IN THE SUPREME COURT OF FLORIDA

CASE NOS. **73,981 & 74,101**

THOMAS HARRISON PROVENZANO,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL OF DENIAL OF MOTION FOR FLA. R. CRIM. P. **3.850** RELIEF

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

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This is an appeal from the circuit court's denial of Mr. Provenzano's motion for Rule **3.850** relief. All matters involved in the Rule **3.850** action, and all matters presented on Mr. Provenzano's behalf before the lower court, are raised again in this appeal and incorporated herein by specific reference, whether detailed in the instant brief or not.[1]

With regard to the Rule **3.850** appeal, certain matters should be noted at the outset. Although the Rule **3.850** motion and the files and records in the case did not "conclusively show the [Mr. Provenzano was] entitled to no relief," Fla. R. Crim. P. **3.850**, the lower court did not require the State to respond to the motion and summarily denied the motion. No evidentiary hearing was held, even though serious and legitimate questions regarding the constitutional validity of Mr. Provenzano's capital conviction and sentence have been raised. This brief is intended to demonstrate that an evidentiary hearing is warranted in this action and that Mr. Provenzano can establish his entitlement to relief if allowed the opportunity. The Court is also referred to Mr. Provenzano's Motion to Vacate Judgment and Sentence and its

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[1]Given Mr. Provenzano's counsels' obligations, obligations imposed by the innumerable numbers of death warrants the CCR office is forced to litigate, a full brief cannot be completed. This brief therefore should be reviewed in conjunction with Mr. Provenzano's Rule **3.850** motion. Given the time constraints involved, counsel have been unable to prepare a summary of argument and respectfully apologize to the Court in this regard.

appendix, both of which are fully incorporated herein by specific reference.

After proper review of the record, it will be apparent that an evidentiary hearing is warranted, and thereafter, that relief would be proper. This Court has not hesitated to order evidentiary hearings in the past. Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987). Mr. Provenzano respectfully submits that the Court should do so in this action, as will be discussed herein.

Citations in this brief shall be as follows: "R. [page number]" shall indicate references to the record on direct appeal. Citations to the record on appeal from the denial of the Motion to Vacate Judgment and Sentence and its appendix shall be: "PC-R. [page number]" or otherwise explained. All other citations shall be self-explanatory or otherwise explained.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 10, 1984, Thomas Provenzano appeared at the Orange County courthouse wearing black combat boots, army fatigue pants, a long olive drab army coat, a red bandana and carrying a knapsack. After being questioned by a bailiff about his knapsack, Mr. Provenzano left the courtroom and returned a few minutes later without it (R. 548).

When his disorderly conduct case was called, Mr. Provenzano began to approach the front of the courtroom but was stopped and told to wait until his attorney arrived (R. 549). Bailiff Dalton was then told by the judge to search Mr. Provenzano (R. 551). When Bailiff Dalton and Correctional Officer Parker approached Mr. Provenzano and began to search him, Mr. Provenzano pulled a pistol out of his pocket and shot Dalton (R. 552).

Parker then went out of the courtroom, followed by Mr. Provenzano. More shots were fired; Parker was eventually wounded, and Biliff Wilkerson was killed (R. 589-91). Mr. Provenzano was also wounded in the gunfire (R. 647).

Mr. Provenzano was charged with one count of first degree murder and two counts of attempted first degree murder. He was convicted by a jury on June 19, 1984. The defense at trial was insanity, and mental health professionals were called and testified about Mr. Provenzano's mental illness. The penalty phase before the jury was conducted on July 11, 1984, and the jury recommended a sentence of death by a seven to five (7-5) vote.

On July 18, 1984, Judge Shepard sentenced Mr. Provenzano to death on the first degree murder conviction and consecutive thirty year sentences for the attempted first degree murder convictions. Mr. Provenzano's convictions and sentences were affirmed by this Court, with two Justices specially concurring. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). Mr. Provenzano petitioned the United States Supreme Court for a writ of certiorari, which was denied. Provenzano v. Florida, 481 U.S. 1024 (1987).

On March 7, 1989, the Governor of Florida issued a death warrant against Mr. Provenzano, and execution was set for May 9, 1989. Pursuant to Fla. R. Crim. P. 3.851, Mr. Provenzano filed his Rule 3.850 Motion to Vacate Judgment and Sentence with the Circuit Court and a Petition for Writ of Habeas Corpus with this Court on April 6, 1989. This was fifteen days earlier than Rule 3.850 proscribed for the filing of the Motion to Vacate Judgment and Sentence.

On April 25, 1989, Judge Shepard denied Mr. Provenzano's Motion to Vacate, without an evidentiary hearing. Appeal was taken to this Court. On May 4, 1989, this Court granted a stay of execution, and ordered briefing.

ARGUMENT

ARGUMENT I

THE RULE **3.850** COURT'S SUMMARY DENIAL OF MR. PROVENZANO'S MOTION TO VACATE JUDGMENT AND SENTENCE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

The lower court summarily denied Mr. Provenzano's claims without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule **3.850** relief (it does), without any adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Provenzano is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Provenzano is entitled to no relief (the record supports Mr. Provenzano's claims). In this regard the lower court erred.

The lower court's rulings regarding Mr. Provenzano's Rule **3.850** motion were incorrect in several respects, as will be more fully explained infra. As to competency, the lower court employed a unique standard of its own:

> Defendant was examined by at least four psychiatrists and a competency hearing was held. He was found to be competent. Defendant's Motion alleges that none of these doctors took into account his past history. Defendant's Motion does not allege that his past history evidences mental retardation, organic brain damage or epilepsy. Although the Defendant's Motion is in excess of 260 pages, no where in it does he sufficiently allege that his emotional problems raise to the level of a finding of legal incompetency.

(PC-R. **448**). Contrary to the lower court's analysis, Mr.

Provenzano's motion presented specifically pled factual contentions demonstrating that he was in fact **not** competent at the time of his trial, and that the previous evaluations were insufficient under the standards established by this Court in Mason v. State, **489** So. 2d **734** (Fla. **1986).**

As to ineffective assistance of counsel the lower court stated:

> Defendant's claim of ineffective assistance of counsel involve alleged errors at both the guilt-innocence phase and the sentencing phase of Defendant's trial.
>
> Most of these allegations involve trial strategy. These include Nos. **3**(b), (f), (h), (i), (j), (o), and (p). Matters involving trial strategy cannot form the basis for a claim of ineffective assistance of counsel. Downs v. State, **453 So.2d 1102** (Fla. **1984).**

(PC-R. **449).**

Of course, as this Honorable Court's recent precedents make clear, tactics and strategies cannot be read into an attorney's challenged conduct -- whether there was a tactic at all is in fact one of the central questions which the evidentiary hearing required in cases such as this is meant to address. Accordingly, the lower court's statements that omissions by counsel were "strategic", a finding supported by no evidence,' is patent error. Clearly the omissions here both at guilt-innocence and penalty were prejudicial. Just as clearly without an evidentiary hearing there is no way of determining whether these omissions

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'Because no hearing was conducted.

were because of any tactical or strategic choice by counsel. No hearing was ever granted whereby counsel could be asked his reasons.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Provenzano's motion alleged facts which, if proven, would entitle him to relief. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous.

Mr. Provenzano's verified Rule 3.850 motion alleged (supported by specific factual proffers) the extensive non-record facts in support of claims which have traditionally been raised by sworn allegations in Rule 3.850 post-conviction proceedings and tested through evidentiary hearings. Mr. Provenzano is entitled to an evidentiary hearing with respect to these claims: the files and records in the case by no means conclusively show that he will necessarily lose. Even if that was what the lower court judge believed, in such instances the judge must attach "a

copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850; Lemon, supra. Otherwise, an evidentiary hearing is proper. The lower court attached no portion of the record. In fact, there is none. This case involves nonrecord matters that have been classically tested through evidentiary hearings. A court may not simply attribute tactical reasons to trial counsel when there is no record evidence of such.

The circuit court erred in denying an evidentiary hearing and in summarily denying Mr. Provenzano's motion to vacate. The circuit court, in its order denying relief, applied erroneous standards to the questions of competency and ineffective assistance of counsel. Facts not of record are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review.

The circuit court also ruled:

> Matters litigated on direct appeal may not be attacked by a Motion for Post-Conviction relief. Jenkins v. State, 479 So. 2d 864 (Fla. 1st DCA 1985). These include Nos. 2; 3(c), (d), (e), (n), (q); 4(e), 7, 10, 12, 13 and 14.
>
> Matters which should have or could have been raised on direct appeal are not cognizable in post-conviction relief proceedings. Porter v. State, 478 So. 2d 33 (Fla. 1985). These include Nos. 6, 8, 9, 15, 16 and 17.

(PC-R. 447). Since the court was incorrect regarding which issues were "raised on direct appeal" and which "should have been," this part of the order is absolutely meaningless.

Morever, the items identified as 3(c), (d), (e), (n), (q) and 4(e) were also raised as ineffective assistance of counsel claims; such claims are clearly cognizable in Rule 3.850 proceedings. Most of the other claims noted by the court also raised questions of counsel's competence. It appears that the court randomly selected claims by numbers to say they either were raised or should have been raised on direct appeal. The circuit court was in error.

The court also addressed Claim XVI, the violation of Booth v. Maryland claim on the merits, stating: "[t]he sentencing order entered by this court shows that there was no reliance on the victim-impact statement." (PC-R. 447). The sentencing order, however, does not support the judge's statements in this regard. When it is so clearly established that a capital defendant has a fundamental right to a fair, reliable and individualized capital sentencing determination, see Greaa v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lockett v. Ohio, 438 U.S. 586 (1976); Zant v. Stephens, 462 U.S. 862 (1983); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mills v. Marvland, 108 S. Ct. 1860 (1988), the introduction of any improper information that might have affected the sentencing outcome cannot be deemed harmless. Particulary where, as in this case, the jury recommendation was by the barest of majorities, 7-5 for death, it cannot be said that such information "had no effect" on the jury's decision. The ultimate sentencer, already predisposed to death by an erroneous jury recommendation, was then subjected

to even more victim impact information that injected constitutionally impermissible information into the capital sentencing determination. The lower court erred in its analysis of this claim. This claim is more fully addressed at Argument IV, infra.

As to the remainder of the claims presented by Mr. Provenzano, the lower court's order is unclear. It should be noted that the lower court's numbering of claims does not correspond to Mr. Provenzano's Motion to Vacate Judgment and Sentence. These claims are also more fully addressed in this brief.

Mr. Provenzano presented valid claims for Rule **3.850** relief. The lower court was asked to determine those questions that needed factual, evidentiary resolution. Instead, the lower court substituted its judgments, judgments unsupported by evidentiary resolution at a hearing, for the standards this Court has established. The trial court's summary denial of Mr. Provenzano's **3.850** motion was erroneous.

Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. **See** O'Callaghan, supra; Squires, **supra;** Groover v. State, **489** So. 2d **15** (Fla. **1986).** Mr. Provenzano's claim that he was denied a professionally adequate pretrial mental health evaluation and comptency determination due to

failures on the part of counsel and the court-appointed mental health professionals is also a traditionally-recognized Rule 3.850 evidentiary claim, see Mason, supra; Sireci, supra; cf. Groover v. State, supra. Numerous other evidentiary claims requiring a full and fair hearing for their proper resolution were also presented by Mr. Provenzano's Rule 3.850 motion.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vausht v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has therefore not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d 537 (Fla. 1984); Vaught, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranso v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Provenzano was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 motion was erroneous.

ARGUMENT II

MR. PROVENZANO'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

In his Rule 3.850 motion, Mr. Provenzano alleged that he was not competent to undergo trial in 1984. Mr. Provenzano proffered

the report of Dr. Pat Fleming, an eminently qualified mental health practitioner who reviewed all of the background information regarding Mr. Provenzano to which the experts retained at the time of trial did not have access and who conducted the testing which was not conducted at the time of trial and which was required for a professionally adequate forensic evaluation of a mentally ill defendant such as Mr. Provenzano. Dr. Fleming's report discussed what a professionally adequate and competent evaluation of Mr. Provenzano reflects: that Mr. Provenzano was not competent. In denying Mr. Provenzano's Mason claim, however, the lower court stated: "Defendant's motion does not allege that his past history evidences mental retardation, organic brain damage or epilepsy." (PC-R. 448). These are not the criteria for competency. Mental deficits such as those from which Mr. Provenzano suffered at the time of trial are evaluated in the context of the eleven factors set forth in Fla. R. Crim. P. 3.211. Dr. Fleming appropriately evaluated these factors. The experts appointed at the time of trial did not. They received little of the relevant background information and conducted none of the necessary testing. Under Mason, an evidentiary hearing was required to properly assess this fact-based claim. The lower court erred in failing to conduct one.

