IN THE SUPREME COURT OF FLORIDA

CASE NO. 95, 849

THOMAS H. PROVENZANO,
Appellant,
V.
STATE OF FLORIDA,
Appellee.

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

APPELLANT'S BRIEF
AND APPLICATION FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Provenzano's successor motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in the instant case:

"R." -- record on direct appeal to this Court;

"PC-R1." -- record on instant 3.850 appeal to this Court bearing clerk's certificate dated 6/24/99;

"PC-R2." -- record on instant 3.850 appeal to this Court bearing clerk's certificate dated 6/18/99;

"App." -- appendix to Rule 3.850 motion, located at pages 99-199 PC-R1;

"T." -- Index to Motion hearing.

REQUEST FOR ORAL ARGUMENT

This Court has already scheduled an oral argument in this case for June 28, 1999.

CERTICATE OF SIZE OF FONT

The Appellant's Brief and Application for Stay of Execution has been typed in Font Size Courier 12.

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STATEMENT OF THE CASE AND FACTS

A. Procedural History

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

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

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

On April 25, 1989, Judge Shepard denied Mr. Provenzano's

Motion to Vacate, without an evidentiary hearing. Appeal was taken to the Florida Supreme Court. On May 4, 1989, the Court granted a stay of execution, and ordered briefing.

On April 26, 1990, the Florida Supreme Court issued an opinion denying habeas corpus relief and affirming the denial of Rule 3.850 relief. *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990). However, the Court ordered the State Attorney's office to disclose records pursuant to Chapter 119, Fla. Stat., Florida's public records law, and allowed Mr. Provenzano to file a new Rule 3.850 motion raising claims arising from the disclosure of records. Id. at 549.

On April 15, 1991, Mr. Provenzano filed a supplemental Rule 3.850 motion. Additionally, Mr. Provenzano personally filed a series of supplemental pro se motions with the trial court. On July 1, 1991, Mr. Provenzano filed a motion to disqualify the trial judge. On July 31, 1991, the circuit court denied the motion to disqualify. On August 5, 1991, the circuit court struck Mr. Provenzano's pro se pleadings. On August 8, 1991, the circuit court denied the supplemental Rule 3.850 motion without an evidentiary hearing. Mr. Provenzano appealed these orders. On February 11, 1993, the Florida Supreme Court affirmed the denials. *Provenzano v. State*, 616 So. 2d 428 (Fla. 1993). Subsequently, Mr. Provenzano filed a petition for habeas corpus in the federal court in the middle district of Florida pursuant to 28 U.S.C. Section 2254. The court denied relief without an evidentiary on March 3, 1997. *Provenzano v. Singletary*, 3 F.

Supp. 2d 1353 (M.D. Fla. 1997). An appeal was taken to the 11th Circuit Court of Appeals, which was affirmed on August 6, 1998. *Provenzano v. Singletary*, 148 F. 3d 1327 (11th Cir. 1998), rehearing denied October 23, 1998. *Provenzano v. Singletary*, 162 F. 3d 100 (11th Cir. 1998).

A death warrant was signed by the Governor of the State of Florida on June 9, 1999 [PC-R1. 476], for the execution of Mr. Provenzano scheduled for 7:00 a.m., July 7, 1999. Over objection of the Capital Collateral Regional Counsel - Middle (CCRC-M), the circuit court appointed that agency to represent Mr. Provenzano, even though Ms. Terri Backhus had last represented Mr. Provenzano and CCRC-M is totally unfamiliar with the case. Mr. Provenzano appealed this order to this Court. The appeal was dismissed on June 18, 1999. A Motion for Appointment of Clemency Counsel was filed on June 21, 1999 [Att. 27]. The circuit court denied that motion on the same day [Att. 28].

On June 22, 1991, a Successor Motion to Vacate Judgment and Sentence, and Request for Evidentiary Hearing and Stay of Execution, an 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, and a Motion for Competency Determination were filed in the circuit court. On June 23, 1999, a Huff Hearing was conducted by the Honorable Clarence Johnson in Orange County. The circuit court denied all of Mr. Provenzano's motions. A Notice of Appeal was filed on June 23, 1999.

The Governor also signed a Death Warrant for Allen Lee Davis on June 9, 1999. Since, Mr. Davis was already being represented by attorneys in the office of CCRC-M, 119 requests were being made for Mr. Davis prior to 119 requests made on behalf of Mr. Provenzano. It has been acknowledged by the office of CCRC-M and the Attorney General's office that the documents provided for Mr. Davis would be adopted by Mr. Provenzano [T. 52-53].

Further, the transcript of the proceedings conducted in Mr. Davis' case has been included in Mr. Provenzano's record [PC-R1. 666].

B. Statement of Facts as to the 119 Claim

On May 8, 1999, the Miami Herald reported that "'Ol Sparky' replaced" [App. A]. On May 19, 1999, Mr. Todd Scher with CCRC-South thereupon made a public records demand upon the Department of Corrections (DOC hereinafter) seeking all records regarding "the electric chair that was recently built and placed at Florida State Prison" [App. RR]. Mr. Scher was taking the lead for the three CCRC offices in following up on the *Miami Herald* article [PC-R1. 566]. In a letter dated June 8, 1999, Susan Schwartz, Assistant General Counsel for DOC, responded to Mr. Scher's request saying it "was not properly made." Nevertheless, in order to "avoid a court hearing, I have enclosed the final structural report conducted by Barkley engineering" [App. SS]. Mr. Scher received this letter by mail on June 10, 1999.

In late May of 1999, DOC received a public records request from counsel for Allen Davis [PC-R1. 634]. On June 9, 1999, the

Governor signed a warrant setting Mr. Provenzano's execution for July 7, 1999. On June 10, 1999, DOC received another public records request from Mr. Davis' counsel. On June 14, 1999, Assistant General Counsel for DOC responded:

> Dear Mr. Brody:
>
> In response to your request for all records on the electric chair, I have enclosed a report dated May 18, 1999 from Barkley Engineering analyzing the wooden chair's structure. . . . I have enclosed two preliminary reports from Barkley engineering.
>
> In response to your request for execution protocols, I have enclosed copies of execution day procedures and testing procedures.
>
> * * *
>
> I believe information on the electrical components was provided to your office prior to April, 1998. No changes have been made.[1] There are a series of electrical blueprints and chart recordings at Florida State Prison that are difficult to reproduce. We can make arrangements for you and/or your expert consultant to view the original at Florida State Prison. I have enclosed from my files the following documentation:
> November 1, 1995 memorandum from D.R. Lehr on electrical components.[2]

1Subsequent disclosures have revealed that this representation simply was not true. As is explained infra, many changes to the electrical system have been made since April 1, 1998.

2This memorandum appears as App. N. It states "In 1993/1994 the entire electrical system was replaced with new electrical breakers and restoring the electrical switch gear to comply with all applicable electrical codes." It was presented to the circuit court in the proceedings in *Jones v. State*, and thus constituted evidence supporting the circuit court's finding that "Florida's electric chair - its apparatus, equipment, and electric circuitry - is in excellent condition." 701 So. 2d at (continued...)

Affidavit dated July 23, 1990 by Michael Morse

Examination of Execution Equipment by Jay Wiechert dated April 8, 1997

Report on Findings by Michael Morse dated April 8, 1997

Memorandum of Testing dated October 6, 1998 [3]

I have asked Florida State Prison top [sic] forward more recent test results to my attention. When I receive these, I will forward them to you. I am also in possession of an electrical engineers memorandum dated October 23, 1998. This memorandum was prepared at my instruction in anticipation of litigation. I am consulting with the Florida Attorney General's Office to determine if it qualifies under the work product exception. I can assure you that it does not include any information of Brady evidence.

[App. J]. The letter does not refer to the existence of any other records.

On June 15, 1999, Ms. Schwartz wrote:

Dear Mr. Brody,

2(...continued)
77. However, disclosures on June 16th and June 21st establish that this memorandum is false; the breakers were in fact not replaced and have been described as "obsolete" [App. M].

3This memorandum addressing the October 6, 1998, testing of the electric chair represented that "The test was uneventful and no discrepancies were noted" [App. Q]. However, a disclosure from June 16th indicated that the October testing of the electric chair was not as described. According to Ira Whitlock, the electrical engineer under contract with DOC to maintain the electric chair: "The left cubicle breaker had a alignment problem", "The spare breaker will not trip. This needs to be addressed on a priority basis", "The transformer in the right cubicle feeding the rectifier for the breaker charging motor has experienced some damage in the past," "A relay contactor in the right cubicle needs to be attached to the switchgear. It presently is hanging loose," "The 5KV cable on the right side of the ABS going back to the switchgear needs to be monitored for possible replacement if it continues to deteriorate" [App. P].

> In my correspondence dated June 14, 1999, I indicated that a memo dated October 23, 1998 might be considered attorney work product. After consulting with the Attorney General's office, it was determined that the memo should not qualify as work product since litigation was concluded. I am attaching a copy of the memo in question. Please call me if any other records are in dispute.

[App. K].[4]

Meanwhile, this Court had entered its order directing all proceedings in the circuit court in Mr. Provenzano's case to be completed by June 22, 1999, subsequently amended to June 24, 1999. As of June 15th, Mr. Provenzano's counsel, through Mr. Davis' counsel, understood that all DOC records regarding "the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair" [App. TT] had been disclosed by DOC except for those items specifically mentioned by Ms. Schwartz as not disclosed ("blueprints and chart recordings" and "more recent test results").

However, the DOC public records disclosures had identified

4Contrary to Ms. Schwartz' representation that this memorandum did not contain Brady evidence, it revealed that according to the electrical engineer under contract to maintain the electric chair, the prescription for amps and volts to be administered in the execution day protocol could not be followed. The reason for this, according to Mr. Whitlock, was the variation in resistance between human bodies. Mr. Whitlock indicated that a human body would have between 200-500 ohms of resistance. This specifically contradicted the experts relied upon by the State in the proceedings in *Jones v. State* which caused the circuit court there to conclude that "Florida's electric chair, as it is to be employed in future executions pursuant to 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." 701 So. 2d at 78.

Barkley Engineering and Consolidated Power Services (Ira Whitlock) as sources for additional records. Accordingly, public records requests were made upon those firms under contract to DOC to provide services. On June 16, 1999, Ira Whitlock on behalf of Consolidated Power Services released approximately one hundred pages of material. Of that material, only the October 23rd memorandum had been disclosed by DOC; however, the documents themselves indicated that DOC would have had a copy in its possession. Moreover, the disclosed documents established that the previously disclosed DOC records were factually not true.

At 4:30 pm., Friday, June 18, 1999, Barkley Engineering finally disclosed some records. After previously indicating that there was a box of material that would take time to copy [PC-R1. 116], he disclosed seventeen pages of records [PC-R1. 118].[5]

On the morning of June 23, 1999, Mr. Provenzano filed his 3.850 motion, an accompanying appendix and motion to compel. In the motion, Mr. Provenzano argued that his judgment and sentence which prescribed death by electrocution was unconstitutional in that Florida's electric chair in its present condition constituted cruel or unusual punishment. Mr. Provenzano based this claim on the disclosures made since May 8, 1999, when the *Miami Herald* first reported the change in the electric chair. Mr. Provenzano's motion relied upon the substantial changes made

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5Under this Court's well recognized precedent, allegations in a 3.850 must be taken as true unless refuted by the record. *Lightbourne v. Dugger*, 549 So. 2d 1314 (Fla. 1989). Therefore, Mr. Provenzano will cite to the 3.850 for factual allegations contained therein.

in the electric chair since the decision in *Jones v. State*[6] and upon the disclosures that the State had presented false evidence at that hearing[7] and upon the disclosure that the electrical engineer under contract with DOC had made statements demonstrating significant disagreement with the two State experts relied upon in that case.[8]

At 1:00 p.m., on June 21, 1999, just prior to a hearing in Mr. Davis' case, Mr. Davis' counsel received a copy of public records disclosures made to Todd Scher regarding the electric chair. Counsel for Mr. Davis orally advised the circuit court of the new information:

> At this point in time -- well, in addition, with reference to Mr. Scher's representation of Mr. Lopez, there had been a

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6The decision in *Jones* concerned whether Florida's electric chair in its present condition constituted cruel or unusual punishment. Clearly, the condition has been changed.

7This Court concluded in *Jones* that the circuit court's finding that Florida's electric chair in its present condition was not cruel or unusual was supported by substantial evidence. The recent disclosures has now shown the evidence presented by the State to have been false in significant ways.

8To some extent, *Jones* was a battle of the experts. The State relied upon the testimony of Jay Wiechert and Michael Morse as to the cause of the previous malfunction and the prescription for avoiding the problem in the future. Mr. Wiechert testified that he knew the human body electrically and that it contained two hundred fifty to sixty ohms of resistance [R. 56]. Similarly, Dr. Morse drafted the language now contained in the protocol which assumes 240-50 ohms of resistance. Mr. Jones challenged their expertise, their knowledge and their conclusions. Now, it has been revealed that Ira Whitlock, the electrical engineer hired by DOC to maintain the chair also disputes their knowledge of the human body electrically. He indicated in his October 23rd memorandum that there is great variance in the electrical resistance of human bodies. He estimates the resistance varies between 200 and 500 ohms.

mandamus action filed in Florida Supreme Court. The Florida Supreme Court remanded it in Lopez to the Circuit Court for further proceedings on the 119 questions and on Friday apparently the Department of Corrections filed in Circuit Court -- excuse me for just a moment. Filed in Circuit Court in Dade County in that case some materials that have not been provided to Mr. Brody on behalf of Mr. Davis.

Included in that -- and we just obtained these records actually at noon. Somebody from Tallahassee drove these over and handed -- actually, it was 1:00 o'clock, handed them to me.

One of the documents is a May 20th, 1998 memorandum from Carl Hackel, who works at Florida State Prison, to the superintendent, James Crosby, and the subject is the electric chair replacement.

This document, which is not included in the appendix because we didn't have it until an hour ago, indicates that due to the age, and many repairs to the original electric chair at Florida State Prison it was decided to replace the original red oak chair with another chair using the same pattern and materials as the original chair, and this is dated May 20th of 1998.[9]

So that's reflecting when the decision was made. Also indicates the amount of lumber that's necessary and estimates that the total cost will be $400.

THE COURT: I am sorry. What is the date of that memo?

MR. MCCLAIN: May 20th, 1998. And I submit, Your Honor, that's significant because, again, as is clear in the 3.850, one of the big issues in this case is the effect of the decision in Leo Jones, where Judge Soud conducted an evidentiary hearing that spanned eight days over a three month time

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9This is the first time DOC released any information regarding when the decision was made to replace the electric chair and why. It establishes that DOC personnel had noticed the deteriorated condition of the electric chair within seven months of this Court's decision in *Jones v. State*, finding that Florida's electric chair in its present condition was not cruel or unusual. During *Jones*, DOC did not advise the parties or this Court of the chair's deteriorated condition.

period and determined that the electric chair and the electric circuitry were in excellent condition.

