IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appe11ant,

v. CASE NO. 78,410

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee adds the following facts:[1]

On January 12, 1984, defense counsel filed a "Motion for Controlled Access to Defendant's Medical Records", stating that Dr. Abraham had interviewed Provenzano, and asking the court to seal the records to all persons other than the defendant, his attorneys, and any medical professionals appointed to assist the defense (R 2704). The motion was granted January 16, 1984 (R 2724). In his deposition, Dr. Pollack testified that he had the medical records from Orlando Regional Medical Center, and these included a consultation report by Dr. Abraham (R 2619). Dr. Lyons testified at trial that he had the progressive Reports from Orlando Regional Medical Center covering January 10 through 13, 1984 (R 1441). In addition, at his deposition, when Dr. Lyons was asked if he had read Dr. Mara's report, he asked if that was the doctor who had seen Provenzano when he was in the hospital (R 2693).

Defense counsel moved pretrial for production of jail records concerning visitor attendance records, and the motion was granted (R 2963-64, 2971). Dr. Pollack testified that he had spoken informally with several of the jail officials responsible for Provenzano's custodial treatment (R 1555).

Dr. Wilder testified at trial that he was taking notes while he was interviewing Pravenzano, and in fact used those notes as he was testifying (R 1809).

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[1] (R) designates the original record on appeal; (PC) designates the instant record on appeal.

By letter dated April 19, 1991, Judge Emerson Thompson, Jr., Chief Judge for the Ninth Judicial Circuit, informed counsel for Provenzano that he was going to ask the Chief Justice of the Florida Supreme Court to assign the instant case to Judge Shepard or some other judge in Duval County (PC 110-11). By letter dated April 26, 1991, Judge Thompson made this request to Justice Shaw, and a copy was sent to counsel for Provenzano (PC 112-13). Judge Shepard was appointed, and on June 10, 1991, ordered the state to file a response to Provenzano's supplemental motion to vacate within twenty days from the date of the order (PC 71-72). The state served its response on June 21, 1991 (PC 75-90). At least a week later Provenzano filed a motion to disqualify Judge Shepard' (PC 94-105). On July 31, 1991, Judge Shepard rendered an order denying the motion to disqualify (PC 116-21), and on August 8, 1991, Judge Shepard rendered an order denying Provenzano's motion for post-conviction relief (PC 128-36).

Counsel's only reason for moving to adopt the "substantial number of pro se motions, pleadings and other communications" was that Provenzano "has taken an active interest in his case" (PC 91). Counsel signed the verification on the supplemental motion, wherein he expressed his belief that Provenzano is incompetent (PC 40).

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[2] It is not clear from the pleading when it was filed, as the certificate of service is dated January 1, 1980. The attached affidavits are dated June 28, 1991, so appellee is assuming the motion was filed at some point after that.

The notes contained in Provenzano's Appendix B were never presented to the trial court. In addition to the several words Provenzano has selected from these notes, they also state:

> Patient is in fair contact with his surroundings. He is religiously preoccupied. His rationalization of his violent act seems to be of delusional proportion and this defense mechanism is working very well to the extent he has no feelings of remorse at all. he is well aware of his charges and does know what are the future procedures. He is fully alert, oriented and his memory is intact. His affect was appropriate and mood was neutral.

SUMMARY OF ARGUMENT

Point 1: Provenzano's allegations are refuted by the record. The record as a whole demonstrates that the defense either had or could have obtained with due diligence the allegedly withheld materials. Even if this is the type of evidence contemplated for disclosure under *Brady*, **Provenzano** has **failed to** demonstrate materiality. Provenzano's alternative allegations that counsel was ineffective are procedurally barred, and alternatively without merit. Relief is not warranted and summary denial was appropriate.

Point 2: The trial court did not abuse its discretion in striking **Provenzano's** ***pro se*** pleadings, as there is no absolute right to hybrid representation by counsel and one's self. Likewise, the trial court did not abuse its discretion **in** denying counsel's motion to adopt the ***pro se*** pleadings, where it was not filed until after the state had filed its response, no compelling reasons for doing so were given, and counsel had in fact expressed his belief that Provenzano is incompetent.

