IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 95,849

ACTIVE DEATH WARRANT

APPEAL FROM DENIAL OF THIRD RULE 3.850 MOTION TO VACATE
THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

PAGE NO.:

OTHER AUTHORITIES CITED

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PRELIMINARY STATEMENT

This is an appeal from the denial of Provenzano's third Rule 3.850 motion to vacate. Designations to the original trial record will be identified by the letters "TR" followed by the appropriate volume and page number. Two separate post-conviction appeals were filed by Provenzano within the last ten days; consequently, there are two separate post-conviction records. On June 18, 1999, Provenzano filed a Notice of Appeal of the trial court's order on Provenzano's "Motion for Determination of Counsel." Although this "preliminary" post-conviction appeal, FSC Case No. 95,808, was dismissed by this Court, the three-volume record filed in FSC Case #95,808 contains, among other things, the transcripts of hearings held on June 14, 1999 (PCR II/45-71) and June 18, 1999 (PCR I/1-44) as well as the trial court's order of reassignment and ruling on CCRC's "Motion for Determination of Counsel." (PCR II/127-128; 129-130) References to Provenzano's "preliminary" 1999 post-conviction record, filed in FSC Case No. 95,808, will be designated by the letters "PCR" followed by the appropriate page number.

Designations to the instant postconviction record, filed in FSC Case No. 95,849, will be referred to by the letter "R" and will be followed by the appropriate volume and page number. The transcript of the Huff hearing held on June 23, 1999, was filed separately and will be designated "T" followed by the appropriate page number.

INTRODUCTION

In his Statement of Judicial Acts to be Reviewed, Provenzano sets forth the following acts to be reviewed:

1. Denial of Defendant's Emergency Motion For Temporary Stay of Execution;

2. Denial of Motion For Appointment of Clemency Counsel;

3. Denial of Successor Motion to Vacate Judgment and Sentence, And Request For Evidentiary Hearing and Stay of Execution; Denial of Motion to Vacate Conviction (Rule 3.850, Fla. R. Crim. P.).

4. Denial of Emergency Motion to Compel, For Leave To Take Depositions, and For a Stay of Execution Pending Further Production, Depositions, and an Evidentiary Hearing on Compliance;

5. Denial of Motion for Competency Determination.

Because the briefs in this expedited appeal are to be filed simultaneously, the State submits its anticipatory response to the claims as identified in Provenzano's Statement of Judicial Acts to be Reviewed.

NOTICE OF SIMILARITY OF ISSUES

In the trial court below, Provenzano's post-conviction challenges to execution by electrocution, the "new" wooden chair, and compliance with public records requests by the Florida Department of Corrections were virtually identical to the claims concurrently raised by CCRC-Middle on behalf of inmate Allen Lee Davis. The only additional "electric chair" challenge asserted by Davis pertained to his obesity.

Accordingly, inasmuch as the instant answer brief is submitted in anticipation of Provenzano's brief, the State respectfully directs this Court's attention to the appellate briefs which are currently pending before this Court in Davis v. State, Florida Supreme Court Case No. 95,845 on this issue.

STATEMENT OF THE CASE AND FACTS

In 1984, Thomas Harrison Provenzano was convicted of two counts of attempted first-degree murder and one count of first-degree murder. The trial judge, the Honorable Clifford B. Shepard, followed the jury's recommendation and imposed a sentence of death for the first-degree murder. In addition, the trial judge also sentenced Provenzano to consecutive thirty-year sentences for each count of attempted first-degree murder. On direct appeal, this Court affirmed Provenzano's convictions and sentences and set forth the following summary of the facts:

STATEMENT OF FACTS[1]

> On August 1, 1983, officers Shirley and Epperson of the Orlando Police Department arrested Provenzano for disorderly conduct. The disorderly conduct charge became an obsession with Provenzano. From the day he was arrested until January 10, 1984, Provenzano continually followed and threatened to kill the arresting officers. Provenzano also purchased a .38 caliber revolver, 12 gauge shotgun, a .45 caliber semi-automatic weapon, and had pockets sewn into the inside lining of his jacket in order to conceal the weapons.
>
> On January 9, 1984, Provenzano appeared at the courthouse wearing black combat boots, army fatigue pants, a long olive drab army coat, a red bandana and a shoulder bag. Provenzano left without incident when told that he had arrived a day early for his disorderly conduct trial.
>
> On January 10, 1984, Provenzano arrived at the courthouse early and was heard to have said "I can't wait until those two policemen walk in. I'll show them," and "I'm going to do it. This is where [these] guys get

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[1]This statement of facts is taken verbatim from the opinion of the Florida Supreme Court on direct appeal in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986).

their ass kicked." As Provenzano entered Judge Conser's courtroom at about 9:30, he was carrying a red knapsack, and wearing the same jacket in which he had the inside pockets sewn. Bailiff Parker stopped Provenzano at the door and told him that he would have to leave the knapsack outside or have it searched. Provenzano then took his knapsack to his car. The knapsack contained a gun stock for his .45 caliber weapon and ammunition for the .38 caliber revolver.

Provenzano returned to the courtroom without his knapsack at 10:15. Provenzano approached the bench when his case was called. Judge Conser then instructed Provenzano to return to the spectator portion of the courtroom until his attorney arrived. Bailiff Dalton was instructed to search Provenzano. Dalton then approached him saying that he was going to have to be searched and that he was his friend. Correction Officer Parker exited the courtroom and reentered directly behind Provenzano. As the defendant reached in his pocket, Dalton went to grab him and was shot in the face by Provenzano, who screamed, "You're not my friend, M_____ F_____!" Provenzano then chased and fired at least two shots at Parker.

Everyone in the courtroom took cover. The people in Judge Coleman's adjacent courtroom heard the shots. Bailiff Wilkerson, the bailiff in charge of Judge Coleman's courtroom, exited the courtroom into the hallway where the shooting was taking place. Shortly thereafter, gunshots were heard. A chase ensued. Provenzano took a military stance in the corner of the hallway where he yelled, "I'm going to kill you, M_____ F_____, I'm going to kill all of you."

Provenzano then ducked into room 436, a lunchroom for bailiffs, and took a barricade position with the shotgun pointing into the hall. Corporal A.C. Jacobs of the Orange County Sheriff's Office shot Provenzano in the back through a window. The defendant was armed with a 12 gauge shotgun, a .45 caliber assault rifle, and a .38 caliber revolver, all loaded with live ammunition.

Dalton and Parker were both shot and injured by Provenzano. Wilkerson was shot and killed by Provenzano.

Provenzano v. State, 497 So. 2d at 1179-1180.

THE STATE COURT DIRECT APPEAL AND PRIOR POST CONVICTION PROCEEDINGS

Provenzano appealed his judgments of conviction and sentences on direct appeal to the Florida Supreme Court, raising nine issues.[2] On October 16, 1986, this Court affirmed Provenzano's convictions and sentences. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), reh denied, December 22, 1986. On April 20, 1987, the United States Supreme Court denied certiorari. Provenzano v. Florida, 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed. 2d 518 (1987).

After the Governor signed a death warrant, Provenzano filed a Rule 3.850 motion for postconviction relief, alleging 23 claims for relief. Although Provenzano alleged 23 claims in his motion for post-conviction relief, the trial court characterized the motion as alleging 17 claims. Of the seventeen claims characterized by the trial court, the majority were found to be procedurally barred and the remainder were without merit. Provenzano's motion was denied by the trial court without the need for an evidentiary hearing.

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[2] The nine claims raised on direct appeal included the following: 1) the trial court erred when it instructed the jury on transferred intent; 2) the trial court erred in denying Provenzano's request for a change of venue; 3) there was insufficient evidence to support the conviction for first degree murder; 4) the trial court erred in finding that the killing of the victim was cold, calculated, and premeditated; 5) the trial court erred in finding that the killing of the victim was for the purpose of disrupting or hindering the lawful exercise of a governmental function; 6) the trial court erred in failing to consider and find statutory and non-statutory mitigating circumstances; 7) there was improper prosecutorial questioning and argument; 8) there was an accumulation of errors; and 9) section 921.141, Florida Statutes was unconstitutional.

Provenzano appealed the denial of his motion for post-conviction relief and simultaneously filed a petition for writ of habeas corpus.[3] In this initial post-conviction proceeding, this Court also granted Provenzano's request for a stay of execution. Provenzano v. State, 561 So. 2d 541, 543 (Fla. 1990).

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[3] Provenzano's petition for writ of habeas corpus raised twelve claims. Of his twelve claims, this Court found the following six to be procedurally barred: (1) The penalty phase jury instructions impermissibly shifted the burden of proof to the defendant (no objection to instruction and not raised on direct appeal). Jones v. Dugger, 533 So.2d 290 (Fla.1988); (2) The finding of the aggravating circumstance that the murder was cold, calculated, and premeditated was error (argued but rejected on direct appeal); (3) The remaining four aggravating circumstances were unconstitutionally applied to Provenzano (either rejected or not argued on direct appeal); (4) The jury was improperly advised that they were not to consider sympathy (no objection at trial and not raised on direct appeal); (5) The prosecutor's closing argument during penalty phase was fundamentally unfair (argued and rejected on direct appeal); (6) The trial judge erroneously failed to find mitigating circumstances set forth in the record (argued and rejected on direct appeal).

Provenzano's remaining six claims alleged instances of ineffective assistance of appellate counsel due to the failure to argue on direct appeal that (1) the instructions given the jury on insanity allegedly were constitutionally inadequate; (2) Provenzano was absent during alleged critical stages of his trial and that admonitions given the jury upon release from sequestration at the conclusion of the guilt phase of the trial were inadequate; (3) improper victim information allegedly was adduced at his trial and sentencing in violation of the principles of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); (4) the Court erred in permitting, over defense objection, the testimony of the wife of one of the victims at the sentencing proceeding; (5) a crime scene photograph of the victim allegedly was improperly admitted into evidence; and (6) the jury's sentencing responsibility was allegedly diminished in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). All six claims of ineffective assistance of appellate counsel were addressed and rejected by this Court. Provenzano, 561 So. 2d at 547-549.

Provenzano initially raised ten issues in his first post-conviction appeal, and he subsequently presented six additional arguments in a supplemental brief.[4] In this case, arising from Provenzano's first 3.850 motion and post-conviction appeal, Provenzano was represented by Larry Helm Spalding, Capital Collateral Representative, Billy H. Nolas, Chief Asst. Capital Collateral Representative, Julie D. Naylor, Asst. Capital Collateral Representative, Bret B. Stand and K. Leslie Delk, Staff Attorneys, Office of the Capital Collateral Representative, Tallahassee. See, Provenzano v. State, 561 So. 2d 541, 543 (Fla. 1990).

