IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs. **CASE NO. 96,453**

STATE OF FLORIDA, **ACTIVE DEATH WARRANT**

Appellee.

_____/

APPEAL FROM JUDICIAL DETERMINATION OF COMPETENCY TO BE EXECUTED

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General
Florida Bar No. 158541
Office of the Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 503843
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

CO-COUNSEL FOR STATE OF FLORIDA

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

CERTIFICATE OF TYPE SIZE AND STYLE

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

PRELIMINARY STATEMENT

This brief is being prepared prior to the record on appeal having been received. A Master Index to the Record on Appeal has been furnished and provides some guidance as to where relevant materials can be found in the record proper; where possible, references to the record will be made as "R." followed by the record page number (record volume numbers are not noted on the Index). References to the transcript of the evidentiary hearing from August 31 through September 2, 1999, will be cited by transcript volume and page number, as "T. Vol. p." and may differ slightly from the proper record on appeal citation. References to the trial court's August 3, 1999, Order finding Provenzano to be competent (R. 88-104) will be cited as "Order" followed by the page number. References to the exhibits admitted at the hearing will be cited as "State Ex.," "Def. Ex.," or "Court Ex.," followed by the exhibit number. Other references are self-explanatory.

Some of the documents filed by Provenzano do not appear in the record on appeal, as they were captioned with the Ninth Circuit court and case number. Where necessary, these documents may be included as appendices to this brief, and cited by identifying the document and appendix number. A separate Motion to Supplement will be filed requesting that these documents be supplemented to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Appellant Thomas Provenzano was convicted of first degree murder and two counts of attempted first degree murder and sentenced to death in 1984. This Court affirmed his convictions and sentences in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987). Postconviction relief has been repeatedly denied in state and federal courts. See, Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Provenzano v. State, 24 Fla.L.Weekly S314 (Fla. July 1, 1999), cert. denied, Provenzano v. Florida, U.S.S.Ct. Case No. 99-150 (July 6, 1999); Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), affirming, Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M.D. Fla. 1997).

On June 9, 1999, Governor Jeb Bush signed a warrant for Provenzano's execution on July 7, 1999. On July 5, 1999, two days before his scheduled execution, Provenzano raised a claim that he is currently insane to be executed, invoking 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 Provenzano's mental competency. 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 reviewed Provenzano's Department of Corrections records and medical records; interviewed corrections officers; and conducted an 80-minute clinical interview with Provenzano. They issued a written report to the Governor, stating, in pertinent part:

> Prior to beginning the interview, the nature, scope, and purpose of the evaluation was explained to the inmate, with details repeatedly explained. Nevertheless, he continued to respond that he did not understand any of these elements and asked no questions in return. This pattern of responding with "I don't understand" or "I don't know" persisted throughout the interview. In response to questions about his mental health, he endorsed multiple, inconsistent, and bizarre symptoms that are incompatible with any known mental disorder. These symptoms included disorientation to surroundings and circumstances, severe memory loss (e.g., inability to remember where he grew up, how far he went in school, the colors of the flag - "red, white, green"), paranoid delusions (delusions: fixed, false beliefs), grandiose delusions (e.g., admits to being Jesus Christ), and auditory, visual, gustatory, and tactile hallucinations. The more that Mr. Provenzano was questioned about various psychiatric symptoms, the more he endorsed symptoms in areas that had previously been discussed. Unlike what is typically found in mentally ill individuals, there seemed to be no end to the depth and breadth of the inmates's reported psychiatric complaints.
>
> The memory and cognitive deficits displayed by Mr. Provenzano were inconsistent with his appearance and reported capability to carry out normal daily activities such as hygiene, conversation, and reading. Both corrections officers queried about his current functioning stated that he "acts normal," has been reading legal publications, has an adequate appetite and energy level, speaks in a logical and coherent manner (at times initiating conversations), and has never appeared to be responding to hallucinations or delusions. We were also informed that the inmate told Sergeant D.K. Williams, just before today's interview, that he would not talk to the "psychologists" until his attorney was

present.

> His history of reported intermittent psychotic symptoms in his medical files often revealed the diagnosis of "atypical psychosis," but no definitive major psychotic disorder was ever documented. The mental health professionals' reports over the years not uncommonly stated that in spite of his reported psychotic symptoms, no overt signs of each illness were observed.
>
> It is thus our opinion that Mr. Provenzano is malingering mental illness. His loss of memory and disorientation are inconsistent with any true memory disorder. As well, his complaints of psychosis are inconsistent with any known mental disorder.
>
> OPINION: It is our unanimous opinion with reasonable medical certainty that Thomas H. Provenzano does not suffer from any mental disease, disorder, or defect that would impair his ability to understand and appreciate the nature and effect of the death penalty and why it is to be imposed on him.

The Governor determined that Provenzano is sane to be executed, and Provenzano's counsel thereafter filed a motion for a hearing on insanity for execution in the Eighth Judicial Circuit court. On July 7, 1999, the trial court, after receiving and reviewing the numerous exhibits and the report of the three psychiatrists, denied Provenzano's motion for hearing on insanity at time of execution. This Court thereafter entered a stay until September 14, 1999, and directed that an evidentiary hearing be conducted as to the present working condition of Florida's electric chair. Following that hearing, this Court accepted supplemental briefs on the trial court's denial of Provenzano's request for a hearing on the issue of his competency to be executed.

Oral argument was held on August 24, 1999, and on August 26, 1999, this Court remanded the case for an evidentiary hearing,

finding that Provenzano had presented reasonable grounds to believe that he might be insane. Provenzano v. State, 24 Fla.L.Weekly S406 (Fla. August 26, 1999). At that time, this Court assigned the Honorable E. Randolph Bentley, Senior Judge, to the Eighth Judicial Circuit to hear and determine the issue of Provenzano's competency to be executed (R. 29).

On Friday, August 27, Judge Bentley conducted a telephonic status hearing in order to determine a date and location for the evidentiary hearing (R. 106-133). Provenzano's counsel, Michael Reiter of the Office of Capital Collateral Regional Counsel - Middle Region (CCRC), notified Judge Bentley that one of his witnesses, Dr. Patricia Fleming of Wyoming, would be available on Tuesday, August 31, but would not be available after that date. However, Mr. Reiter did not feel that he could be adequately prepared on such short notice and requested a continuance and stay of execution. Judge Bentley denied the continuance and set the hearing for August 31, 1999, in Bartow, Florida.

Within minutes of the conclusion of the telephonic hearing, Provenzano's counsel faxed a list of prospective witnesses, which included a statement that Dr. Fleming had advised CCRC that she would not be available at all during the week of August 30 through September 3 (Defense Witness List, App. 1). The judge requested an affidavit from Dr. Fleming attesting to her unavailability and

conducted another telephonic hearing on Monday, August 30, wherein a continuance was again requested and denied (R. 30, 65-82). However, Judge Bentley indicated his willingness to accommodate Dr. Fleming's schedule by accepting her testimony via telephone or deposition and, if necessary, out of order and outside of normal business hours in order to alleviate time zone differences.

The evidentiary hearing was conducted from August 31 through September 2, 1999. Each side presented twelve witnesses. Provenzano presented two Department of Corrections psychologist specialists, two DOC psychiatrists, two DOC correctional officers, Dr. Robert Pollack, Dr. Harold Smith, Dr. Patricia Fleming of Wyoming, and Provenzano's sister, niece, and nephew. Provenzano also offered affidavits from five other death row inmates, which were admitted by stipulation (Def. Ex. 1-5). The State presented the three psychiatrists from the Governor's Commission, Dr. Harry McClaren, and eight DOC corrections officers.