Point 3: Provenzano never sought a writ of prohibition against Judge **Shepard,** so he should **be** estopped from complaining on appeal. that Judge Shepard erred in denying the motion to disqualify, and the claim should be found waived. In any event, the trial court correctly found that the motion was legally **insufficient,**

POINT 1

THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATE DID NOT WITHHOLD MATERIAL, EXCULPATORY EVIDENCE.

Provenzano claims that the state withheld material exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a *Brady* violation, a defendant must establish the following:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So.2d 170 (Fla. 1991), quoting, *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989). There is no *Brady* violation where the allegedly exculpatory evidence is equally accessible to the defense and prosecution. *Roberts v. State*, 568 So.2d 1255 (Fla. 1990). The state need not actively assist the defense in investigating a case. *Hegwood, supra*, citing, *Hansbrough v. State*, 509 So.2d 1081 (Fla. 1987).

The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is a reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Duest v. Dugger*, 555 So.2d 849, 851 (Fla. 1990),

quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985).[3] *See* ***also,*** *Swafford v. State*, 533 So.2d 270 (Fla. 1988). The undisclosed information must be viewed in the context of the entire record. *Thompson* v. *State*, 553 So.2d 153 (Fla. 1989), citing, *United States* v. ***Agurs,*** 427 U.S. 97, 112 (1976). If upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. *Kelley* v. *State*, 486 So.2d 578 (1986). "The mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of trial, does not establish 'materiality' in the constitutional sense." *Id.*, quoting, ***Agurs,*** 427 U.S. at 109-110.

Provenzano first alleges that there were hospital records in the State Attorney's file, including a psychiatric consultation by Dr. Joy Abraham on January 10, 1984. Provenzano contends that it was imperative for the jury to hear this evidence in the penalty phase, and whether due to the prosecutor's failure to disclose or the defense's unreasonable failure to present this evidence, an adversarial testing did not occur in violation of the sixth amendment and confidence is undermined in the outcome. Provenzano states that the trial court denied relief on this claim because "it believed that defense counsel should have been aware of Dr. Joy Abraham's consultation and handwritten notes" (IB 5). Actually, the trial

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[3] The *Duest* court stated that it did not intend to create a new standard of review for discovery violations in *Roman* v. *State*, 528 So.2d 1169 (Fla. 1988), which is the standard cited by Provenzano (IB 10).

court found that the record demonstrates that the defense was well aware of Dr. Abraham's report as well as all of Provenzano's medical records concerning his stay at the Orlando Regional Medical Center following the shootings in the instant case, and that these records were given to the mental health experts (PC 131). The record supports this finding.

On January 12, 1984, defense counsel filed a "Motion for Controlled Access to Defendant's Medical Records", stating that Dr. Abraham had interviewed Provenzano, and asking the court to seal the records to all persons other than the defendant, his attorneys, and any medical professionals appointed to assist the defense (R 2704). The motion was granted January 16, 1984 (R 2724). In his deposition, Dr. Pollack testified that he had the medical records from Orlando Regional Medical Center, and these included a consultation report by Dr. Abraham (R 2619). Dr. Lyons testified at trial that he had the progressive Reports from Orlando Regional Medical Center covering January 10 through 13, 1984 (R 1441). In addition, at his deposition, when Dr. Lyons was asked if he had read Dr. Mara's report, he asked if that was the doctor who had seen Provenzano when he was in the hospital (R 2693). Since it is clear the defendant had this evidence, there was no *Brady* violation. *Hegwood, **supra.***

