IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

CASE NO. 95,959

STATE OF FLORIDA,

ACTIVE DEATH WARRANT

Appellee.

_____/

APPEAL FROM DENIAL OF POSTCONVICTION MOTION FOR HEARING ON INSANITY AT TIME OF EXECUTION

SUPPLEMENTAL ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

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, postconviction relief has been denied by this Court in each of Provenzano's three separate postconviction 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. 99-150 (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).

Prior Competency Claims

In 1984, Provenzano's counsel filed a Motion for Competency Determination prior to trial. (R. 2766-67.) The trial court entered an order appointing Dr. Robert Kirkland, Dr. J. Lloyd Wilder, and Dr. Michael Gutman as experts to examine Provenzano and determine if he was competent to stand trial. (R. 2784-85.) Dr. Gutman submitted a report dated February 20, 1984, determining that Petitioner was competent to stand trial; Dr. Kirkland submitted a report dated February 22, 1984, finding that Provenzano was competent to stand trial; and Dr. Wilder submitted a report dated February 23, 1984, determining that Provenzano was competent to stand trial. (R. 2791-95, 2798.) On March 1, 1984, the trial court held a competency hearing during which Dr. Gutman, Dr. Kirkland, and Dr. Wilder testified. Each of these three experts testified that Provenzano was competent to stand trial. (Transcript of Competency Hearing at 5-7, 14-15, 26-28.) On March 6, 1984, the trial court entered an order finding as a matter of fact and law that Provenzano was competent to stand trial. (R. 2809-10.)

1984 - Insanity Defense at Trial

Provenzano relied on an insanity defense at trial and five mental health witnesses testified. Two expert witnesses testified

for the defense and three psychiatric experts testified in rebuttal for the State. At trial, Provenzano's experts testified that he suffered from the mental disease of paranoia that rendered him insane under the Florida standard (R. 1445-59, 1471-72, 1532-34, 1536-37.) The State's expert witnesses found that Provenzano merely suffered from paranoid personality traits which did not affect his ability to distinguish right from wrong. (R. 1687-90, 1752-54, 1773, 1813-17.) In addition, several lay witnesses described many of Provenzano's deliberate and premeditated actions preceding the murder, including purchasing several weapons, taking instruction on the use of the deadly weapons, buying spare ammunition for the weapons, arranging for reinforced pockets to be sewn into his jacket, thus enabling Provenzano to secrete the murder weapons and ammunition, and Provenzano's efforts to avoid detection and capture.

During the penalty phase proceedings in 1984, Provenzano testified on his own behalf for approximately two hours. In denying federal habeas corpus relief in 1997, the federal district court specifically found that Provenzano testified coherently and rationally during the penalty phase proceedings. Notably, much of Provenzano's testimony was inconsistent with his insanity defense. Not only did portions of his testimony contradict testimony by defense witnesses concerning specific instances of alleged odd or

bizarre behavior, but Provenzano also testified unequivocally that on the day of the shooting he knew right from wrong (R. 2154, 2165) and that the shooting was accidental (R. 2113). See, Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M.D. Fla. 1997).

Prior postconviction challenges to competency

Provenzano did not challenge his competency to stand trial on direct appeal. Instead, in his first motion for postconviction relief submitted ten years ago, Provenzano submitted a report prepared in 1989 by a psychologist, Dr. Pat Fleming of Wyoming, in support of his allegation that he was not competent to stand trial. In denying relief on Provenzano's postconviction claim of competency-to-stand-trial, this Court explained:

> Relying upon a recent examination by Dr. Fleming, Provenzano claims that he was not competent to stand trial. The record reflects, however, that this issue was thoroughly explored before the trial commenced. Several doctors were appointed to examine Provenzano, and each of them concluded that he was competent to stand trial. Three psychiatrists testified to this effect at the competency hearing. The trial judge conducted a proper hearing and ruled Provenzano to be competent. Provenzano's assertion that his counsel should have called Dr. Pollack to testify at the competency hearing is without merit. Like the other doctors, Dr. Pollack believed Provenzano to be competent and simply cautioned that he was a violent individual who could become disruptive in court.
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> Provenzano, 561 So. 2d at 544.

