IN THE SUPREME COURT OF FLORIDA

NO. 78,410

THOMAS PROVENZANO,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

HARUN SHABAZZ
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Provenzano's supplementary motion for post-conviction relief. The circuit court denied Mr. Provenzano's claims without an evidentiary hearing.

Citations in this brief to deeignate references to the records, followed by the appropriate page number, are as follows:

"R. _____" - Record on appeal to this Court on direct appeal;

"PC-R. _____" - Record on appeal from denial of the Motion to Vacate Judgment and Sentence.

"PC-S _____" - Record on appeal from denial of the Supplemental Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Provenzano lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to aire the issues through oral argument would be entirely appropriate in this case given the seriousness of the claims and the issues raised here. Mr. Provenzano, through counsel, respectfully urges the Court to permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On January 10, 1984, Thomas Provenzano appeared at the Orangs County courthouse wearing black combat boots, army fatigue pants, a long olive drab army coat, a red bandanna 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 want out of the courtroom, followed by Mr. Provenzano. More shots were fired; Parker was eventually wounded, and Bailiff Wilkerson was killed (R. 589-91). Mr. Provenzano was also wounded in the gunfire (R. 647).

Mr. Provenzano was hospitalized following the shooting. The hospital records discovered in the State Attorney's file included mental health observations of Mr. Provenzano made between January 10th and 12th. These observations included a diagnosis "chronic paranoid psychosis." Appendix A. Detailed handwritten notes stated "His rationalization of his violent act seems to be of delusional proportions." Appendix B. Further, the notations reflected that Mr. Provenzano did not believe he "did any thing wrong . . . because Jesus wanted it that way. He (Jesus) works through you." Appendix B.

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. However, the jury did not hear that the first mental health person to see Mr. Provenzano after the shooting found a "psychosis" and delusional thinking. 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).

A Rule 3.850 motion to vacate judgment and sentence was filed on April 6, 1989. This motion was filed after the State had refueed to provide Chapter 119 disclosure. The trial court denied relief without an evidentiary hearing on April 25, 1989. An appeal to this Court followed. This Court held that the state erred in failing to comply with Chapter 119 then ordered that Mr. Provenzano would have sixty days from dieclosure to file a new 3.850. Provenzano v. Duqqer, 561 So. 2d 541, 549 (Fla. 1990).

On April 15, 1991, Mr. Provenzano filed a Supplemental Motion to Vacate Judgment and Sentence, with Special Request €or Leave to Amend to Supplement (PC-S 1). The supplemental motion alleged that Mr. Provenzano had been denied an adversarial testing because exculpatory evidence (the hospital records and notations) was not presented to the jury. This failure to present this evidence to the jury undermined confidence in the outcome of the capital trial and sentencing. This evidence furthered Mr. Provenzano's contentions at trial that he was suffering from severe mental illness at the time of the homicide.

Mr. Provenzano personally filed a series of supplemental pro se motions with the trial court, each of which were consistent with post-conviction counsel's pleadings prepared on his behalf (PC-S 22; PC-S 41; PC-S 57; PC-S 60; PC-S 66; PC-S 68). These motions contained additional allegations for Rule 3.850 relief.

On June 24, 1991, the State filed a Motion to Strike Pro Se Pleadings filed by Mr. Provenzano (PC-S 73). On July 1, 1991, collateral counsel filed a Motion to Adopt Pro Se Pleadings of Thomas Provenzano (PC-S 91). On the same date Mr. Provenzano, through collateral counsel, filed a timely Motion to Disqualify the trial judge (PC-S 106). The motion waa based on Mr. Provenzano's fear that the trial judge could not render a fair and impartial

ruling on his motions. On July 18, 1991, the State responded to the Motion to Disqualify (PC-S 106). On July 31, 1991 the circuit court denied Mr. Provenzano'a motion to diequalify (PC-S 116). In this order, the circuit court gave notice that Mr. Provenzanw had thirty days to appeal (PC-S 120). On August 5, 1991, the circuit court denied collateral counsel's Motion to Adopt Pro Se Pleadings of Thomas Provenzano and struck those pro se pleadings (PC-S 122). Mr. Provenzano filed a notice of appeal regarding the denial of the motion to disqualify on August 7, 1991 (PC-S 126). Counsel had not yet received the second order striking the pro se pleadings. On August 8, 1991, the trial court denied Mr. Provenzano'e eupplemental post-conviction motion without an evidentiary hearing (PC-S 128). A notice of appeal from the denial of the Supplemental Motion to Vacate was filed on August 19, 1991 (PC-S 157). A notice of appeal from the order striking Mr. Provenzano's pro se pleadings was aleo filed on August 19, 1991 (PC-S. 161).

