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IN THE SUPREME COURT OF FLORIDA

THOMAS H. PROVENZANO,

Appellant,

vs.

CASE NO. 95,959

STATE OF FLORIDA,

ACTIVE DEATH WARRANT

Appellee.

_____/

APPEAL FROM DENIAL OF POST-CONVICTION MOTION
FOR HEARING ON INSANITY AT TIME OF EXECUTION

ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

PRELIMINARY STATEMENT

This brief is filed pursuant to the Order of this Court directing the simultaneous filing of briefs in this proceeding. The records of the Bradford County competence for execution proceeding are before this Court, as are all pleadings and documents filed by the parties to this action. The State specifically relies upon, and incorporates herein by reference to the extent necessary, all pleadings heretofore filed by the State.

STATEMENT OF THE CASE AND FACTS

Provenzano's Crimes

In 1984, Thomas Provenzano, armed with three fully-loaded and concealed guns, entered a crowded courthouse and shot and critically injured Bailiff Harry Dalton and 19-year-old Corrections Officer Mark Parker, both of whom were unarmed. Provenzano then shot and killed Bailiff Arnie Wilkerson. Provenzano was shot and captured at the scene.

Provenzano's Appeals

This is Provenzano's fifth appeal before this Court. Provenzano's convictions and sentences were affirmed on direct appeal in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987). Since that time, post-conviction relief has been denied by this Court in each of Provenzano's three separate post-conviction appeals. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Provenzano v. State, Fla. S. Ct. Case No. 95,849, (Opinion filed July 1, 1999), cert. denied, Provenzano v. Florida, U.S.S.Ct. Case No. 99-5107 (July 6, 1999). Likewise, the federal courts have denied relief on Provenzano's collateral challenges. See Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), affirming, Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M.D. Fla. 1997).

1999 Post-Conviction Proceedings

On June 9, 1999, Governor Jeb Bush signed a death warrant for Provenzano's execution. On June 14, 1999, Provenzano was present in court before the Honorable Richard Conrad. (PCR II/45-71). At the conclusion of the June 14 hearing on CCRC's Motion for Determination of Counsel, Judge Conrad inquired of Provenzano:

> THE COURT: Mr. Provenzano, the one thing I do want to be at least somewhat comfortable with is that the -- for the sake of our discussion, I wanted to talk in terms of the procedures that you've heard from C.C.R. Have your lawyers or all of them at least kept you abreast of the conflict problems here and the problems in dealing with the three divisions of C.C.R. and Ms. Backhus? Have you heard this?
>
> THE DEFENDANT: My lawyer, Terri Backhus, the last time I seen her, she advised me that she would not be able to represent me any more and cannot.
>
> THE COURT: Here, right, or --
>
> THE DEFENDANT: When the United States Supreme Court denied my appeal, at that time she told me that she would not represent me any more and could not.
>
> THE COURT: When was that, Mr. Provenzano?
>
> THE DEFENDANT: She didn't tell me who would represent me after that.
>
> THE COURT: When was that; do you remember?
>
> THE DEFENDANT: No.
>
> THE COURT: Have you got a ball park?
>
> THE DEFENDANT: Yeah. Two months ago, I believe. Approximately two months ago.
>
> (PCR II/69-70)

On June 23, 1999, a Huff hearing was held before Senior Judge Clarence Johnson on Provenzano's third motion for post-conviction relief. Addressing Provenzano's post-conviction competency-to-proceed claim, Senior Judge Johnson inquired:

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

(T I/34-35)

On June 24, 1999, Senior Judge Johnson entered a comprehensive written order denying Provenzano's successor Motion to Vacate. (R III/748-770). On July 1, 1999, this Court affirmed the trial court's denial of Provenzano's third motion to vacate. Provenzano v. State, No. 95,849 (Fla. July 1, 1999), cert. denied, Provenzano v. Florida, U.S.S.Ct. Case No. 99-5107, July 6, 1999).

On July 5, 1999, two days before his scheduled execution, Provenzano raised, for the first time in any proceeding, a claim that he is currently insane to be executed. On that day, Provenzano's counsel invoked the provisions of §922.07, Florida Statutes by notifying the Governor of Provenzano's claim of insanity for execution. On July 6, 1999, Governor Bush issued Executive Order 99-151, appointing a three-member commission to

determine the mental competency of Provenzano. The Commission consisted of three psychiatrists, Wade C. Myers, M.D., Leslie Parsons, D.O. and Alan J. Waldman, M.D., each Diplomates of the American Board of Psychiatry and Neurology in the subspecialty of Forensic Psychiatry. The Commission members conducted an 80-minute clinical interview with Provenzano on July 6, 1999 at Florida State Prison. Each Commission member reviewed Provenzano's Department of Corrections records and medical records for approximately 3.5 hours prior to the evaluation. Additionally, two corrections officers who have recently worked with Provenzano were interviewed to help assess his recent cognitive, emotional, and behavioral state during his incarceration at Florida State Prison.