At the time of his trial in 1984, Mr. Provenzano was plagued by his long-standing mental disorders. He was besieged by a chronic paranoia disorder in such a way that he could not deal

with counsel or aid in his own defense. His chronic vigilance, expectation of trickery or harm, overconcern with hidden meanings or motives, inter alia, and psychosis rendered him unable to consult with his lawyer with any rational or factual degree of understanding. His ability to relate to his attorney and plan a rational defense was essentially non-existent.

Defense counsel's motion, prior to trial, set out the reasons why he questioned Mr. Provenzano's competency:

> a. Defendant, although apparently in agreement with counsel at the time of conferences, often fails to follow counsel's advice.
>
> b. Defendant has stated that he intends to take actions at the trial that otherwise would not be in his best interests or in the interest of justice and will not dissuade from same.
>
> c. The mental health expert retained on behalf of the Defendant has advised counsel that Defendant's competency is questionable at best.

(R. 2766). A competency hearing was held prior to trial, at a time when Mr. Provenzano was represented by "temporary counsel," Mr. Horneffer.[3] Mr. Horneffer had made it absolutely clear that he had no intention of representing Mr. Provenzano at trial, and was actively seeking to be allowed to withdraw from the case. Eventually "permanent" counsel was appointed, but ineffectively did not seek to reopen the question of competency. The only

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[3]Mr. Provenzano's counsel at trial was Jack Edmund.

witnesses called at the competency hearing were the State's psychiatrists, Dr. Wilder and Dr. Kirkland. Both witnesses found Mr. Provenzano competent to stand trial although Dr. Kirkland's report expressed the opinion that "Mr. Provenzano suffers from serious emotional disturbance." (R. 2791).

A third psychiatrist retained at the time, Dr. Pollack, stated:

> [S]hould his attorney ever offer a negative comment, I believe that Mr. Provenzano could become quite violent, or could become rather secretive and unresponsive to his attorney. For the time being, however, I do feel that Mr. Provenzano is competent to stand trial and can actively participate in all of the litigation processes. Caution should be taken, however, that Mr. Provenzano represents an individual who is extremely violent and labile and during any courtroom procedure, is most probably going to lose control, and become assaultive to any individuals, particularly those in uniforms.

(emphasis added). None of this was developed by defense counsel at the time of trial. Cf. Pridgen v. State, 531 So. 2d 951 (Fla. 1988).

It is also fairly obvious from the reports of Dr. Wilder and Dr. Kirkland that they did not follow the statutory guidelines enumerated in Florida Rules of Criminal Procedure Rule 3.211. Although Drs. Wilder and Kirkland were questioned about the statutory criteria at the competency hearing itself, neither gave any basis for their opinion other than a cursory "yes" or "no" regarding the criteria. This is far from a proper assessment. Cf. Muhammad v. State, 494 So. 2d 969 (Fla. 1984)(expert's

competency evaluation must properly assess defendant's functioning under the statutory criteria).

Even Dr. Pollack's report did not follow the statute. However, his repeated warning that Mr. Provenzano could become "violent with his attorney," that "during any courtroom procedure, is most probably going to lose control," and that he could become "assaultive", "unresponsive to his attorney" and "secretive" are clear indications that Mr. Provenzano fell short of meeting the criteria set forth in Rule 3.211. Counsel's failure to develop this information with his expert, or to subject the State's experts to adequate cross-examination as to the basis for their opinions, was unreasonable performance and prejudiced Mr. Provenzano by causing him to undergo judicial proceedings although he was not competent to do so.

Dr. Fleming's evaluation, involving proper testing,[4] considering the client's history,[5] and employing Rule 3.211's criteria,[6] explained:

> In considering Mr. Provenzano's competency to stand trial, the single most important consideration is that this defendant's paranoia and delusional system is of such a severity that it cannot be viewed as reversible. At the time of the shooting, he was so disorganized that he lacked responsibility for his acts and was obviously not in control.

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[4] Something the experts then appointed did not do at the time of trial.

[5] Ibid.

[6] Ibid.

At the time of the trial, his paranoia and the accompanying delusional system would still be present. Due to this very intricate, complex and elaborate system Mr. Provenzano knew without question that everyone in the legal system was involved in a plot against him. This belief would so affect his ability to perceive facts that he would be ineffective. Delusions of grander caused him to view himself as having unique and superior abilities. As a result, he would also be unable to utilize the skill and expertise of his attorneys. Periodically, the attorneys would be viewed by this defendant as an integral part of the delusion and he would have to "trick" them during the trial.

In paranoid thinking, ability is not diminished as is the case in mental retardation. Mr. Provenzano is fully capable of intricate reasoning. The problem is that the reasoning is not rational or reasonable. Mr. Provenzano would be able to state the charges against him, but he would believe they were manufactured by the legal system or that he was completely justified in his actions, given the plot to harm him.

He would be able to communicate with his attorneys, but would be unable to understand their perspective. His cooperation would be akin to the blind man describing the elephant.

At the time of the trial, Mr. Provenzano:

1. Would intellectually understand the seriousness of the charges, but would not accept that he had committed a crime since he believes the legal system was out to harm him and homosexual conspiracy exists. In my opinion, Thomas Provenzano would not be in appreciation of the charses.

2. Would be able to recite the range and nature of possible penalties, but would not connect these penalties with his act since he would believe that he was acting in a rational manner, given the conspiracy and intent to harm him by the legal system. In my opinion, Thomas Provenzano would not

appreciate the range and nature of possible penalties.

3. Would understand the adversary nature of the legal process.

4. Would not have the capacity to disclose to his attorney pertinent facts surrounding the offense. His tightly woven delusion regarding the homosexual plot by the legal system not only distorts the facts of the day of the shooting, but has also affected his perception of prior events. As a child, Mr. Provenzano had been physically and sexually abused. The police, including his relatives, were part of the events that victimized the defendant. It is probable that most of his life, he felt the legal system was conspiring against him, rendering his judgment of the legal process distorted. In my opinion, Mr. Provenzano would have diminished capacity to disclose to the attorney pertinent facts surroundins the allesed offense.

5. Would relate to his attorney based on the severity of his delusions. His attorney would likely have no idea that he was trying to trick them if on that day he viewed them as part of the conspiracy. His information would be variable and unreliable. In my opinion, Mr. Provenzano would have diminished ability to relate to the attorney.

6. He would be unable to realistically challenge prosecution witnesses. Although he would intellectually be able to understand the facts, he would so misinterpret and twist the information that he would be unable to make adequate judgment regarding the facts. In my opinion, Thomas Provenzano would not be able to realistically challense prosecution witnesses.

7. He would be unable to manifest appropriate courtroom behavior if he did not perceive himself as threatened and/or violated by the opposition. He would have the capacity, if he became psychotic, to attack. In my opinion, Thomas Provenzano would have the diminished ability to manifest appropriate courtroom behavior.

> **8.** He would be able to testify, but would tend to miss the point of the questions, and not be able to shift sets as the questioning changed. He would appear to understand the questions, but would be processing the information in context of his delusional system. In my professional opinion, Mr. Provenzano would not have the capacity to cope with the stress of incarceration prior to the trial.

(PC-R. 357-374)(emphasis added).

Mr. Provenzano's claim, like the claim in ~~Mason v. State~~, is clearly one in which evidentiary resolution is required since the experts who found Mr. Provenzano competent to proceed did so on the basis of brief interviews and very little, if any, review of background materials. No adequate testing was conducted of this pathetic, mentally ill individual. Dr. Kirkland testified that he had seen Mr. Provenzano for a total of two hours (R. **1684)** and was unaware of significant facts such as the fact that Mr. Provenzano had previously maintained that he was Jesus Christ (R. **1698),** or that he could cure his nephew of a thyroid condition, because he was an instrument of God (R. **1698-1699).** Nor was Dr. Kirkland aware of Mr. Provenzano's bizarre behavior with Teresa Chambers (R. 1703). In fact, there were several critical areas of Mr. Provenzano's history of which Dr. Kirkland was unaware, yet he made a diagnosis of competency based on this wholly inadequate evaluation. When confronted on cross-examination with these incidents, Dr. Kirkland admitted that each "might **be"** or definitely **"was"** psychiatrically significant (R. 1703-1720). Interestingly, Dr. Kirkland is the same expert whose conclusions were found professionally inadequate in State v. Sireci, 13

F.L.W. 722 (Fla. 1988). The same flaws in his evaluation there are present here.

Dr. Michael Gutman conducted an evaluation based on an hour and a half interview. Even though Dr. Gutman had some previous experience with Mr. Provenzano over a workman's compensation claim in 1982, he was unaware of Mr. Provenzano's delusions of being Jesus Christ, of being a spiritual healer, and numerous other delusional and obsessive acts. Once again, this expert made a determination of competency based on inadequate information. Dr. Gutman agreed that he did not have "all the bricks and all the mortar" (R. 1784) to make a decision.

Dr. Lloyd Wilder had seen Mr. Provenzano on three different occasions for a total time of two hours and fifteen minutes (R. 1814). Dr. Wilder did not rely on anything other than Mr. Provenzano's personal account of his history. This is just like Mason:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved... In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, and interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L Rev. 427, 508-10 (1980).

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). What is clear is that the evaluations here were professionally inadequate and

invalid, and that an evidentiary hearing is therefore required. Mason, supra; State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). In Mr. Provenzano's case as in Sireci and Mason, there was "significant evidence" of physical, emotional and even sexual abuse that was ignored by the mental health professionals and an "extensive history" of psychotic behavior that went undiscovered by the experts and therefore was completely ignored when the at-trial evaluations were conducted. Under the standards set by this Court, it cannot be questioned that an evidentiary hearing was required to determine the adequacy or lack thereof of those mental health evaluations. Based on the record facts alone, it is clear that none of these evaluations were adequate under the standards set by this court in Mason and Sireci. No records were considered, none of the critical facts regarding Mr. Provenzano's history were known, no testing (critical in a case such as this) was conducted, and the Rule 3.211 criteria were never employed.

Mr. Provenzano's current evaluation involved not only the necessary review of the material facts about Mr. Provenzano's past, but also the requisite professionally adequate testing. Based on these materials, plus extensive testing and interview time totaling over eight hours, Dr. Fleming reached conclusions regarding Mr. Provenzano's competency which were quite different from those of the prosecution's experts. This is just like Mason. Dr. Fleming, unlike the prior experts, assessed each of the statutory criteria and gave not only her opinion as to whether Mr. Provenzano met the criteria, but also provided the

reasons for her opinions.

The lower court, however, not only ignored the statutory requirements for determining competency, but also ignored this Court's established precedents regarding determination of professionally adequate mental health evaluations: the court erred by simply ignoring the significant facts proffered with Mr. Provenzano's Rule **3.850** motion, facts undiscovered by the experts or counsel at the time of trial. These facts, however, were and are necessary for the proper determination of mental health issues in a case such as this.

The rights to professionally adequate mental health assistance and effective assistance of counsel are closely interwined. The mental health professional's judgments are rendered invalid if defense counsel fails to provide the expert with necessary, important background information. Counsel in such instances fails to secure for his or her client a professionally adequate mental health evaluation -- this is ineffective assistance. See Blake v. Kemp, **758** F.2d **532, 529** (11th Cir. **1985).** Where the expert's opinions at the time of the defendant's initial proceedings are inadequate or invalid, the expert violates the accused's rights to professionally adequate mental health assistance -- relief again is warranted. See Mason v. State, **489** So. 2d **734, 735-37** (Fla. **1986);** State v. Sireci, 502 So. 2d 1221, **1223-24** (Fla. **1987).** The results of trial level proceedings founded upon inaccurate or inadequate professional evaluations -- whatever the reason for the inadequacy -- cannot

be relied upon. Post-conviction relief is appropriate in such instances. Mason; Sireci.