On April 26, 1990, rehearing denied June 26, 1990, this Court upheld the trial court's summary denial of Provenzano's first motion for post-conviction relief and denied his petition for a

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[4] The ten issues raised in Provenzano's post-conviction appeal included the following: 1) the summary denial of the Rule 3.850 motion was erroneous; 2) Provenzano was not competent to proceed at trial; 3) Provenzano was denied effective assistance of counsel at the guilt and sentencing phases; 4) there was improper consideration of the victim's character and victim impact information; 5) the opinions of the mental health experts were inadequate; 6) the trial court erred in denying Provenzano's request for a change of venue; 7) Provenzano was denied effective assistance of counsel with regard to certain jury instructions; 8) trial counsel allowed prejudicial testimony to be introduced at trial; 9) the State withheld certain evidence; and 10) Provenzano incorporated the other claims presented in his motion for post-conviction relief.

All of the claims in his supplemental brief dealt with Provenzano's argument that the State violated Chapter 119, Florida Statutes by failing to disclose certain documents.

writ of habeas corpus. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). However, this Court did require the State Attorney to disclose to Provenzano's attorney those portions of his file covered by chapter 119, Florida Statutes (1989). Provenzano was given an extension of sixty days to file a new Rule 3.850 motion for post-conviction relief premised on any claims under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), arising from the disclosure of the contents of the file.

Thus, Provenzano filed a second motion for post-conviction relief, which was denied by the trial court without the need for an evidentiary hearing. Provenzano appealed to this Court, alleging a Brady violation, additional claims of ineffective assistance of trial counsel, and that the trial court erred in denying Provenzano's motion for recusal. On February 11, 1993, rehearing denied April 26, 1993, this Court affirmed the summary denial of Provenzano's second motion for post-conviction relief.[5] Provenzano v. State, 616 So. 2d 428 (Fla. 1993). In this case, Provenzano's *second* state post-conviction appeal proceeding, Provenzano was

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[5]On his second post-conviction appeal, this Court held, *inter alia*, that (1) the State's alleged failure to disclose the report of a psychiatrist, Dr. Abraham, (who interviewed Provenzano at the hospital immediately after the shootings), Provenzano's jail records, and notes of one of state's expert witnesses did not amount to a Brady violation because such information either was in possession of defense or could have been obtained from sources other than state; (2) trial counsel was not ineffective in failing to discover this information or present it to the jury; and (3) the trial judge did not err in denying Provenzano's motion for recusal. See, Provenzano v. State, 616 So. 2d 428 (Fla. 1993).

represented by Larry Helm Spalding, Capital Collateral Representative, Martin J. McClain, Chief Asst. CCR, Kenneth D. Driggs, Asst. CCR and Harun Shabazz, Staff Atty., Office of Capital Collateral Representative, Tallahassee. See, Provenzano v. State, 616 So. 2d 428, 429 (Fla. 1993).

FEDERAL HABEAS CORPUS PROCEEDINGS

In 1993, Provenzano filed a petition for writ of habeas corpus in federal district court pursuant to 28 U.S.C. §2254.[6] On March 3, 1997, the district court denied habeas relief in a comprehensive written order. Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M. D. Fla. 1997). In this federal habeas corpus proceeding, Provenzano

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[6]In denying relief on Provenzano's subsequent federal habeas corpus appeal, Provenzano v. Singletary, 148 F. 3d 1327 (11th Cir. 1998) the Eleventh Circuit understandably criticized the massive 335-petition which was filed in the district court, stating, "Provenzano's counsel in the district court, who were attorneys with the Office of Capital Collateral Representative, filed a 335-page habeas petition which included much legal argument and extensive quotations from the record and various documents. We have previously warned that such a prolix filing, resembling a treatise more than a petition, is not consistent with the requirements of Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Court, and is subject to being struck. "Attorneys who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courts but also to their clients." *Spaziano v. Singletary,* 36 F.3d 1028, 1031 n.2 (11th Cir.1994), *cert. denied,* 513 U.S. 1115, 115 S.Ct. 911, 130 L.Ed.2d 793 (1995); *accord, Buenoano v. Singletary,* 74 F.3d 1078, 1081 n.1 (11th Cir.1996) ("The petition in this case reads as if it were both petition and brief.... This practice, which has become common, is not contemplated either by the habeas rules or the civil rules and makes it difficult for courts to identify discrete claims in a petition. We expressly disapprove the practice."); *Kennedy v. Herring,* 54 F.3d 678, 681-82 n.1 (11th Cir.1995). . ." See, Provenzano, 148 F.2d at 1328, fn 1.

was represented by Michael J. Minerva, Capital Collateral Counsel, Tallahassee, FL, Martin J. McClain, Capital Collateral Regional Counsel, Miami, FL, Gail E. Anderson, Capital Collateral Regional Counsel, Greensboro, FL. See, Provenzano v. Singletary, 3 F. Supp. 2d 1353, 1359 (M. D. Fla. 1997).

On May 5, 1997, a notice of appeal was filed on Provenzano's behalf by Martin J. McClain, an attorney with CCR. On June 13, 1997, two separate appearance of counsel forms were filed with the Eleventh Circuit, one signed by Mr. McClain and the other by Jennifer M. Corey, another CCR attorney. (PCR II/110) On October 17, 1997, CCRC-Middle filed a "Notice of Loss of Designated Counsel" with United States Court of Appeal for the Eleventh Circuit. This notice, filed October 17, 1997, was signed by attorney John Moser, as the "attorney for Mr. Provenzano." In this notice, CCRC-Middle agreed that under the statute [Ch. 97-313, Florida Session Laws], Provenzano's case "will be handled by the Middle Regional office in Tampa." (PCR II/80-83). However, CCRC-Middle alleged that Provenzano "lost" his designated counsel, Martin McClain and Jennifer Corey, because they were not employed by CCRC-Middle and CCRC-Middle was unable to designate counsel for Provenzano at that time. In this same notice, CCRC-Middle informed the Eleventh Circuit that Chief Assistant CCR Terri Backhus resigned effective November, 1997 [from CCRC-Middle]. (PCR II/82).

On November 12, 1997, the Eleventh Circuit granted, albeit

reluctantly, a motion to withdraw filed by Martin J. McClain and Jennifer M. Corey "because the motion does proffer the name of an experienced counsel [Terri L. Backhus] who is ready, willing and able to undertake the representation of Provenzano's current counsel" and the Eleventh Circuit appointed attorney Terri Backhus, former Chief Assistant CCR and CCRC-Middle, to represent Mr. Provenzano "in this Court." (PCR II/105, citing to Attachment B)

On August 6, 1998, the Eleventh Circuit affirmed the district court's order, finding that district court thoroughly analyzed each of the many claims raised by Provenzano, and supplementing the district court's order only as to (1) the change of venue claims; (2) ineffective assistance of trial counsel; (3) the Ake v. Oklahoma claim; (4) the aggravating circumstances claim; and (5) the Caldwell v. Mississippi claim. Provenzano v. Singletary, 148 F. 3d 1327 (11th Cir. 1998)[7]

On March 22, 1999, the United States Supreme Court denied Provenzano's motion to direct the Clerk to file his petition for writ of certiorari out-of-time. Provenzano v. Singletary, 119 S. Ct. 1247, 67 USLW 3585 (March 22, 1999).

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[7]Provenzano raised twelve issues on appeal in the Eleventh Circuit: (1) The Change of Venue Claim; (2) Guilt Phase Ineffective Assistance of Counsel; (3) Penalty Phase Ineffective Assistance of Counsel; (4) The Ake V. Oklahoma Claim; (5) No Adversarial Testing Claim; (6) Vague and Overbroad Aggravating Circumstances Claim; (7) The Competency Claim; (8) Appellate Ineffective Assistance of Counsel; (9) The Burden-shifting Claim; (10) The Failure to Find Mitigation Claim; (11) The Caldwell Claim; and (12) Applicability of the PLRA

1999 Post-Conviction Proceedings

On June 9, 1999, the Governor signed a death warrant for Thomas Provenzano. The execution is currently scheduled for July 7, 1999.

On June 14, 1999, a hearing was held before the Honorable Richard Conrad concerning two pending motions: (1) CCRC-Middle's "Motion for Determination of Counsel" and (2) the State's "Motion to Transfer Postconviction Proceedings to the Original Trial and Post-Conviction Judge." (PCR II/45-71). Mr. Provenzano was present in court during this hearing. (PCR II/ 48).

At the conclusion of the June 14 hearing on CCRC's Motion for Determination of Counsel, Judge Conrad inquired of Mr. Provenzano,

> THE COURT: Mr. Provenzano, the one thing I do want to be at least somewhat comfortable with is that the -- for the sake of our discussion, I wanted to talk in terms of the procedures that you've heard from C.C.R. Have your lawyers or all of them at least kept you abreast of the conflict problems here and the problems in dealing with the three divisions of C.C.R. and Ms. Backhus? Have you heard this?
>
> THE DEFENDANT: My lawyer, Terri Backhus, the last time I seen her, she advised me that she would not be able to represent me any more and cannot.
>
> THE COURT: Here, right, or --
>
> THE DEFENDANT: When the United States Supreme Court denied my appeal, at that time she told me that she would not represent me any more and could not.
>
> THE COURT: When was that, Mr. Provenzano?

THE DEFENDANT: She didn't tell me who would represent me after that.

THE COURT: When was that; do you remember?

THE DEFENDANT: No.

THE COURT: Have you got a ball park?

THE DEFENDANT: Yeah. Two months ago, I believe. Approximately two months ago.

(PCR II/69-70)

On June 15, 1999, Judge Conrad granted the State's "Motion to Transfer Postconviction Proceedings to the Original Trial and Post-Conviction Judge" to the extent this matter was referred to Chief Judge Belvin Perry in accordance with the provisions of Florida Rule of Judicial Administration, 2.050(b)(4)(R 123).

On June 16, 1999, Chief Judge Perry notified the parties that the original trial judge, retired Senior Judge Clifford Shepard, was unavailable. That same day, Judge Perry entered an order of reassignment directing the Honorable Clarence T. Johnson, Jr., a Senior Judge temporarily assigned to the Ninth Circuit, to preside in this case. (PCR II/127-128).

In light of the order of reassignment, a second hearing was held on Friday, June 18, 1999, in order to address CCRC-Middle's Motion for Determination of Counsel. Once again, Mr. Provenzano was present in the courtroom. (PCR I/4). Attorney Terri Backhus, counsel for Mr. Provenzano in the Eleventh Circuit, appeared via telephone and informed the trial court that, due to existing

obligations to other clients, she was unwilling and unable to represent Mr. Provenzano in any death warrant proceedings. (PCR I/34-37) Ms. Backhus advised the court that the Provenzano files and records in her possession were merely duplicates of records already held by CCRC-Middle; however, she was "more than willing" to turn over any of her files to CCRC-Middle. (PCR I/37).