SUMMARY OF ARGUMENT

I. Mr. Provenzano was denied an adverearial testing when material and exculpatory evidence was withheld from Mr. Provenzano's jury, violating constitutional guarantees and Florida Rules of Criminal Procedure. As a result, important material was not presented to the trial jury. Confidence in the outcome of the trial and the 3.850 process is undermined to the extent that relief must be granted.

11. Mr. Provenzano from the beginning of this cause had filed pro se supplementary pleadings which did not conflict with those filed by counsel. The trial court denied Mr. Provenzano's due process rights and abused its sound discretion when it granted a state motion to strike those pleadings and deny Mr. Provenzano full participation in his defense, and when it refused to address the merits of Mr. Provenzano's claims.

III. Mr. Provenzano experienced a reasonable fear based on a series of events that the trial court could not be fair and impartial in handling his amended 3.850 claims and filed a timely motion to diequalify. The trial court erred in denying his legally sufficient motion.

ARGUMENTS

ARGUMENT I

THE STATE WITHHELD MATERIAL AND EXCULPATORY EVIDENCE IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THOMAS PROVENZANO UNDER THE FIFTH, SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENTS, *AND* THE DISCOVERY PROVTSTONS OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. MOREOVER BECAUSE TEE JURY DID NOT KNOW OF THIS IMPORTANT EVIDENCE CONTAINED IN THE STATE'S POSSESSION AN ADVERSARIAL TESTING DID NOT OCCUR. EITHER THE PROSECUTOR VIOLATED BRADY OR DEFENSE COUNSEL WAS INEFFECTIVE. AS A RESULT CONFIDENCE IS UNDERMINED IN THE OUTCOME AND 3.850 RELIEF MUST BE GRANTED.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washinaton, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense couneel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Baqley, 473 U.S. 667, 674 (1985), quoting Bradv v. Maryland, 373 W.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, supra.

Here, Mr. Provenzano was denied a reliable adversarial tenting. The jury never heard all the available compelling evidence that Mr. Provenzano was severely mentally ill at the time of the homicide. Evidence in the State's possession was not heard by the jury. This evidence was obviously exculpatory as to Mr. Provenzano because it indicated the murder was committed while he was severely mentally ill. In order "to ensure that a miscarriage of justice [did] not occur," Baqley, 473 U.S. at 675, it was essential for the jury to hear this evidence.

If the undisclosed evidence is material and its suppression undermines confidence in the outcome of the trial, the defendant has been deprived of a fair trial and relief is warranted. Under this standard Mr. Provenzano is

entitled to relief. The withholding of evidence of Mr. Provenzano's mental health deprived the jury of information which should have been provided to a mental health professional for evaluation purposes. The evidence withheld undermines confidence as to both the guilt and penalty phase because the suppressed evidence would have supported the defense at both phases of the trial.

In the State Attorney's file, were hospital records of Mr. Provenzano. Theae records included a psychiatric consultation by Dr. Joy Abraham on January 10, 1984. At that time, the day of the homicide, she diagnosed Mr. Provenzano as having a "chronic paranoid psychoeie" (PC-S 5). There were alao detailed handwritten notes regarding Mr. Provenzano's mental history and condition on January 10, 1984, the day of the shooting. Dr. Abraham opined "His [Provenzano's] arrest by the police in August of 1983 and later the charges against him with misdemeanor might have lead to the development of his paranoid deluaiona about the police and finally he acted violently upon his perceived persecutors" (PC-S 5-6).

The jury needed to hear this evidence in determining whether the defense had sufficiently raised an insanity defense. It was also imperative for the jury to hear this evidence in the penalty phase. 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. Counsel can have no valid reason for not presenting this evidence to the jury. At the very least these medical reports should have been introduced verbatim at the penalty phase proceeding where hearsay was admissible. There can be no legitimate reason for the jury not to know Dr. Abraham's findings on January 10, 1984.

The circuit 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. However, there is no evidence that Mr. Provenzano's defense counsel was provided with either the consultation report ("DIAGNOSIS:

Chronic paranoid psychosis" Appendix A) or Dr. Abraham's handwritten notes dated January 12, 1984 ("His rationalization of his violent act seems to be of delusional proportions" Appendix B). These materials were in the State Attorney'e files disclosed pursuant to Chapter 119. These documents were not contained in the record, and there is absolutely no evidence that the State disclosed these items to Mr. Provenzano's trial counsel. Contrary to the circuit court's ruling, the files and records do not conclusively establish that Mr. Provenzano'a trial counsel had copies of Dr. Abraham's consultation report and handwritten notes (Appendix A and B).