The trial court was also correct in finding Provenzano's alternative allegation that counsel was ineffective procedurally barred, as the fact that Provenzano was examined by Dr. Abraham is readily apparent from the record, and any claims pertaining to this could and should have been raised in his first motion for

post conviction relief (PC 132). Where counsel is attacked in first motion, additional claims in second or third motions are procedurally barred. *Tafero v. State*, **561 So.2d** 557 (Fla. 1990). In any event, Provenzano has neither alleged nor demonstrated prejudice, or that there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, **466** U.S. 668 (1984). This court has already found that counsel was not ineffective for failing to present additional psychiatric testimony. *Provenzano v. Dugger*, **561 So.2d 541, 546** (Fla. 1990). As the trial court found, a review of Dr. Abraham's report demonstrates that her findings were consistent with those of the experts who testified, and contained nothing additional regarding insanity (IB Appendix A).[4]

Provenzano next alleges that the state did not disclose jail records covering the time of his pretrial incarceration which reflected his behavior in jail, and as such they were relevant to the mental health evaluations, and reflect, consistent with Drs. Pollack's and Lyons' testimony that Provenzano was calm and tranquil, which would have supported their testimony that there was a psychotic break on January 10, 1984. The trial court correctly found that Provenzano's jail records would have been equally accessible to the defense, so there is no *Brady* violation (PC 133). Defense counsel moved pretrial for production of jail records concerning visitor attendance records, and the motion was granted (R 2963-64, 2971).

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[4] This report was before the trial court in the appendix to the state's response. See (PC 89).

Further, Dr. Pollack testified that he had spoken informally with several of the jail officials responsible for Provenzano's custodial treatment (R 1555).

Alternatively, even if this is the **type** of evidence contemplated for disclosure under *Brady,* there is no reasonable probability that the result of the proceeding would have been different. ***Hegwood,*** *supra; Duest,* ***supra.*** It must be remembered that Provenzano's whole theory of insanity was based on delusions of persecution from law enforcement (R 1475, 1491, 2681, 2642-43, 1535), that anybody in uniform was part of the system, and that Provenzano "just went" when a uniformed individual invaded his space (R 1535, 2643). It certainly would not have benefitted this theory to demonstrate that Provenzano had adjusted to an environment controlled by uniformed law enforcement individuals.

This is apparent from a review of Dr. Pollack's cross-examination. The prosecutar, no doubt in an attempt to demonstrate that Provenzano had *not* behaved bizarrely in jail, asked Dr. Pollack if he had spoken with jail officials and if they had indicated Provenzano had been acting in a bizarre ok abnormal way (R 1555). Dr. Pollack responded that he had spoken informally with several officials, and they mentioned that Provenzano's behavior was somewhat inconsistent, with a significant amount of paranoia present (R 1555). The prosecutor immediately left that topic, and it certainly would not have behooved the defense to impeach its own witness with evidence contrary to its theory, i.e., that Provenzano was adjusting well to uniformed individuals. The defense theory is also apparent

from the cross examination of the state's experts, Dr. Kirkland and Dr. Gutman. Defense counsel pointed out to both that Provenzano only exhibits hostility and anxiety when he comes in contact with courthouse personnel, law enforcement personnel, and uniformed personnel (R 1702, 1772). Thus, contrary to Provenzano's allegations that the records would have supported his expert's testimony, they would in fact have been inconsistent with it. Provenzano contends that a hearing is required because courts are not permitted to make up possible strategies which defense counsel did not testify he possessed, but it is clear that Provenzano's defense was insanity, and the trial court's finding is simply a ruling that in light of this, materiality could not be demonstrated.

Again, the trial court correctly found Provenzano's alternative claim that counsel was ineffective for failing to investigate procedurally barred, as the jail records could have been obtained with due diligence from a source other than the State Attorney's file (PC 134), and such claim could and should have been presented in Provenzano's first motion for post conviction relief. *Tafero, supra.* **Even** if the claim is cognizable, neither deficient performance nor prejudice has been or can be demonstrated, as the trial court found (PC 134), for as stated, such records would have served only to impeach the theory of defense. Thus, neither a hearing nor relief was warranted.