Senior Judge Johnson granted the Motion for Determination of Counsel and ordered that the Office of the Capital Collateral Regional Counsel-Middle be appointed as counsel for the defendant, Thomas Harrison Provenzano, in this case. (PCR I/39; II/129).

On June 22, 1999, CCRC-Middle, on Mr. Provenzano's behalf, filed a ninety-five page "Successor Motion to Vacate Judgment and Sentence, and Request for Evidentiary Hearing and Stay of Execution". Provenzano's successor motion, his third, alleged the following six grounds for post-conviction relief:

> Claim I: Florida's electric chair in its present condition constitutes cruel and/or unusual punishment and its use for execution is unconstitutional because it does not result in instant death and inflicts severe mutilation on the body of the condemned prisoner. (Motion, pages 21-62)
>
> Claim II: Florida's current use of judicial electrocution as its sole method of execution is unconstitutional because it violates the evolving standards of decency that mark the progress of a maturing society. (Motion, pages 63-65)
>
> Claim III: Access to the files and records pertaining to Mr Provenzano's case in the possession of certain State agencies has been withheld in violation of Chapter 119, Florida Statutes, Rule 3.852, Florida Rules of Criminal Procedure, the sixth, eighth and fourteenth amendments to

the United States Constitution and the corresponding provisions of the Florida Constitution. Further, certain documents were withheld in violation of Brady v. Maryland.
(Motion, pages 66-75)

Claim IV: Mr. Provenzano is being denied his constitutional right to due process to receive effective representation.
(Motion, pages 75-80)

Claim V: Mr. Provenzano's fifth, sixth, eight, and fourteenth constitutional amendment rights are being violated in that Mr. Provenzano is incompetent to proceed in his postconviction proceedings.
(Motion, pages 80-87)

Claim VI: Defendant's fifth, sixth, eighth, and fourteenth amendment rights to the United States and Florida's Constitution were violated when the court failed to utilize its discretionary authority and counsel failed to request an individualized sequestered voir dire in light of the extensive publicity of the case.
(Motion, pages 87-93)

(R. I/4-98)

The State filed its response in opposition to Provenzano's successor motion to vacate that afternoon. (R II/ 519-558).

The following day, June 23, 1999, a Huff hearing was held before the trial court. In addition to Provenzano's successor motion to vacate, the trial court also addressed the defendant's request for an evidentiary hearing and stay of execution and motion to compel and to take depositions concerning public records disclosure.

During the Huff hearing held on June 23, 1999, Attorney Susan Schwartz, Assistant General Counsel for the Department of Corrections, appeared via telephone and addressed DOC's compliance

with CCRC-Middle's public records requests concerning the electric chair. Sometime after 5:00 p.m. on Friday, June 18, 1999, CCRC-Middle, on Mr. Provenzano's behalf, submitted two separate public records demands to the Department of Corrections in Tallahassee requesting copies of any (1) documents pertaining to the electric chair and (2) medical records on inmate Provenzano. Provenzano's public records demand to DOC specifically advised that DOC need not furnish anything which was furnished in response to requests made on behalf of Allen Lee Davis. (T II/5-6). On Monday, June 21, 1999, during the Huff hearing in the Davis case, Ms. Schwartz hand-delivered copies of all of the DOC records obtained from Florida State Prison concerning the electric chair, including blueprints, to CCRC attorney McClain. (T II/7-9).

Addressing Provenzano's competency claim during the Huff hearing held on June 23, 1999, Senior Judge Johnson inquired,

> THE COURT: Let me make sure that I understand you.
>
> You are talking about competency to proceed her, not competency to be executed.
>
> MR. REITER: At this point not competency.
>
> THE COURT: You have got a predicate to go before the Governor on that, right, on that particular issue.
>
> MR. REITER: That's correct.
>
> (T I/34-35)

On June 24, 1999, Senior Judge Johnson entered a 23-page written order denying Provenzano's successor Motion to Vacate. (R

III/748-770). The issues raised in Provenzano's successive motion were either untimely, procedurally barred, insufficiently pled, or without merit. Among other things, the trial court found that Provenzano's multiple challenges to the electric chair were barred under Jones v. State, 701 So. 2d 76 (Fla. 1997) and Provenzano's own exhibits establish that DOC is attempting to maintain the "reliability of the electric chair and its components and ensure that no future problems occur during the execution by electrocution process." (R IV/759). Additionally, the fact that four executions have been successfully carried out [since Jones], "shows that [DOC's] efforts have been successful." (See R IV/759).

The trial court also denied Provenzano's Motion for Competency Determination, finding that Provenzano's counsel, "did not set forth any claims in Provenzano's successive motion for postconviction relief . . . that are not procedurally barred, that are not purely legal issues, or that involve specific factual matters at issue that require Provenzano's input . . . [t]here is no basis for ordering a determination of Provenzano's competency to proceed in postconviction proceedings." (R III/745-747). The trial court further denied Provenzano's Motion to Compel, specifically rejecting CCRC's claim that DOC failed to comply with Provenzano's public records requests. (R III/771-772)

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Provenzano's Emergency Motion for Temporary Stay of Execution. Provenzano has offered no reasonable basis for the granting of a stay in this case. Since substantial grounds of a colorable issue upon which relief might be granted have not been presented, the stay was properly denied.

II. The trial court properly denied Provenzano's request for clemency counsel. The Governor of Florida has already indicated in the signing of the death warrant in this case that clemency is not appropriate, and Provenzano has failed to demonstrate any basis for any court to interfere with the executive function of the consideration of clemency.

III. The trial court properly denied Provenzano's third motion for postconviction relief. The issues raised in this successive motion were either untimely, procedurally barred, insufficiently pled, or without merit. No error in the summary denial of this motion has been presented.

IV. The trial court properly denied Provenzano's requests for further investigation into the disclosure of public records by state agencies. The finding of the court below as to compliance with all of Provenzano's recent public records requests is supported by the record, and no basis for delay of this execution on these grounds has been offered.

V. The trial court properly denied Provenzano's Motion for

Competency Determination. Provenzano has failed to identify any potential postconviction issues which would be cognizable at this time and which require Provenzano's input for the development of factual claims. In addition, he has failed to offer any reasonable basis to believe that he might be incompetent to participate in any postconviction proceedings.

ARGUMENT

ISSUE I

DENIAL OF DEFENDANT'S EMERGENCY MOTION FOR TEMPORARY STAY OF EXECUTION.

The trial court correctly declined to grant a stay of execution in connection with Provenzano's third Rule 3.850 motion to vacate, which was filed more than a dozen years after his judgment and sentence became final. Provenzano's successor motion is procedurally barred under Rule 3.850 and neither exception to the clear time bar exists in this case. As the trial court recognized, Provenzano does not allege the establishment of and retroactive application of any new fundamental constitutional right; therefore, in order to be entitled to relief, Provenzano must establish that the "facts upon which his claims are predicated were unknown to him or his counsel, and that they could not have been ascertained by the exercise of due diligence. Further, this newly discovered evidence must be of a nature that would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911 (Fla. 1991); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). (R IV/753)

Provenzano has not asserted due diligence during the preceding decade and cannot demonstrate that any of his successive postconviction claims are based on "newly discovered" evidence which would *probably produce an acquittal on retrial.* Correll v.

State, 698 So. 2d 522 (Fla. 1997); Jones v. State, 591 So. 2d 911 (Fla. 1993). A stay of execution should be denied when a defendant fails to demonstrate that he might be entitled to post-conviction relief. Compare, State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); State ex rel Russell v. Schaeffer, 467 So. 2d 698 (Fla 1985); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callahan v. State, 461 So. 2d 1354 (Fla. 1984). No stay of execution is justified in the instant case. See, Delo v. Stokes, 495 U.S. 320, 110 S.Ct. 1880, 109 L.Ed.2d 325 (1990); Antone v. Dugger, 465 U.S. 200, 104 S.Ct. 62, 79 L.Ed.2d 147 (1984). "A stay of execution pending disposition of a second or successive [motion] should be granted only when there are 'substantial grounds upon which relief might be granted.'" Bowersox v. Williams, 518 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996), (quoting Delo v. Stokes, 495 U.S. 320, 321, 110 S.Ct. 1880, 1881, 109 L.Ed.2d 325 (1990), quoting Barefoot v. Estelle, 463 U.S. 880, 895, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983)); See, Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues). As the United States Supreme Court stated in Gomez v. U.S. Dist. Court for Northern Dist. of California, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992), "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute

attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id. at 1653.

Based on the arguments set forth in the issues which follow, the State maintains that it can be conclusively shown that Provenzano, based on the files and records before this Court, cannot establish any entitlement to relief. Any request for stay of execution should be denied. Darden v. State, 521 So. 2d 1103 (Fla. 1988)(court not required to issue a stay on a successive motion for post-conviction relief even if the same issue is pending in the United States Supreme Court in another case.)

ISSUE II

DENIAL OF MOTION FOR APPOINTMENT OF CLEMENCY COUNSEL.

Provenzano also challenges the trial court's denial of his request for appointment of clemency counsel. This same argument was rejected in Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986), wherein this Court stated:

> In the final claim raised under his 3.850 motion, appellant contends that he must be allowed time to prepare and present an application for executive clemency before sentence may be carried out in this case. In the death warrant authorizing appellant's execution, the governor attests to the fact that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate." It is not our prerogative to second-guess the application of this exclusive executive function. First, the principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted matter of executive grace. Sullivan v. Askew, 348 So.2d 312 (Fla.), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977). As noted in In re Advisory Opinion of the Governor, 334 So.2d 561, 562-63 (Fla. 1976), "[t]his Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government." See also Ex Parte White, 131 Fla. 83, 178 So. 876 (1938).
>
> Bundy v. State, 497 So. 2d at 1211

In the death warrant authorizing Provenzano's execution, Governor Bush attests to the fact that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate." (R III/476) As clemency has already been denied, the appointment of counsel is not

appropriate. Thus, the trial court properly denied the motion.

ISSUE III

DENIAL OF SUCCESSOR MOTION TO VACATE JUDGMENT AND SENTENCE, AND REQUEST FOR EVIDENTIARY HEARING AND STAY OF EXECUTION; DENIAL OF MOTION TO VACATE CONVICTION (RULE 3.850, FLA.R.CRIM.P).

This is Provenzano's third motion for post-conviction relief to come before this Court for review. As a successive motion, the claims raised are subject to dismissal as an abuse of process. Recently, in Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999), this Court rejected Downs's second 3.850 motion, stating:

> This is Downs' second 3.850 motion. Under rule 3.850 "[a] successive motion may be dismissed if it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the failure to raise those issues in a prior motion constitutes an abuse of process." *Foster v. State*, 614 So. 2d 455, 458 (Fla. 1992); *see also Zeigler v. State*, 632 So. 2d 48, 51 (Fla. 1993). Although Downs raises this claim in the form of a *Brady* violation, Downs has not shown in his motion that this same claim could not have been raised at the time the initial 3.850 motion was filed; i.e., Downs has not demonstrated that this allegedly withheld memorandum could not have been discovered through the exercise of due diligence prior to the time the initial motion was filed.[8] *See Mills*, 684 So. 2d at 804-05; *Zeigler*, 632 So. 2d at 51.
>
> Downs at S233 (e.s.)

