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

SUPPLEMENTAL BRIEF OF APPELLANT

MICHAEL P. REITER
Chief Assistant CCRC
Florida Bar No. 0320234

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park, Suite 210
Tampa, Florida 33619
(813) 740-3544

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Provenzano's Motion for Evidentiary Hearing to Determine Competency pursuant to Florida Rules of Criminal Procedure 3.811 and 3.812.

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

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

REQUEST FOR ORAL ARGUMENT

This Court has already scheduled an oral argument in this case for August 24, 1999.

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STATEMENT OF THE CASE AND FACTS

A. Procedural History

Mr. Provenzano was convicted of First Degree Murder and two counts of Attempted Murder in 1984. Mr. Provenzano 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's postconviction appeals have been denied. 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 be 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.

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

On July 6, 1999, Dr. Myers, Dr. Waldman, and D.O. Parsons examined Mr. Provenzano and found him to be competent to be executed. On July 5, 1999, Dr. Fleming was requested by Mr. Provenzano's counsel to examine the appellant. Dr. Fleming examined Mr. Provenzano on July 5, 1999 and found him not competent to be executed. On July 6, 1999, Governor Bush entered an order lifting the stay of execution for Mr. Provenzano. The Governor's order reinstated the execution for July 7, 1999, at 7:00 a.m.

Counsel for Mr. Provenzano filed a Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency and Motion for Hearing on Insanity at Time of Execution on July 6, 1999, in Bradford County, Florida, pursuant to Florida Rules of Criminal Procedure 3.811 and 3.812. Further, Mr. Provenzano's counsel filed with this Court a Motion for Stay of Execution pending the outcome of the circuit court's ruling.

This Court entered a temporary stay of execution on July 6, 1999. This Court's order temporarily stayed the execution until 7:00 a.m., July 9, 1999, and appointed the Honorable Clarence Johnson to conduct proceedings pursuant to F. R. Crim. P. 3.811. Judge Johnson entered an order on July 7, 1999, denying an evidentiary hearing on Mr. Provenzano's motion. Mr. Provenzano filed a notice of appeal with this Court. This Court entered an order July 7, 1999, requiring briefs to be filed no later than noon, July 8, 1999.

On July 8, 1999, Mr. Provenzano filed his brief, as well as a Petition for Writ of Habeas Corpus to declare execution by electrocution to be unconstitutional in its present condition, due to the events during the execution of Allen Davis. This Court entered its order requiring: (a) stay of execution of Mr. Provenzano until 7:00 a.m., September 14, 1999, (b) filing of supplemental briefs no later than July 23, 1999, and (c) briefs shall include discussion of threshold requirement of "reasonable grounds" as used in F. R. Crim. P. 3.811.

B. Statement of Facts

On July 6, 1999, the three doctors assigned to examine Mr. Provenzano by the Governor submitted a combined two-page report indicating that they had spent an 80-minute clinical interview with Mr. Provenzano. Additionally, they expended another 3.5 hours speaking to two correction officers, and reviewing DOC medical records. The doctors reported 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 a 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 examined Mr. Provenzano on July 5, 1999, and submitted her report[2]. 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 13 and 14, 1989, and had conducted 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 thinks or believes, that the reason that he is to be executed is because "They" believe that he is

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2Dr. Fleming's report was attached as an appendix to the initial brief submitted July 8, 1999.

> 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.
>
> He does not connect the courthouse shooting with the execution. It is unrelated because he is innocent.

