He learned that his first wife's husband had succeeded in adopting the son without his knowledge (R 2065-2066). Though Thomas was permitted to see his son, his wife refused to tell the son that Thomas was the real father (R 2065-2066). Thomas stated that his son was his whole life, but he never attempted to do anything about the adoption because his wife wanted it that way and, since he was poor, it was in his son's best interest to leave his son alone (R 2065-2067).

Thomas related that when he was very young, he raised his sister's son and had thus grown very attached to him (R 2069). He loved his niece and nephew very much (R 2070), but feels that his sister put drugs in his food in an effort to ruin his life (R 2070-2071). He recognized the effects of the drugs due to his prior experiences with them when he was a juvenile (R 2071). Thomas stated that his sister had been framing him since he was child and he therefore disowned his sister (R 2071-2072). The only reason that he would go to her house was to visit his niece and nephew (R 2070-2071).

Thomas disavowed ever telling a family member that he was on a mission from God or that he was Jesus (R 2073); he believed that many preachers and evangelists are on a mission for Jesus, and that, other than a power for healing, he never felt that he was any more religious than anyone else (R 2073-2074).

Thomas related that when he went to Chicago to attend the funeral of a friend, he was jumped and handcuffed by the pushers who had provided battery acid in lieu of heroine to his friend (R 2074-2076). The police knew all about it but refused to do anything, and because Thomas was inquiring about the incident he was followed back to Florida by a person from a "very important source" in order to obtain information about him (R 2076-2077). When Thomas perceived an assassination plot on his life, he confronted the persons later and sent them packing (R 2077-2078).

In 1979, Thomas gained his electrical contractor's license and started his own business, "Superfriend Electric" (R 2079). His business cards displayed a picture of Superman. He received a 7% mental disability for various psychiatric disorders based upon a worker's compensation/disability claim in which Dr. Gutman testified (R 2079-2082).

Thomas explained that his fascination with the Susan Assad case derived from her resemblance to Teresa Chambers, the girl he knew at ABC Liquors (R 2082). Thomas had read the Assad files and learned things that were not exactly according to the law as he perceived them (R 2083). He purchased the whole file and became suspicious that she was getting a raw deal (R 2083). He went to see Ms. Assad's defense attorney a number of times, attempting to help her, and the lawyer failed to address the court with the point of law that concerned Thomas (R 2083-2084). He was convinced that a judicial conspiracy between the judges and the lawyers existed (R 2084).

Thomas often related that people were out to get him (R 2085), and that a conspiracy surrounded him (R 2085-2086). He is 35 years old, an educated individual, and not dumb anymore (R 2086). In August of 1983, Thomas was driving down the street looking for Teresa Chambers, [the girl from ABC] as he had been doing for the past 4 years (R 2088). He had not seen her in 4 years and was worried about her (R 2088).

Thomas' explanation of the incident concerning his arrest for disorderly conduct was that he was driving down the street in a white van and observed a police officer heading north. Thomas proceeded on for approximately 2 blocks at a speed of 35 miles per hour when, the next thing he knew, a police car with sirens on came flying up next to him and ordered him to pull over. He was startled and scared because he had been listening to music and had done nothing (R 2089-2090).

He pulled over and inquired what was wrong, and was told by the officer "You gave me the bird". When Thomas explained that he didn't know what the officer was talking about, the officer checked his driver's license and license tag, then returned his license because nothing was wrong. The officer however declared that Thomas would be given a ticket for failure to yield to an emergency vehicle (R 2090-2091). Thomas became upset, and inquired whether he was an emergency now (R 2091). The altercation escalated, and when the officer unnecessarily touched on Thomas he lost control (R 2091-2092). The officers grabbed Thomas by the arms and placed him against a police car, and when he refused to let them put handcuffs on him he was thrown to the ground and his nose was broken (R 2092-2093).

Thomas was charged with two counts of resisting arrest (R 2094). His public defender withdrew because she and Thomas were unable to get along (R 2094). Another attorney was appointed (R 2095). Thomas believed he was arrested because of a homosexual conspiracy on behalf of the police department (R 2097-2098). He related a homosexual event that he viewed the day he was arrested in August, where he observed from his cell window homosexuals on the street outside performing a certain homosexual act, and thereafter those same homosexuals were allowed access into the jail (R 2098-2099). He became convinced that the homosexuals were able to gain access to the jails at different hours through guard connections; that they could come in and go out at will (R 2100).

After his arrest in August, Thomas continued to look for Teresa in the area where he was arrested, and often times he saw Officers Shirley and Epperson on patrol (R 2102-2103). He recalled being stopped by Officer Epperson in the same neighborhood, and he (Thomas) maintained that he had the entire cordial conversation taped (R 2103-2104). Thomas also asserted that at that time he had a shotgun in the backseat of his car (R 2103). Thomas argued that, had he intended to hurt Epperson, he could have done so then (R 2102).

Thomas went to court on January 9, 1984 because he was confused as to what day it was (R 2107). He claimed to have been dressed in combat attire because they were simply dirty clothes, and he wanted to go target practicing after his court appearance (R 2107-2108). He claimed to have been carrying the

firearms into the courtroom because he did not want to leave them in his car, fearing they would be stolen (R 2108-2110). He stated, "I've been in the courtroom twenty times maybe, and they never searched me before. I just never suspected them to search my clothing." (R 2110).

Thomas remembered taking the knapsack back down to his car when being given the opportunity, and returning to the courtroom. Upon his return, he was told by Dalton that he would be searched. Mark Parker came running through the door behind him and held it shut (R 2110-2111). Thomas felt trapped and scared, and he inquired, "Who's going to search me?" (R 2112) Dalton took his glasses off and there appeared to be a holster under the bailiff's coat, and, "Something just slipped in [Thomas'] mind, and I pulled the handgun out of my clothing. And I yelled and screamed, and the gun went off." (R 2113).

Mark Parker ran out the door, and though he at first just stood there, Thomas ran for the front door as everyone else took cover (R 2113). When he stepped into the hallway, he was met by a hail of gunfire (R 2114). Thomas returned the gunfire (R 2115).