The affidavits from death row inmates Jerry Correll, Robert Hendrix, Anton Meyers, Jason Walton, and Wayne Tompkins stated that they had observed Provenzano exhibit bizarre behavior, such as sleeping under his bunk and covering his face with rags to "prevent demons from getting inside him" (Def. Ex. 1-5). Provenzano's sister, niece, and nephew testified that Provenzano did not understand what was going on as he repeatedly asked them to explain

what was happening to him (T. Vol. I, pp. 136-138; T. Vol. II, p. 559; T. Vol. II, p. 562).[1] In addition, the sister testified that she had not visited with Provenzano in the last five years, until the signing of the death warrant in June; since that time, he agreed to see her and she has spoken to or seen him about twice a week. She assumed the reason he would not see her before June was for her safety (T. Vol. II, pp. 134-135).

Dr. Fleming testified briefly as to her qualifications, but refused to discuss any conclusion as to Provenzano's mental state, claiming she was not prepared (T. Vol. V, pp. 654-655). Dr. Smith, a forensic psychologist, and Dr. Pollack, a psychiatrist, criticized the report written by the Governor's Commission as insufficient and questioned the adequacy of the Commission's examination, but did not dispute the findings of the Commission (T. Vol. II, p. 145; T. Vol. IV, p. 480). Dr. Pollack opined that the evaluation did not comply with accepted psychiatric principles, primarily due to the presence of three psychiatrists and three attorneys during the evaluation (T. Vol. II, pp. 149-151). Dr. Pollack had no opinion as to Provenzano's current competency, and would have needed extensive time to review records and evaluate

[1]A statement from the sister, dated July 7, 1999, states that Provenzano "says they are going to kill him by a chair with electric. I explain that to him on every visit so he understands." See, Provenzano v. State, F.S.C. Case No. 95,959, at R. 76.

Provenzano in order to reach any conclusion on this issue.

One of the DOC psychological specialists, Lisa Wiley, noted that Provenzano had exhibited strange behavior while housed at Union Correctional Institute (UCI) prior to the signing of his death warrant (T. Vol. I, p. 23). She had observed him wearing cardboard masks, rags or towels on his face for "keeping out evil spirits," overdressing despite warm temperatures, sleeping or hiding under his bunk, talking out loud or yelling from his cell to no one in particular, and appearing tense, guarded, and suspicious (T. Vol. I, pp. 29-32). She stated that Provenzano heard voices and stated, from time to time, that he was Jesus Christ (T. Vol. I, p. 34). However, he would not consent to treatment and would not follow through by visiting with her because such call outs required strip searches; although he told her he feared the strip searches, Wiley noted that he consented to them in order to visit with his attorneys or to get his teeth cleaned (T. Vol. I, pp. 33, 39, 41).

Wiley referred Provenzano to a senior psychiatrist at UCI, Dr. Anil Arora (T. Vol. I, p. 53). Dr. Arora testified that he had seen Provenzano a number of times over the years at his cell front, as Provenzano refused the call outs to come and see Arora. He did not recall when he last saw Provenzano but estimated it was five or six months ago. He noted that Provenzano had been referred for wearing masks on his face but did not remember if he had asked

Provenzano why he did this or what the answer may have been. He also recalled that Provenzano had said he was Jesus Christ and noted that he would not prescribe medication to an inmate based on this (T. Vol. I, pp. 58-60).

The other psychological specialist, Larry Kelly, noted that he first had contact with Provenzano in early August, 1999, when Provenzano was claiming to suffer from hallucinations, including auditory hallucinations in his left ear (T. Vol. I, pp. 72-73, 76).[2] Provenzano also indicated that he was having trouble sleeping. Kelly noted that Provenzano was generally clean and well kept, although generally someone who is not mentally well does not have good hygiene (T. Vol. I, pp. 75-76). He also stated that Provenzano's behavior was appropriate for his circumstances. The tension and anxiety were not inappropriate, he did not appear to respond to internal stimuli, and his behavior was goal directed (T. Vol. I, pp. 76-77).

Kelly referred Provenzano to Dr. de Ocampo, a senior psychiatrist (T. Vol. I, p. 63). Dr. de Ocampo met with Provenzano three times in August, 1999 (T. Vol. I, pp. 64-65). She initially prescribed Visteril[3] for his anxiety and later, on August 23,

---

[2]This was subsequent to the examination by the Commission, where Dr. Waldman suggested to Provenzano that some individuals only heard hallucinations in one ear.

[3]Visteril is an antihistamine, similar to the over-the-counter medication Benadryl (T. Vol. III, p. 365).

changed the prescription to an anti-psychotic medication. She noted that his symptoms changed each time she saw him and she merely prescribed medication to address his self-reported symptoms (T. Vol. I, pp. 66-67).

Provenzano also presented the testimony of Correctional Officer Sergeants Chris Yost and Ty Jordan. Yost and Jordan had contact with Provenzano during his transport to the evidentiary hearing in Orlando in July, 1999; Jordan also supervised Provenzano's visitations (T. Vol. I, pp. 83, 116). Both stated they had not observed anything out of the ordinary in Provenzano's behavior (T. Vol. I, pp. 84, 117). He acted normally during strip searches, carried on normal conversations, and was responsive to their directions (T. Vol. I, p. 84). The testimony from these witnesses was consistent with the testimony of other correctional officers presented by the State, including Lt. William Muse and Sgt. David Garland, both of whom observed Provenzano during his trip to Orlando and stated that Provenzano responded to verbal directions and followed their instructions to the letter (T. Vol. I, pp. 101-104, 109). Muse also recalled Provenzano talking to him about Provenzano's having been a contract electrician in Orlando prior to being on death row (T. Vol. I, pp. 104-105).

The State also presented the testimony of five correctional officers that had monitored Provenzano since his being placed on

death watch when his warrant was signed. Sgt. George Hanson noted that Provenzano puts his coffee cup on a shelf at his cell or simply asks for water when he wants Hanson to get him hot water for his coffee (T. Vol. I, p. 90). Provenzano has always been responsive to Hanson's questions and orders and spends time in his cell listening to the radio, watching television, reading paperwork, or working out. Hanson recalled conversations with Provenzano about current events, including recently tracking Hurricane Dennis (T. Vol. I, pp. 91-92).

Sgt. Martin Sanders noted that Provenzano asked for coffee when he wanted it, maintained a neat appearance, and asked for a broom to clean his cell at appropriate times. Sanders noted that Provenzano sometimes has a pillow tied around his waist (T. Vol. I, pp. 121-122). Once Sanders saw Provenzano with a shirt wrapped around his mouth, which Provenzano said was due to his sweat; Sanders told Provenzano that he couldn't understand him and to remove the shirt when he talked to Sanders. Since then, Provenzano removes the shirt when Sanders approaches to speak with him, and then replaces it when they are finished conversing (T. Vol. I, p. 123). Sanders also stated that Provenzano sleeps on the floor in front of his bunk, sometimes partially under his bunk, where it is cooler, closer to the fan (T. Vol. I, pp. 124-125).

Sgt. Timothy Ford testified that Provenzano had told Ford that

he kept a towel across his mouth because he had a medical condition that caused him to drool (T. Vol. II, p. 202). Ford was aware that Provenzano had told a nurse recently that the towel was to keep out evil spirits, but this was the first Ford had ever heard anything about evil spirits (T. Vol. II, pp. 202-203). Provenzano also told Ford that he kept a pillow on his back because he had back pain (T. Vol. II, p. 203). Ford stated that Provenzano was able to carry on normal conversations, and recalled some of these (T. Vol. II, p. 203). In one conversation, Ford asked Provenzano how he was doing, and Provenzano responded he was fine physically but not mentally. Provenzano then asked Ford if he had heard any news; Ford asked if he meant about the hurricane, or sports, and Provenzano replied no, about his execution, that he didn't know why he was being executed. On July 10, 1999, Provenzano told Ford that he was lucky to have gotten a stay of execution (T. Vol. II, pp. 200-201). Ford noted that he had had contact with a number of inmates with mental conditions, including some that were seriously mentally disturbed, but that he had never observed anything about Provenzano which would cause him to question Provenzano's mental capacity (T. Vol. II, pp. 204-205). Ford also stated that Provenzano sleeps on his bunk, but sometimes sleeps on the floor or under the bunk, noting that it was closer to the fan on the concrete floor (T. Vol. II, pp. 210-211).

