IN THE SUPREME COURT OF FLORIDA

CASE NO.

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

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. 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. The motion was brought pursuant to Fla. R. Crim. P. 3.811 and 3.812.

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

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

REQUEST FOR ORAL ARGUMENT

Mr. Provenzano has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Provenzano, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF CASE AND FACTS

Mr. Provenzano was convicted of First Degree Murder and two counts of Attempted Murder in 1984. Mr. Provenzao was sentenced to death.

Mr. Provenzano's convictions were affirmed on direct appeal in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert denied, 481 U.S. 1024 (1987). Since then Mr. Provenzano had been denied on appeal on his postconviction motions. 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).

On June 9, 1999, the Governor of Florida signed a death warrant for Mr. Provenzano. Mr. Provenzano's execution was first scheduled for July 7, 1999, at 7:00 A.M. On July 5, 1999, Mr. Provenzano filed a notice to the Governor, pursuant to Section 922.07, Florida Statutes, that Mr. Provenzano was insane to executed. On July 6, 1999, the Governor appointed three mental health experts to examine Mr. Provenzano[1] to determine if he was insane to be executed.

Dr. Myers, Dr. Waldman, and D.O. Parsons examined Mr. Provenzano and submitted a two page report indicating that they had spend and 80-minute clinical interview with Mr. Provenzano. That they had spent an additional 3.5 hours speaking to two

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[1]Dr. Parsons was not one of the original doctors assigned to examine Mr. Provenzano.

correction officers and reviewing DOC medical records. The Drs. found the following: Mr. Provenzano expressed symptoms that are incompatible with any known mental disorder, memory and cognitive deficits displayed were inconsistent with Mr. Provenzano's appearance and reported capability to carry out normal daily activities, that Mr. Provenzano is malingering mental illness, and that he appreciates the nature and effect of the death penalty and why it is to be imposed on him.

Dr. Patricia Fleming examine Mr. Provenzano on July 5, 1999, and submitted her report (Appendix A). In her report she indicated that she had interviewed and/or examined Mr. Provenzano for five hours on July 5, 1999, eight hours on March 13th and 14th, 1989, and additional interviews on September 24, 1991 and June 21, 1993. Dr. Fleming made the following observations and evaluations: Mr. Provenzano had some difficulty in identifying Dr. Fleming; Motor activity was remarkable in the lack of movement; coordination was adequate although his shackles prevented smooth walking; speech was expressionless but pressured; conversation was rambling with frequent changes of topics; Mr. Provenzano denied suicidal thought or plans but did say that he was depressed; Mr. Provenzano demonstrated difficulty staying on task, ability to retain information was significantly impaired; and ability to find commonalities in simple comparisons was markedly impaired. Dr. Fleming conducted a number of tests upon Mr. Provenzano, which showed impairment.

Dr. Fleming further indicates that Mr. Provenzano had

suffered decline since his 1989 screening. In expressing that Mr. Provenzano does not appreciate the nature of his execution and reason for it, Dr. Fleming states:

> Mr. Provenzano knows, not things or believes, that the reason that he is to be executed is because "They" believe that he is Jesus Christ. Those who seek to execute him hate and fear Jesus Christ and if he is dead then Jesus Christ is dead and that is their goal. At this time Mr. Provenzano does not say that he is Jesus Christ because that would make it more likely that he would be executed. He states that he has a spirit, there is God's spirit in him, and he is also pressured and plagued by a legion of evil spirits who seek to overtake him. He continually has to battle against these spirits.
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> He does not connect the courthouse shooting with the execution. It is unrelated because he is innocent.

On July 6, 1999, Governor Bush lifted the temporary stay of execution on Mr. Provenzano. Mr. Provenzano filed a Combined Motion to Stay Execution and to Conduct an Evidentiary Hearing to Determine Competency to be Executed in Bradford County, Florida pursuant to Florida Rules of Criminal Procedure 3.811. On July 6, 1999, Mr. Provenzano filed an Emergency Motion to Stay Execution with this Court. This Court entered a temporary stay until July 9, 1999. Judge Clarence Johnson entered an order on July 7, 1999, denying Mr. Provenzano's motions. Mr. Provenzano filed a notice of Appeal on July 7, 1999.

SUMMARY OF ARGUMENT

What constitutes "reasonable grounds?" A vote of 3 to 1 from the experts, or a reasoned determination by a court after review and consideration of all relevant information? The trial court's order declining to find "reasonable grounds" of insanity to be executed was based on number crunching and not a reasoned review of all information provided. Rule 3.812 requires that a hearing be conducted de novo. No less standard should be applied to Rule 3.811 when the court reviews all documents to determine "reasonable grounds." Therefore, the trial court failed to sufficiently perform his assigned duty and abdicated to the findings of the Governor's experts. This court should remand for an evidentiary hearing.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO PROVIDE MR. PROVENZANO AN EVIDENTIARY HEARING ON THE ISSUE OF HIS COMPETENCY TO BE EXECUTED, BECAUSE THE DOCUMENTATION SUPPORTED REASONABLE GROUNDS FOR AN EVIDENTIARY HEARING.

In finding that no reasonable grounds were established to warrant an evidentiary hearing, the

The Honorable Clarence Johnson stated:

> "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."

It is quite apparent that the trial court only believes that "mental health experts" can constitute "reasonable grounds." Further, it is also apparent that the trial court placed great weight on the number of experts for each position.

> "Therefore, this Court has been presented with two opinions issued by one expert, a Clinical Psychologist, who in a report 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."