Mason, a capital case, sets the standard. There, mental health professionals conducted pretrial evaluations and determined that the defendant was competent. Id., 489 So. 2d at 735-36. However, significant background information reflecting the defendant's history of impairments was not "uncovered by defense counsel" and therefore not provided to the experts. Id. at 736. The Florida Supreme Court remanded for an evidentiary hearing on the questions of whether the initial opinions were professionally valid, the source of the experts' initial evaluations, and whether newely discovered information would have altered the result. Mason, 489 So. 2d at 735-37. The same result is appropriate in Mr. Provenzano's case.

In sum, Mr. Provenzano was not competent to undergo criminal judicial proceedings. His lack of competency should have been obvious to the court, defense counsel, and the defense psychiatrists, as well as to the State's psychiatrists. The rights of this mentally ill capital defendant were simply not protected.

Accordingly, Mr. Provenzano's conviction and sentence of death stand in stark violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. See, e.g., Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So. 2d 1253 (Fla. 1985). An evidentiary hearing, and thereafter, Rule 3.850 relief, are appropriate.

ARGUMENT III

THOMAS PROVENZANO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Regarding Mr. Provenzano's claims of ineffective assistance of counsel, the lower court attributed, without the benefit of an evidentiary hearing, strategic reasons for counsel's actions or inactions. Whether a decision is **"strategic",** and indeed whether any **"decision"** was made at all **(as** opposed to actions founded in ineffectiveness of counsel), are classic Rule 3.850 evidentiary issues. Squires, supra. Specifically the lower court listed the following as matters for which counsel had "strategic" reasons:

(b) at the competency hearing counsel failed to rebut the State's witnesses (p. 80);

(f) counsel should have cross-examined certain state witnesses about their interest in giving particular testimony (p. 90);

(h) counsel failed to present a defense of **"imperfect"** self-defense (p.95)(p.229);

(i) counsel failed to allow Defendant to testify (p. 98) (p. 235);

(j) counsel failed to object to the testimony of a court official (p. 99);

(o) counsel failed to file motions to suppress certain witness statements;

(p) counsel failed to impeach certain witnesses (p. 260).

The lower court erroneously concluded that these claims dealt with **"strategic"** decisions and could therefore not be disturbed.

However, there was no evidentiary hearing at which the facts could be assessed and at which it could be determined whether these were strategic decisions or not. Mr. Provenzano pled that they were not, and supported his pleading in this regard with specific allegations of fact. These were nonrecord matters clearly appropriate for evidentiary review. Where the facts are in dispute, an evidentiary hearing is called for to determine the facts. Cf. Squires, supra.

In capital cases, the Townsend v. Sain, 372 U.S. 293 (1963), requirement that evidentiary hearings be conducted on contested questions of fact is especially significant. The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gress v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957)(Frankfurter, J., concurring); id. at 77 (Harlan, J. concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); sentence, Lockett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); Florida post-conviction

proceedings, Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); and federal habeas corpus review. Zeigler v. Wainwright, 805 F.2d 1422 (11th Cir. 1986). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair state and federal post-conviction proceedings. Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980)(Phillips, J.); Evans v. Bennett, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

As to the remaining allegations of ineffective assistance of counsel, found both in Claims V and VI of the Motion to Vacate, as well as other claims, the lower court merely stated that there was no ineffectiveness. No portions of the files or record were attached to the lower court's order, and in fact none could be, showing that trial counsel was not ineffective. Mr. Provenzano alleged facts which support a claim of ineffectiveness. Before an evidentiary hearing, the facts pled must be credited in the petitioner's favor:

> Because there was no hearing, the record before us is completely inadequate. We are, therefore, unable to effectively evaluate the claims raised by Agan. See Clark v. Blackburn, 619 F.2d 431, 434 (5th Cir. 1980)(per curiam). We can only determine that Agan's allegations, if true, would warrant relief; therefore, we remand for the evidentiary hearing he should have had a long time ago.

Agan v. Dugger, 835 F.2d 1337, 1341 (11th Cir. 1987). See also Blackledae v. Allison, 431 U.S. 63 (1977); Squires v. State, supra.

Indeed, the lower court did not even address the issue of counsel's failure at the penalty phase to investigate and present significant mitigating facts crucial to understanding Thomas Provenzano, who he was as a person, and what led up to the disastrous chain of events concluding on January 10, 1984. These facts were fully set out in the Motion to Vacate, but were never presented to Mr. Provenzano's sentencing judge and jury. Counsel's ineffectiveness in this regard was never addressed by the lower court.

Contrary to the lower court's assertions, the Rule 3.850 motion set forth numerous specific allegations of trial counsel's deficient performance and presented a wealth of information demonstrating the prejudice resulting from counsel's deficiencies. The lower court denied the claim without an evidentiary hearing, see Argument I, supra, although the allegations in the motion and the entire record in this case demonstrated Mr. Provenzano's entitlement to an evidentiary hearing and to Rule 3.850 relief. Without conducting an evidentiary hearing, the lower court made findings regarding Mr. Provenzano's claims and regarding trial counsel's strategy. There is simply no record upon which to base these findings. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); see also Argument I, supra. The lower court erred, for the motion and the files and records in this case do not conclusively show that Mr. Provenzano is entitled to no relief. Fla. R. Crim. P. 3.850. An evidentiary hearing was and is required. Given the opportunity

at an evidentiary hearing, Mr. Provenzano would establish what his Rule 3.850 motion alleged: counsel's performance was deficient and those deficiencies operated to Mr. Provenzano's substantial prejudice.

In Strickland v. Washinston, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). As a result, where errors, deficiencies, or omissions of counsel "undermin[e] the [reviewing] court's confidence in the outcome of the . . . proceeding," or when the court is unable "to gauge the effect of [an attorney's] omission," relief is appropriate. See State v. Michael, 530 So. 2d 929 (Fla. 1988). Strickland v. Washinston requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Motion to Vacate, Mr. Provenzano did just that.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummell v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Homer, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See ~~also~~ Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent

duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal and factual arguments to assist his client in accord with the applicable principles of law and the facts of the case. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client receives

professionally adequate expert mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's mental health is at issue. See, e.g., Mauldin, supra; see also United State v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

Counsel must also discharge significant responsibilities at the penalty phase of a capital trial:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the

> defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Tyler v. Kemp, 755 F.2d 741, 743 (11th Cir. 1985).

The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, see State v. Michael, supra, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (1984); Goodwin v.

Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these constitutional standards. See King v. Strickland, supra; Tyler v. Kemp, supra; Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1985); see also O'Callaghan v. State, 486 So. 2d 1454 (Fla. 1984); Douglas v. Wainwright, supra; Thomas v. Kemp, supra, 796 F.2d at 1325.

Each of the errors pled in the Rule 3.850 motion were sufficient, even standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence and penalty determinations. The allegations were more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

With regard to defense counsel's failures at penalty phase, some of the evidence that would be presented at an evidentiary hearing is detailed in the Motion to Vacate Judgment and Sentence and its accompanying Appendix (see Claim VI, Motion to Vacate). At an evidentiary hearing, testimony relating to Mr. Provenzano's history of mental and sexual abuse, his abandonment at a young age, his developmental ideas regarding law enforcement (formed in part by watching his Uncle Danny sell stolen goods on the black market), and his psychotic fear of homosexuality would have been presented. Mr. Provenzano's background establishes a wealth of mitigation. These matters were not investigated at the time of

trial. The information was there; the jury had a right to hear it; Mr. Provenzano had a right to have it presented. However, because trial counsel failed to properly investigate and prepare, it never reached the jury or judge.

While Mr. Provenzano's sister did testify at the guilt phase of trial, virtually nothing was presented at the penalty phase. No testimony whatsoever was presented as to statutory mitigating factors or to rebut statutory aggravating factors. In addition, there existed a great deal of mitigating information (detailed in the Rule **3.850** motion), that was never presented to the jury. This included:

Uncle Danny, the police officer, had a great influence on Thomas' life:

> Thomas' Uncle Danny would often times slap him around. Danny was a Chief of Police and felt that he had to be the big shot. Therefore, he would discipline his children, nieces, and nephews when he felt they were out of line. Although many times he would be abusive. At one point even his own son tried to shoot him.

(PC-R. **384).**

Thomas learned about "law and order" from his family, especially from Uncle Danny:

> Thomas would steal stuff and give it to his Uncle Danny to sell on the black market. Thomas also knew that Danny was involved in the syndicate. Thus, Thomas grew up realizing that an officer of the law was actually violating laws and getting away with it. Consequently, Thomas grew up believing all police officers were crooked.

(PC-R. **384).**

On one occasion, Thomas was arrested by the Melrose Park police:

> They took [him] in a back room and worked him over. These were the same police officers who, when they would catch him with stolen property, would take half of the goods and let him go on his way. Again, Thomas did not trust or believe that police officers were honest.

(PC-R. 384).

This was the way Thomas Provenzano grew up:

> Thomas grew up in an environment that lead him to lose all respect for the law. Many of his family members were involved in the syndicate and would obtain jobs through connections and more importantly he watched his relatives buy off the legal system. Thomas' uncle Danny was involved in behind the scenes handling of criminal charges. Thus Thomas grew up watching a law man intentionally destroy justice.

(PC-R. 379).

As a result, this young man developed a growing paranoia of law enforcement officers. Thomas' sister, Catherine, also remembers the police officers that controlled their lives:

> Thomas distrusted the police and lost all respect for the law. After a friend of his overdosed in Chicago he went to the police with evidence that supported a drug murder but they told him to go back to Florida. The police also told him that they were going to put a person on his flight to make sure he went home. Thomas told me that the Chicago police followed him around in Orlando, found out where he lived, and even pointed a rifle at his head. In a separate incident, the police raided my house while Thomas was visiting and accused him of threatening his second wife, whom he found with another man earlier in the evening. The Orlando police started screaming at him and

banging his head on the wall, without asking him any questions. His then-wife bailed him out of jail. It is these type of incidents that pushed Thomas over the edge. He lost all respect for the police and developed the belief that all police officers, whether they be from Chicago, Orlando, or the CIA, were out to get him.

(PC-R. **389).**

One of Mr. Provenzano's greatest fears was that he would be the target of homosexual conspiracies. Testimony from the mental health experts confirmed this fear. The jury heard about Kempf's Syndrome from Dr. Lyons:

Q. Please tell the jury what the definition of Kempf's Syndrome is.

A. That's a nineteenth century German psychiatrist's name which has been given to the syndrome which has been somewhat inappropriately named homosexual panic. What it refers to is the excitement, the absolute panic that is created when a person who is fearful of homosexuality has hands laid on him or approached too closely by other males.

Q. Well, Kempf's Syndrome would not apply to a homosexual?

A. No, sir. It would not. It applies to someone who is fearful of homosexuality, but who is not himself homosexual.

Q. Relate, if you will, the episode of August, **1983** to Kempf's Syndrome and Tommy Provenzano.

A. I think this was a similar case where the officers laid hands on him, threw him to the ground. And by doing so frightened him out of his mind. They scared him to death. He was panicked when they did that to him. He was expecting even more than he got, and was fearful of the whole situation. Could I give another example of this?

Q. If you will, please.

A. When I came to see him the first time on the 18th of May from Gainesville he refused to see me because he had been strip-searched the day before, and was absolutely enraged about the indignity of this. They not only laid hands on him, but they let him stand bare naked in front of other men. And he knew that every time he left his cell this might happen to him again. He did not want to come down and see me.

(R. 1459-60).

What the jury did not hear was how this fear developed. According to his cousin, Frank,

> When Thomas was 8 years old he lived with his father and his stepmother. His stepmother had a child who made homosexual advances on Thomas. Thomas told me that it happened several times. His stepbrother later ended up in a mental hospital due to his sexual problem.

(PC-R. 384). Thomas' home life continued to be abusive according to Frank Provenzano:

> Thomas also used to tell me that his one uncle was different. He used to tell me things about this one uncle that leads me to believe that he was also molested by one of his uncles.

(PC-R. 384).

Those who knew him knew Mr. Provenzano feared being locked up, perhaps because prison was known to be a place where homosexual attacks occurred:

> He definitely knew how to avoid his greatest fear which is serving time in prison.