The instant successor motion to vacate was properly denied as it failed to allege new or different grounds for relief and the prior determination was on the merits. The failure to raise the new and different grounds constitutes an abuse of process.

Newly Discovered Evidence

In Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), this Court set forth the standard for reviewing claims of newly discovered evidence. To establish a newly discovered evidence claim, a defendant must prove the following:

> 1) The facts must have been unknown by trial counsel at the time of trial.
>
> 2) Defendant or his counsel could not have known them by the use of due diligence.
>
> 3) The evidence would probably produce an acquittal on retrial.

Successive postconviction relief motions filed after the expiration of the time limit must be based on newly discovered evidence. Porter v. State, 653 So. 2d 374 (Fla.), cert. denied 514 U.S. 1092, 115 S.Ct. 1816, 131 L.Ed.2d 739 (1995). See, also, Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999)(Where a defendant is previously aware of the evidence he now claims is newly discovered, claim is procedurally barred.)

Finality

In Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this Court emphasized:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final

> simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.
>
> Id. at 925.

Provenzano cannot excuse a procedural bar by simply asserting that counsel was ineffective for failing to raise a defaulted claim. Robinson v. State, 707 So. 2d 688, 700 (Fla. 1998); Johnson v. State, 695 So. 2d 263, 265 (Fla. 1996).

In the instant case, Provenzano raised the following claims in his third rule 3.850 motion for post-conviction relief. For the following reasons, the trial court did not err in summarily denying Provenzano's successor motion.

A. CONSTITUTIONALITY OF JUDICIAL ELECTROCUTION

The trial court properly denied Provenzano's multiple challenges to the electric chair, which were virtually identical to the arguments raised by Allen Lee Davis, another death row inmate facing imminent execution. To the extent that Provenzano still contends that execution by electrocution is unconstitutional per se, it is both procedurally barred because it could have been raised in previous petitions for relief, and meritless. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997); Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997); Jones v. State, 701 So. 2d 76 (Fla. 1997),

cert. denied, ___ U.S. ___, 118 S.Ct. 1298, 140 L.Ed.2d 335 (1998). See, also, Mills v. State, 684 So. 2d 801 (Fla. 1996); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(matters that were, or could have been raised on direct appeal cannot be raised in a postconviction claim).

As both Davis and Provenzano must recognize, their biggest obstacle in presenting their electrocution claim is this court's decision in Jones, as well as the four subsequent executions which took place without incident more than a year ago, in March of 1998.

On April 3, 1997, in response to the circumstances of the execution of Pedro Medina, Leo Jones filed a petition in this Court seeking a determination whether electrocution in Florida is cruel and unusual punishment. This court ordered the circuit court of Duval County, Judge A.C. Soud presiding, to conduct a full evidentiary hearing regarding the present working condition of Florida's electric chair. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997). This Court summarized Judge Soud's factual findings as being:

> 1. The procedures used in the last seventeen Florida executions have been consistently followed, and no malfunctions occurred until the execution of Pedro Medina.
>
> 2. The flame and smoke observed during Medina's execution were caused by insufficient saline solution on the sponge in the headpiece of the electric chair.
>
> 3. Medina's brain was instantly and massively depolarized within milliseconds of the initial

surge of electricity. He suffered no conscious pain.

4. Consistent with recommendations of experts appointed by the Governor following Medina's execution, the Department of Corrections has now adopted as a matter of policy written "Testing Procedures for Electric Chair" and "Electrocution Day Procedures."

5. Florida's electric chair--its apparatus, equipment, and electric circuitry--is in excellent condition.

6. Florida's death chamber staff is qualified and competent to carry out executions.

7. All inmates who will hereafter be executed in Florida's electric chair will suffer no conscious pain.

Jones v. State, supra, 701 So. 2d at 77. This Court summarized Judge Soud's conclusions of law as follows:

1. Cruel or unusual punishment is defined by the Courts as the wanton infliction of unnecessary pain.

2. Florida's electric chair, in past executions, did not wantonly inflict unnecessary pain, and therefore, did not constitute cruel or unusual punishment.

3. Florida's electric chair, as it is to be employed in future executions pursuant to the Department of Corrections' written testing procedures and execution day procedures, will result in death without inflicting wanton and unnecessary pain, and therefore, will not constitute cruel or unusual punishment.

4. Florida's electric chair in its present condition does not constitute cruel or unusual punishment.

5. During the hearing it has been strongly suggested and inferred by Jones that Florida's

> electric chair as the method of judicial execution should be abandoned in favor of judicial execution by lethal injection. Such a move to adopt lethal injection is not within the constitutional prerogative of the Courts of this State, but rather lies solely within the prerogative of the Legislature of the State of Florida.

Jones v. State, supra, 701 So. 2d at 77-78. This Court affirmed these findings, holding "that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment." Id. at 80. Since this decision was issued, Gerald Stano, Leo Jones, Judy Buenoano and Daniel Remeta have been executed, and many of them, as well as Eduardo Lopez, made similar claims for relief, relying -- like Jones -- upon the circumstances of the Medina electrocution and upon the declarations of many of the same experts who had testified at the Jones hearings.

In addition, however, they also -- like both Davis and Provenzano -- relied upon alleged circumstances of executions carried out since Jones was decided. For example, Remeta relied upon alleged circumstances of the Jones execution and, as well, the executions of Buenoano and Gerald Stano. Lopez relied upon alleged circumstances of all these post-Medina executions and, as well, upon alleged circumstances of the Remeta execution. In short, all of these death-sentenced prisoners made the same kind of allegations Provenzano makes in this case. All were denied evidentiary hearings on these claims for relief, and these summary denials were affirmed by this Court. Remeta v. State, 710 So. 2d

543, 546 (Fla. 1998)(Court concluded, "as we recently have in other cases," that Remeta was entitled to neither hearing nor relief on claim that the manner in which Florida proposes to carry out his electrocutions violates cruel and unusual punishment provisions of both state and federal constitutions); Remeta v. State, 717 So. 2d 536 (Fla. 1998)(summarily affirming denial without hearing of additional electric-chair claim based upon executions subsequent to Medina); Buenoano v. State, 717 So. 2d 529 (Fla. 1998)(summarily affirming denial of similar claim); Lopez v. Singletary, 719 So. 2d 287 (Fla. 1998)(summarily denying -- without requiring response from State -- an all-writs petition raising similar electric-chair claim). Just as the electric-chair claims of Remeta, Buenoano and Lopez were properly denied summarily, so was Provenzano's claim properly denied without an evidentiary hearing.

Provenzano argued below that Jones, Remeta or Lopez should not apply because the wooden chair has recently been replaced, that DOC's execution-day protocols cannot be followed, that humans vary in their resistance, and that the electrical circuitry has needed maintenance since the Jones hearing in 1997. For the following reasons, Provenzano failed to establish any entitlement to relief on any of these claims.

As to the replacement of the wooden chair, his claim is not predicated upon any constitutional basis. The chair is merely a place for the condemned prisoner to sit; there are no electrical

connections on the chair itself. Provenzano cannot even allege, much less demonstrate, how replacing one oak chair with another oak chair can have any effect on the administration of electricity through the condemned prisoner. Four convicted murderers were successfully electrocuted since the Jones hearing, including Jones himself. The fact that, following these executions, it was determined that the old chair may not have continued to be structurally sound hardly establishes that the chair was not sufficiently sound in 1997 for its intended purpose -- which is simply to provide a seat for the prisoner. As established in Jones, there is in fact *no* electrical circuitry in the chair itself. The prisoner is merely strapped into the chair. The electricity is administered through electrodes attached to the prisoner's head and leg. Wires run from these electrodes to the electrical equipment. Provenzano has not alleged how the condition of the wooden chair could affect the transmission of electricity through the body of the prisoner. Nothing disclosed about the condition of the old wooden chair or its new replacement provides any basis for hearing or relief.

In support of his claim that the execution-day protocols cannot be followed, Provenzano relied on a memorandum from engineer Ira Whitlock dated October 23, 1998, attached to petitioner's motion as Appendix F. In rejecting both the constitutional challenge to execution by electrocution and allegations of "newly

discovered" evidence regarding variations in current levels of electricity, the trial court painstakingly reviewed Provenzano's exhibits, including the Whitlock memorandum, and, in denying relief, explained:

> Based upon Jones v. Butterworth, 691 So. 2d 481, and Jones v. Butterworth, 695 So. 2d 679, this Court rejects any claim by Provenzano that execution by electrocution is per se unconstitutional.
>
> Provenzano's claim regarding the variations in the voltage levels of individuals who were executed in March of 1998 is refuted by Appendix F to his motion. In a memo dated October 23, 1998, from Ira E. Whitlock of Consolidated Power Services, Inc., to Susan Schwartz of the Florida Department of Corrections, Whitlock states:
>
> > This memo is sent to you to address the language contained in paragraph 1 of the "Electrocution day Procedures" effective for executions after 16 April 1997.
> >
> > Present Language is as follows:
> > 7:00 AM I. The automatic cycle begins with the programmed 2,300 volts, 9.5 amps, for 8 seconds; 1,000 volts, 4 amps for 22 seconds; and 2,300 volts, 9.5 amps for 8 seconds . . . . This language was adopted verbatim from the language developed in the April 16, 1997 testing procedures for the chair, specifically paragraph "C."
> >
> > **Although this language is technically correct (and is correct in terms of voltage and current during testing with a fixed resistance load bank) it may tend to confuse someone who expects these same results during the electrocution process.**
> >
> > **It is absolutely true that the same preprogrammed conditions that are used in the test are indeed used in the**

electrocution process. However, the recorded results during the electrocution will be different because of the different characteristics of the inmates; i.e., weight, muscle tone, fat content, skeletal configuration, size, body build etc. These characteristics combine to determine the body resistance of the inmate, which will be different for each individual.

The most fundamental equation in electricity is Ohms law, which was based upon experiments conducted by George Simon Ohm in 1826 which showed for constant voltage when resistance increased current decreased and when resistance decreased, current increased. This is reflected in his equation E=(I)(R) where E = voltage, I = current and R = resistance. Rewritten it becomes I = E/R which means current is the voltage in the circuit divided by the resistance.

During cycle I in the test procedure we connect a 260 ohm load bank into the 2,300 volt supply. By ohms law this gives us 8.85 amperes in the circuit. During the execution process the current by ohms law will depend upon the inmate body resistance which normally will vary between 200-500 ohms, With this variation, you could expect to see currents from 4.6 to 11.5 amperes reflected on the chart recorder. Cycle 3 will be the same as just described for cycle 1.