Sgt. Glenn Fogg and Sgt. Thomas Henderson testified that it is generally common for inmates to sleep on the floor because the concrete is cooler (T. Vol. II, p. 218; T. Vol. IV, pp. 455-456). Both described Provenzano's behavior and interaction as normal for someone on death watch (T. Vol. II, p. 216; T. Vol. IV, pp. 455-456). Fogg recalled general conversations with Provenzano, such as about the hurricane (T. Vol. II, p. 214). He also noted that Provenzano was able to manage his money and canteen orders and that he had observed Provenzano reading books and court transcripts. Fogg stated that he had seen Provenzano with a rag over his face, which could be a little strange, depending on why he was doing it. Fogg had not observed Provenzano to scream, yell, act unruly or present a discipline problem; Provenzano understood procedures, followed directions, and kept himself and his cell neat and clean (T. Vol. II, pp. 215-217). When he wanted coffee, Provenzano would ask for water or put his cup on a shelf in his cell (T. Vol. II, p. 218).

Col. Alton Christie met Provenzano when he brought Provenzano to Florida State Prison from UCI after the signing of the death warrant. He recalled Provenzano's reaction when Assistant Warden Thornton told Provenzano that the warrant had been signed; Provenzano was surprised, telling Thornton he couldn't believe it because he had just finished his appeals, and he thought there were

thirty-five or forty inmates ahead of him (T. Vol. IV, p. 460). Christie had frequent contacts with Provenzano while he was on death watch, getting his canteen orders and hot water for his coffee. Christie recalled once he asked Provenzano if he could get him anything, and Provenzano replied, "Not unless you got a stay in your back pocket, you can't help me" (T. Vol. IV, p. 461). Christie stated that Provenzano had, since receiving a stay in July, discussed his execution pending on September 14, 1999. Last Saturday [August 28], they had discussed the upcoming competency hearing; Provenzano asked Christie where it would be held. Christie noted that, although some inmates on death watch act strange and need to be calmed down, Provenzano was not like that. Christie had not observed any bizarre or unusual behavior from Provenzano (T. Vol. IV, p. 462-465).

Dr. Leslie Parsons, Dr. Alan Waldman, and Dr. Wade Myers, all forensic psychiatrists, testified about their actions and conclusions on the Governor's Commission to evaluate Provenzano for competency to be executed (T. Vol. II, p. 243; T. Vol. III, p. 318; T. Vol. IV, 469). All three independently reached the conclusion that Provenzano was malingering and suffered no mental disorder or illness which would interfere with his capacity to understand the nature and effect of the death penalty or the reason it was imposed on him (State's Ex. 4; T. Vol. II, pp. 248, 267; T. Vol. III, p.

367; T. Vol. IV, p. 475). All three were aware of the statutory standard for competency to be executed and determined that Provenzano met that standard within a reasonable degree of medical certainty (T. Vol. II, pp. 248, 257-258; T. Vol. III, pp. 327, 367-368; T. Vol. IV, p. 475). They described having reviewed Department of Corrections documents going back to 1984 and talking to two correctional officers prior to their mental status examination, as well as the conditions of their evaluation (T. Vol. II, p. 244; T. Vol. III, pp. 321-325, 363, 384, 391, 394-397; T. Vol. IV, pp. 472-474, 525). Neither the time constraints nor the number of people present at the examination interfered with their ability to complete the evaluation and reach their conclusions (T. Vol. II, pp. 246, 276, 283; T. Vol. III, pp. 363-364; T. Vol. IV, pp. 472, 535). Prior to the evaluation, Dr. Myers was chosen to take the lead in making introductions and asking questions since he had previously conducted an examination into competency to be executed (T. Vol. II, p. 246; T. Vol. III, p. 377; T. Vol. IV, pp. 543-544, 546).

The doctors noted that Provenzano directly expressed an understanding of the death penalty, acknowledging that he was in prison because he had killed someone and describing the death penalty as “killing, or whatever they call it,” which happens because “you kill, so they kill you” (T. Vol. II, pp. 253-254; T.

Vol. III, pp. 332, 334-335). In addition, they noted that the standard for competence to be executed is such a low threshold that, in order to be incompetent, an inmate would have to suffer from severe mental retardation, profoundly disorganized or disassociative thoughts, or severe cognitive deficits, none of which was present in this case (T. Vol. II, pp. 255-256; T. Vol. III, p. 339). Such a person would appear disheveled, with poor hygiene, and nonsensical or rambling talk (T. Vol. II, pp. 249-250; T. Vol. III, p. 340).

The doctors noted Provenzano's response to a question on the colors of the American flag -- red, white, and green -- and his appropriate use of proverbs such as "An eye for an eye, and a tooth for a tooth" (when asked about the death penalty) and "It's Greek to me" (after Provenzano stated he didn't know what a psychiatrist was) as indicative of Provenzano's true mental state (T. Vol. II, pp. 252, 254; T. Vol. III, pp. 326-327, 335). They determined he was intentionally being evasive and uncooperative, malingering mental illness in order to avoid the application of the death penalty (T. Vol. II, p. 249; T. Vol. IV, pp. 430, 474, 554-555).

Dr. Waldman, a forensic psychiatrist with a subspecialty in malingering, testified extensively about a number of indications that demonstrated that Provenzano was malingering. These include: a lack of response latency (Provenzano would frequently respond "I

don’t know” without giving any thought to the question; individuals with cognitive deficits will typically stop to ponder any question they truly can’t answer) (T. Vol. III, pp. 330-332); the appropriate use of proverbs (as noted above) which demonstrate abstract thinking, inconsistent with any mental illness (T. Vol. III, pp. 326, 335); his physical appearance and normal behavior as noted by the corrections officers (good hygiene, ability to converse normally, reading Georgetown Law Review in cell, good eating and sleeping patterns) (T. Vol. III, pp. 324-325, 340); the organized, sophisticated documents which he had drafted, included in the DOC records (T. Vol. III, pp. 354-356); his inability to answer why he believed he was Jesus Christ was inconsistent with a true delusion (T. Vol. III, pp. 336-337); his responses to questions which even severely mentally ill individuals, young children, and Alzheimer’s patients do not miss, such as the colors of the flag or the ability to repeat the name of an object (T. Vol. III, pp. 340; T. Vol. IV, p. 547); his claim of hearing voices all of the time, even in his sleep (although only in his left ear, based on a response to a question designed to elicit this), and his inability to describe the ghouls he claimed to see (T. Vol. III, pp. 343-347); his characterization of his symptoms as hallucinations, a medical term which would not be used by someone truly experiencing hallucinations (T. Vol. III, pp. 547-548); and

his description of hallucinations across multiple spheres (auditory, visual, tactile, and gustatory) (T. Vol. III, pp. 342-351). According to Dr. Waldman, an individual that suffered from cognitive deficits as severe as suggested by Provenzano's responses would be in a nursing home receiving total care, unable to toilet themselves (T. Vol. III, p. 333).