(PC-R. 403).

It is not difficult to imagine how these fears and this

upbringing gradually worked into the paranoia that revolved around the police. The abuse he had suffered as a child, much of it at the hands of family members who were police officers, served to eventually narrow the focus of his delusions. As Dr. Fleming explained:

> Mr. Provenzano's pervasive paranoia, well developed delusions, blunted affect, vague and tangential speech, odd beliefs, identification with deity, marked anxiety, long history of clumzy and ineffective interpersonal relationships, and the failure to learn from experience are verified by a number of sources: self report, text results, and accounts from fellow workers, relatives and his ex-wife. The day of the arrest was the final stage of the paranoid psychosis that was developing. He became more socially withdrawn, more agitated, disorganized, and paranoid. His appearance and activities deteriorated. Prior to this day, however, his sister had attempted to have him hospitalized. He had also sought treatment. The shooting was part of an acute psychotic episode that had traumatic and disastrous effects on all involved. Reports indicate that he showed severe signs of paranoid psychosis for months prior to the acute stage. His work, social relations and self-care had markedly diminished. In addition, he had a continued theme of grandiosity, saw himself as Jesus, and an inflated sense of his ability to save the poor and oppressed from the hands of the law. His grandiosity included the belief that he had very superior intelligence, and the ability to perform work significantly above the average man. Following the arrest, he has settled into a more chronic phase, but the symptoms are not in complete remission. He continues the battle with evil. The paranoia, grandiosity, loose associations, tangential speech, rigidity, agitation and racing thoughts are still present. Mr. Provenzano told this examiner that the most important thing to be learned from the evaluation was that he was not always as he

> was that day. Past events support his statement.

(PC-R. **356).** Defense counsel, however, ineffectively and in ignorance failed to present any expert testimony regarding the critical mental health mitigation issues involved in this case: issues central to the jury's proper assessment of penalty. The evidence was there; counsel had it. Ignorantly and ineffectively, counsel failed to present it.

Family witnesses and others who knew Mr. Provenzano were also completely ignored. Catherine Provenzano, for example, could have added a great deal for the jury's consideration, especially at sentencing:

> Our Uncle Danny was chief of police when we were growing up. He was responsible for Thomas becoming involved in theft. He would have Thomas steal stuff and give it to him so he could sell it on the black market. Uncle Danny was also involved in the syndicate. Thomas was aware of this and the corrupt practices of Danny. Again, Thomas was convinced that all police officers were cheaters and arrested only certain people. There was a period of time when Thomas idolized Uncle Danny. Therefore, when Uncle Danny passed away, about two months prior to the courthouse incident, Thomas was once again devastated by the loss of someone he loved.
>
> Throughout his entire life, Thomas was constantly trying to overcome the **loss** of someone he either cared for or loved. It started out with our mother and father, then his grandfather died. After that it was both his wives, his son, the stillbirth, Uncle Danny, and on and on and on.

(PC-R. 389).

The repeated failures and abandonments in Thomas' life,

particularly the death of this very significant person in his life, Uncle Danny, together with his fears and delusions brought him to the Orange County Courthouse on January 10, 1984 "dressed for a part in a movie." A wealth of evidence was available in this regard. Indeed, the relevant witnesses attended the trial. Counsel never called them to the stand. He failed to in any way investigate, develop, or present this evidence, an omission supported by no tactic or strategy, as Mr. Provenzano's Rule 3.850 motion properly pled.

Thomas played out his drama that day but the rest of the tragedy -- Thomas' tragedy -- was never told to the jury. There is so much in this case that should have been said that the jurors never learned about:

> Mr. Provenzano was abandoned by his natural mother, suffered sexual, psychological and physical abuse, was victimized by police, experienced two failed marriages, lost two sons, one through divorce and one through death. He had an early unfortunate abusive relationship with an uncle who was a Police Chief. He was a shy, socially maladept young man who then became involved in drugs and alcohol during his adolescence. His strange and hard to understand behavior increased the difficulty in establishing adequate social relationships. This early abuse, abandonment and emotional instability provided the basis for the later psychosis. The paranoia gradually increased. Delusions of perception and grandeur developed including identification with Jesus. He continues to view himself as having special talents and gifts. This very fragile man has few and limited personal resources. His frantic efforts to create some kind of safe life and stability consistently failed. His black and white approach to life, his compulsivity and rigidity were all efforts to maintain an equilibrium he never had. Thomas may have

> been able to survive in a less complicated world with fewer expectations and better defined rules. He was unable to understand the expectations of others or quell his overwhelming paranoia that governed his life.

(PC-R. 356).

The prejudice here is obvious. Because the information outlined above was never fully explored and not presented to the jury or the judge, "[t]he death penalty that resulted was . . . robbed of the realiability essential to ensure confidence in that decision." Tyler v. Kemp, supra. Mr. Provenzano was denied his right to an individualed and reliable capital sentencing determination because of trial counsel's failures.

Likewise, at the guilt phase of trial, counsel's performance was deficient, to Mr. Provenzano's substantial prejudice. As the Rule 3.850 motion alleged, counsel's failures included, ~~inter~~ alia:

> 1. Defense counsel failed to adequately represent Mr. Provenzano at his competency hearing. See also Argument II, supra.
>
> 2. Defense counsel failed to timely move for change of venue, or perfect for appeal the motion for change of venue that was ulitimately orally made at the start of trial.
>
> 3. Defense counsel's voir dire was woefully inadequate. For example, defense counsel completely failed to voir dire the venire panel as to the extent of ~~their~~ exposure to pretrial publicity and its effects.
>
> 4. Defense counsel failed to cross-examine State's witnesses on their biases in testifying.

5. Defense counsel waived attorney/client privileges without benefit to Mr. Provenzano.

6. Defense counsel unreasonably failed to urge a defense of imperfect self-defense, even though the testimony of two State experts supported it.

7. Defense counsel failed to allow Mr. Provenzano to testify at the guilt phase, after informing the court that he would testify. Mr. Provenzano wished to testify as was his right, but was misled by counsel into believing he could not do so.

8. Defense counsel failed to object to pretrial press interviews given by Mr. Provenzano's county court judge, who was an eyewitness to the January 10, 1984 shooting.

9. Defense counsel repeatedly allowed Mr. Provenzano to be absent during critical stages of these capital proceedings.

10. Defense counsel failed to obtain adequate mental health assistance.

The prejudice from these deficiencies is also obvious: through defense counsel's ineffectiveness, Mr. Provenzano was deprived of his right to a fair and reliable determination of his guilt and sentencing in a capital case. See Beck v. Alabama, 447 U.S. 625 (1980). Counsel failed to assure that Mr. Provenzano would obtain a fair and impartial jury and that the jury would fairly assess the evidence, and failed to maintain his duty of loyalty to his client.

Mr. Provenzano's claims regarding ineffective assistance of counsel were more than sufficient to require an evidentiary hearing and thereafter Rule 3.850 relief. The lower court erred in denying an evidentiary hearing and in summarily denying the

claims for relief. An evidentiary hearing and Rule **3.850** relief are proper.

ARGUMENT IV

MR. PROVENZANO'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION THROUGHOUT THE PROCEEDINGS

The circuit court ruled on the merits of this claim, but applied an erroneous harmless error analysis and determined that the error was harmless (PC-R. **447**). The Order acknowledged that victim impact testimony was presented to the judge, but denied that any victim impact information was presented to the jury. This was error.

As explained more fully in the Rule **3.850** Motion to Vacate, the judge and jury were subjected to victim impact information throughout the entire trial (See, e.g., Claim XVI, Motion to Vacate).

This was a highly publicized case, which received not only printed media and radio coverage but also extensive television coverage as well. From the time of the incident and throughout the trial, filmed accounts showing the victims and their families were virtually a nightly event. The coverage included the very moving report of the funeral of Mr. Wilkerson (**See** Appendix 16 to the Motion to Vacate). While this information was outside the courtroom, the mood conveyed in these reports was pervasive throughout the community and was what the jurors brought with them to the court. With this as a background, the types of

prejudicial victim impact information presented throughout the course of the proceedings were even more damaging than they would otherwise have been.

From opening statement until sentencing before the court, the State insisted on placing before the sentencers information about the impact to the victims and their families. On opening, the State defined what it intended to present:

> The State of Florida will present evidence in this case that will show the human damage that the defendant inflicted on that fateful day back in January here in Orange County. One bailiff murdered from a shotgun blast. One bailiff so severely injured he can't eat. He has lost an eye. Six months after the incident is, portions of his brain has been blown away. He can't go to the bathroom, can't remember the incident. He needs twenty-hour hour nursing care. And a third individual, correctional officer, paralyzed from the shoulder down permanently.

(R. 472-473).

From the onset of the trial, family members of Mark Parker, Harry Dalton, and Arnold Wilkerson were seated in the front row of the courtroom. When the state introduced the audio tape of the shooting (R. **508**), the television cameras recorded the highly emotional, not unexpected reaction of the families as they cried and held one another in comfort (Appendix **16**).

Shortly thereafter, the State offered the testimony of Mark Parker, a victim of the shooting, who was a paraplegic (R. **581**). Mr. Parker's very presence, and the way in which the jury was urged to consider it, were painful reminders of how his life had been tragically altered. During his testimony Mr. Parker asked

to be turned in his wheelchair since his neck was becoming stiff. (R. **590**). This was not enough drama for the State, however and Mr. Kunz, the prosecuting attorney, asked:

> Q. Now, Mr. Parker, as a result of the injuries that you sustained to January 10th, **1984**, can you tell the members of the jury what physical injuries you now have?
>
> A. Well, sir, I'm paralyzed from this position down. I have no sensation in any part of my body from here down. (Indicating) My left arm, I have sensation from about here up. I have no use of my left hand. My arm, arm, I have sensation from about mid-bicep down. And I have no usage of my right hand.
>
> **Q.** Were you hospitalized as a result of your injuries on January 10th.
>
> A. Yes, sir.
>
> **Q.** From what period of time?
>
> **A.** Four months, fifteen days.
>
> Q. Okay, sir. Have you been able to return to work?
>
> **A.** No, sir.
>
> **Q.** You anticipating being able to return to work as an correctional officer?
>
> A. No, sir.

(R. 595-596).

The State then questioned Mr. Parker's physician as to the injuries Mr. Parker had sustained and proceeded to ask about the impact of those injuries on Mr. Parker's future (R. **811**). Defense counsel's objection on relevancy grounds was granted but the question of Mr. Parker's future and the **"impact"** on him was still in the minds of the sentencers. Later, the State also evoked

testimony with regard to the condition of Bailiff Dalton (R. 856).

When the State introduced the photos of the body of Mr. Wilkerson, the judge in a sidebar admonished the State to show it carefully.

> THE COURT: I have admitted that picture. Now, when y'all are displaying it, for Christ sake don't let the front row see it. That's all the family out there. I don't want to break up the courtroom.
>
> MR. EDMUND: I just as soon we don't show it to anybody.
>
> THE COURT: I know. You could get a re-trial real quick, I believe, if you show that picture to the front row.

(R. 696).

An audio cassette tape of the actual shooting was put into the evidence and published to the jury during the State's case in chief (State's Exhibit A)(R. 510). The audio recording brought out a pronounced reaction by the audience. In a newspaper report the audience's reaction was recorded:

> The brief tape brought back Provenzano's shouted, obscene challenges to Dalton followed by gunshots and screaming. Relatives of Parker and Dalton, who made up about half the small audience in the courtroom, wept and embraced one another. They still seemed upset as they stood in the courthouse hallway later.

(PC-R. 353). In a video news report members of the audience are captured on film weeping. (Appendix 16). This type of audience participation has no place in a jury trial, and denied Mr. Provenzano's rights to a fundamentally fair and reliable capital trial and sentencing determination, as required by the fifth,

sixth, eighth, and fourteenth amendments.

Defense counsel moved for a mistrial based on the audience's emotional reaction to the tape:

> MR. EDMUND: Comes now the Defendant and move this Honorable Court declare a mistrial. Ask this record to reflect upon the unexpected playing of the tape of the event of the shooting of the 10th of January, 1984. Members of the audience became upset and besan crying, and in such a manner and fashion as became obvious to the jury to the point that the jury was looking around at them, thus creating an atmosphere immediately prior to their deliberations that would, could only result in their being unable to render a fair and impartial verdict.

