IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 74101

FILED
SID J. WHITE
MAY 2 1989
CLERK, SUPREME COURT
By
Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Provenzano was convicted of one count of first degree murder and two counts of attempted first degree murder in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, following a trial by jury on June 11-19, 1984. A separate sentencing proceeding was held on July 11, 1984, and the jury subsequently returned an advisory verdict of death. On July 18, 1984, Judge Shepard formally sentenced Provenzano to death, finding five (5) aggravating circumstances and one (1) mitigating factor; the judge found in mitigation that Provenzano had no significant history of prior criminal activity, section 921.141(6)(a), whereas in aggravation the court found that Provenzano had previously been convicted of a felony involving the use or threat of violence, section 921.141(5)(b), that Provenzano had knowingly created a great risk of death to many persons, section 921.141(5)(c), that the capital felony was committed for the purpose of avoiding lawful arrest, section 921.141(5)(e), that the capital felony was committed to disrupt or hinder the lawful exercise of a governmental function, section 921.141(5)(g) and that the homicide had been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i).

Provenzano appealed his convictions and sentences to The Florida Supreme Court, and such appeal was styled, Provenzano v. State, FSC Case No. 65,663. Provenzano presented nine (9) primary claims on appeal, including: (1) alleged error in the

instruction on transferred intent; (2) alleged error in any denial of a motion for change of venue; (3) alleged insufficient evidence as to premeditation; (4) alleged error in the finding of the aggravating circumstance of cold, calculated and premeditated; (5) alleged error in the finding of the aggravating circumstance relating to disruption of a governmental function; (6) alleged error in the sentencing judge's failure to consider and find statutory and nonstatutory mitigating circumstances; (7) alleged improper questioning and argument by the prosecutor during the penalty phase; (8) alleged cumulative error including, inter alia, alleged limitation of cross-examination and denial of a motion for mistrial following an emotional outburst by the audience and (9) alleged unconstitutional application of section 921.141, given the fact that the jury does not find the aggravating circumstances.

On October 16, 1986, The Florida Supreme Court rendered its opinion, affirming Provenzano's convictions and sentence in all respects. See, Provenzano v. State, 497 So.2d 1177 (Fla. 1986). The Florida Supreme Court found no error in the instruction given the jury on transferred intent, and further found sufficient evidence as to premeditation. The Florida Supreme Court concluded that no claim of error had been preserved in regard to the point concerning the change in venue; however, The Florida Supreme Court chose to address the substantive aspects of the issue, so as to allay any fear that Provenzano had not received a fair trial and, indeed, concluded that Provenzano merited no relief. The Florida Supreme Court expressly approved the finding

of the cold, calculated and premeditated aggravating circumstance, as well as that involving the disruption of a governmental function. As to the allegedly unfound statutory mitigating circumstances, The Florida Supreme Court found that the trial court had considered all the evidence presented and found in its sound discretion that such did not rise to the level of a mitigating circumstance; similarly, as to the nonstatutory mitigating circumstances allegedly not found, The Florida Supreme Court concluded that none of the factors cited were supported by the record. The Florida Supreme Court found that the record refuted any contention of improper accumulation of errors, and further noted that even if the two contested aggravating circumstances had been improperly found, in light of the three that would remain and the single mitigating circumstance, "the sentence of death is still appropriate." Id. at 1184. Finally, the Florida Supreme Court found Provenzano's attack upon the application of a capital sentencing statute to be without merit. The Florida Supreme Court subsequently denied rehearing on December 22, 1986.

On or about February 17, 1987, Provenzano sought review by the Supreme Court of the United States, presenting three (3) claims for relief, including that relating to any denial of his motion for change of venue, The Florida Supreme Court's affirmance of the trial court's failure to find anything in mitigation and the fact that the jury did not find aggravating circumstances. On April 20, 1987, the Court denied review. See, Provenzano v. Florida, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987).

On March 7, 1989, Governor Martinez signed a death warrant for Provenzano, such death warrant active between noon, May 8, and noon, May 15, 1989, with execution presently scheduled for 7:00 a.m. on May 9, 1989. Pursuant to Florida Rule of Criminal Procedure 3.851, Provenzano filed a petition for writ of habeas corpus in the Supreme Court of Florida and Motion for Post-Conviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850 in the circuit court. In such motion, Provenzano presented twenty-three (23) primary claims for relief. These claims include the following contentions: (1) that, by virtue of the death warrant, Provenzano has been deprived of fifteen (15) days which he would otherwise have had within which to file his 3.850; (2) that Provenzano was tried while mentally incompetent; (3) that the trial court should had granted a change of venue, and an alternative claim of ineffective assistance of counsel; (4) that trial counsel had been ineffective in failing to adequately cross-examine certain state rebuttal witnesses; (5) that trial counsel had rendered ineffective assistance during the guilt phase in ten specific respects; (6) that trial counsel had rendered ineffective assistance during the sentencing phase in three specific respects; (7) that trial counsel had rendered ineffective assistance during the guilt phase through failure to object to testimony regarding Provenzano's future dangerousness; (8) that the mental health experts' opinions had been rendered professionally inadequate due to their "failures" and those of trail counsel; (9) Provenzano had been absent during alleged critical stages of his trial, and an alternative claim of

ineffective assistance of counsel; (10) that trial counsel had rendered ineffective assistance during the guilt phase by failing to object to the standard jury instructions on insanity; (11) that the admonition given the jury upon release from sequestration was inadequate and an alternative allegation of ineffective assistance of counsel (12) that Provenzano's sentence should be reversed because the jury was allegedly told not to consider sympathy; (13) that Provenzano's conviction should be reversed due to the admission of an allegedly inflammatory photograph; (14) that the state withheld evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (15) that the sentencer failed to consider non-statutory mitigation, in violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); (16) that improper victim impact information was introduced in violation of Booth v. Maryland, 482 U.S. 486, 107 S.Ct. 2529, 96 L.Ed.2d 440 ('1987); (17) that four of the five aggravating circumstances were improperly found; (18) that through argument, instruction and comment, the jury's sense of responsibility in sentencing was diluted, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 271 (1985); (19) that the instructions at the penalty phase shifted the burden of proof onto the defense to prove mitigation; (20) that the cold, calculated and premeditated and aggravating circumstance had been improperly found; (21) that the prosecutor had made improper argument during the penalty phase; (22) that one of the witnesses, a judge, had acted unethically in making certain pretrial statements and an

alternative allegation of ineffective assistance of counsel and (23) various claims raised by Provenzano pro se.

On April 25, 1989, Judge Shepard summarily denied the motion finding, inter alia that claims three, nine, twelve, thirteen, fourteen, fifteen, seventeen, eighteen, nineteen, twenty, twenty-one and twenty-two, all represented matters which could have been, should have been, or actually were, raised on direct appeal, and, thus, were procedurally barred on post-conviction motion. The court considered that only matters concerning competency, ineffective assistance of counsel, competency of mental health experts and introduction of alleged victim impact information were properly presented, and the court found that such claims likewise merited summary denial, given their insufficiency and/or the existence of harmless error. In rejecting claim twenty-three, the court found certain portions of this claim to be procedurally barred and those involving ineffective assistance of counsel to be insufficient.

SUMMARY OF ARGUMENT

The circuit court's summary denial of all relief requested was proper and should be affirmed. The motion for post-conviction relief, while of considerable length and density, did not present any claim upon which an evidentiary hearing was merited. The motion likewise presented a good number of claims which were correctly found to be procedurally barred, although, as will be noted, the state will, on occasion, disagree with the precise basis for such finding by the circuit court. Additionally, the state would suggest that those claims involving Florida Rule of Criminal Procedure **3.851**, alleged withholding of evidence by the state, and alleged failure to consider mitigating circumstances were, technically, properly presented on post-conviction motion, yet still deserving of summary denial in this case. The state also suggests that there was no need for the circuit court to have addressed any portion of claim twenty-three, inasmuch as Provenzano had no right to appear simultaneously before the court both pro se and through counsel. In light of Harris v. Reed, U.S. ___, **109** S.Ct. **1038** (1989), the state will, on occasion, request this court to make express and explicit the existence of a procedural bar, so that Provenzano will not be allowed, undeservingly, to secure federal review of claims which were improperly presented in the state courts.

Provenzano's most substantial claim relates to ineffective assistance of counsel. While claims of this nature are properly

presented on post-conviction motion, and, often require evidentiary hearings for their resolution, the specific claims presented in this motion were simply insufficient to merit relief. The state has identified fifteen (15) specific allegations of ineffective assistance of counsel at trial and sentencing, and, in every instance, Provenzano has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A great number of he claims are expressly refuted by the record and, even in the absence of an evidentiary hearing, defense counsel's strategy is not only apparent, but, at times, even explicit on the record. While the performance of counsel is assailed from every conceivable direction, focusing upon actions or inactions both consequential and trivial, the underlying fact remains that prejudice has not been demonstrated and, in some instances, not even adequately alleged. This case was vigorously defended at the trial stage, and these claims are simply unfounded.

The primary focus of the ineffective assistance of counsel claim, as well as the related claims pertaining to Provenzano's alleged incompetency at the time of trial and at the alleged incompetency of the mental health experts, relates to Provenzano's mental state. The defense in this case was insanity. This was the only reasonable defense, given the fact that the murder in this case was committed in the hallway of the Orange County Courthouse, in full view of scores of eyewitnesses. Defense counsel sought the assistance of two experts to assist in

this defense. Both experts, experienced Florida psychiatrists, testified that Provenzano had been insane at the time of the offense. There was also considerable testimony from lay witnesses, including Provenzano's sister, who testified extensively as to his background. At the penalty phase, Provenzano himself took the stand, and likewise testified extensively as to his life. The state countered this evidence with that of its own three experts who had, prior to trial, found Provenzano competent to stand trial, in accordance with all statutory criteria. These witnesses all testified that Provenzano had known what he was doing at the time that of the murder, and their testimony was supported by scores of other lay witnesses who had observed Provenzano close to that time. The jury chose to believe that Provenzano was sane, and convicted him, and the judge, after considering all the evidence, chose to find that death was the appropriate sentence.

Provenzano seeks to undo all of the above, based primarily upon a March **1989** report from a Wyoming psychologist which, in turn, is premised at least in part upon "new" facts. Provenzano's attacks upon his defense experts are particularly unconvincing, given the fact that the present experts diagnosis is identical to that reached by the two experts who testified on his behalf in **1984.** The existence of this "new", and largely cumulative, evidence is of little, if any, significance. This new psychological diagnosis, while at odds with the opinions of the state experts, does not raise any reasonable doubt as to the confidence of the state's experts or as to Provenzano's

competence to stand trial in 1984. While the state experts, like so many others were apparently unaware of these "new" facts, no reasonable probability exists that their diagnosis would have been different, if they had known. This case does not represent one of those rare instances in which convincing mental state or mitigating evidence has been uncovered years after the fact, and where a reviewing court must question the reliability of the prior proceedings. Rather, this case represents an instance of a defendant dissatisfied with the outcome of the trial and sentencing, and seeking to change such regardless of the number of mental health experts and attorneys whose reputations must be destroyed in the process. The denial of all requested relief was proper and should be affirmed.