The State's last witness was Dr. Harry McClaren, a forensic psychologist (T. Vol. V, p. 599). Dr. McClaren had reviewed Provenzano's records and had observed Provenzano in court during two days of the evidentiary hearing in Orlando regarding the functioning of the electric chair, and during the two previous days of his competency hearing (T. Vol. V, pp. 601-602). Dr. McClaren noted that Provenzano had behaved appropriately at all times during his observations and he had not noticed any signs of psychotic impairment. Provenzano never appeared to be responding to internal stimuli, such as rocking, talking to himself, or exhibiting bizarre outbursts. He appeared to recognize and confer with his attorneys and family members in the courtroom. He stood or was seated as directed when a judge entered or left court; he watched his attorneys and reacted appropriately, looking horrified when large, graphic photos of the Allen Davis execution were displayed and concerned when the Davis autopsy and the dying process were discussed (T. Vol. V, pp. 605-608, 611). McClaren opined that the

lack of inappropriate courtroom behavior or any manifestations of mental illness were inconsistent with what would be expected from an inmate with a severe mental illness. Furthermore, McClaren noted that the proceeding in Orlando would have been stressful for Provenzano, which should maximize the likelihood of any abnormal behavior (T. Vol. V, pp. 609-612).

After all of the State's evidence had been presented, Provenzano's counsel requested the court below "for an extension of time in order to obtain and have Dr. Pollack and Dr. Henry Lyons examine my client" (T. Vol. V, p. 617). Although counsel stated he was "renewing" a motion for extension of time, no prior request for such action had ever been made. Counsel requested "anywhere from two weeks to a month" to get a new expert opinion on Provenzano's competency. Judge Bentley indicated he may have agreed to this request had it been presented earlier in the hearing, and denied it as untimely (T. Vol. V, p. 620).

Following the conclusion of the evidentiary hearing, Judge Bentley entered an extensive order finding Provenzano to be competent to be executed (R. 88-104). This appeal follows.

SUMMARY OF THE ARGUMENT

Provenzano has failed to demonstrate any error in the trial court's finding him to be competent to be executed, 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 FINDING PROVENZANO TO BE COMPETENT FOR EXECUTION.

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), Fla.R.Crim.P. Rule 3.812(e) specifically requires a defendant to prove, by clear and convincing evidence, that he is incompetent to be executed. Inasmuch as Provenzano failed to meet this burden at the evidentiary hearing below, this Court must affirm the judicial finding of competency entered by Judge Bentley.

After explaining his reasons for giving less weight to the testimony of Provenzano's expert, Dr. Patricia Fleming -- including noting that Fleming's credentials were less impressive than the other experts and the court's dissatisfaction of her reasons for not participating more completely in the hearing (see, Order, pp. 9-10; R. 97-98) -- Judge Bentley detailed his findings and the reasons for his conclusion of competency:

> In considering the evidence and testimony, the Court has given great weight to the testimony of Leslie Parsons, D.O., Alan J. Waldman, M.D., and Wade C. Meyers, M.D. These three doctors are the psychiatrists who were appointed by the Governor to examine Provenzano's competency to be executed. The three doctors testified that although the conditions under which they examined Provenzano were not optimal, they were adequate, and that they were able, with a reasonable degree of medical certainty to opine that 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 upon him.

One aspect of the testimony of Dr. Parsons and Dr. Waldman that was particularly persuasive to this Court was their testimony regarding Provenzano's response to questions from Dr. Meyers about Provenzano's understanding of the nature of the death penalty and why is was to be imposed upon him. They testified that during their examination of Provenzano, in response to questions on this subject, Provenzano said something to the effect that "if you kill someone, they kill you back." Additionally, in response to this same line of discussion, Provenzano stated "eye-for-an-eye, tooth-for-a-tooth."

The testimony of Alton Christie, Colonel at Florida State Prison, was also given great weight. Colonel Christie testified that when Provenzano was notified about the Governor signing his death warrant, Provenzano responded, in essence, that he was surprised because he had just finished his appeals, and that he thought there would be thirty-five to forty others who were ahead of him.

The Court gave no great weight to the testimony of Harold H. Smith, Jr., Ph.D. He testified that he would have conducted the examination of Provenzano differently from the manner in which the three psychiatrists appointed by the Governor conducted it. His testimony was not given great weight because it became clear during the course of the examination of him that he did not have sufficient information regarding the actions the psychiatrists took during the course of the examination. In short, he was basing his opinion that their examination was inadequate primarily on the statements contained in the final report that they issued to the Governor. His testimony did not address the issue of whether Provenzano met the standard, but rather the adequacy of the examination by the State's witnesses.

Robert Pollack, M.D., a psychiatrist who examined Provenzano before trial, testified regarding his belief that the report generated by Doctors Meyers, Parsons, and Waldman was not adequate. The Court did not give great weight to this testimony because it did not address the matter before the Court for consideration. Instead, this testimony was directed at alleged problems with the examination conducted by Dr. Meyers, Dr. Parsons, and Dr. Waldman. Dr. Pollock's main complaint was that there were too many individuals present in the room during the

examination. He testified that it was not a generally accepted procedure to have other individuals present during a psychiatric examination. Further, Dr. Pollock specifically testified that he could not testify as to whether Provenzano is competent to be executed.

Harry McClaren, Ph.D., testified that he observed Provenzano not only throughout these proceedings, but throughout the proceedings held in Orlando July 27 through 30, 1999, regarding the functioning of the electric chair. Dr. McClaren testified that throughout these proceedings, he never observed Provenzano exhibit any bizarre behavior; Provenzano had no stereotypical movement or signs which indicated that he was responding to internal stimuli; Provenzano tracked the proceedings; Provenzano consulted with his counsel and read documents during the proceedings regarding the electric chair; and, Provenzano looked horrified when the disturbing photographs of Allen Lee Davis were displayed at the hearing on the functioning of the electric chair. Dr. McClaren opined that this behavior is not consistent with the suggestion the Provenzano suffers from severe mental illness.

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. In attempting to establish that a prisoner is insane to be executed, counsel for the prisoner must establish by a preponderance of the evidence that the prisoner "lacks the mental capacity to understand the fact of the impending execution and the reason for it." See Fla. R. Crim. P. 3.811(b) and 3.812(e). Counsel for Provenzano did not meet this burden.

Further, assuming for the sake of argument that the burden of proof in this matter is simply preponderance of the evidence, counsel for Provenzano did meet that burden either.[4] In fact, Provenzano's counsel presented minimal evidence that Provenzano is not competent to be executed.

He presented some evidence of unusual behavior by

[4]A correction to the Order was later entered which clarified that the court intended this sentence to read that Provenzano had **not** met the lower, preponderance of the evidence standard (R. 105).

Provenzano. Such behavior includes covering his face with rags or towels, sleeping on the floor under his bunk, and his self-diagnosed phobia of strip searches. However, the testimony at the hearing established that it is not uncommon for inmates at Florida State Prison to sleep on the floor because it is hot in the prison and the concrete floor is cooler. Further, sleeping under his bunk puts Provenzano in a position where he is closer to a fan, and thus, but sleeping under his bunk, he is cooler and more comfortable. Moreover, despite his phobia of strip searches, Provenzano willingly succumbs to the strip searches when it suits his personal desires. For example, Provenzano willingly submits to strip searches so that he may have his teeth cleaned and so that he may meet with his attorneys. The only time he expresses concern over the strip searches and refuses to subject himself to them is when a mental health issue is involved.

Assuming for the sake of argument that some of Provenzano's behavior is bizarre, bizarre behavior does not render one incompetent to be executed. 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. The Court finds that Provenzano may have mental health problems, but that these problems do not prevent him from having the required mental capacity to understand the fact of the impending execution and the reason for it. Further, as Dr. Waldman testified, one would have to virtually be unable to clean himself, feed himself, or otherwise function in order to meet the low threshhold [sic] of incompetency to be executed. Aside from the above behavior, the main evidence of Provenzano's incompetency is Dr. Fleming's report, coupled with the opinion expressed in the continuance affidavit. The Court does not find her analysis as convincing as that of the State experts and, for reasons given earlier, does not find her testimony entitled to great weight.

