**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 96,453**

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**THOMAS H. PROVENZANO,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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

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# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order Finding Defendant Competent To Be Executed pursuant to an evidentiary hearing conducted under the Florida Rules of Criminal Procedure 3.811 and 3.812.

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

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

## REQUEST FOR ORAL ARGUMENT

This Court has already scheduled an oral argument in this case for September 14, 1999.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

### A. Procedural History

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

Mr. Provenzano's convictions were affirmed on direct appeal in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), cert denied, 481 U.S. 1024 (1987). Since then, Mr. Provenzano's postconviction appeals have been denied. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Provenzano v. State, 616 So.2d 428 (Fla. 1993); Provenzano v. State, Fla. S. Ct. Case No. 95,849, (opinion filed July 1, 1999), cert. denied, Provenzano v. Florida, U.S. S. Ct. Case No. 99-5107 (July 6, 1999).

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

On July 6, 1999, Dr. Myers, Dr. Waldman, and D.O. Parsons examined Mr. Provenzano and found him to be competent to be executed. On July 5, 1999, Dr. Fleming was requested by Mr.

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

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

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

This Court entered a temporary stay of execution on July 6, 1999. This Court's order temporarily stayed the execution until 7:00 a.m., July 9, 1999, and appointed the Honorable Clarence Johnson to conduct proceedings pursuant to F. R. Crim. P. 3.811. Judge Johnson entered an order on July 7, 1999, denying an evidentiary hearing on Mr. Provenzano's motion. Mr. Provenzano filed a notice of appeal with this Court.

On July 8, 1999, Mr. Provenzano filed his brief, as well as a Petition for Writ of Habeas Corpus to declare execution by electrocution to be unconstitutional in its present condition, due to the horrific events surrounding the execution of Allen Davis. This Court entered its order requiring: (a) stay of execution of Mr. Provenzano until 7:00 a.m., September 14, 1999,

(b) filing of supplemental briefs no later than July 23, 1999. Oral argument was conducted on August 24, 1999, and an opinion was issued on August 26, 1999. This Court ordered an evidentiary hearing to be conducted on the issue of the Appellant's competency to be executed and appointed the Honorable Judge Bentley to preside.

On August 27, 1999, the Honorable Judge Bentley conducted a telephonic hearing. At the hearing, Judge Bentley set the evidentiary hearing to begin on August 31, 1999, and denied Appellant's motion for continuance. On August 30, 1999, Judge Bentley entered an Order to Transport, which included his ruling that the hearing would be extended to September 7, 1999, if necessary. Another telephonic hearing was conducted on August 30, 1999, wherein the court denied Appellant's renewal of a motion for continuance.

The evidentiary was hearing was conducted from August 31, 1999, through September 2, 1999. Judge Bentley entered his Order Finding Defendant Competent To Be Executed on September 3, 1999. Appellant's Notice of Appeal was filed on September 3, 1999.

**B. Statement of Facts**

On July 6, 1999, the three doctors assigned to examine Mr. Provenzano by the Governor, pursuant to Section 722.07, Florida Statutes, submitted a combined two-page report indicating that they had spent an 80-minute clinical interview with Mr. Provenzano. Additionally, they expended another 3.5 hours speaking to two correction officers and reviewing DOC medical

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

Dr. Patricia Fleming examined Mr. Provenzano on July 5, 1999, and submitted her report[2]. In her report she indicated that she had interviewed and/or examined Mr. Provenzano for five hours on July 5, 1999, eight hours on March 13 and 14, 1989, and had conducted additional interviews on September 24, 1991, and June 21, 1993. Dr. Fleming made the following observations and evaluations: Mr. Provenzano had some difficulty in identifying Dr. Fleming; motor activity was remarkable in the lack of movement; coordination was adequate, although his shackles prevented smooth walking; speech was expressionless but pressured; conversation was rambling with frequent changes of topics; Mr. Provenzano denied suicidal thoughts or plans but did say that he was depressed; Mr. Provenzano demonstrated difficulty staying on task, and his ability to retain information was significantly impaired; and ability to find commonalities in simple comparisons was markedly impaired. Dr. Fleming conducted a number of tests upon Mr. Provenzano, which showed impairment.

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2Exhibit #7, R. 1131.