And that conclusion was reached in July of '97, which is merely ten months before this memorandum indicating that there was concern about the condition of the chair itself.

Also disclosed to Mr. Scher -- it's a notice of filing dated Friday, but I believe he received it this morning in the mail, is a purchase request dated May 7th of 1998. And it is, again, for red cypress of various widths and lengths. It is the red cypress that's to be used in constructing the new chair.

And the purchase order has do not delay written on it and underscored, immediate requirement per James Crosby written on it, indicating -- and it's $706 on this purchase request. And so this is obviously the materials that were used to build the new chair, and it's dated May 7th, 1998.[10]

Another document that had not been disclosed to Mr. Brody on behalf of Mr. Davis is, again, just another memo regarding the cost. It's a cover memo and then an attachment that shows the actual purchase order for the $706 to purchase the lumber.

Then attached to that is a document that -- again, that had never been disclosed to Mr. Davis' counsel, which also suggests that maybe that this is something that is kept on a regular basis. It's a printed form that's called Florida State Prison E. C., dash repairs and maintenance purchases, and it has a 10:30 a.m. September 28th, 1998 date on it.

I am assuming that must be when it was printed out from the computer, and it reflects repairs and maintenance purchases in connection with the electric chair from February 11th, 1998 through June 24th of 1998 totaling $43,913. On this it indicates the new sponges were bought February 11th, 1998.

It also shows that Consolidated Power tested and calibrated volt and meter on switch gear on February 24th, 1998. Now

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10Thus, prison officials in May of 1998 viewed the need to replace the electric chair as an urgent matter. Yet, the change was not made for over a year.

that's significant, because according to the records we received from Mr. Whitlock, his contract started June 8th of 1998. So this would indicate that there must -- perhaps there was another contract or there was some arrangement that predates that contract that we have not been provided.

In addition, it indicates March 11th, 1998 testing of high voltage gloves. March 15th, 1998, switch gear repair. March 17th, '98 on site visits. These are all Consolidated Power, so they were apparently -- they had some sort of arrangement with Consolidated Power, Ira Whitlock prior to June of 1998.

And then there is also a March 18th Consolidated Power eastern angus pins for recorder and a testing and calibration of the voltage meter.

Then March 25th, 1998 more sponges were purchased, and then April 1st of '98 -- and just for the record, there were four executions in Florida's Electric Chair the end of March of 1998. So on April 1st would be after those four executions.[11]

There was purchased a new amp recorder that was $14,000, and that was apparently purchased through Consolidated Power. On April 2nd of 1998 there was a Florida Electric -- there is an A.L. in front of Florida Electric, I am assuming that's abbreviation, for something, installed the recorder, and that was a $4,883 charge.[12]

Then April 20th is a Consolidated Power -- that's Ira Whitlock consulted with the superintendent and legal and that was $705 and, actually, what it has over -- okay. What

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11This was the first time DOC disclosed that the chart recorders were replaced immediately after the March 31, 1998, execution of Daniel Remeta who had petitioned this Court on March 30th, saying the chart recordings from the Stano and Jones executions showed that the State was not administering the prescribed voltage during an execution. However, it was revealed in records disclosed after the June 21st hearing that DOC had been told in May of 1997 that the chart recorders needed to be replaced. Thus, DOC waited eleven months until after the next four executions to act.

12Records disclosed after the June 21st hearing establish that new chart recorder was installed on April 22, 1999.

I neglected to point out is there is also a remark column, and when the lumber was purchased, which was April 1st, in the remark column it has malfunction or change in technology was the reason that the $14,000 was spent on a new recorder, and- the same thing is said when Florida Electric installed the recorder on April 2nd. The reason given was malfunction or change in technology.[13]

Then there is the consultation with Superintendent and legal, and it just says variable per each death warrant, then has to the lumber, which is purchased on May 7th, 1998 and which is referred to in the other documents. In the other documents we already discussed what the remarks are, malfunction or change in technology for that purchase as well.

Then there is also May 15th, water proof resin. May 20th, leather straps with buckles. It just says variable per each death warrant on that. Then there is June 10th of 1998, repair of Westinghouse breakers and the vender was Industrial Electric and that was $9,000.[14]

Then on June 15th, Consolidated Power -- and we know Consolidated Power had the contract starting June 8th -- maintenance and service on Westinghouse switch gear, and then there is also a call on June 16th to check repaired breakers. On June 17th, to check trip and closed circuit and on June 24th, checked repaired breakers.

So we have this disclosure, but then that raises more questions about presumably there is going to be a similar forum for

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13Again subsequent disclosures show that DOC had been advised that the chart recorders needed to be replaced in a letter from Ira Whitlock dated May 7, 1997.

14Records disclosed by DOC after the June 21st hearing show that the prison possessed three Westinghouse breakers. These breakers rotated through the execution chamber as they each in turn continued to break down. After the June 10th work when the breakers were reinstalled, the one first placed in the execution chamber did not work, so the one then designated a spare was placed in the execution chamber. Records show another breakdown in July, problems in October, a breakdown in January, and a recommendation that they all be replaced, which according to the disclosed records has not yet occurred.

other time periods. This only covers purchases between February 11th, 1998 and June 24th, 1998, and it also contains significant information given that Susan Schwartz, in her June 14th letter, had indicated that all information regarding the electric circuitry had been disclosed prior to April of 1998 and so she wasn't going to reproduce it and that there had been no changes made since then.

And this would indicate that in April of 1998 the recorders were changed and that the -- also that the breakers apparently broke and were repaired in June of 1998.

Again, this -- oh, and then there is one more memorandum that is included in the disclosures from an hour ago. A memorandum from James Crosby to Stan Czerniak, dated February 22nd, 1990. It indicates several months ago, at the instruction of the secretary, we built a new [electric] chair to replace the chair presently being used for executions.

Once the chair was built we instructed to send it to the central office for the museum and not to install it at the institution. The reason was not given, but there was an insinuation that it could have legal ramifications.[15]

The present chair, built 75 years ago, does show stress, and our maintenance superintendent has expressed concern, particularly if we executed someone weighing 300 pounds or more, which is a possibility. If it's not a legal problem, I would recommend exchanging the old chair with a new chair. Your consideration is appreciated and, again, despite requests last week this wasn't disclosed.

These -- these disclosures sort of are troubling, in that it raises the question of what else is out there that hasn't been disclosed.

15Again, the prison records reflect that it was believed that building a replacement chair was an urgent matter. The obvious override of that recommendation suggests that the Governor's Office believed that replacing the electric chair would require a new evidentiary hearing to determine whether Florida's electric chair in its present condition is cruel or unusual.

[PC-R1. 572-582].

The undersigned counsel informed the court that 1200[16] pages of documents were received by counsel, through Mr. Davis' counsel, the night before Mr. Provenzano's 3.850 motion was due [T. 32].

During Mr. Provenzano's June 24th hearing, the State's representative asked to permit Susan Schwartz to address the court [T. 52]. After a recess, the Court permitted Ms. Schwartz to appear by telephone [T. 3]. Ms. Schwartz addressed the circuit court and provided her version of the sequence of events since late May, 1999. She made factual assertions in conflict with allegations in the 3.850 and specifically with her letters to Mr. Brody, which were included in the appendix to the 3.850 [T. 5-9].

The undersigned was permitted to inquire of Ms. Schwartz. She indicated that she did not read any of the documents provided and did not know whether any of the documents had been provided to any other inmate at any time, including Mr. Jones, Mr. Davis, and Mr. Provenzano [T. 9-12].

Nearly twenty-four hours after the conclusion of the June 24th proceedings, the circuit court issued its order denying the

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16Undersigned counsel has had insufficient time to review and digest the records while preparing this brief. Nonetheless, counsel has endeavored to discuss some of what was disclosed and to provide the records discussed in the accompanying attachments. However, time constraints have made it impossible to adequately discuss and brief the issues raised. This problem is directly attributable to the actions of DOC in responding to Mr. Provenzano' public records request.

3.850 [PC-R1. 748]. The circuit court found that all public records had been disclosed to Mr. Provenzano. As to the claim that Mr. Provenzano's sentence by electrocution was cruel or unusual, the circuit court indicated that *Jones* was controlling.

The circuit court also denied the Motion to Compel and request for depositions, as well as the Motion to Determine Competency [PC-R1. 745, 771].

C. Statement of Facts as to the Chair Claim

Some of the evidence presented in support of the electric chair in *Jones* was false. Time has shown some of the evidence to have been false or misleading. Further, some of the expert testimony presented by the State and relied upon by the circuit court has been discarded by the State as invalid.

1.

Firstly, false evidence was contained in a memorandum dated November 1, 1995. This memorandum, by D.R. Lehr to Everett Perrin, stated: "In 1993/1994 the entire electrical system was replaced with new electrical breakers and restoring the electrical switch gear to comply with all applicable codes" [App. N]. The false information was also contained in the French Report which was admitted into evidence before Judge Soud in *Jones v. State*. The French Report appears as App. O. The French Report at page 8 provides: "It should be noted that Mr. Hopkins was involved in replacing the entire electrical system for the execution chamber approximately seven years ago and is familiar with the equipment."

Disclosed on June 16, 1999, by Ira Whitlock was his February 19, 1999, letter to Superintendent Crosby in which Mr. Whitlock specifically described the breakers as "obsolete" and "in excess of forty years old":

19 February 1999

Mr. James V. Crosby, Jr., Superintendent
Florida State Prison
P.O.Box 747
Starke, Florida 32091

Re: Electrical breakers in the death house

Dear Mr. Crosby:

On 1-14-99 Mr. Jackie McNeill called and stated that the upcoming 5KV breaker at the death house would not operate. I immediately responded and we investigated the cause. It was another failure of the shunt trip coil that created the failure. I replaced the breaker with the one that I had repaired and we ran several tests to assure proper performance. You were in attendance for one of these tests.

While discussing this failure along with some parts missing on other breakers, Mr. Hackle instructed me to research and provide a list of parts necessary to completely rebuild these breakers and to maintain three sets of necessary parts in stock.

My investigation revealed that no spare parts for these Westinghouse DH breakers are available. See attached letter from Mr. Mark Riffle, senior sales engineer for Cutler-Hammer who merged with Westinghouse and maintains spare parts for these breakers.

I have kept in constant contact with Mr. McNeill updating him of the progress (or lack thereof) to assure you that everything is being done to maintain the Electrocution Process in the most reliable condition possible so that if needed it will perform as required.

> I have written to Mr. McNeill on 2-12-99 that to assure reliability you should purchase at a minimum two replacement breakers style DH-VR manufactured by Cutler-Hammer as a substitute for these obsolete breakers.
>
> I have asked Mr. Jeff Thrift of Smith & Royals to provide you with a quotation directly.
>
> Most importantly if you should need the use of this facility, be assured that it can and will function.
>
> I will continue to monitor this situation for you and keep you apprized through Mr. McNeill unless you instruct my [sic] otherwise.
>
> I further indicated to Mr. McNeill that depending on the cost of these breakers, I could breakdown two of the units for parts to keep the third unit in satisfactory condition for a spare breaker. Bear in mind that your existing breakers are in excess of forty years old.
>
> Attached is some of the correspondence along with catalog date of the replacement breakers.
>
> Thank you for your continued confidence, I remain.

[App. M](emphasis added). A document received on June 22nd is the invoice from Ira Whitlock for his services on January 14, 1999. It described these services as "01-14-99 Respond to request from Mr. McNeill for bad breaker" [Att. 1].

Also received on June 22nd is the following handwritten faxed note from Ira Whitlock to Jackie McNeill dated 2-12-99: "letter attached from Mr. Mark Riffle stating why I couldn't get parts to rebuild/ stock for your old breakers-I recommend purchasing at least 2 & if price is reasonable a spare. If not I can take the three old breakers & make one good one with the

others used for spare parts" [Att. 2].

One of the documents received on June 22nd was a handwritten note stating:

> On Monday morning Feb 22, 1999 at approximately 8:30 AM Mr. Crosby had a meeting concerning the memo received from Mr. Ira Whitlock at Consolidated Power Services. The different items was [sic] discussed and Mr. Crosby decided to order two replacement breakers [illegible] Cutter hammer 50DH-VCR-250 that were recommended by Consolidated Power Services. [The memo lists those present at the meeting]
>
> On Tuesday Feb 23, 1999 a bill was received from Consolidated Power Service for approx $1600.00 and I was ask to sign off on the invoice. I looked the invoice [sic] and took it to Mr. Arocho and told I [sic] that I think the invoice was right and he ask me to show it to Mr. Crosby. Mr. Crosby was not pleased with invoice and called Consolidated Power and had it changed.
>
> Later that day Cutter-hammer informed purchase that the 50DH-VCR-250 would not interchange with the 50DH75 breakers we are using. I talk with Mr. Crosby about this and he instructed me to find a company that could rebuild the bad breaker. I contacted Mr. Nat Crews field engineer with A.B.B. Services and he sent a break down. [sic] of what services his company performs on rebuilt breakers and a quote stating the price to rebuild our 50DH75 breaker. After discussing these possibilities with Mr. Crosby he instructed Mr. Arocho to seek other prices to complete the breaker project.

[Att. 3].

Another handwritten note received on June 22nd provides:

> 3-31-99 0850 hr.
>
> Meet with Nat Crews of ABB eng. Concern updating west house switch gear in excu. Chamber and switchgear room. It is Mr. Crews recommendation that we use the old cabinet

> and update all controls and breakers. His [sic] to give me a est first week of April. At this time he figures approx 250,000.00 to 300,000.00 to do this project. After part are made it will take approx 30 days to install and certify.

[Att. 4].

Another document received on June 22nd provided:

> April 12, 1999
>
> Mr. Jackie McNeill
> Florida State Prison
> P.O. Box 747
> Starke, Fl 32091
>
> REF: ABB NEGOTIATION NO. JAX-Q0446
>
> Dear Mr. McNeill;
>
> Per your request, ABB Services is pleased to submit our proposal to replace existing 5KV switchgear with new ABB vacuum breakers consisting of:
>
> 3-5KV, 1200 amp vacuum breakers.
> 1-Switchboard lineup with reactor, PT's, CT's, metering and voltage switching.
> 1-Installation, testing and startup.
>
> ABB will supply all labor, tools and materials to complete this project.
>
> **PRICING: $265,000.00** (est. pricing only)
>
> The service and prices as stated herein are subject to the terms and conditions of ABB Services, Inc. form B411f, dated 11/1/94 and price list B4253-5, dated 1/1/98.

[Att. 5]. There are no documents disclosed to indicate that in fact DOC has gone ahead with the "breaker project." Thus at this point, the execution chamber is equipped with "obsolete" breakers which the electrical engineer has recommended need to be replaced. These breakers broke down during testing in June,

July, October, and January.

The history of the breakers in question can be pieced somewhat together from other documents received on June 22nd . A handwritten, undated note provided:

> Perform Repair, Clean & Test
> Westinghouse 5KV - DH Breaker.
> Certify as to proper operation.
>
> Justification:
>
> Due to the age and avibilate [sic] of part for the breaker that prest [sic] time frame Industrial Electronics Group, Inc. has been selected based upon the recommendation of our consulting engineer. Repair is of the essence since these breakers are required to perform tests & electrocution required by law.