Parker fell, and Provenzano ran past him (R 2116), turned the corner and fell, the gun falling from his hand (R 2116). He believes he was shot in the back at that point (R 2117). When he turned the corner, all sorts of people were running and screaming. He was yelling, "Okay I give up, don't shoot no more" (R 2118). He vaguely remembered the shotgun going off (R 2119-2120). He passed out, and when he awoke people were standing over him with guns (R 2121).

Defense counsel moved for a mistrial and asked that the jury be discharged and that a new sentencing jury be impaneled when the prosecutor improperly cross-examined Thomas (R 2159). The motion was denied (R 2161). An objection was later overruled where the prosecutor asked the jury to consider non-statutory aggravating factors to recommend the death sentence (R 2184, 2192-2198).

The jury was charged (R 2226-2232), the two alternate jurors were discharged (R 2232), and the jury retired for deliberations. After approximately 2 hours and 45 minutes, the jury returned a recommendation of death by a margin of 7 to 5 (R 2237-2241, 3437).

Thomas Provenzano was sentenced on July 18, 1984 to die in Florida's electric chair. The court found as aggravating circumstances: (1) That the defendant had previously been convicted of another capital felony or of a felony involving the use of threat or violence to the person; (2) that in committing the murder the defendant knowingly created a great risk of death to many persons; (3) that the murder for which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (5) that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 2316-2322, 3452-3458). The court further found that the only mitigating circumstance, the presence of which had been

conceded by the state, was that the defendant had no significant history of prior criminal activity (R 2322-2325, 3458-3460). The court concluded that the aggravating circumstances outweighed the mitigating circumstances, and accordingly that the death sentence was appropriate (R 2325-2326, 3460-3462). Provenzano was further sentenced upon the two convictions for attempted first-degree murder to two consecutive 30 year terms of imprisonment, with credit to be received for 191 days time served (R 3462-3466).

A timely notice of appeal was filed July 23, 1984 (R 3484), and the Office of the Public Defender was appointed to represent Provenzano for the purpose of his appeal (R 3544). This brief follows.

SUMMARY OF ARGUMENTS

POINT I The instruction on transferred intent constituted reversible error when it was given over timely, specific objection because the instruction was not supported by the testimony presented at trial and it tended to confuse the premeditation aspect of the first degree premeditation murder counts.

POINT II It was reversible error to try Thomas Provenzano in Orange County over objection because he obviously could not receive a fair trial by jurors who would be reliably impartial. He was being tried at the scene of the shooting soon after the incident and in the midst of pervasive, prejudicial publicity. The voir dire of the venire affirmatively demonstrated that a fair trial of Thomas Provenzano could not be had in Orange County so soon after the incident. To conduct the trial in Orange County in light of the circumstances of this case was a denial of the right to a fair trial.

POINT III There is insufficient evidence of premeditation upon which to rest a conviction for first degree murder. The actions of Provenzano in arming himself and randomly shooting Wilkerson and other uniformed officers is more appropriately second degree murder because it is an act eminently dangerous to another, evincing a depraved mind regardless of human life.

POINT IV The finding that Provenzano killed Wilkerson in an act of heightened premeditation without any pretense of moral or legal justification is not supported by the law or the evidence. Any intent or plan to kill other people cannot be automatically transferred to Wilkerson. Further, it is uncontroverted that

Wilkerson, after shooting Parker, pointed his revolver at Provenzano before he was shot thereby establishing at least a pretense of moral justification [self-defense].

POINT V The finding that Provenzano killed Wilkerson to disrupt or hinder the lawful exercise of a governmental function is supported by neither the law nor the evidence. The trial court predicated its finding on the premise that people were to be killed to eliminate them as witnesses. Those people were not killed. The presence of an aggravating circumstance must be determined in reference to the actual murder, not what otherwise might have occurred.

POINT VI A new penalty phase or reduction of sentence is required because the trial judge applied the wrong standard in considering the presence of statutory mitigating circumstances by simply concluding that Thomas Provenzano was sane. Moreover, the Court failed to recognize and consider the non-statutory mitigating factors of, inter alia, Provenzano's broken childhood, the death of one son and adoption of the other, Provenzano's employment record and his concern for the welfare of others.

POINT VII A new penalty proceeding is required because the prosecutor improperly questioned Provenzano over objection concerning the defendant's perception of the bias of his jurors, and then argued over objection that the jurors "must lay the gauntlet down" as a sign of outrage for taking an "innocent" person's life. The prosecutor was clearly improperly seeking a death sentence recommendation for non-statutory reasons with the approval of the trial court.

POINT VIII Notwithstanding that Provenzano unquestionably shot and killed Wilkerson, and shot and injured Parker and Dalton, viable and extremely close factual questions concerning premeditation and sanity were present at trial. The combined, prejudicial effect of numerous errors that occurred [including inappropriate venue, jurors of unreliable impartiality and incorrect/confusing jury instruction on transferred intent] requires that the conviction be reversed.

POINT IX A new penalty proceeding is required because the findings of fact concerning the presence of aggravating/mitigating circumstances was found by the judge, not the jury. The jury is the proper entity to determine factual matters of the crime when determining guilt, and these same factual determinations must be used to enhance a penalty to that of death. For the trial judge to redetermine the facts is constitutionally impermissible.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION BY INSTRUCTING THE JURY ON THE LAW CONCERNING TRANSFERRED INTENT OVER TIMELY OBJECTION, WHERE THE INSTRUCTION WAS NOT THE LAW OF THE CASE AND TENDED TO CONFUSE THE JURY ON THE ELEMENT OF PREMEDITATION.

The doctrine of transferred intent, according to Black's Law Dictionary, is that "[i]f a person intentionally directs force against one person wrongfully but, instead, hits another, his intent is said to be transferred from one to the other and he is liable to the other though he did not intend it in the first instance." Black's Law Dictionary, Fifth Edition, page 1432. Thus, the doctrine of transferred intent is a legal fiction used to fulfill the requirement of concurrence in time between the mens rea and the act.

> ...It seems clear that the act with respect to which the felonious intent will be "transferred" from the object of the accused's design to the victim, is the homicidal act directed at the former and resulting in the death of the latter, and not some antecedent act. The rule contemplates only the one felonious act, the result of which is unintended. The illustration most frequently given is taken from Blackstone, where he says it is murder if one shoots at A and misses him, but hits B. 4 Blackstone commentaries, p. 201 *** as some of the cases very expressively say, "The intention follows the bullet." (Citations omitted).