During the testing in cycle 2 a 400 ohm reactor is inserted in series with 260 ohm load bank. By ohms law the current in the circuit now becomes 2,300 volts/(400 + 260 ohms) or 3.49 amperes. The recorder during the cycle only measures the voltage drop across the load bank, or in the case of the execution process, across the inmate.

During cycle 2 in the electrocution

process you can expect relative figures of 2.5 to 3.9 amperes (using the 200 - 500 ohms as the projected standard deviation of the human body resistance.) Again using ohms law the voltage indicated on the chart recording and the actual voltage differential across the inmate will vary from approximately 750 volts to 1250 volts.

These figures are normal and constant with the physical properties of basic electricity and by no means what-so-ever indicate a malfunction of the electrocution process.

I might also add it is understood in Electrical Generation line to line voltages are nominal figures and can vary. Industry norm can be up to 10 percent of the indicated 2,300 volts.
(emphasis added).

Whitlock's memo indicates that the variations in the recorded data regarding the level of current that passes through an individual's body during the electrocution varies, based upon a basic premise of electricity law. This premise of electricity law has, apparently, been in existence for over one hundred and fifty years. Therefore, through the exercise of reasonable diligence, one could have easily ascertained that the voltage differential across each individual inmate's body would vary based upon the resistance created by that inmate's body. Thus, this Court finds that the basic claim regarding variations in voltage differentials across different inmates bodies is procedurally barred on the basis that it could have previously been ascertained through the exercise of reasonable diligence, and raised in Provenzano's prior motion for postconviction relief.

With regard to the specific variations in the voltage levels recorded during testing and the voltage levels recorded during the

> execution of inmates, Whitlock's memo explains that the preprogrammed voltage levels will consistently be administered during testing and to each and every inmate during the execution process. "However, the recorded results during the electrocution [of an inmate] will be different because of the different characteristics of the inmates; i.e., weight, muscle tone, fat content, skeletal configuration, size, body build etc." Therefore, although each inmate will receive the same level of voltage, give or take up to 10 percent based upon normal fluctuations in the flow of electricity, there will be normal variations in the readings regarding the current level that passes through the inmates body due to the resistance created by that inmate's body. The fact that there is now a document in existence which states, based upon a basic electricity law principle that is over one hundred and fifty years old, that there will be variations in the recorded data does not render the electrocution process any different now that the circuit court and the Florida Supreme Court in Jones found it to be. Thus, this Court finds that Jones, 701 So. 2d 76 is still controlling.

(R IV/ 754-757)(e.s.)

Whitlock's October 23, 1998 memorandum contains nothing new. The language in the protocols, as Whitlock states, is "technically correct" and "absolutely true." (R I/124). As Judge Johnson found, based on variations to be expected in the recorded data and a basic electricity law principle that is over 150 years old, Provenzano presented no credible basis to remotely undermine the validity of this Court's holding in Jones.

Provenzano next argued below that DOC is not competent to carry out executions; this claim is ostensibly premised on the

disclosure of records which were requested by CCRC-Middle on June 18, 1999, and were provided by DOC three days later, June 21, 1999.

In arguing that DOC was not competent to carry out the scheduled execution, Provenzano argued that the public records produced after the Jones hearing establish that the wooden chair had to either be repaired or replaced, or it would fail, and that the electrical system had not been replaced in 1993 or 1994. Contrary to Provenzano's claim, the records concerning alleged changes and improvements in the electric chair represented a correct interpretation and adherence to the protocols approved in Jones, rather than the opposite. The trial court correctly denied relief on Provenzano's speculative and conclusory allegations and specifically found, based on Provenzano's own exhibits, that the fact that DOC has engaged in an active testing and maintenance procedures "following the Jones hearing establishes that DOC is attempting to maintain the reliability of the electric chair and its components and ensure that no future problems occur during the execution by electrocution process." In rejecting Provenzano's claim that his recently-requested public records would entitle Provenzano to any relief, the trial court explained:

> In this subclaim, Provenzano asserts that the electric chair has continued to malfunction after the Medina execution, based upon reports of variations in current levels and reports of smoke coming from the legs of individuals who were executed in March of 1998. Further, Provenzano claims that based upon public records produced during the Jones hearing, the evidence established at the Jones hearing was inaccurate, and

therefore, that the facts and conclusions drawn from the Jones evidentiary hearing are inaccurate. Specifically, Provenzano contends that public records produced after the Jones hearing establish that the chair was not in excellent condition, but rather that it was about to fail. This assertion is based upon the fact that a subsequent analysis of the chair recommended that the wooden chair be either repaired or replaced, because if it was not repaired or replaced, it would fail. Additionally, Provenzano claims that the electrical system of the electric chair had not been replaced in 1993 or 1994, as DOC had claimed at the Jones hearing.

This Court finds Provenzano's argument regarding the alleged "continued malfunctions" of the electric chair to be nothing more than conclusory allegations. Further, for his claim that public records produced since the Jones hearing establish that the Jones decision is based on inaccurate information, Provenzano relies on various documents regarding maintenance of the electrical components of the electric chair. One of those documents describes some of the maintenance performed on the electrical breakers. It states "Most importantly if you should need the use of this facility, be assured that it can and will function."[1] Further, Provenzano relies upon reports regarding the condition of the old wooden chair and the new wooden chair. These reports indicate that DOC was advised after the Jones hearing that the old chair would fail due to cracks and other structural problems that had resulted from many years of use. Provenzano contends this evidence that the chair would fail was contrary to the claims made at the Jones evidentiary hearing that the chair was in excellent condition.

This Court disagrees with Defendant's arguments that the documents produced after the Jones hearing show that the evidence established at the Jones hearing was inaccurate, and therefore, that the fact and conclusions drawn from the Jones hearing are inaccurate. To the contrary, the fact that DOC has engaged in an active testing and maintenance procedures following the Medina execution and following the Jones hearing establishes that DOC is attempting to maintain the reliability of the electric chair and its components and ensure that no future problems occur during the execution by electrocution process. Furthermore, the fact that DOC successfully carried out the executions of Stano, Jones, Buenoano, and Remeta shows that its efforts have been

> successful. This Court finds, therefore, that there has been nothing presented to indicate that DOC no longer is competent to carry out executions.

(R IV/ 758-759)

The Eighth Amendment requires that a chosen method of execution must minimize the risk of unnecessary pain, and that, as much as humanly possible, feasible measures must be taken to minimize any risk of mistake or malfunction. See, Glass v. Louisiana, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting from denial of certiorari); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). The voluminous materials provided to CCRC by the Department of Corrections and offered by Provenzano as support for his Eighth Amendment claim establish only that the State of Florida is making every effort to insure that executions in this State are, and will remain, consistent with Eighth Amendment principles, in that periodic testing, routine maintenance, and, where necessary, rebuilding or replacement of parts are all taking place as appropriate.

The matters asserted by Provenzano do not call into question the Department of Corrections' compliance with its execution protocols, and the existence of routine testing, maintenance or other procedures carried out in accordance with the protocols. Provenzano's attack on the manner in which electrocutions in Florida are carried out is procedurally barred; what he offers essentially is based upon events alleged to have occurred during

electrocutions which, at the latest, occurred over a year ago. Claims must be presented within a year of any alleged newly-discovered evidence. Mills v. State, 684 So. 2d 801, 804-05 (Fla. 1996).

All facts pertinent to Provenzano's electrocution claim, including his challenge under Article I, Sec. 17 of the Florida Constitution and the Eighth Amendment to the United States Constitution, have already been decided adversely to Provenzano in Jones v. State, 701 So. 2d 76 (Fla. 1997). Although not determinative of this Court's resolution, it is the State's position that the applicable constitutional standard to be applied in the resolution of any claim by Provenzano is that contained within the Eighth Amendment to the Constitution of the United States, in light of the recent amendment to Article I, Sec. 17 of the Florida Constitution which requires identical construction of the state and federal constitutional provisions in this regard, and provides for retroactive application in circumstances such as this.

B. EVOLVING STANDARDS OF DECENCY

In this claim, Provenzano contends that evolving standards of decency dictate that his death sentence must be vacated, as Florida is one of only a number of states still conducting executions by electrocution. The trial court properly rejected this claim in light of this Court's decision in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1297, 140

L.Ed.2d 335 (1998). (R IV/759-60)

Moreover, to the extent that this claim raises any matter arising more than one year prior to the filing of the motion below, it is procedurally barred under Mills v. State, 684 So. 2d 801, 804-5 (Fla. 1996). To the extent that anything "new" is presented, such should be no basis for relief under this Court's decision in Jones v. Butterworth, 691 So. 2d 481, 482 (Fla. 1997), and Jones v. State, supra. See also Pooler v. State, 704 So. 2d 1375, 1380-1 (Fla. 1997) (rejecting identical claim).

Further, precedent is clear that the "evolving trend" analysis is not a recognized basis for an attack upon a method of execution. See, e.g., Campbell v. Wood, 18 F.3d 662, 682 (9th Cir.), cert. denied, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994) ("The number of states using hanging is evidence of public perception, but sheds no light on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.") (cited in Jones v. State); Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 724 (1996) (fact that "more humane" means of execution existed does not render contested method cruel or unusual) (cited in Jones); Langford v. Day, 110 F.3d 1380, 1393 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 208 (1997).

Likewise, when the United States Supreme Court upheld

Florida's usage of its jury override in Spaziano v. Florida, 468 U.S. 447, 463-5, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), it specifically rejected a contention that the practice was constitutionally suspect because "only" four states utilized it, stating:

> The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.

This language was cited with favor more than a decade later in Harris v. Alabama, 513 U.S. 504, 510-11, 115 S.Ct. 1031, 1034 (1995), when the United States Supreme Court upheld Alabama's unique jury override provision. Provenzano's claim cannot serve as a basis for relief in any court, see, e.g., In re: Jones, 137 F.3d 1271, 1273-4 (11th Cir. 1998), and the circuit court's denial of relief as to this procedurally barred and meritless claim was not error, and should be affirmed.

C. PUBLIC RECORDS

This issue was properly denied, for the reasons stated in Issue IV, infra.

D. APPOINTMENT OF CCRC-MIDDLE AS COUNSEL

Provenzano also complains that he is being denied due process by the appointment of CCRC-Middle to represent him in the instant proceedings. This issue involves the same claim which was

dismissed by this Court on June 18, 1999. Therefore, the State submits that no further review is appropriate.

Assuming, *arguendo*, this claim is properly before this court, CCRC-Middle's complaint nevertheless must fail. CCRC-Middle is the agency which is statutorily authorized to represent this defendant and CCRC-Middle has been well aware of their statutory obligation since 1997. Thus, the trial court's challenged ruling is consistent with Section 27.702, Florida Statutes, and all applicable case law.