[Att. 6].

Another handwritten note received on June 22nd, provided:

> 6-16-98 8:30 AM
>
> I.E.G. delivered Westinghouse breakers to F.S.P. and helped unload into the switch gear room.
>
> 9:30 AM
>
> Consolidated Power (Ira Whitlock) arrived at F.S.P. with tec. Mr. McNeill + C.P.S. went to death house wher [sic] Westinghouse breakers were installed in switch gear. One breaker that was repaired by I.E.G. would not work. Installed spare breaker and Mr. Whitlock performed two (2) exc. Test everything work good. [sic]

[Att. 7].

Another handwritten note received on June 22nd, provided:

> I am concerned about work being done in excu. Chamber to the point I have talk to Mr. Hackel and he told me not to worrie [sic] about it because Mr. Wittlock is a P.E.

> evertime [sic] work is done something is tore up and it cost extry [sic] money to fix the broken part which is all so [sic] preformed [sic] by Mr. Wittlock. Some of of [sic] the work to be done such as the amp meter the charge $2500.00 for a project just the materials cost would not be over $100.00 but the charge is high because of him being a P.E.

[Att. 8]. On this page were other notes with June 1998 dates.

Another handwritten received on June 22nd provided:

> 7-9-98
>
> Called Neal Carmichael after quarterly test of excu. equiment [sic]. He is on vacation for two weeks. [sic] will call back on 7-20-98 concerning exc [sic] line breaker.
>
> 7-20-98 call I.E.G.I. Neal out on job
>
> 7-23-98
> called Neal at I.E.G.I. and talk with him about problem with excu [sic] line breaker. [sic] denying on the excu. test. He ask if I would test the breaker on 7-24-98 (Friday] and call him back with the results. If the breaker does not work right we will then set up a date and time for him to come to F.S.P.

[Att. 9].

Yet another undated typewritten document that was received on June 22nd discusses the Westinghouse switch gear and breakers. The document makes reference to a purchase request turned in on May 1, 1998, thereby giving a time frame:

> After researching the Westinghouse switch gear file, the following Maintenance items were noted:
>
> 1. Westinghouse blueprints and manuals were sent to the Legal Department in the Central Office in or about April, 1997, and have not been returned. This information was received from Ms. R. Horler.

2. Westinghouse switch gear, breakers and the relays were serviced, tested and cleaned on May 1, 1990 by General Electric Apparatus Division.

3. Westinghouse breakers and relays were tested by P.D.S. testing contracting firm during the high voltage renovation. The breakers were serviced in 1993 and the relays were serviced in 1994.

4. One blueprint of Westinghouse switch gear modification, to accept the recording system, was supplied by Wilson & Associates Engineering Firm during the high voltage renovation in 1994.

5. One line blueprint on the Westinghouse switch gear, furnished by Wilson & Associates Engineering Firm, can be utilized for a preventive maintenance program.

6. The Department of Management Services suggests cleaning and servicing medium and high voltage switch gear every three years.

7. Westinghouse recommends cleaning and servicing switch gear and related equipment each year.

8. General Electric recommends the switch gear and related relays and reactors be cleaned and serviced at least once every twelve months

9. Fred Wilson & Associates Engineering Firm recommended that all contractors perform servicing and cleaning according to the Institute of Electric and Electronic guidelines. IEEE C37.09 power circuit breakers, IEEE C37.90 relays.

10. Fred Wilson & Associates Engineering Firm recommended verbally that the Westinghouse switch gear and related systems be exercised monthly.

11. A purchase request was turned in on May 1, 1998 for cleaning, testing and servicing the Westinghouse switch gear. Prices are to be received from Miller Electric; however, Cogburn Brothers Electric, Inc., will be

> unable to submit one at this time because of workload.

[Att. 10].

2.

Secondly, in *Jones*, the State adopted written protocols for testing and execution day procedures. The State's experts suggested that this was a way to avoid a future malfunction. The protocols were in conformity with Dr. Morse and Mr. Wiechert's recommendations. And they both testified to the soundness of the protocols that were actually adopted. However, in the four executions in March of 1998, the prescribed amps and volts were not administered. Following Mr. Remeta's petition complaining about the prison's failure to follow the protocol in the Stano, Jones and Buenoano executions, this Court ordered DOC to follow the protocol in Mr. Remeta's execution [App. G]. However as was alleged in the 3.850, the protocol was not followed in the Remeta execution [PC-R1. 46].

New documents were received on June 22nd, which demonstrate that the failure to follow the protocol was not lost on DOC. One handwritten note indicates that the Stano execution had in fact deviated even further from the protocol than had been alleged. The note indicated that in cycle 1 the volts at their highest were 1550 and the amps 9; in cycle 2 the volts at their highest were 600 and the amps 3; and cycle 3 the volts at their highest were 1500 and the amps were 9 [Att. 11].

Prior to these four executions in May of 1997, Ira Whitlock had advised Mr. McNeill that the chart recorders needed to be

replaced:

> Dear Mr. McNeill:
>
> We have researched the use and application of your recording meters that are presently used to record the voltage and amperage during the electricution [sic] process. Your present equipment is the Esterline-Angus recorders model A601C. We repaired these meters in April of this year. Based upon our observations during repair, it is our opinion that the reliability of the meters cannot be assured. The availability of parts for this particular style of mete is a long lead item and the cost to supply backup units is extremely high ($28,054.00 plus freight). Attached is a copy of the quotation for backup metering identical to the existing equipment from Van & Smith company showing our cost as indicated.

[Att. 12]. This letter, dated May 6, 1997, existed at the time of the *Jones* hearing, but was not disclosed. Moreover, the records disclosed by DOC after the June 21st Davis hearing establish that despite the stated need to replace the chart recorders it was not until April 1, 1998, that action was taken. This was the day after Mr. Remeta's execution, and two days after he raised a claim that the chart recordings from the Stano and Jones executions demonstrated something was awry. It was disclosed in the documents received by Mr. Scher on the morning of June 21st, which he provided to Mr. Davis' counsel one hour before the June 21st hearing, that the new recorder was purchased on April 1, 1998. This occurred after the four executions even though new documentation shows a purchase request form dated March 5, 1998 [Att. 13]. Thus, DOC was advised in May 1997 that the recorders needed to be replaced. A purchase request was

dated three weeks before the next scheduled execution, but the recorder was in fact not purchased until after the executions despite the fact that the chart recordings from the executions were made an issue.

According to a document released after the Davis hearing, the new recording device was installed on April 29, 1998:

> On Wednesday, April 29, 1998, while witnessing the installation of a new recording device for the execution reactor in the death house, it was obvious to all present that something was burning in or around the recorder. I feel that this needs to be checked before the final installation of the recorded is complete.
>
> My concern is that All-Florida Electric, the installers are not sure where the burning smell was coming from. I think we should be provided with detailed information about this problem.

[Att. 14].

However, newly released documents indicate that even after the replacement of the chart recorders, DOC still agonized over the problem of its failure to follow its established protocol. A newly released confidential memorandum from Superintendent McAndrew to Secretary Singletary dated April 14, 1997, explains very succinctly where the protocol came from:

> To conform with 100% of both Dr. Michael Morse's and Mr. Jay Wiechert's recommendations to the Governor, we are submitting three draft documents and a list of actions already taken. Herewith are:
>
> 1. Draft- Execution Day Procedures
> 2. Draft- Test Procedures
> 3. Draft- Required Equipment Use
>
> Actions taken include:

1. Leg electrode has been repaired, lead removed and replaced with brass.
2. The chart recorder has been repaired and fully calibrated in inches per second by registered professional engineers on chart paper.
3. The voltmeter and ammeter have been fully calibrated by registered professional engineers.
4. We are fabricating a repeatable resistive load bank for testing head and leg pieces for stable measured voltage and current.
5. The electrical schematic of equipment is permanently placed in the execution equipment case and will be in-hand during executions/tests. This case is assigned to the electrician.
6. Extra cables, leather straps, salt, leg piece and leather head piece will be purchased as spare parts. We are also attempting to purchase a new, more modern, digital chart recorder to upgrade this technology.
7. We are in the solicitation process to hire a professional electrical engineer to service and calibrate the chart recorder (on-site) prior to each execution.

[Att. 15].

A newly released confidential memorandum from Superintendent Crosby to Secretary Singletary dated September 1, 1998, proposed changes to the execution day procedure:

Present Language

7:00 AM 1. 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. When the cycle is complete, the equipment is manually disconnected by the Electrician. The safety switch is then opened by the Assistant Superintendent for Operations.

Proposed Language

7:00 AM 1. The automatic cycle begins with the programmed 2,300 volts for 8 seconds; 1,000 volts for 22 seconds; and 2,300 volts for 8 seconds. When the cycle is

complete, the equipment is manually disconnected by the Electrician. The safety switch is then opened by the Assistant Superintendent for Operations.

Rationale for Change

The "amps" should not be referred to because they are not "programmed," but are variable since the body acts as a resistor. Different bodies will cause different readings, since each creates a different resistance.[17]

The proposed language has been discussed with Mr. Ira Whitlock, Electrical Engineer with Consolidated Power, Jacksonville, who agrees with this recommendation.

[Att. 16]. There is no indication that the proposal was adopted. In fact, the October 23rd Whitlock memorandum to Susan Schwartz seems to have been the final word:

Date: 23 October 1998

To: Ms. Susan Schwartz, Florida Department of Corrections

From: Mr. Ira E. Whitlock, P.E.

Re: Variations in recorded data during the electrocution process

This memo is sent to you to address the language contained in paragraph I of the "Electrocution day Procedures" effective for executions after 16 April, 1997.

Present language is as follows:

7:00 A.M. I. the automatic cycle begins with

17There is no indication that DOC ever adopted these proposed changes and perhaps the best explanation of why is that the chart recordings and the newly disclosed memo regarding the voltage administered to Stano show that the problem is that the voltage level is not reaching or maintaining the appropriate levels. Thus, deleting reference to the amps does not cure the problem. DOC cannot figure out how to administer the prescribed voltage.

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 a 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 1 in the test procedure we connect a 260 ohm load bank into the 2,300 volt supply. By ohms law this gives u 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 expert 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 testing in cycle 2 a 400 ohm reactor

is inserted in series with the 260 ohm load bank. By ohms law the current in the circuit now becomes 2,300 volts / (400 + 260 ohms) or 3.49 amperes.[18] The recorder during this 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)[19] 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.[20]

These figures and normal and constant with the physical properties of basic electricity and by no means what-so-ever indicate a malfunction of the electrocution process.[21]

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

---

18The testing described by Mr. Whitlock is not in conformity with the testing protocol adopted by DOC. This memo thus reflects that the proper testing procedure is not being followed.

19This representation of the variance between human bodies in the amount of resistance is at odds with the testimony of Mr. Wiechert and the prescribed protocol written by Dr. Morse. Mr. Wiechert said he knew the human body electrically and its resistance was between 250 and 260 ohms. Dr. Morse's work assumed between 240 and 250 ohms.

20According to DOC's recently disclosed calculations, Stano in cycle received 600 volts. This is below the normal range set out by Whitlock. The chart recordings for Jones shows the voltage was in 550 range for cycle 2.

21The circuit court took this sentence out of context and implied that it was referencing the actual chart recordings from the four executions in March of 1998. When this sentence is compared to the chart recordings it is clear that the voltage administered was not in the expected range; the voltage administered was too low.

2,300 volts.

[App. F].

Another DOC document disclosed after the Davis hearing provides:

ELECTRIC CHAIR/ EXECUTION ISSUES

A. The Chair
  1. Build/Buy a new chair
    a. Check Georgia and/or other state designs
    b. How will it set up, etc., with lethal injection table

B. Lethal Injection
  1. Develop plans/design room, etc.
    a. Trip to Texas?

C. Electrocution Day Protocol
  1. Rewrite voltage/amperage
  2. Do we want it backed up by science or not?[22]

D. Consultant Service Contract

E. Develop equipment "upkeep" procedures (Mr. Whitlock can develop plan)
  1. Clean switch equipment in chamber
    a. Old boxes
  2. Generator Maintenance/Relays
    a. Breakers check by certified outside company
    b. Calibrating relays
    c. Check switch wiring, etc.

F. Witness Room
  1. Reduce number of people allowed in on executions

[Att. 17]. There is no date on this document, but it reflects consideration of changing the protocol as to the amperage/voltage.

22Of course this statement is troubling to say the least.

3.

Thirdly, DOC has substantially altered the condition of the electric chair since October of 1997 due to undisclosed defects in its condition then. See Barkley report disclosed on June 8th [App. B].

STRUCTURAL EVALUATION

OF

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
WOOD CHAIR
(NEW AND EXISTING)

A DOC document disclosed after the Davis hearing provides:
TO: Central Office
FR: FSP Outside Maintenance Tool Room
RE: Electric Chair

This certifies that the undersigned accepts full responsibility for the newly built electric chair that is being received from Outside Maintenance Tool Room on June 25, 1998.

This document relinquishes Florida State Prison from all responsibilities of the above mentioned electric chair.

[Att. 18].

Similarly, a document disclosed by DOC after the Davis hearing reveals other changes:

MEMO TO: James V. Crosby, Jr., Superintendendent
FROM: Carl Hackle
DATE: July 23, 1998
SUBJECT: Redesign of Leg Piece

Due to excessive salt concentration to the metal eyelets while preparing the leg piece for testing and executions, the eyelets are rusting and corroding. Due to the

> possibility of a failure with the eyelets on the leg piece during an execution, I have attached a drawing for the design of a new leg piece using a strap and stainless steel buckle to replace the existing eyelets being used for the attaching of the leg piece. The leg piece physical size will remain the same.

[Att. 19].

Another DOC handwritten document disclosed after the Davis hearing indicates that a recommendation had been made by Mr. Wiechert to obtain new head and leg electrodes:

> Ken Nunley
> Mary Ellen McDonald 5-5-98
> S.C. 278-2326
>
> Mr. McDonald instructed me contact Jay Wiechert and discuss items needed for death house. 5-4-98, 11:50 AM.
>
> Call Mr. Wiechert 1:35 AM 5-4-98
>
> Mr. Wiechert return my call 3:50 P.M. 5-4-98 and discussed what was needed by him to build the item that we wanted
> (1) photo and mes. of leg peice [sic]
> (2) photo and mes. of head peice [sic]
> (3) if it would be possible he would like for us to send a old head & leg peace [sic] so he could use them as a patern [sic] and then return them.
> (4) Jay is concern about the area of conduct in head peace [sic] and expressed the need for enlargement.
> (5) discussed the leg peace [sic] being inlarged [sic]. Stated that we needed to be careful and not to make it to [sic] big.
> (7) we need to make sure the sponge would cover the electrod [sic] when increasing size of conductor
> (8) discussed make 1 each of leg peace [sic] 1-lace up 1-buckel [sic] + strap
> (9) discused [sic] using velcro strap on leg peace [sic]. I told Jay that personaly [sic] I liked strap & buckel [sic] better because under a strain I felt that might come loose.