State v. Batson, 96 So.W.2d 384, 389, 339 Mo. 298 (1936).

The doctrine of transferred intent is concerned with the intent existing at the time an act is done, and it may be used to show that an act was either unlawful or lawful notwithstanding unintended consequences from doing an act [e.g. Coston v. State, 139 Fla. 250, 190 So. 520 (1939); Tinder v. State, 27 Fla. 370, 8 So. 837 (1891)].

In Lee v. State, 141 So.2d 257 (Fla. 1962), this Court stated the following:

> This court is committed to the doctrine that one who kills a person through mistaken identity or accident, with a premeditated design to kill another is guilty of murder in the first-degree if the indictment in such a case properly alleges that the premeditated design was to effect the death of the person actually killed. The law transfers the felonious intent in such a case to the actual object of his assault, and the homicide so committed is murder in the first-degree. (Citations omitted).

Lee, supra, at 259 (Emphasis added).

The universal interpretation of this rule is that the guilt of the perpetrator of an act is exactly what it would have been had the act fallen upon the intended victim instead of a bystander. "Under this rule, the fact that the bystander was killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished." 18 ALR 917 "Act Aimed at Another". However, there is no evidence to support giving the transferred intent instruction sub judice. It simply was not part of the law of the case.

Specifically, the proof established that Thomas Provenzano shot Bailiff Dalton, and that Bailiff Dalton was the intended victim of that act (R 512-514, 525-530, 551-552, 576-578, 589). Thomas Provenzano followed and similarly shot Officer Parker, and the clear evidence shows that Parker was the intended victim (R 591-592, 603-607, 621, 625, 626-630). There were no witnesses to the actual shooting of Wilkerson, but the record contains no testimony or allows any inference that Thomas Provenzano was shooting at anyone other than Wilkerson.[8]

"The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel..." Fla.R.Crim.P. 3.390(a) (emphasis added). This rule is sound, in that "...the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350, 354 (1946). This observation was recently noted in State v. Roberts, 427 So.2d 787 (Fla. 2d DCA 1983), where the Second District Court of Appeal refused to sustain a conviction for second-degree murder on the "fragile assumption" that a jury had not been misled by confusing instructions. Id. at 787.

In Pridgeon v. State, 425 So.2d 8 (Fla. 1st DCA 1982), a trial court had instructed the jury concerning the law of

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[8] The fact that the shotgun pellets' trajectory was parallel to the floor, the distal portion of Wilkerson's finger being severed, and the cylinder release latch being blown off his firearm indicates that Wilkerson's weapon was drawn and being aimed at the time he was struck by the shotgun blast. The only logical inference is that Provenzano was intending to shoot Wilkerson before Wilkerson shot him.

provocation[9] over the defendant's objection even though it was not the law of the case. The majority of the court reversed the conviction for second-degree murder, holding that the instruction had been inappropriate because no evidence had been presented to support the giving of the instruction. Id. at 9. Similarly, there was no evidence presented to support the giving of the instruction sub judice on the doctrine of transferred intent, and accordingly the trial court was in error in giving the instruction over objection.

It is respectfully submitted that the giving of the instruction cannot be considered harmless because of the circumstances surrounding this case. There was overwhelming evidence that Thomas Provenzano planned the death of Officers Shirley and Epperson. This line of thought was fully developed by the state attorney at trial, and even the defense psychiatrist testified that Thomas went to the courtroom intending to kill Officers Shirley and Epperson (R 1541-1542). Unfortunately, the state attorney grossly misrepresented the law of transferred intent while addressing the jury during closing argument. In part, the prosecutor argued as follows:

> [By the Prosecutor] Now, the court's going to define with you what killing with premeditation is. And that's a killing after a concious deliberation to do so. The decision must be present in the mind of the defendant at the time of the killing. Now, it's important for y'all to know that there is no specific time frame or period of time that's

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[9] See "EXCUSABLE HOMICIDE" F.S. 782.03, paragraph 2, page 76, Florida Standard Jury Instructions in Criminal Cases, 2d edition.

required that the state must show, when it really has to occur between the formation of the premeditated intent to kill and the actual killing. Of course, in this case the proofs are sufficient that the defendant well before January 10 had decided consciously, and had reflected upon an intent to kill Officers Paul Shirley and Rick Epperson; that he came to the courthouse on that day with the very intent to do some bodily harm. Namely, to kill both those officers.

* * *

You can find just from those facts alone he had the premeditated design to kill Arnold Wilkerson. But if for some reason that you feel the facts don't warrant your finding the premeditation at that particular time, there is another instruction the court's going to give you with respect to what the law is, called transferred intent. If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another the killing is deemed to be premeditated. Even if for some reason you don't feel the defendant had enough time to reflect and deliberate on the murder of Arnold Wilkerson based on his waiting as Wilkerson followed him around the hall on the fourth floor, you can still find, and I would submit to you the evidence clearly supports the transferred intent; that he came to the courthouse with the intent to murder Officer Shirley and Officer Epperson of the Orlando Police Department on January 10, 1984. And while he was attempting to carry out those two planned murders he resulted and caused the murder of another individual.

[By the Prosecutor] Recall his statements to Dr. Wilder. "When I blow I blow. And I don't care what happens." He didn't care. He knew it was wrong. He didn't care what happened. He's going to get back at Shirley and Epperson.

* * *

> Officer Epperson, who was on the scene, told you about the actual threats the defendant made to him at the scene when he was arrested. He was going to kill him. He told you about the incident between Christmas and New Years, where another officer pulls him over and Officer Epperson was assisting. And there was the defendant trying to talk to him again about the incident in August, wanting to know some information on him. And Officer Epperson was then threatened. He was specifically told, "I'm going to kill you." The defendant told him several weeks in advance he was going to kill Epperson. Another evidence of that premeditation, that planning, that intent to kill.

(R 1868).