This Court concluded that Provenzano was not entitled to

postconviction relief based on the 1989 psychological examination by Dr. Fleming of Wyoming, who merely reached a similar diagnosis as that given by the prior defense experts, Drs. Lyons and Pollack. Id. at 546.

In Provenzano's subsequent habeas corpus proceedings, the federal courts likewise denied relief on Provenzano's competency-to-stand trial claim, finding that Provenzano had not demonstrated any entitlement to an evidentiary hearing:

> The trial court's finding of competence is fairly supported by the record before the trial court at the time of the decision. The allegations now asserted by Petitioner, including the report of Dr. Fleming, simply do not demonstrate a real, substantial, and legitimate doubt as to his competence. Moreover, since Petitioner has not presented evidence that "positively, unequivocally, and clearly generates doubt as to his competence at the time of his trial," he is not entitled to an evidentiary hearing on this claim.
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> Provenzano, 3 F. Supp. 2d at 1377.

In denying relief on Provenzano's related claim of ineffective assistance of trial counsel/adequacy of mental health assistance at trial, the federal district court summarized the mental health background and information evaluated at the time of trial and concluded that Provenzano was not entitled to any relief:

> Petitioner avers that failures on the part of defense counsel and the mental health experts rendered the opinions of the experts professionally and constitutionally inadequate. Specifically, he alleges that defense counsel failed to investigate, develop and present the necessary collateral information and evidence to the court-appointed mental health experts. In fact, Petitioner contends that "significant and crucial

background facts regarding mental, emotional, and psychological background were never sought out, reviewed, or considered." Instead, Petitioner argues that "self-report from a deranged defendant formed the primary basis for diagnosis." The claim is largely premised on a 1989 evaluation by Dr. Fleming, who diagnosed Petitioner as suffering from paranoid psychosis both during the shooting and at the time of the trial.

Both the state trial court and the Florida Supreme Court rejected Petitioner's claim. *Provenzano v. Dugger,* 561 So.2d 541, 546 (Fla.1990). The state supreme court found the diagnosis duplicated that of the defense's trial experts and that "[t]he mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief." *Id.*

Petitioner's arguments concerning investigation, development, and presentation of collateral and background information simply are not supported by the record. Counsel garnered a plethora of information and provided it to the mental health experts:

Dr. Pollack testified to the following:

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

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

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

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

e. He talked to jail officials about Petitioner's

behavior. (R. 1555.)

Dr. Lyons testified to the following:

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

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

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

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

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

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

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

This Court has reviewed the cases relied upon by Petitioner and concludes that they are factually distinguishable. In the instant case, defense counsel promptly obtained a court order to retain investigators. (R. 2705-06.) Myriad witnesses were interviewed, background information was assembled, family members were contacted, and medical records were reviewed. The scope

> and extent of the investigation conducted by trial counsel were reasonable. *Thompson v. Wainwright,* 787 F.2d 1447, 1450 (11th Cir.1986), *cert. denied,* 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987)("A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.").
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> Furthermore, the record reflects that counsel forwarded this information to the defense experts who utilized the materials in forming their opinions. Neither the presentation of the information nor the experts' reliance on the materials was unreasonable. Both the attorneys and the experts conducted their duties in a professional, competent, and reasonable manner. The fact that additional facts subsequently surfaced and were utilized by Dr. Fleming to reach the same diagnosis does not render the earlier doctors' opinions inadequate. *Waters,* 46 F.3d at 1513-14.
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> Finally, trial counsel's decision not to duplicate evidence of Petitioner's alleged mental incapacity during the penalty phase was not unreasonable. *Id.* at 1512-13. During the penalty phase closing arguments, defense counsel clearly argued facts brought out during the guilt phase, and the judge correctly instructed the jury that they could consider guilt phase evidence during the penalty deliberations. (R. 2226.) Neither the trial attorneys nor the experts rendered ineffective assistance to Petitioner. (FN19) Moreover, Petitioner has failed to demonstrate prejudice. The conclusion offered by Dr. Fleming merely duplicates the opinions of the trial experts. This claim must fail.
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> Provenzano, 3 F. Supp. 2d at 1374-75.