Aleo not dieclosed by the State were jail records. Theae jail records covered the time of Mr. Provenzano's pretrial incarceration and reflected his behavior in jail (PC-S 7-9). As such they were very relevant to the mental health evaluations. Dr. Wilder's "notes on Provenzano" which were contained in the State's Attorney file and also not disclosed to the defense referred to Mr. Provenzano's behavior in jail. Dr. wilder noted "officers had afforded him the privacy that security would permit" (PC-S 6). In fact the jail records contain much more information. They reflect, consistent with Drs. Pollack and Lyons' conclusions that following the January 10 explosion, Mr. Provenzano was very calm and tranquil, if not docile. It would have supported their testimony that there was a psychotic break on January 10, 1984.

Besides corroborating the defense experts, these jail records constitute mitigation evidence under Skipper v. South Carolina, 476 U.S. 1 (1986). The jury's failure to know of these records content denied Mr. Provenzano an adversarial testing under the sixth amendment. Either Brady was violated or counsel unreasonably failed to investigate and present. However, the bottom line is confidence is undermined in the outcome because the jury did not know, and defense mental health experts were denied access to this important and valuable information.

The jail records reflect that in the month of January of 5984 reports were submitted almost daily on Mr. Provenzano. These reports reflect Mr. Provenzano'e attitude and adjustment to confinement. These reporta reflect

Mr. Provenzano's attitude and adjustment as follows: January 13th -- "good," 14th -- "fair," "quiet," 15th -- "good," 16th -- "good," 17th -- "good," 18th -- "good," 19th -- "good," "reading the Bible, 20th -- "good," 22nd -- "good" "quiet," 23rd -- "good," 24th -- "good," 25th -- "good" "fair," 26th -- "good," 27th -- "fair" "good," 28th -- "fair," 30th -- "good," and 31st -- "good" (PC-S 7).

For the month of February 1984, these records were also kept concerning Mr. Provenzano and reflect: February 1st -- "fair" "very quiet" "good," 2nd -- "good" "doing Bible study," 3rd -- "good," 4th -- "goad," 6th -- "good" "quiet," 7th -- "good," 9th -- "good" "fair," 10th -- "good" "quiet," 11th -- "fair" "good," 13th -- "good" "okay," 14th -- "good," 16th -- "good," 17th -- "good" "quiet," 18th -- "good," 19th -- "good" "quiet," 20th -- "good," 21st -- "good," 22nd -- "good," 23rd -- "good," 24th -- "good," 25th -- "good," 26th -- "fair," 27th -- "fair," 28th -- "good," and 29th -- "good" (Pc-S 8).

For the month of March 1984, these records were also kept concerning Mr. Provenzano and reflect: March 2nd -- "good," 3rd -- "fair" "acceptable," 4th -- "good," 5th -- "fair," 8th -- "good," 9th -- "good," 10th -- "fair," 11th -- "good," 12th -- "fair" "cleaning cell," 13th -- "good," 14th -- "fair" "good," 15th -- "good" "very quiet," 16th -- "good," 17th -- "fair" "good" "quiet," 18th -- "good" "quiet," 19th -- "good," 20th -- "good" "quiet" "satisfactory," 21st -- "good," 22nd -- "good," 23rd -- "good" "quiet," 24th -- "good," 25th -- "good," 26th -- "good" "good behavior cooperative," 28th -- "fair" "good," 31st -- "good" (PC-S 8).

These records were also kept for the month of April 1984 concerning Mr. Provenzano. The April records reflect: April 1st -- "good" "fair" "quiet," 2nd -- "good" "excellent," 3rd -- "good" "very quiet" "satisfactory," 4th -- "good" "very quiet" "satisfactory," 5th -- "good," 6th -- "fair" "seems depressed," 7th -- "good," 8th -- "good" "quiet," 9th -- "fair" "good," 10th -- "good," 11th -- "good" "quiet" "satisfactory," 12th -- "good," 14th -- "good," 15th -- "good," 16th -- "poor" "yelling and cussing about story in newspaper," 17th -- "good," lath -- "good," 20th -- "fair" "good," 21st --

"ok" "good," 22nd -- "good," 23rd -- "good," 25th --- "good" "quiet" "satisfactory," 26th -- "good," 27th -- "good," 28th -- "good," and 29th -- "good" (PC-S 8-9).

These records were also kept for the month of May 1984 concerning Mr. Provenzano. The May records reflect: May 1st -- "good," 3rd -- "good" "satisfactory," 4th -- "good," 5th -- "good," 6th -- "good," 7th -- "good," 8th -- "good," 9th -- "good" ok" "quiet," 10th -- "good," 13th -- "good" 14th -- "good," 15th -- satisfactory," 16th -- "good," 19th -- "good," 20th -- "good" "quiet," 21st -- "good," 23rd -- "god," 24th -- '*good" "quiet," 25th -- "fair" "good," 26th -- "good," 29th -- "good," 30th -- "good," and 31st "good" "fair" "quiet" (PC-S 9).