POINT I

THE CIRCUIT COURT'S SUMMARY DENIAL OF CLAIMS IV, V, VI, VII AND X, WHICH RAISED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND SENTENCING, WAS CORRECT.

In these claims, Provenzano argued that he received ineffective assistance of counsel at both trial and sentencing. Provenzano alleged that counsel was ineffective in the following respects: (a) failing to adequately litigate Provenzano's competence to stand trial; (b) failing to adequately move for a change of venue; (c) failing to adequately question prospective jurors as to any prior knowledge of the case; (d) failing to cross-examine certain rebuttal witnesses as to bias or prejudice; (e) waiver of the attorney-client privilege as to two witnesses; (f) failing to present a defense of "imperfect" self-defense; (g) failing to allow Provenzano to testify; (h) failing to object to the testimony of Judge Conser; (i) failing to object to Provenzano's absence during allegedly critical portions of the trial; (j) failing to assure the assistance of effective mental health experts; (k) failing to object to testimony concerning Provenzano's future dangerousness; (1) failing to object to the jury instruction on insanity and/or to propose others; (m) failing to object to the admonition given the jury upon release from sequestration; (n) failing to call expert witnesses during the penalty phase and (o) failing to investigate and present background information concerning Provenzano at sentencing. While these claims are cognizable on 3.850, and while

ineffective assistance of counsel can be the proper subject of an evidentiary hearing, the state suggests that summary denial of these claims was proper. Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Provenzano must demonstrate not only deficient performance of counsel, but also resultant prejudice, such that it can be said that a reasonable probability of a different result exists, but for counsel's alleged errors. The state would respectfully suggest that Provenzano has failed to make either showing.

A. Provenzano's Claim Regarding the Competency Hearing

In this claim, Provenzano argues that his original attorney, Steven Horneffer, rendered ineffective assistance in his handling of the competency hearing of March 1, 1984, in that, according to Provenzano, Horneffer should have called Dr. Pollack to testify, and in that counsel should have attacked the state's doctors, on the grounds that they had not evaluated Provenzano in accordance with the criteria set forth in the rules of criminal procedure. This claim is utterly without merit.

The record in this case indicates that, upon defense counsel's motion, Dr. Pollack was appointed to examine Provenzano, pursuant to Florida Rule of Criminal Procedure 3.216 (R 2707, 2756). Subsequently, on February 7, 1984, defense counsel moved to have Provenzano's competency to stand trial determined, in that Provenzano often failed to follow counsel's advice, Provenzano had stated that he intended to take certain actions at trial which would not be in his best interest and in that the mental health expert had advised counsel that

Provenzano's competency was "questionable at best" (R 2766-2767). The motion was granted, and Doctors Kirkland, Wilder and Gutman were appointed to examine Provenzano and to determine his competency to stand trial, in accordance with Florida Rule of Criminal Procedure 3.210(b) (R 2784-2785). The reports subsequently filed indicate that all three doctors found Provenzano competent to stand trial (R 2791-2796, 2798). Following the hearing on March 1, 1984, at which the three doctors testified, Judge Shepard expressly found Provenzano competent to stand trial (R 2809-2810).

The actual competency hearing of March 1, 1984 was not originally transcribed as part of the record on appeal, and one can only assume, charitably, that the instant claim is based upon Provenzano's ignorance of the contents of this transcript; this proceeding, however, was transcribed on April 5, 1989, the day before the 3.850 was filed, such transcription, apparently, at the request of the Office of the Capital Collateral Representative. This transcript indicates that the prosecutor expressly asked the doctors the following questions, receiving an affirmative answer as to each: whether Provenzano understood the nature of the charges against him, whether he had an ability to confer with his attorney with a reasonable degree of rational understanding, whether he had a rational and factual understanding of the proceedings against him and the nature of such proceedings, whether he had an ability to relate the facts concerning the offense to his attorney, whether he would be able to assist his attorney in planning for his defense, whether he

would be able to help his attorney in cross-examining witnesses, whether he would be able to manifest appropriate courtroom behavior, whether he would be able to testify truthfully, whether he would be motivated to help in his own defense, whether he would have the capacity to cope with incarceration prior to trial, and whether he understood the nature of the penalties he was facing (Proceeding on March 1, 1984, at 5-7, 14-15, 26-28) (see, Appendix). This record also indicates that defense counsel extensively cross-examined each doctor, and asked each, if the trial were delayed, whether Provenzano's condition might worsen substantially due to stress (R 11, 18-19); although Horneffer did not expressly cross-examine Dr. Gutman on this subject, that doctor's testimony was simply presented as a proffer, given defense objections due to Gutman's prior treatment of Provenzano (R 21-22).

Thus, on the basis of this record, it is clear that defense counsel had no basis to attack the doctor's opinions. Similarly, he had no reason to call Dr. Pollack as a witness, assuming that the excerpt quoted in the motion to vacate is indeed a portion of the doctor's report, in that even such excerpt indicates that Dr. Pollack found Provenzano competent to stand trial, albeit with some reservations; the doctor, at most, tempered his opinion with certain observations suggesting that, under certain circumstances, Provenzano might "lose control". There is no reasonable probability that this "conditional" diagnosis would have had any effect upon the trial court's determination of Provenzano's competency to stand trial, and neither deficient

performance of counsel nor prejudice has been established under Strickland v. Washington.

B. Provenzano's Claim Relating to the Change of Venue.

Provenzano contends that his counsel rendered ineffective assistance in failing to "effectively" request a change of venue. The record reflects that defense counsel made a strategic decision not to seek a change of venue in this case. This is clear from remarks by defense counsel at the pretrial hearings, as well as at the commencement of the trial itself (R 2295-2296; 2387; 3-22). In fact, at the hearing on March 1, 1984, defense counsel expressly represented to the court that he had discussed the matter with Provenzano and that the latter understood that the defense would not be seeking a change of venue (R 2295-2296). While Provenzano contended, as the trial was about to begin, that he had misunderstood all of this, thinking that even if he were tried in Orlando, he would not be tried by Orange County jurors, defense counsel refuted these claims, representing that they had fully discussed the possibility of a change of venue with Provenzano (R 9). Attorney Edmund stated on the record that he had been advised that any claim of venue would involve a trial in St. Augustine, and that he preferred that the trial be held in Orlando, in that a juror's knowledge of the case would not necessarily be an impediment, given the fact that an insanity defense would be presented (R 9-10); Edmund also stated that he felt that an Orlando jury would be more receptive to the defense of insanity, as opposed to a more conservative one in St. Augustine (R 9-10). Co-counsel Brawley likewise stated,

> I spoke with Mr. Provenzano about that matter on several occasions. I advised him in that in my best judgment his best bet for a fair trial was here in Orange County. There is no way I can see he would have understood that jurors would have come from anywhere but Orange County.

(R 13).

Nevertheless, given Provenzano's obdurate attitude on the subject, defense counsel announced that he would make an oral motion for change of venue, subject to the court's "determination as to whether or not we can select a fair and impartial jury in this case." (R **17);** defense counsel Edmund then formally made such motion, which he stated was "upon the desire of the client", and asked the court to defer ruling and to see whether or not a fair and impartial jury could be selected from the venire that had already been chosen, sworn and qualified that morning, and to rule upon the motion at such time that the court deemed proper (R **18-19).** The court agreed that it would take the matter under advisement (R 21). The motion was never formally renewed, nor was any written motion filed, as defense counsel had stated that it would, and the record clearly reveals why. While, undoubtedly, it cannot be said that there was no publicity concerning this case, as this court noted in its opinion on direct appeal in this case, the judge was extremely lenient in granting challenges for cause and, "Any potential juror with even a hint of prejudice was immediately removed for cause, and a comprehensive gag order covered even peripheral participants." Provenzano, **497** So.2d at **1183.** Further, as this court likewise

noted, Provenzano personally acquiesced to the selection of the jury panel after consulting with his attorney and,

> More importantly, the fact that the defense did not use all of its peremptory challenges is the best evidence that Provenzano was personally satisfied with the jury selected. See, Davis v. State, **461** So.2d **67** (Fla. 1984), cert. denied, U.S. ___, **105** S.Ct. **3540**, **87** L.Ed.2d **663 (1985).**

Provenzano, **497** So.2d at **1182.**

Under the facts of this case, it cannot be said that attorneys Edmund and Brawley acted as no reasonably competent attorneys would have under all the circumstances, in failing to move for a change of venue. As this court recognized, this was a tactic of the defense, and it was directly related to the defense actually presented. Provenzano did not contest his factual guilt of the offenses at issue, arguing instead that he had been insane at the time. As attorney Edmund stated,

> I told him [Provenzano] that, in my opinion, if you walk the streets of Orlando and stop twenty people, if any of them knew about his case -- and I didn't think all of them would -- that immediate reaction I was getting from everybody that he was insane. And this was our defense. And it seemed to me this was the place to keep it.

(R 10). Further, counsel clearly made a strategic choice, given his knowledge of St. Augustine, that he preferred a trial in Orlando, See also, Buford v. State, **492** So.2d **355** (Fla. **1986)** (counsel not ineffective for failing to move for change of venue, as such was strategic choice and attorneys often prefer to try a

case where they and their clients are known)' . The performance "prong" of Washington has not been met.

Further, it should indisputable that the prejudice prong has likewise not been met. This court expressly resolved this claim on direct appeal, despite the fact that it noted that the claim was not preserved, and in so doing, specifically found that Provenzano had not been deprived of a fair trial. This court specifically found that Provenzano had failed to raise a presumption of partiality, and that

> An evaluation of the pretrial publicity and voir dire testimony reveals that a fair and impartial jury was ultimately empaneled. Provenzano, 497 So.2d at 1182.

The state would suggest that this express holding must be regarded as dispositive upon the issue of prejudice under Strickland v. Washington. If, as this court held, an impartial jury was ultimately empaneled, then it cannot be said 'that a reasonable probability of a different result at trial exists, had counsel formally moved for a change of venue. Accordingly, summary denial of this claim was not error. See also, Muhammad v. State, 426 So.2d **533** (Fla. **1982)** (summary of denial of **3.850** raising ineffective assistance of counsel for, inter alia, failing to preserve record as to motion for change of venue

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[1] Interestingly, the viedeotape appended to the motion to vacate includes an interview between Provenzano and a reporter, in which he stated that he had agreed to be tried in Orlando because that was where his friends were, and he did not want to be viewed as running away. (Appendix 16 to Motion).

without merit, given the fact that such point was raised, and rejected, on direct appeal.)

C. Provenzano's Claim Relating to the Conduct of Voir Dire

Provenzano contends that his attorneys rendered ineffective assistance during voir dire, in that they failed to question prospective jurors as to exactly what they knew about the case, and in that they failed to request individual and sequestered voir dire. Provenzano contends that he was deprived of a fair trial because his jury was "exposed to unknown amounts of media brainwashing." (Motion to Vacate at p. 89). The state would contend that this claim is utterly without merit. As Provenzano concedes, the trial court excused for cause any juror who stated that he or she had a fixed opinion about the case (Motion at 88). Given such fact, the state suggests that it was hardly defense counsel's duty to seek to "rehabilitate" these jurors, and that it was obviously not to the defense's advantage to have those jurors blurt out their preconceived notions on the record before the rest of the panel. Those jurors who indicated some knowledge of the case, but also an ability to be impartial, were allowed to remain and, even had defense counsel requested individual voir dire of them, there is no reasonable probability that such would have been granted, or that, if it were, such would have had any effect on the impartiality of the jury ultimately chose. Cf., Stano v. State, 473 So.2d 1282 (Fla. 1985) (question of whether individual and sequestered voir dire will be granted a matter of discretion for the trial court). Defense counsel specifically advised all prospective jurors that the defense would involve

insanity, and there is no indication that any juror had a fixed opinion in this regard. This court's finding, cited earlier, to the effect that Provenzano was tried by a fair and impartial jury remains applicable, and is, again, dispositive on the question of prejudice.