Provenzano's counsel vigorously attacked and attempted to whittle away at the evidence presented by the State which, even after vigorous cross-examination, established that Provenzano is competent to be executed. Even if one were to assume that the State had the burden of establishing Provenzano's competency to be executed, Provenzano's counsel's attack on the State's witnesses was not particularly successful given the facts and opinions presented in this matter.

During closing argument, counsel for Provenzano argued that the testimony of the three psychiatrists

> appointed by the Governor to examine Provenzano pursuant to section 922.07, Florida Statutes, was inadmissible in this proceeding because the standard of competency set forth in section 922.07 is different from the standard of competency set forth in Florida Rule of Criminal Procedure 3.812 which this Court must employ. Provenzano's counsel is correct in that there is a difference in the wording of the two standards. Under section 922.07, Florida Statutes, an individual is competent to be executed if "he or she understands the nature and effect of the death penalty and why it is to be imposed upon him or her." Under Florida Rule of Criminal Procedure 3.812, a person is competent to be executed if he or she does not lack "the mental capacity to understand the fact of the impending execution and the reason for it." The Court finds this variation in wording of the two standards is a distinction without a difference, and rejects Provenzano's claim that the testimony of these experts is inadmissible.
>
> This Court, as the finder of fact, has considered the demeanor of the witnesses, has carefully considered the testimony and evidence presented at the hearing, and has weighed the credibility of the evidence and witnesses. Additionally, the Court has had the opportunity to personally observe Provenzano over the course of two and one-half days. Throughout the hearing on this matter, Provenzano has at all times acted appropriately. He has, at times, appeared sad, and he appeared to become more melancholy when the State's experts testified or when the attorney for the State was providing argument against him.
>
> Dr. Waldman, a well-credentialed expert with a sub-specialty in malingering, finds that Provenzano is malingering mental illness.
>
> The Court finds Provenzano has failed to prove incompetence for execution by clear and convincing evidence.

(Order, pp. 11-16; R. 99-104).

The testimony presented below fell far short of even reasonably suggesting that Provenzano is incompetent. Provenzano focused on attacking the Commission's conclusions rather than proving his incompetence. In fact, Provenzano was left with **less**

than what had originally been presented to Judge Johnson and to this Court in seeking an evidentiary hearing. Some "bizarre" behavior was explained, such as sleeping under his bunk in an effort to stay cool, and wearing rags to absorb sweat or drool. Provenzano had only Dr. Fleming's report, which she, testifying telephonically, did not endorse and would not be cross examined about. As noted below, strange behavior alone, or even when coupled with a diagnosed mental illness, does not bar the execution of an inmate that understands the fact of the execution and the reason for it. See, Medina v. State, 690 So. 2d 1255, 1256 (Fla. 1997); Weeks v. Jones, 52 F.3d 1559, 1571 (11th Cir.) (competent for execution, notwithstanding long-standing diagnoses of schizophrenia, paranoid type, and delusions including Weeks' belief "he is God in various manifestations"), cert. denied, 514 U.S. 1104 (1995); Shaw v. Armontrout, 900 F.2d 123 (8th Cir. 1990) (mental impairments and brain damage did not preclude finding of competence to be executed), cert. denied, 507 U.S. 927 (1993).

Judge Bentley applied the correct rule of law, and his factual findings are supported by competent, substantial evidence. Provenzano has failed to demonstrate any error in the circuit court's finding him competent to be executed. Therefore, this Court must affirm the denial of relief.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

Provenzano also may challenge the trial court's refusal to continue this hearing until at least September 7, 1999, so that Provenzano could present the testimony of Dr. Patricia Fleming of Wyoming. When advised of the potential scheduling problem with Dr. Fleming, the trial judge requested an affidavit from Dr. Fleming attesting to her unavailability. In response, Dr. Fleming executed an affidavit which stated:

> 1. My name is Patricia Fleming. I am a licensed clinical psychologist. I first completed a psychological evaluation of Thomas Provenzano on March 4, 1989 and followed his psychological condition during the years following his conviction. I completed a second psychological evaluation on July 4, 1999 to determine his current mental status and competency to be executed.
>
> 2. Upon my return to Cheyenne today, August 27, 1999, I received word that the Honorable Judge Bentley had scheduled an evidentiary hearing for Thomas Provenzano for the week of August 30, 1999. I am unable to be in Florida during this week due to prior commitments that cannot be changed on short notice.
>
> 3. Training for State of Wyoming employees has been scheduled during this week for a computer program that has been developed for case managers. It would not be possible to change the date since the participants and their supervisors throughout Wyoming will be in attendance. This meeting has been scheduled for over three months. On Monday, August 30 the meeting for finalization of the computer program and training is scheduled. On Wednesday, August 29 [sic], we travel to the training site and return on Friday, September 3. In addition, I have hospital and office patients that I was not able to see during my recent absence.
>
> 4. I considered the option of requesting a telephone

> testimony, but there is not time to adequately prepare. It is necessary to review the records and prepare for testimony, which requires at least seven or eight hours, time that is not available during now and the time scheduled for the evidentiary hearing.
>
> 5. I examined Mr. Provenzano for competency to be executed on July 4, 1999 and my complete findings are available in that report. It is my professional opinion that Mr. Provenzano is incompetent to be executed due to the severity of his mental illness. Thomas Provenzano does not appreciate or understand the fact of his impending execution and the reason for it. I regret my inability to participate in the hearing.
>
> 6. I could be available for testimony September 7, 8, 9, or 10 of the following week.

August 27, 1999, Affidavit of Patricia Fleming, Ed.D.[5]

The court held a telephonic hearing on Monday, August 30, in order to consider the issue of Dr. Fleming's availability. Judge Bentley recalled the prior representation that Dr. Fleming would be available on August 31, and noted that, although the affidavit indicated the conflicting training was for State of Wyoming employees, there was no explanation as to why Dr. Fleming needed to attend the training.[6] Ultimately, CCRC's motion to continue was denied, but the court offered to accommodate Fleming's schedule by accepting her testimony out of order and via telephone.

In his order finding Provenzano to be competent, Judge Bentley

---

[5]Dr. Fleming is an Ed.D., or doctor of education in psychology, not a Ph.D. in clinical psychology (Order, p. 10; R. 98).

[6]On Thursday, September 2, it was discovered that Dr. Fleming and her daughter were giving the training on September 2 (Order, p. 4; R. 92).

commented on his denial of the motion to continue:

> Despite her references in the affidavit to computer training for State of Wyoming employees, Dr. Fleming is not, insofar as has been made known to this Court, an employee of the State of Wyoming. In fact, as Dr. Fleming testified at this matter, she is in private practice. So, it is unclear as to why she would be required to attend computer training for State of Wyoming employees. Further, if this training were of such importance, this Court is uncertain as to how Dr. Fleming could have forgotten about it and represented to Provenzano's counsel that she would be available to participate in this hearing.
>
> If this matter had been delayed until the week of September 7, 1999, not only would it be difficult to conclude this matter in a period of time sufficient to enable the Florida Supreme Court to review these proceedings before Provenzano's scheduled execution date of September 14, 1999, but scheduling problems with other witnesses would have been created. Considering all of the circumstances, including the fact that this claim was raised by Provenzano's counsel over one and one-half months ago, the Court concluded that Dr. Fleming's affidavit did not set forth adequate grounds which would justify continuing this matter, and consequently, Provenzano's oral motion to continue was denied. However, the Court advised Provenzano's counsel that Dr. Fleming could testify by telephone or video deposition, and that she could testify out of order. Further, the Court advised counsel that Dr. Fleming's testimony could be scheduled as early in the morning as necessary, which, given the time zone differences between here and Wyoming, would accommodate Dr. Fleming's schedule and avoid any conflict with the conference that she was attending or participating in.