These records were also kept for the beginning of the month of June 1984 concerning Mr. Provenzano. The June records reflect: June let -- "good," 2nd -- "good" "quiet," 4th -- "good," 6th -- "good," 7th -- "good," 8th -- "good," 9th -- "good," and 10th -- "good" (Pc-S 9).

The State definitely had facts which it did not disclose, and the truth of the matter did not come out at trial because those facts were omitted and/or misrepresented. This information should have been provided to trial counsel. However to the extent that this Court holds that there was no duty to disclose, then counsel had a duty to investigate, learn, prepare, and present this evidence to the jury.' His failure to do so was ineffective assistance. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

The circuit court denied relief on this claim saying that the "jail records would have been equally accessible to the defense" (PC-S 133). However, the files and records do not conclusively establish this. Accordingly, an evidentiary hearing is required in order to determine whether the jail would have provided defense counsel these records and whether defense counsel was ineffective in not obtaining these records,

---

'This claim could not have been presented before because the State refused to comply with Chapter 119. As a result this evidence could not be diecovered by collateral counsel until this Court ordered disclosure.

The circuit court also found the jail records reflecting a daily log of Mr. Provenzano's behavior within his cell were inconsistent with the theory of the defense -- on January 10, 1984, Mr. Provenzano had a psychotic break (PC-S 134). The files and records do not support the circuit court's finding that counsel would have tactically chosen not to present this evidence. Courte are not permitted to make up possible strategies which defenee counsel did not testify he possessed. Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer"). An evidentiary hearing is required.

Florida law expressly mandates disclosure of the statements of "any person," Rule 3.220(a)(1)(ii), who is "known to the prosecutor to have information which may be relevant to the offense charge, and to any defense with respect thereto," Rule 3.220(a)(1)(x) (emphasis added), including "Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of ecientific testa, experiments or comparisons."

It is clear from the facts alleged that the State's failure to fully disclose the information discussed above was a substantial violation of Mr. Provenzano's right to discovery. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

> (a) Prosecutor's Obligation.
>
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutwr shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> (i) The names and addresses of all persona known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> * * *
>
> (ii) The statement of any person whose name is furnished in compliance with [paragraph i]. The term "statement" as used herein means a written [adopted or approved] Statement . . . or . . . a substantially verbatim recital of an oral statement [made to a state agent or officer] . . . The court shall prohibit the State from introducing in evidence the material not disclosed,

so as to secure and maintain fairness in the just determination of the cause.

* * *

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to neaate the quilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unlese the State can prove the error is harmless. Roman v. State, 528 So. 2d 1129 (Fla. 1986). Here, names of witnesses and reports of experts material to the defendant's case were undisclosed. Certainly the non-disclosure cannot be found to be harmless. It in all probability affected the result, and confidence in the outcome and fairness of Mr. Provenzano's trial is therefore undermined.

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1963); United states v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). Thus the prosecutor must reveal to defense counsel any and all information helpful to the defense, whether that information relates to guilt/innocence ok punishment, and regardless of whether defense counsel requests the specific information. Bagley, Id. Claims based on discovery violations and/or Brady are clearly cognizable in a Rule 3.850 motion for post-conviction relief. See, e.g., Roman v. State; Arango v. State, 467 So. 2d 692 (Fla. 1985); Ashley v. State, 433 So. 2d 1263 (Fla. 1st DCA 1983); Press v. State, 207 So. 2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So. 2d 618 (Fla. 3d DCA 1965); Wade v. State, 193 So. 2d 454 (Fla. 4th DCA 1967).

Mr. Provenzano alleges that the State'e action of withholding exculpatory evidence violated the sixth, eighth and fourteenth amendments. An explanation of how each amendment's guarantees were denied Mr. Provenzano is appropriate. The cornerstone is the fourteenth amendment: withholding exculpatory, impeachment, or helpful evidence deprives the accueed of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth

amendment right to confront and cross-examine witnesses against him is violated as well. Cf. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so withholding of favorable information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). The unreliability of fact determinations rendered upon less than full crone-examination of critical witnesses, and the unfairness of trial proceedings at which evidence to which the defense is entitled is not disclosed also violates the Eighth Amendment requirement that in capital cases the Constitution cannot tolerate margins of error on material issues. All these rights, designed to prevent miscarriages of justice and ensure the integrity of the fact-finding process, were violated in this case. The State has a duty other than to convict at any cost:

> By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See Brady v. Maryland, 373 U.S., at 87-88.

Bagley, 105 S. Ct. at 3380 n.6.