The trial court makes his own quiet assessment of the credibility of the three experts by mentioning that they are diplomats of the America Board of Psychiatry, while attempting to dismiss Mr. Provenzano's expert by emphasizing "Clinical Psychologist." This type of expert prejudice certainly establishes that the trial court merely reviewed the Governor's determination, and did not consider any of the numerous other documents submitted. Had he done so, it would be expected that the court would have commented as to how the documents provided fail to establish reasonable grounds. The court makes no mention as to their validity, but merely dismisses them.

Further, it appears that the Judge Johnson considers that Medina v. State, 690 So. 2d 1241 (Fla. 1997) is the standard of

review (order page 5), because there were three experts on both sides and Judge Johnson believes that a battle of the experts is required in order to obtain an evidentiary hearing (order page 6). However, a close review of Medina indicates that this Court stated "**in this case**" id at 1246. Nowhere in Medina did this Court state that the standard of review for an evidentiary hearing would there need to be a similar number of experts on each side.

The science of mental illness is at best an inexact science. Experts differ as to opinions continuously. In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985), the court stated:

> "We recognized that, because `psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms,' the factfinder must resolve differences in opinion within the psychiatric profession `on the basis of the evidence offered by each party' When a defendant's sanity is at issue in a criminal trial...
>
> The same holds true after conviction... Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent."

If the test for an evidentiary hearing is the number of expert opinions, absent the ability to question them as to their conclusions, why bother involving the court at all? The whole intent of the evidentiary hearing is to determine the basis of the findings of the experts and an evaluation of **all** information

available relevant to the defendant's competence, not just an abdication to the experts.

Had Medina not existed, would the trial court have required an equal number of experts provided by the defendant? The trial court is required to review and assess all material submitted, not just the "battle of experts." The trial court's order doesn't mention that the three experts only spent "80-minute clinical interview[2]" with Mr. Provenzano. There is no indication that any testing was done. Further, the state's expert evaluation does not specify exactly which DOC documents they examined and for what periods of time.

However, Dr. Fleming has spend numerous hours with Mr. Provenzano over a number of years[3]. Dr. Fleming provides an eight page detailed description of her examination, findings, and conclusions (no such document was provided by the states' expert). The trial court points out that Dr. Fleming does not state in her report the specific words: that Mr. Provenzano does not appreciate the nature and effect of the death penalty and why he is to be imposed on him. Although that may be correct, the magic words in and of themselves do not establish the basis for

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[2]It should be noted that a "clinical" interview was conducted and not a "forensic" interview. The undersigned certainly doesn't know if there is a difference, but it appears to the trial court to make a difference that the state's experts are forensic mental health experts while Mr. Provenzano's expert is a clinical mental health expert.

[3]Her letter of July 5, 1999, indicates she spent five hours with Mr. Provenzano on July 4, 1999; eight hours on March 13th and 14th of 1989; and additional interview on September 24, 1991 and June 21, 1993.

the finding. However, Dr. Fleming was quite candid in placing Mr. Provenzano's words in her report. The tenor of Dr. Fleming's report cannot be ignored because it doesn't contain the exact wording. There can be no questions as to the findings by Dr. Fleming that Mr. Provenzano is incompetent to be executed based upon the legal standard.

A large amount of Mr. Provenzano's DOC medical records were submitted to Judge Johnson covering a period of years, as well as, affidavits of individuals who made personal observations of Mr. Provenzano. The trial court gave no basic consideration to these reports because they "do not purport to be mental health experts..." However, L. Wiley, Psych. Spec. at U.C.I. has made numerous reports regarding Mr. Provenzano complaints of hallucinations[4]. Further, Mr. Provenzano's DOC medical records[5] indicate that he has suffered hallucinations continuously over a large number of years. The state's doctors do not indicate in their report that these long term hallucinations amounted to malingering, nor do they mention his history at all. However, Dr. Fleming does review and comment on Mr. Provenzano's history. Certainly, Judge Johnson should have considered the longevity of observations by Dr. Fleming as compared to the short term evaluation by the state's doctors. Mr. Provenzano's long term

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[4]Reports dated 3/12/99, 2/9/99, 8/11/98, 2/12/98, 7/12/96.

[5]Only a portion of Mr. Provenzano's DOC records were submitted to Judge Johnson. The documents selected amounted to a number of years of complaints of mental problems suffered by Mr. Provenzano.

medical history and observations by others tends to support the findings of Dr. Fleming.

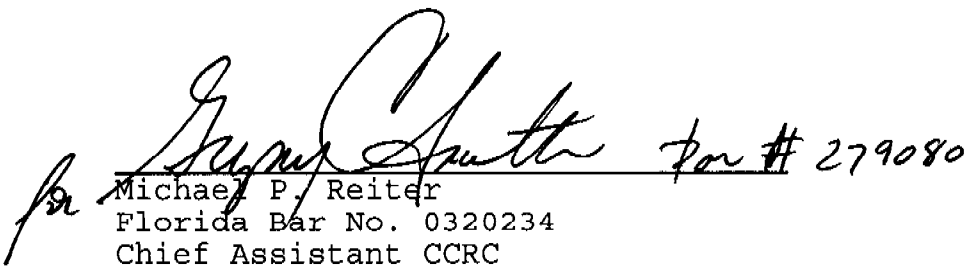
Judge Johnson abused his discretion by failing to consider all of the documentation presented and by relying solely upon the battle of the experts. Only an evidentiary hearing can separate out the real circumstance involving Mr. Provenzano's mental state so that a fair court can make a legally reasoned decision.

CONCLUSION

This Court should find that Mr. Provenzano has established reasonable grounds to determine that he is insane to be executed and remand this case for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **INITIAL BRIEF OF APPELLANT** has been furnished by to all counsel of record by either United States Mail, first class /federal express /facsimile transmission and/or hand delivery on July 8th, 1999.



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