(R. 1966-67)(emphasis added).

All of these incidents set the stage for the State to add the finishing touches with the sentencing testimony of Eileen Dalton, the wife of Bailiff Harry Dalton.

> Q. Do you have anything that you'd like to tell the Court with respect to the sentencing or concerning the circumstances of what your husband's currently undergoing as a result of that shooting incident and what the family is going through?

(R. 2300).

Defense counsel again objected but the court overruled him and permitted Mrs. Dalton's testimony:

> THE WITNESS: For six months, I've watched my husband with his head caved in, not able to eat, not able to drink, not able to use the bathroom, not able to do anything that we take for granted every day. We have worked with him, we have overcome some of these problems; some will never be overcome.
>
> It has caused a very big emotional problem in many of the children . . .

Q Okay. Do you have any recommendation for the Judge with respect to what sentence you think Mr. Provenzano should receive on the attempted 1st degree murder?

A I think it should be the maximum for what we've had to so through and what we will be going throush and what we will be going throush.

(R. 2301)(emphasis added)

It is clearly improper for the sentencers to consider such information, information which "injected irrelevant material into the sentencing proceedings." Scull v. State, No. 68,919 (Fla. Sept. 8, 1988)(skip op. at 9). Here, not only was such information separately provided to the judge (through the PSI, etc.) but was also paraded before the jury.

Under Booth v. Maryland, 107 S. Ct. 2529 (1987), the eighth amendment is violated by the presentation of such victim impact information. Part of the rationale used by the Court in this decision involved the eighth amendment's mandate that the jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." Booth, supra at 2532. Cf. Scull v. State, No. 68, 919 (Fla., Sept. 8, 1988).

What occurred here was clearly improper under Scull and Booth and as such denied Mr. Provenzano's right to an individualized and reliable capital sentencing proceeding in accord with the eighth and fourteenth amendments. The victim impact information imparted to the sentencing judge and jury was

pervasive. The jury's recommendation for death was by the slimmest of majorities, 7 to 5. Had the jury recommended life imprisonment, the trial court would have been bound by that, as there was more than an ample basis therefor in this record. See, Tedder v. State, 322 So. 2d 908 (Fla. 1975). The error under Booth, supra, was far from harmless, and relief is now appropriate.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. PROVENZANO'S CLAIM THAT BECAUSE OF FAILURES ON THE PART OF DEFENSE COUNSEL AND THE MENTAL HEALTH EXPERTS, THE OPINIONS OF THE EXPERTS WERE RENDERED PROFESSIONALLY INADEQUATE, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The lower court's ruling on this issue is confusing. It is not clear whether the ruling was that "counsel cannot be deemed ineffective simply because he relied on what may have been less than complete pre-trial psychiatric evalustions. Sireci, supra." (PC-R. 450), or that "Defendant's final claim concerns the competency of his mental health experts. As discussed under competency, the defendant's motion fails to allege sufficient facts to show that he is in fact incompetent. Therefore, a finding of competency is warranted." (PC-R. 451). Each of these confusing bases for denying Mr. Provenzano's Rule 3.850 motion was erroneous.

As was plainly set forth in his Rule 3.850 motion (see Claim VIII), Mr. Provenzano alleged that the mental health evaluations

performed in his case were professionally inadequate and therefore that his rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were violated. This inadequacy resulted from actions by both defense counsel and the mental health experts.

The rights to professionally adequate mental health assistance and effective assistance of counsel are closely interwined. The mental health professional's judgments are rendered invalid if defense counsel fails to provide the expert with necessary, important background information. Counsel in such instances fails to secure for his or her client a professionally adequate mental health evaluation -- this is ineffective assistance. See Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Where the expert's opinions at the time of the defendant's initial proceedings are inadequate or invalid, the expert violates the accused's rights to professionally adequate mental health assistance -- relief again is warranted in such instances. See Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1223-24 (Fla. 1987), subsequent history, 13 F.L.W. 722 (affirming grant of Rule 3.850 relief). The results of trial level proceedings founded upon inaccurate or inadequate professional evaluations -- whatever the reason for the inadequacy -- cannot be relied upon. Post-conviction relief is appropriate in such instances. Mason; Sireci.

Again, this claim is one regarding which an evidentiary hearing is required to determine matters not of record that bear

on the adequacy of the examinations performed and on the allegations of ineffective assistance of counsel. See Argument I, supra. However, the lower court summarily dismissed the claim without attaching portions of the files and records in the case which demonstrated that Mr. Provenzano was entitled to no relief. Rather, the court determined that the claim lacked merit, without any record upon which to make such a determination. This was error. As the discussion in the Rule 3.850 motion, the summary of that discussion presented below, and the entire record demonstrate, Mr. Provenzano has presented allegations which entitle him to relief, were he given the opportunity to establish those allegations at an evidentiary hearing.

In Mr. Provenzano's case, mental health experts were utilized for the issues of competency as well as insanity. (As noted elsewhere, no experts were utilized for the capital sentencing determination). The experts called by the defense on the issue of insanity were given a limited amount of background material regarding Mr. Provenzano. The experts called at the competency hearing, and called by the State at trial, were provided with virtually no information about Mr. Provenzano other than that revealed by his own self report. This is inadequate. As noted in previous portions of this brief, this is far from enough to meet the Mason/Ake standard.

In Mr. Provenzano's case, three experts were appointed, on defense counsel's motion, to determine Mr. Provenzano's competency to stand trial and sanity. The defense's experts

determined that Mr. Provenzano was not sane at the time of the offense, but were never asked to testify at the competency hearing. Three State experts evaluated Mr. Provenzano and determined that he was sane and competent. Defense counsel, however, failed to provide any of the experts with sufficient, relevant background information regarding Mr. Provenzano necessary to a professionally valid and accurate evaluation. The State experts, for this reason, and because of inadequacies in their own assessment, rendered opinions which -- in light of Mr. Provenzano's history -- were professionally invalid. The defense's experts' opinions were similarly weakened by a lack of information. Due to the failures of defense counsel to provide adequate background information and to consult with the experts regarding mitigation, invaluable penalty phase evidence was lost as well.

All of the experts agreed that Mr. Provenzano suffered from significant mental defects. However, without the benefit of the wealth of background information then available regarding Mr. Provenzano, and without ever conducting the necessary testing, the doctors provided an account of Mr. Provenzano which was significantly deficient regarding the true defects from which this capital defendant suffered.

Had defense counsel or the mental health experts obtained Mr. Provenzano's Florida State Hospital records, for example, they would have learned that Mr. Provenzano had requested treatment for mental illness, that his leg and knee were in

constant involuntary motion during the interview, that he reported feeling suicidal, that his sister had received mental health treatment and that he started sobbing when he talked about being abandoned by his parents and now his wife. Indeed, the account of family and others who knew Mr. Provenzano provided information of great significance to an adequate mental health assistance. Defense counsel provided virtually none of this to the experts. The experts sought none of it out.

It is well recognized that the patient is often an unreliable data source for his own medical and social history. See Mason, supra. "The past personal history is somewhat distorted by the patient's memory of events and by [other] knowledge . . ." Kaplan and Sadock, p. 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the [expert] must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in

the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 **(1980)** (emphasis added), cited with approval in Mason v. State, supra. Accord. Kaplan and Sadock, supra at **550;** American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing **Process,"** Issues in Forensic Psychiatry, p. 202 **(1984);** Pollack, Psychiatric Consultation for the Court, **1** Bull. *Am.* Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry, pp. **38-39** (2d ed. **1965).**

Thomas Provenzano's mental deficiencies are patently obvious. His behavior and his background demonstrated substantial and longstanding mental health problems. His illness was in fact clear from his records, and was readily recognized even by his attorney and others. **Cf.** Sireci, **502** So. 2d at 1224 (evaluations professionally inadequate when "clear indications" of mental illness are inadequately assessed). But no one here sought out or used critical and available background information. As the Florida Supreme Court has explained:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. . .
>
> In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. **See** Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L.Rev. 427, **508-10 (1980).**

Mason v. State, 489 So.2d 734, 737 (Fla. 1986)(emphasis supplied).

None of the experts were provided with the requisite data from individuals who knew Mr. Provenzano or even from his attorney. None of them spoke with the family, or read the documents accumulated over the years regarding Mr. Provenzano. They relied on their interviews. Dr. Barbara Mara admitted that she did not interview Mr. Provenzano and had no background information:

> Q. Fifty percent. Fair enough. Did you ever inquire from Mr. Provenzano as to his backaround, psychological backsround, his family history, any social backsound he had?
>
> A. No, sir. I wasn't asked to do a clinical interview.

(R. 1342)(emphasis added). Dr. Henry Lyons admitted that he had little background information:

> Q. That is based on your understanding of his background, correct?
>
> A. That's a necessary element for the diagnosis, yes.
>
> Q. Did you interview anyone in Mr. Provenzano's family?
>
> A. No, I did not.
>
> Q. Pursuant to your examination?
>
> A. No, I did not.
>
> Q. Did you interview any neighbors?
>
> A. No. I did not.
>
> Q. Did you interview any friends?
>
> A. No, I did not.

Q. Did you interview anyone else in the past medical history of Mr. Provenzano?

A. No, I did not.

Q. Isn't it a fact that the only facts that you had before you were provided to you by defense counsel or provided to you by Mr. Provenzano?

A. That is correct.

(R. 1488)(emphasis added). Dr. Robert Pollack admitted that he also had little background information:

Q. Doctor, would you agree that it's very difficult to make retrospective statements about a person's state of mind about a given time in the past?

A. Yes, sir.

Q. And isn't it especially true where the primary source of your information is from the patient itself?

A. Like I said, it's a difficult process.

Q. And isn't it also true, Doctor, that not only is it especially true when the primary source of the information is the patient, but also when the outcome is so important to his future?

A. Sure.

Q. Do you have any evidence of organic brain damage?

A. No, sir, we don't.

Q. In fact, you didn't do any tests for that, did you?

A. Other than interview, mental status exams. question of those nature, that's about it.

(R. 1552-53)(emphasis added).

Q. Now Doctor, you indicated prior to going into that interview on January 10th of the defendant that you had some information prior to going in.

A. Again, that which this came off I.V., yes, sir.

(R. 1566)(emphasis added). Dr. Robert Kirkland testified that he did not have background information other than some reports regarding the incident:

Q. Okay. And what do you base your opinion on, Doctor, that you have just given us?

A. I base it on several factors. The information that I obtained from him primarily. Obviously, I base it to some extent on my expertise and my 20 some odd years experience in this matter. And I base it in part also on other information that I received.

Q. What information are you referring to, Doctor?

A. Certain information was supplied by your office, reports from various and sundry individuals.

Q. Would the circumstances surrounding the actual shooting incident, namely, the firing of the weapon at Mr. Dalton and then proceeding down the hall chasing Corrections Officer Parker, and subsequently shotgun shooting of Officer Wilkerson, were all those factors in your determination?

A. Keep in mind, sir, this is not the information that Mr. Provenzano supplied me.

Q. Right. I understand.

A. That information which was sent to me, which I don't, I don't know about as factuality, yes, I reviewed that information. And certainly it does play a part in my evaluation, particularly when compared with

what Mr. Provenzano discussed about this matter.

(R. 1690). Later on, Dr. Kirkland acknowledged the importance of information about Mr. Provenzano's mother and father, information which he never obtained:

> Q. Doctor, is it important in the formulation of your evaluation that you be aware of matters such as the Teresa Chambers episode?
>
> A. More information is always better than less, Mr. Edmund.
>
> Q. And if there were 35 or 40 instances of bizarre behavior prior to the homicide that you were unaware of, or some of which you were unaware of at the point that you made your evaluation, would that have been of importance to you to know those prior to having made your evaluation?
>
> A. Well, I think that it would have been important. Once again, it's always best to have as much information as we can get. There has to be a limit somewhere, of course. Yes, but more information is better than less.