Provenzano also alleges that Dr. Wilder's "notes on Provenzano" which were contained in the State Attorney's file and not disclosed to the defense referred to Provenzano's behavior in

jail, and Dr. Wilder noted "officers had afforded him the privacy that security would permit". Dr. Wilder testified at trial that he was taking notes while he was interviewing Provenzano, and in fact used those notes as he was testifying, so if defense counsel did not have a copy of them he could have objected oK simply asked to see them (R 1809). The trial court correctly found that since this is a matter of record, it could have been raised on direct appeal if there had been an objection, and is procedurally barred in post conviction proceedings (PC 134-35). ***See, Lambrix v. State,*** 559 So.2d 1137 (Fla. 1990); ***Kelley v. State,*** 569 So.2d 754 (1990) (claims based on information contained in original record of case must be raised on direct appeal). Also, at the competency proceeding, Dr. Wilder testified that Provenzano assumed that certain jail personnel unnecessarily invaded his privacy.[5] This explains why officers had afforded Provenzano the privacy that security would permit, and if defense counsel felt such information was relevant he could have presented it. Finally, since Provenzano did not allege how this could have possibly affected the outcome, the trial court correctly found that the claim is legally insufficient (PC 135). *Hegwood,* ***supra.***

In sum, Provenzano's allegations are refuted by the record. The record as a whole demonstrates that the defense either had or could have obtained with due diligence the allegedly withheld materials. Even if this is the type of evidence contemplated for disclosure under *Brady,* Provenzano has failed to demonstrate

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[5] This was also contained in the appendix before the trial court. See (PC 90).

materiality. Provenzano's alternative allegations that counsel was ineffective are procedurally barred, and alternatively without merit. Relief is not warranted and summary denial was appropriate.

POINT 2

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING PROVENZANO'S PRO *SE* PLEADINGS.

Provenzano contends that the trial court erred in striking his *pro se* pleadings[6] and in denying counsel's motion to adopt those pleadings. The trial court found that Provenzano failed to show any compelling reasons to justify hybrid representation, and in the absence of compelling reasons the orderly progress of judicial proceedings and the concomitant administration of justice would not be served by allowing co-representation by a defendant who is already adequately represented by counsel (PC 122-24). Provenzano has failed to demonstrate that the trial court abused its discretion in reaching this conclusion. *See e.g., Tucker v. State,* 562 So.2d 415 (Fla. 1st DCA 1990)(when an accused is represented by counsel, affording him the privilege of addressing the court or jury in person is a matter for the sound discretion of the trial court).

This court has determined that Article I, section 16 of the Florida Constitution does not embody the right to representation by counsel and one's self. *State v.* Tuit, 387 So.2d 338 (Fla. 1980). As the First District has recognized:

> The defendant had no right to act as co-counsel with his attorney. *Goods v. State,* 365 So.2d 381 (Fla. 1978), *cert. denied,* 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979), including the right to file separate motions and pleadings, *Sheppard v. State,* 391 So.2d 346 (Fla. 5th DCA 1980). There is no reason why our system must tolerate dual

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[6] There is a somewhat similar issue pending before this court in *Salser v. State*, Case No. 78,439.

> pleadings filed by both the defendant's attorneys *and* the defendant himself. Unless counsel moves to ''adopt" his client's pleadings or motions, e.g. ***Perry v. State,*** **436** So.2d 426 (Fla. 1st DCA 1983), such filings should be treated as nullities.

Smith v. ***State,*** 444 So.2d 542, 547 (Fla. 1st **DCA** 1984). ***See*** *also,* *Whitfield v.* ***State,*** 517 So.2d 23 (Fla. 1st DCA 1987). Based on this reasoning, the trial court did not abuse its discretion in declining to rule on Provenzano's ***pro*** *se* pleadings.