As pointed out in Judge Johnson's order of denial, Mr. Provenzano, via counsel, submitted the following in support of his motion: (1) report from Dr. Fleming, dated July 5, 1999; (2) correspondence dated July 5, 1999, from Mark S. Gruber, Assistant Staff Counsel, Capital Collateral Regional Counsel Middle Region, to Governor Jeb Bush; (3) affidavit of Susan Cary, Esq., dated July 2, 1999; (4) affidavit of Jerry W. Correll, death row inmate, dated July 2, 1999; (5) affidavit of Robert Eugene Hendrix, death row inmate, dated July 2, 1999; (6) affidavit of Antoine Meyers, death row inmate, dated July 2, 1999; (7) affidavit of Wayne Thompkins, death row inmate, dated July 2, 1999; (8) affidavit of Jason Walton, death row inmate, dated July 2, 1999; (9) report of Dr. Fleming, dated June 18, 1999; (10) numerous requests for administrative remedy or appeal; (11) affidavit of Catherine Forbes, Provenzano's sister, which was acknowledged July 7, 1999, and which was not given under oath;

(12) affidavit of Catherine Provenzano, Provenzano's cousin, dated July 7, 1999, which was not given under oath; (13) portion of Det. Robert Pollack's testimony at Provenzano's trial, which is found at pages 1532 through 1535 of the trial transcript; (14) portion of Dr. Henry R. Lyons' testimony at Provenzano's trial, which is found at pages 1450 through 1480 of the trial transcript; (15) multiple pages of Provenzano's medical records from DOC; (16) numerous DOC "Inmate Requests" from Provenzano; (17) various other DOC inmate records regarding Provenzano; (18) Christmas card from Provenzano to his attorneys, Karen L. Delk and Martin McClain; (19) affidavit of Catherine Chiano Provenzano, the wife of one of Provenzano's cousins, dated April 13, 1989, which was under oath; (20) affidavit of Frank Provenzano, Provenzano's cousin, dated April 3, 1989, which was under oath; (21) affidavit of Catherine Provenzano, Provenzano's sister, dated April 5, 1989, which was under oath; (22) affidavit of Nicholas Welch, Provenzano's nephew, dated April 5, 1989, which was under oath; and (23) affidavit of Shirley DeWitt, one of Provenzano's ex-wives, which was under oath.

All documents and reports submitted to Judge Johnson on behalf of Mr. Provenzano express either behavior patterns of Mr. Provenzano over the years, or conclusions of those behavior patterns. All indicate evidence of incompetency, which infers that Mr. Provenzano is insane to be executed.

SUMMARY OF ARGUMENT

1. The threshold of "reasonable grounds" to grant an evidentiary hearing as announced in F. R. Crim. P. 3.811, should be construed to be the same as that for an evidentiary hearing in a postconviction proceeding: The movant is entitled to an evidentiary hearing on a claim if he alleges specific facts, which taken as true, unless the files and records conclusively show that the prisoner is entitled to no relief.

2. Rule 3.811 and 3.812 are unconstitutional as applied because they fail to provide minimal due process and should be amended to conform with minimal due process standards.

ARGUMENT I

WHAT IS THE THRESHOLD OF PROFFERED EVIDENCE TO CONSTITUTE "REASONABLE GROUNDS" TO BE GRANTED AN EVIDENTIARY HEARING PURSUANT TO F. R. CRIM. P. 3.811?

By this Court's order dated July 8, 1999, supplemental briefs were requested to discuss the threshold requirement of "reasonable grounds" as used in Florida Rules of Criminal Procedure 3.811. In order to properly analyze the issue, it is necessary to briefly review the history of Rule 3.811, as well as the progeny of cases which followed.

Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), effectively announced a newly[3] recognized right under the Eighth Amendment to the United States Constitution: The right of an insane prisoner not to be executed. The Court found that Florida's Section 922.07, Florida Statutes (1985) was unconstitutional because: Florida's statutory procedures for determining a condemned prisoner's sanity for execution provide inadequate assurance of accuracy to satisfy the requirement of Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 and that the fact-finding procedure "adequate to afford a full and

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3Although some have advocated that the prohibition to execute the insane is a new right as it relates to the Eighth Amendment, Justice Marshall indicates that the principle has long resided there but is only now being explicitly recognized. Id. at 417.

fair hearing" on the critical issue, as required by 28 U.S.C., Section 2254(d)(2), was being denied.