Counsel for Mr. Provenzano requested pretrial:

> COMES NOW the defendant, THOMAS HARRISON PROVENZANO, by and through the undersigned attorney, and hereby makes written demand for the State Attorney to disclose to him, and permit to inspect, copy, test and photograph the following information and material in the State's possession or control within fifteen (15) days of receipt of this written Demand:
>
> 1. Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and addresses of each witness to the statements.
>
> 2. Any tangible papers or objects which were obtained from or belonged to the accused.
>
> 3. Whether there has been any search or seizure and any documents relating thereto.
>
> 4. Reports or statements or experte made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

5. Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

Further, written demand is made for discovery of all evidence favorable to the Defendant on the issue of guilt or punishment pursuant to the decision of the united Statee Supreme Court in the ease of Brady v. Maryland, 373 U.S. 83, 83 So.Ct. 1194, 10 L.Ed.2d 215 (1963).

The Defendant, by and through the undersigned attorney, hereby moves that the State Attorney furnish a Statement of Particulars under Rule 3.140(n), Florida Rules of Criminal Procedure, specifying as definitely as possible the place, date and time of the commission of the offense alleged in the Information herein, in that said Infarmation fails to inform the Defendant of the particulars of the offense sufficiently to enable him to prepare his defense.

(R. 2754-55).

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence are one and the same.

The method of assessing materiality is well-established. Analysis begins with the Supreme Court's reminder in Agurs that the failure of the prosecution to provide the defense with specifically requeeted evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United Statee ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v. Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney, 730 F.2d at 1344.

Second, materiality muet be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., Agurs, 427 U.S. at 112; Chaney, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require revereal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson, 542 F. Supp. at 734-37 (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

Third, materiality may derive from any number of characteristics of the suppreesed evidence, ranging from (1) its relevance to an issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, Miller v. Pate, 386 W.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant or sentence him to death. Chaney, 730 F.2d at 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th cir. 1981). For, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is €or a jury, and not th[e] Court to determine guilt or innocence," Blanton, 494 F. Supp. at 901, materiality is established and reversal required once the reviewing court concludes that the

withholding of evidence undermines confidence in the results on "the issue of guilt . . . Jorl punishment," United States v. Auurs, 427 U.S. at 105, 106 (emphasis added); Bagley, and when there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [either phase of the capital] proceeding would have been different." Bagley, 105 S. Ct. at 3383.

An analysis of Mr. Provenzano'e Bradv claim plainly establishes that he is entitled to relief. First, the prosecution did not resolve any doubt about materiality of the evidence "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980). second, given the nature of the undisclosed evidence and its clear relevance to what was at issue in Mr. Provenzano's trial, the suppressed evidence was obviously material. Any of the Bradv discovery violations noted above are sufficient to warrant reversal. When the suppressed evidence is assessed on the basis of the cumulative effect, the fact that it creates the reasonable probability that the outcome would have been different is beyond question. United States v. Auurs, 427 U.S. at 117; Bagley.

There can be no question that in this case Bradv was violated. Material mitigating and exculpatory evidence was not disclosed to defense counsel. If the judge had refused to admit the undisclosed mitigation, the eighth amendment would require reversal. Skipper v. South Carolina, 476 U.S. 1 (1986). This is because the death sentence would be unreliable. The same result must occur where the State precludes presentation of mitigation by nondisclosure. It cannot possibly be said that the nondisclosure did not contribute to the conviction and/or sentence.

Moreover if the failure to present this exculpatory evidence to the jury was the fault of defense counsel, confidence is still undermined in the outcome.[2] The death recommendation was by the barest of margins. This evidence would have made a difference. Its presentation was absolutely

[2]The claim presented here was premised on the Chapter 119 material which the State previously refused to disclose.

critical to reliable guilt and penalty determinations. Either the prosecutor or defense couneel failed Mr. Provenzano.

Mr. Provenzano is entitled to a full and fair evidentiary hearing on this issue. At such time, Mr. Provenzano can establish that he is entitled to Rule 3.850 relief and a new trial. Fundamental fairness demands no leaa.

ARGUMENT II

MR. PROVENZANO'S DUE PROCESS RIGHTS WERE VIOLATED AND THE TRIAL COURT ABUSED ITS SOUND DISCRETION WHEN THE TRIAL COURT DENIED HIS PARTICIPATION IN HIS DEFENSE THROUGH THE FILING OF SUPPLEMENTARY PLEADINGS.