Further, to the extent that Provenzano is simply attacking the general manner in which counsel conducted voir dire, this court has held that it will be recognized that the manner of jury voir dire is highly subjective and individual among attorneys, and that while some favor a short voir dire, others will conduct as extensive an examination as the court will allow, with practices varying not only from attorney to attorney, but also from region to region. See, Meeks v. State, 418 So.2d 987 (Fla. 1982). Thus, in Muhammed v. State, supra, this court relied upon Meeks in affirming the summary denial of a post-conviction motion raising ineffective assistance of counsel due to, inter alia, counsel's failure to request sequestered and individual voir dire in a "high publicity" case. This court refused to find such choice of tactics a deficiency measurably below the standard expected. A similar result is dictated here, given Provenzano's failure to demonstrate either deficient performance or prejudice.

D. Provenzano's Claim Concerninq the Cross-Examination of Certain Witnesses.

In this claim, Provenzano argues that defense counsel were ineffective for failing to adequately cross-examine state rebuttal witnesses Hostetter, Blecha, Laufman, Jones, Barnett, Thomas, Beaulieu, Evalle, D'Auteil, Flynn and Wilder. Provenzano

argues that the first five witnesses, all persons who had sold Provenzano firearms, should have been cross-examined as to bias, i.e., the consequences of selling firearms to a "crazy" person, and that the next five, all law enforcement or courtroom personnel, should have been cross-examined as to prejudice, i.e., what would happen to them if they testified in favor of Provenzano. Provenzano also points out that defense counsel did not cross-examine Dr. Wilder, a state witness, at all. This claim is without merit. It should not require extensive citation of authority for the proposition that a decision to cross-examine a witness, as well as the extent of such cross-examination, is a matter of strategy.

From the record, it is clear that, whatever may be said about the cross-examination now suggested, Provenzano's attorneys did cross-examine the state witnesses on the bases which they felt most appropriate. Thus, those ten lay witnesses who offered opinion testimony as to Provenzano's sanity were extensively cross-examined as to the basis for their opinion, i.e., whether they knew of certain specific instances of Provenzano's bizarre behavior (R **1586-1588; 1595-1596; 1601-1602; 1607-1608; 1610-1611; 1614-1615; 1619; 1622; 1628-1629; 1633-1634)**. Obviously, defense counsel's purpose was to suggest to the jury that the witnesses were not familiar enough with Provenzano personally or with the discipline of psychiatry in general to offer a meaningful opinion. While defense counsel did not seek to dilute the importance of the witnesses' testimony by the means now suggested, i.e., questioning the witnesses as to "bias", the

state respectfully suggests that Provenzano has failed to demonstrate that no reasonably competent attorney would have taken the same tack that defense counsel sub judice did. Their method of cross-examination had the additional benefit of reminding the jury of the alleged "bizarre" behavior by Provenzano already testified to by other witnesses, when such was repeated on cross-examination. Further, it is difficult to see how Provenzano has demonstrated prejudice, in that it is sheer speculation to believe that those questions, even if asked, would have either provoked a "favorable" response or that their mere utterance would have benefited the defense.

It is additionally clear that defense counsel's decision not to cross-examine Dr. Wilder was simply a matter of tactics. Whereas the doctor was called by the state, his testimony was not entirely harmful to the defense. This is because the doctor, while recounting his various interviews with Provenzano, 'seemed to shy away from offering a specific diagnosis, and, indeed, was apparently of the opinion that such diagnosis were misleading (R 1812). When asked whether, in his opinion, Provenzano was sane at the time of the offense, the doctor stated, "well, using the M'Naughton rule, I think that he would be found to have been sane on that day." (R 1813). While stating that he felt that Provenzano had known what he was doing at the time, the doctor also suggested that Provenzano had, to some extent, been acting from a sense of self-preservation, in that he had felt threatened when he was approached in the courtroom to be searched, given his belief that there was a conspiracy involving all law enforcement

officers against him (R 1817). The doctor also seemed to suggest that Provenzano might never intended to shoot anyone in the courtroom, in that he would simply had derived satisfaction from being armed in the courtroom and knowing that he could have killed anyone, if he wished to (R 1817). Finally, the doctor also analogized the events in the courthouse to the "shooting at the OK Corral", a phrase which defense counsel later put to substantial use during closing argument (R 1817).

These latter remarks are certainly in keeping with the defense theory of the case, as well as with the testimony of the defense psychiatrists, Drs. Lyons and Pollack, to the effect that Provenzano had panicked when he had been approached in the courthouse and had felt threatened by all law enforcement officers. Accordingly, defense counsel no doubt simply wished to leave this favorable testimony alone, and not to allow the witness a chance to change or retract it on cross-examination. Defense counsel also apparently felt that Dr. Wilder's testimony as a whole was rendered suspect, given his refusal to make an expressed "diagnosis", and, of course, defense counsel would not wish to offer the doctor a chance to correct this on cross-examination. Thus, during closing argument, attorney Edmund, while somewhat misstating the doctors testimony as to his views of Provenzano's sanity, did tell the jury that the reason that he did not cross-examine Dr. Wilder was that the doctor had not offered any opinion as to Provenzano's sanity,

> And he spent more time with him than any of the rest of them did. And he sat there and said, "I

> think he would be found...", and I think he would this, and I think he would that. And that was his testimony.

(R **1937**). As noted, defense counsel also made extensive use of the doctor's analogy to the shooting at the OK Corral, arguing that such was in keeping with their view that the defendant had simply panicked or had not premeditated the shootings (R **1905**, **1933**). The state would also note that Provenzano has never suggested just what counsel should have asked Dr. Wilder on cross-examination or how such cross-examination would have benefited the defense. Accordingly, as to this entire claim, neither deficient performance of counsel nor prejudice has been established under Strickland v. Washington.

E. Provenzano's Claim in Regard to the Waiver of the Attorney Client Privilege.

In this claim, Provenzano argues that counsel rendered ineffective assistance by waiving Provenzano's attorney client privilege in regard to two state witnesses, Josephine Stafford and Kimberly Duff. The record indicates that attorney Edmund did expressly waive any attorney client privilege between Provenzano and Josephine Stafford prior to that witnesses testimony (R **911**), but it also reveals that he took the position that no privilege existed in regard to Kimberly Duff (R **919**). Ms. Stafford, a legal investigator with a private law firm, testified that in late December of **1983**, Provenzano had come to the firms office to seek her assistance in a law suit involving an automobile accident in which Provenzano had been involved. She stated that

he had returned in January of **1984**, wearing a combat outfit, and that, during the discussion of his case, Provenzano had become quite angry and had started describing for her his prior altercation with the police in August **(R 914-915).** Provenzano had stated that he wished the accident case settled, *so* that he could use any money to pay his fines in the other case **(R 914-915).** Provenzano seemed upset at the fact that his hearing was coming up in that case, stating that what the establishment had done to him was "treason", and further stating that, "come Monday the city will be sorry.'' **(R 915).** Ms. Stafford stated that Provenzano had alarmed and scared her and that she had told her employers that she did not wish to have this case handled in the office **(R 917).**

Ms. Duff, on the other hand, testified that she was the receptionist for the Public Defender of the Ninth Judicial Circuit, and that she had seen Provenzano on both January **9** and 10, **1984** (R **921).** She stated that at such time he had seemed very happy and pleasant, and had asked her whether his attorney was in the office; when being told that he was not on January **9**, he simply left **(R 922).** The next day when he returned, Provenzano again seemed cheerful and pleasant **(R 923).** When again told that his attorney was in court, 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 923).** On cross-examination, attorney Edmund elicited testimony to the effect that Provenzano had not been as neat and clean on these two days as he had been previously and that when he had left the

office, he had been ''jumpingup and down and dancing around." (R **923, 926).**

Although Provenzano describes this testimony as "devastating", such adjective is simply excessive. To the extent that this testimony went toward the existence of premeditation, it was simply cumulative to the overwhelming evidence otherwise presented on this score. Additionally, it was quite consistent with the defense theory of the case for there to be testimony adduced as to Provenzano's intention to shoot Officers Shirley and Epperson; it was the defense theory of the case that Provenzano had gone to the courtroom intending to shoot them, but that he had later panicked when he had been approached about being searched, given his belief that all law enforcement officers were in a conspiracy against him. Thus, Provenzano's remarks concerning the "establishment" to Ms. Stafford, as well as the fact that he frightened her, must be regarded as beneficial to the defense. Similarly, Ms. Duff's testimony concerning the deterioration in Provenzano's appearance and his excessive joy shortly before the shooting were again consistent with the defense's theory of the case. It would also appear that Ms. Duff's original statement to the police was utilized by defense expert witness Dr. Lyons, and defense counsel may have wished for the jury to hear of this matter, *so* that they would understand the basis for his opinion (R **1441);** it additionally appears, that the defense might have contemplated calling Kimberly Duff themselves (R **918).**

The question, of course, remains whether reasonably competent counsel would have asserted a claim of privilege to prevent these witnesses from testifying and whether the failure of Provenzano's counsel to have actually done so has rendered the result of his trial unreliable. See, Strickland v. Washington. Both questions must be answered in the negative. Whereas the attorney-client privilege, under section 90.502, could be said to apply to Ms. Stafford, given the fact that Provenzano approached her law firm for representation, it should be clear that the matters to which she testified were not those within the privilege. In other words, Ms. Stafford did not testify as to any confidence which Provenzano had imparted to her concerning his automobile accident and, to the extent that Provenzano imparted to her intention to commit a crime in the courthouse, the state would respectfully suggest that such communication is not protected under section 90.502. Cf., Roberts v. Jardine, 366 So.2d 124 (Fla. 2d DCA 1979). Thus, even if the claim of privilege could have been asserted, the state respectfully suggests that no reasonably probability exists that it would have been sustained; additionally, as previously argued, the admission of this testimony was insufficiently prejudicial, in any event, to create any reasonable probability of a different result.

A similar finding is dictated as to the testimony of Kimberly Duff. While she unquestionably was an employee of the law firm representing Provenzano on a legal matter, the remarks which he imparted to her would seem, again, hardly those which he intended to be confidential and/or within the privilege; certainly her

physical observations of his demeanor and rationality would not fall within section 90.502. Cf., Anderson v. State, 297 So.2d 124 (Fla. 2d DCA 1974). Additionally, to the extent that Provenzano's statements involve an intention to commit a crime in the courthouse, such could not be privileged under section 90.502(4)(a). Accordingly, there would not seem to be any reasonable probability that a claim of privilege would have been sustained in this respect and, as argued previously, the admission of this testimony was, in any event, not sufficiently prejudicial to merit relief. Accordingly, Provenzano has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington.