During his portion of the closing argument, defense counsel sought to clarify the law concerning transferred intent, and correctly stated that law as previously set forth in this brief (R 1898-1901). In rebuttal, the state attorney again incorrectly argued the following:

> [By the Prosecutor] Mr. Brawley made quite a bit of argument about premeditation versus transferred intent. And again, premeditation-- as you are going to have the instructions-- the court's going to explain to you, need not exist for weeks, for days, for hours. Premeditation can happen in a minute. It can happen in seconds, as long as the individual has that reflection, the conscious decision to know what he's going to do.
>
> * * *
>
> That's premeditation, even if you don't want to accept the transferred intent. But the state would submit to you there is transferred intent. And read that instruction. <u>Because the defendant went to the courthouse with</u>

> intent to kill Officers Epperson and Shirley on January 10. It's interesting to note counsel, just as Mr. Edmund anticipated I may say to you, they want to have their cake and eat it too. That's exactly what they want.
>
> They want to tell you on the one hand the defendant came to the courthouse without any intent to kill the police officers; that's not what his intent was. On the other hand, to buttress his psychiatric testimony they have to accept the fact, because the defendant himself made the statement he wanted to kill Officers Epperson and Shirley. They can't have it both ways, ladies and gentlemen of the jury....
>
> The defendant, clearly in this case, got the wrong guy. That's exactly what happened. He went in the courthouse trying to find Shirley and Epperson, and instead found Officers Dalton and Parker and Officer Wilkerson.

(R 1951-1952).

At the jury charge conference, defense counsel moved that the court delete the instruction concerning transferred intent, "[o]n the grounds that the facts of this case are such that the particular paragraph is vague, ambiguous, misleading, is not predicated upon any facts, and is tantamount to an instruction by the court to the jury to return a verdict of guilty." (R 1822-1823). The court refused and instructed the jury, "If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person the killing is premeditated." (R 1970). This instruction was provided the jury in writing in accordance with Florida Rule of Criminal Procedure 3.390(b).

It is respectfully submitted that the doctrine of transferred intent is totally inapplicable to this case, in that it is wholly unsupported by any evidence. Officers Shirley and Epperson were clearly not the intended targets of the acts of Thomas Provenzano that resulted in the death of Arnie Wilkerson or the shooting of Parker and Dalton. The instructions combined with the erroneous argument by the state attorney could not have helped but confuse the jury and assure a verdict of guilty based upon an inappropriate premise of law. It is respectfully submitted that the convictions must be reversed and the matter remanded for a retrial.

POINT II

THE DEFENDANT WAS DENIED A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, OF THE FLORIDA CONSTITUTION, BY BEING TRIED IN ORANGE COUNTY IN THE COURTHOUSE THAT WAS THE SCENE OF THE ALLEGED CRIME OVER THE DEFENDANT'S REQUEST FOR CHANGE OF VENUE.

At the inception of jury selection the defendant informed the court that he did not wish to be tried by Orange County jurors because he was convinced he would be unable to receive a fair trial by an impartial jury (R 3-9). Defense counsel orally moved for a change of venue (R 18-19). The judge deferred ruling on the motion, stating, "We will put the, bring the hundred jurors in. And we will put some in the box and start selection process. If we cannot select a fair and impartial jury, the Court will have to cross that bridge when we get to it. I think we should attempt -- I think that's the case law. That's the best way to determine the motion, coming as late as it did, for whatever reason. The only thing we can do is attempt to select a fair and impartial jury out of the venire that are [sic] waiting for us." (R 22).

It is respectfully submitted that the trial court erred in refusing to grant Thomas Provenzano's motion for change of venue when it became apparent that a fair trial could not be had in Orange County, in the very courthouse where the alleged crime took place.

The seminal case in this area is that of Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), where the United States Supreme Court held that Sheppard was

denied his right to a fair trial for the second-degree murder of his wife because of the trial court's failure to protect Sheppard from the massive, pervasive and prejudicial publicity that attended his prosecution. In Sheppard an affirmative fundamental duty on behalf of the trial court was recognized to assure that a fair trial by an impartial jury was had for both parties. The Court stated:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threaten the fairness of the trial, a new trial should be ordered.

Sheppard, Id. at 362, 16 L.Ed.2d at 620. (Emphasis added).

Traditionally, the voir dire record has been found to be not only the best but also the most reliable source of evidence to indicate the existence or absence of both juror and community prejudice. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct.

1417, 10 L.Ed.2d 663 (1963). As shown by the instant voir dire, the community of Orange County was so patently biased that neither Thomas Provenzano nor the State of Florida could receive a fair trial. (See Appendix "A" to this brief).

The shooting incident occurred January 10, 1983. The trial commenced June 11, 1984, 152 days later. There was massive, prejudicial pretrial publicity (State's Exhibits 1-45, See Appendix "B"), and the trial was conducted at the scene of the shooting in an adjacent courtroom.

The instant voir dire disclosed widespread prejudice, and great difficulty was had in selecting a jury. The undersigned counsel would be less than candid in failing to point out that the defense attorney obviously wanted the trial conducted in Orange County believing that the jury was prone to acceptance of the insanity defense due to the pretrial publicity. By the same token, however, the prosecutors felt that the jurors were biased in favor of a verdict of guilty. The trouble with these tactical decisions by the attorneys is that a fair trial by an impartial jury did not result for either the defendant or the state.

In Copeland v. State, 457 So.2d 1012 (Fla. 1984) this Court addressed in depth the law concerning a change of venue, and stated the following:

> Appellant's motion [for change of venue] was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone, however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors,

that may accompany the knowledge. It has long escaped strict definition:

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

(citations omitted).
The question of jury partiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of impaneled jurors. (citations omitted). The test for determining whether a change of venue is required was expressed in Kelley v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968), and adopted by this Court in McCaskill v. State, 344 So.2d 1276 (Fla. 1977):

> [W]hether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.

Copeland, supra at 1016. The Court went on to note, "If it is possible to empanel a jury comprising persons who can be relied upon to decide the case based upon the evidence, and not be influenced by knowledge gained from sources outside the courtroom, then a denial of change of venue is proper. (Citation omitted)" Id. at 1017 (Emphasis added).