Mr. Provenzano had enjoyed an active, positive, and cooperative relationship with collateral counsel in this cause. As part of this active participation in his defense Mr. Provenzano has often filed pro se pleadings. These were always supplementary to those filed by collateral counsel, never represented a conflict in strategy, and were not inconvenient to the court. If anything, the filing of these motions furthered a positive attorney-client relationehip. This pattern continued for at least two months as Mr. Provenzano's firet pro se pleading in this record is dated April 15, 1991 (PC-S 41-56). There was no comment from the court or the state until a June 21, 1991, motion to strike pro se pleadings was filed. The only grounds offered were that Mr. Provenzano was represented by counsel who had not moved to adopt (PC-S 73-74). On June 28, 1991, collateral counsel moved to adopt pro se pleadings of Thomas Provenzano (PC-S 91-93).

The circuit court later denied this motion to adopt and granted the State's motion to strike (PC-S 122-124). The order cites a number of decisions in support of the court's position, but each is substantially different from Mr. Provenzano's situation and demonstrate the court's failure to understand that situation. No authority relied upon comes in post conviction proceedings.

This is not a case where the defendant does not wish to be represented by counsel, as in Goode v. State, 365 So. 2d 381 (Fla. 1979), U.S. cert. denied, 441 U.S. 967 (1979). Mr. Provenzano has not asked to be recognized as

co-counsel, as in Salser v. State, 582 So. 2d 12 (Fla. 5th DCA 1991); State v. Tait, 387 So. 2d 338 (Fla. 1980); Brantley v. State, 570 So. 2d 364, fn. 1 (Fla. 3rd DCA 1990); and as appears to be the case in Sheppard v. State, 391 So. 2d 346 (Fla. 5th DCA 1980). This is not an instance of the defendant not getting along with counsel and filing conflicting pro se pleadings at trial, as in Smith v. State, 444 So. 2d 542 (Fla. 1st DCA 1984) and State v. Smilev, 529 So. 2d 349 (Fla. 1st DCA 1988), or on appeal, as in Whitfield v. State, 517 So. 2d 23 (Fla. 1st DCA 1987), or in a time or manner that surprises counsel at trial, as in Johnson v. State, 501 So. 2d 94 (Fla. 1st DCA 1987). Mr. Provenzano is not asking to physically appear and argue, completely displacing his attorney in that role, as in Thompson v. State, 194 So. 2d 649 (Fla. 2nd DCA 1967). Not only is none of the authority relied upon by the trial court found in a post conviction context, but the largest number concern active attorney-client conflicts over speedy trial issues. Perry v. State, 436 So. 2d 426 (Fla. 1st DCA 1983), Smith, Salser, Johnson, and Smilev.

In fact, case law holds that in many instances motions to adopt pro se pleadings should be granted. Lawyers and clients can work harmoniously in such a relationship. Perry, Tait, and Powell v. State, 206 So. 2d 47 (Fla. 1968). In Davis v. State, 16 F.L.W. S 602 (Fla. 1991), the trial court found a comfortable way to allow limited participation of a defendant as a kind of seated-only co-counsel. A move by counsel to adopt pro se pleadings, as occurred here, has been recognized as proper. Perry and Smith, 444 So. 2d at 547.

Additionally, the decisions relied upon by the circuit court to deny the motion to adopt are premised upon the defendant's post-conviction remedy if he disagrees with trial counsel's decisions. Johnson, 501 So. 2d at 96; Whitfield, 517 So. 2d at 24; and Salser, 582 So. 2d at 14. Such a judicial lecture to Mr. Provenzano rings pretty hollow given his current position in the process.

In the only situation similar to Mr. Provenzano's -- a post-conviction death penalty proceeding where the defendant wished to file pro se pleadings

complimenting those filed by CCR -- this Court has allowed them without designating the individual as co-counsel. Routly v. State, No. 74,583 (March 28, 1990, Order Granting Petition for Writ of Mandamus or Alternative Relief). Mr. Provenzano urges a similar outcome in this case. It is entirely consistent with the dictates of article I, §16, Florida Constitution, it causes no real inconvenience to the courts or the State, and will greatly enhance a positive relationship between post-conviction counsel and Mr. Provenzano.

Here the trial court erred in granting the State's motion to strike and denying post-convcition counsel's motion to adopt Mr. Provenzano's pro se pleadings. The matter must be remanded so that Mr. Provenzano's First Amended 3.850 Motion for Post Conviction Relief Rule 3.987 (filed April 15, 1991) (PC-S 41), Amended Motion to Vacate Judgment and Sentence Pursuant to Court Rules (filed April 19, 1991) (PC-S 60), Amendment Motion to Vacate Judgment and Sentence Post-Conviction 3.850, to April 15, 1984 3.850 (filed April 19, 1991) (PC-S 64), Notice of Supplemental Authority (filed May 2, 1991) (PC-S 66), and Amendment and Notice (filed May 23, 1991) (PC-S 68), can be addressed on the merits. The files and records do not conclusively establish that Mr. Provenzano is entitled to no relief on the claims presented within these pro se pleadings. In fact, these pleadings discuss additional Brady material that was not disclosed by the State. Collateral counsel sought to adopt Mr. Provenzano's claims. The circuit court's action in striking the pro se pleadings violated Hoffman v. State, 571 So. 2d 449 (Fla. 1990). The matter must be remanded for further proceedings, as was ordered in Hoffman.