[Att. 20].

Documents disclosed after the Davis hearing show that Jay Wiechert offered to build the new electrodes (two head pieces and two leg pieces) for $3,800.00. He explained in his June 16, 1998, proposal that: "Head electrode will be rectangular with approximately twice the area of present circular screen. This will reduce the current density and therefore tissue damage" [Att. 21]. A purchase request was made on June 18, 1998, to have approval for Mr. Wiechert's proposal [Att. 22]. However, the documents do not show that approval was received, so that by July the proposal was down to simply replacing the eyelets in the leg piece.

4.

DOC also has disclosed documents suggesting that death in the electric chair is not instantaneous. A January 28, 1977 memorandum provides:

> On the morning of January 28, 1977, Westinghouse was contacted regarding two issues which were posed on January 24, 1977. I was referred to an unidentified Westinghouse Consultant who indicated he was present at the last execution (May, 1964) and was familiar with our equipment. [The unidentified consultant then recommended execution cycles] The Consultant indicated that the M.D. wait one to two minutes before checking vital signs to allow for involuntary heart spasms to conclude. It was also pointed out by the Consultant that the above recommendations were his feelings based on his personal experiences with executions and his recommendations should not be construed as the official Westinghouse advice. [The memo indicated that the unidentified consultant's suggestions would be followed].

[Att. 23]. DOC has disclosed a document which appears to be an excerpt from the Virginia execution procedures. It indicates that "Five minutes after completion of second cycle, a physician will determine if the prisoner is dead" [Att. 24]. This suggest that death is not instantaneous.

5.

Newly disclosed DOC records also disclose that there was a previously undisclosed problem with a 1992 execution. A memo dated September 14, 1992, indicated: "It was noted that during the last execution that sparks were coming from the right front leg of the electric chair" [Att. 25]. There has not been sufficient time to investigate these issues further particularly because the circuit court ruled there was full compliance even before the last 1200 pages could be reviewed.

ARGUMENT I

A. DUE PROCESS APPLIES IN CAPITAL POST-CONVICTION.

Post-conviction proceedings in Florida are governed by the principles of due process no less than at trial or sentencing proceedings. This Court has long recognized that a 3.850 petitioner is entitled to due process. *State v. Reynolds*, 238 So. 2d 598, 600 (Fla. 1970)("due process requires that [pro se] petitioner be produced so that he may confront all of the witnesses, interrogate his own witnesses and cross-examine those of the State")(emphasis added).

In *Johnson v. Singletary*, 647 So. 2d 106, 111 n. 3 (Fla. 1994), the defendant appealed the denial of his motion to vacate

his conviction, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had confessed to the crime for which Mr. Johnson was convicted and sentenced to death. This Court remanded for an evidentiary hearing because the circuit court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the circuit court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights.[23] This Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n. 3.

Certainly, the most basic principles of due process are notice and opportunity to be heard. "Procedural due process, therefore, requires adequate notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)." *Jones v. State*, ___ So. 2d ___, Slip Op. at 6 (Fla. June 17, 1999).

B. THE PROCEEDINGS BELOW VIOLATED DUE PROCESS.

23These are the identical circumstances presented here. Mr. Provenzano objected to Ms.Schwartz testifying without a fair opportunity to present evidence in opposition.

Under well established law, allegations even in a successor Rule 3.850 motion are taken as true unless refuted by the record. *Lightbourne v. Dugger*, 549 So. 2d 1314 (Fla. 1989). "[T]he state's admitted inability to refute the facially sufficient allegations without recourse to matters outside the record" establishes that the files do not conclusively refute the allegations and evidentiary hearing is warranted. *McClain v. State*, 629 So. 2d 320, 321 (1st DCA 1993).

Certainly, this Court's decision in *Johnson v. Singletary* controls. Mr. Provenzano was not given adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Jones v. State*, Slip Op. at 6. The proceeding below should not be considered an evidentiary hearing; the circuit court's order should not be found to contain findings made after a full and fair hearing.

C. CHAPTER 119 AS CONSTRUED BY DOC VIOLATES DUE PROCESS.

On June 24, 1999, the State filed in *Lopez v. Bush*, Dade County Case No. 83-11553, a Motion to Dismiss Petition [and] for Writ of Mandamus [Att. 26]. In that motion, the State alleges:

> While the basis for the Petition is 'Chapter 119' public records requests, that statute specifically prohibits the instant requests. See Fla. Stat. 119.19(8)(e)(1998)("If, on the date that this statute becomes effective, the defendant has had a Rule 3.850 motion denied and no Rule 3.850 motion is pending, no additional [public records] requests shall be made by the capital collateral regional counsel or contracted private counsel until a death warrant is signed by the Governor and an execution is scheduled."); see also Fla. Stat. 27.708(3)(1998)("Except as provided in s. 119.19, the capital collateral regional

> counsel or contracted private counsel shall not make any public records request on behalf of his or her client.") [emphasis in Motion].

[Att. 26 at 3].

In *Lopez*, the State's position is that collateral counsel for a death sentenced client who has lost one 3.850 motion cannot make public records requests on behalf of his client until a death warrant is signed. Yet in Mr. Provenzano's case, the Court found that Mr. Provenzano is procedurally barred because he did not make public records requests sometime in the year before his warrant was signed.

Ms. Schwartz' position below was that after receiving a public records request by Davis' counsel in late May before the warrant was signed "I was a little bit confused because the request came in under a 119 Request and since the new enactment of rule 3.852 and changes to Chapter 27, C.C.R. is not supposed to ask for records under Chapter 119. Nonetheless I proceeded to honor the request" [PC-R1. 635]. Yet in *Lopez*, Ms. Schwartz signed the Motion to Dismiss saying Mr. Lopez was not entitled to public records. Thus according to DOC: a request made before the warrant is signed may or may not be honored; and whatever is provided is all that can be obtained because DOC will oppose any court proceeding to enforce a right, because there is no right. Collateral counsel are thus left with no guidance and a big Catch-22: You can make the request and break the law, be subject to sanctions, but you might get some records. If you do not make the request, you will (according to Mr. Martell's argument) be

procedurally barred from presenting what you get once a warrant is signed because you did not try to prevail upon Ms. Schwartz' good graces.

Of course, there is an argument to be made against each of the State's assertions,[24] but until a case reaches this Court which causes this Court to address this issue collateral counsel are in the dark as to how to proceed and protect the client's rights. This means that as of now there is no adequate notice of what counsel can and cannot do and what the risks are for the client. The bottom line is simply that Chapter 119.19 is chilling collateral representation (as it was meant to). Without adequate notice in these circumstances, there can be no due process.

ARGUMENT II

THE STATE'S OBLIGATION TO DISCLOSE EVIDENCE WHICH ADVANCES A CONSTITUTIONAL CHALLENGE TO A SENTENCE OF DEATH BY ELECTROCUTION CONTINUES THROUGHOUT THE POST-CONVICTION PROCESS.

Mr. Provenzano wishes to challenge the constitutionality of Florida's electric chair. Accordingly, evidence that supports

---

24For example, the right to seek public records is a substantive right. It attaches to every citizen of this State. There is no valid reason for singling out death sentenced individuals after their initial 3.850 is denied who are to poor to hire an attorney for extinguishment of the right. Secondly, the right was extended to every individual sentenced to death before 1998 and cannot be taken away in an ex post facto manner. Thirdly, equal protection precludes distinctions made on ability to pay to obtain the access to the information which will be used to gain access to the courts. Fourth, the purpose behind the rule is to render collateral counsel ineffective by denying him the ability to conduct investigation and preparation before a warrant is signed. Fifth, it is a way of attempting to deny a successor capital defendant access to the courts.

his challenge or impeaches the State's case in favor of the chair is exculpatory evidence as to Mr. Provenzano.[25] "[T]he State is under a continuing obligation to disclose any exculpatory evidence," even in post-conviction proceedings. *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998). Here, the State has either not understood its obligation to disclose or has chosen to ignore that obligation.[26] Ms. Schwartz either does not understand *Brady's* application to this situation or she

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25Further, Mr. Provenzano was specifically sentenced to death by electrocution.

26DOC, through Ms. Schwartz, did not disclose the February 19, 1999, letter to James Crosby from Mr. Whitlock discussed infra. The letter also contains evidence impeaching the State's case at the 1997 *Jones* hearings and other previously disclosed information regarding the maintenance and testing of the electric chair. Similarly, Ms. Schwartz did not disclose the November 13, 1998, letter from Mr. Whitlock to Jackie McNeill, or the October 9, 1998, letter to Jackie McNeill, both of which are inconsistent with DOC's disclosures regarding the outcome of tests of the electric chair. Nor did Ms. Schwartz disclose the fact that in May 1997 at the time of *Jones* proceeding, an electrical engineer recommended that the chart recorders be replaced because of their age and poor condition. Nor did she disclose that despite this recommendation the DOC did not replace the chart recorders until after the March of 1998 executions. Nor did she reveal that DOC officials recognize that the voltage administered to Gerald Stano was too low. Nor did she reveal that in May of 1998 prison employees indicated that the replacement of the old and structurally unsound electric chair was an urgent matter which DOC officials delayed for one year. Nor did she reveal that the obsolete electrical breakers have repeatedly failed during the past twelve months and that the electrical engineer has recommended their replacement, but due to the estimated cost the obsolete breakers have not been replaced. Nor did she reveal that Jay Wiechert recommended replacing the head piece with one that would double the amount of contact of the condemned's head with the electrode and that due to the cost this change was not made. Nor did she reveal that DOC officials considered amended the execution day protocol to change the amperage and voltage prescription designed by Dr. Morse to delete reference to the amperage because it is supposed to vary depending upon the resistance of the inmate's body.

thinks as Richard Martell does that it does not obligate the State to disclose evidence in its possession which would provide a basis for presenting a challenge to Mr. Provenzano's sentence by electrocution.

In light of the position taken by the Assistant Attorney General in this case and in light of Ms. Schwartz' statement that she did not possess of information which qualified as *Brady* material, this Court needs to address this issue.

ARGUMENT III

DOC AND THE STATE OF FLORIDA FAILED TO PROVIDE MR. PROVENZANO WITH THE PUBLIC RECORDS HE REQUESTED AND THEREBY FAILED TO COMPLY WITH APPLICABLE PUBLIC RECORDS LAW.

It is well recognized that capital 3.850 litigants can assert in a 3.850 motion a state agency's failure to comply with public the records laws. This is true even when the defendant is litigating a successor 3.850. *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996)(error found as to public records issue when circuit court did not decide certified questions from public records depositions). Here, the error is much greater than that found in *Roberts*.

Mr. Provenzano properly pled his claim that the State and DOC, in particular, had failed to disclose public records.

Mr. Provenzano pled in his 3.850 motion that certain agencies had not complied with public records laws. Mr. Provenzano asserted that DOC had not fully complied with Chapter 119 of the Florida Statutes or with Rule 3.852 of the Florida Rules of Criminal Procedure. Collateral counsel learned from the

records of agents of various agencies and from the Department of Corrections, Barkley Engineering and Douglas Barkley, and Ira Whitlock and Consolidated Power Services, Inc. that there are other materials in existence which are possessed by DOC, by Barkley, and by Whitlock, and probably by other governmental agencies that have not been released to counsel for Mr. Provenzano.

On June 10, 1999, Mr.Davis' counsel duly served a Chapter 119/Rule 3.852(h)(3) request on DOC for files and documents concerning, inter alia, the construction, maintenance, testing, use, inspection, structural evaluation, measurement, and analysis of fitness for its intended purpose of the electric chair [App. TT]. On the morning of June 11, counsel for Mr. Davis spoke to Susan Schwartz, counsel for DOC. Counsel for Mr. Davis was advised to route requests through Ms. Schwartz and that Ms. Schwartz would expedite production pursuant to the June 10, 1999 request and to an outstanding unfulfilled request from May 21, 1999 for medical and inmate records.

On the morning of June 14, 1999, counsel for Mr. Davis spoke with Ms. Schwartz and that afternoon received a facsimile transmission from Ms. Schwartz which consisted of a letter and two "preliminary reports" from Barkley Engineering [App. III] and five other documents. The June 14 letter from DOC to Mr. Davis' counsel states that "information on the electrical components" was provided to "your office" in April, 1998. In a subsequent conversation, Mr. Davis' counsel advised Ms. Schwartz that he had

no record of such production and requested confirmation of such production or production of the "information." The information was not produced.[27]

The October 6, 1998 memorandum from James V. Crosby, Jr. to Harry K. Singletary, Jr. regarding a "Test of Execution Equipment" is a bare bones statement that the "Fourth Quarter" test was performed. However, no other quarterly tests were provided, and a copy of the identified attachment, a Chart Recording, was not produced. Further, the memorandum did not identify which chair was tested [App. Q].

Upon receiving the Barkley Engineering report from DOC, Mr. Davis' counsel called Douglas Barkley, and he agreed to produce his files. He indicated that, in total, he might have a box of documents. He asked that counsel provide him a formal request. On June 15, attorneys hand-delivered a request to Mr. Barkley's Tallahassee office. He stated that he was going to redo his notes because no one could follow them. He stated he would need until Friday. Mr. Davis' counsel subsequently called him and advised that time was of the essence and he agreed to produce his file by noon on Thursday (June 17). At this time, he added he

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27The June 14, 1999 letter from Ms. Schwartz to Davis' counsel identifies "an electrical engineers memorandum dated October 23, 1998." This memorandum was not provided pending a work-product privilege review by the Attorney General's Office. On June 15, 1999, the memorandum was produced. This delay, aside from depriving the Defendant of time for follow-up investigation, is also disturbing because of the conflicting positions taken by DOC. First, DOC asserts that the memo was "prepared in anticipation of litigation." The next day the memo is provided because litigation was concluded [App. K].

was also preparing an "addendum" at the direction of DOC and that the delay was in part being caused by preparation of the "addendum."

On June 17, 1999, Mr. Hazen, an attorney for CCRC-M, went to Mr. Barkley's Tallahassee office. But Mr. Barkley indicated that the documents were not ready, but would be later, and that he would call the attorney for Mr. Davis in Tampa when the documents were ready. That afternoon, the Attorney General's Office furnished a copy of the "addendum" to Mr. Hazen as part of its production. The "addendum" is dated June 15, 1999 [App. C]. Before leaving Tallahassee to return to Tampa that evening, Mr. Hazen called Mr. Barkley, who explicitly stated that DOC was advising him what to produce and what not to produce.

On June 16, 1999, Mr. Davis' counsel served a 119/3.852 request on Ira E. Whitlock of Consolidated Power Services in Jacksonville. After obtaining the permission of DOC, Mr. Whitlock released documents to CCRC-M's investigator.

On June 16, 1999, DOC's counsel belatedly furnished Mr. Davis' counsel with a memo, "Test of Execution Equipment", dated January 14, 1999. Identified attachments were not provided. No explanation was provided as to why the production was late, but the accompanying correspondence cavalierly mentions that there are other "test results" and that DOC counsel may provide them.