F. Provenzano's Claim in Regard to the Defense of "Imperfect" Self-Defense.

In this claim, Provenzano argues that his counsel rendered ineffective assistance by failing to present a defense of "imperfect" self-defense., The state would respectfully suggest that this claim is premised upon a misreading of the record. The defense did argue that Provenzano had shot the victims in this case because he had felt threatened and because he had felt that he was protecting himself (R 1902, 1934). As Provenzano recognizes in his motion, in order to merit an instruction on self-defense, evidence would have to be adduced to the effect that a reasonably prudent person would had felt that danger was imminent and that such force was necessary; Provenzano also recognizes that he was not a "reasonably prudent" person. (Motion at 98). Accordingly, Provenzano must concede that he was

not entitled to a "standard" self-defense instruction. That being the case, his attorneys acted reasonably in asserting a defense of insanity, and in further suggesting to the jury that, due to Provenzano's alleged delusions and paranoia, he had felt that he was acting in self-defense. Neither deficient performance nor prejudice has been demonstrated under Strickland v. Washington.

G. Provenzano's Claim Concerning his Failure to Testify.

In this claim, Provenzano argues that his counsel rendered ineffective assistance because Provenzano had absolute right to testify and did not do *so.* This claim is insufficient on its face. As Provenzano notes, defense counsel originally stated that Provenzano would testify; although the record further indicates that defense counsel later stated, at the time of the recess of June 15, 1984, that it was still not formally decided whether Provenzano would take the stand (R 1411). Apparently, it was decided that Provenzano would not testify at trial. Provenzano did, however, testify during the sentencing phase, and the content of his testimony sheds light on what must have been a strategic decision by counsel.

The defense presented at the guilt phase was to the effect that Provenzano was insane, that he had paranoid delusions and that he would not had been able to form the requisite intent to commit the premeditated murder of the victims who were actually killed. In the course of presenting this defense, Provenzano's counsel were prepared to concede that Provenzano had come to the courthouse on the day in question with firearms and with the

intention to murder the two officers who had originally arrested him in August; it was, however, the defense contention that Provenzano had panicked when the bailiff had approached him to search him and that the subsequent shootings had not been intentional. This defense was in accordance with the expert testimony presented by the psychiatrists (R **1457-1462**; **1535-1543**, **1573**). When Provenzano testified at sentencing, his story was entirely different. He denied any hostile intent toward anyone, claiming that he had entered the courtroom with his two pistols and sawed-off shotgun simply because he had not wished to leave them in the car, fearing that they would have been stolen (R **2109-2111**). Provenzano denied harboring any ill feelings toward the arresting officers and stated that his shootings of the bailiffs had been accidental (R **2111-2121**, **2164**).

While it can be argued that, given this story's inherent implausibility, the defense might had wished to put Provenzano on the stand during the guilt phase, in further support of their contention that he had not been mentally competent at the time of the incident, it should be recognized that this step would have resulted in the introduction of contradictory and inconsistent testimony. The defense, through their expert witnesses, and was painting a very specific picture of Provenzano for the jury, the state suggests that had the above testimony been presented at the guilt phase, such would simply have been distracting. Additionally, the simple fact that Provenzano could testify rationally and in a coherent and detailed fashion could be regarded as inconsistent with the defense of insanity presented,

and Provenzano's penalty-phase testimony would seem to have been more properly viewed as a vehicle toward mitigation as opposed to acquittal (R 2050-2125; 2149-2168). The state would suggest that Provenzano has failed to demonstrate that any reasonably competent attorney would have called him to testify during the guilt phase or that the omission of such testimony during the guilt phase has rendered the result of his trial unreliable. Accordingly, neither deficient performance nor prejudice has been demonstrated under Strickland v. Washington.

H. Provenzano's Claim Concerning the Testimony of Judge Conser.

In this claim, Provenzano argues that his counsel was ineffective for failing to object to the testimony of Judge Conser, on the grounds that the judge had acted unethically in giving certain pre-trial statements to the press. This point is frivolous. Provenzano offers no legal support for this argument and never suggests upon what basis counsel could had objected to the judge's testimony. To the state's knowledge, a witness who has talked to the press prior to testifying is not ipso facto barred from the stand. Judge Conser did not preside over Provenzano's trial, rather he was simply one of the long string of eye witnesses to the actual shooting, and given the fact that he viewed the shooting with his own eyes, the state suggests that no reasonable probability exists that he could had been precluded from testifying on any basis. Alternatively, the state would simply note that his testimony, comprising some eight pages worth of transcript, was hardly a "feature" of the trial (R 609-617).

Provenzano has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington.

I. Provenzano's Claim Concerning the Absence From Certain Stages of the Trial.

In this claim, Provenzano argues that he received ineffective assistance of counsel, due to counsel's failure to object to his absence during certain critical stages of the trial and/or due to counsel's waiver of Provenzano's presence. This claim is utterly without merit. Whereas Provenzano suggests that he was not present during the motions hearing of May 1, 1984, the court minutes indicate otherwise (R 2931, 2932)[2] . Even if he had been correct, it is still clear that this type of pretrial non-evidentiary hearing, at which only arguments of law were presented is not a critical stage under Florida Rule of Criminal Procedure 3.180. See, e.g., Herzog v. State, 439 So.2d 1372 (Fla. 1983); Garcia v. State, 492 So.2d 360 (Fla. 1986).

As to the two other proceedings as issue - the charge conference and argument upon a defense motion for mistrial - the record indicates that attorney Edmund waived Provenzano's presence at such proceedings (R 1821, 1966). The state would likewise suggest that neither proceeding was a critical stage under Rule 3.180, in that, ~~inter alia, n~~o evidence was presented, the jury was not present and, at most, legal arguments were presented. Courts have specifically held that jury charge conferences are not critical stages at which the presence of a

[2] Interestingly, the videotape appended to the motion to vacate includes a videotape of this proceeding and Provenzano is obviously present. (Appendix 16 to Motion).

defendant is mandated, see, Randall v. State, 346 So.2d 1233 (Fla. 3d DCA 1977), Howard v. State, 484 So.2d 1319 (Fla. 3d DCA 1986), and the argument on the motion for mistrial simply seemed to represent a proceeding which would not had been enhanced by Provenzano's personal presence. Cf., Roberts v. State, 510 So.2d 885 (Fla. 1987). It is difficult to see how deficient performance of counsel or prejudice under Strickland v. Washington have even been alleged, let alone demonstrated. Defense cou sel did not waive any of Provenzano's personal rights at the charge conference, in contrast to the situation in Harris v. State, 438 So.2d 787 (Fla. 1983) (only defendant personally can waive instructions on lesser offenses in capital cases). No relief is warrant as to this claim.

J. Provenzano's Claim Reqarding the Adequacy of Mental Health Assistance.

In this claim, Provenzano argues that counsel rendered ineffective assistance in failing to assure adequate mental health assistance, by failing to provide the experts with "any of the necessary collateral information regarding Mr. Provenzano" and by failing to use available information to challenge the state's experts. This claim is largely refuted by the record. Defense expert Lyons testified extensively as to the materials which he had utilized in forming his opinion, citing to, inter alia, Provenzano's employment records, his report of police brutality concerning his original arrest, police reports concerning the murder, written statements by two of Provenzano's co-workers at the ABC, summary of Provenzano's military records

including reference to his undesirable discharge, psychiatric reports by Doctors Pollack, Kirkland, Gutman, Callahan, and Wilder, Provenzano's hospital records following his own shooting and a report from an attorney who had represented Provenzano in his worker's compensation case (R 1440-1441). Similarly, Dr. Pollack's deposition indicates that he also considered a significant number of reports, interviews, and witness statements (R 2617-2620). In any event, the simple fact must be recognized that regardless of what these doctors allegedly did not "know", they still concluded that Provenzano had been insane at the time of the murder. It is difficult to see how they could have reached a more favorable conclusion with "more" data.

Similarly, Provenzano's contention that defense counsel failed to challenge the state's experts is ludicrous in light of the cross-examination actually conducted. Defense counsel vigorously cross-examined both Doctors Kirkland and Gutman as to their knowledge of various specific incidents of Provenzano's "bizarre" behavior (R 1697-1730; 1761-1771, 1778-1790). During the course of this cross-examination, the doctors often acknowledged that they had not been aware of some of the specific incidents cited by defense counsel. Later, during closing argument, defense counsel made much of this fact, pointing out to the jury that the defense experts were more believable because they knew more about Provenzano's background, and that, accordingly, the jury could trust them more. Similarly, defense counsel argued that the jury themselves knew more than any of the experts, inasmuch as they had heard actual testimony from

Provenzano's sister concerning his background, as well as that of other lay witnesses (R **1908, 1910, 1913, 1917, 1923, 1924, 1938).** In fact, at one point attorney Edmund argued,

> Because only two of the five psychiatrists who have testified in this case knew all the facts before they formed their opinion. And those two each testified for the defense (R **1938).**

In this case, defense counsel had two experts who were prepared to testify that Provenzano was insane at the time of the offense. Counsel surely had no "**duty**" to further "educate" the state experts, in the hope that they would come around to the defense point of view, especially when counsel could use any relative lack of knowledge on the part of the state's experts to the defense advantage. It is entirely speculative to assert that had Doctors Kirkland, Gutman or Wilder been more "informed", a reasonable probability would exist that they would have testified in the defense's favor; indeed, when asked on redirect whether any of the "new information" cited by defense counsel during cross-examination would have changed their original opinions, Doctors Kirkland and Gutman both responded in the negative (R **1740-1741, 1798).** Neither deficient performance of counsel nor prejudice has been demonstrated under Strickland v. Washington.

K. Provenzano's Claim Regarding the Testimony as to "Future Dangerousness".

In this claim, Provenzano argues that defense counsel rendered ineffective assistance by allowing into evidence testimony concerning Provenzano's future dangerousness. Provenzano cites to two specific incidents. During the testimony

of defense expert Lyons, attorney Edmund asked the witness whether Provenzano's paranoia was likely to improve in the future; the doctor noted that there was no effective treatment at the time (R 1471-1472). In answer to the next question, the doctor affirmed that Provenzano was severely paranoid (R 1472). Subsequently, at the conclusion of the direct examination of Dr. Pollack, defense counsel asked the witness whether Provenzano was a dangerous person; the doctor replied in the affirmative, and explained that Provenzano's illness was deep-seated and not amenable to easy treatment. The doctor stated that Provenzano was dangerous because of his illness and that, should Provenzano find himself under comparable circumstances, he would most probably react in a similar way (R 1542-1543). Defense counsel's last question related to whether the doctor knew the victims in the case; Pollack replied that he did (R 1453). Provenzano complains that this testimony was unfairly prejudicial and could not have been motivated by any "reasonable" strategy.