Justice Marshall wrote the opinion for the plurality of the Court, and made the following pertinent findings:

> "...If federal factfinding is to be avoided, then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts."
>
> "...if the Constitution renders the fact or time of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that `in the present state of the mental sciences is at best a hazardous guess however conscientious.' (Citations omitted). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations. Id. at 411,412.

The Ford Court examined Section 922.07, Florida Statutes (1985), as it existed in 1986. Their review of that section created concern by the Court that the executive branch made the determination of sanity without the benefit of inquiring about the reasons for the finding of competency, and thus excluded participation by the condemned prisoner in the process.

In Response to Ford, this Court adopted as a temporary rule F. R. Crim. P., Rule 3.811 on November 13, 1996. In re Emergency Amendment to Florida Rules of Criminal Procedure, 497 So.2d 643 (Fla. 1986). The rule, although temporary, contained no standard of review by the court in order for a petitioner to obtain an evidentiary hearing. The determination of whether an evidentiary hearing would be granted was left to the sole discretion of the trial court. The pertinent part of the rule read as follows:

> ...The trial judge shall review the experts' reports and any written submissions from the parties, including experts representing the prisoner. No evidentiary hearing shall be required, but the trial judge, at his or her discretion, may allow the parties to present oral argument and may permit or require the live testimony of witnesses, including one or more of the experts. If the court finds that the prisoner understands the nature and effect of the death penalty and why it is to be imposed upon the prisoner, it shall enter its order so finding.

Research indicates that only two cases, prior to the instant case, have invoked Rule 3.811: Martin v. Wainwright, 497 So.2d 872 (Fla. 1986), and Medina v. State, 690 So.2d 1241 (Fla. 1997). In both cases, the prisoner was provided an evidentiary hearing[4].

4Nollie Martin was provided an evidentiary hearing by the Federal District Court for the Southern District of Florida, after being denied a hearing in state court. Pedro Medina was provided an evidentiary hearing by this Court after the circuit court denied an evidentiary hearing.

Contemporaneously and subsequent to the adoption of Rule 3.811, Nollie Lee Martin, a death row inmate, announced that he was insane to be executed[5]. Mr. Martin was the first to challenge his execution due to insanity under the new temporary Rule 3.811. On December 31, 1987, this Court adopted a permanent rule regarding the procedure for review of insanity of a prisoner to be executed. The permanent rule modified the then-existing temporary Rule 3.811 and added Rule 3.812. The modified Rule 3.811 created a standard of "reasonable grounds" showing of proof of insanity -- a standard not included in the temporary rule.

The rule in effect today is for all practical purposes the same as that adopted in 1987. The pertinent parts read as follows:

> Rule 3.811 (e) Order Granting. If the circuit judge, upon review of the motion and submissions, has reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant a stay of execution and may[6] order further proceedings

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5Martin v. Wainwright, 497 So. 2d 872 (Fla. 1986); Martin v. Dugger, 515 So. 2d 185 (Fla. 1987); Martin v. State, 515 So.2d 189 (Fla. 1987), cert. denied. 881 U.S. 1033, 107 S. Ct. 1965 (1987); Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1988); Martin v. Dugger, 891 F. 2d 807 (11th CA 1989), cert. denied. 498 U.S. 881, 111 S. Ct. 222 (1990); Martin v. Singletary, 795 F. Supp. 1572 (S.D. Fla. 1992); Martin v. Singletary, 965 F. 2d 944 (11th CA 1992).

6Mr. Provenzano contends that this provision, "may," is unconstitutional as applied because under the rule, even if a prisoner meets the threshold of proof, an evidentiary hearing is still at the discretion of the trial court, rather than mandatory. This issue will be discussed in further detail in (continued...)

which may include a hearing pursuant to rule 3.812.