ARGUMENT III

THE POST CONVICTION COURT DENIED MR. PROVENZANO'S CONSTITUTIONAL DUE PROCESS RIGHTS WHEN THE JUDGE REFUSED TO RECUSE HIMSELF ON A TIMELY AND LEGALLY SUFFICIENT MOTION TO DISQUALIFY.

Pursuant to Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990), Mr. Provenzano filed a eupplemental motion to vacate judgment and sentence under Rule 3.850. Mr. Provenzano filed a timely motion to disqualify the trial judge assigned to rule on the supplemental motion to vacate, but the circuit

court erroneously denied the motion based on the incorrect findings that it was untimely (PC-S 118) and that the concerns expressed therein were not well-grounded fears (PC-S 120).

It is absolutely essential to our justice system that judges making any decision effecting litigants before them not only be without any bias, but that they also be reasonably perceived by litigants as being without bias. As a thoughtful member of this court once reflected:

> I believe it is essential that judges contemplate the appearance of partiality at every turn. The acceptance of court-made justice delivered by imperfect humans relies heavily for its existence on the respect of the citizenry for those who dispense it. In order for the courts to remain as a civilized alternative to leas acceptable means of resolving disputes, the public in general, and parties and their counsel in particular, must be reassured regularly that causes brought to the judiciary are decided on the law alone.
>
> > "Possessed of neither the purse nor the sword, [the judiciary] depends primarily on the willingness of members of society to follow its mandates."

Department of Revenue v. Golder, 322 So. 2d 1, 1-2 (Fla. 1975), order by Justice England, footnote omitted. Put more bluntly:

> "Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.

State ex re. Mickle v. Rowe, 131 So. 331, 332 (1930), quoted with approval in Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983), a death sentence case where the conviction was overturned because of a trial judge's refusal to disqualify himself. This hyper-sensitivity to perceptions and subtle biases is especially necessary in capital cases where the distinctions leading tw a life sentence or a death sentence can be extremely fine.

Four rules address the disqualification of a judge in Florida: the Code of Judicial Conduct Canon 3-C; section 38.10, Fla. Stat. (1981); Florida Rule of Criminal Procedure 3.230, which was adopted verbatim from a former statute, section 911.01, Florida Statutes (1967); and Florida rule of Civil Procedure 1.432.

The Florida Rules of Criminal Procedure provide for the disqualification of a judge as follows:

VII. DISQUALIFICATION AND SUBSTITUTION OF **JUDGE**

RULE 3.230. DISQUALIFICATION OF JUDGE

(a) The State or the defendant may move to diequalify the judge assigned ta try the cause on the grounds: that the judge is preiudiced aaainst the mwvant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time,

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him *for* prejudice to determine their legal sufficiencv only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavit are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

Fla. Rule of C. P. 3.230 (emphasis added).

Were the circuit court acknowledged that Mr. Provenzano's motion to diequalify was facially complete. "The instant written motion is accompanied by two affidavits setting forth facts relied upon to show the grounds for disqualification. A certificate of counsel states that the motion is made in good faith" (PC-S 116). However, the circuit court ruled that the motion was not timely.

The circuit court misconstrue's this Court's interpretation of what constitutes a timely filing of a motion to disqualify in a criminal matter. Rule 3.230 urges such a motion to "be filed no less than 10 days before the time the case is called for trial," but here we have no trial, evidentiary hearing, or other formal proceeding scheduled, as the trial judge acknowledged

(PC-S 116). It is also indisputed that the court still had an issue before it (PC-S 118) -- a ruling on Mr. Provenzano's supplemental 3.850 motion. This supplemental 3.850 motion is analogous to a motion for new trial after a verdict -- it is "something 'further'" -- and with a legally sufficient motion to disqualify "the judge 'shall proceed no further'." Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987)(emphasis in original).

In its order denying Mr. Provenzano's motion to disqualify, the circuit court finds public policy support in Jones v. State, 411 So. 2d 165, 167 (Fla. 1982) and Gieseke v. Grossman, 418 So. 2d 1055, 1057 (Fla. 4th DCA 1982) (PC-2 117-118). This is a misreading of both decisions. Unlike the present case, Jones involved a jury trial and all the necessary preparations that involved, clearly falling under the ten day language of Rule 3.230(c). Jones was a capital case where the motion to disqualify was filed between guilt phase and penalty phase. Gieseke is a civil trial case that was unlike Mr. Provenzano's situation which involved only motions.