The state disagrees. Initially, it must be noted that the testimony of Dr. Lyons was relatively innocuous. His testimony as to Provenzano's prognosis was simply offered to underscore the gravity of the defendant's mental illness, thus rendering it more likely that the jury would conclude that Provenzano was insane; it is difficult to see any implication of future dangerousness in this. The testimony of Dr. Pollack was, of course, more explicit on the issue of future dangerousness, although the state would still challenge Provenzano's assessment of it. Again, the testimony was offered to underscore the severity of Provenzano's

mental illness, to encourage the jury to find Provenzano insane. Additionally, defense counsel did have strategic reasons for eliciting it. During the pretrial deposition of Dr. Pollack, the state attorney had asked the witness whether Provenzano was a "dangerous person" based upon certain scientific studies; the doctor replied that Provenzano satisfied seven of the twelve criteria which had been set forth by Dr. Kozol regarding the predictability of "somebody's dangerousness" (R **2647-2649**). Thus, the defense may simply have wished to "take the wind out the state's sails", by raising, and "burying" this issue during its own case. Similarly, defense counsel pointed to this testimony by Dr. Pollack during closing argument, as proof that the doctor was unbiased, arguing,

> A word about Dr. Pollack. This is a man who knows, knew William Arnold Wilkerson, knows Mark Parker, knows I'm sorry, Harry Dalton. A man who, for most of the testimony that he has given in court, has testified on the side of the prosecution, a man who believes, and who told you that Tommy Provenzano is dangerous. Implied that he's not treatable. And in spite of all that, in his opinion as an expert, his honest, and I suggest, medical opinion, Tommy was insane on January **10** when he committed these acts. I suggest to you that is a gratifying testament to the integrity of the man, that he called it like he saw it in spite of what we might assume would cause him to call it the other way (R **1922-1923**).

Provenzano has failed to demonstrate that no reasonable competent attorney would have elicited the testimony at issue or

that the introduction of such testimony rendered the result of his trial unreliable. Accordingly, he has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington.

L. Provenzano's Claim Regarding the Jury Instructions on Insanity

In this claim, Provenzano argues that his counsel rendered ineffective assistance by failing to object to the standard jury instructions on insanity and/or to propose alternatives. Provenzano notes that this court disapproved such instruction in Yohn v. State, 476 So.2d 123 (Fla. 1985). While conceding that Yohn did not exist at the time of Provenzano's trial, counsel points to a number of other arguably pre-Yohn cases in which defense counsel had objected to comparable instructions. This argument is unconvincing. The fact that a handful of defense attorneys throughout the state may have objected to these instructions prior to the rendition of this court's decision in Yohn does not mean that every reasonable competent attorney would have made such objection or that, conversely, any attorney who failed to make such objection had rendered ineffective assistance. The fact remains that counsel cannot be deemed ineffective for failing to anticipate a change in the law. See, Muhammad v. State, supra. Obviously, any "change in law", is inaugurated by one individual who chooses to object to a matter which all of his peers would consider unobjectionable. Additionally, the state would note that this court subsequently held in Smith v. State, 521 So.2d 106 (Fla. 1988), that the

standard jury instruction condemned in Yohn had not been constitutionally infirm or fundamentally erroneous, and that it had, in fact, "made it quite clear that the burden of proof was on the state to prove all the elements of the crime beyond a reasonable doubt." Smith, **521** So.2d at **108.**

Further, the state would respectfully suggest that defense counsel in this case would have had little cause to object, given the fact that the state's burden of proof in this regard was always clear. During voir dire, defense counsel had expressly advised the jury that the burden was not on the defense to prove Provenzano insane (R **230-1),** and the prosecutor likewise reaffirmed that it was the state's burden to prove Provenzano sane **(R 278, 353).** Defense counsel twice expressly told the jury during closing argument, without objection from the state, "We do not have to prove that Tommy was insane. We only have to show you that there is a reasonable doubt as to his sanity." (k **1907, 1928).** During opening statement, the prosecutor had promised to prove to the jury that Provenzano had been sane, and, in closing statement, he similarly argued that such fact had been shown, given the evidence presented (R **477, 1963-4).** Accordingly, it cannot be said that Provenzano has demonstrated deficient performance of counsel or prejudice under Strickland v. Washington. Certainly, this court's holding in Smith, to the effect that these jury instructions are not constitutionally infirm or fundamentally erroneous, must be dispositive as to the lack of prejudice in this regard.

M. Provenzano's Claim Regarding the Admonition Given the Jury.

In this claim, Provenzano argues that his counsel rendered ineffective assistance in failing to object to the admonition given the jury upon release from sequestration at the conclusion of the trail. Provenzano argues that, while the judge did tell the jury not to talk to anyone about the case or to let anyone discuss it with them, given the fact that such was still pending, counsel should have still objected on the grounds that the jury was not explicitly told to avoid newspaper and television accounts of the case; Provenzano cites two articles printed on June 20 and 21, 1984 as evidence of "prejudice" (App. 11 to Motion). This argument is unconvincing, and it based upon sheer speculation. There has been no evidence that the jury in this case considered any "improper" matter or that such "tainted" their recommendation at sentencing. The jury returned its verdict of guilty on June 19, 1984, and the penalty phase in this case did not take place until July 11, 1984. The article of June 20, 1984, for the most part, simply describes the events in the courtroom at the time that the jury returned its verdict; obviously, the jurors, who had observed these events with their own eyes, were already aware of such things, and it is difficult to see any prejudice to Provenzano, should any of his jurors have seen this article. As to the article of June 21, 1984, this article seems primarily to represent an interview with Provenzano himself. It seems more than a little inconsistant for a defendant to talk to the press during a recess in his court

proceedings and then, later, to argue that his sentence must be reversed, because the jury might have read about it. Additionally, a good deal of this interview seems consistent with the testimony which Provenzano would later present to the jury during the actual penalty phase, and it is difficult to see how this would have prejudiced the defense[3]. The judge in this case had already issued an extremely comprehensive gag order which, apparently, would still have been in effect during this recess, and, in all likelihood, would have cut down on the likelihood of any media article of the type which Provenzano now considers prejudicial (R 3066-8).

The state would suggest that Provenzano has failed to demonstrate either deficient performance of counsel or prejudice under Strickland v. Washington. Given the existence of this gag order, it cannot be said that every reasonable competent attorney would have objected to the instructions given the jury which, as noted, did admonish them not to let anyone discuss the case with them (R 1993). The jury had, of course, been sequestrated during the trial itself. Further, there has been no showing that counsel's failure to object to this instruction or to further investigate at the time of sentencing has rendered Provenzano's sentence of death unreliable. The jury was instructed at the

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[3] Interestingly, the videotape appended to the motion to vacate includes not only videotapes of the few news reports broadcast during this time period, which, were innocuous in the extreme, but also an interview with the foreman of the jury who, following the jury's recommendation of death, stated that every juror had approached the deliberations with an open mind, and that no one had come into the juryroom with a preconceived decision already made. (Appendix 16 to Motion).

penalty phase to base their advisory verdict upon the evidence presented during trial and sentencing (R 2226), and during the state's closing argument, the prosecutor specifically reminded the jury that such facts as sympathy for the victims could not be considered (R 2171, 2196-7). Additionally, despite the importance of the jury's advisory verdict, the sentencer in this case was Judge Shepherd, and his sentencing order clearly indicates that no improper matters were considered (R 3452-3462); the sentencer in this found five aggravating circumstances and one in mitigation, and no reasonable probability of a different result exists, had counsel performed as Provenzano now wishes.

N. Provenzano's Claim Regarding the Lack of Experts at the Penalty Phase.

In this claim, Provenzano argues that counsel rendered ineffective assistance at the penalty phase by failing to recall the defense experts at witnesses and/or to argue their testimony as proof of mitigation or in rebuttal to the state's assertion of aggravation. Provenzano complains that his counsel called "only" two witnesses at the penalty phase, and points to the recently-acquired psychological report of Dr. Pat Fleming of Wyoming as evidence of what "should" have been presented. The state would suggest that this claim is refuted by the record.

While it is true that Drs. Lyons and Pollock did not physically testify at the penalty phase, it is also true that defense counsel argued extensively to the jury that Provenzano was mentally ill, and not deserving of the death penalty, based upon their testimony, as well as that of others (R 2201, 2209,

2211, 2216, 2218-2220). Defense counsel argued that the psychiatric testimony, from both the state and defense experts, not only precluded the finding of certain factors in aggravation (R 2201, 2209, 2211, 2216), but also established the mitigating circumstances set forth in sections 921.141(6)(b)(f) (R 2218-2220). Defense counsel also specifically reminded the jury,

> First of all, the law on insanity in Florida, as I can see it, is extremely difficult. It presents a test that is extremely difficult to meet, and we may not have met that. But a mental condition short of insanity may still be considered in your deliberations. And I suggest that the mental condition short of insanity which put Tommy in a position where he was in the O.K. Coral, he was not avoiding a lawful arrest. (R 2211)
>
> * * *
>
> His [Dr. Lyon's] testimony as to the extreme mental disturbance is uncontradicted. The fact that we were not able to persuade you that we had crossed that line and established a defense of insanity does not mean that we did not establish a lesser degree of mental disturbance, which I suggest is uncontradicted in the evidence. (R 2218).

This portion of Provenzano's claim is utterly without merit.

Additionally, Provenzano's complaint that "only" two witnesses testified at the penalty phase is misleading. It is, of course, axiomatic that the testimony of guilt phase witnesses is likewise before the jury at sentencing. Provenzano's sister, Catherine Robertson, as well as her son, Nicholas Welch, had testified extensively at the guilt phase (R 968-1084, 1099-1123),

and defense counsel made reference to their testimony during closing argument at the penalty phase **(R 2220-2)**. Further, one of the "only" two witnesses who testified at the penalty phase was Provenzano himself, whose testimony comprises some ninety-two **(92)** pages of transcript **(R 2050-2123, 2149-2168)**. It is fair to say that Provenzano detailed his entire life history to the jury, and that they were additionally able to draw their own conclusions to his mental state, not only based upon his demeanor and what he told them, but also upon the inherent incredibility of some of his testimony, i.e. his explanation that the reason that he had brought the sawed-off shot gun and two pistols into the courthouse on the day of the murder was that he was afraid to leave them in the car, for fear that they would be stolen.

Given the extensive testimony of the defense experts during the trial **(R 1418-1507; 1512-1575)**, it cannot be said that no reasonable competent attorney would have failed to recall them at the penalty phase or that such counsel would have relied upon other witnesses, including the defendant. Cf. Daugherty v. State, **505** So.2d **1223** (Fla. **1987)**. Similarly, because Provenzano's entire life story was presented and argued to the jury as a basis for mitigation, it is difficult to see prejudice in this regard. The sentencer in this case found five aggravating circumstances and one in mitigation. The court rejected any finding that Provenzano had been under the influence of extreme mental or emotional distress, not due to insufficiency of evidence per se, but due to a finding that the evidence of emotional disturbance related to a point in time too remote from

the murder to be truly mitigating (R **3458-9).** Judge Shephard similarly rejected the circumstance relating to one's inability to conform one's conduct to the requirements of the law, on the grounds that the credible evidence showed that Provenzano had known right from wrong at the time of the murder (R **3459-3460).** It is sheer speculation to suggest that "more" psyciatric testimony would have created a reasonable probability of a different result at sentencing. Provenzano had failed to demonstrate either deficient performance counsel or prejudice under Strickland v. Washington.