1999 Postconviction 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 postconviction relief. Addressing Provenzano's postconviction 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 her, not

competency to be executed.

MR. REITER: At this point not competency.

THE COURT: You have got a predicate to go before the Governor on that, right, on that particular issue.

MR. REITER: That's correct.

(T I/34-35)

On June 24, 1999, Senior Judge Johnson entered a 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).

1999 Alleged Insanity at Time of Execution

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 Section 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 99-150, 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. 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.
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> 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.
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> 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.
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> 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.
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> 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.

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, after receiving and reviewing the numerous exhibits furnished by CCRC-M, the State's response, and the report of the three psychiatrists, denied Provenzano's

motion for hearing on insanity at time of execution, stating:

> **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,[1] the documents that Provenzano faxed to the undersigned Judge on July 7, 1999,[2] the State's response to the motion, and

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[1]In support of his motion, Provenzano filed: 1) Report from Dr. Patricia Fleming, of Fleming Associates, 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; and 9) Report from Dr. Patricia Fleming, of Fleming Associates, dated June 18, 1999.

[2]The documents faxed on July 7, 1999, include: 1) numerous "Requests for Administrative Remedy or Appeal"; 2) affidavit of Catherine Forbes, Provenzano's sister, which was acknowledged July 7, 1999, and which was not given under oath; 3) affidavit of Catherine Provenzano, Provenzano's cousin, dated July 7, 1999, which was not given under oath; 4) portion of Dr. Robert Pollack's testimony at Provenzano's trial, which is found at pages 1532 through 1535 of the trial transcript; 5) portion of Dr. Henry R. Lyons' testimony at Provenzano's trial, which is found at pages 1450 through 1480 of the trial transcript; 6) multiple pages of Provenzano's medical records; 7) numerous Department of Corrections "Inmate Requests" from Provenzano; 8) various other Department of Corrections inmate records regarding Provenzano; 9) Christmas card from Provenzano to his attorneys, Karen L. Delk and Martin McClain; 10) affidavit of Catherine Chiano Provenzano, the wife of one of Provenzano's cousins, dated April 3, 1989, which was under oath; 11) affidavit of Frank Provenzano, Provenzano's cousin, dated April 3, 1989, which was under oath; 12) affidavit of Catherine Provenzano, Provenzano's sister, dated April 5, 1989, which was under oath; 13) an affidavit of Nicholas Welch, Provenzano's [sic] nephew, dated April 5, 1989, which was under oath; 14) affidavit of Shirley DeWitt, one of Provenzano's ex-wives, which was under oath;

the attachment filed with the State's response.[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

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and 15) Report from Dr. Patricia Fleming, of Fleming Associates, dated July 5, 1999 (the same report that was filed with the motion on 7/6/99).

All documents faxed to this Court on July 7, 1999, will be sent to the Clerk of the Court for Bradford County, Florida, for filing with this Order.

[3]The State attached the Report of the Commission that was appointed by the Governor to determine Provenzano's competency to be executed to its response to Provenzano's motion.

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,[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

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[4]In her report, Dr. Fleming states her initial evaluation of Provenzano was conducted on March 18, 1989, and that she saw Provenzano at least four additional times after that date. However, Dr. Fleming does not indicate the dates on which these four additional meetings with Provenzano occurred.

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,"[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 American 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

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[5]See page 7 of July 5, 1999, Report of Dr. Patricia Flemming.

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.**

NO MOTION FOR REHEARING WILL BE ENTERTAINED BY THE COURT.