Rule 3.812. Hearing on Insanity at Time of Execution:

Capital Cases

(a) Hearing on Insanity to Be Executed. The hearing on the prisoner's insanity to be executed shall not be a review of the governor's determination, but shall be a hearing de novo.
(b) Issue at Hearing. At the hearing the issue shall be whether the prisoner presently meets the criteria for insanity at time of execution, that is, whether the prisoner lacks the mental capacity to understand the fact[7] of the pending execution and the reason for it.
(c) Procedure. The court may do any of the following as may be appropriate and adequate for a just resolution of the issues raised:
(1) require the presence of the prisoner at the hearing;
(2) appoint no more than 3 disinterested mental health experts to examine the prisoner with respect to the criteria for insanity to be executed and to report their findings and conclusions to the court;
(3) enter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised.

Mr. Martin's claims were raised under the temporary rule and he was denied an evidentiary hearing in state court. In Martin, 686 F.Supp. at 1523, Martin was granted an evidentiary hearing.

(...continued)
Argument II.

7Mr. Provenzano contends that this provision, "mental capacity to understand the fact of the pending execution," is unconstitutional as applied, because it fails to consider the prisoner's rational understanding of the impending execution. This issue will be discussed in further detail in Argument II.

Judge James Lawrence King exhaustively discussed in detail the issues in Ford as applied to Florida's temporary rule 3.811[8]. Judge King noted that the Court in Ford did reach a uniform agreement on the particular procedural requirements required by due process here. However, Judge King recognized that a majority of justices held that due process demands a hearing at least once the prisoner has made some "threshold showing" that he has become insane after trial. Martin 666 F.Supp. at 1558.

Judge King further pointed out that the Court in Ford believed a threshold showing is required, but it did not specifically define the threshold. Judge King mentioned and discussed a number of potential "threshold" levels, such as: "sufficient doubt," "significant factor," and "genuine issue of material fact." Judge King equated a threshold standard for an evidentiary hearing to determine sanity to be executed to that of the standard in Ake v. Oklahoma, 470 U.S. 68, 105, S. Ct. 1087, 84 L.Ed.2d 53 (1985) (due process requires the appointment of a psychiatrist only after the defendant made an "ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense."). However, Judge King subsequently stated that the situations in Ake are not the same

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8Florida's permanent rule 3.811 and 3.812 were adopted prior to the opinion of the Federal District Court's opinion of June 1, 1988. However, the federal court only dealt with Florida's temporary rule 3.811.

as in Martin. Despite his assent with Ake, Judge King elected not to dictate what that threshold should be:

> "Even though this case differs substantially from Evans, the court need not determine the precise parameters of the threshold requirement. Fla. R. Crim. P. 3.811 leaves the decision to hold an evidentiary hearing to the discretion of the trial judge. Of course, the trial judge could fail to exercise this discretion when due process requires an evidentiary hearing. That situation, however, is not before this court, for Judge Fagen exercised his discretion and decided to hold an evidentiary hearing.[9]"

The Ford Court did not declare what threshold showing of incompetency was necessary to obtain an evidentiary hearing, nor did they set out a specific procedural method that the states must comply with in order to satisfy constitutional muster. Martin, 686 F.Supp. 1523; Weeks v. Jones, 52 F.3d 1559 (11th CA 1995). However, in Ford, Justice Marshall stated[10]:

> "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal appropriate ways to enforce the constitutional restriction upon its execution of sentence...
>
> Other legitimate pragmatic considerations may also supply the boundaries of the procedural

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9It should be noted that although Judge King found that Judge Fagan afforded some due process by providing a hearing, that hearing was not full and fair, thereby failing to comply with proper due process and ordered that Martin was entitled to an evidentiary hearing in district court.

10Justices Brennan, Blackmun and Stevens concurred with Justice Marshall's opinion.

> safeguards that feasibly can be provided." Id. at 417

Further, Justice Marshall suggested in a footnote that the states should look to similar circumstances within their existing laws for guidance on the procedure to be utilized. Id. at FN4

Justice Powell also wrote independently of the majority Court, although concurring in the result. Justice Powell indicated that he did not believe that the procedural safeguards necessary in an insanity to be executed claim were as stringent as that suggested by Justice Marshall. Justice Powell stated:

> "First, the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question raised is not whether, but when, his execution may take place.
>
> This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all. It follows that this Court's decisions imposing heightened procedural requirements on capital trials and sentencing proceedings (citations omitted) do not apply in this context."