On June 18, 1999, Mr. Provenzano's counsel submitted 119 requests to Ms. Schwartz regarding all records regarding the electric chair. That had not already been previously been

provided to Mr. Davis. Also, on June 18, 1999, having been advised of Mr. Barkley's statements and after reviewing the "addendum," Mr. Davis' counsel called Mr. Barkley's office and was advised he was out. He didn't return the call. Counsel then faxed him a demand for the records [App. MMM]. At 4:30 p.m. on Friday, June 18, 1999, Mr. Barkley called Mr. Davis' counsel and said the documents were ready. The documents were immediately picked up. Surprisingly, Mr. Barkley produced only 17 pages of new documents, including five (5) poor copies of photographs of an electric chair. Mr. Provenzano's counsel has not been provided an opportunity to view the photographs nor were they afforded the reasonable opportunity to replicate the original photographs in a manner that could be useful to their structural engineers. None of the notes Mr. Barkley "redid" were produced.

DOC withheld documents and directed its agent, Barkley, to withhold documents. Although Whitlock's response was prompt, the face of his production establishes that it too was partial.[28]

Mr. Barkley's, Mr. Whitlock's, and DOC's records make reference to numerous documents which were not produced. Mr. Whitlock's contract shows on its face that his compensation maximum was increased from $23,000 to $52,290 in the middle of the contract term (March 4, 1999). However, no documentation of

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28Mr. Barkley's delays in producing records, orchestrated by DOC's directive regarding the "addendum", hindered the effective analysis of Barkley's reports by the defendant's structural engineers. The reports that were originally provided to Mr. Provenzano's counsel did not contain sufficient data for a structural engineer to analyze his accuracy or methodology.

consideration or explanation for the increase was produced by either party. Whether DOC contracted with someone prior to June 8, 1998, to provide the services Mr. Whitlock was contracted to provide for a one-year period starting that date has not been disclosed. Further, Mr. Whitlock revealed documents reflecting work performed for DOC prior to June 8, 1998, although the contracts cite statutory authority for a one-year limitation on such contracts. Mr. Barkley's contracts were not produced at all.

Mr. Whitlock's time sheet showed numerous instances of work performed on the electric chair for which no documentation was produced nor any explanation given. Billing was made for documents sent, but no such documents were produced. Correspondence was identified, but not produced. Mr. Barkley's billing was withheld.

A February 19, 1999 letter to Mr. Crosby from Mr. Whitlock was not produced by DOC. That letter also referred to other documents which were produced by neither DOC nor Mr. Whitlock. For instance, Mr. Hackle requested a list of parts to rebuild breakers, but no list was produced. Mr. Whitlock's investigation was not documented. An attached letter from Mr. Riffle was not produced. "Constant contact" with Mr. McNeill was not documented. Quotations were not included.

The responses of DOC and its contractors were, at best, careless and, at worst, in bad faith in the apparent hope that no court will have the courage to call them for flagrant fouls

before time expires.

A review of Mr. Whitlock's production, Mr. Barkley's production, and DOC's production dispositively demonstrated the withholding of documents about testing, maintenance, and failure of the electric chair.

Taking the allegations as true, the files and records do not refute the allegations. In fact, the appendix provided herein supports the allegations. The circuit court erred in not requiring compliance with public records requests. Certainly in other successor cases, motions to compel and 119 claims have been taken seriously. In Jerry White's case, the circuit court ordered depositions. Similarly, depositions occurred in Rickey Roberts. See *Roberts v. State*. Public records were ordered disclosed in *Jones v. State*. Yet here, Mr. Provenzano's public records allegations were ignored after Mr. Provenzano's counsel informed the court that DOC dumped 1200 pages of additional material on counsel just hours before his 3.850 motion was due. However, untimely disclosures do not cure the defect. Certainly undersigned counsel has endeavored in this brief to advise this Court of some of the newly released information; however, just as clearly the disclosures are not complete. The new documents indicate other documents exist which have not yet been disclosed.

The only way to determine the full extent of the documents withheld and the reasons for the State's conduct in withholding exculpatory evidence is to order depositions of Mr. Barkley, Mr. Whitlock, Mr. Crosby, Mr. McNeill, Mr. Singletary, Mr. Moore, Ms.

Schwartz, and Mr. Vargus, and of such others as evidence obtained may indicate have knowledge of the issues raised herein.

Mr. Provenzano's case has been severely prejudiced by the failure of the DOC and its agents to produce documents; thus, this Court should stay the execution, permit orderly discovery by deposition, and hold an evidentiary hearing to determine compliance by the State and its contracting agents.

Unless and until counsel has had a full opportunity to review all of the records and fully develop all his claims, Mr. Provenzano will be denied his rights under Florida law and the Eighth and Fourteenth Amendments. See *Porter v. State*, 653 So. 2d 375 (Fla. 1995).

ARGUMENT IV

FLORIDA'S ELECTRIC CHAIR CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT AND IS THUS UNCONSTITUTIONAL.

A. RULE 3.850

Mr. Provenzano filed a Rule 3.850 motion challenging whether his sentence of death by electrocution is constitutional. His factual allegations must be taken as true.[29] Mr. Provenzano alleged in circuit court and alleges in this brief that the Florida's electric chair in its present condition is cruel or unusual punishment. He has asserted that DOC has made changes in the electric chair since the decision is *Jones v. State*. He has

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29Counsel recognizes that DOC had not disclosed to Mr. Provenzano 1200 records until hours before the time of the filing of his 3.850. Nevertheless, Mr. Provenzano has pled those documents in this brief because it was DOC's action in not disclosing those documents sooner that precluded their inclusion in the motion to vacate.

asserted that new evidence has revealed false and misleading evidence was presented by the State in *Jones v. State* which wash away the factual underpinnings. He has asserted that DOC has revealed documents that impeach the State's experts in *Jones v. State*. He asserts that new documents reveal that protocols adopted during *Jones* incorporating "100% of both Dr. Michael Morse's and Jay Wiechert's recommendations" are not being followed and cannot be followed.[30]

New documents have revealed that Mr. Wiechert a year ago recommended replacing the head and leg electrodes. However, DOC has chosen to ignore its own expert's recommendation. In May of 1997 during the *Jones* proceedings, DOC was advised by an electrical engineer (Ira Whitlock) that the chart recorders needed to be replaced. DOC ignored the recommendation for eleven months until after four executions had occurred, although it had been pointed out right before the last one that the chart recordings showed a problem. The next day a new chart recorder was purchased. During the past year the "obsolete breakers" have regularly been breaking down. Ira Whitlock urged DOC in February of 1999 to replace them. However, when the cost estimate arrived showing a projected cost of $265,000.00, movement on the project

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30It is interesting that when DOC considered amending the protocols with this problematic language, the suggestion was to delete reference to amps "because they are not 'programmed.'" [Att. 16]. This means that the programming is to provide the voltage in conformity with the protocol. The problem with this is that voltage levels have been at times less than half of what they are supposed to be. And no one has come up with an explanation why other than the suggestion that the system isn't working correctly.

stopped according to the newly disclosed document.

As a matter of fact, Mr. Provenzano has alleged that the "electric chair"[31] has been replaced since the hearing in *Jones v. State*. As a matter of fact, Mr. Provenzano has alleged that false evidence regarding the electrical circuitry was presented in *Jones*. As a matter of fact, Mr. Provenzano has alleged that the State's experts in *Jones* have been shown to have been ignorant of basic knowledge of the resistance of the human body by the language they prescribed for the protocol. Now DOC wishes to discard or at least ignore this language. Mr. Provenzano has alleged that the letters from DOC counsel demonstrate utter confusion at DOC regarding the condition and operation of the electric chair. Ms. Schwartz represented on June 14, 1999, that no changes have been made to the electrical circuitry for the electric chair since prior to April of 1998. Documents show that new chart recorders were installed on April 29, 1998. Documents show that the "obsolete" breakers failed in June, July and October of 1998, and again in January of 1999. Ms. Schwartz makes similar representation about the finality of Mr. Barkley's report, even as DOC scrambled to get him to delay production of records while he prepared a baseless "addendum."

Further, Mr. Provenzano has alleged as a matter of fact that the four executions, though resulting in four dead inmates, were not successful. After a one-year moratorium on executions,

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31DOC officials referred to the "newly built electric chair" when custody of it was transferred from to FSP to the museum. [Att. 18].

Gerald Stano was executed in the Florida electric chair on March 23, 1998. Despite the State's assurances that there would be no further malfunctions with their electric chair, recordings of the execution current indicated that Mr. Stano received an electrical shock at a current far below the amount that the execution day procedure indicated was necessary to insure in an instantaneous death. The lack of an instant death makes Florida's operation of its electric chair unconstitutional. See *In re Kemmler*, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947)(same).

During Leo Jones' execution on March 24, 1998, *The Florida Times Union*, the Jacksonville paper, reported the eyewitness observations of John Boney, an employee of the Jacksonville Sheriff's Office, during Boney's observation of Mr. Jones' execution:

> After a 17-year wait, John Boney didn't feel the elation he expected yesterday when he watched the execution of the man who killed his best friend.
>
> "It wasn't the feeling I thought I would have had, like 'Yea, we got him!' It was more just a relief to know it's over now, and we don't have to think of this anymore," said Boney, now a Jacksonville Sheriff's Office lieutenant.
>
> Boney watched as Leo Jones was strapped into the electric chair at Florida State Prison, repeatedly mouthing a prayer in Arabic.

* * *

> Boney watched Jones' hand curl into fists when a hooded executioner turned a dial that sent 2,300 volts of electricity through his body.
>
> And finally, he saw Jones pronounced dead at 7:11 a.m. after one last heave from his chest.

[App. EE] (emphasis added).[32]

Mr. Boney's observations are corroborated by another witness to Mr. Jones' execution:

> 9. When the electrical current was stopped, I observed Leo [Jones'] left thigh jittering almost as if in spasm. I also observed Leo [Jones'] chest heave three seperate [sic] times after the electricity was disengaged. Having observed these things, I was deeply concerned that the process of determining that Leo was in fact dead took 5 to 7 minutes.

[App. FF].

Additional accounts of the Leo Jones execution corroborate these reports:

> 2. I was sitting in the third row and had a clear view of Mr. Jones. After the power had been turned off, a doctor approached Mr. Jones. As the doctor was in the process of placing a stethoscope on Mr. Jones' chest, Mr. Jones' chest heaved. After the execution other [persons] were remarking that it looked as if Mr. Jones was trying to breath [sic].

[App. PP]. The photographs of Leo Jones' body (the last six pages of App. QQ] are contained in the appendix.

The observations of witnesses to the Leo Jones execution

32Predictably, the chart recordings show that 2300 volts were not delivered in conformity with protocol. In fact, DOC records show that the control knob is preset to deliver 2300 volts, but for whatever reason it repeatedly fails to do so.

report observations similar to those during Pedro Medina's execution: multiple breaths following the cessation of the electrical current. These movements indicated that Mr. Jones in fact was not dead when the electrical current was turned off, despite the fact that the State of Florida and the Department of Corrections have blindly maintained that the condemned are instantly killed during a Florida judicial electrocution. That Leo Jones was still alive well after the execution cycle was complete means that Florida's particular manner of judicial electrocution is unconstitutional. See *In re Kemmler*, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947)(same).

Moreover, Mr. Provenzano's counsel is in receipt of the chart recordings of the executions of Mr. Jones as well as those of Gerald Stano, who was executed on March 23, 1998, one day before Mr. Jones. These chart recordings provide the most concrete and objective evidence possible that the Department of Corrections is violating the protocol it established on April 16, 1997, following Pedro Medina's execution. The chart recordings of the executions of Gerald Stano on March 23, 1998 and Leo Jones on March 24, 1998 received by counsel indicate that DOC is disregarding its execution protocol. According to the protocol, which DOC represented to the courts that it would follow from now on, the execution cycle is supposed to be: 2300 volts for 8

seconds; 1000 volts for 22 seconds; and 2300 volts for 8 seconds [App. GG at 5.I.]. However, the chart recordings of both the Stano and Jones executions demonstrate that the execution cycle was: 2250 volts for less than 1 second; 1600 volts for less than 8 seconds; 550 volts for 22 seconds; 1500 volts for 4 seconds; and finally a spike up to 2400 volts for less than 1 second. In the executions of both Leo Jones and Gerald Stano, DOC ignored its own protocol.[33] This deviance and indifference is constitutionally troubling because the low voltage raises the risk that the condemned were subject to pain, lingering death and mutilation.

DOC did not fare much better during the executions of Judy Buenoano and Daniel Remeta the following week. On Monday morning, March 30, 1998, Judy Buenoano was electrocuted at Florida State Prison. During her electrocution, an 8" stream of smoke was seen coming from the electrode strapped to Ms. Buenoano's right leg, as described by a witness:

> 2. I was seated in the witness viewing area in the front row seat in front of Ms.

33According to the chart recordings, DOC did follow their protocol during the testing of the electric chair on March 22, 1998 prior to the executions. At the testing, the chart recordings indicate voltage in line with the protocol.

The chart recordings also indicate that testing of the electric chair prior to Mr. Stano's execution on March 23 was not entirely successful. For example, one chart indicates that at 9:10 AM on March 16, 1998, there was a "fail test" because "due to no amperage . . . had to call Consolidated Power at 9:20 AM" (App. HH). Also on March 16, the amperage chart indicates "found loose wire on amperage meter" [App. II]. So the electric chair, which the State and DOC assured the Florida Supreme Court worked just fine, has failed tests. And then DOC does not employ the protocol it indicated that it would from now on.

Buenoano. As she was brought into the execution chamber and was seated in the chair, she had to slide backs towards the back of the chair because the chair was too large for her body. However, to place her legs in the leg restraints at the base of the chair, she had to slide forward slightly while slouching to allow the top of her back to touch the back of the chair. In this position, she was awkwardly slumped. Ms. Buenoano indicated pain and discomfort as the chest strap and leg electrode were applied to her body. In fact, as the chest strap was tightened, it appeared that her flesh of her breast was pinched in the metal buckle until it was loosened slightly by the correctional officer.

3. I saw the sponges as they were being applied to her body. The sponge applied to her leg did not appear to be dripping any fluid and it was larger than the leg electrode and could be seen coming from both the top and bottom of the strap containing the electrode. Considerable fluid must have dripped from the sponge as it was applied to her leg because the correctional officer mopped the floor near the leg electrode with a towel after the leg electrode was attached. The sponge placed inside the headpiece was about the same diameter as the headpiece and it not appear to be dripping fluid. As the leg electrode and the headpiece were applied to Ms. Buenoano, the correctional officer stood between me and Ms. Buenoano.

4. As electricity was applied to her body, Ms. Buenoano tensed and balled up her hands. About halfway through the application of current, white smoke or steam could be seen coming from the leg electrode. The smoke or steam lasted until after the current was disconnected. The smoke rose about eight to ten inches above the electrode.