Mr. Provenzano filed his motion to disqualify well before a decision was rendered by the Court and at a time that represented no serious inconvenience to anyone. It was timely. Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

The standard in evaluating a motion to disqualify is not the actual truth of any allegations. "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling," State ex rel Brown v. Dewell, 179 So. 695, 697 (Fla. 1938), as quoted approvingly in Gieseke, 418 So. 2d at 1057. "The judge with respect to whom a motion to disqualify is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations." Suarez v. Dugger, 527 So. 2d at 191 (a post conviction capital case where a trial court's denial of a motion to disqualify was reversed). A trial judge who responds in any way to the allegations or contentions contained in a motiwn to disqualify must be removed from the case. "Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this

case - the creation of 'an intolerable adversary atmosphere' between the trial judge and the litigant." Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978), citation omitted. See also A.T.S. Melbourne, Inc. v. Jackson, 473 So. 2d 280, 281 (Fla. 5th DCA 1985); Kreager v. State, 566 So. 2d 934, 935-936 (Fla. 4th DCA 1990); Diaerononimo v. Reasbeck, 528 So. 2d 556 (Fla. 1988); Ryon v. Reasbeck, 525 So. 2d 1024, 1025 (Fla. 4th DCA 1988); Fruehe v. Reasbeck, 525 So, 2d 471, 472 (Fla. 4th DCA 1988); Davis v. Nutaro, 510 So. 2d 304 (Fla. 4th DCA 1986); and Manaaement Corporation v. Grassman, 396 So. 2d 1169, 1169-70 (Fla. 3rd DCA 1981). "The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised." Dickerson v. Parks, 140 So. 2d 459, 462 (1932).

The analysis of the legal sufficiency of a motion to disqualify is centered on the thoughts of the moving party, not the court or any other party. "The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of this ability to act fairly and impartially." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). "The standard for determining whether a motion is legally sufficient is 'whether the facts allegedly would place a reasonably prudent person in fear of not receiving a fair and impartial trial.'" MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332, 1335 (Fla. 1990)(emphasis in original).

While undertaking the analysis the trial judge must accept the facts of the motion and affidavits as true. Hope v. State, 449 So. 2d 1315, 1317 (Fla. 2nd DCA 1984). See also Jones v. State, 446 So. 2d 1059, 1061 (Fla. 1984), "we recognize that we must accept the allegations for diequalification in the light most favorable to appellant." There is an extremely low threshold in order to require disqualification. "If they (the alleged facts) are not frivolous or fanciful, they are sufficient to support a motion to disqualify on the ground of prejudice." Gieseke, 418 So. 2d at 1057, quoting with approval Dewell, 179 So. at 556.

In Mr. Provenzano's case the analysis is accepting the allegatione of hie motion in the light most advantageous to his position, would Mr. Provenzano have concerns as to whether this trial judge would give his pending supplemental 3.850 motion a fair and impartial review and hearing before deciding it. Were his concerns "frivolous or fanciful." In conducting this analysis the court cannot consider the concerns raised by Mr. Provenzano separately but must view their cumulative total effect on his perception of the trial judge.

Mr. Provenzano had already expressed his concerns about the effect of intense prs-trial publicity not just on the jury at trial, but on judges who would remain involved with the matter long after a jury verdict (R. 3-22). This fear was heightened when the trial court not only denied his post conviction motions, but did so by taking the highly unusual step of not allowing an evidentiary hearing on any claim. His reasonable fears were even further aroused when the trial judge refused his choice of counsel, K. Leslie Delk, by denying her motion to appear pro hac vice. The cumulative total of all these clearly gave rise to a prudent and reasonable fear, one which was not frivolous or fanciful, that the trial judge could not give him a fair and impartial hearing.

The trial judge here erred in failing to disqualify himself on Mr. Provenzano's timely motion presenting concerns which would place a reasonably prudent person in fear of not receiving a fair and impartial hearing. The trial court's ruling on his supplemental motion to vacate should be reversed with a remand and instructions for a new circuit judge to hear the motion.

CONCLUSION

On the basis of the arguments presented here, Mr. Provenzano respectfully submits that he is entitled to an evidentiary hearing. Mr. Provenzano respectfully urges that this Honorable Court remand to the trial court *for* euch a hearing, and that the Court set aside hie unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the initial brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 9, 1991.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

HARUN SHABAZZ
Staff Attorney

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Appellant

Copies furnished to:

Kellie A. Nielan
Assistant Attorney General
210 North Palmetto Avenue, Suite 447
Daytona Beach, Florida 32114