In Medina, this Court cited to the reasoning of Justice Powell (as noted above), as well as Justice O'Connor's concurring opinion. Part of Justice O'Connor's opinion, cited by this Court, reads as follows:

> "The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly."

This Court, in Medina, appeared to accept and/or adopt the reasoning of Justice Powell and Justice O'Connor[11] regarding the interest of the state in the procedural requirements for a determination of insanity to be executed. However, as suggested by Justice Marshall in Ford and Justice Anstead in his concurring opinion in Medina, the state courts should look to their existing laws for guidance regarding the threshold requirement and also procedural requirements. Justice Anstead seemed to indicate that the threshold standard in Rule 3.210(b) should be the same threshold standard to be used in Rule 3.811 and Rule 3.812. Medina at 1254. By way of construction, Justice Anstead extrapolated from a number of cases with varying degrees of evidence to illustrate sufficient levels of establishing "reasonable grounds." Id. at 1254.

Rule 3.210(b) states:

11Justice O'Connor is concerned with the potential for false claims and deliberate delay in this context as obviously enormous. Ford at 429. However, in Florida the number of executions, since the announcement of Ford , has been 29, but only three individuals, including Mr. Provenzano, have invoked Rule 3.811 since its inception. It appears that the rush to claim insanity so as not to be executed was not quite the concern that Justice O'Connor was in fear of, or nobody reads the court's opinions to know about it.

> "If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable grounds to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting at time for a hearing to determine the defendant's mental condition..."

In contrast to rule 3.210(b), Rule 3.811(e) states:

> "If the circuit Judge, upon review of the motion and submissions, 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 rule 3.812."

In this complex area of the law it is important to have reasonable consistent interpretations. Public Employees Relations Commission v. City of Naples, 327 So.2d 41 (2nd DCA 1976); O'Brien v. State, 478 So.2d 497 (5th DCA 1985).

Certainly one threshold standard for Rule 3.811(e) can be the same standard established in Rule 3.210(b), as described by Justice Anstead in Medina. At least that would constitute consistency in interpretations.

Another, and perhaps the most appropriate, standard to consider in order to obtain an evidentiary hearing, is the standard for a Rule 3.850 postconviction evidentiary hearing. That standard is: The movant is entitled to an evidentiary hearing on a claim if he alleges specific facts -- which are taken as true -- unless the files and records conclusively show that the prisoner is entitled to no relief. Gaskin v. State,

1999 WL 462616 (Fla. July 1, 1999); Mordenti v. State, 711 So.2d 30 (Fla. 1998). In Gaskin this Court stated (referring to Rule 3.850):

> "The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the 'rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts.'"

Further, Justice Pariente in her concurring opinion stated (citing Justice Wells' concurring opinion in Mordenti):

> " [An evidentiary hearing should be required on] ...initial [3.850] motions which assert ineffective assistance of counsel, Brady, or other newly discovered evidence claims, **or other legally cognizable claims which allege an ultimate factual basis**." [Emphasis added]

In light of Ford, there is no question that "INSANITY TO BE EXECUTED" is a legally cognizable claim which alleges an ultimate factual bases. That being the case, the only two questions left are: (1) what is the threshold showing requirement giving rise to some type of due process hearing, and (2) what type of procedural safeguard is necessary to establish the ultimate fact? The undersigned submits that the answer can be found in the same threshold showing and the same procedural safeguards now existing for rule 3.850 claims. This standard can be harmonized with the reasoning of Justice Powell, Justice O'Connor and this Court's reasoning in Medina.

The concern this Court had in citing Justice Powell and O'Connor, is that once the prisoner's guilt and/or sanity has been challenged by a trial, sentence, and direct appeal, the state's interest increases to make sure that the punishment is carried out and the procedural safeguards provided at trial, sentence and direct appeal are no longer as great. But, assuming arguendo that this is true, it is the same argument which would hold true for postconviction proceedings. At postconviction, a prisoner is entitled to an "evidentiary hearing" if he "alleges facts, taken as true, would constitute relief if not conclusively refuted by the record." Yet, at the time of postconviction the prisoner's guilt and/or sanity likewise, has been challenged by a trial, sentence, and direct appeal. The circumstances are virtually indistinguishable.