5. This is the first execution I have witnessed. I did not know whether this was unusual or not. Melodee Smith, who was sitting next to me during the execution, asked me when I was leaving if I had seen the smoke. She commented that she had and asked

if I was going to report what I had seen.

[App. JJ].

Other eyewitnesses confirm that the smoke lasted between 20 and 30 seconds and rose more than a foot in height [App. KK].

Media reports of Judy Buenoano's execution support the eyewitness accounts. The Associated Press reported that the smoke was observable during the entire 38 seconds of the execution cycle. Reports on the Cable News Network confirmed the observations of a witness and the Associated Press regarding smoke emanating from Ms. Buenoano's right leg.[34] Julie Hauserman with the *St. Petersburg Times* confirmed seeing an approximately foot long plume of smoke [App. LL]. She had indicated that prison officials claimed this was a common occurrence, even though testimony at the *Jones* electric chair hearing was to the contrary. See infra (testimony of Carlton Hackle).

During the evidentiary hearing in the Leo Jones case, Carlton Hackle, the construction maintenance superintendent of Florida State Prison, testified that at that time,[35] he had been involved with eleven (11) electrocutions. During the course of his testimony, Hackle confirmed that some smoke was seen coming from the leg electrode during the electrocution of John Mills in

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34CNN also reported that the execution involved 5600 volts of electricity. If true, this amount would be contrary to the DOC's execution protocol.

35The *Jones* hearing at which Hackle testified occurred on April 15, 1997.

December 1996. (*Jones v. State*, April 15, 1997 transcript at 25). He also indicated that in the eleven executions he had witnessed, he only saw smoke coming from the leg in the execution of John Mills:

> Q And had you noticed any smoke from the prior executions, on the leg, besides Mr. Mills, prior to Mr. Mills?
>
> A No, I did not.
>
> THE COURT: You'll have to answer out loud.
>
> A I said no, I did not.

(*Jones v. State*, April 15, 1997 transcript at 32)(emphasis added). As a result of this "rare" occurrence during the Mills' execution, Mr. Hackle investigated and ultimately changed the size of the sponge used in the leg electrode (Id. at 26).

The smoke coming from Ms. Buenoano's leg raises constitutional concerns. If she was alive, she was subject to pain and torture, in violation of the State and Federal Constitutions. See *In re Kemmler*, 136 U.S. 436, 443 (1890)(holding that judicial electrocution must result in instantaneous death to satisfy constitutional standards); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 474 (1947)(same). If she was dead, then her body was subject to mutilation, which also implicates constitutional considerations.

On March 31, 1998, Daniel Remeta was executed in the Florida electric chair. Prior to his execution, Mr. Remeta petitioned this Court based on the new evidence gathered from the executions of Mr. Stano, Mr. Jones, and Ms. Buenoano. In denying Mr.

Remeta's petition, this Court directed DOC to follow its published protocol for carrying out judicial electrocutions. See *Remeta v. Singletary*, No. 92,679 (Fla. March 30, 1998] [App. G]. The chart recordings from Mr. Remeta's execution indicate that DOC once again did not follow its protocol during Mr. Remeta's execution.[36] This is especially troubling because the Florida Supreme Court specifically ordered the State to follow its protocol when it executed Mr. Remeta. Eyewitness reports also indicate that smoke was coming from the area of Mr. Remeta's leg electrode.

Counsel for Mr. Provenzano has obtained complete autopsy reports for Gerald Stano and Judy Buenoano.[37] These reports indicate extensive mutilation of the bodies of the condemned in the most recent executions in Florida's electric chair. For instance, the autopsy report of Gerald Stano notes an ill-defined burn ring on Mr. Stano's scalp, with a maximum diameter of 7" and a width varying from 1/2" to about 1 1/2". Also on the scalp, the coroner noted peripheral charring and gray tan to brown discoloration surrounded by an area of reddened skin. The autopsy report also indicates that there is a rectangular burn of 7" x 9" on the back of Mr. Stano's right leg beginning at the knee and extending into the mid-calf. The burn, which is full-

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36The chart recordings from Ms. Buenoano's judicial electrocution also deviated dramatically from the DOC's protocol.

37For religious reasons, Leo Jones and Daniel Remeta did not have an autopsy conducted. Mr. Remeta did have a body diagram prepared by the Medical Examiner, the results of which are discussed infra.

thickness, is accompanied by peripheral gray to brown charring [App. MM].

The autopsy report of Judy Buenoano notes strikingly similar burns to those on the body of Gerald Stano. There are burns, which are deemed to be electrical in nature, on the head and the back of the right leg. The burn on the scalp has a 7" diameter and a width ranging from about 1/2" to 1 1/8". It is a full-thickness burn surrounded by reddened skin. The burn on the right leg is 7" x 5" [App. NN].[38]

The individual who prepared Leo Jones' body observed that the State of Florida mutilated Mr. Jones:

> 10. As his spiritual adviser, Leo [Jones] entrusted me to arrange for his funeral. As an adherent of Islam, Leo planned on receiving a Moslem burial. As part of his funeral, his body had to be cleansed before burial. It was my responsibility to see this done, as well as to participate in the cleansing.
>
> 11. While washing Leo [Jones'] body, I witnessed the intense burns caused by the execution, particularly around the areas where the electrodes were attached. I noticed that Leo's head was disfigured and swollen. The skin around his right eye was blistered. There were also two deep black burns on Mr. Jones' right leg. The skin in between the legs was blistered and pink flesh was visible on the upper leg burn. Most shockingly, I noticed a hole in his chest directly above the breast bone which had blood flowing from it. This concerned me most due to the fact that it was in the same place where the torso straps were pulled so tightly around his chest prior to execution.

38Photographs from other bodies reflect similar burns and mutilation occurring in judicial electrocutions. See [App. QQ].

[App. FF].

Mr. Provenzano has obtained the body diagram of Daniel Remeta made by the Medical Examiner during his external examination of Mr. Remeta's body. The diagram indicates that there is a burn ring on Mr. Remeta's scalp of seemingly similar size to those of Mr. Stano, Mr. Jones and Ms. Buenoano, and there is a burn on the right leg measuring about 6" x 9" [App. OO].

Even if Mr. Stano, Ms. Buenoano, Mr. Jones and Mr. Remeta were rendered instantly dead by the Florida electric chair, Supreme Court caselaw makes clear that any post-death mutilation that occurred in their cases such as smoke coming from the leg and disfigurement caused by massive burning of the body offends notions of basic human dignity underlying the Eighth Amendment.[39] See *Weems v. United States*, 217 U.S. 349, 372 (1910)(noting that Eighth Amendment prohibition on cruel and unusual punishment bars punishments that "inflict[] bodily pain or mutilation"); See also *Jones v. McAndrew*, No.4:97-CV-103-RH at 34-35 (N.D.Fla. February 20, 1998)(holding that fire about head of judicially electrocuted person implicates Eighth Amendment). Cf. *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985)(Brennan and Marshall, JJ., dissenting from denial of

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39Certainly, the newly disclosed DOC records show that DOC could carry out the execution with less mutilation. For example, the current could be turned off sooner. If death is instantaneous, the 38 seconds that current is flowing is unnecessary. Further, Mr. Wiechert's recommendation to increase the size of the head piece would reduce current density and thus burning of flesh. However, DOC has not acted on that recommendation in over a year.

certiorari); *Furman v. Georgia*, 408 U.S. 238, 266 (1972)(Brennan, J., concurring); *Jones v. State*, 701 So. 2d at 84, 88 (Kogan, C.J., Shaw and Anstead, JJ., dissenting).

Taking Mr. Provenzano' allegations as true, a stay of execution and an evidentiary hearing are required. See *Lightbourne v. Dugger*; and *Jones v. Butterworth*.

B. THE CIRCUIT COURT'S ORDER.

The circuit court's order is erroneous on many counts. Judge Johnson made an interesting point, which, though technically correct, apparently caused him to get confused. Judge Johnson stated:

> "Whitlock's memo indicates that the variation in the recorded data regarding the level of current passes through an individual's body during 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."

[PC-R1. 756].

The lower court's statement misses the point. The State's experts testified in *Jones* that the variance of the resistance between human bodies was small (240 ohms to 260 ohms). Judge Soud and DOC accepted this information as true. However, Whitlock indicates that the variance is between 200 ohms to 500 ohms [App. F]. Therefore, is a question of fact that DOC has recognized that the language in the protocol is a problem because

it is based upon false information provided by the State's two experts which is adverse to that of Mr. Whitlock. The information by the two experts provided the basis for Judge Soud's conclusion that the electric chair was constitutional.

Also, the lower court's description of the four executions in March of 1998 as "successful" reveals that either it did not read the allegations in the 3.850 that the executions were not successful in a constitutional sense, or that it believes executions are successful so long as they result in death [PC-R1. 759].

In its order denying relief, the lower court further stated:

> 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."

[PC-R1. 759](emhasis added).

Despite the lower court's "analysis," the newly released documents demonstrate that DOC has refused to follow its engineer's recommendation to replace the "obsolete" breakers which have failed at least four times in the past year. DOC failed to buy and install the new chart recorders following the engineer's recommendation until eleven months until after four executions, and the chart recordings from those executions, were made an issue in court.

The lower court has failed to accept the factual allegations in the motion as true. Additionally, its failure to order

further 119 proceedings or to conduct an evidentiary to determine what relevant information was revealed in the newly disclosed DOC records, caused it to reach an erroneous factual conclusion.

Finally, the lower court makes no mention of the issue raised as to whether the four previous executions resulted in instaneous death. It merely states that *Jones* is controlling [PC-R1. 757]. This finding again gives undersigned counsel the sense that the lower court did not read or fully comprehend the 3.850, nor the supporting Appendix, or the proffered report from Dr. John Wikswo.

ARGUMENT V

MR. PROVENZANO IS BEING DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS TO RECEIVE EFFECTIVE REPRESENTATION.

On June 9, 1999, the Governor of the State of Florida signed a death warrant for the execution of Thomas H. Provenzano for 7:00 a.m., July 7, 1999 [PC-R1. 476]. At that time Mr. Provenzano had no Circuit Court Judge appointed to his case, nor an attorney to represent him. On June 11, 1999, the CCRC-M filed a "Motion for Determination of Counsel or, in the Alternative, to Stay Execution" [PC-R2. 103]. An emergency hearing on this motion was scheduled for the morning of June 14, 1999 [PC-R2. 45-71]. On June 11, 1999, the State filed its response to the motion, and on June 13, 1999, the State filed a "Motion to Transfer Post-Conviction Proceedings to the Original Trial and Post-Conviction Judge." Circuit Court Judge Richard Conrad entertained these pleadings at the hearing on June 14, 1999, and

entered an order the next day. The order addressed only the State's motion to transfer, and the case was referred to Chief Judge Belvin Perry, Jr. On June 16, 1999, The Honorable Belvin Perry, Jr. (Ninth Circuit) assigned the case to the Honorable Clarence T. Johnson, Jr., a senior judge temporarily assigned to the Ninth Circuit by the order of this Court [PC-R2. 127]. On June 18, 1999, Judge Johnson ordered CCRC-Middle Region to represent Mr. Provenzano [PC-R2. 129-130].

The death warrant was issued June 9, 1999. At the time the warrant was signed, Terri Backhus was the attorney of record for Mr. Provenzano; Ms. Backhus is a private attorney who had previously worked for Capital Collateral Representative (CCR)[40] and CCRC-Middle Region, and who had represented Mr. Provenzano since November of 1997 after her departure from CCRC-M. Before Ms. Backhus represented Mr. Provenzano, his attorneys had been employees of CCR. That agency was abolished by statute in June of 1997. During the transition, some of Mr. Provenzano's attorney's at CCR transferred to and became employees of CCRC-Southern Region. None of the attorney's at CCRC-Middle Region has ever represented Mr. Provenzano. Until June 18, 1999, Mr. Provenzano did not have any counsel to represent him in his state death warrant proceedings.

Mr. Provenzano is scheduled for execution on July 7, 1999.

40In 1997 the Florida Legislature abolished CCR and replaced it with three offices called Capital Collateral Regional Counsel (CCRC). The legislation assigned the cases to the three offices based on geographic regions.

This Court directed that all circuit court proceedings be concluded by June 24, 1999. No other extensions have been granted, and all motions to stay execution have been denied.

The Honorable Clarence T. Johnson, Jr. was assigned the case on June 16, 1999 [PC-R2. 127]. CCRC-M was appointed as Mr. Provenzano's counsel on June 18, 1999, over CCRC's objection. No judge was effectively assigned to Mr. Provenzano's case until Judge Johnson was assigned on June 18, 1999.

CCRC-M requested this Court, as well the circuit court to stay the execution of Mr. Provenzano until CCRC-M could properly prepare to represent Mr. Provenzano [PC-R2. 129]. Both courts denied the request.

Moreover, there are approximately 25 file boxes full of documents pertaining to Mr. Provenzano's case. There simply isn't enough time for any attorney within this office to become even remotely familiar with the details of this case.[41]

At this time, any attorney at CCRC-M who has undertaken representation of Mr. Provenzano could be subject to a potential bar complaint for incompetent representation. When Judge Johnson appointed CCRC-M as Mr. Provenzano's attorney, a chilling effect occurred, which affects the proper representation of Mr. Provenzano. In essence, Mr. Provenzano has no attorney.

CCRC-M cannot competently represent Mr. Provenzano under the present time constraints. As mentioned above, CCRC-M was just

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41In light of the voluminous amount of material, the undersigned apologizes in advance for lack of knowledge regarding specific facts pertaining to Mr. Provenzano's case.

assigned to the case on June 18, 1999. The deadline placed CCRC-M in the impossible position of familiarizing, researching, and investigating Mr. Provenzano's case for preparation of a competent 3.850 motion in five days. Not only is the time constraint unreasonable, but it denies Mr. Provenzano his right to competent representation, and forces CCRC-M to unethically proceed with a case that no employee within the agency can even remotely become prepared. Competence of an attorney to represent a client is described by the Florida Bar. Specifically rule 4-1.1., which states:

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."
>
> **Comment**
>
> **Legal knowledge and skill**
>
> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity, and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience...
>
> **Thoroughness and preparation**
>
> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence. The lawyer should consult with

> the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

On June 23,1999, a Huff Hearing was conducted before the Honorable Clarence T. Johnson, Jr. [Index to Hearing, Volumes I, II]. Judge Johnson entered his order denying Mr. Provenzano a stay of execution and additional time to prepare a proper 3.850 motion. In his order, Judge Johnson, states:

> "Further, it has been established that there is no constitutional right to the effective assistance of postconviction counsel."

[PC-R1. 766].

In support, Judge Johnson cites: *Lambrix v. State*, 698 So. 2d 247[42] (Fla. 1996). The Court in *Lambrix* makes no such statement. That case involved a claim of ineffective assistance of postconviction counsel. Mr. Provenzano concedes that this Court, as well as the Federal Courts, indicates that a claim of ineffective assistance of postconviction counsel has been held invalid. Further, Mr. Provenzano concedes that the courts have held that there is no constitutional right to postconviction counsel. However, Mr. Provenzano does contend that once postconviction counsel has been made available, he is entitled to effective legal representation. In *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988), this Court stated:

> "We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital

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42The court cited this case incorrectly to page 248.