In the instant case, this Court is confronted with a situation in which a state collateral agency, as well as members of the Bar, seek to avoid responsibility for the representation of a death sentenced individual who faces scheduled execution. As in the cases of Jerry White, Joseph Spaziano, Pedro Medina, and Gerald Stano, Thomas Provenzano has been represented by CCR counsel and has engaged in more than a decade of collateral litigation in state and federal courts, exhausting every permissible challenge to his convictions and sentence of death. Like White, Spaziano, and Stano, Provenzano was represented by CCR at the initiation of the collateral proceedings and was later represented by a former CCR attorney throughout the remainder. As recognized by Judge Johnson below, CCR counsel represented Provenzano during his initial Rule 3.850 motion and appeal; his state habeas corpus proceeding in this Court; his second Rule 3.850 motion and post-conviction appeal; and

his federal habeas proceedings in the United States District Court. See, Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Provenzano v. Singletary, 3 F.Supp.2d 1353 (M.D. Fla. 1997). Now that execution of Provenzano's sentence is imminent, no one wishes to step forward and represent him, even though CCRC was, of course, created to prevent exactly this eventuality.

The trial court properly appointed CCRC-Middle to resume active representation in this case. See, Spaziano v. State, 660 So. 2d 1363 (Fla. 1995); White v. Singletary, 663 So. 2d 1324 (Fla. 1995); Stano v. Singletary, 692 So. 2d 180 (Fla. 1997). Pursuant to Section 27.701, Provenzano is CCRC-Middle's client because his case arose in the Ninth Judicial Circuit. During the hearing conducted on Friday, June 18, 1999, Terri Backhus, former chief assistant CCR and CCRC-Middle, informed presiding Judge Johnson that, due to her commitments to other clients, she is unable and unwilling to represent Provenzano. Provenzano did not cite any contrary authority which required the trial court to appoint private counsel, Terri Backhus, who specifically advised the trial court that she was unable to represent Provenzano in this death warrant proceeding. In the instant case, given Judge Johnson's exchange with attorney Terri Backhus during the Friday hearing as to her unavailability and unwillingness to proceed as counsel for Provenzano, it is clear that the trial court explored alternatives

to appointing CCRC-Middle and correctly appointed CCRC-Middle.

Provenzano argued that he should receive additional time under Scott v. State, 634 So. 2d 1062 (Fla. 1982). In distinguishing Scott, the trial court reasoned:

> There are two important distinctions between Provenzano's case and Scott. First, Scott's attorney withdrew from representing him just four days before he was scheduled to be executed. In the instant case, CCRC-Middle was ordered to represent Provenzano on a date much further away from Provenzano's scheduled execution.
>
> Second, in Scott, when Scott's counsel withdrew, CCR "entered" the case. See Scott at 1064. This Court presumes the use of the word "entered" means that CCR had not at any prior time represented Scott. In the instant case, CCR represented Provenzano when he filed his first motion for postconviction relief and petition for writ of habeas corpus, when he filed his second motion for postconviction relief, and when he filed his federal petition for writ of habeas corpus. See Provenzano, 561 So. 2d 541; Provenzano, 616 So. 2d 428; and Provenzano, 3 F. Supp. 2d 1353. It was only on appeal to the Eleventh Circuit Court of Appeals, and on his "petition for writ of certiorari out-of-time" to the United States Supreme Court that Provenzano was represented by private attorney, Terri Backhus.
>
> The Court finds Provenzano's arguments that CCRC-Middle should be treated as an entity which is entirely distinct from CCR unavailing. As stated by Terri Backhus stated [sic] at the hearing held June 18, 1999, on Provenzano's motion for determination of counsel, Backhus received all records she has on Provenzano's case from CCRC-Middle. Therefore, it seems that CCRC-Middle has been in possession of all of Provenzano's records since the time CCR was abolished and the Capital Collateral Regional Counsel offices were established. Accordingly, this Court finds that this case presents a very different case than Scott, and that Scott is not controlling.
>
> With regard to Provenzano's complaints that CCRC-Middle should not have been ordered to represent him, this Court has previously ruled that CCRC-Middle shall represent Provenzano in these postconviction proceedings.

> The Court has not been presented with any basis upon which to conclude that ruling should be revisited.
>
> (R IV:764-66)

Although Provenzano also alleged a claim purportedly based on a right to effective assistance of collateral counsel, this Court has also held that no such right exists. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) ("claims of ineffective assistance of postconviction counsel do not present a valid basis for relief"), cert. denied, 118 S. Ct. 1064 (1998). Inasmuch as there is no constitutional right to collateral counsel, any alleged lack of effective assistance of counsel in postconviction proceedings cannot create any right to file a successive motion seeking postconviction relief. See, Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318, 330, n. 5 (1992); Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989). Further, although Durocher v. Singletary, 623 So. 2d 482, 483 (Fla. 1993), discussed the *statutory* right to collateral counsel for capital defendants, the Florida Supreme Court also reiterated that the statute creating the Office of the Capital Collateral Representative "did not add anything to the substantive state-law or constitutional rights" of capital defendants. Id., at 483; Troedel v. State, 479 So. 2d 736, 737 (Fla. 1985).

Likewise, any suggestion that a right to effective collateral counsel may arise from the due process clause in accordance with Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821

(1985), has previously been rejected by the United States Supreme Court. In Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), the Court refused to extend the due process holding of Evitts to situations where a state has opted to afford collateral postconviction counsel to indigent inmates. In doing so, the Court noted that Evitts rested on a constitutional right to appointed counsel that does not exist in state postconviction proceedings. 481 U.S. at 558.

> [T]he decision below rests on a premise that we are unwilling to accept -- that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position -- at trial and on first appeal as of right. In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines annunciated in *Anders* [*v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)].

481 U.S. at 559. In Murray v. Giarratano, 492 U.S. at 7, 10, the Court confirmed that the holding of Finley is equally applicable in cases involving defendants sentenced to death. See also, Kennedy v. Herring, 54 F.3d 678, 684 (11th Cir. 1995) (in denying

petitioner's allegation that insufficient state funding for collateral counsel constituted "cause" so as to preclude application of a procedural bar, the court noted "It makes no sense to say that the state need not provide counsel at all, but that if the state opts to provide counsel, the state must fund counsel adequately or face the possibility of excusing procedural defaults."); Campbell v. Wood, 18 F.3d 662, 676-678 (9th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

On June 22, 1999, CCRC-Middle filed a ninety-five page successive motion to vacate in the circuit court, alleging six independent claims for relief and which clearly indicate their considerable familiarity with this case. (See, especially motion at pages-89-93, citing extensively to portions of the trial record.) Any claim of insufficient time to prepare a third motion to vacate is belied by the instant record. Provenzano, who was convicted and sentenced to death some fifteen years ago, has simply run out of cognizable issues, rather than sufficient time to prepare a successor petition. See, Hall v. State, 420 So. 2d 872, 874 (Fla. 1984) ["Additionally, we find the denial of the continuance of these proceedings to have been proper. Hall's current counsel notes that he had only fourteen days between his appointment and the scheduled execution and expresses his concern that Hall's right to due process and access to the courts might be adversely affected

by time constraints. In the legal profession, as in many other facets of life, it is not the amount of time that one spends on something that counts, but, rather, the quality of what one accomplishes with the time available."]

E. COMPETENCE TO PROCEED IN POSTCONVICTION PROCEEDINGS

The court below properly denied this claim for the reasons stated in Issue V, infra.

F. INDIVIDUAL AND SEQUESTERED VOIR DIRE

Provenzano's next claim below was that the trial court erred in failing to grant him individual sequestered voir dire and that counsel was ineffective for failing to request individual sequestered voir dire. The trial court correctly rejected this claim as procedurally barred because it could have been, and should have been, raised either on direct appeal or in Provenzano's first motion for post conviction relief. See, Buenoano v. State, 708 So. 2d 941 (Fla. 1998)(juror claim barred where facts underlying claim could have been known to defendant or her counsel within time limit by use of due diligence). See, generally, Mills v. State, 684 So. 2d 801 (Fla. 1996); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(matters that were, or could have been raised on direct appeal cannot be raised in a postconviction claim); Atkins v. State, 663 So. 2d 624, 627 (Fla. 1995)("endless repetition of claims not permitted").

The voir dire proceedings have been a matter of record in this

case since 1984 and have been the subject of various related claims by Provenzano since that time. For example, on review of Provenzano's direct appeal, this Court noted that, "although Provenzano insists that he did not want to be tried by Orange County jurors he personally acquiesced to the selection of the jury panel after consulting his attorney. More importantly, the fact that the defense did not use all of its peremptory challenges is the best evidence that Provenzano was personally satisfied with the jury selected." Provenzano v. State, 497 So. 2d 1177, 1182 (Fla. 1986).

The ineffective assistance aspect of Provenzano's juror/voir dire claim was likewise denied in Federal district court, wherein the court agreed with this Court's determination that a fair and impartial jury was ultimately impaneled. Specifically, the court stated:

> Petitioner next claims his trial counsel was ineffective for failing to inquire during voir dire to "find out what they [jurors] had heard, or how it would affect their partiality in judging an insanity defense" [emphasis in original]. The record clearly does not support this contention. Although the trial court specifically avoided inquiring into the details of pre-trial publicity experienced by the potential jurors, both the trial court and defense counsel inquired extensively of the venire to determine whether the exposure would have any impact on an individual's ability to render a fair and impartial verdict. In fact, any potential juror expressing the slightest reservation about his or her ability to disregard any pretrial publicity was promptly excused for cause. Furthermore, the trial

> judge and defense counsel both conducted considerable inquiry concerning each juror's ability to consider an insanity defense. Having reviewed the complete transcript of the jury selection proceedings, this Court concludes that Petitioner's trial counsel performed reasonably. However, even if counsel could be said to have been ineffective, Petitioner has failed to demonstrate any prejudice. This Court agrees with the Florida Supreme Court's determination that "a fair and impartial jury was ultimately impaneled." 497 So.2d at 1182.

Provenzano v. Singletary, 3 F.Supp.2d 1363, 1365 (M.D. Fla. 1997) (e.s.)

Provenzano's assertion that his latest voir dire complaint has never been raised in the specific context now presented does not excuse the procedural bar, as the record and basis of this claim was available since the time of Provenzano's trial in 1984. Mills v. State, supra, at 804-05. Similarly, Provenzano's claim that this claim has never been raised in the specific context now presented does alter the conclusion that "a fair and impartial jury was ultimately impaneled." Provenzano 497 So. 2d at 1182; Provenzano v. Singletary, 3 F.Supp.2d 1365.