The three-member Commission issued a written report to the Governor, stating, in pertinent part:

> Prior to beginning the interview, the nature, scope, and purpose of the evaluation was explained to the inmate, with details repeatedly explained. Nevertheless, he continued to respond that he did not understand any of these elements and asked no questions in return. This pattern of responding with "I don't understand" or "I don't know" persisted throughout the interview. In response to questions about his mental health, he endorsed multiple, inconsistent, and bizarre symptoms that are incompatible with any known mental disorder. These symptoms included disorientation to surroundings and circumstances, severe memory loss (e.g., inability to remember where he grew up, how far he went in school, the colors of the flag - "red, white, green"), paranoid delusions (delusions: fixed, false beliefs), grandiose delusions (e.g., admits to being Jesus Christ), and auditory, visual, gustatory, and tactile hallucinations. The more that Mr. Provenzano was questioned about various psychiatric symptoms, the more he endorsed symptoms in

areas that had previously been discussed. Unlike what is typically found in mentally ill individuals, there seemed to be no end to the depth and breadth of the inmates's reported psychiatric complaints.

The memory and cognitive deficits displayed by Mr. Provenzano were inconsistent with his appearance and reported capability to carry out normal daily activities such as hygiene, conversation, and reading. Both corrections officers queried about his current functioning stated that he "acts normal," has been reading legal publications, has an adequate appetite and energy level, speaks in a logical and coherent manner (at times initiating conversations), and has never appeared to be responding to hallucinations or delusions. We were also informed that the inmate told Sergeant D.K. Williams, just before today's interview, that he would not talk to the "psychologists" until his attorney was present.

His history of reported intermittent psychotic symptoms in his medical files often revealed the diagnosis of "atypical psychosis," but no definitive major psychotic disorder was ever documented. The mental health professionals' reports over the years not uncommonly stated that in spite of his reported psychotic symptoms, no overt signs of each illness were observed.

It is thus our opinion that Mr. Provenzano is malingering mental illness. His loss of memory and disorientation are inconsistent with any true memory disorder. As well, his complaints of psychosis are inconsistent with any known mental disorder.

OPINION: It is our unanimous opinion with reasonable medical certainty that Thomas H. Provenzano does not suffer from any mental disease, disorder, or defect that would impair his ability to understand and appreciate the nature and effect of the death penalty and why it is to be imposed on him.

(Appendix)

Following the Governor's determination that Provenzano is sane to be executed, Provenzano's counsel filed a motion for hearing on

insanity at time of execution.

On July 7, 1999, the trial court denied Provenzano's motion for hearing on insanity at time of execution, finding:

> **THIS MATTER** came before the Court for consideration of Plaintiff, Thomas H. Provenzano's, "Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency and Motion for Hearing on Insanity at Time of Execution" filed July 6, 1999, pursuant to Florida Rule of Criminal Procedure 3.811. The Court has reviewed Provenzano's motion, all of the attachments that he filed in support of his motion,[fn. 1] the documents that Provenzano faxed to the undersigned Judge on July 7, 1999,[fn. 2] the State's response to the motion, and the attachment filed with the State's response. [fn. 3] Based upon the review of those documents, and being otherwise duly advised in the premises, the Court finds as follows.
>
> In his motion, Provenzano, by and through his counsel, claims that he is insane to be executed. He requests that this Court order a stay of his execution and a hearing pursuant to Florida Rule of Criminal Procedure 3.812 to determine whether he is competent to be executed.
>
> A person under sentence of death shall not be executed while he or she is insane. See Ford v. Wainwright, 477 U.S. 399 (1986); Fla. R. Crim. P. 3.811. See also Martin v. Dugger, 686 F. Supp. 1523 (M.D. Fla. 1988); § 922.07, Fla. Stat. In Florida, a person is considered to be "insane to be executed" if he or she "lacks the mental capacity to understand the fact of the impending execution and the reason for it." Fla. R. Crim. P. 3.811(b). See also § 922.07. Fla. Stat. When counsel for a death-sentenced individual has reason to believe that his or her client may be insane for purposes of execution, counsel may initiate proceedings with the Governor of Florida so that the individual's competency to be executed can be determined. See § 922.07, Fla. Stat. After the Governor's proceedings have concluded and the Governor has determined that the person is sane to be executed, counsel may file a motion for a determination of the individual's competency to be executed in the circuit court of the circuit in which the execution is to take place. See Fla. R. Crim. P. 3.811(c),(d). Rule 3.811(d) provides that when filing such a motion:

(3) Counsel for the prisoner shall file, along with the motion, all reports of experts that were submitted to the governor pursuant to the statutory procedure for executive determination of sanity to be executed. If any of the evidence is not available to counsel forth prisoner, counsel shall attach to the motion an affidavit so stating, with an explanation of why the evidence is unavailable.