Actually, it can be argued that the procedural safeguards for the determination of "sanity to be executed" is greater than that for postconviction relief. This is so because "sanity to be executed" is a substantive constitutional right under the Eighth Amendment as espoused in Ford. However, postconviction review is not a constitutional right. Rule 3.850 is merely a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus. Haag v. State, 591 So.2d 614 (Fla. 1992). The rights being asserted, whether through a 3.850 procedure or habeas corpus, are underpinnings of the postconviction process and the process is utilized to attack

errors violating substantive rights. Postconviction proceedings are a collateral attack of a violation, while allegations of insanity to be executed are a direct attack of a violation.

However, one might argue that the two situations (postconviction v. insanity to be executed) are not identical because insanity to be executed occurs after the prisoner has been afforded procedural collateral attacks in both the state and federal systems, as suggested by Justice Powell.

> "Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review.
>
> "[FN1]...Only after all of these challenges had been resolved against him did petitioner challenge his impending execution on the ground of insanity."

However, this argument fails to consider that the only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin, 497 So.2d 872 [If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985)].

The same situation exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an

execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

Again, the threshold showing and procedural safeguards for a determination of insanity to be executed must be the same for postconviction proceedings. Assuming for argument's sake that postconviction proceedings did not begin until after a death warrant was issued or a claim of insanity to be executed was permitted to be filed with a postconviction proceeding, would not the prisoner be entitled to the same considerations for violations of a constitutional right as those normally considered in a postconvictions proceeding? I THINK SO. It is not the prisoner's fault that the laws of the state and federal governments permit the claim only at the time a death warrant is signed.

Judge Johnson abused his discretion by denying an evidentiary hearing, because Mr. Provenzano provided sufficient evidence, which if taken as true, could not be conclusively refuted by the record.

ARGUMENT II

WHETHER FLA.R.CRIM.P. 3.811 AND 3.812, AS APPLIED, VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED?

Due to the possibility that this Court may reject Mr. Provenzano's argument regarding the threshold showing to be the same as that for postconviction, and should this court affirm the trial court's ruling in denial of an evidentiary hearing, Mr. Provenzano must point out that Florida Rules of Criminal Procedure 3.811 and 3.812 are unconstitutional as applied.

Rule 3.811 (b) reads as follows:

> "A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it."

This rule is unconstitutional as applied because it does not allow for the prisoner's rational appreciation of the connection between his crime and punishment. Martin, 686 F.Supp. 1523. This Court expressed in Martin, 515 So.2d 189, that the standard announced in Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), does not apply because Dusky concerned competency to stand trial and Martin's competency to stand trial was not as issue.

However, the finding of this Court was predicated upon the dicta of Justices Powell and O'Connor in Ford, suggesting that because the prisoner has been through trial, sentence, and appeals, the state's interest was substantial. But Justice Marshall in

Ford, along with three other Justices, indicated that the states should look to other laws of its state to determine the standards to be utilized. As pointed out by Justice Anstead (concurring opinion) in Medina, 3.210(b) establishes the standards to be utilized for competency at time of trial. Justice Anstead listed a number of cases supporting the theory that 3.210(b) is the standard to be utilized for determination of competency, whether at time of trial or at time of execution

Further, in Martin, 515 So.2d 189, and Medina, this Court clearly rejected any suggestion that the standards to be utilized at time of trial are the same as the standards to be utilized at time of execution.

