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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

Citations in this brief to designate reference 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.

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REPLY TO STATEMENT OF FACTS

Mr. Provenzano continues to rely upon his statement of the case aa aet forth in his initial brief and upon the facts set forth throughout that brief. However, he must take issue with the incomplete facts set forth by the State.

Mr. Provenzano was first indicted for these crimes under Case No. 84-167, where he was represented by Steven G. Horneffer of Casselberry. It was Mr. Horneffer who filed the Motion for Controlled Access to Defendant'e Medical Records on January 12, 1984 (R. 2704). His motion was granted on January 16, 1984, with a copy of the order to Mr. Horneffer. The first indictment was withdrawn and a second issued under Case No. 84-835. On March 13, 1984, Horneffer withdrew from the case citing conflicts with other clients under Babb v. Edwards, 412 So. 2d 859 (Fla. 1982)(R. 2822-2823). A week later the public defender's office also made a motion to withdraw (R. 2841, 2846-49). It was not until March 22, 1984, that trial counsel was appointed to represent Mr. Provenzano (R. 2850). The record does not indicate whether these documents were provided to trial counsel.

Mr. Provenzano testified at his trial that he did not speak to Dr. Wilder from his hospital bed -- "I never said one word to Dr. Wilder" (R. 2151) -- nor had he conversed with any of the State's experts (R. 2151-2153). The State contends that jail records were disclosed to the defense. However, the State did not disclose its daily log of Mr. Provenzano's behavior while in jail.

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 PROVISIONS OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. MOREOVER, BECAUSE THE 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.

The State in its brief argues that this claim is procedurally barred. "Where counsel is attacked in first motion, additional claims in second or third motions are procedurally barred" (Answer Brief at 7 and 8). This

position assumes that Appellant had access to the records that form the basis for this claim. However, as noted in Appellant's Initial Brief, this Court held that the State erred in failing to comply with Chapter 119 then ordered that Mr. Provenzano would have sixty days from discloeure to file a new 3.850. Provenzano v. Dusaer, 561 So. 2d 541, 549 (Fla. 1990). Specifically, the State refused to disclose the State Attorney's file. These 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 psychosis" (PC-S 5). There were also detailed handwritten notes regarding Mr. Provenzano's mental history and condition on January 10, 1984, the day of the shooting. Dr. Abraham opined "Hie [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 delusions about the police and finally he acted violently upon his perceived persecutors" (PC-S 5-6).

Also not disclosed by the State were jail records, These 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 Dre. Pollack and Lyons' conclusions that following the January 10 explosion, Mr. Provenzano waa very calm and tranquil, if not docile. It would have supported their testimony that there was a psychotic break on January 10, 1984.

The State comes before this Court not with clean hands, but in breach of a fundamental statutory and constitutional duty -- to provide access to its files and records to assure due process and equal protection of the law. A holding that this claim should be procedurally barred under the facts of this case would not serve any equitable principlee which govern the equitable

nature of post-conviction remedies. Instead, it would potentially reward the State for unconstitutional conduct.

Procedural bars, after all, depend on the proper functioning of the adversarial system. That functioning, in turn is founded upon two independent components. On the one hand, it requires discharge of the defenee function. See Murray v. Carrier, 477 U.S. 478, 496 (1986). Criminal proceedings are a "reliable adversarial testing process" only where an accused is represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. Strickland v. Washinaton, 466 U.S. 668 (1984). If the adversarial procese is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial so that they may be relief upon in subsequent proceedings. Wainwright v. Sykes, 433 U.S. 72, 89 (1977). No sandbagging or intentional withholding of claims has taken place here. Indeed, Mr. Provenzano's counsel have done all they could to withhold no claims from petitioner's first poet-conviction action.

The adversarial process is also impaired by the perversion of its other component, the prosecutorial function. Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 390 W.S. 264 (1959); United States v. Bagley, 473 U.S. 667 (1985). Such a perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by misleading or deceptive conduct that is intended to accomplish illegal ends. Franks v. Delaware, 438 U.S. 154 (1978)(fourth amendment violated where the state relies upon material misstatements in warrant proceedings); Oregon v. Kennedy, 456 U.S. 667 (1982)(fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); Napue v. Illinois (due process violated by prosecutor's failure to correct misleading trial testimony); United States v. Bagley (due process violated by prosecutor's withholding of critical impeachment evidence).