DONE and **ORDERED** on this 7th day of July, 1999.

On July 8, 1999, Provenzano and the State filed simultaneous briefs with regard to this ruling. Provenzano also filed a petition for extraordinary relief based on alleged malfunctions of the electric chair during the execution of Allen Lee Davis earlier that morning. Thereafter, this Court issued a stay of execution and mandated that an evidentiary hearing be held as to the current working condition of Florida's electric chair. The Court also directed supplemental briefs to be filed relating to the trial court's denial of Provenzano's request for an evidentiary hearing to determine his sanity to be executed. The instant brief is offered in accordance with that Order.

SUMMARY OF THE ARGUMENT

Florida Rule of Criminal Procedure 3.811 states that "reasonable grounds" to believe that a prisoner is insane to be executed must be presented to the trial judge in order for the judge to grant an evidentiary hearing or any other relief. This standard requires sufficient facts to cause a reasonable person to believe that a death row inmate does not have the mental capacity to be executed, and has not been met on the facts of this case.

Provenzano has failed to demonstrate any error in the trial court's ruling on his emergency motions for a judicial determination of competency, or any constitutional infirmity in the applicable rules governing this process. Accordingly, all relief should be denied.

ARGUMENT

ISSUE I

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

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. Rule 3.811(b), Florida Rules of Criminal Procedure. Rule 3.811 specifically requires that "reasonable grounds" to believe that a prisoner is insane to be executed must be presented to the trial judge in order for the judge to grant an evidentiary hearing or any other relief. This standard requires sufficient facts to cause a reasonable person to affirmatively believe that a death row inmate does not have the mental capacity to be executed.

Provenzano's brief suggests that the reasonable grounds standard of Rule 3.811 should be interpreted in one of two ways. He would accept a standard equivalent to that embodied in Rule 3.210 as to the need for a competency determination prior to a conviction, as discussed in Justice Anstead's separate opinion in Medina v. State, 690 So. 2d 1241, 1253 (Fla. 1997); however, he argues instead for this Court to adopt an even lower threshold for relief, invoking the same standard used for determining the right to an evidentiary hearing on any postconviction motion, i.e., whether he has offered

specific facts which, taken as true, would entitle him to relief, unless the files and records conclusively demonstrate otherwise. Although analogizing Rule 3.811 to the pretrial competency standard of Rule 3.210 is a useful beginning, neither of the approaches offered by Provenzano adequately address the particular issues implicated by Rule 3.811.

The reasonable grounds language of Rule 3.811 is, as noted by Justice Anstead, nearly identical to the standard for requiring a competency determination under Rule 3.210, and certainly the cases construing the factual situations presented under that rule are relevant in determining whether the reasonable grounds standard was met in this case. However, there are important procedural and substantive differences between Rules 3.210 and 3.811 which require further consideration. As this Court has recognized, the state interest just prior to execution is much greater than prior to trial, since a valid conviction and judgment has been obtained and collateral attacks have been rejected. Medina v. State, 690 So. 2d 1241, 1246-1247 (Fla. 1997); see also, Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring). Similarly, the demands of due process are accordingly reduced. Medina, 690 So. 2d at 1247; Ford, 477 U.S. at 429 (O'Connor, J., concurring).

In addition, the reasonable grounds standard for a competency hearing under Rule 3.210 requires a court to determine "whether

there is reasonable ground to believe the defendant may be incompetent, not whether he is incompetent." Scott v. State, 420 So. 2d 595, 597 (Fla. 1982); Tingle v. State, 536 So. 2d 202, 203 (Fla. 1988). If such grounds exist, the court must order at least two experts to examine the defendant and set a time for a hearing on the defendant's mental condition. Fla.R.Crim.P. 3.210(b). Yet Rule 3.811 only requires a court to consider "reasonable grounds to believe that the prisoner is insane to be executed;" if such grounds exist, a court must grant a stay and has the discretion to order further proceedings.