O. Provenzano's Claim Regarding any Failure to Investigate.

In this final claim on ineffective assistance of counsel, Provenzano contends that counsel was ineffective in failing to investigate and present "a wealth of mitigation", such omission meaning that the jury "learned little about this very complicated, very frightened, very ill young man." (Motion at 108). Based upon certain recently-acquired affidavits, Provenzano suggests that the jury in this case was unaware of his "difficult upbringing", his mistreatment by his Uncle Danny, and the local police, the likelihood that he had been sexually abused when younger and his fear of being incarcerated. The record indicates that both Provenzano and his sister, Catherine Robertson, testified extensively as to Provenzano's background. Thus, his sister advised the jury of the following: (1) the fact that their mother had deserted them when they were both young children; (2) the fact that they were raised by their paternal grandparents; **(3)** the fact that their father largely ignored them

and that he later remarried an unsympathetic person; **(4)** the fact the Provenzano did not get along with his father or step-mother; (5) the fact the Provenzano dropped out of school, used drugs and stole things; **(6)** the fact that Provenzano married, had a child, and was devastated by the later divorce and the loss of his child; (7) the fact that a priest had made sexual advances to Provenzano; **(8)** the fact that Provenzano loves his nieces and nephews; (9) the fact that Provenzano was undesirably discharged from the armed forces; (**10)** the fact that Provenzano had gone to a mental hospital and complained about headaches; **(11)** the fact that Provenzano had remarried and fathered a stillborn child and (12) the fact that Provenzano had secured a master electritian license and had been gainfully employed. (R **968-1034).** Provenzano himself, likewise testified along similar lines, advising the jury, inter ~~alia~~: (1) that he had had a "pretty hard upbringing"; (2) that his parents had "dumped" him on his grandparents; **(3)** that he had dropped out of school, taken drugs and stolen things as a juvenile; **(4)** that his father had gotten him a job at a park; (5) that he had married and had a child; (6) that the had lost the child to his ex-wife and her new husband; (7) that he had been discharged from the Air Force for drug use and **(8)** that he had remarried and had a stillborn child (R **2049-2066).**

The state would respectfully suggest that the record indicates clearly that defense counsel investigated and presented substantial background information in mitigation. While, in the intervening years, Provenzano, like so many others, has

apparently secured affidavits from various witnesses who would have come forward with new matters, such fact does not cast doubt upon the competence of the attorneys who represented him in **1984.** As this court observed in Maxwell v. Wainwright, **490** So.2d **927, 932** (Fla. **1986),** in rejecting a similar claim of error,

> Next appellant argues that counsel at trial was ineffective in that he inadequately investigated appellant's background and related matters in preparation for the penalty phase of the trial. However, the record shows that defense counsel did present testimony of witnesses concerning the defendant's character and background. The testimony went beyond statutory mitigating factors to include also non-statutory factors. The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done.

This court then concluded that the mere presentation of "more" information concerning Maxwell would not have influenced the jury to recommend or the judge to impose a life sentence. Such holding is applicable sub judice, especially given the largely cumulative nature of the evidence now proffered, see, Groover v. State, **489** So.2d **15** (Fla. **1986),** as well as its remoteness in time from the crime at issue. See, Stone v. State, **481** So.2d **478** (Fla. **1985).**

Certainly, in order to be effective, defense counsel need not introduce evidence as to every facet of his client's life; additionally, it is difficult to see why Provenzano's sister,

while on the stand in **1984**, did not tell the full story of "Uncle Danny", assuming that she regarded such to be relevant. Given what was actually presented at the trial and sentencing, it cannot be said that no reasonable attorney would have failed to adduce the presently-proffered evidence in mitigation. Similarly, it cannot be said that the omission of this evidence has rendered Provenzano's sentence of death unreliable. As noted, Judge Shephard rejected any finding of mental or emotional distress, on the grounds that the evidence presented was too remote in time to be mitigating **(R 3458-9)**. Thus, simply offering the judge more details of Provenzano's childhood would have been pointless. While the details as to Provenzano's early mistreatment at the hands of the Illinois Police could, arguably, shed some light on his later conduct, the state suggests that the record was already clear as to Provenzano's hostility toward authority. The death sentence in this case is premised upon the finding of five aggravating circumstances and one in mitigation. It cannot be said that a reasonable probability exists of a different result, had this evidence been presented. Provenzano has failed to demonstrate deficient performance of counsel or prejudice under Strickland v. Washington.

In conclusion, while, as noted, claims on ineffective assistance of counsel can require evidentiary hearings for resolution, the claims raised by Provenzano, as presently pled, were such that summary denial was appropriate. The denial of relief below should be affirmed, in accordance with this court's prior precedents. See, e.g., Washington v. State, **397** So.2d **285**

(Fla. 1981); Smith v. State, 445 So.2d 323 (Fla. 1984); Jones v. State, 446 So.2d 1059 (Fla. 1984); Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Atkins v. Dugger, 14 F.L.W. 207 (Fla. April 13, 1989).

POINT II

THE TRIAL COURT'S SUMMARY DENIAL OF CLAIMS II AND VIII, WHICH RAISED PROVENZANO'S ALLEGED INCOMPETENCY TO STAND TRIAL AND ALLEGED INEFFECTIVE ASSISTANCE OF MENTAL HEALTH EXPERTS, WAS CORRECT.

The district court was correct in summarily denying relief as to these claims, which, though cognizable on post-conviction motion, were insufficient on their face to merit relief. In Claim II, Provenzano contended that he was mentally incompetent to stand trial; Provenzano contends that the experts who found him competent did not follow the statutory criteria, and points to the recent diagnosis by Dr. Pat Fleming of Wyoming, which, five years after the fact, states that Provenzano was not competent in 1984. In Claim VIII, again, largely on the basis of Dr. Pat Fleming of Wyoming's 1989 report, Provenzano contends that the mental health experts who examined him at his trial rendered ineffective assistance. The record largely refutes these claims.

As to the claim relating to competency to stand trial per se, it is clear, as demonstrated in Point I, supra, that the doctors who found Provenzano competent to stand trial did in fact consider all of the proper statutory criteria (see, Proceeding of March 1, 1984, at 5-7, 14-15, 26-8) (see, Appendix). The fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief. See, Stano v. State, 520 So.2d 278 (Fla. 1988); Henderson v.

Dugger, 522 So.2d 835 (Fla. 1988). This case is particularly distinguishable from Mason v. State, 489 So.2d 734 (Fla. 1986) or State v. Sireci, 502 So.2d 1221 (Fla. 1987), cited by Provenzano. To the extent that Provenzano's present expert even offers a diagnosis, it is apparently that he was psychotic due to his paranoia. Even Dr. Pat Fleming of Wyoming, however, seems to recognize that this is the identical diagnosis offered by defense experts Lyons and Pollack in 1984 (Appendix 4 - Motion). As the motion to vacate also indicates, one of the experts who found Provenzano insane at the time of the offense, also stated that he was competent to stand trial, albeit with some reservation (Motion at 42-3). Thus, it is difficult to see what this "new" diagnoses "adds".

Whereas, in some instances, it may be appropriate for a defendant to seek to relitigate his competency to stand trial on post-conviction motion, this is not one such instance.' This issue was properly decided prior to trial in 1984. It would hardly serve the interests of finality to allow a defendant's mental competency to be constantly relitigated on post-conviction motion, whenever a defendant finds a "new" expert or a "new" piece of evidence which no prior expert has seen. Even assuming that some of what the present expert now says is true, i.e., that Provenzano was suspicious of his attorneys and not inclined to work with them, such fact does not mean that he was incompetent to stand trial. See, James v. State, 489 So.2d 737 (Fla. 1986). The record of the trial itself would seem to refute Dr. Pat Fleming's of Wyoming belated assessment of Provenzano's alleged

incompetency to understand the nature of the proceedings or the penalty or to testify, maintain an appropriate courtroom behavior or to assist his attorneys.

As to the claim relating to the adequacy of the mental health experts themselves, this matter would again seem largely premised upon the existence of this "new" expert. As was demonstrated in the prior claim relating to ineffective assistance of counsel in this regard, defense counsel took advantage of everything which the Florida procedural rules would allow him to do in this regard. He requested that his client's competency to stand trial be determined; all three doctors found Provenzano competent to stand trial. Defense counsel likewise requested the appointment of not one, but two, defense experts to assist in the presentation of a psychiatric defense. His request was, of course, granted, and the doctors offered extensive testimony during the guilt phase as to Provenzano's insanity at the time of the offense; while not physically present during the penalty phase, defense counsel argued to the jury that based upon their testimony, as well as that of others, certain mitigating factors had been established and certain factors in aggravation were precluded. In essence, this is a case in which the defendant's mental state was fully litigated at trial. Provenzano should not be allowed to reopen this issue, simply upon the basis of the existence of a "new" "more favorable" expert. Cf. Stano, supra; Henderson, supra.

The defense experts, Dr. Lyons and Pollack, testified that Provenzano had been insane at the time of the offense, due to his

extensive chronic paranoia or paranoid psychosis (R 1446-7, 1533-4, 1537). This is, apparently, also the diagnosis of Dr. Pat Fleming of Wyoming (see, appendix 4 to motion). While the newly-discovered expert points to certain background information which was allegedly not available to the original doctors, such would seem to be a fact without significance, inasmuch as the diagnoses remains the same. Similarly, Dr. Pat Fleming of Wyoming would hardly seem to be one to "throw stones'' in regard to the matter of background information. Her report relies upon an extremely selective reading of the trial, inasmuch as she read only the psychiatric testimony, that of Provenzano, and that of several defense witnesses (Appendix 4 to Motion). Had she read *any* portion of the state's case, she would no doubt have been confronted with compelling evidence of Provenzano's premeditation at the time of the murder which she would have found hard to square with her five-years-after-the-fact "diagnosis". Additionally, as noted earlier, the record clearly indicates that Dr. Lyons considered a great number of sources, other than Provenzano himself, in reaching his opinion as to Provenzano's competency, such sources including employment, military and hospital records, and Dr. Pollack's deposition likewise indicates that he considered a number of reports, statements and witness statements (R 1440-1, 2617-2620).

The following "new" "facts" are apparently at issue: (1) the fact that Provenzano's mother deserted her family and that Provenzano has a half brother with Downs Syndrome; (2) the fact that Provenzano's stepmother was an alcoholic and that she

neglected Provenzano's father as he was dying of cancer; (3) the fact that Provenzano was devastated at the loss of his son; (4) the fact that Provenzano tried to commit himself to a mental hospital, citing headaches and alleged need for treatment; (5) the fact that Provenzano was sexually molested by his stepbrother and uncle; (6) the fact that Provenzano was also verbally and physically abused by this uncle, who also had him steal for him; (7) the fact that some Illinois police had punched Provenzano when he was thirteen or fourteen; (8) the fact that a priest had made sexual advances to him; (9) the fact that Provenzano did not trust the media; (10) the fact that Provenzano's relatives felt that he would not have "rationally" killed someone in a public place, given the chances for arrest and his fears of imprisonment; (11) the fact that he read the newspaper to find person in need of legal help and gave them money and (12) the fact that in 1983, he had walked around Orlando with a sign that said, "T in 83". The state suggests that any failure on the part of the experts to be familiar with the above is an insufficient basis to create a reasonable probability of a change in their diagnoses and/or in the result of the proceeding below. First of all, some of these "facts" are highly suspect. Thus, at most, the recently-acquired affidavits from family members simply suggest that Provenzano might have been sexually abused, and do not represent that he actually was (Appendix 7 to Motion); similarly, it is averred that Provenzano's natural mother is caring for a child with Downs Syndrome, not that she is such child's mother (Appendix 8 to Motion). A good number of these

"facts" are derived from the recently-acquired affidavit of Provenzano's sister, she, of course, testified at trial, and at such time advised the jury concerning Provenzano's attempt to commit himself, his devastation at the loss of his son, the fact that a priest had made sexual advances to him, and it was otherwise established that Provenzano sought to help those he viewed as fellow victims of the legal system (R 1003, 1006-7, 1015, 1027-8, 1226-42). It should be noted that defense counsel specifically advised the jury that, because they had heard this live testimony, they were in effect more qualified than any expert to determine Provenzano's sanity (R 1908); of course, this information obviously made no difference to the jury. The other matters, all of which would seem to relate to incidents remote in time from the murder, are simply insufficient to cast doubt upon the reliability of the opinions reached by the defense experts.