None of the interests served by any procedural rule, or ultimately by the adversarial system, would be furthered by enforcement of a procedural bar

in the present case. In this case it is the State, not Mr. Provenzano, that has undercut the integrity of judicial procese and that is responsible for the failure, if any, to litigate paramount constitutional questions in accord with state procedural law. It is the state attorney who is jeopardizing the adversarial procese when he withholds his files in direct contravention of section 119, due process, equal protection and the eighth amendment's requirement of reliability in capital proceedings.

The State argues "that the defense was well aware of Dr. Abraham's report" (Answer Brief at 7). However, the record is not clear on this point. The "Motion for Controlled Access to Defendant's Medical Records," was filed January 12, 1984 by Appellant's first court appointed counsel, Steven G. Hornheffer (R. 2704). The motion was granted January 16, 1984 (R. 2724). The Appellant was appointed new counsel, Jack T. Edmund, on March 22, 1984. Making matters more confusing was the fact that Mr. Provenzano was indicted on two separate occasions between the appointment of Mr. Hornheffer and Mr. Edmund as trial counsel. Appellant was indicted January 17, 1984 (R. 2726-2727) and reindicted February 8, 1984. The Motion and Order for Controlled Access to the Defendant's Medical Records have the first indictment case number, CR 84-167 (R. 2704 and 2724). The conclusion that trial counsel should have been aware of Dr. Abraham's report through Dr. Pollack and Dr. Lyons testimony is speculation. Thus, the record does not establish trial counsel, Mr. Edmund, had access to Dr. Abraham's report.

Further, the State does not argue whether trial counsel was ineffective for not using Dr. Abraham's report. The State maintains that "Provenzano has neither alleged nor demonstrated prejudice, or that there is a reasonable probability that the outcome of the proceeding would have been different" (Answer Brief at 8). However, to the contrary, Appellant argues in hie initial brief that the jury needed to hear Dr. Abraham's report 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. Under these circumstances Mr. Provenzano is in a similar position as another death

sentenced inmate with a 7-5 jury vote. "While reaeonable persons might disagree with the weight to be accorded to the foregoing facts or whether some of them are even mitigating, we cannot be certain that . . . one additional juror would not have voted for life." Way v. Dugger, 568 So. 2d 1263, 1267 (Fla. 1990).

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 vary 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 State argues "that Provenzano's jail records would have been equally accessible to the defense." The State premises this argument on the fact that a motion for production of visitor attendance records at the local jail was granted May 22, 1984 (Appellant Answer Brief at 8). However, on February 2, 1984 defense counsel made a written demand for discovery of all evidence favorable to the Defendant on the issue of guilt or punishment pursuant to the decision of the United States Supreme Court in the case of Bradv v. Maryland, 373 U.S. 83 (1963). Despite this written demand €or Bradv material, the jail record reporte of Mr. Provenzano's daily condition were not released to the defense counsel. These records are consistent with Drs. Pollack and Lyons' conclusions that following the January 10 exploeion, 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 cwntent 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 (in the face of 7-5 death recommendation), and defense mental health experts were denied access to this important and valuable information.

The mere fact that Dr. Pollack testified that he apoke informally with jail officials responsible for Appellant's custodial treatment would not give notice to defense counsel that a daily log of Appellant's condition was being kept. 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 50, 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 nwt to present this evidence. Courts are not permitted to make up possible strategies which defense 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 doea not offer"). An evidentiary hearing is required.

As for Dr. Wilder's notes, the record is not clear whether defenre counsel had due notice that Dr. wilder had nates concerning Mr. Provenzano. The fact that if there had been an objection to Dr. Wilder's testimony, this issue could have been raised on direct appeal avoids the issue. The question here is whether the State had an obligation to disclose Dr. Wilder's notes and/or whether trial counsel was ineffective in procuring Dr. Wilder's notes? Florida law expressly mandates disclosure of the statemente of "any person," Rule 3.220(a)(1)(ii), who is "known to the prosecutor to have information which mav be relevant to the offense charge, and to any defense with respect thereto," Rule 3.220(a)(1)(x) (emphasia added), including "Reports or statemente of experts made in connection with the particular case, including results of physical or mental examination5 and of scientific teats, 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.

There can be no question that in this case Brady was violated. Material mitigating and exculpatory evidence was not disclosed to defense couneel. 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 nondieelosure 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.' The death recommendation was by the barest of margins. This evidence would have made a difference. Its presentation was absolutely critical to reliable guilt and penalty determinations. Either the prosecutor or defense counsel failed Mr. Provenzano.