Finally, the ultimate standard of competency to be executed, requiring a mental capacity only to understand the fact of the impending execution and the reason for it, is much lower than the ultimate standard of competency to be tried, requiring a mental capacity to appreciate the proceeding brought against him and to consult with and assist his attorney. This means that the same facts which may constitute reasonable grounds to require a competency hearing pursuant to Rule 3.210 may not be sufficient to require a hearing or any other relief pursuant to Rule 3.811. As a practical matter, this means that facts such as a history of bizarre behavior or a current expert opinion of incompetency such as found to require a hearing in Boggs v. State, 575 So. 2d 1274 (Fla. 1991), Tingle v. State, 536 So. 2d 202 (Fla. 1988), or Hill

v. State, 473 So. 2d 1253 (Fla. 1985) may not be sufficient to require a stay under Rule 3.811(e). This is particularly true since the histories, behaviors, and expert opinions identified in Boggs, Tingle, and Hill had never been explored in any judicial proceeding, whereas Provenzano's history of bizarre behavior has been thoroughly examined by a number of state and federal courts.

For these reasons, the standard for requiring a judicial determination of sanity under Rule 3.811 involves a higher threshold than that requiring a competency hearing under Rule 3.210. However, the actual standard to be employed is not a critical question in this particular case, because the submissions by Provenzano clearly did not meet the reasonable grounds test under any standard. Even taking his lowest threshold of requiring a hearing if his submissions, taken as true, establish an incompetency to be executed not conclusively refuted by the files and records in his case, a hearing would not be required on these facts.

Rule 3.811 clearly contemplates that a trial judge will consider the totality of circumstances, including any materials and documents submitted along with the motion for judicial determination of sanity. The decision as to whether sufficient facts have been offered which would require a reasonable person to affirmatively believe that the prisoner is insane to be executed

must take into consideration all of the available mental health litigation and prior proceedings in the case. In this case, the submissions offered in support of Provenzano's motion are nothing more than what has been offered by Provenzano's attorneys for years to support various mental health claims raised during and after his trial. These same allegations were not sufficient to require an evidentiary hearing as to his competency to be tried when presented in his postconviction appeals. See, Provenzano, 3 F. Supp. 2d at 1377. Certainly the same facts, offered now on the eve of his execution, cannot be sufficient to meet any threshold for relief based on a claim of insanity to be executed.

Provenzano relied on the following exhibits to support his alleged claim of current insanity to be executed:

(1) Excerpts - 1984 trial transcripts: Provenzano extracted portions of the 1984 trial record containing some of the testimony of his own expert witnesses in support of his claim of alleged insanity to be executed. Provenzano's claim of insanity at the time of the murders was rejected at trial and all of the expert witnesses agreed that Provenzano was competent to stand trial. Provenzano does not state that any of these expert witnesses have seen him since 1984.

(2) Excerpts, 1989 postconviction appendix: In 1989, Provenzano submitted numerous exhibits to the trial court and this Court in

support of his first Rule 3.850 motion for postconviction relief. These exhibits, which were originally submitted in 1989 and rejected as a basis for any postconviction relief, were again photocopied and re-submitted by Provenzano in 1999. These exhibits include the 1989 report of Dr. Fleming, a psychologist from Wyoming, as well as the affidavits of petitioner's sister, cousin, nephew, and ex-wife.

(3) Affidavits of fellow death row inmates: Provenzano also offered affidavits from other death row inmates attesting to Provenzano's strange behavior over an unidentified period of time. These affidavits suggest only cumulative facts to support Provenzano's prior mental health claims, which have all been repeatedly rejected.

(4) 1999 Report of Dr. Fleming of Wyoming: Provenzano also submitted a recent report by Dr. Fleming; however, the 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 incompetent to be executed in a letter written to Provenzano's attorneys on June 18, 1999.[6] At that time,

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[6]Based on this letter, Provenzano's attorneys arranged for Provenzano to be examined by Dr. Robert Berland on June 20, 1999 (see, 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.