It is respectfully submitted that the record conclusively shows that a fair trial by a reliable impartial jury did

not occur sub judice. Rather, the instant voir dire gives rise to a presumption of partiality (See Appendix "A"). The pretrial publicity was massive and prejudicial. The trial was to occur at the very scene of the crime. It is manifest that Thomas Provenzano personally did not want to be tried by Orange County jurors. When it became apparent during voir dire that the vast majority of jurors admitted holding fixed, unalterable positions concerning guilt, the trial court abused its discretion in failing to grant the motion for change of venue. Accordingly, the matter must be reversed and remanded for retrial.

POINT III

THE CONVICTION FOR FIRST-DEGREE MURDER MUST BE VACATED WHERE THERE IS INSUFFICIENT COMPETENT, SUBSTANTIAL EVIDENCE OF PREMEDITATION TO SUSTAIN THE VERDICT.

In Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), this Court held that "...the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." (footnote omitted). Subsequently, in Williams v. State, 437 So.2d 133 (Fla. 1983), this Court acknowledged that its role in reviewing a capital case is to see if there is substantial, competent evidence to support the verdict.

> To convict an individual of premeditated murder the state must prove, among other things, a "fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." Sireci v. State, 899 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Obivously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. E.g., Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944); Chisolm v. State, 74 Fla. 50, 76 So. 329 (1917). Likewise, specific intent to kill is also an element to be proved by the state in a charge of attempted first-degree premeditated murder. Fleming v. State, 374 So.2d 954 (Fla. 1979); Deal v. State, 359 So.2d 43 (Fla. 2d DCA 1978).

Gurganos v. State, 451 So.2d 817 (Fla. 1984).

It is respectfully submitted that no competent, substantial evidence exists in the instant case that Thomas Provenzano, from a premeditated design, took the life of Arnold Wilkerson. Specifically, the state presented evidence showing that Bailiff Wilkerson was relieved from duty and that he stepped outside a courtroom. Ten seconds later there were gunshots (R 631-634).

A court reporter and her husband walking in the hallway heard gunshots being fired, and got up against the wall (R 656-657, 663-664). The court reporter "inched" toward the gunfire and observed Provenzano without a gun in his hand (R 658-659). Provenzano made a "lurching" movement, and the court reporter ran around a corner, encountering the body of Mark Parker who had evidently just been shot by Wilkerson (R 659-660). Wilkerson was in that hallway and he pointed his revolver at her (R 660). She proceeded past Wilkerson and went into the clerk's office (R 661).

The court reporter's husband heard shots and got up against the wall. Someone was yelling "I'm going to kill you, m----- f------. I'm going to kill all of you." (R 665). A fellow came around the corner and more shots were fired (R 665) His wife left. Thereafter Provenzano, with the shotgun, came around the corner and took a "military stance" pointing it at both the witness and a bailiff who was taking cover in the back (R 666). Provenzano situated himself where he could observe

either way, and the witness thereafter heard a gunshot that was louder than the others (R 667), but he did not see the shooting because he was trying to "crawl through the wall."

Without a doubt Wilkerson was shot by Thomas Provenzano. The inquiry does not end there, however. Wilkerson must have been shot by Provenzano with the premeditated intent to take his life.

The uncontroverted evidence is that Wilkerson shot and wounded Officer Parker, and that Wilkerson thereafter rounded the corner with his service revolver drawn up about his face. Wilkerson was immediately shot and killed by a single shotgun blast that also struck his drawn weapon. In this regard, it is respectfully submitted that this case is controlled by this Court's decision in Purkhiser v. State, 210 So.2d 448 (Fla. 1968). As in Purkhiser, sufficient evidence exists sub judice to convict Provenzano of second-degree murder.... a killing done by an act evincing a depraved heart. As in Purkhiser, the defendant came to the scene of the shooting seeking an altercation with one person, but shot and killed a different, unknown person within 2 minutes of their encounter.

The uncontroverted evidence shows that Provenzano was at most simply firing at any uniformed bailiff that approached him. This is a classic example of second-degree murder. The conviction for first-degree murder should accordingly be vacated and the cause remanded with directions to adjudicate Provenzano guilty of second-degree murder and to resentence him accordingly.

POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING OF WILKERSON WAS COLD, CALCULATED AND PREMEDITATED WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The state must prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980).

> As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1951, 40 L.Ed.2d 295]...(1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty [sic] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated... and without any pretense of moral or legal justification."

Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

The premeditation needed to support this aggravating circumstance is a heightened plan to effect the death of the victim. "The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue (citations omitted)." Hardwick v. State, 9 FLW 484 (Fla. November 21, 1984).

The record sub judice fails to support the finding that the killing of Arnie Wilkerson was "cold, calculated and premeditated without any pretense of moral or legal justification." The proof and testimony that Provenzano planned the death of Officers Shirley and Epperson is wholly irrelevant to finding an enhanced premeditation to effect the death of Arnold Wilkerson. The fact that Provenzano went to the courthouse intending to shoot one person cannot automatically be transferred to an intent to kill a different person under the facts of this case.

The instant finding is predicated solely upon Provenzano's actions of purchasing firearms and preparing to kill Shirley and Epperson (R 3458). An enhanced intent to effect the death of Wilkerson is unsupported by any evidence. Moreover, the proof that Wilkerson was about to shoot Provenzano provides at least a pretense of moral justification, bearing in mind that Wilkerson's revolver was shot four times before he was killed (R 713-714).

As set forth in Point II, supra, there is inadequate evidence of a specific intent to kill Wilkerson upon which to rest a conviction for first degree murder. Clearly there is insufficient proof of the heightened premeditation necessary to find this aggravating circumstance. Though there is evidence that Provenzano armed himself to kill Shirley and Epperson, at least one state psychiatrist opined that merely demonstrating an ability to kill Shirley and Epperson would have been enough. (R 1815-1817)

This case is analogous to Bates v. State, 10 FLW 97 (Fla. January 31, 1985), where this Court refused to allow the

finding of a cold, calculated and premeditated murder without any pretense of moral or legal justification. In Bates, a planned burglary went wrong and "the situation simply [got] out of hand" Id. at 98. That is precisely what happened here. Whatever Provenzano planned, whether he in fact was going to shoot Shirley and Epperson or merely threaten them into admitting what really occurred when Provenzano was arrested, the situation got out of hand.