In sum, it must again be observed that given the jury's 7-5 recommendation it cannot be said that any omission relating to mitigation was harmless. 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 lees.

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.

The State's Answer Brief casts this situation as just another trial court burglary defense. Some vague quantitative judicial efficiency goal can only be met by viewing individual defendants as fungibles to be dealt with by the tens or hundreds and where post-conviction proceedings remain available at some future date. Such is not the situation. The power of the State has decreed that Mr. Provenzano should not only pay €or his crime, but that he should pay the highest price possible, the forfeiture of hie life at the hand

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

of the State's official executioner. We are not in trial, nor are we in direct appeal. we are in post-conviction, the very last stop in this process. If Mr. Provenzano loses at this stage of the proceedings, he will die a horrible and unnatural death at the hands of the State, That is a fact.

It is unchallenged that Mr. Provenzano has not invoked hie right to self-representation under Faretta v. California, 422 U.S. 806 (1975). It is also unquestionable from the record of his case that he is laboring under significant mental disabilities. This litigation is primarily over the extent of those disabilities and their legal ramificatione. Finally, it is also beyond question that Mr. Provenzano has taken a considerably greater active interest in his case than most death row inmates, and that he acts on this by filing a number of supplemental pro se motions and pleadings. These pleadings below have not been in conflict with those of his lawyers and could have been dealt with without serious inconvenience to the trial court or the State.

This Court has recognized in the past, both in this case and others, the significant safety valve value of such supplemental pro se pleadinge. Routlv v. State, No. 74,583 (March 28, 1990, Order Granting Petition €or Writ of Mandamus or Alternative Relief) and Provenzano v. State, No. 78,410 (November 20, 1991, Denial of State's Motion to Strike Pro Se Pleadings and Amended Motion to Strike Pro Se Pleadings). The court has also been willing to address issues raised in the pro se brief of a death row inmate represented in post-conviction matters by CCR. Routly v. State, 17 F.L.W. S 16 (Fla., Jan. 2, 1992). This Court has no doubt recognized how important it is that post-conviction counsel have a constructive, confidence promoting relationship with death row clients. While this is important at the appellate level, it is considerably more important at the trial court level where records are made for appellate review. A willingness by courts to further harmony between post-conviction counsel and death row clients serve the orderly progress of judicial proceedings and the commitment to administration of justice. The State may not always be prepared to see that such harmonious attorney-client

relationships are in the best interests of justice, but it is manifestly the case.

The trial court's order relies on Goode v. State, 365 So. 2d 381, 383 (Fla. 1978) for the proposition that "a mixture of a defendant's partially appearing €or himself and partially being repreeented by counsel is not a constitutional right" (PC-s. 123). Goode is a capital case on direct appeal. A closer reading of Goode reveals that it was an example of mixed pro se and representation by counsel:

> Defendant Goode unequivocally declared that he wanted to represent himself. The record shows that he was literate, competent, and Understanding. He was voluntarily exercising his informed free will even though the judge warned him that it waa a mistake not to accept representation. Nevertheless, in an effort to further protect his rights, the court furnished counsel for the purpose of giving legal advice when needed. Defendant did not abject to this form of self-representation with the assistance of appointed counsel. The record clearly reflecta that defendant was allowed self-representation and the record does not reflect that counsel was forced upon an unwilling defendant. In fact, defendant knowingly coneented to the appearance of counsel and, in fact, sought legal advice from him during the course of the trial.

365 So. 2d at 384. It can fairly be assumed that the trial court would not have appointed counsel to assist Mr. Goode had it not been a death penalty case, and presumably appointed counsel was also required to act competently within the meaning of Strickland v. Washinaton, 466 U.S. 668 (1984). The point of this is that Goode actually exhibits the very kind of accommodation in death penalty matters that Mr. Provenzano seeks.

A judicial accommodation of supplemental pro se pleadings allows defendants such as Mr. Provenzano to be heard, to be comfortable that they have had their say without having to resort to the extreme and dangers position represented by Faretta or to openly battle counsel during court sessions. This is true of all death row litigants regardless of where they fall on the competency question. The benefits to the criminal justice system of this small accommodation greatly outweigh any inconveniences relied upon by the State.

The trial court and state's reliance on State v. Tait, 387 So. 2d 338 (Fla. 1980); Smith v. State, 444 So. 2d 542 (Fla. 1st DCA 1984); Whitfield v.