To the extent that Provenzano attacks the "competence" of the state's experts, this argument seems misplaced. Any lack of knowledge on the part of the state experts was fertile grounds for cross-examination, and, indeed, defense took full advantage of such opportunity (R 1697-1730, 1761-1771, 1778-1790). Also, as noted, it is more than unlikely that the state experts would have "crossed over" had they known of any of this "new" information; following the vigorous cross-examination at trial, as to the information which they had to concede that they had not known, Doctors Gutman and Kirkland stated, on redirect, that they maintained their original opinions (R 1740-1, 1798). In any event, defense counsel made use of what he perceived to be

favorable portions of the state experts' opinions, and argued to the jury during the penalty phase, on the basis of their testimony, as well as that of the lay witnesses and other experts, that death was not the appropriate sentence (R 2210-2222).

In contrast to the situation in Mason or Sireci, this does not represent an instance in which a later expert has come forward with a vastly different diagnosis than that reached by prior experts or where previously-unsuspected mental illness has been brought forward. Certainly, the newly proffered evidence sub judice is much less compelling than that in Mason, wherein the original experts had been unaware of Mason's "extensive history of mental retardation, drug abuse and psychotic behavior", including his extensive use of psychotropic drugs and a prior diagnosis as a schizophrenic. While Provenzano, like so many others, apparently views this court's opinion in Mason as an open invitation to reopen every unfavorable psychiatric diagnosis, the state suggests that such is not the case. Provenzano's true complaint is with the result of his trial, not with the quality of the experts presented or utilized. The circuit court was correct in denying all relief as to these claims.

POINT III

THE CIRCUIT COURT'S SUMMARY DENIAL OF CLAIMS III, IX, XI, XII, XIII, XVII, XVIII, XIX, XX, XXI AND XXII, WHICH REPRESENTED MATTERS WHICH COULD HAVE BEEN, SHOULD HAVE BEEN, OR ACTUALLY WERE RAISED ON DIRECT APPEAL, WAS CORRECT.

The state would begin by saying that it finds the circuit court's summary denial of Claims 111, IX, XI, XII, XIII, XVII, XVIII, XIX, XX, XXI and XXII to be certainly the correct result. With no disrespect to the circuit court, however, the state must on occasion differ as to the precise bases for the findings of procedural default, even though such ultimate result is correct. In light of Harris v. Reed, ___ U.S. ___, **109** S.Ct. **1038 (1989),** the state would respectfully request that this court's finding of procedural default be explicit and unmistakable, in that Provenzano should not be allowed to secure federal review of issues which he improperly presented in state court. Each of the claims will now addressed:

CLAIM 111: In this claim, Provenzano argues that his convictions and sentences must be reversed because the trial court refused to grant a motion for change of venue. Under Florida law, this is clearly a claim which must be raised on appeal, as opposed to **3.850** motion. See, Mills v. State, **507** So.2d 602 (Fla. **1987);** Armstrong v. State, 429 So.2d **287** (Fla. **1983);** Henderson v. Duqqer, 522 So.2d **835** (Fla. **1988).** Additionally, although Provenzano does not acknowledge it, this claim **was** raised on direct appeal, and the Supreme Court of

Florida, while noting its lack of preservation, alternatively addressed the merits, and found that Provenzano had not been deprived of a fair trial. See, Provenzano v. State, 497 So.2d at 1181-3. The circuit court was correct in recognizing that this claim had been raised on appeal. This claim is procedurally defaulted.

CLAIM IX: In this claim, Provenzano argues that his convictions and sentences must be reversed because alleged critical portions of his trial were held in his absence. The Florida Supreme Court has expressly held that claims of this nature must be presented on direct appeal, and are not cognizable on 3.850. See, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Mills v. State, 507 So.2d 602 (Fla. 1987); Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). The circuit court was correct in recognizing that this claim should have been raised on appeal. This claim is procedurally defaulted.

CLAIM XI: In this claim, Provenzano argues that his convictions and sentences must be reversed because of an allegedly insufficient admonition given the jury upon release from sequestration. This clearly represents a matter which should have been raised on direct appeal, see, McCrae v. State, 437 So.2d 1388 (Fla. 1983), and, thus, is not cognizable on 3.850. The circuit court's order is not precise as to its disposition of this claim. Nevertheless, this claim clearly represents a matter which should have been raised on appeal. This claim is procedurally defaulted.

CLAIM XII: In this claim, Provenzano argues that his sentence of death must be reversed because the jury was allegedly told during the penalty phase not to consider sympathy. This clearly represents a matter which should have been raised on direct appeal and, thus, is not cognizable on 3.850. See, Henderson v. Dugger, 522 So.2d 335 (Fla. 1988). While the circuit court found that this claim had been raised on appeal, the state must respectfully disagree, inasmuch as it was not raised on appeal. Because it should have been, the circuit court's ultimate finding of procedural default was correct. **This claim is procedurally defaulted.**

CLAIM XIII: In this claim, Provenzano argues that his convictions must be reversed because of the admission of an allegedly inflammatory crime scene photograph. This clearly represents a matter which should have been raised on direct appeal and, thus, is not cognizable on 3.850. See, McCrae v. State, 437 So.2d 1388 (Fla. 1983). The circuit court was correct in recognizing that this claim should have been raised on appeal. **This claim is procedurally defaulted.**

CLAIM XVII: In this claim, Provenzano argues that his sentence of death must be reversed because four of the aggravating circumstances found were improperly applied. This is clearly a matter which could and should have been presented on direct appeal, and, thus, is not cognizable on post-conviction motion. See, e.g., Cave v. State, 529 So.2d 293 (Fla. 1988); Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). Indeed, Provenzano's attack on the aggravating circumstance relating to

hinderance of a governmental function, section 921.141(5)(g), was specifically raised, and rejected on direct appeal. See, Provenzano, 497 So.2d at 1183-4. The circuit court was correct in recognizing that at least a portion of this claim had been raised on direct appeal; the matters which were not clearly represent arguments which should have been. **This claim is procedurally barred.**

CLAIM XVIII: In this claim, Provenzano argues that his sentence of death must be reverse because through argument, instruction and comment, his jury was allegedly misled as to its role in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 271 (1985). This claim has been raised by virtually every inmate on Death Row, and the Florida Supreme Court has consistently held that it represents a matter which must be raised on direct appeal and, thus, is not cognizable on 3.850. See, e.g., Bertolotti v. State, 534 So.2d 386 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988); Cave v. State, 529 So.2d 263 (Fla. 1988). The fact that this claim can be procedurally barred should be beyond dispute, in light of the recent decision by the Supreme Court of the United States in Dugger v. Adams, U.S. ___, 109 S.Ct. 1211 (1989). Although the circuit court seemed to hold that this claim had been raised on appeal, the state must respectfully disagree, inasmuch as this claim was not raised on appeal. This matter clearly represents one which should have been, and the court's ultimate finding of procedural default is correct. **This claim is procedurally defaulted.**

CLAIM XIX: In this claim, Provenzano argues that his sentence of death must be reversed because the instructions given the jury allegedly impermissibly shifted the burden of proof on to the defense to prove mitigation. The Florida Supreme Court has consistently held that claims of this nature must be raised on direct appeal and, thus, are not cognizable on 3.850. See, Clark v. State, 533 So.2d 1144 (Fla. 1988); Henderson v. Duqqer, 522 So.2d 835 (Fla. 1988). Again, the circuit court would seem to have found that this claim was raised on appeal. The state must respectfully disagree; this claim was not raised on appeal. The court's ultimate finding of procedural default was correct, nevertheless, given the fact that this represents a matter which should have been raised therein. This **claim** is **procedurally barred.**

CLAIM XX: In this claim, Provenzano argues that his death sentence must be reversed because it was error for this court to find the aggravating circumstance relating to the homicide being cold, calculated and premeditated, under section 921.141(5)(i); Provenzano also argues that the Florida Supreme Court's decision in Roqers v. State, 511 So.2d 526 (Fla. 1987) constitutes a change in law which supports his position. The propriety of the finding of this aggravating circumstance is obviously a matter which could and should have been raised on direct appeal. See, Henderson v. Duqqer, 522 So.2d 835 (Fla. 1988). Indeed, this matter was raised on direct appeal, and the Florida Supreme Court not only affirmed the finding of this aggravating circumstance, but further held that, even if error had been demonstrated, any

such error would be harmless. Provenzano, 497 So.2d at 1184. Further, as to Provenzano's claim premised upon Rogers, the Florida Supreme Court recently held in Eutzy v. State, 14 F.L.W. 176 (Fla. March 28, 1989), that Rogers was not a fundamental change in law, entitled to retroactive application on 3.850 motions, under Witt v. State, 387 So.2d 922 (Fla. 1980). The circuit court was correct in recognizing that this claim had been raised on appeal. **This claim is procedurally barred.**

CLAIM XXI: In this claim, Provenzano argues that his death sentence must be vacated because of alleged improper argument by the prosecutor during the penalty phase. It should be clear that this matter represents one which should have been raised on direct appeal, and thus, is not cognizable on 3.850. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983). In fact, this claim was raised on direct appeal, and rejected by the Florida Supreme Court. Provenzano, 497 So.2d at 1184. The circuit court was correct in recognizing that this claim had been raised on direct appeal. **This claim is procedurally barred.**

CLAIM XXII: In this claim, Provenzano argues that he is entitled to a new trial because the judge who witnessed the shooting, Judge Conser, acted unethically in making pretrial statements to the press. Judge Conser, of course, did not preside over Provenzano's trial, and it is difficult to see the relevance of the above; if Provenzano truly feels that the judge acted unethically, his remedy is not under Rule 3.850. To the extent that any claim of legal error is involved, such would seem to represent a matter which should have been raised on direct

appeal and, thus, would not be cognizable on **3.850.** See, e.g., McCrae v. State, **437** So.2d **1388** (Fla. **1983).** The circuit court was correct in recognizing that this represents a matter which should have been raised on appeal. **This claim is procedurally barred.**

In conclusion, the state suggests that, while the finding of procedural default was correct as to all these claims, this court should, in affirming the court below, find, in accordance with its precedents, that Claims 111, XX, XXI and part of XVII represent matters which were actually raised on appeal, and, thus, were improperly represented on post-conviction motion. Similarly, this court should find that Claims IX, XI, XII, XIII, XVIII, XIX, XXII and the remainder of XVII represent matters which should have been raised on appeal, but which were not; they, of course, likewise represent matters which are not cognizable on post-conviction motion. The state apologizes for what may be regarded for what may be regarded as "nitpicking" in this regard, but given the exactitude now required under Harris v. Reed, supra, feels that it has no option.