(4) Counsel for the prisoner and the state may submit such other evidentiary material and written submissions including reports of experts on behalf of the prisoner as shall be relevant to determination of the issue.

Fla. R. Crim. P. 3.811(d). After reviewing the motion and documents submitted to the court in support of the motion, if the circuit judge has "reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant a stay of execution and may order further proceedings which may include a hearing pursuant to [Florida Rule of Criminal Procedure] 3.812" Fla. R. Crim. P. 3.811(e). Thus, under rule 3.811, a hearing on the individual's competency to be executed is proper only where the motion and all documents submitted in support thereof establish "reasonable grounds" to believe the person is insane to be executed. If the individual fails to establish such "reasonable grounds," then a hearing is not proper.

As indicated above, in support of his motion Provenzano submitted numerous documents to this Court as support for his motion. Those documents include affidavits of family members; affidavits of five fellow death row inmates; Provenzano's medical records; various Department of Corrections records; and two reports dated July 5, 1999, and June 18, 1999, issued by one expert, Dr. Patricia Fleming, a Clinical Psychologist. In her report dated June 18, 1999, Dr. Fleming, who at the time she issued said report apparently had not interviewed or examined Provenzano for several years,[fn. 4] opined: "[I]t is my professional judgment that Mr. Provenzano is not competent to be executed." Despite her opinion on June 18, 1999, that Provenzano is not competent to be executed, no where in her subsequent report dated July 5, 1999, which was prepared after spending five hours interviewing and examining Provenzano, does Dr. Fleming render such a judgment. In fact, although Dr. Fleming states in her report dated July 5, 1999, that "[s]ince the purpose of the evaluation was to evaluate Mr.

Provenzano's competency to be executed, a focus was placed on his understanding of the nature and effect of the death penalty and why it is to be imposed,"[fn. 5] no where within her report does Dr. Fleming squarely address these two very limited issues.

Provenzano has not submitted the reports of any additional experts with his motion. Further, he has not indicated pursuant to rule 3.811(d)(3), that any of the evidence submitted to the governor for executive determination of sanity to be executed was not available for submission to this Court.

In response to Provenzano's motion, the reports of Provenzano's expert Dr. Fleming, and the other affidavits filed in support of Provenzano's motion, the State relies primarily on the unanimous report of Wade C. Myers, III, M.D., Alan J. Waldman, M.D., and Leslie Parsons, D.O., the three experts appointed by Governor Bush pursuant to section 922.07, Florida Statutes, to examine Provenzano's competency to be executed. In their report, Doctors Myers, Waldman and Parsons opined: "It is our unanimous opinion with reasonable medical certainty that Thomas H. Provenzano does not suffer from any mental disease, disorder, or defect that would impair his ability to understand and appreciate the nature and effect of the death penalty and why it is to be imposed on him."

Therefore, this Court has been presented with two opinions issued by one expert, a Clinical Psychologist, who, in a report that was issued over two weeks before her most recent visit with Provenzano, specifically opined that Provenzano is not competent to be executed, and with one unanimous opinion issued by three experts, each Diplomates of the America Board of Psychiatry and Neurology in the subspecialty of Forensic Psychiatry, who opined that Provenzano is competent to be executed. Additionally, this Court has been presented with many affidavits and other documents which indicate that Provenzano has engaged in bizarre behavior, that he has abnormal beliefs, and that he may suffer from mental illness.

This Court finds that one expert's opinion, which was rendered at a time when she had not recently examined Provenzano, that Provenzano is not competent to be executed, along with documents which record bizarre beliefs and behavior, and the possible existence of mental illness, in addition to affidavits of several individuals who do not purport to be mental health experts, do not establish "reasonable grounds" to believe that Provenzano is insane to be executed. Compare with

Medina v. State, 690 So. 2d 1241 (Fla. 1997). As the court in Martin stated: "A defendant may be mentally ill and still be competent enough to be executed." Martin, 686 F. Supp. at 1572-73.