(Order, p. 3-4; R. 91-92) (footnote omitted).

The State, unable to cross examine Dr. Fleming, was the only party that could possibly have been prejudiced by her reluctance to testify. Having the benefit of her written report, Provenzano had no reason to secure her attendance to defend her opinion. As noted by Judge Bentley, the State was able to eventually locate Dr.

Fleming, and she ultimately **did** testify at the hearing:

> To begin with, the Court specifically notes that although she is one of, if not the most critical witness in this matter, the testimony of Patricia Fleming, Ed.D., presented at the hearing was extremely limited. At the start of the hearing, Provenzano's counsel stated that he was uncertain as to whether Dr. Fleming would be available to testify at the hearing because his office had been unable to reach her. From day one to day three of the hearing, multiple efforts were made by the Attorney General's Office to locate and contact Dr. Fleming. In fact, although Dr. Fleming was Provenzano's witness, the Attorney General's Office appeared to put forth more effort to locate her than Provenzano's counsel's office did. If Provenzano's counsel took strides to locate Dr. Fleming, other than calling her office a few times and leaving messages for her, then they did not make those efforts known to this Court.
>
> Once Dr. Fleming was located and contacted via telephone, she declined to testify whatsoever regarding her opinions of Provenzano's competency to be executed. Specifically, she stated she did not have any of her materials with her and that she was unable to provide any testimony regarding Provenzano's competency to be executed. In fact, the Court was forced to order her to stay on the telephone line simply to answer some questions regarding her qualifications.
>
> The State stipulated to the admission of Dr. Fleming's Curriculum Vitae, which it rather than Provenzano's counsel had obtained in an effort to determine Dr. Fleming's credentials, and the State stipulated to the admission of Dr. Fleming's report dated July 5, 1999, which she prepared after conducting her examination of Provenzano on July 4, 1999. However, the State would not stipulate that she was an expert in the field of forensic clinical psychology. Thus, the purpose of obtaining information from Dr. Fleming regarding her qualifications was to clarify exactly what Dr. Fleming's qualifications are, and to assist this Court in determining what weight to give the report that she prepared after her July 4, 1999, examination of Provenzano.
>
> Dr. Fleming's brief testimony established that while she has experience in mental health, she is not a clinical psychologist, at least not as that term is used in Florida. Accordingly, she was accepted as an expert in mental health, but not as an expert in clinical

psychology. The Court finds that her credentials are less impressive than the credentials of the other experts. For this reason, together with a consideration of her report, the Court finds her testimony is entitled to less weight than the testimony and/or reports of the other experts who were admitted as experts in psychiatry or clinical psychology.

Further, this Court is disturbed by Dr. Fleming's behavior, and is not satisfied with the reasons she gave for not being able to participate in this hearing. This Court has taken every effort to accommodate her in order for her to testify in this matter. Despite those efforts, she declined to accommodate this Court whatsoever. For that reason, this Court has given less weight to her July 5, 1999 report regarding Provenzano's competency to be executed.

Dr. Fleming never specifically opines in her report on the issue at hand, which is whether Provenzano understands the fact of the impending execution and the reason for it. She does state, however, that "[the role of the mental health professional in the competency to be executed evaluation is not as the decision maker, but the provider of information that would aid the court, tribunal, or jury in decision making." The only comments in Dr. Fleming's report which seem to address the issue before this Court are her comments on page nine of the report where she asked Provenzano "What is your main worry now?" She wrote that he stated that he had no worries, and that he does not think about the execution. Additionally, on page ten of her report, Dr. Fleming states that Provenzano does not connect the courthouse shooting with the execution.

Although she either inadvertently did not comment on whether Provenzano understands the fact of the impending execution and the reason for it, or she specifically chose not to render such an opinion in her July 5, 1999, report, in her affidavit dated August 27, 1999, in which she outlined her reasons for not appearing to testify in this matter, she specifically was able to reach a conclusion on this issue. Therein, she specifically states: "It is my professional opinion that Mr. Provenzano is incompetent to be executed due to the severity of his mental illness. Thomas Provenzano does not appreciate or understand the fact of his impending execution and the reason for it."

(Order, pp. 8-11; R. 96-99) (footnote omitted).

Provenzano has demonstrated no error in the trial court's refusal to continue this matter to hear further from Dr. Fleming, a woman whose bias in prior cases has not gone unnoticed by this Court. See, Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991); see also, Brewer v. Reynolds, 51 F.3d 1519, 1524-27 (10th Cir. 1995) (noting conclusory and speculative nature of Fleming's evaluation, with diagnoses which conflicted with other expert testimony), cert. denied, 479 U.S. 871 (1996). Notably, her affidavit did not offer any explanation as to why she could not have testified on Tuesday, August 31, as initially represented. An agenda from the training demonstrates that it was a one day session with scheduled breaks, which was over at 4:30 p.m. (6:30 p.m. local time in Bartow) (R. 134-137). The judge expended great efforts in trying to secure Dr. Fleming's testimony, as is evident throughout the transcript of the three day hearing, and indicated his willingness to hold the hearing open through Friday, Sept. 3, had he received any assurance of getting her to testify at that time (T. Vol. II, p. 185; T. Vol. III, pp. 296-300, 350, 407-409; T. Vol. IV, pp. 563, 570-576; T. Vol. V, pp. 613-617, 623-624, 628-630, 636-646). His efforts were met only with Fleming's staunch refusal to discuss this case at any time before the following Tuesday, less than a week before the scheduled execution.

Since Provenzano was able to present Fleming's ultimate

conclusion that he was incompetent to be executed through admission of her report and affidavit, and yet was able to avoid having her cross examined by the State, he could not possibly have been prejudiced by this ruling. Thus, the only prejudice from her lack of preparation would accrue to the State. Clearly, Dr. Fleming was more beneficial to the defense as an unavailable witness, which may explain why, as Judge Bentley noted, the State put forth more effort in attempting to locate Dr. Fleming than did the defense.

The granting or denial of a motion to continue is a matter within the broad discretion of a trial judge. Gore v. State, 599 So. 2d 978, 984 (Fla.), cert. denied, 506 U.S. 1003 (1992). No abuse of discretion has been demonstrated based on Judge Bentley's refusal to delay these proceedings in order to secure a reluctant witness from across the country to reiterate in person what she had already said on paper. No new hearing is warranted by the judge's denial of the motion to continue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PERMITTING EXPERT TESTIMONY OVER APPELLANT'S FRYE OBJECTION.