(R. 1704). Although Dr. Kirkland claimed to be aware of the instances of bizarre behavior referred to by defense counsel, as he was questioned regarding specific instances, his ignorance of critical background information became obvious. He was unaware of any of the background information prior to his evaluation. At the time of the trial he was unaware of the Teresa Chambers episode; did not know of a homosexual encounter between Thomas Provenzano and his then closest friend; was unaware of all details surrounding Thomas Provenzano's marriage/divorce history and child custody struggle: was unaware of Thomas Provenzano's

stillborn child and his psychotic accusations regarding the child's mother; Thomas Provenzano's unusual behavior around his sister's house; his discussions concerning his belief that **"they"** were poisoning Orlando water; his accusation that his brother-in-law was an undercover police officer and his other compulsive and psychotic activities (R. 1703-22).

Dr. Michael Gutman admitted he did not have "all the bricks and all the mortar" (R. 1784). Again, the record reflects that the expert had very little background information and what he did have was obtained after the evaluation. Dr. Gutman did not know that Mr. Provenzano claimed to be Jesus Christ; that he believed he could heal a child's thyroid condition; that he had a business card with a picture of Superman; that he believed the city was controlling peoples' minds by poisoning the water supply; that he thought the Orlando Police Department wanted to use him for homosexual acts; and that he believed, psychotically, that his brother-in-law was an undercover police officer assigned to surveil him (R. 1761-67). In fact, it appears that Dr. Gutman got what background information he did have from newspapers:

> Q. Now, what other -- would you consider the three examples I gave you as being somewhat bizarre among the normal and natural everyday affairs of our lives so that I might use the term bizarre as we go along? Okay?
>
> A. Okay. I'll go along with it. I'll give you a break.
>
> Q. There you go. Thanks, Doc. What other bizarre events of his life preceding the homicide of the 10th of January, of 1984, were you aware of at the time of your

evaluation, Doctor?

A. Well, the things concerning the, the hostile, aggressive, and accusatory things that he said about his attorneys and the judges at the time of the workmen's comp issue. The predilection for drugs in the past might border on the abnormal, perhaps not bizarre. Things that he had done. Now, I will have to say that I did read newspaper accounts of things. And I -- but I --

Q. (Interposing) I have never been able to remember whether Will Rogers believed everything he read in the newspaper or didn't believe everything he read in the newspaper. But which way are you?

A. Well, I tell you one thing I know, when I say it and I'm quoted I believe it, and hen I see it in the newspaper. But I believe some and reject some.

Q. Explain to the jury some of those things you read in the newspaper that you used in your conclusions and evaluations.

A. Well, I can't say that I used them, because I don't think that I did. But some of the business of being preoccupied with this girl friend, and although he did say to me some, that he drove around looking at her, her place, and wanted to have some communications with her, but which I thought was somewhat inordinate since there had been and old --

(R. 1762-63).

Finally, in his very brief testimony, Dr. Lloyd Wilder also indicated that he did not have background information (R. 1815-17).

Defense counsel and the experts failed to investigate available sources which would have revealed, inter alia, that:

a. Thomas' natural mother deserted Thomas and his father and then deserted another family after that. Thomas has a

brother with Downs Syndrome;

b. Thomas' stepmother was an alcoholic. As a teenager, Thomas watched his father die a slow painful death from cancer. The father's condition was worsened by the stepmother's lack of care;

c. When Thomas lost custody and visiting rights with his son, he was devastated and became obsessed with his son and children in general. At one point, he went to his nephew's school and claimed to be his father;

d. Thomas went to the mental ward at Florida State Hospital complaining of headaches, stated that he had been mentally ill for ten years and needed treatment, and stated that he was so disturbed over his parents and wife that it made him want to kill people;

e. Thomas was sexually molested at the age of eight by an older stepbrother who was eventually committed to a mental hospital for his sexual deviations;

f. Thomas was sexually molested by an uncle when he was twelve or thirteen years of age;

g. Thomas was severely abused verbally and physically by an uncle who was a police officer. Thomas became the target of this sadistic individual because his parents had abandoned him and he had no one to protect him; as a result, Thomas developed psychotic delusions regarding police officers;

h. The same uncle used Thomas to steal property which the uncle then sold on the black market. When the police would catch

him stealing they would take half of the property and release him;

i. When he was thirteen or fourteen, the police in Melrose Park, Illinois, took him in a back room of the police station and beat him by throwing him around and punching him;

j. A priest that Thomas was close to attempted to molest Thomas and a cousin sexually;

k. Thomas had developed a psychotic delusional system involving law enforcement, the media, the courts, the "government", and his family;

1. Family members believed that Thomas was severely mentally ill;

m. Thomas would read the newspaper to find people who needed legal assistance and give them money to hire a lawyer;

n. In late 1983, he walked around the city of Orlando during the presidential campaign with a sign that said, "T" (for Thomas) "in 83."

None of this information and no other significant background facts were gathered or provided to the mental health experts.

Although Dr. Kirkland did not have any of this background information, he asserted that no information would make any difference to him. Another court has addressed Dr. Kirkland's proclivity to ignore background information and found it to be professionally inadequate:

> [T]here is substantial evidence that the Defendant's organic brain disorder existed at the time the defendant murdered Henry Poteet.

> That circumstances existed at the time of the defendant's pre-trial examination by the Court appointed psychiatrists which required, under reasonable medical standards at the time, additional testing to determine the existence of organic brain damge.
>
> The failure of the Court appointed psychiatrist to discover these circumstances and to order additional testing based on the circumstances known deprived the defendant of due process by denying him the opportunity through an appropriate psychiatric examination to develop factors in mitigation of the imposition of the death penalty.

State v. Sireci, Order Granting Defendant's Motion for Post-Conviction Relief, No. CR76-532, Ninth Judicial Circuit, affirmed, State v. Sireci, 13 F.L.W. 722 (Fla. 1988).

The State was only too ready to exploit the defense experts' lack of background information. The prosecutor used vigorous and extensive cross examination to ascribe a broad range of incompetence to the defense experts. The effect on the credibility of poorly prepared defense experts was devastating. This not only could have been prevented by proper investigation of background information but also the experts' opinions would have been substantially more compelling had they had the background facts regarding Mr. Provenzano's history of child abuse, sexual molestation, abandonment, lower than normal I.Q., and a whole catalog of bizarre delusions and behaviors.

The prejudice to Thomas Provenzano did not end at the guilt-innocence stage of the trial. The inadequate performance of defense counsel and the mental health experts precluded the presentation of evidence to the court of Mr. Provenzano's

incompetence to cooperate with his defense counsel and aid in his defense. The inadequate performance of defense counsel and the experts deprived Mr. Provenzano of the overwhelming evidence of mitigation at the penalty phase. Indeed, no expert was asked to assess mental health statutory and nonstatutory mitigating evidence or to consider mental health evidence which could have been used to challenge the State's proffered aggravating factors.

An adequate evaluation has now been conducted. Dr. Fleming was asked to assess mental health mitigation (something the at-trial experts were never asked to evaluate). Dr. Fleming noted, regarding available statutory and nonstatutory mitigating evidence:

> Mitiaatins Circumstances
>
> 1. The capital felony was committed while the defendant was under the influence of extreme mental and emotional disturance.
>
> 2. The defendant acted under extreme duress.
>
> Mr. Provenzano had a long and detailed history of a severe mental illness. His paranoia and delusions had become increasingly severe during the past ten years. He believed that police had followed him on the plane from Chicago and remained in Orlando to watch him, he feared poisoning by all persons, even his sister, he put matches in his door for fear of people entering his apartment, he became increasingly isolated from any social interaction. His appearance deteriorated, a classic symptom of increased mental problems. Mr. Provenzano's unusual behavior was noted by courthouse employees prior to the shooting. Several years previously, his sister had attempted to institute hospitalization procedures. He, himself, had gone to Lincoln Hospital to ask for treatment. The history and affidavits

are replete with bizarre thoughts and behaviours. Current testing indicate psychotic functioning of long standing. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired due to his psychosis and belief of a homosexual conspiracy. In my professional opinion, Mr. Provenzano committed the felony while under the influence of extreme mental and emotional disturbance and while under extreme duress.

3. Mr. Provenzano intellectually knew the stated law and the consequences of shooting a police officer. He was unable to utilize this knowledge due to the complete disorganization he was experiencing. Since the August arrest, this man had been consumed with the belief of his victimization by the legal system, which had its roots many years previously. His beliefs were not rational, nor logical, but part of paranoid system that caused panic to the point that he could not utilize any of his resources. He lost control and contact with reality. He was psychotic at that time and was unable to act reqsonably nor judge consequences. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. It is my professional judgment that Mr. Provenzano did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law due to the distorted perception of facts caused by the paranoia and delusions.

Additional Mitisatins Factors:

Mr. Provenzano was abandoned by his natural mother, suffered sexual, psychological and physical abuse, was victimized by police, experienced two failed marriages, lost two sons, one through divorce and one through death. He had an early unfortunate abusive relationship with an uncle who was a Police Chief. He was a shy, socially maladept young man who then became involved in drugs and alcohol during his adolescence. His strange and hard to understand behavior increased the

> difficult in establishing adequate social relationships. This early abuse, abandonment and emotional instability provided the basis for the later psychosis. The paranoia gradually increased. Delusions of perception and grandeur developed including identification with Jesus. He continues to view himself as having special talents and gifts. This very fragile man has few and limited personal resources. His frantic efforts to create some kind of safe life and stability consistently failed. His black and white approach to life, his compulsivity and rigidity were all efforts to maintain an equilibrium he never had. Thomas may have been able to survive in a less complicated world with fewer expectations and better defined rules. He was unable to understand the expectations of others or quell his overwhelming paranoia that governed his life.
>
> The effect of two severe head injuries has never been examined.
>
> Mr. Provenzano was and is psychotic and has been diagnosed by other professionals as psychotic and legally insane at the time of the shooting. His emotional disturance began with the abandonment of his parents and the sexual, physical and psychological abuse. The victimization by police during these traumatic years formed the basis for the paranoia and delusions which continue to be present.
>
> The severity waxes and wanes depending on the external and internal stressors. I would expect him to deteriorate with the pressures he is presently experiencing and to again lose contact with reality. Previous examiners who did not have access to detailed background information or interviews would have been unable to trace the development of this psychosis since he periodically appears sane and rational.

(PC-R. 356). Mr. Provenzano was denied the benefit of the compelling mitigation available to him. The standard mandated by the sixth, eighth, and fourteenth amendments, **see**, Mason, supra;

Sireci, supra; **Ake**, supra, was not met in this case.

The extremely poor quality of preparation by defense counsel and the mental health experts in this case substantially prejudiced Mr. Provenzano. All of the experts depended upon the report prepared by Dr. Mara. Adequate psychological testing must include a combination of testing, interview and background information, yet Dr. Mara formed opinions used by all the other experts based on inadequate testing alone. Dr. Mara did not even use standard tests to assess Mr. Provenzano's level of functioning (such as the WAIS). The little testing she did conduct was grossly inadequate, and the other experts had no testing conducted.

Although defense counsel had a wealth of information regarding Mr. Provenzano's bizarre delusional behavior, it was not provided to any of the experts. The experts in turn did not speak to any family members, friends, etc., or request the type of records and other background information essential to an adequate evaluation.

Mr. Provenzano has always suffered from the long-term effects of his mental illness and low normal intelligence. Such factors will effect a person's receptive and expressive functioning, a person's vocabulary, and a person's capacity to comprehend complex topics and issues (such as those involved in a capital trial), all of which are essential ingredients to an adequate assessment of the degree to which the defendant is able to aid in his defense or understand the proceedings transpiring

before him. Thomas Provenzano was far from a knowledgeable criminal defendant.

A criminal defendant is constitutionally entitled to expert mental health assistance when the state makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). This constituional entitlement requires a professionally "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

Florida law also provides, and thus provided Mr. Provenzano, with a state law right to professionally adequate mental health assistance. See, e.g., Mason, supra, 489 So. 2d 734; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were denied.

Mr. Provenzano's Rule 3.850 motion more than sufficiently alleged his claims of ineffective assistance of counsel and professionally inadequate mental health assistance. Summary denial without benefit of an evidentiary hearing on these claims was erroneous. An evidentiary hearing and thereafter Rule 3.850 relief are proper.