State, 517 So. 2d 23 (Fla. 1st DCA 1987); and others simply are not controlling in Mr. Provenzano's and similarly situated individuals' situations. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differe more than life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because death is different -- is so absolutely final -- as well as because we are in post-conviction, the courts must accommodate Mr. Provenzano's desire to be personally heard, in this small way, in addition to representation by couneel.

Nowhere in these proceedings does the trial court or the State point to any real inconvenience or hardship resulting from Mr. Provenzano's pro se pleadings. The order denies Mr. Provenzano this small accommodation merely because the trial court interprets the law as allowing him to refuse (PC-S. 122-124). The State's Answer Brief likewise fails to point out even the smallest inconvenience, dismissing the matter as something Mr. Provenzano is not legally entitled to and that he has "failed to show any compelling reasons to justify" (AB 13). Nothing has been advanced to justify the trial court's decision. In the absence of any reason for this decision, the trial court has abused its discretion.

The trial court erred, abusing its discretion in denying counsel's Motion to Adopt and in Granting the State Motion to Strike Pro Se Pleadings. The denial of post-conviction relief below must be vacated by this Court. The matter must be remanded to the trial court with instructions to consider the supplemental pro se motions and pleadings filed by Mr. Provenzano.

ARGUMENT III

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

Again, the State seeks to dismiss this argument as if it arose in the context of a routine petty criminal offense instead of the final stages of a

death penalty case.[2] However, it is a capital case and because death is different, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), all concerns must be subject to a heightened level of judicial scrutiny as compared to a non-capital matter. As indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring). Thus, in a capital case such as Mr. Provenzano's, the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment. In Caldwell v. Mississippi, 472 U.S. 320 (1985), for example, a prosecutor's closing argument in the penalty phase was found to violate the Eighth Amendment's heightened scrutiny even though a successful challenge could not be mounted under the Fourteenth Amendment. Caldwell, 472 U.S. at 347-52 (Rehnquist, J., dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987).

But this death penalty case is made even more awkward €or the courte because of its unique victim, physical setting, and circumstance. This is the murder of a uniformed court officer, in a county courthouse, during the course of judicial business. See Provenzano v. State, 497 So.2d 1177, 1179-1180 (Fla. 1986). A circuit judge publicly announced that he considered himself a likely victim (PC-R. 420). It was so explosive that the Chief Judge of the Ninth Judicial Circuit, the initial venue, recognized that "It is obvioue that no judge in Orange County can hear this case without there being the suggestion of partiality" (PC-S. 110). The judge's letter recognized that not only is the issue real prejudice, but the appearance of prejudice as well.

There is no question all of this was known to Mr. Provenzano. Under these circumstances any rational individual would have concerns about whether

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[2]The State contends that the motion was not timely even though it was filed more than a month before the circuit judge ruled on the motion to vacate. The State's position is clearly in error under Rule 3.231 and Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

any circuit judge could avoid an adverse personal reaction to the facts of the case and give the defendant a fair hearing. Under these circumstancee, such concerns could not be dismissed as "frivolous or fanciful."

In its answer brief the State attempts a hook slide around thie component of a recusal analysis. See Bundy v. Rudd, 366 So. 2d **440, 442 (Fla. 1978).** The legal sufficiency of **a** recusal motion includes appearancee to the moving party:

> The term "legal sufficient" encompaseee more than mere technical compliance with the rule and the statute; the court must **also** determine if the facts alleged (which must be taken **as** true) would prompt **a** reasonably prudent person to fear that he could not get **a** fair and impartial trial.

Gieseke v. Grossman, 418 So. **2d** 1055, **1057** (4th **DCA 1982),** quoting Havslip **v.** Douglas, 400 So. 2d 553 **(Fla.** 4th DCA **1981).**

On appeal this court need not defer to the finding of the trial court, but is free to reach its own conclusions as to whether Mr. Provenzano's motion to disqualify was legally sufficient. **Suarez** v. Dugger, **527** So. **2d 190, 192 (Fla. 1988).** Here the trial court should have granted Mr. Provenzano's motion to disqualify himself. The unique circumstances of thie crime in combination with the combined matters alleged in Mr. Provenzano'a motion gave him a good faith apprehension **as** to the trial court's ability to hear his motion impartially. His fears are not "frivolous or fanciful." This Court must reverse the trial court's denial of the motion to disqualify and must **remand** to the trial court for the assignment of a new judge to hear these post-conviction matters.

CONCLUSION

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

I HEREBY CERTIFY that a true copy of the reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 12, 1992.

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