Further, at the time the state's response was filed, counsel had not moved to adopt Provenzano's pleadings, and again, the trial court did not abuse its discretion in declining to prolong these proceedings to permit him to do so. Counsel's only reason for moving to adopt the "substantial number of pro se motions, pleadings and other communications" was that Provenzano "has taken an active interest in his case" (R 91). Appellee does not dispute the fact that most death-sentenced inmates take an active interest in their cases, but this fact, standing alone, does not justify the filing of dual pleadings, and serves no other reason than to further delay the proceedings. Appellee would also point out that it was counsel who signed **the** verification on the supplemental motion, wherein he expressed his belief that Provenzano is incompetent, which is somewhat inconsistent with adopting pleadings filed by Provenzano (R 40). Provenzano states this is *not* a **case** where he does *not* wish to be represented by counsel, he has *not* asked to act **as** co-counsel, it is *not* a case where he is not getting along with counsel, and he is *not* asking to physically appear and argue. Appellee submits that in the absence of any compelling allegations as to exactly

what Provenzano is trying to accomplish, the filing of dual pleadings should not be tolerated.

Even if for some reason this court determines that it was error to strike the pleadings, reversal is not warranted since Provenzano has pointed to nothing in those pleadings that warrants further consideration,[7] so prejudice has not been demonstrated. 8924.33, Fla. Stat. (1989). In this respect, appellee would point out that this case was remanded for a very limited purpose, which was to present any additional *Brady* claims after the prosecutor turned over the file, ***Provenzano v. State,*** 561 So.2d 541 (Fla. 1990), and there is no indication that Provenzano reviewed this file. Further, a review of the ***pro se*** pleadings shows there are no allegations to overcome either the two year or successive petition procedural bars, so consideration of any claims presented therein would not be warranted in any event.

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[7] Provenzano simply states that "The files and the records do not conclusively establish that Mr. Provenzano is entitled to no relief on the claims presented within these pro se pleadings" (IB 17).

POINT 3

THE TRIAL COURT JUDGE CORRECTLY DENIED PROVENZANO'S MOTION TO DISQUALIFY HIM.

By letter dated April 19, 1991, Judge Emerson Thompson, Jr., Chief Judge for the Ninth Judicial Circuit, informed counsel for Provenzano that he was going to ask the Chief Justice of the Florida Supreme Court to assign the instant case to Judge Shepard or some other judge in Duval County (PC 110-11). By letter dated April 26, 1991, Judge Thompson made this request to Justice Shaw, and a copy was sent to counsel for Provenzano (PC 112-13). Judge Shepard was appointed, and on June 10, 1991, ordered the state to file a response to Provenzano's supplemental motion to vacate within twenty days from the date of the order (PC 71-72). The state served its response on June 21, 1991 (PC 75-90). At least a week later Provenzano filed a motion to disqualify Judge Shepard' (PC 94-105). On July 31, 1991, Judge Shepard rendered an order denying the motion to disqualify (PC 116-21), and on August 8, 1991, Judge Shepard rendered an order denying Provenzano's motion for post-conviction relief (PC 128-36). Appellee would first point out that Provenzano never sought a writ of prohibition against Judge Shepard, so he should now be estopped from complaining on appeal, and the claim should be found waived. In any event, relief is not warranted.

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[8] It is not clear from the pleading when it was filed, as the certificate of service is dated January 1, 1980. The attached affidavits are dated June 28, 1991, so appellee is assuming the motion was filed at some point after that.

Provenzano first states that the circuit court ruled his motion was untimely. While the trial court's order is not clear that this was a reason the motion was denied, appellee submits that it certainly is a sufficient legal basis for upholding the denial.[9] Pursuant to Florida Rule of Criminal Procedure 3.231, a motion to disqualify a judge shall be filed no less than ten days before the time the case is called for trial. While the instant situation did not involve a trial, all pleadings had been filed, and Provenzano had known for several months that Judge Shepard would be handling the case. Appellee would also point out that unlike a trial situation, a post-conviction proceeding requires the presiding judge to review extensive prior records and be familiar with all issues and facts, which should mandate much stricter time limits. Pursuant to Florida Rule of Civil Procedure 1.432, a motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification. The grounds presented in the instant motion have been known for years. *See also* g38.02, Fla. Stat. (1989)(suggestion of disqualification shall be filed within thirty days after party learns of such disqualification; *Jones v. State,* 411 So.2d 165 (Fla. 1982); *In Re Estate of Carlton,* 378 So.2d 1212 (Fla. 1979).