In Medina, Medina's counsel claimed he was incompetent to be executed. In support of their claim, counsel provided the reports of two psychologists and one psychiatrist who opined that Medina was not competent to be executed. In response to Medina's claim, the State submitted the reports of three psychiatrists who had been appointed by the governor to examine Medina's competency to be executed. Those three psychiatrists opined that Medina was not insane for purposes of execution. The Florida Supreme Court concluded "in this case the reports of the two psychologists and the psychiatrist meet the reasonable-ground threshold of rule 3.812 in view of the conflicting opinions of the experts." Medina, 690 So. 2d at 1246. The court, therefore, reversed the circuit court's order denying Medina's motion for a determination of his competency to be executed, and remanded the matter for a hearing pursuant to Florida Rule of Criminal Procedure 3.812. Id.

The facts of Medina are drastically different that [sic] the facts of the instant case. Here, as discussed above, this Court is not presented with three experts opining that Provenzano is sane for purposes of execution while three other experts are opining that he is not. Instead, we have one expert who has, on one occasion prior to the time that she conducted her most recent interview of Provenzano, opined that Provenzano is insane for purposes of execution, and we have three experts who have unanimously opined that Provenzano is sane for purposes of execution. This is a far stretch from the battle of the experts that existed in Medina.

Based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** that:

1) This Court, based upon review of the "Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency and Motion for Hearing on Insanity at Time of Execution," the State's response, and all documents submitted by both Provenzano and the State, does not find reasonable grounds to believe that Thomas H. Provenzano lacks the mental capacity to understand the fact of his impending execution and the reason for it, and therefore, finds that Thomas H. Provenzano is not insane to be executed within the meaning of applicable law.

2) Plaintiff, Thomas H. Provenzano's, Emergency

Motion for a Stay of Execution Pending Judicial Determination of Competency is **DENIED.**

3) Plaintiff, Thomas H. Provenzano's, Motion for Hearing on Insanity at Time of Execution is **DENIED.**

Order Denying Defendant's "Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency and Motion for Hearing on Insanity at Time of Execution" (footnotes omitted). This appeal follows.

SUMMARY OF THE ARGUMENT

The only relevant issue before the trial court was whether Provenzano established an entitlement to an evidentiary hearing by presenting reasonable grounds to believe that he is currently insane to be executed. The trial court's ruling that Provenzano had failed to offer a sufficient showing to question his current competence is supported by the submissions before the court and should not be disturbed on appeal. The judge below extensively reviewed a wealth of material submitted by Provenzano, and there is no allegation that any material facts exist which have not been considered in regard to Provenzano's claim. The judge applied the correct legal standard and issued a comprehensive order denying relief. Accordingly, all relief should be denied.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING PROVENZANO'S MOTION FOR AN EVIDENTIARY HEARING ON ALLEGED INSANITY TO BE EXECUTED.

The only relevant issue before the trial court was whether Provenzano established an entitlement to an evidentiary hearing by presenting reasonable grounds to believe that he is currently insane to be executed. Pursuant to Florida Rule of Criminal Procedure 3.811(e), the trial court "may" order further proceedings only if a review of Provenzano's motion and the submission of both parties create "reasonable grounds to believe" that Provenzano is currently insane to be executed. No reasonable grounds were discernable from the submissions before the trial court. Consequently, the trial court properly found that Provenzano has not met his burden of establishing any reasonable grounds to believe that he is insane to be executed and denied his request for stay.

On July 6, 1999, a commission of three psychiatrists was appointed by Governor Jeb Bush to report its findings on the question of Provenzano's current competency to be executed, pursuant to §922.07, Florida Statutes. This report clearly refutes the current claim of incompetency.

Although Provenzano offered a report by Dr. Pat Fleming of

Wyoming, this most recent report does not affirmatively conclude that Dr. Fleming, who examined Provenzano on Sunday, July 4, 1999, has found him to be incompetent to be executed. As noted by Judge Johnson, Dr. Fleming initially opined that Provenzano was not competent to be executed in a letter written to Provenzano's attorneys on June 18, 1999.[1] However, at the time that letter was submitted, Fleming had not even seen Provenzano for a number of years. After Fleming evaluated Provenzano on July 4, 1999, she compiled another report which, curiously, does not affirmatively state that she has determined Provenzano to be insane to be executed. In fact, to the contrary, Fleming has now expressly noted that Provenzano "understands the electric chair and the function."