This is due primarily to the reasons suggested by Justices Powell and O'Connor. However, Judge King in Martin, 686 F.Supp. 1523, disagreed with this Court in stating:

> "If both purposes behind the death penalty are to be served, and, therefore, the sentence is to be carried out in accordance with the eighth amendment, the defendant must at least appreciate the connection between his crime and punishment. This appreciation consists of both a subjective and objective test. The subjective part is nothing more than the defendant's perception of the connection between his crime and punishment. A defendant must understand the fact he committed his crime and the fact that he will die at a specific time and place. A defendant must also understand the basic and fundamental logical proposition that because he has committed an act that society and all civilized humanity finds heinous he is to be killed. The objective aspect of this realization test is relatively straightforward. This concept determines whether the defendant's subjective understanding

is grounded in reality; that is, is rational."

Judge King also pointed out that part of Justice Powell's reasoning is similar to his viewpoint. Judge King stated:

> "This appreciation of the connection between crime and punishment is very similar to Justice Powell's `perceives the connection' requirement...
>
> The perceive the connection phrasing is not the complete description of the Powell requirement. Powell believed that the eighth amendment forbids the execution of condemned prisoners who are unaware of the punishment they are about to suffer and why they are to suffer it."

Judge King also contended that the American Bar Association's pronouncements regarding the meaning of insanity to be executed complies with the factual as well as rational standard.

Judge King does not stand in isolation on this issue. In Weeks, the state court applied the standard of competency to be executed enunciated by the American Bar Association. The 11th Circuit Court of Appeals in Weeks stated:

> "While our circuit has not articulated a standard as to competency to be executed under Ford, we need not determine this issue to decide Week's emergency motion for stay of execution and certificate of probable cause. Whatever the standard is, it is no higher than the ABA standard advanced by Weeks and used by the state trial judge. (citing Martin v. Dugger, 686 F.Supp. 1523)."

Rule 3.812 (e) reads as follows:

> "If, at the conclusion of the hearing, the court shall find, by clear and convincing evidence, that the prisoner is insane to be

> executed, the court shall enter its order continuing the stay of the death warrant..."

This rule is unconstitutional because it creates the standard of proof of incompetency to be "clear and convincing" instead of the "by preponderance of the evidence" standard announced in Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed. 2d 498 (1996). The undersigned concedes that this Court rejected the same proposition contended by the prisoner in Medina. In that case, this Court stated:

> "We find that Cooper does not apply to a rule 3.812 proceeding. In Cooper, the issue involved the standard of proof in determining whether a defendant was incompetent to stand trial, which is clearly different from a determination of sanity to be executed."

However, upon closer review of Justices Powell and O'Connor's opinions we learn that the "great interest of the state" they speak of pertains to the **procedural method** to determine an ultimate fact, not the **standard of proof** to determine the ultimate fact, although both are elements of due process.

The preponderance of the evidence standard should apply in determinations of sanity to be executed, because the measuring stick of "clear and convincing" evidence may be impossible to achieve, for the following reasons:

(1) The prisoner comes to the court presumed to be sane.

(2) The courts in both Ford and Cooper acknowledge that psychiatrists disagree widely and frequently on what constitutes

mental illness and on the appropriate diagnosis to be attached to given behavior and symptoms.

(3) Florida's rules do not even guarantee that an evidentiary hearing will take place for the prisoner to be sufficiently heard, even if the prisoner meets the threshold.

Clear and convincing evidence is a quantum of proof which requires more proof than a preponderance of the evidence but less than beyond a reasonable doubt. In re Ford-Kaus, 730 So.2d 269 (Fla. 1999). Obviously, such an amorphous definition would be difficult at best to review for an abuse of discretion.

From a practical point of view, the clear and convincing standard of proof is difficult to apply because the determination of competency to be executed is conducted in an adversarial backdrop with evidence that is at best contradictory (mental health experts opinions) and the burden of proof upon the prisoner is an amorphous standard necessary to overcome his presumption of sanity. How can any judge declare that a prisoner has met that standard of proof, regardless of how incompetent the prisoner might be.

Inasmuch as Florida's rules reduce the procedural methods necessary to obtain a hearing and increases the standard of proof, Mr. Provenzano is being denied minimal due process to protect his fundamental right not to be executed while insane.