Provenzano may also challenge the trial court's evidentiary ruling to allow the expert testimony of the three psychiatrists from the Governor's Commission. Provenzano objected to the testimony of Dr. Parsons as inadmissible pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), because the mental status examination conducted by the Commission purportedly was conducted by a procedure not generally accepted in the scientific community. Judge Bentley's order details his reason for denying the defense objection:

> Defendant argues that the procedures provided under section 922.07, Florida Statutes, for the governor's proceedings to determine the competency of an individual to be executed are not consistent with the scientific procedures generally accepted in the scientific community, and therefore, that the procedure cannot pass the Frye test. Provenzano's main complaint about the procedure set forth in section 922.07 is that all three doctors, as well as the attorneys for Provenzano and the State, may be, and in Provenzano's case all were, present during the examination. Provenzano contends that this method of conducting a mental health examination is not a scientifically accepted procedure, and that the examination is not and cannot be effective with this many people in the room. Provenzano argues that since the procedure utilized by the three psychiatrists was not a scientifically accepted procedure, the procedure was unconstitutional and therefore, the testimony of these experts is inadmissible at the hearing before this Court.
>
> In considering this argument, the Court did not take into the account the relaxation of the rules of evidence that is permitted in a hearing of this kind. Having said that, the Court finds that the opinions of the three

psychiatrists who were members of the commission appointed to examine Provenzano pursuant to section 922.07, Florida Statutes, are professional opinions to which the requirements of Frye do not apply. See Hadden v. State, 690 So. 2d 573 (Fla. 1997). In Hadden, the court stated:

> We did point out in Flanagan [v. State, 625 So. 2d 827 (Fla. 1993)] that the Frye standard for admissibility of scientific evidence is not applicable to an expert's pure opinion testimony which is based solely on the expert's training and experience. See 625 So.2d at 828. While an expert's pure opinion testimony comes cloaked with the expert's credibility, the jury can evaluate this testimony in the same way that it evaluates other opinion or factual testimony. Id. When determining the admissibility of this kind of expert-opinion testimony which is personally developed through clinical experience, the trial court must determine admissibility on the qualifications of the expert and the applicable provisions of the evidence code. We differentiate pure opinion testimony based upon clinical experience from profile and syndrome evidence because profile and syndrome evidence rely on conclusions based upon studies and tests. Further, we find that profile or syndrome evidence is not made admissible by combining such evidence with pure opinion testimony because such a combination is not pure opinion evidence based solely upon the expert's clinical experience.

Hadden, 690 So. 2d at 579-80.

Further, the testimony of these three doctors at the hearing was that although they might ideally prefer to have fewer people present in the room during an examination of an individual, and although in their past experience in conducting forensic psychiatric examinations, they ordinarily had not had as many people present in the room during the examination of an individual, they were still able to form an opinion, within a reasonable degree of medical certainty, that Provenzano understands the nature and effect of the death penalty and why it is to be imposed upon him.

(Order, pp. 6-7; R. 94-95) (footnote omitted). The court's

reasoning and application of Hadden were correct. The opinions and conclusions of the psychiatrists that comprised the Governor's Commission were based on their training and experience, not on any novel scientific theory. Therefore, Frye did not apply and the trial court correctly permitted this testimony.

In addition, even if the Frye standard were to be applied to purely expert opinion, Provenzano did not meet his burden of establishing that the mental status examination conducted by the Governor's Commission did not meet standards generally accepted in the scientific community for these types of examination. Although Dr. Pollack testified that having three psychiatrists and three attorneys present for the examination provided less than optimal conditions and fell below generally accepted scientific standards, he stated that the evaluation in this case was **not** "done in a medically inappropriate manner" and, according to Dr. Pollack, any suboptimal evaluation would fall below the guidelines (T. Vol. II, pp. 173-177). Other testimony at the hearing established that there are, in fact, no generally accepted standards for conducting an evaluation of competency for execution (T. Vol. II, p. 264; T. Vol. IV, p. 495).

Furthermore, since it was not the State's burden to prove Provenzano to be competent, and Provenzano did not present any clear or convincing evidence of incompetency that needed to be

rebutted by the challenged testimony, the result in this case would not have been any different even if none of this testimony had been admitted, and any possible error must therefore be deemed harmless. On these facts, no error has been demonstrated in the trial court's overruling of Provenzano's Frye objection, and no new hearing is warranted.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING PROVENZANO'S REQUEST FOR ADDITIONAL PSYCHOLOGICAL EXAMINATIONS.

Provenzano may also attack the trial court's ruling denying his untimely request for a continuance so that he could be examined for competency by Drs. Pollack and Lyons.[7] Although Dr. Pollack testified on the first day of the hearing that he did not have an opinion as to Provenzano's current competency and could not form such an opinion without an extensive examination and review of records, Provenzano did not request the opportunity to be evaluated by Dr. Pollack (or by any mental health professional) until after the conclusion of the hearing. Of course, Dr. Pollack's testimony never indicated that an additional examination was necessary. The trial court was absolutely correct in denying Provenzano's last-ditch effort to secure further delay.

The record reflects, after the State had presented its last witness, the judge and the parties were still discussing efforts to locate and produce Dr. Fleming (T. Vol. V, pp. 613-617). During the course of this discussion, the following exchange occurred:

> MR. REITER: Well, at this time, Judge, I want to renew a motion for an extension of

[7]It is interesting to note that, in addition to having been evaluated by Dr. Fleming, Provenzano had also been examined by Dr. Robert Berland, at the request of the defense, on June 20, 1999 (see R. 38-39; Provenzano v. State, F.S.C. Case No. 95,849, Transcript of hearing, June 23, 1999, p. 12).

time in order to obtain and have Dr. Pollack and Dr. Henry Lyons examine my client.

THE COURT: Whoa. I got lost. I was expecting to hear something about the Witness Fleming and, I'm sorry, I was going off in another direction. I'm not even sure at this point I remember about your other motion, so start at ground one.

MR. REITER: What I was saying was I was renewing my motion for an extension of time for this hearing.

THE COURT: You were mentioning to have certain doctors examine your client and I didn't hear Fleming's name in there, so I'm baffled.

MR. REITER: It was Dr. Pollack and Dr. Henry Lyons. When we had spoken on Friday with regard to the hearing I had asked for an extension. We were attempting to contact Dr. Lyons and Dr. Pollack at the time. As Dr. Pollack had testified on I guess it was the first day, when he was asked whether he could form an opinion, he indicated he did not have enough time in order to do that. Dr. Henry Lyons, who also examined Mr. Provenzano at the time of trial, we got ahold of him on Monday afternoon, also indicated that he would be unable to examine him in sufficient time for a hearing today.

THE COURT: How long a continuance are you requesting for that purpose?

MR. REITER: Probably anywhere from two weeks to a month, Judge.

THE COURT: Does the State desire to respond to that?

MR. NUNNELLEY: Absolutely. Your Honor, this is the third day of this proceeding. Dr. Pollack was here on the first day. He was here early that morning. Good faith and fair dealing by opposing counsel would certainly seem to indicate that if he wished to ask this court to allow anyone to evaluate his client, that he make that request on Tuesday, not on Thursday after we have been here, after one of the very witnesses that he now claims he wants to evaluate this client was here and testified before this court. Your Honor, this is absolutely absurd to wait to the end of the hearing to bring these grounds for a

continuance to this court's attention. We strenuously object to any further delay in these proceedings.

THE COURT: All right. Any response?

MR. REITER: No, Your Honor.

THE COURT: All right. I have to point out that, first of all, and we may have discussed earlier, that everybody has known when this warrant was -- all summer, while the other proceedings before the Supreme Court, the possibility that this hearing was going to occur, and I don't think under the circumstances you just assume, well, we'll wait until it's over.

Secondly, I think the State's point is well taken. Had there been a request on Tuesday that Dr. Pollack be permitted to spend the evening hours or whatever hours or to recess at three o'clock so he could start an examination to finish it by whatever hour, I don't know who our conditions were, how much time he requires, I have some idea of how much time the other people have spent, whether the court would have or could have accommodated that, I don't know, but I certainly would have taken a shot at it.

MR. REITER: Well, Judge -- I'm sorry.

THE COURT: This coming the last morning, what was scheduled to be the last morning of the trial, once again, I think is a bit late and I will deny the motion at this time.

MR. REITER: Just for the record though, because of the comment the court made, I just want -- my best recollection was when we first spoke on the phone, I guess it was last Friday, I had asked for a continuance then.