ARGUMENT VI

THE TRIAL COURT'S FAILURE TO GRANT A CHANGE OF VENUE DEPRIVED MR. PROVENZANO OF HIS RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL JURY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS; MR. PROVENZANO ASSERTED HIS RIGHT TO A CHANGE OF VENUE AND NEVER VALIDLY WAIVED THAT RIGHT, AND TRIAL COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE MATTERS.

This claim was raised as Claim III of Mr. Provenzano's Motion to Vacate. The lower court held that this issue had been raised on direct appeal, and thus "may not be attacked by a Motion for Post-Conviction Relief. Jenkins v. State, 479 So. 2d 864 (Fla. 1st DCA 1985)." (PC-R. 447). Likewise, in its brief, the State also states that this claim was raised and addressed on appeal (brief of Appellee, 57-58).

This Court's opinion on Mr. Provenzano's direct appeal, however, notes trial counsel's errors. An evidentiary hearing was required on Mr. Provenzano's claim of ineffective assistance of counsel:

> Appellant contends that the trial court erred in failing to grant his request for change of venue. However, this issue has not been preserved for appellate review. The trial court granted leave to file an oral motion for change of venue of the first day of trial. The motion was taken under advisement with the condition that a written motion follow shortly thereafter. No written motion was ever filed. This allegation has not been preserved for appellate review because the motion to change venue was neither written, as required by Florida Rule of Criminal Procedure 3.240 and requested by the judge, nor ruled upon by the trial court.

Provenzano v. State, 497 So. 2d 1177 (Fla. 1986)(emphasis added).

After then deciding to address the change of venue claim on the merits anyway, this Court noted that it was only addressing the substantive claim of whether venue was proper in Orange County, specifically stating: "This is not the proper time or place to raise allegations of ineffective assistance of counsel. Perri V. State, 441 So. 2d 606 (Fla. 1983); State v. Barber, 301 So. 2d 7 (Fla. 1974)." Id. at 1182. Rule 3.850 motions are the "proper time [and] place to raise allegations of ineffective assistance of counsel." This Court's opinion did not address Mr. Provenzano's claim that defense counsel was ineffective for failing to move for a change of venue, and in connection therewith, ineffective for failing to explore the effects of the massive pretrial publicity on the venire panel through voir dire. The lower court erred in declining to conduct an evidentiary hearing on this claim.

As explained more thoroughly in the Rule 3.850 motion, even the State conceded that this was a very high profile case (R. 2281-88). Where, as here, all agree that a community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," see Manning V. State, 378 So. 2d 274, 276 (Fla. 1979), a change of venue is proper.

Although defense counsel had moved, orally, for a change of venue, he did nothing in voir dire to determine whether his assessment of the effects of the pre-trial publicity on the venire members was valid. Nearly every member of the venire

questioned had been exposed to the publicity on Mr. Provenzano's case. None of them were asked what they had heard or what effect it had on them. Defense counsel never moved for individual voir dire to probe into the prospective juror's minds without contaminating the entire panel.

Instead, defense counsel blindly assumed that anyone who had heard details of the shooting would conclude that Thomas Provenzano was **"insane."** As stated in this Court's opinion,

> Trying the case in Orange County was a tactic of the defense. Counsel testified that he would prefer selecting a jury from Orange County rather than St. Augustine--the place where the trial was going to be moved--because he felt that the insanity defense would stand a better chance in Orange County than the more conservative community of St. Augustine.

Provenzano v. State, supra.

Without an evidentiary hearing, it is impossible to know why defense counsel did nothing in voir dire to further his "tactic" of keeping venue in Orange County. It is unknown whether this was even an appropriately investigated tactic or a tactic at all. Mr. Provenzano himself, however, noted on the record that he did not want Orlando County jurors. This statement was followed by the on-the-record discussion regarding change of venue. Counsel promised to file the motion, after moving orally **for** a change of venue, but never did file it. None of this was addressed on direct appeal, as that was not the proper time or place. Mr. Provenzano's motion pled that there was no reasonable tactical decision in this case; any **"decision"** was made in ignorance, and

founded on lack of investigation. The publicity was massive and prejudicial. Defense counsel were not residents of Orange County. Failing to properly investigate the facts and research the law, counsel had no basis in fact to determine if the citizens of Orlando would be unbiased. The Honorable Joseph W. DuRocher, an eminently qualified criminal defense attorney and the Public Defender for the Ninth Judicial Circuit has expressed his opinion as to the reasonableness of not moving for change of venue:

> 1. My name is Joseph W. DuRocher. I have practiced law in Florida since **1967** and have extensive experience with the criminal justice system since that time.
>
> 2. I was elected Public Defender of Orange County in **1980** and took office in **1981**. Presently, I am serving my third term as Public Defender.
>
> 3. I was familiar with the considerable pre-trial publicity in the case of State of Florida v. Thomas Provenzano in **1984**. This was a very high profile case, and it received extensive attention from both the written and broadcast news media.
>
> **4**. In my opinion, this case presented a textbook example of a case in which pre-trial publicity had so pervaded the Orlando community that any first-year lawyer would have questioned venue. I was surprised to learn that no motion to change venue was pursued in this case, particularly when the defense was one of insanity.
>
> 5. Orlando is a very conservative community. In the more than two decades that I have been involved with the criminal justice system, I have never seen an insanity defense succeed in a capital case in Orlando. In fact, I believe no insanity defense in a capital case has prevailed in over a

generation.

> 6. I am acquainted with Jack Edmund and Dan Brawley, the defense attorneys in the Provenzano case. Neither attorney contacted me for any opinion regarding the issues of venue or insanity.

(PC-R. 375). An evidentiary hearing was proper in this action; the lower court erred in failing to conduct one.

Courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida , 627 F.2d 706, 709 (5th Cir. 1980).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washinston v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of

constitutional dimension);; Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washinston, supra; Kimmelman v. Morrison, supra.

This claim pleads ineffective assistance of counsel. In Strickland v Washinston, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washinston requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Provenzano pled each. He should have been allowed a full and fair evidentiary hearing at which he could prove each.

ARGUMENT VII

THOMAS PROVENZANO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT COUNSEL FAILED TO OBJECT TO IMPROPER INSTRUCTIONS AND/OR PROPOSE CORRECT INSTRUCTIONS ON MR. PROVENZANO'S SOLE DEFENSE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE INSTRUCTIONS GIVEN WERE CONSTITUTIONALLY IMPROPER AND INADEQUATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This claim is set out in Mr. Provenzano's Motion to Vacate (Claim X), and will therefore not be detailed again in this brief. The lower court, in summarily dismissing this claim, ruled that "counsel cannot be deemed ineffective for failing to anticipate a change in the law." (PC-R. 451). The State also

argued, in its brief, that 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 [v. State, 476 So. 2d 123 (Fla. 1985)] does not mean that every reasonably competent attorney who failed to make such objection had rendered ineffective assistance." (Brief of Appellee, 38).

This issue involves fundamental due process, equal protection and eighth amendment principles which are clearly cognizable in these Rule 3.850 proceedings. See, e.g., Palmers v. Wainwright, 460 So. 2d 362 (Fla. 1984); Nova v. State, 439 So. 2d 255 (Fla. 3d DCA 1983); see also Adams v. Dusser, 816 F.2d 1493 (11th Cir. 1987), overruled on other srounds sub nom., Dusser v. Adams, U.S. (1989). The instruction, as given, did not explain that the State had the burden of proving sanity once the defendant's sanity was made an issue by the defense. This is in violation of fundamental constitutional mandates. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstorm v. Montana, 442 U.S. 510 (1979).

This Court has ruled that this instruction does not completely and accurately state the law of Florida. Yohn, supra. Yohn was decided before Mr. Provenzano's direct appeal was final. This Court should have applied Yohn to Mr. Provenzano's case on direct appeal; it should be applied now. Defense counsel ineffectively litigated this issue at trial. The trial court thereafter committed fundamental constitutional error. Relief is

now appropriate.

ARGUMENT VIII

TRIAL COUNSEL INEFFECTIVELY AND PREJUDICALLY ALLOWED PATENTLY IRRELEVANT AND INADMISSIBLE TESTIMONY TO BE INTRODUCED AT MR. PROVENZANO'S TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This claim was set out in Mr. Provenzano's Rule **3.850** motion (Claim VIII), and will therefore not be repeated in detail here. The lower court applied no procedural bar to this claim and, indeed, did not even rule on it. The State's response to this claim was that defense counsel somehow had a strategic reason for presenting Mr. Provenzano's future dangerousness to the sentencing jury, and proofered some possible strategic reasons for this Court's consideration (Brief of Appellee, p. **67**).

Clearly an evidentiary hearing on this issue is necessary. Any possible "strategy" that defense counsel may have had is clearly a nonrecord matter that must be decided at an evidentiary hearing. The State cannot simply provide a number of possible strategies and ask this court to choose one. Mr. Provenzano's Rule **3.850** motion pled that there was no reasonable strategy. An evidentiary hearing was and is required. **See** Squires, supra; O'Callaghan, supra.

Defense counsel ineffectively elicited from his own experts that Mr. Provenzano would possibly be dangerous in the future, and not amenable to treatment (R. **1471-72; 1542-43**). Had the State elicited such evidence, error would have been plain.

Counsel ineffectively did what the State is not allowed to do.

Defense counsel should never have injected this inflammatory prejudicial testimony into evidence. Eliciting this testimony clearly constituted ineffective assistance of counsel. Strickland v. Washinston, 466 U.S. **668, 688 (1984).** Public statements by a defense attorney that his client is not amenable to rehabilitation have been found to be indicia of ineffective assistance of counsel. Osborn v. Shillinger, **861** F.2d 612, **629** (10th Cir. **1988).** Surely having two expert witnesses testify to the jury and trial court that defense counsel's client would kill again involves a higher order of prejudice.

This Court cannot assume that defense counsel made a reasonable strategic decision to introduce this irrelevant testimony. He did not. Indeed, he could not. There was no tactic here. An evidentiary hearing is proper, and thereafter Rule **3.850** relief.

ARGUMENT IX

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED THOMAS PROVENZANO'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This claim was raised in Mr. Provenzano's Rule **3.850** motion (Claim XIV), and therefore will not be discussed in detail again herein. The lower court summarily dismissed this claim on the basis that it could have been or should have been raised on direct appeal (PC-R. **447).** The State, however, now disagrees and notes that claims premised on Bradv v. Marvland, **373** U.S. **83**

(1967), violations "are cognizable on post-conviction motion." (Brief of Appellee, p. 65). Mr. Provenzano agrees with the State that the lower court's disposition was erroneous. An evidentiary hearing is required.

As set out in the Rule 3.850 motion, the State has refused to provide access to their files on Mr. Provenzano, pursuant to Chapter 119, Fla. Statutes. It is indeed speculative for the State to argue that Mr. Provenzano was not denied his due process rights under Brady, supra, when the State itself has refused to allow Mr. Provenzano's counsel the means to determine whether that is in fact the case.

Mr. Provenzano petitioned the lower court for a Writ of Mandamus/Prohibition pursuant to Fla. Stat. Section 119.01 et. seq. on April 6, 1989. On April 27, 1989, the lower court denied this Petition (See Motion to Supplement Record on Appeal). As of this date, Mr. Provenzano still has not had access to the files held by the State Attorney's Office for the Fourth Judicial District. In that petition, which is fully incorporated and urged again herein, Mr. Provenzano set forth his legal right to the State Attorney's file. He also explained that in two other cases in the Fourth Judicial Circuit the State Attorney has been ordered to disclose his files. State v. Kokal, No. 83-8975-CFA (Duval County, Wiggins, J.); State v. Jones, No. 81-4593-CF (Duval County, Soud, J.).

In Kokal v. State, the State Attorney for the Fourth Circuit stipulated to the disclosure of part of his file on Mr. Kokal and

disputed the rest. State Attorneys from other Circuits routinely disclose their files upon proper request, in compliance with the law. Mr. Provenzano's rights to equal protection and due process under the Constitution of the United States and Florida are now violated, as the State refuses to comply with what the law requires. See Fla. Stat. section 119.01, et seq.

The Office of the Attorney General for the State of Florida has taken the position that State Attorney files regarding capital prosecutions are accessible to capital post-conviction defendants under Fla. Stat. Section 119.01, et. seq. Agan v. Dugger, U.S. District Court, Middle District, Jacksonville Division (Response to Motion to Reopen Evidentiary Hearing, Case No. 87-489-Civ-J-16). The State's arbitrary refusal to comply here is patently improper.