> collateral representative in all collateral relief proceedings."

Whether a defendant's right to postconviction counsel is a constitutional right or a statutory right, begs the question as to effective representation. Mr. Provenzano now has counsel -- via Judge Johnson's appointment of CCRC-M in his order -- and that counsel should be permitted to be effective for such representation.

Also, in Judge Johnson's order, he attempts to distinguish *Scott v. Dugger*, 634 So. 2d 1062 (Fla. 1993), from the case sub judice. First, he points out that Mr. Scott had only four days before his execution when this Court granted him a stay of execution in order to file a 3.850 motion, as compared to Mr. Provenzano, who had been given 19 days[43]. However, the Court fails to consider the reason for the request for the extension. In Mr. Scott's situation, he received approximately 53[44] days to file his postconviction motion, while Mr. Provenzano was permitted only five[45] days to file his 3.850 motion.

In *Scott* this Court granted a stay of execution to allow CCR an opportunity to file motions for postconviction relief. This case has essentially the same factual circumstances as those set

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4319 days is calculated from the date of CCRC-M appointment, June 18, 1999, and the date the execution of July 7, 1999.

44CCRC-M requested a stay on October 26, 1990 and filed Mr. Scott's postconviction motion on December 18, 1990.

45CCRC-M was appointed to represent Mr. Provenzano on June 18, 1999 [PC-R2. 131], and was ordered to file his 3.850 motion by June 23, 1999.

out in *Scott*. Mr. Scott had previously completed all state proceedings and federal proceedings when a death warrant was issued. Four days prior to the execution date, his private counsel withdrew and CCR entered the case. CCR was granted a stay of execution. At least 53[46] days had expired between the order of this Court and the filing of a successor 3.850 being filed on behalf of Mr. Scott.

Also, Judge Johnson assigns a legal fiction of continued representation of Mr. Provenzano by CCRC-M, because CCR represented him through his habeas corpus proceeding in the Federal District Court, for the Middle District of Florida. Judge Johnson also incorrectly imputes knowledge of Mr. Provenzano's case to the attorneys presently employed by CCRC-M because he assumes that CCRC-M had possession of Mr. Provenzano's records since CCR has been abolished. The undersigned cannot attest to that presumption because Ms. Backhus has recently delivered boxes of Mr. Provenzano's files. The undersigned cannot distinguish between the boxes this office already had and the boxes from Ms. Backhus. The fact that CCRC-M happened to have some of Mr. Provenzano's records should have absolutely no bearing on the issue of familiarity with Mr. Provenzano's case for purposes of preparedness to assume representation, because Mr. Provenzano was represented by outside counsel. To do so would deprive all the clients that are presently being

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46The motion to say was filed October 26, 1990. The 3.850 motion was filed December 18, 1990.

represented by CCRC-M of precious time and resources being spent on non-clients.

Again, Mr. Provenzano strenously urges this Court to grant a stay of execution so that Mr. Provenzano's counsel will have sufficient time to become familiar with his case. To do otherwise would certainly amount to Mr. Provenzano having no representation at all.

ARGUMENT VI

MR. PROVENZANO'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH CONSTITUTIONAL AMENDMENT RIGHTS ARE BEING VIOLATED IN THAT MR.PROVENZANO IS INCOMPETENT TO PROCEED IN HIS POSTCONVICTION PROCEEDINGS.

Forcing a death row inmate to go forward with proceedings when he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 789 (1960); *Scott v. State*, 420 So. 2d 595 (1982) poses an unacceptable risk that he will be deprived of life in violation of the due process clause of the Fourteenth Amendment.

Mr. Provenzano is incapable of assisting counsel to formulate claims to include in his Motion for Postconviction Relief. See *Spalding v. Dugger*,. (A defendant in capital postconviction proceedings is entitled to the effective assistance of counsel.) In his motion, Mr. Provenzano alleges deprivations of substantial rights which require detailed allegations of facts of which only Mr. Provenzano is aware. See, *Harrell v. State*, 458 So. 2d 901 (Fla.App. 2 Dist. 1984). Such

claims likewise will involve Mr. Provenzano calling witnesses and cross-examining them. *Harrell*, 458 So. 2d 901. See, *Barr v. State*, 548 So. 2d 819 (Fla.App. 2 Dist. 1989). To conduct his case in accordance with these requirements, Mr. Provenzano must understand the nature and consequences of the proceedings. Without such an understanding, he cannot assist counsel.

Postconviction counsel retained Dr. Berland, a mental health expert, and he has reviewed Mr. Provenzano's psychiatric history, background material, and has evaluated him [T. 75]. Dr. Berland has preliminarily determined that there is reasonable evidence to believe that Mr. Provenzano is unable to proceed in his postconviction proceedings at present. However, due to the lack of time necessary to make complete findings, the Berland has recommended that an addictionologist be obtained to help make a more complete determination. Family members have recently revealed to CCRC-M that there is a strong likelihood that family member(s), or a close friend of the family, was responsible for sexually abusing Mr. Provenzano, and that at the time of the offense Mr. Provezano was ingesting illegal substances, as well as receiving injections of hormones.

Counsel must confer with Mr. Provenzano to determine whether he experienced any abuse, and who may have been the perpetrator or perpetrators. Postconviction counsel suspects a bizarrely hostile yet dependent relationship exists between Mr. Provenzano and his mother, and perhaps with other family members.

Other information with which Mr. Provenzano could provide

postconviction counsel relates to his head injuries. His medical history reveals regular episodes of dizziness and headaches. Only Mr. Provenzano can describe the circumstances surrounding his headaches, and how he reacts to them. Only Mr. Provenzano can describe for counsel the specific nature and location of his headaches. This information is essential for the development of Mr. Provenzano's claims in postconviction because such details are relevant to specific mental health diagnoses and behavioral disorders that may be present in addition to his diagnosis of paranoid schizophrenia.

Because Mr. Provenzano has the right to be competent during his postconviction proceedings, he must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope*, 420 U.S. at 171, and have a "rational, as well as a factual, understanding of the pending proceedings." *Dusky*, 362 U.S. at 402.

In *Carter v. Florida*, 706 So. 2d 873 (Fla. 1998), the Court addressed the issue presented herein -- the standard of competency in postconviction proceedings. The Court found that a hearing regarding competence of capital murder defendant to participate in postconviction proceedings must be held when the defendant shows there are specific factual matters at issue that require him to competently consult with counsel. The Court went on to adopt the *Dusky* standard of postconviction competency. A defendant seeking postconviction relief is required to make

numerous decisions and undertake various tasks, including "assist[ing] counsel in raising new issues and developing a factual foundation for appellate review," Id., All of these considerations must be taken into account when assessing a defendant's capacity not only to have a factual understanding, but also, and most importantly, a rational understanding of the postconviction process.

In order to arrive at a workable "standard" for competency in the context of a capital postconviction proceeding, it is necessary to take into consideration the role of the defendant in these proceedings. First and most obvious, a defendant must be able to effectively communicate with his counsel "with a reasonable degree of rational understanding." Fla. R. Crim. P. 3.211 (a)(1). "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf." *Riggins v. Nevada*, 112 S. Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment).[47]

If a defendant does not have the capacity to remember the trial, or any witnesses who testified at the trial, or other essential aspects of the trial or the investigation, or provide

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47That the proceedings are postconviction proceedings rather than trial proceedings is a distinction without a difference, as Mr. Provenzano has the right to effective representation during his postconviction proceedings. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988); *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995).

any information about potential avenues of investigation, then the defendant cannot be said to have the capacity to "consult with counsel with a reasonable degree of rational understanding."

An individual seeking postconviction relief in a capital case must also have the capacity to be present at and participate in an evidentiary hearing, listen to the testimony, and consult with counsel with a reasonable degree of rational and factual understanding about the testimony being presented. A defendant does not lose his right to due process when seeking postconviction relief, and fundamental constitutional rights to which a defendant is entitled at trial also attaches at a postconviction evidentiary hearing. See, e.g., *Teffeteller v. Dugger*, 21 Fla. L. Weekly S107 (Fla. 1996). For example, Mr. Provenzano has the constitutional right to confront witnesses against him at an evidentiary hearing. *Teffeteller*, 21 Fla. L. Weekly at S107.

Given that Mr. Provenzano has the right to be competent during these proceedings, he is also entitled to the assistance of competent mental health expert. *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987); *Mason v. State*, 489 So. 2d 734 (Fla. 1986). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. *Mason*, 489 So. 2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his

> criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake v. Oklahoma, 470 U.S. 68 (1985).

In denying Mr. Provenzano an evidentiary hearing on his mental incompetency to proceed, the court basically found two situations as existing to support his finding:

> (1) 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 [PC-R1. 767], and
>
> (2) That there are no specific factual matters at issue that require the defendant to competently consult with counsel id.

Although the court's legal basis for the denial of an evidentiary hearing and motion to determinate defendant's competency may have been valid, the court's factual findings do not speak to the practical applications of the situation. To hold the defendant to the legal standard at this juncture, while

under warrant and having five days to file a postconviction motion, places the defendant in a "catch 22" position.

Counsel informed the court at the Huff Hearing that Dr. Berland was retained to evaluate Mr. Provenzano for competency to proceed and that Dr. Berland spent six hours on June 20, 1999. Counsel also explained to the court that Dr. Beland was unable to provide a complete report without further investigation, but that his preliminary finding raise question as to Mr. Provenzano's competency to proceed [T. 75]. Given that counsel was provided with only five days to file Mr. Provenzano's postconviction motion, that counsel was **totally** unfamiliar with Mr. Provenzano's case, and that Dr. Berland had insufficient time to complete his evaluation, Mr. Provenzano could not comply with the letter of the findings of the court in *Carter*.

Inasmuch as counsel had insufficient time to investigate facts to properly prepare a postconviction motion, counsel could not, in good faith, allege facts not known to or available to counsel. Therefore, counsel was forced to seek help from Mr. Provenzano. Due to Mr. Provenzano's mental state, he was unable to communicate with counsel sufficiently to illicit information which could be investigated by counsel. Hence, counsel requested Dr. Berland for an evaluation. Albeit, *Carter* holds for the proposition that if the claims alleged in the postconviction motion are not factual in nature, no competency evaluation is required. However, *Carter* presupposes that sufficient time would be present for counsel to make an independent investigation.

This is not the case here.

This Court has loosened the stringent procedural requirements during a warrant stage of appellate procedures.[48] However, the obvious lack of time to prepare properly should not place the defendant in a worse position by being appointed an attorney who knows little or nothing about his case, and then providing the attorney with no time to fight for his client's life.

This Court should stay Mr. Provenzano's execution, remand the case to the lower court, require that Mr. Provenzano be evaluated for competency to proceed, and grant an extension for counsel to investigate and amend Mr. Provenzano's postconviction motion.

ARGUMENT VII

MR. PROVENZANO'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.

The court, in denying Mr. Provenzano's request for relief without an evidentiary hearing, found the claim procedurally barred because it could have been raised on direct appeal or in the first motion for postconviction relief [PC-R1. 768].

However, the court failed to consider whether the claim amounted to "fundamental error." The only exception to a blanket procedural bar is fundamental error. Fundamental error is defined

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48For example, facsimiles have been accepted, time period shortened, briefs expedited, etc.

as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Kilgore v. State*, 688 So. 2d 898 (Fla. 1996), cert. denied, ___ U.S. ___, 118 S. Ct. 103, 139 L.Ed.2d 515 (1997); *Gibson v. State*, 351 So. 2d 948 (Fla. 1977); *State v. Jones*, 204 So. 2d 515 (Fla. 1967).

Each of the jurors indicated that they had knowledge of the case from media accounts. Despite this candor, trial counsel failed to explore these issues in a sequestered and individual voir-dire, and the court failed to use its discretionary authority, thereby prejudicing defendant's opportunity to receive a fair and impartial jury trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding State Constitutional provisions. Given that the advisory opinion was a vote of 7 to 5 in recommendation of death, there is a strong probability that the verdict would have been different had a proper determination of jury impartiality been made by sequestered and individual voir dire.

Florida courts have consistently found that a defendant's right to an impartial jury can be greatly affected by a juror's knowledge of information which would not be admissible at trial. *Pender v. State*, 530 So. 2d 391 (Fla. 1st DCA 1988)(Where jury was informed of prior convictions of defendant and neither the court or the attorneys could remember that fact being mentioned); *Kelly v. State*, 371 So. 2d 162 (Fla. 1st DCA 1979)(Where the

court reversed appellant's conviction because some jurors knew appellant was to be tried for another offense as well as the present one.); *Wilding v. State*, 427 So. 2d 1069 (Fla. 2nd DCA 1983)(Where appellant's conviction was reversed because a juror explained during jury selection that he knew of previous charges against defendant, the district court found that "the prejudice to appellant is almost as certain to be as great, if not greater, when the information is received in this manner rather than when it is part of the prosecutor's evidence and subject to protective procedures.")

In addressing this issue on direct appeal, this Court observed that the issue of change of venue was not preserved. *Provenzano v. State*, 497 So. 2d 1177 (Fla. 1986). However, the Court discussed the issue of publicity and failed to speak to the **obligation of the trial court**.

In discussing the prejudice of the news articles, this Court found that all, except one, were straight news stories of a factual nature and therefore not inflammatory. Id. at p. 1182.

The federal district court found the same lack of inflammatory remarks in the news articles. *Provenzano v. Singletary*, 3 F. Supp. 1353, 1362 (M.D. Fla. 1997).

In *Gore v. State*, 719 So. 2d 1197 (Fla. 1998), this Court stated:

> "This type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects. We further note that the trial court has a

> crucial role in ensuring that lawyers do not exceed the bounds of proper advocacy."

Although *Gore* dealt with prosecutorial misconduct, this Court acknowledged that the court had an obligation to ensure a fair trial. In the case subjudice, the trial court knew about the publicity of the case, but seemed annoyed at the prospect of having to adequately query the prospective jurors.

The court asked the prospective jurors whether they could render a fair and impartial verdict based solely on the evidence presented and the law which the court would instruct them on [R. 38]. Only Juror L.B., Number 132 indicated the following in front of the other jurors: "Yes., I would have a hard time, having heard [sic] everything I have heard prior about the trial and all" [R. 39].

Thereafter, the defense requested a side bar conference outside the jury's presence. The defense suggested that "in anticipation that things like this might come up" the Court should instruct the jury on defendant's intention to rely on an insanity defense. The defense suggested that somehow merging the publicity issue with an instruction on insanity would somehow get jurors who would otherwise be prejudiced. The Court responded *"I'm trying to figure a way from keeping - to ask every one of these damn jurors these questions."*

However, in *Bolin v. State*, 1999 WL 394284 (Fla. June 10, 1999), this Court found prejudice in articles such as:

> During the first trial, Phillip Boling was a willing witness for the state, and his testimony played an important part in putting

> Oscar Bolin, now 34, on death row....Id.
>
> All three convictions were reversed in 1995 by the Florida Supreme Court, which ruled the trial judge erred in allowing testimony of Bolin's former wife, who is now deceased, as to what Oscar Bolin had told her about the killings. Id.