THE COURT: I understand that but, Counsel, there was no request will you make the defendant available to my expert Friday, Saturday, Sunday, after he gets to Polk County, Monday evening. There was, to my recollection, and refresh my memory if I'm wrong, to make him available here. Yes, your motion for continuance, I think you're correct, was denied then for the first reason I gave here, but my point is that some of these things could have perhaps been alleviated. Maybe the doctor would have not found those conditions acceptable, maybe he

> would have. I'm aware of a fair number of mental health people who have examined people while hearings were going on.
>
> MR. NUNNELLEY: Your Honor, I would also point out that Dr. Fleming evaluated the inmate some time back and there -- they never even bothered to ask -- they never asked about that, they just got that done. They certainly knew they could have done this a long time ago, back when Dr. Fleming was doing what she claims that she did. It's just one more indication of an attempt to inject delay.
>
> MR. REITER: Well, let me point out, and it really has nothing to do with the continuance but just for the record, if necessary I could put my investigator on to describe how difficult it is to find people in this field when you do this work. We started on Friday morning attempting to find individuals when the court instructed as to when the hearing was going to be done.
>
> THE COURT: I again have to agree with the State. Apparently Dr. Fleming, if she is a doctor, and apparently she is a doctor of education, but whatever she's a doctor of, the defense was able to find her, went ahead and had this examination done, chose not to do any others at this time for reasons that may be tactically very good, but, at any rate, that's where we are. I am not continuing this case for those reasons at this time.

(T. Vol. V, p. 617-622). Thus, after all of the State's evidence had been presented, Provenzano's counsel was requesting "an extension of time in order to obtain and have Dr. Pollack and Dr. Henry Lyons examine my client" (T. Vol. V, p. 617). Although counsel stated he was "renewing" a motion for extension of time, no prior request for such action had ever been made. Counsel represented that, when the continuance had been requested on August 27, 1999, "We were attempting to contact Dr. Lyons and Dr. Pollack

at the time," yet no mention of this had been made at the August 27 hearing. The allegation at the August 27 hearing was a vague "I-couldn't-possibly-be-ready-by-then" type request for a continuance, no specifics such as the need to talk with Drs. Pollack and Lyons or additional time for another examination was mentioned.

Provenzano raised the issue of his competency to be executed with the Governor on July 6, 1999, and on the same date requested that the circuit court conduct an evidentiary hearing on this issue. Why counsel waited until Friday, August 27, 1999, to actually begin preparing for such a hearing has never been explained. And counsel's later remarks to the judge that the court had the authority, pursuant to Rule 3.812(c), to appoint disinterested mental health experts on its own (while acknowledging "I'm not suggesting in any way that I couldn't have asked for that, but that doesn't imply that the court couldn't do it on its own or the State couldn't do it on their own") sheds no light on why this request could not have been presented earlier (T. Vol. V, p. 696). This Court previously admonished counsel for failing to diligently pursue this claim. Provenzano v. State, 24 Fla.L.Weekly at S408. The continuing lack of diligence does not justify any further delay.

Provenzano's demand for a "anywhere from two weeks to a month" delay in order to get an examination by another mental health

professional was properly rebuffed by the court below. No error has been demonstrated.

ISSUE V

WHETHER FLORIDA RULES OF CRIMINAL PROCEDURE 3.811 AND 3.812 VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Provenzano may also allege that Florida Rules of Criminal Procedure 3.811 and 3.812 are unconstitutional because (1) Rule 3.811(b) does not allow for the prisoner's rational appreciation of the connection between his crime and his punishment and (2) the clear and convincing standard of Rule 3.812(e) cannot be met and violates Cooper v. Oklahoma, 517 U.S. 348 (1996). This argument must also be rejected.

In denying the motion to declare these rules unconstitutional, Judge Bentley ruled:

> On August 31, 1999, through the middle of the day on September 2, 1999, this Court held a hearing on this matter. On the first day of the hearing, hours after the hearing had commenced and after Provenzano's counsel had presented the testimony of several witnesses in support of his claim that Provenzano is not competent to be executed, Provenzano filed "Defendant's Motion to Declare Florida Rules of Criminal Procedure, Rule 3.811(b) and Rule 3.812(e) As Unconstitutional." In the Motion, Provenzano asserted that "[r]ule 3.811(b) is unconstitutional "because it does not allow for the prisoner's rational appreciation of the connection between his crime and punishment." In addition, Provenzano asserted that "[r]ule 3.812(e) is unconstitutional because it creates the standard of proof of incompetency to be 'clear and convincing' instead of 'by the preponderance of the evidence' standard announced in Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. [sic] 1373, 134 L.Ed.[sic] 2d 498 (1996)."
>
> The Court finds the issue of the constitutionality of Florida Rules of Criminal Procedure 3.811(b) and 3.812(e) is not within the purview of the order of the Supreme Court of Florida directing the undersigned judge

> to "to hear, conduct, try, and determine the above cause . . . and thereafter to dispose of all matters . . . regarding the competency of Thomas H. Provenzano to be executed, excluding other matters subsequently raised that are collateral to said cause." However, in the interest of time and judicial economy, the Court has considered the merits of the Motion.
>
> In his Motion, Provenzano's first claim is that Florida Rule of Criminal Procedure 3.811(b) is unconstitutional "because it does not allow for the prisoner's rational appreciation of the connection between his crime and punishment." The Court finds the standard set forth in rule 3.811(b), that the person must have "the mental capacity to understand the fact of the impending execution and the reason for it," does allow for a prisoner's rational appreciation of the connection between his crime and the punishment he is to receive. Accordingly, this argument is rejected.
>
> With regard to Provenzano's assertion that rule 3.812(e) is unconstitutional, as his counsel pointed out in the Motion, in Medina v. State, 690 So. 2d 1241 (Fla. 1997), the Florida Supreme Court rejected the argument that rule 3.812(e) is unconstitutional because it creates the "clear and convincing" standard of proof rather than the "preponderance of the evidence" standard of proof announced in Cooper. In rejecting this argument, the court in Medina specifically stated: "[w]e 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." Id. at 1246-47. This Court is not in a position to overturn the rulings of the Supreme Court of Florida. However, despite that fact and in the event the Florida Supreme Court decides it would be appropriate to revisit this issue, this Court has considered this argument and rejects it.

(Order, pp. 4-6).

Provenzano has never explained how Rule 3.811(b) fails to allow for consideration of whether an inmate appreciates the connection between his crime and his punishment. Although he cites Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1987), apparently

for the principle that the constitutional standard for competency under Ford v. Wainwright, 477 U.S. 399 (1986), requires such a rational appreciation of the connection, Martin does not invalidate Florida's procedural rule for failing to respect for this principle. The rule itself clearly states that a prisoner must understand the fact of his impending execution and the reason for it; thus the Rule directly commands that an appreciation of the connection between the crime and the punishment must exist.

As noted by Judge Bentley, this Court rejected his argument that the "clear and convincing evidence" standard of Rule 3.812(e) is unconstitutional under Cooper in Medina, 690 So. 2d at 1246-1247. Provenzano has offered no legitimate basis to revisit this issue.

In addition, it must be noted that Judge Bentley also determined that even if the standard to be applied were "preponderance of the evidence" rather than "clear and convincing," Provenzano failed to meet even that lower burden (Order, p. 13; R. 101, 105). In fact, the judge noted that even if the State had the burden of establishing Provenzano's competency to be executed, a determination of competency would have been made on the facts and opinions presented (Order, p. 15; R. 103). Therefore, any constitutional infirmity in applying the higher standard would not compel the granting of any relief for Provenzano.

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 finding Thomas Provenzano to be competent for execution must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Florida Bar No. 158541
Office of the Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739
CO-COUNSEL FOR STATE OF FLORIDA

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 Michael Reiter, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 10th day of September, 1999.

CO-COUNSEL FOR STATE OF FLORIDA