Additionally, Provenzano's reliance on this Court's recent decision in Bolin v. State, 24 Fla. Law Weekly S273b (Fla. June 10, 1999) is misplaced. This Court in Bolin made it clear that the decision rested solely on the facts of the case and acknowledged that a trial court has broad discretion in deciding whether prospective jurors must be questioned individually about publicity

the case has received. In Bolin, this Court noted that he had used all his peremptories and a challenged juror sat on the jury. Provenzano, unlike Bolin, did not use all of his peremptory challenges and personally acquiesced to the selection of the jury panel after consulting his attorney.

To the extent that Provenzano may claim that this issue has not been properly litigated due to ineffective assistance of counsel, Provenzano has already had two prior Rule 3.850 appeals before this court, addressing claims of ineffective assistance of trial counsel. A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis. Jones v. State, 591 So. 2d 911 (1993); Francis v. Barton, 581 So. 2d 583 (Fla.), cert. denied, 501 U.S. 1245, 111 S.Ct. 2879, 115 L.Ed.2d 1045 (1991); Squires v. State, 565 So. 2d 318 (Fla. 1990). Moreover, as in Jones, Provenzano's current motion was filed beyond the time limit of Florida Rules of Criminal Procedure 3.850 and 3.851. Spaziano v. State, 570 So. 2d 289 (Fla. 1990); Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989). As Provenzano has failed to show why this claim should not be barred as untimely and successive, he is not entitled to relief. Downs v. State, 24 Fla. Law Weekly S231 (Fla. May 20, 1999). Accordingly, this issue was properly denied as procedurally barred.

ISSUE IV

DENIAL OF EMERGENCY MOTION TO COMPEL, FOR LEAVE TO TAKE DEPOSITIONS, AND FOR STAY OF EXECUTION PENDING FURTHER PRODUCTION, DEPOSITIONS, AND AN EVIDENTIARY HEARING ON COMPLIANCE WITH PUBLIC RECORDS REQUESTS.

As in many of the cases in which executions have occurred after decades of litigation, see Buenoano v. State, 708 So. 2d 941, 952-3 (Fla. 1998), Remeta v. State, 710 So. 2d 543, 546-8 (Fla. 1998), Provenzano contends that he was entitled to a stay of execution, due to eleventh hour public records requests and litigation, in this instance involving the electric chair. The trial court made a specific finding that, on Monday, June 21, 1999, Provenzano was provided with the DOC records which he had requested on Friday, June 18, 1999. As the trial court found,

> With regard to Provenzano's claim that DOC has withheld documents, counsel for DOC stated on the record, as an officer of the court, that all records responsive to Provenzano's public records requests were supplied to Provenzano on June 21, 1999, three days after he requested them. Therefore, this Court finds that Provenzano's claim that DOC either withheld or is withholding documents is without merit.

(R IV/763)

Any appellate claim alleging a lack of compliance with Provenzano's public records requests is meritless.

The trial court likewise rejected Provenzano's argument that any records regarding the electric chair or the maintenance of it

are Brady material. As the trial court reasoned:

> . . . In Brady, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S. Ct. at 1196-1197. In United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985), the United States Supreme court set forth the specific test for determining the materiality of Brady evidence:
>
> > [E]vidence at issue is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> In order to be entitled to relief on a Brady claim, a defendant must establish that: (1) the State possessed evidence favorable to him, including impeachment evidence; (2) the defendant does not possess the evidence nor could he obtain it through the exercise of reasonable diligence; (3) the evidence was suppressed; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. Jones v. State, 709 So. 2d 512 (Fla. 1998)(citations omitted). Further, "[a] defendant seeking postconviction relief after a death sentence has been imposed must present his Brady claim within one year of the discover [sic] of the new evidence." Id.
>
> This Court finds that the public records regarding the maintenance of the electric chair do not constitute Brady evidence. Therefore, if the records were wrongfully withheld from Provenzano, which this Court

> does not find to be true, they were not withheld in violation of Brady.
>
> (R IV/763-64)

The trial court was correct in finding that public records regarding the maintenance of the electric chair do not constitute Brady evidence. Moreover, any information about the electric chair, including the "new" wooden chair constructed in 1998, would not be Brady material because it would not effect Provenzano's conviction or sentence. Under the 1998 amendment to Art. I, s. 17, Fla. Const., if the execution by electrocution is declared unconstitutional, the method of execution simply changes to lethal injection; the sentence does not change.

It is anticipated that Provenzano may argue that due to recent amendments to Fla.R.Crim.P. 3.852, and enactment of Sec. 119.19, Florida Statutes (1998), effective October 1, 1998, somehow precluded him from requesting public records earlier. It must be noted initially that no public records have ever been withheld from CCRC under these authorities; therefore, it is not appropriate to address any claim related to these authorities in this case. As found by the judge below, Provenzano has received, on an expedited basis, all public records which he has requested in this case. Moreover, even if Rule 3.852/Section 119.19 had been invoked, those authorities would only have prohibited public records requests between December 31, 1998, and the signing of the death warrant on June 9, 1999; this is relevant because many of the documents

allegedly relevant to Provenzano's electric chair claim were generated prior to that time period. While it is certainly not the State's position that Provenzano failed to exercise due diligence to obtain any records relating to the "new" wooden chair, it is the State's position that he had more than ample time to seek records to "impeach" the Jones holding, not only within the course of the Jones litigation itself or thereafter.

Further, it can be said that Provenzano's plight is not quite as dramatic as may be represented, in that CCRC is receiving public records generated in the Lopez case pursuant to requests made by another CCR attorney, Todd Scher (Transcript of Davis Proceedings of June 21, 1999, at 8-9, 15, 43). CCRC attorney Scher made public records requests to the Department of Corrections, as to the electric chair, in May of 1999, despite the fact that no 3.850 motion was then pending in Lopez's case (See Appendix RR to motion). Given the lack of due diligence in earlier seeking public records, Provenzano merits no relief. See Buenoano, supra; Remeta, supra; Zeigler v. State, 632 So.2d 48 (Fla. 1993); Agan v. State, 560 So.2d 222 (Fla. 1990); Demps v. State, 515 So.2d 196 (Fla. 1987).

Further, despite any anticipated attempt by Provenzano to vilify the Department of Corrections, this record reflects compliance by that agency, compliance rendered under extreme time constraints and in the face of an equally extremely broad public

records request. On June 18, 1999, Provenzano requested from DOC,

> . . . any and all files or documents concerning the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair. By 'electric chair,' we mean both the 1923 and 1996 (sic) chairs, the current chair, if different, and all electric systems that have been or are used therewith. Also, we request copies of guidelines, all protocols, or other documents related to execution and post-execution procedures, both as to the electric chair and the condemned inmate. In sum, we seek any and all documents (regardless of form of memorialization, and including photographs, sound or video records, physical evidence, and electronic mail and/or files) relating to the electric chair and its use.

Provenzano's public records demand to DOC specifically stated, "You need not furnish anything that has already been furnished in response to requests made on behalf of Allen Lee Davis, DOC #040174." As evidenced by the public records correspondence filed in the instant record, and as confirmed by DOC attorney Susan Schwartz at both the Davis' hearing held on June 21, 1999, and the Provenzano hearing held on June 23, 1999, DOC not only made the records available for inspection at Florida State Prison, an option which CCRC-Middle did not seem to have exercised, but also hand-delivered copies of the requested records on an expedited basis. Judge Johnson's ruling in regard to Provenzano's public records claim was neither error nor an abuse of discretion.

ISSUE V

DENIAL OF MOTION FOR COMPETENCY DETERMINATION.

In both his Motion for Competency Determination and his successor 3.850 motion, Provenzano asserted that he may be presently incompetent to proceed with post-conviction proceedings. Therefore, Provenzano alleges that he is entitled to the appointment of experts and a competency determination under Carter v. State, 706 So. 2d 873, 875 (Fla. 1997). In rejecting this claim, the trial court below found:

> To begin with, this Court finds that Provenzano's attorneys' claim that Provenzano may be incompetent to proceed in postconviction proceedings is merely a conclusory allegation. Nothing in their allegations justifies a competency determination. I note that in all proceedings conducted before me, Provenzano has behaved appropriately. Furthermore, in the hearing held June 14, 1999, Provenzano had no difficulty expressing himself to Judge Conrad. In fact, Provenzano was able to accurately respond to Judge Conrad's questions, and he was able to recall specific facts about the attorney who represented him in his last proceedings in federal court. Therefore, there are have been [sic] no facts presented which establish that a competency determination is warranted in this case.
>
> Before being entitled to a competency determination, a capital defendant must make a specific showing that "there are specific factual matters at issue that require the defendant to competently consult with counsel." Carter v. State, 706 So. 2d 873, 875 (Fla. 1997). In other words, a judicial determination of competency is required only where there are factual matters at issue, and

> the development or resolution of those factual matters require the defendant's input. Id. Further, if a defendant is found incompetent to proceed in postconviction, claims involving purely legal issues that are of record and claims that do not require the defendant's input must proceed. Id.
>
> Provenzano's counsel, acting on behalf of Provenzano, have not set forth any claims in Provenzano's successive motion for postconviction relief that are not procedurally barred, that are not purely legal issues, or that involve specific factual matters at issue that require Provenzano's input. Therefore, there is no basis for ordering a determination of Provenzano's competency to proceed in postconviction proceedings.
>
> (RIV/767-68) See, also, Order Denying Motion for Competency Determination (R IV/745)

In Carter v. State, 706 So. 2d 873 (Fla. 1997), this Court examined the appropriate considerations when postconviction counsel alleges that a capital defendant is currently incompetent and unable to assist in investigating and presenting his postconviction motion. Carter, however, has no applicability in the instant case, where prior postconviction litigation has been completed and execution is imminent. At this juncture, the only relevant mental health issue is whether Provenzano is competent to be executed in accordance with Florida Rule of Criminal Procedure 3.811; that is, whether Provenzano understands the fact of the pending execution and the reason for it. See, Fla.R.Crim.P. 3.811(b); Ford v. Wainwright, 477 U.S. 399 (1986). During the Huff hearing held on

June 23, 1999, Provenzano's counsel admitted that, "at this point" CCRC is not challenging Provenzano's competency to be executed. (T I/35). Since no claim of incompetence has been made pursuant to these authorities, there is no basis for this Court to grant any relief on this issue.

Furthermore, even if Carter could be applicable to a claim of incompetence when execution is imminent, Provenzano has not pled sufficient allegations for relief under that decision. Pursuant to Carter, a trial court must conduct a competency determination "only after a capital defendant shows there are specific factual matters at issue that require the defendant to competently consult with counsel." As Judge Johnson found, no such specific issues have been identified in this case. The successive postconviction motion that was before Judge Johnson did not raise any claims that were not procedurally barred, that were not purely legal issues, or that involved specific factual matters at issue that required Provenzano's input (Order, p. 21). Thus, Carter offers no basis for requiring a competency hearing.