It is respectfully submitted that this aggravating circumstance has not bee proved beyond a reasonable doubt. it must be struck.

POINT V

THE TRIAL COURT ERRED IN FINDING THAT PROVENZANO KILLED WILKERSON TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF A GOVERNMENTAL FUNCTION.

The trial court found that Provenzano killed Wilkerson to disrupt or hinder the lawful exercise of a governmental function or the enforcement of law (R 3457). It is respectfully submitted that this constitutes an impermissible finding, initially because the finding of this aggravating circumstances must be made by the jury, not the trial judge (See Point IX, infra). Assuming, arguendo, that the judge can constitutionally make this factual determination used to enhance the severity of the penalty, the finding nonetheless is unsupported by the evidence and it constitutes an improper doubling of circumstances.

Specifically, the "facts" contained in the sentencing order purportedly justifying the finding of this circumstance concern solely the intention of Provenzano to kill Shirley and Epperson, perhaps to prevent them from testifying against him, perhaps for revenge. Perhaps Provenzano merely intended to confront Shirley and Epperson with the firearms and threaten them into admitting the "true" facts concerning the initial arrest for disorderly conduct. In any event, the reason Wilkerson was killed was not to prevent him (Wilkerson) from being a witness. See Rivers v. State, 458 So.2d 762 (Fla. 1984); Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977).

Moreover, the murder cannot be said to have been committed to disrupt a governmental function because a bailiff

was killed while performing his duties. That conduct is dealt with in the finding that the murder was committed to prevent a lawful arrest by the bailiff. See Thomas v. State, 456 So.2d 454 (Fla. 1984). When an officer is killed in this manner, it may be inferred that the reason was to prevent a lawful arrest. See Caruthers v. State, 10 FLW 114 (Fla. Feb. 7, 1985). However, to also find upon these same facts that the murder was committed to disrupt the lawful exercise of a governmental function constitutes an impermissible doubling of aggravating circumstances.

The finding is improper and unsupported by the evidence. The death sentence must be vacated and the matter remanded for resentencing.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES.

The sole mitigating factor found to exist by the trial court was that the defendant had no significant history of prior criminal activity[10] (R 3458). It is respectfully submitted that the court erred in failing to consider and find both statutory and non-statutory circumstances that exist without contradiction.

The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.[11] The evidence as to the presence of this mitigating circumstance is overwhelming. Though disagreeing about Thomas Provenzano's legal sanity under the subjective M'Naughten Rule, all of the psychiatrists testified that Thomas Provenzano is extremely mentally disturbed. Dr. Gutman, a state witness, testified that on February 17, 1984 Thomas Provenzano had "the same mixed character and behavior disorder, long term pattern of certain features that appear consistently. They were, were a paranoid personality, obsessive, compulsive personality, and a passive/aggressive personality... Inadequate handling of adult situations... It appears to me that this man had shown some regression and deterioration in his general ability to handle life stresses, in the period of time coming up to the January 10th incident..." (R 1752-1753). He described Provenzano as being "a pretty sick guy, mentally" (R 1776).

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[10] Section 921.141(6)(a)

[11] Section 921.141(6)(b)

Dr. Kirkland, who also testified for the state, said "...I think its probably obvious, Mr. Kunz, there is no doubt in my mind that Mr. Provenzano has severe problems, amongst them being pretty paranoid. No doubt in my mind about that...." (R 1740). "My opinion remains that Mr. Provenzano is a very disturbed man with many symptoms of emotional disorder, but that he was legally sane on January the 10th, of 1984." (R 1741).

Dr. Wilder stated that Thomas Provenzano had a paranoid personality, and that in the past he would have qualified as a sociopathic personality (R 1814). Dr. Lyons testified that he believed that the violent arrest in August of 1983 by Shirley and Epperson frightened Provenzano out of his mind (R 1458-1460) ...that Thomas was suffering from severe untreatable paranoia and was legally insane on January 10, 1984 (R 1462, 1472).

Dr. Pollack examined Provenzano 10 days after the shooting and testified that the defendant suffers from a paranoid psychosis (R 1537) and that Thomas did not understand that his acts were wrong (R 1533-1535). The doctor also believes that Thomas Provenzano was legally insane on January 10, 1984 (R 1540-1542).

There is simply no room in the instant case for the trial judge not to find that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The trial court further failed to find that the capacity of Thomas Provenzano to appreciate the criminality of his conduct or to conform his conduct to the requirements of the

law was substantially impaired[12] (R 3459), notwithstanding the foregoing expert testimony that is wholly unrefuted. It is apparent from the court's sentencing order that the trial court applied the wrong standard in considering this circumstance.

Specifically, the order stated that "[a]lthough there has been some evidence adduced that the defendant may have been emotionally disturbed to some degree, the credible evidence in this case shows that this Defendant did know the difference of right from wrong and was able to appreciate the criminality of his conduct, and the Defendant could have conformed his conduct to the requirements of law if it had not been for the fact that the Defendant... had a hot temper..." (R 3460). The foregoing standard is the minimum standard to be applied to determine legal responsibility for an act. If any of the foregoing considerations had not been present, Thomas Provenzano would have been legally insane.

This Court has consistently held that the finding of sanity does not eliminate the necessity for consideration of the statutory mitigating factors concerning the mental condition of a defendant. Ferguson v. State, 417 So.2d 631 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Mines v. State, 390 So.2d 332 (Fla. 1980), cert. denied, 447 U.S. 1, 101 S.Ct. 1994, 64 L.Ed.2d 681 (1981). These holdings comport with Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the United States Supreme Court held that it is error to consider

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[12] Section 921.141(6)(f), Fla.Stat.

only that evidence to be mitigating which would tend to support a legal excuse for criminal liability.