Fleming had not 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. Certainly, as Judge Johnson found, this ambiguous report is not sufficient to establish reasonable grounds to believe that Provenzano is not currently competent to be executed. See, Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1988) (psychologist's affidavit insufficient to afford hearing on sanity to be executed); Evans v. McCotter, 805 F.2d 1210 (5th Cir. 1986) (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, insufficient to raise a legitimate question as to Evans' sanity); Card v. State, 497 So. 2d 1169, 1175 (Fla. 1986) (warning that reports filed by psychologists hours before a scheduled execution will be viewed with great suspicion).

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.

ISSUE II

WHETHER FLORIDA RULES OF CRIMINAL PROCEDURE 3.811 AND 3.812, AS APPLIED, VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Provenzano also alleges that Rules 3.811 and 3.812 are unconstitutional because (1) the clear and convincing standard of Rule 3.812(e) cannot be met and violates Cooper v. Oklahoma, 517 U.S. 348 (1996); and (2) Rules 3.811(e) and 3.812(c) do not provide for a full and fair hearing even when the "reasonable grounds" threshold has been met. For several reasons, his argument must be rejected.

Initially it must be noted that Provenzano is challenging the constitutionality of these rules "as applied" (Supplemental Brief, pp. 22-28). However, no such challenge was presented to the trial court, and therefore this claim cannot be considered on appeal. In addition, none of the particular sections or alleged flaws he identifies have been applied to him. Rule 3.812 addresses procedures if an evidentiary hearing is ordered by the trial judge. Since no hearing has ever been ordered in this case, that rule has not been applied to Provenzano. And Provenzano's complaint with the application of the "reasonable grounds" standard of Rule 3.811(e) focuses only on the fact that a trial judge has discretion as to the relief to be afforded once that standard has been met; since it was not met in this case, that discretion has not been

exercised and that aspect of the rule has not been applied to him. Thus, Provenzano's "as applied" claim must fail since the provisions he is challenging have not been applied to him.

In addition, as Provenzano concedes, this Court previously rejected his argument that the "clear and convincing evidence" standard of Rule 3.812 is unconstitutional under Cooper. See, Medina, 690 So. 2d at 1246-1247. Provenzano has offered no legitimate basis to revisit this issue. His reliance on Judge King's findings in Martin v. State, 686 F. Supp. 1523 (S.D. Fla. 1988) is misplaced since that decision was known at the time Medina was decided. His concern that the standard is "amorphous" because it is only defined as more than a preponderance of the evidence and less than proof beyond a reasonable doubt is illusory; any standard would suffer the same "amorphous" characterization. His concern that the standard can never be met because there is (1) a presumption of sanity; (2) disagreement among mental health experts; and (3) discretion to the trial judge even if the threshold standard is met is also trivial because these factors would again apply to any standard. In sum, he has not identified any constitutional shortcoming with the clear and convincing standard adopted in Rule 3.812.

Provenzano's argument that the rules are unconstitutional for failing to require a full and fair hearing once the reasonable

grounds threshold has been met is also without merit. In Ford v. Wainwright, 477 U.S. at 417, the United States Supreme Court sanctioned the use of a high threshold for consideration of this issue. The Ford Court 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 417. 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 constitutional right not to be executed while insane, as fulfilled in Florida's procedural rules, permits adequate consideration of the prisoner's rational connection between his crime and punishment. Any reduced procedural protections or higher standards than those of pretrial competency rights are justified by the substantial interest which the State maintains in executing a capital defendant once all appeals have been exhausted.

Provenzano has failed to demonstrate any basis for relief in this issue. No further stay of execution is justified in this case. See, Bowersox v. Williams, 517 U.S. 345 (1996); Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying Provenzano's emergency motion for judicial determination of competency must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail/facsimile to John Moser, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 2 day of August, 1999.

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