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[9] *See Case v. State,* 524 So.2d 422 (Fla. 1988)(a conclusion or decision of the trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternate theory supports it); *Stuart v. State, 360* So.2d 406 (Fla. 1978); *Combs v. State,* 436 So.2d 93 (Fla. 1983); *Grant v. State,* 474 So.2d *259* (Fla. 1st DCA 1985).

In any event, the trial court correctly determined that the motion was legally insufficient. To justify recusal, a motion must be well-founded. *Gilliam v. State,* 582 So.2d 610 (Fla. 1991); *Fischer v. Knuck,* 497 So.2d 240 (Fla. 1986). The test for sufficiency of a motion for disqualification of a judge for prejudice is whether the motion demonstrates a well-grounded fear on the part of the defendant that he will not receive a fair trial at the hands of the judge. The facts and reasons given must tend to show personal bias or prejudice. *Tafero v. State,* 403 So.2d 355 (Fla. 1981); *Livingston v. State,* 441 So.2d 1083 (Fla. 1983); *Lewis v. State, 530* So.2d 449 (Fla. 1st DCA 1988). Merely receiving adverse rulings is not a ground for recusal. *Gilliam, supra* at 611, *Tafero, supra* at 361. The rule "is not intended as a vehicle to oust a judge who has made adverse pretrial rulings". *Id.*

Provenzana set forth three grounds for disqualification; pretrial publicity, the denial of his first motion far post-conviction relief, and the denial of an attorney's motion to appear *pro hac vice* (PC 99-100). The supporting affidavits simply state:

> ... I have reviewed the Motion to Vacate Judgment and Sentence, portions of the record and examples of the substantial newspaper publicity of the trial, in the case of *State v. Provenzano,* Case No. 84-835, in the Ninth Judicial Circuit.
>
> After review af these materials, I believe Mr. Provenzano has a basis for a realistic concern as to Judge Shepard's fairness and impartiality towards Mr. Provenzano.

(PC 104-05). As to Provenzano's first ground, pre-trial publicity, there is no demonstration of a well-grounded fear that Judge Shepard would not be fair or that he had any personal bias or prejudice. The trial court found that judicial awareness of publicity is not such as to cause a reasonable fear of bias or prejudice (PC 119). *Sanders v. Yawn,* 519 So.2d 28 (Fla. 1st DCA 1987). There is nothing in this "substantial newspaper publicity" attributed to Judge Shepard that would indicate bias or prejudice. *Cf. Suarez v. Dugger,* 527 So.2d 190 (Fla. 1988)(statements in newspaper attributed to judge legally sufficient to demonstrate judge prejudicial). Provenzano never moved to recuse Judge Shepard pretrial, never moved to recuse Judge Shepard before his last post conviction motion, and it simply is not reasonable to believe that pretrial publicity would suddenly cause bias or prejudice seven years and two proceedings after it.[10] Indeed, if pretrial publicity, standing alone, was a reason to recuse a judge, no judge would ever be able to hear this case.

Likewise, Provenzano's other two grounds are legally insufficient, as they simply refer to prior adverse rulings, both of which were legally correct. *Gilliam, supra; Tafero, supra, Dragavich v. State,* 492 So.2d 350, 352 (Fla. 1986). Provenzano's alleged fears, which did not arise until several months after Judge

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[10] *See MacKenzie v. Super Kids Bargain Store Inc.*, 565 So.2d 1332 (Fla. 1990)(a determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial).

Shepard was appointed, are "frivolous and fanciful", and the trial court correctly denied the motion.

CONCLUSION

Based an the arguments and authorities presented herein, appellee respectfully requests this court affirm the order of the trial court denying Provenzano's supplemental motion for post conviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301, this 18th day of December, 1991.

Kellie A. Nielan
Of Counsel