The sentencing order states, "There are no other aspects of the Defendant's character on record, nor any other circumstances of the offense, which would mitigate in favor of the Defendant or his conduct in this matter." (R 3460)(emphasis added). It is respectfully submitted that there was uncontroverted proof of the following facts that have been recognized as non-statutory mitigating circumstances, and that these require consideration in determining the appropriate sentence:

> 1) Provenzano's love, concern, care and consideration for his son and nephew. See Caruthers v. State, 10 FLW 114 (Fla. Feb. 7, 1985); Jacobs v. State, 396 So.2d 713 (Fla. 1981).
>
> 2) Provenzano's turbulent childhood, the early death of his mother, the still-born son, and the divorce from his first wife. See Lara v. State, 10 FLW 79 (Fla. January 24, 1985); Scott v. State, 411 So.2d 866 (Fla. 1982).
>
> 3) Provenzano's employment history and attainment of a Master-Electrician license, especially in light of his mental problems. McCampbell v. State, 421 So.2d 1072 (Fla. 1982).
>
> 4) Provenzano's attainment of 35 years of age without having a significant prior criminal history, especially in light of his mental problems. Washington v. State, 432 So.2d 44 (Fla. 1983).

Further, the following are respectfully suggested to be unrefuted non-statutory mitigating factors that bear consideration; Provenzano did not take explosive devices with him to the courthouse, but instead alerted the police about their presence in his apartment to prevent anyone form being injured

(R 2040-2049); Provenzano made no effort to hurt "civilians" even though they were in close proximity to him, and instead just fired at uniformed officers (R 624-625, 658-661, 668); Provenzano led a reclusive life prior to involuntarily being drawn into the legal system by his initial, violent arrest by Shirley and Epperson; Provenzano's gallant but misguided effort donated to assist Susan Assad against the conspiracy he perceived was out to railroad her into jail.

The overwhelming, uncontroverted evidence of mitigation in the instant case compels that the sentence of death be reduced to that of life imprisonment with the twenty-five year mandatory minimum.

POINT VII

THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION BY GROSSLY IMPROPER PROSECUTORIAL QUESTIONING AND ARGUMENT DURING THE PENALTY PHASE OF TRIAL.

The portions of the prosecutor's argument and questioning pertaining to this point are set forth in Appendix "C" to this brief for the convenience of this Court. It is plainly evident that the prosecutor was requesting that the jury recommend an advisory sentence of death for improper, non-statutory reasons.

Such beseechments as "If a collective society can't -- when an innocent person such as Arnie Wilkerson's life is snuffed out, the only way that society can show the respect for the integrity of that innocent person's life is to, through the use of the death penalty, show its outrage that an innocent person in society's [sic] life has been taken", "If we don't have the death penalty in cases like this, we cheapen the lives of innocent people when they are murdered ", and "We've got to lay the gauntlet down " constitute improper argument[13] and are incredibly improper appeals for the jury to consider factors outside of the statutory aggravating circumstances set forth in Section 921.141, Fla.Stat. The prosecutor's questioning the defendant about his perception of his jurors bias is totally indefensible (R 2158-2159).

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[13] See Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984).

Throughout the trial the jury was importuned by the prosecutor with the theme that the killing of Wilkerson by Provenzano was an assault against the law-abiding community of Orange County (cf. R 1961-1962, 2183-2184). The trial was conducted at the scene of the shooting, the Orange County Courthouse. The jury was composed of the law-abiding community of Orange County. There can be no doubt but that, given the circumstances of this case, the argument was "so prejudicial as to vitiate the [penalty proceedings]." Cobb v. State, 376 So.2d 230, 232 (Fla. 1979). As recently said by this Court in Teffeteller v. State, 439 So.2d 840 (Fla. 1983):

> Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. (citation omitted). ..."We think that in a case of this kind the only safe rule appears to be that unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused the... [sentence] must be reversed." (citation omitted).

Id. at 845.

The above language tracks the language of the United States Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 205 (1967), where the "harmless error" rule [as opposed to a per se rule] was adopted for constitutional error, this rule being that an appellate court must be able to declare that the error was "harmless"[14] beyond a reasonable doubt.

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[14] "Harmless" in this context means there is no reasonable possibility that the error complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

It is respectfully submitted that the improper argument previously set forth cannot be reasonably viewed as not having contributed to the 7-5 recommendation in favor of death by the instant jury in light of the circumstances of this case. The prosecutor, over objection, solicited the jury to return a death recommendation for reasons not set forth in Section 921.141. Just as a judge cannot sentence a defendant to death based upon non-statutory aggravating factors, [Miller v. State, 373 So.2d 882 (Fla. 1979)], neither can a jury be implored to recommend death for those same non-statutory factors.

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). The foregoing improper argument, portions of which were erroneously sanctioned by the trial court in front of the jury, could not have helped but tip the scale improperly in favor of a death recommendation. A new penalty proceeding is required.

POINT VIII

THE ACCUMULATION OF ERRORS IN THIS CLOSE CASE DEPRIVED THE DEFENDANT OF A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 16 AND 22 OF THE FLORIDA CONSTITUTION.

It goes without gainsay that a defendant is constitutionally entitled to a fair trial by an impartial jury. It has long been a premise of law that, in a close case, errors that otherwise might be considered harmless amount to reversible error when considered cumulatively. Porter v. State, 84 Fla. 552, 94 So. 680 (1922); Harris v. State, 53 So.2d 827 (Fla. 1951). "While a defendant is not entitled to a perfect trial, he must not be subjected to a trial with error compounded upon error." Perkins v. State, 349 So.2d 776, 778 (Fla. 2d DCA 1977); see also Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1980).

Appellant is not seeking a perfect trial sub judice, merely the fair trial to which he is constitutionally entitled. It is respectfully submitted that the following errors, considered cumulatively, resulted in reversible error in light of the closeness of the issues of premeditation and insanity:

1) Inappropriate venue. The trial was conducted at the Orange County Courthouse, the scene of the shooting, shortly after the incident, amidst pervasive, prejudicial publicity. See Point II, supra; Manning v. State, 378 So.2d 274 (Fla. 1979).

2) Jury of dubious impartiality. The vast majority of the Orange County jury venire admitted having preconceived, fixed/unalterable opinions concerning the guilt of Thomas Provenzano. A jury composed of the same

Orange County jurors was obviously extremely susceptible to improper argument by the prosecutor.

3) Transferred intent instruction. The inappropriate and misleading jury instruction on transferred intent given over objection, coupled with the prosecutor's incorrect argument on the instruction's use by the jury, so distorted the law of specific intent and premeditation that a correct jury determination cannot be assumed to have occurred. See Point I, supra.