Provenzano's counsel identifies three broad, general areas about which he claims he must consult with Provenzano: possible facts pertaining to alleged abuse as a child; possible facts pertaining to alleged mental illnesses; and possible facts pertaining to his relationship with trial counsel. As to the first two areas, there is no likelihood that the development of

particular facts can generate a cognizable successive postconviction claim. Provenzano's background was well established at his trial and penalty phase proceeding. Provenzano's sister testified at trial as to their difficult upbringing, and Provenzano testified in his own behalf for approximately two hours during the penalty phase. Any potential postconviction claim would be procedurally barred since any issues regarding Provenzano's background should have been raised in prior postconviction proceedings.

The same reasoning applies to rebut counsel's assertions that he must meet with Provenzano to develop facts relating to his alleged mental illness. Provenzano's mental and emotional problems were thoroughly explored at the time of trial by virtue of his insanity defense[8] and mental mitigation was discussed in the

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[8] This Court, in Provenzano v. State, 616 So.2d 428, noted that, at trial, "five psychiatric experts testified, two for the defense and three for the State. All experts agreed that Provenzano was a paranoid individual. Both of the defense experts concluded that Provenzano had a paranoid psychosis and that he was delusional. They also went on to state that as a result of this psychosis Provenzano was unable to tell right from wrong on the day of the shootings. The State experts agreed that Provenzano was paranoid, but disagreed with the defense experts' conclusions regarding the extent of his paranoia. Dr. Wilder and Dr. Gutman concluded that Provenzano had a paranoid personality, but that it did not rise to the level of the mental illness of paranoia. Dr. Gutman opined that Provenzano used his paranoia to get attention, and therefore he did not believe that Provenzano's paranoid beliefs were delusional. Dr. Kirkland, on the other hand, concluded that Provenzano was a very disturbed person with delusional paranoid beliefs. Kirkland diagnosed Provenzano as having an antisocial personality disorder with strong paranoid trends. All State experts agreed that Provenzano's mental problems did not rise to the level of insanity." Id. at 431.

sentencing order. See, Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986).

Provenzano's initial post-conviction motion raised a challenge predicated on his competency to stand trial.[9] Provenzano's post-conviction claim, predicated on Dr. Fleming's report, was rejected in Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). Since the record reflects that all mental health issues have been thoroughly investigated at the time of trial and in subsequent postconviction litigation, these are not specific factual matters requiring Provenzano to competently consult with counsel at this time.

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[9] Prior to trial in 1984, upon request by Provenzano's trial counsel, the trial court appointed Dr. Robert Pollack to conduct a psychiatric examination of Provenzano and submit a report to Provenzano's counsel. (TR. 2756) Provenzano then filed a motion for competency determination prior to trial. (TR. 2766-2767) The trial court entered an order appointing three additional experts to examine Provenzano. (TR. 2784-2785)

Dr. Robert Kirkland, Dr. J. Lloyd Wilder, and Dr. Michael Gutman were appointed as experts to examine Provenzano and to determine if Provenzano was competent to stand trial. (TR. 2784-2785.) Dr. Gutman submitted a report dated February 20, 1984, determining that Provenzano was competent to stand trial; Dr. Kirkland submitted a report dated February 22, 1984, determining that Provenzano was competent to stand trial; and Dr. Wilder submitted a report dated February 23, 1984, determining that Provenzano was competent to stand trial. (TR. 2791-2795, 2798.) The trial court held a competency hearing on March 1, 1984, during which Dr. Gutman, Dr. Kirkland, and Dr. Wilder testified. These experts each testified that Provenzano was competent to stand trial. (Transcript of Competency Hearing at 5-7, 14-15, 26-28.) On March 6, 1984, the trial court entered an order finding as a matter of fact and law that Provenzano was competent to stand trial. (TR. 2809-2810.)

The last area alleged as requiring Provenzano's input is his relationship with trial counsel. Facts concerning Provenzano's relationship with trial counsel will not lead to a postconviction claim since the Sixth Amendment does not assure a "meaningful relationship" with counsel as part of the constitutional right to counsel. Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Although Provenzano could have relevant information about counsel's specific performance, any information regarding a claim of ineffective assistance of counsel had to have been presented with Provenzano's initial postconviction motion. Clearly, Carter's requirement for the identification of relevant specific factual matters cannot be met in a successive motion filed on the eve of an execution.

Thus, Provenzano's allegations in this regard were insufficiently pled and correctly denied by the lower court. In addition, even if his assertions were sufficient to suggest that there are specific factual matters (rather than broad legal claims) which require Provenzano's input, his motion fails to allege reasonable grounds to believe that he is presently incompetent. See, Carter, 706 So. 2d at 875. The motion for a competency determination merely asserts that an unidentified mental health expert has concluded that Provenzano's competency is "questionable at best" (RIII/517). The 3.850 motion asserted that an expert has concluded "within a reasonable degree of medical certainty that there is no other explanation for his conduct other than a severe

mental illness," although it is not clear whether this allegation refers to Provenzano currently, at the time of the offense, or at the time of the trial (RI/86). The only support for these allegations offered with the 3.850 motion was a letter from Dr. Fleming (Ex. NNN), which does not support these assertions.[10] At

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[10] Ten years ago, Provenzano first submitted the 1989 evaluation by Dr. Fleming of Wyoming, who diagnosed Provenzano as suffering from paranoid psychosis during the shooting and at the time of the trial. Both the trial court and this Court rejected Provenzano's post-conviction claim premised on Dr. Fleming's conclusions. Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990). This Court found Dr. Fleming's diagnosis duplicated that of the defense's trial experts and that "[t]he mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief." Id.

The federal district court agreed with this Court, finding that Provenzano's arguments concerning investigation, development, and presentation of collateral and background information were not supported by the record. And, as found by the district court, trial counsel provided abundant information to the mental health experts. For example,

Dr. Pollack testified to the following:

a. He examined Petitioner twice. Before the first interview he intentionally avoided reviewing any information. (TR. 2615-17.)

b. After his initial interview he requested as much information as he could from defense counsel. He received quite a bit of information, including police offense reports and investigative reports. (TR. 1530-31.) In fact, he continued to receive information for quite some time. (TR. 1531-32.)

c. He reviewed newspaper articles, investigative report (including fifty to sixty pages of witness interviews), and medical records (including Dr. Abraham's report which was rendered shortly after the shooting). (TR. 2617-19.)

d. After writing his report, he received twenty-three more witness statements which reinforced his conclusions. (TR. 2619-20.)

e. He talked to jail officials about Petitioner's behavior. (TR. 1555.)

Dr. Lyons testified to the following:

a. Before examining Provenzano he was given various court

the Huff hearing, counsel for Provenzano did not rely on this letter, noting that "her evaluation was quite awhile back," and instead offered counsel's representation that Dr. Berland had seen Provenzano on Sunday, June 20, 1999, and had indicated on Monday morning, June 21, that he had concerns about Provenzano's competency to proceed with the postconviction proceeding (TI/12-14;

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documents; police reports; investigative reports; the statement of Kimberly Duff; the Internal Affairs report regarding Petitioner's complaint of excessive force during arrest; Petitioner's employment history; statements of Janice Limpkey and Mary T. O'Brian; a summary of Petitioner's military record; reports of Drs. Pollack, Kirkland, Gutman (two reports), Callahan, and Wilder; Orlando Regional Medical Center progressive reports following the shooting; and a summary of Dr. Marra's reports. (TR. 1440-42, 1671-72.)

b. Prior to the examination, he was provided with information concerning the time Petitioner signed an application "Jesus Christ." (TR. 2683-84.)

c. He was aware of Petitioner's interest in both Theresa Chambers and Susan Assad. (TR. 1462-63.)

d. Petitioner informed him of childhood problems, particularly relating to his relationship with his father. (TR. 1464.)

e. He was aware of Petitioner's two marriages, the results of each, and the background concerning the loss of his two children. (TR. 1465.)

f. At the time he interviewed Petitioner, he had copies of the typed interviews done by the investigators, psychiatric reports, and past medical histories. (TR. 1505-06.)

In addition to the expert testimony, the defense presented a variety of lay witnesses who testified to numerous incidents and behaviors reflecting on Petitioner's mental health.

Trial counsel promptly obtained a court order to retain investigators. (TR. 2705-06.) And, as the district court recognized, "myriad witnesses were interviewed, background information was assembled, family members were contacted, and medical records were reviewed. The scope and extent of the investigation conducted by trial counsel were reasonable."

The fact that additional facts subsequently surfaced and were utilized by Dr. Fleming to reach the same diagnosis does not render the earlier doctors' opinions inadequate. The conclusion offered by Dr. Fleming merely duplicates the opinions of the trial experts. See, Provenzano v. Singletary, 3 F.Supp.2d 1353 (M.D.Fla. 1997).

34-36; 75). Indeed, Dr. Fleming has not visited or evaluated Provenzano since 1989, and only bases her conclusory opinion of incompetency upon information provided by Provenzano's attorneys suggesting that his mental condition has deteriorated. Of course, Dr. Fleming's conclusions about Provenzano's mental health were previously rejected as a basis for relief in his original postconviction proceedings in both state and federal court. Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990); Provenzano v. Singletary, 3 F.Supp.2d 1353, 1374 (M.D. Fla. 1997). And despite the representations at the Huff hearing about Dr. Berland's conclusion, no report or preliminary findings by Dr. Berland have ever been offered in this case. Thus, no specific facts or other support for this conclusory assertion of incompetency have been presented.

Inasmuch as Provenzano's alleged expert is never identified in the 3.850 motion, his credentials are never disclosed, and there is no supplemental affidavit or other provision of specific facts to support his conclusion of incompetence, this issue was insufficiently pled. Rule 3.850(c)(6) expressly requires the recitation of specific facts relied upon in support of a postconviction motion. See, Card v. State, 497 So.2d 1169, 1174-6 (Fla. 1986) (Credibility of letters criticizing prior competency determination, coming three days before scheduled execution, were suspect and did not warrant finding of error); Jackson v. Dugger,

633 So.2d 1051, 1054 (Fla. 1993) ("Conclusory allegations are not sufficient to require an evidentiary hearing"); Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

Finally, even if the allegations submitted in this claim went beyond the unsubstantiated speculation of incompetence, much of this claim is refuted by the record. As Judge Johnson noted, Provenzano behaved appropriately in the circuit court hearings conducted in the last couple of weeks, and was able to accurately respond to Judge Conrad's question at the June 14, 1999 hearing, demonstrating specific recall about the attorney that represented him in the latest federal court proceedings (Order, p. 20; transcript of 6/14/99 hearing, PCRII/69-70). The allegation that postconviction counsel "attempted to visit Mr. Provenzano on a number of occasions to explore these matters with him," (Motion, p. 82), is suspect given that current counsel was only appointed to represent Provenzano four days before the filing of his motion.

For all of the foregoing reasons, the lower court correctly denied the instant claim.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail/facsimile to John Moser, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 28th day of June, 1999.

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