POINT IV

THE CIRCUIT COURT'S SUMMARY DENIAL OF CLAIMS I, XIV, XV AND XVI, WHICH RAISED CLAIMS BASED UPON FLORIDA RULE OF CRIMINAL PROCEDURE 3.851, BRADY V. MARYLAND, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), HITCHCOCK V. DUGGER, 481 U.S. 393; 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) and BOOTH V. MARYLAND, 486 U.S. 482, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) RESPECTIVELY, WAS CORRECT.

In addition to the procedurally-barred claims discussed in Point 111, supra, the circuit court likewise denied relief as to Claims I, XIV, XV and XVI. The circuit court regarded Claim XVI, that premised upon Booth v. Maryland, 486 U.S. 482, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), as properly presented, but as one which established, at most, harmless error. The circuit court would not seem to have expressly addressed Claim I, involving Florida Rule of Criminal ,Procedure 3.851, although in its order, it seems to find the instant motion untimely under the rule. The circuit court also regarded Claim XIV, involving Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), as representing a matter which should have been raised on appeal, and disposed of Claim XV, allegedly involving Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), on the grounds that it had already been presented on appeal. As with certain portions of Point 111, supra, the state cannot agree with all of these findings. While the correct result was reached, the state, in light of Harris v. Reed, supra, would set forth the following argument.

Claims I and XIV do not merit extended discussion. While there would not seem to have been any basis to find the instant motion untimely, given the fact that the "two year" provision of Florida Rule of Criminal Procedure **3.850** does not begin to run until the denial of certiorari by the United States Supreme Court, see, Burr v. State, **518** So.2d **903** (Fla. 1987), Provenzano's claim of being "deprived" of fifteen **(15)** days within which to file his post-conviction motion, which he otherwise would have had, except for the death warrant, is without merit, in light of this court's decision in Cave v. State, **529** So.2d **293** (Fla. **1988).** Additionally, Provenzano's argument is moot, inasmuch as the circuit court did not deny relief until April 25, **1989**, several days beyond what would have been the "two year" mark, and in the interim, Provenzano made no attempt to amend or supplement his motion. As to the claim allegedly premised upon Brady v. Maryland, supra, while such claims are cognizable on post-conviction motion, see, e.g., Palmes v. Wainwright, 460 So.2d 362 (Fla. **1984),** the instant claim is insufficient on its face, being entirely speculative in nature. Additionally, the instant case is an unlikely one for a claim of this nature, given the fact that the defendant did not dispute his factual guilt of the offense, a reasonable choice given the fact that he committed this crime in front of eyewitnesses, and instead raised a defense of insanity. It is difficult to see how the state could have withheld material evidence in this respect.

As to Claim XV, the state recognizes that "true" claims premised upon Hitchcock v. Dugger, supra, are, of course, cognizable on post-conviction motion. See, e.g., Hall v. State, 14 F.L.W. 101 (Fla. March 9, 1989). The circuit court, however, was correct in recognizing this claim for what it was - not a "true" Hitchcock claim, but rather a "rehash" of the argument presented on direct appeal. The state would respectfully suggest that a "true" Hitchcock claim is limited to those instances in which a reasonable doubt exists as to whether the jury and/or the judge was aware of the fact that they could consider mitigating factors outside the statute. In this case, the jury was expressly advised that they could consider "any other aspect of the defendant's character or record, or any other circumstance of the offense." (R 2229) This court has held that the giving of this instruction not only "moots" any Hitchcock claim as to the jury, but also as to the judge, given the fact that it will be presumed that the judge will follow his own instructions. See, Johnson v. Dugger, 520 So.2d 565 (Fla. 1988). In this case, though, it is not necessary to rely on this presumption. The judge stated, both at the imposition of sentence and in his sentencing order, that he had considered all the evidence presented (R **3453-4**, 2313). Further, the sentencing order includes the following language, placed after the court's address of the statutory mitigating circumstances,

> There are no other aspects of the Defendant's character or record, nor any other circumstances of the offense, which would mitigate in

> favor of the Defendant or his conduct in this matter (R 3460).

The conclusion of the sentencing order begins,

> There are no mitigating circumstances existing, either statutory or otherwise, . . . (R 3460)

Accordingly, any claim premised upon Hitchcock is refuted by the record. The state would suggest, however, that this does not represent a "true" Hitchcock claim, but rather an attempt to relitigate matters presented on direct appeal, due simply to Provenzano's continued dissatisfaction with the sentence imposed. This court held on direct appeal that the nonstatutory mitigating factors which Provenzano felt applied to his case were not "supported by the record." Provenzano, 497 So.2d at 1184. It is difficult to see how the advent of the Hitchcock decision could have any affect upon this holding. It is also difficult to see why this claim should be relitigated under Hitchcock, given this finding on direct appeal. Cf. Daugherty v. State, 533 So.2d 287 (Fla. 1988). Given the five strong aggravating circumstances, any error would be harmless, in any event. See, Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); Smith v. Dugger, 529 So.2d 679 (Fla. 1988). No relief is warranted as to this claim assuming, of course, that, stripped of its Hitchcock finery, it is not procedurally defaulted.

Finally, as to Claim XVI, involving Booth v. Maryland, the state would suggest that while the circuit court again reached the correct result, some further explanation is necessary. In his motion to vacate, Provenzano identified five (5) instances of alleged admission of victim impact evidence, including the prosecutor's opening statement (R 472-3), the testimony of one of the surviving victims and that of his doctor (R 595-6, 811), the testimony of another doctor as to the medical condition of the other surviving victim (R 856), the playing of an audiotape of the actual shooting, which allegedly provoked an emotional response from the audience, and the testimony of the wife of one of the surviving victims at the imposition of sentence hearing (R 2299-2301). The state would note that no objection was interposed at the time of opening statement or at the time that Mark Parker testified (R 472-3, 581-601); accordingly, this portion of the claim is procedurally barred under Grossman v. State, 525 So.2d 833 (Fla. 1988). While defense counsel did object to the testimony of the doctors, such objections were sustained, and no mistrial was requested (R 811-13; 861-2); the state would respectfully suggest, in any event, that this is not the type of victim information precluded under Booth. Cf. Preston v. State, 531 So.2d 154 (Fla. 1988). Conversely, defense counsel did move for a mistrial following the playing of the tape recording and, following the denial of such motion, raised the claim on appeal to this court, again being denied relief. See, Provenzano, 497 So.2d at 1184. Provenzano should not be allowed to relitigate this matter under the guise of Booth, especially

given the fact that its relationship to "victim impact" is highly tangential. Cf. Preston. Accordingly, the state would contend that these portions of the claim are procedurally defaulted.

The only "true" victim impact information at issue would seem to be that presented by Eileen Dalton at the proceeding of July **18, 1984.** The circuit court, however, was correct in finding that this testimony had no effect upon the sentence of death. This evidence was not introduced at the penalty phase or before the jury. Further, it was not presented in regard to the death sentence, but, as the prosecutor expressly noted, "with respect to the sentencing for the defendant on the second count of the indictment, the attempted murder of Harry Dalton." **(R 2299)** (emphasis supplied). This court has specifically held, in both Grossman and Scull v. State, **533** So.2d **1137** (Fla. **1988),** that there is no prohibition to the introduction of such victim impact information, under section **921.143,** in non-capital'cases. Accordingly, Provenzano has failed to demonstrate a basis for relief, and the state would further observe that this case is a particularly inappropriate candidate for a claim of this nature, given the fact that the prosecutor continuously advised the jury - during voir dire, closing argument at the guilt phase and closing argument at sentencing - that they were not to consider sympathy for the victims in their deliberations **(R 234, 1846, 2171, 2196).** Assuming that this portion of the claim is properly presented on post-conviction motion, the circuit court's ruling should be affirmed.

POINT V

THE CIRCUIT COURT'S SUMMARY DENIAL OF CLAIM XXIII, WHICH RAISED PROVENZANO'S PRO SE CONCERNS, WAS CORRECT.

The circuit court likewise summarily denied relief as to Claim XXIII of the motion to vacate, which contained approximately forty (40) pages of Provenzano's personal concerns. While the circuit court addressed a number of these matters, finding some procedurally barred and those involving ineffective assistance of counsel insufficient, the state would respectfully suggest that the claim should have been dismissed or stricken as procedurally improper. Provenzano is represented by the Office of the Capital Collateral Representative and, indeed, such office was expressly created to represent individuals such as Provenzano. See, § 27.702, Fla. Stat. (1985); Spalding v. Dugger, 526 So.2d 77 (Fla. 1988). Provenzano has no right to appear both pro se and through counsel, simultaneously, and this type of "hybrid" representation has been condemned by this court, and others, in the past. See, e.g., State v. Tait, 387 So.2d 338 (Fla. 1980); Sheppard v. State, 391 So.2d 346 (Fla. 5th DCA 1980); Whitfield v. State, 517 So.2d 23 (Fla. 1st DCA 1987).

It is particularly inappropriate here, given the fact that the Office of the Capital Collateral Representative has already filed a ninety-eight (98) page petition for writ of habeas corpus in this court, as well as the motion to vacate below, which contains some two hundred and forty (240) pages of their own

arguments. As even CCR concedes, some of Provenzano's pro se arguments overlap with theirs and are "unedited" (Motion at 228). CCR's willingness to allow their client to co-represent himself not only flies in the face of section 27.702, but also sheds some interesting light upon the depths of their conviction that, as per the report of Dr. Pat Fleming of Wyoming, their expert, he remains mentally incompetent. Accordingly, the state suggests that Claim **XXIII** in its entirety, as representing Provenzano's pro se arguments, should have been stricken below and, to the extent that any of these arguments are presented on appeal, would likewise move to strike them at this time, pursuant to Tait and Sheppard. The finding of this procedural bar is especially important, in light of Harris v. Reed, in that Provenzano should not be entitled to "double" federal review as to his claims, which he has never presented properly to any state court. No alternative argument is presented. This **claim** is **procedurally defaulted.**

CONCLUSION

WHEREFORE, for the aforementioned reasons, the denial of relief below should be affirmed. The correct result was reached, although, as noted, the state has disagreed at times with certain findings of the circuit court.

Respectfully submitted,

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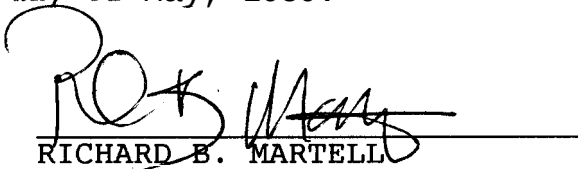
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by U.S. Mail/Delivery to K. Leslie Delk, Capital Collateral Representative, counsel for appellant, at the Office of the Capital Collateral Representative, **1533 S.** Monroe Street, Tallahassee, FL **32301** this 2 day of May, **1989.**



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