In order for undersigned counsel to know what there exists regarding this claim, and in order for counsel to adequately plead this claim, disclosure must be ordered. Thereafter, an evidentiary hearing may be mandated. The State's refusals, however, represent a continuous violation of Mr. Provenzano's constitutional rights.

ARGUMENT X

ADDITIONAL CLAIMS

The other claims presented in Mr. Provenzano's motion to vacate are specifically incorporated herein and presented for the Court's review. Given the time constraints imposed by the numerous outstanding death warrants which the CCR office must

litigate, counsel has been unable to fully brief these claims herein. The Motion to Vacate, however, sets them forth and counsel respectfully refers the Court to his Rule 3.850 motion in this regard. Some additional matters, however, should be noted regarding these claims, and counsel therefore does so below.

The lower court rejected these claims as having been raised on direct appeal (Order, p. 3-4). However, these claims involve fundamental constitutional error which is appropriately raised in Rule 3.850 proceedings. See Palmes, supra; Nova, supra. See also Adams v. Dusser, supra.

Moreover, inasmuch as trial counsel failed to object on Claims XVIII and XIX, his omissions were ineffective. However, no hearing was ever held in which to determine whether any tactics were present for these omissions.

Claim XVIII involves Mr. Provenzano's Caldwell v. Mississippi claim. In Mann v. Dusser, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed in the motion to vacate violated Mr. Provenzano's eighth amendment rights. Thomas Provenzano is entitled to relief under Mann, for there is little discernible difference between the two cases.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved

prosecutorial/judicial reduction of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Provenzano's trial. The in banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(in banc), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann, supra. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46.

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, given comments such as those provided to Mr. Provenzano's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments at issue created a danger of bias in favor of the death penalty. Had the jury not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and

had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation was more than a "reasonable basis" which would have precluded an override. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The Caldwell violations here assuredly had an effect on the ultimate sentence. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received. This case also presents a classic example of a case where no Caldwell error can be deemed to have had "no effect" on the verdict.

Moreover, counsel was ineffective for not objecting to the prosecutorial comments and judicial instruction. Longstanding Florida case law established the basis for such an objection. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case constituted reversible error). No tactical decision can be ascribed to counsel's failure to object. Counsel's failure could not but have been based upon ignorance of the law. It deprived Mr. Provenzano of the effective assistance of counsel. Accordingly, Mr. Provenzano was denied his sixth and eighth amendment rights. His sentence of death is neither "reliable" nor "individualized." The Court should order an evidentiary hearing on counsel's ineffectiveness and grant relief pursuant to

Rule 3.850.

Claim XIX of Mr. Provenzano's motion is set out in full in pages 209 through 222 of the Rule 3.850 motion and refers to the improper shifting of the burden of proof regarding instructions on aggravating and mitigating circumstances. In addition to the facts and law set out in Mr. Provenzano's motion, this Court should note that the United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 44 Cr. L. 4210 (March 27, 1989), to review a related issue. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is offered then the jury must decide whether the aggravating circumstances outweigh the mitigating. Specifically, in Blystone, the defendant decided no mitigation was to be presented. Thus, the jury after finding an aggravating circumstance returned a sentence of death.

Clearly, under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production. However, once evidence of a mitigating circumstance is offered then the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law and the instructions presented here, once one of the statutory aggravating circumstances is found, by

definition sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus under Florida law the finding of a statutorily-defined aggravating circumstance operates to impose upon the defendant both the burden of production and the burden of persuasion. Florida law is obviously more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. The outcome in Blystone will directly affect correct resolution of the issue presented and the viability of Mr. Provenzano's death sentence.

Moreover, the error raised here can not be written off as harmless. Any consideration of harmlessness must also consider that had the jury voted for life, that vote could not have been disturbed -- the evidence before the jury established a "reasonable basis" for a jury's life recommendation. See Hall v. State, 14 F.L.W. 101 (Fla. 1989); Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(in banc); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Under Florida law, to be binding, a jury's decision to recommend life does not require that the jury reasonably conclude that the mitigating circumstances outweighed the aggravating. In fact, the Tedder standard for overriding a jury recommendation of life belies any contention of harmlessness made by the Respondent. Under Tedder and its progeny, a jury recommendation of life may not be overridden if there is a "reasonable basis" discernible

from the record for that recommendation, regardless of the number of aggravating circumstances, and regardless of whether the mitigation **"outweighs"** the aggravation. **See, e.g.,** Ferry v. State, 507 So. 2d 1373 (Fla. 1987)(override reversed irrespective of presence of five aggravating circumstances); Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(same). Thus the instruction not only violated Mullaney and Adamson, but it was not an accurate statement of Florida law. The error can not be found to be harmless beyond a reasonable doubt because if the jury here had been correctly told that it could recommend life so long as it had a reasonable basis for doing so and the jury had recommended life, a reasonable basis for that recommendation exists in the record. Thus a life recommendation could not have been overridden. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the mitigation presented by Mr. Provenzano. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Provenzano's death sentence. It also involves the need for an evidentiary hearing on counsel's failings to object or to propose proper instructions. The trial court erred by employing this patently erroneous standard during its own review. For each of the reasons discussed above and in the motion to vacate the Court should vacate Mr. Provenzano's unconstitutional sentence of death and/or order an evidentiary hearing.

The lower court was correct that Claim XX had been raised on

direct appeal. However, this Court did not then have the benefit of Mavnard v. Cartwriaht, 108 S. Ct. 1853 (1988), to properly evaluate the jury instructions regarding the "cold, calculated and premeditated" aggravating factor. In its decision in Mavnard v. Cartwrisht, the United States Supreme Court held that state courts had failed to comply with Godfrev v. Georgia, 466 U.S. 420 (1980), when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. Mavnard v. Cartwrisht also applies to the judge's sentencing where there has been a failure to apply a limiting construction which the eighth amendment requires. Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). The same channelling and guiding of the sentencer's discretion is required for the "cold, calculated and premeditated" aggravating circumstance as was required regarding the aggravating factor at issue in Cartwrisht.

As previously stated, the circuit court correctly found this claim had been raised on direct appeal but then incorrectly concluded that this issue could therefore not be addressed in post-conviction hearings. In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), the Florida Supreme Court held that state post-conviction relief is available to a litigant on the basis of a "change of law" which:

> (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id., 387 So. 2d at 922.

Maynard v. Cartwright, supra, like Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), satisfies the three Witt requirements. It is a United States Supreme Court decision. It is premised upon the eighth amendment to the United States Constitution. Finally, it constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court, were misconstruing Godfrev v. Georgia, 446 U.S. 420 (1980). State courts had interpreted Godfrev as not requiring a sentencer to be instructed on or to apply limiting principles which were to guide and channel the sentencer's constructions of aggravating circumstances. Thus, the decision in Maynard v. Cartwrisht is very much akin to the decision in Hitchcock v. Dusaer, which held that the Florida Supreme Court and the Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. 586 (1978). Cartwrisht, like Hitchcock, changed the standard of review previously applied. See Thompson v. Dusser, 515 So. 2d 173 (Fla. 1987); Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987).

Indeed, this Court had previously passed off Godfrev as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981)("Illustrative of the Court's exercise of the review function is Godfrev v. Georgia"). This Court had declined to address the impact of Godfrev upon the adequacy of jury instructions regarding this aggravating circumstance. This Court's prior constructions of Godfrev were in error. That standard has been altered by Cartwrisht.

Accordingly, the rule in Witt applies and Rule 3.850 is available to address the failure to apply the limiting construction of "cold, calculated and premeditated" in Mr. Provenzano's case. Cartwriaht changed the relevant eighth amendment standard of review. Cartwrisht applies to this case, as Witt makes clear. See also Thompson v. Duaaer, supra; Downs v. Duaaer, supra. The lower court erred in concluding otherwise. The "cold, calculated, and premeditated" aggravating factor, as applied in this case, violated the eighth and fourteenth amendments. Sentencing relief is appropriate.

With regard to Claims XV and XVII, again the lower court correctly found these issues to have been raised on direct appeal but then incorrectly found that they were precluded from review in post-conviction proceedings. These claims, as the others more specifically addressed herein and in the motion to vacate, involve fundamental constitutional error which is appropriately raised in Rule 3.850 proceedings. See Palmes, supra; Nova, supra. See also Adams v. Duaaer, supra. The claims reflect fundamental eighth amendment errors which rendered Mr. Provenzano's capital sentencing proceedings and resulting death sentence fundamentally unreliable. Particularly when the Court considers that the jury vote in this case was by the barest majority 7-5, it simply cannot be said these sentencing errors had no effect.

As reflected in the claims presented in the Rule 3.850 motion and by the entire record in this case, the claims were

properly raised. Their merits required relief.

Claims XII and XXI, for example, of Mr. Provenzano's Motion to Vacate are classic examples of fundamental error. The claims involve substantial and meritorious eighth amendment issues. Moreover, the claims presented also involved allegations of ineffective assistance of counsel. For example, Claims IV, IX, XI, XXII, respectively, of Mr. Provenzano's Motion to Vacate, as with the other claims discussed herein, involved classic examples of ineffective assistance.

Claim IV involved Mr. Provenzano's fundamental rights to confront witnesses through cross-examination. Trial counsel rendered ineffective assistance in not adequately cross examining important State witnesses. Trial counsel even failed to cross examine one of the State's key psychiatric witnesses. The trial court summarily denied this claim by finding that these omissions were somehow the strategy of trial counsel. Nowhere in the record is there any indication that Mr. Provenzano's attorneys made a tactical decision to omit key cross examination. The trial court did not attach any portion of the record which conclusively shows that Mr. Provenzano is not entitled to an evidentiary hearing or relief, as required by Fla. R. Crim. P. 3.850. A trial court may not assume counsel's actions were based on reasonable strategy without any evidence in the record to support this contention. Agan V. Dugger, 835 F. 2d 1337 (11th Cir. 1987). An evidentiary hearing on this matter was and is required.

Claim IX involved trial counsel's ineffectiveness in not having Mr. Provenzano present during critical portions of his trial in violation of the Sixth, Eighth, and Fourteenth Amendments. This claim also involves fundamental fairness and fundamental error. As reflected by the allegations presented by the Rule 3.850 motion and by the entire record, this claim is appropriately raised in Rule 3.850 proceedings: it involves both fundamental constitutional error and ineffective assistance of counsel.

Claim XI involves trial counsel's failure to object to the jury being separated and not objecting to inadequate jury admonition. These unreasonable attorney actions were ineffective assistance. The trial court's erroneous actions were fundamental constitutional error. The trial court did not rule on this claim. The Appellee notes this at page 58 of the State's brief. Fla. R. Crim. P. 3.850 grants Mr. Provenzano a statutory right to trial court review and resolution of all claims. This Court, however, has no ruling to review. This case should be remanded for appropriate resolution. **See** King v. State, FSC No. 73,361. (unreported order of Nov. 28, 1988)(order remanding cause based on similar omission).

Claim XXII involves Judge Lee C. Conser expressing his personal opinions concerning Mr. Provenzano's actions to the press before the trial. Trial counsel did not object to Judge Conser's subsequent testimony at the trial, thus rendering ineffective assistance of counsel. The actions of Judge Conser

violated Mr. Provenzano's fifth, sixth, eighth and fourteenth amendments as well as his rights under the Florida Constitution. The trial court ruled that this claim should have been brought on direct appeal and is thus barred. Ineffective assistance of counsel claims are not cognizable on direct appeal. Judge Conser's actions constituted fundamental constitutional error. This claim merits F. R. Crim. P. **3.850** relief or at a minimum an evidentiary hearing.

The lower court inadequately and erroneously reviewed these issues. Given the time constraints involved, counsel respectfully refer the Court to Mr. Provenzano's Motion to Vacate, incorporated fully herein, regarding any claim not specifically discussed in this brief. Rule **3.850** relief is proper.

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, Mr. Provenzano respectfully requests that this Honorable Court remand the cause for an evidentiary hearing and findings of fact, and that the Court vacate his unconstitutional capital conviction and sentence of death.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard B. Martell, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida **32014** this _____ day of May, **1988.**

_____
Counsel for Petitioner