> "Difficulty in ascertaining whether a defendant is incompetent or malingering may make it appropriate to place the burden of proof on him, but it does not justify the additional onus of an especially high standard

of proof.

> Although it is normally within a State's power to establish the procedures through which its laws are given effect, the power to regulate procedural burdens is subject to proscription under the Due Process Clause when, as here, the procedures do not sufficiently protect a fundamental constitutional right." Cooper at 349.

Rules 3.811 (e) and 3.812 (c) read as follows:

> 3.811(e): If the circuit judge, upon review of the motion and submissions, 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 3.812.
>
> 3.812(c): The court may do any of the following as may be appropriate and adequate for a just resolution of the issues read:

These rules are unconstitutional as applied because they do not provide for minimal due process for a full and fair hearing, even after the prisoner meets the threshold requirement listed. Ford and Martin, 686 F.Supp. 1523.

Prior to Mr. Provenzano invoking Rule 3.811, and since the permanency of Rules 3.811 and Rule 3.812, only Medina has invoked the provisions of the rule. This Court avoided any claim of constitutionality of these rules by remanding to the circuit court with directions to the circuit court to hold a hearing pursuant to 3.811. The trial court in fact held an evidentiary hearing. In Medina this court held:

> "We agree with Medina that an evidentiary hearing pursuant to rule 3.812 should be held in this case. We conclude that in this

> case the report of the two psychologists and psychiatrist meet the reasonable ground threshold of rule 3.811(e) and that it was an abuse of discretion not to have an evidentiary hearing pursuant to rule 3.812 in view of the conflicting opinions of the experts."

It should be noted that this Court did not remand to the trial court to determine "if" an evidentiary hearing was required in light of the conflicting experts pursuant to 3.811 and 3.812, but found that it was an abuse of discretion not to hold an evidentiary hearing.

It is quite possible that in Mr. Provenzano's cause, this Court could potentially: (1) affirm the trial court's ruling, (2) remand for the trial court to determine if a hearing is required, given that the threshold has been met, or (3) remand for an evidentiary hearing. In the first two circumstances, Mr. Provenzano contends that the trial court's discretion to provide or not provide him with an evidentiary, once the threshold has been met, amounts to a constitutional deprivation of his minimal due process rights.

CONCLUSION AND RELIEF SOUGHT

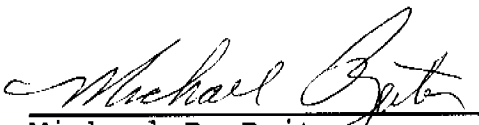
1. Because "insanity not to be executed" is a constitutional right with at least the same concerns and interests as those claims associated with postconviction proceedings, the threshold showing of "reasonable grounds" announced in Rule 3.811 should be amended to the same standards for acquisition of an evidentiary hearing in postconviction proceedings.

2. Florida Rules of Criminal Procedure, 3.811 and 3.812 are unconstitutional as applied, because they do not meet minimal due process requirements. Therefore, this Court should either amend 3.811 and 3.812 to provide for a mandatory evidentiary hearing upon a threshold showing of proof and amend the burden of proof standard of insanity to be executed to the "preponderance of the evidence," or declare rules 3.811 and 3.812 unconstitutional.

3. Grant such other and further relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **SUPPLEMENTAL BRIEF OF APPELLANT** has be furnished by either United States Mail, first-class/federal express/facsimile transmission/hand delivery this 22nd day of July, 1999.



Michael P. Reiter
Florida Bar No. 0320234
Chief Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

Copies furnished to:

ATTN: ROBIN BERGHORN
The Honorable Clarence T. Johnson, Jr.
Orange County Courthouse
425 N. Orange Avenue, Room 360
Orlando, Florida 32801

Kenneth Nunnelley
Katherine V. Blanco/Carol Dittmar
Assistant Attorney Generals
Office of the Attorney General
Westwood Building, Seventh Floor
2002 North Lois Avenue
Tampa, Florida 33607

Cynthia Rapp
Deputy Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543