4) Improper limitation of cross-examination. Defense counsel sought to question lay-persons concerning their previously expressed opinion as to the sanity of Provenzano, but was prevented from doing so when the Court sustained the State's objection (R 1595-1596, 1605-1607, 1610). It is proper for lay-people to opine as to a defendant's sanity if a proper predicate is established [cf. Rivers v. State, 455 So.2d 762 (Fla. 1984)], but a defendant is nonetheless thereafter entitled to demonstrate that the lay-person may not have known all of the pertinent facts in forming his opinion. [cf. Fine v. State, 70 Fla. 412, 70 So. 379 (1915).

5) Denial of Motion(s) for Mistrial. At the conclusion of closing argument the prosecutor unexpectedly played the tape recording of the shooting incident, whereupon the victim's relatives began crying in front of the jury (R 1965-1967). Thereafter, during the penalty phase, the prosecutor indefensibly asked Thomas Provenzano whether he had stated "[he] never had a chance with this jury" (R 2159-2162). The question could have had no purpose other than to impermissibly prejudice the jury against Provenzano.

6) Overruling of objection concerning improper prosecutorial argument. Defense counsel timely objected when the prosecutor asked the jury to recommend a sentence of death to "show its outrage that an innocent [person's] life has

> been taken" (R 2197) ...for the jury "to lay the gauntlet down." (R 2199). These are improper non-statutory reasons to recommend a death sentence. (See Point VII, supra).

It is respectfully submitted that the foregoing errors, considered cumulatively, cannot be reasonably said not to have contributed to the conviction of guilt and sentence of death. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Accordingly, a new trial is required.

POINT IX

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

Appellant does not quarrel with a process whereby the court applies the facts established by the jury to impose a death sentence. Rather, Appellant takes issue with having the court determine the facts used to impose the death sentence. Specifically, Section 921.141, Fla.Stat. requires that a weighing process occur whereby the jury and the trial court weigh statutory aggravating circumstances against mitigating circumstances. The jury then recommends a sentence, and the trial court considers this recommendation in imposing the sentence. However, as presently applied, there are no written findings of aggravating or mitigating circumstances made by the jury, nor of the facts found by the jury in consideration of the question of whether such circumstances exist. Instead, the trial court determines the facts anew after the jury issues its recommendation. Thus, the facts determined by the jury are not necessarily the same facts determined or used by the judge.

The Sixth Amendment to the United States Constitution guarantees the defendant the right to a jury trial by his peers. This right is applied to the states by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). It is manifest that the facts of a case are determined

by the jury during the guilt phase. Notwithstanding that the bifurcated penalty phase is a separate proceeding, it remains a part of the trial. Principles of collateral estoppel and res judicata apply to those facts previously determined by the jury during the guilt phase, and those facts control.

Aggravating circumstances and mitigating circumstances are comprised of facts. Aggravating circumstances must be proved beyond and to the exclusion of a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Although mitigating circumstances must be proved to a somewhat lesser standard, it remains that a burden of proof exists for both categories. The determination of whether a party has met a burden of proof in reference to the matters associated with a criminal episode falls exclusively within the province of the jury, and it is therefore unconstitutional for the judge to step in and redetermine the operative facts at sentencing.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), this Court held that a trial court cannot enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm absent a factual finding by the jury that a firearm was used by the defendant while committing the crime. This Court stated:

> ...The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode.

Id. at 1387. (Emphasis added).

An example is in order. The trial court found as an aggravating circumstance, as a matter of fact, that Provenzano had previously been convicted of a felony involving the use of violence[15] (R 3454). The jury returned verdicts of guilty on two felonies involving the use of force (R 3314-3316). Thus, a separate jury finding may be said to exist in reference to this aggravating circumstance.

No such separate factual determination by the jury exists concerning the aggravating circumstances of; 1) creating a great risk of death to many persons[16]; 2) committing murder to prevent lawful arrest or escape from custody[17]; 3) committing murder to disrupt or hinder the lawful exercise of a governmental function[18], or; 4) committing a murder in a cold, calculated and premeditated manner without any pretense of moral or legal justification.[19]

All of the foregoing aggravating circumstances were found to exist, solely as questions of fact, by the trial judge, not the jury. It is respectfully submitted that this procedure is constitutionally infirm. As in Overfelt, the jury must make the findings of fact on matters associated with the criminal

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15 Section 921.141(5)(b), Fla.Stat.

16 Section 921.141(5)(c), Fla.Stat.

17 Section 921.141(5)(e), Fla.Stat.

18 Section 921.141(5)(g), Fla.Stat.

19 Section 921.141(5)(i), Fla.Stat.

episode. Thereafter, if a death sentence is imposed the trial judge must review in writing the findings made by the jury and isolate and identify the testimony and proof that he feels supports the jury's findings. §921.141(3), Fla.Stat. Finally, those findings are to be reviewed by this Court prior to imposition of the death penalty.

The jury is the proper body to initially determine the presence of aggravating circumstances, not the trial judge. It was incumbent upon the State to obtain a jury finding as to the presence of aggravating circumstances.

Due to this unconstitutional procedure, the death sentence must be vacated.

CONCLUSION

Based upon the argument and authority set forth herein, this Court is respectfully asked for the following relief:

POINTS I, II and VIII: That the conviction be reversed and this matter remanded for retrial;

POINT III: That the conviction be reversed and the matter remanded with directions that Appellant be adjudged guilty of second degree murder and resentenced accordingly; and

POINTS IV, V, VI, VII and IX: That the sentence of death be vacated and that either a new penalty proceeding be had or that this Court modify the sentence to life imprisonment with a twenty-five year mandatory minimum term of imprisonment.

Respectfully submitted,

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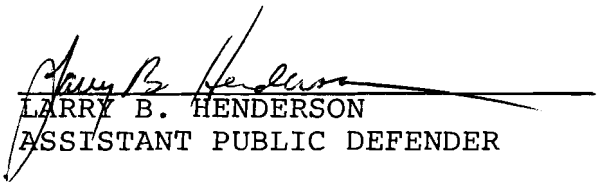
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Thomas H. Provenzano, Inmate No. 094542, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 11th day of March, 1985.



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