Certainly this report is ambiguous at best, and clearly insufficient to establish reasonable grounds to believe that Provenzano is not currently competent to be executed. In fact,

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[1]Based on this letter, Provenzano's attorneys arranged for Provenzano to be examined by Dr. Robert Berland on June 20, 1999 (see, transcript of Huff hearing, 6/23/99, pp. 12, 75, Florida Supreme Court Case No. 95,849). No report from Dr. Berland has ever been offered for consideration as to any claim of incompetence or insanity. Although Rule 3.811(d) liberally permits submissions to the circuit court, and Provenzano has taken advantage of this rule by barraging the court below with a tremendous amount of material, no expert opinion has been provided which positively supports Provenzano's claim of insanity. Furthermore, although Provenzano declined the opportunity to raise this issue at the Huff hearing, he has not indicated any circumstances have changed since that time; Provenzano is simply closer to his execution date.

this lone supporting expert document offered by Provenzano is more like the "general and conclusory" affidavit which was held insufficient to require an evidentiary hearing in Evans v. McCotter, 805 F.2d 1210 (5th Cir. 1986). In Evans, the Fifth Circuit held that a sworn affidavit from Evans' sister attesting that, based on her personal observations, Evans' mental condition had worsened and that Evans was presently insane and incompetent, was insufficient to raise a legitimate question as to Evans' sanity. 805 F.2d at 1212, 1213. Similarly, no legitimate question as to Provenzano's sanity has been raised in the instant case.

The lay affidavits offered by Provenzano similarly did not compel the granting of an evidentiary hearing. The unsworn affidavit from Provenzano's sister states that "[Provenzano] says they are going to kill him by a chair with electric. I explain that to him on every visit, so he understands" (p. 4). Although the sister notes that she has seen him in the last several weeks, she does not claim that he has deteriorated or that his mental condition has changed during the time that he has been in prison. The unsworn affidavit from Provenzano's cousin, Catherine Provenzano, does not even indicate that she has seen him since he has been in prison.[2]

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[2]Other materials submitted by CCRC include selected excerpts from the 1984 trial transcript and affidavits prepared in 1989 and submitted during Provenzano's first postconviction proceedings.

In Medina v. State, 690 So. 2d 1241 (Fla. 1997), this Court remanded a case in the same procedural posture as this case for an evidentiary hearing and a judicial determination of competency. Medina's request for an evidentiary hearing in the circuit court, however, had been supported by reports from two psychologists and one psychiatrist stating that, in their expert opinions, Medina was insane to be executed. As noted by Judge Johnson, Provenzano's support with the instant motion falls considerably short of the "battle of the experts that existed in Medina" (Order, p. 6).

To the extent that Provenzano may allege that the circuit court's ruling violates his right to due process pursuant to Ford v. Wainwright, 477 U.S. 399 (1986), such claim is without merit. In Ford, the United States Supreme Court recognized, for the first time, that the Eighth Amendment prohibits the execution of a death row inmate that was currently insane. Since no state court had ever considered the factual question of Ford's sanity to be executed, Ford was entitled to a federal evidentiary hearing to resolve the issue. The Ford decision acknowledges that "[i]t may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." 477 U.S. at 414. In fact, in Ford, Justice Powell pointed out:

> Second, petitioner does not make his claim of insanity against a neutral background. On the contrary, in order

> to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.

477 U.S. at 425-426 (Powell, J., concurring) (footnote omitted).

In the ruling below, the circuit court found that Provenzano had failed to meet a threshold showing of entitlement to an evidentiary hearing on his current claim of insanity. This finding clearly did not deprive Provenzano of any opportunity to be heard or any other due process protection. The circuit court reviewed a wide variety of documents and information provided by Provenzano, and assiduously studied the facts presented and the applicable law in reaching his well-reasoned conclusion. Provenzano does not identify any additional facts or materials which should have been considered; nor does he assert that he was denied the opportunity to present any further records.

Provenzano has failed to demonstrate any error in the circuit court's ruling on his emergency motions for an evidentiary hearing and a judicial determination of his competence to be executed. Therefore, this Court must affirm the denial of relief. No stay of execution is justified in this case. See Delo v. Stokes, 495 U.S. 320, 110 S.Ct. 1880, 109 L.Ed.2d 325 (1990); Antone v. Dugger, 465 U.S. 200, 104 S.Ct. 62, 79 L.Ed.2d 147 (1984); Buenoano v. State,

708 So. 2d 941, 951 (Fla. 1998), citing Bowersox v. Williams, 517 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying Provenzano's emergency motions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail/facsimile to John Moser, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 8 day of July, 1999.

CO-COUNSEL FOR STATE OF FLORIDA