In Provenzano's case this court did not find prejudice in such articles[49] as:

> "Police found Provenzano's yellow Vega station wagon in a city parking garage at Palmetto Avenue and Washington Street, fearing that the suspect might have rigged it to explode when towed."
>
> "Provenzano has had numerous run-ins with police, prosecutors, and court officials in the Orlando area within the last two years, disorderly conduct, resisting arrest and battery on a police officer."
>
> "Maitland Police Lt. Ed Doyle said Provenzano 'had a little dispute with this lady at the insurance company, and he was very upset. There was some indecent exposure on his part and he was threatening the lady.'"

According to the cases cited herein, this type of publicity would normally amount to prejudicial exposure to a jury.

Further, in *Bolin*, this Court stated:

> "Individual voir dire to determine juror impartiality in the face of pretrial publicity is constitutionally compelled only if the trial court's failure to ask these questions renders the trial fundamentally unfair. (Citation Omitted).

49Due to lack of available time prior to the filing of the 3.850 motion, the referenced articles were not included in the defendant's 3.850. Counsel is aware that proper procedure precludes counsel from presenting information to the appellate court that has not been presented to the trial court. However, due to the gravity of the circumstances and having only reviewed these articles today, counsel is compelled to present a reminder of these articles to the court.

> The mere existence of extensive pretrial publicity is not enough to raise a presumption of unfairness of constitutional magnitude."

Much of the consideration by the Court's in Mr. Provenzano's case deals with the trial attorney's tactic, rather than focusing on the trial court's obligation to see that a defendant receives a fair trial, regardless of trial counsel's tactics.

It appears that the primary difference between the case sub judice and *Bolin* is that Mr. Bolin's counsel requested sequestered and individual voir dire, while Mr. Provenzano's counsel did not (allegedly due to trial tactics). If Mr. Bolin's counsel had not requested such voir dire, would this Court's ruling have changed? If not, then Mr. Provenzano should receive the same consideration.

It is apparent from the record that the trial court grew tired of asking individual jurors questions. At one point in voir-dire, the trial court abandoned asking each new juror whether he or she had heard about the case in the media. The court presumed that each new panel member had heard about the case in the media: "THE COURT: I take it the rest of the jurors have heard about this matter, at least through television or newspaper coverage" [R. 253][50]

The court then went back to simply asking whether each juror had heard accounts of the case in the media, but not to the

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50The court was addressing the following prospective jurors: Juror K.G., Number 12; Juror SF., Number 13; Juror R.R., Number 15; Juror 82 N.W; Juror J.A. number 102; Juror M.R., Number 101; Juror C.B. Number 27; Juror R.M., Number 23 [R. 251-252].

extent of their knowledge. Juror L.E., Number 2 through newspaper and T.V. [R. 256]; Juror M.H., Number 44 through T.V. [R. 257]; Juror C.P., Number 28 television and newspaper [R. 290], Juror C. R. Number 96 through television and newspaper [R. 290] ; Juror P.S. Number 93, through television and newspaper [R. 290]; Juror B.T., Number 49, through television and news [R. 292]; Juror E.D., Number 73 fixed opinion from newspaper [R. 300]; Juror B.H., Number 36, television and newspaper coverage [R. 301]; Juror S.S., Number 63, publicity [R. 314]; Juror A.C., Number 54 thorough media and church [R. 320].

The court then swore in the jury and turned its attention to the election of alternate jurors. While each individual juror expressed that he or she had knowledge of the case through media accounts, not one was asked about the extent of that knowledge. This was an issue that the Court had no intention of exploring because it did not want to ask every one of those "damn jurors" these types of questions. Not one juror was sequestered or individually examined on those points.

In *Bolin* there were only five jurors who had pre-trial knowledge, some of which sat on the actual jury. Further, the trial attorney had utilized all of his challenges. In the instant case, counsel retained some remaining challenges. However, this is insignificant as compared to *Bolin*, because in the instant case, **all the jurors had some knowledge**, and utilizing all of his challenges would not have accomplished the intended purpose of removing prospective tainted jurors.

In light of *Bolin*, this Court should consider Mr. Provenzano's lack of sequestered and individual voir dire as fundamental error and revisit the issue.

ARGUMENT VIII

MR. PROVENZANO WAS DENIED HIS RIGHT TO EQUAL PROTECTION AND TO DUE PROCESS AND THE LOWER COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE BECAUSE IT DENIED HIS REQUEST FOR COUNSEL TO PRESENT A CLEMENCY APPLICATION TO THE GOVERNOR OF FLORIDA ADDRESSING THE MATTERS DISCOVERED IN POSTCONVICTION WHICH WARRANT A COMMUTATION OF HIS DEATH SENTENCE.

Undersigned counsel filed a motion in the Circuit Court requesting the appointment of counsel to represent Mr. Provenzano in proceedings for executive clemency on June 21, 1999. The Capital Collateral Regional Counsel's are prohibited by statute from representing their clients in clemency proceedings. Fla. Stat. 27.001. The motion was summarily denied the same day [Att. 27, 28].

Mr. Provenzano had been denied clemency by Governor Martinez after a hearing before the Executive Clemency Board on December 3, 1987. The 1987 clemency proceeding occurred after Provanzano's conviction became final on April 20, 1987, but before postconviction proceedings commenced with the filing of an initial rule 3.850 on April 6, 1989. This Court remanded the case after the lower court's summary denial of the motion to provide counsel an opportunity to review files which had been withheld by the state attorney. Provenzano v. State, 561 So. 2d 541 (Fla. 1990).

It is especially important that condemned individuals like

Mr. Provenzano be given the opportunity to present to the Governor a clemency petition after the termination of the postconviction proceedings. It is only during the postconviction process that the facts which were not discovered at the time of trial surface, and therefore were not presented to the jury. This is why the important clemency power is vested in the Governor -- to address matters not considered by the sentencer, and to address issues which, for technical reasons, cannot be remedied by the courts. Provenzano was deprived of this opportunity.

The necessity of meaningful review of capital cases by the Governor and the Office of Executive Clemency in order to determine the propriety of putting an individual to death has been repeatedly addressed by the courts of this country:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex Parte Grossman, 267 U.S. 87, 120-121 (1925). The United States Supreme Court has always recognized the particular value of executive clemency to our system of capital punishment. For example, in *Gregg v. Georgia*, 428 U.S. 153, 199 & 200 n.50 (1976), the Supreme Court noted, "[n]othing in any of our cases

suggests that the decision to grant an individual mercy violates the Constitution," explaining that a system without executive clemency "would be totally alien to our notion of criminal justice." Additionally, the *Gregg* Court declined to hold that the discretion inherent in clemency power violated the standards set forth in *Furman v. Georgia*, 408 U.S. 238 (1972).

Because of the complexities of the legal system and the difficulties inherent in attempting to seek redress of constitutional claims in courts of law due to procedural hurdles, the United States Supreme Court, reaffirmed the importance of clemency to remedy injustices which are technically barred from presentation in courts of law:

> Executive clemency has provided the "fail safe" in our criminal justice system. K.Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.

Herrera v. Collins, 113 S. Ct. 853, 868 (1993). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Id. at 866 (footnotes omitted).

Executive clemency is a safety net upon which not only society has relied to cure injustices -- the legal system has traditionally relied upon clemency to provide a remedy for miscarriages of justice which, due to legal technicalities, cannot be addressed by the courts. Public confidence in the

efficient and reasoned imposition of the most serious penalty is undermined when this historical mechanism for obtaining relief is cast aside. "The objective of commutation is to promote the public welfare. As previously explained, the Florida Constitution grants the Executive power to commute a prisoner's death sentence based on mitigation circumstances, without judicial review. The power of commutation is intended to promote the cause of justice by ensuring that no one falls through the cracks in the State's sentencing procedure." Comment, *Commutation of the Death Sentence: Florida Steps Back From Justice And Mercy*, 20 Fla. St. L. Rev. 253, 266 (1992) (footnotes omitted).

These considerations are especially applicable to Mr. Provenzano's case because: 1. All of the experts that testified at trial agreed that Provenzano was mentally ill and allegations have been made repeatedly by post conviction counsel that he remains mentally ill and that, in fact, his mental condition has deteriorated over time; 2. Despite the evidence presented and argued by the state at every stage of this case the jury recommended death by only a seven to five vote - one juror would have made the difference between life or death; and 3. Mr. Provenzano has never been granted an evidentiary hearing during the entire post conviction process. Most of his post conviction factual claims, especially those alleging mental mitigation which was not heard by the jury, have been summarily denied because of procedural bars, and these are precisely the types of claims that

could be considered by the executive branch in a clemency proceeding.

This Court has recognized that the "clemency proceeding is just part of the overall death penalty procedural scheme in this state." *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990). The Court further recognized that "this state has established a right to counsel in clemency proceedings in death penalty proceedings, and this statutory right necessarily carries with it the right to have effective assistance of counsel." Id. Section 27.51(5)(a) provides that ". . . the trial court shall retain the power to appoint the public defender or other attorney not employed by the capital collateral representative to represent such persons in proceedings for relief by executive clemency pursuant to s. 925.035." Section 925.035 Fla. Stat. addresses compensation of the appointed attorney who represents a death sentenced prisoner in a clemency proceeding. In light of the time constraints posed by the scheduled execution, the complexities of a request to the Office of Executive Clemency for at least consideration of the matter, established evidence from the trial about Provenzano's mental illness plus allegations about his present incompetence to proceed,[51] the need to appoint an attorney to represent Mr. Provenzano in at least a request for clemency consideration is

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51The trial court denied Provenzano's motion for a competency determination on the theory that the issues raised in his present motion for post conviction relief were matters of law, not of fact, so that competent communication with his attorney was unnecessary pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1997), not because he specifically determined Provenzano was mentally capable to any degree.

manifest. Provenzano has been deprived of these fundamental guarantees.

A clemency hearing is only meaningful when the legal avenues have been exhausted, not, as happened in 1987 in Mr. Provenzano's case, when the direct appeal is decided. For clemency to have any meaning, and for the right to clemency counsel to have any meaning, Provenzano should have had counsel appointed following the exhaustion of his postconviction proceedings, and that counsel should be provided with the time and resources to present an adequate case for mercy on Provenzano's behalf. The failure to do so deprived Mr. Provenzano of equal protection, due process, and his statutory right under Florida law to a clemency proceeding at which he is entitled to be represented by effective counsel. The Eighth and Fourteenth Amendments have been violated. The equal protection clause of the Fourteenth Amendment of the U.S. Constitution applies to the exercise of all powers of the state which can affect the individual. *State ex rel. Vars v. Knott*, 184 So. 752 (1939), vacated on other grounds 60 S. Ct. 72, 308 U.S. 507, appeal dismissed 60 S. Ct. 72, 308 U.S. 506.

This Court has held that clemency power reposes exclusively in the chief executive. *Sullivan v. Askew*, 348 So. 2d 312 (Fla. 1977) ("By this self-executing constitutional provision [Article IV, Section 8(a) Fla. Const.], the people of this state chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." Also, special

concurrence by Justice England opining that clemency proceedings are reviewable for minimal due process standards, see *Ohio Adult Parole Authority*, infra.) In *Wade v, Singletary*, 696 So. 2d 754 (Fla. 1997), this Court cited Sullivan for the proposition that the executive power to grant or deny clemency is ". . .beyond the control, or even the legitimate criticism, of the judiciary." Nevertheless, infringement on executive discretion is exactly what the lower court did by denying Provenzano's request for the appointment of counsel to pursue clemency proceedings. The lower court denied Capital Collateral Regional Counsel's request that the private attorney who represented Mr. Provenzano in his federal proceedings -- and who would have had the ability to petition for clemency on Mr. Provenzano's behalf -- be required to represent him in his current post conviction proceeding. Because undersigned counsel is prohibited by statute from pursuing clemency for Mr. Provenzano, and because the lower court denied his request that private counsel be appointed for that purpose, the court has effectively deprived the executive branch of the authority to deal with a clemency petition as it deems fit.

Moreover, the lower court's actions have denied Provenzano minimal due process. This Court's prior decisions curtailing judicial review of the Office of Executive Clemency's actions should be re-examined in light of *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244, 523 U.S. 272, 140 L.Ed. 387 (1998), where a majority of the U.S. Supreme Court held that minimal due

process rights attach to clemency proceedings. It is difficult to imagine what could be construed as minimal due process more than the act of merely requesting that a clemency proceeding take place. The lower court's actions in this regard have prevented even that much from happening, and have therefore violated the due process requirements of the United States and Florida Constitutions.

The lower court's actions also deprived Mr. Provenzano of his right to equal protection of the law guaranteed by the state and federal constitutions. Although the warrant signed by Governor Bush states that ". . . it has been determined. . . " that executive clemency is not appropriate, that determination was made by Governor Martinez before any post conviction proceedings were initiated and consequently, before any of the information which was gathered during the post conviction process and which might very well justify a commutation of the death sentence became available. That information has never been presented to the courts for the reasons discussed above, but there is no reason why the Governor cannot consider it, other than that the lower court has prevented him from doing so. All cases, including those of Sonny Boy Oates, Paul William Scott, Ricky Bernard Roberts, and Bennie Demps, where an execution has been carried out during the administration previous to this one had a clemency proceeding, usually a successive one, as part of executive's warrant process. Again, the point here is not that this Court should order the executive what to do, the executive

may very well decide not to consider a renewed petition for clemency. The point, rather, is that the lower court's actions interfere with the executive branch's ability to even reach that decision, resulting in an arbitrary application of the executive clemency component to the warrant decision making process.[52] As it stands, the lower court's actions have effectively singled out Mr. Provenzano from other prisoners facing an execution over the past decade and deprived him of minimal due process and the right to the assistance of counsel in violation of the equal protection guarantees of the federal and state constitutions.

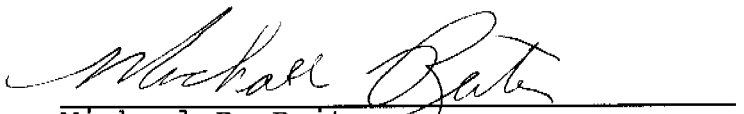
CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, and upon the record, Mr. Provenzano urges the Court to grant a stay of execution, order an evidentiary hearing, and grant such other relief as the Court deems just and proper.

52If the Office of Executive Clemency or any member of the executive branch conducted any sort of review regarding a consideration of clemency, it did not comply with the requirement of the assistance of counsel recognized in Remeta or the procedures set out in the Rules of Executive Clemency, FL-ADC T.27 App., F.A.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing APPELLANT'S BRIEF AND APPLICATION FOR STAY OF EXECUTION has been furnished to all counsel of record by either United States Mail, first-class/federal express/facsimile transmission/hand delivery this **28th day of June, 1999**.



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