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

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

On August 27, 1999, a telephonic hearing was conducted by Judge Bentley and all attorneys concerned. The court indicated that the hearing would be set for Tuesday, August 31, 1999 [R 114]. Appellant's counsel objected to the date and indicated that Tuesday would be insufficient time to investigate and prepare for the hearing [R114]. The Court stated his concerns for extending the hearing as: "When we finish the hearing I need to prepare an order, the mechanical physical part of getting that done, plus there's a decision-making process part of that" [R121-122]. Appellant's counsel responded: "My only point being, is that hopefully my client's interests are not hurt by the time restraints..." [R122]. The Court overruled Appellant's counsel

for a continuance and set the hearing for Tuesday, August 31, 1999 [R124].

On August 27, 1999, Appellant's counsel faxed a preliminary witness list to the Court and the State, indicating that Dr. Fleming was unable to attend the hearing until September 7, 1999. Dr. Fleming submitted an affidavit, per the Court's request [R1878], stating the reason for her unavailability and expressing her opinion as to Appellant's competency to be executed [R1378].

> 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.

Another telephonic hearing was conducted on August 30, 1999. At the hearing, the Court [R66] and the state [R68] acknowledged that they had Dr. Fleming's affidavit. Appellant's counsel entered an oral motion for continuance [R66]. Based upon Dr. Fleming's affidavit of availability on September 7, 1999, and the Court's Order to Transport, Appellant's counsel requested the hearing be continued through September 7, 1999 [R67-69]. The Court did mention and entertain the possibility for extending the hearing until September 7, 1999 [R70]. However, the Court again denied Appellant's request for continuance [R78-79].

The evidentiary hearing began on Tuesday, August 31, 1999. The Appellant and the State called witness out of order as they were available. The Appellant introduced into evidence, by

stipulation, affidavits of five inmates at Union Correctional Institution, indicating that Mr. Provenzano continually acted with bizarre behavior. Susan Carey's affidavit was introduced, by stipulation, and indicated that Appellant had difficulty in understanding their conversation. Catherine Forbes, Mr. Provenzano's sister, testified that she visits Mr. Provenzano twice a week [R305]. She further testified that he doesn't understand why they are killing him [R305], and that he sends her stuff to read and explain to him because he doesn't understand [R306].

Laura Rothstein, Mr. Provenzano's niece, testified that she constantly receives documents from Mr. Provenzano for her to read and explain to them to him because he doesn't understand [R558].

Nicholas Welch, Mr. Provenzano's nephew, testified that he recently spoke to Mr. Provenzano. During the conversation, Mr. Provenzano at time will think that Nicholas is Mr. Provenzano's son rather than his nephew [R756].

Dr. DeOcampo, a licensed psychiatrist for the Department of Corrections, testified:

> "...from the record, based on my evaluation, he presented with auditory hallucinations and occasional delusional thinking. At one point there was, you know, mention of depression" [R221].
>
> "...On the second visit he came saying that he was hearing voices, but strictly on the left ear, and so, you know, at that point I decided since, based on the records and the total clinical picture, that I was going to try him on a little bit of antipsychotic medication" [R222].

Lisa Wiley, a psychological specialist for the Department of Corrections, testified:

> (1) that she met with Mr. Provenzano on a average of once per month since 1993, until his transfer to FSP in June, 1999 [R184].
>
> (2) that Mr. Provenzano engages in bizarre behavior such as: wears cardboard masks -- to keep out the evil spirits [R187], cloths tied around his face, being overdressed [R185].
>
> (3) that he has a habit of lying on the floor, which is not uncommon because of the heart. But he makes a little tunnel underneath his bed and drapes his blankets over and his sheet over [R185].
>
> (4) observed Mr. Provenzano talking out loud to no one in particular [R187-188].
>
> (5) that Mr. Provenzano volunteered that he thought he was Jesus Christ from time to time [R190].
>
> (6) that a review of a report she wrote indicated that Mr. Provenzano doesn't believe that he has to be strip searched when he sees his attorneys [R192].

A number of correction officers from Florida State Prison testified for the Appellant and for the State. Their testimony primarily related that Mr. Provenzano: kept himself clean, shaven, drank coffee, swept out his cell; appeared to read materials, didn't cause trouble, and conversed on occasions. However, Sgt. Hanson testified that Mr. Provenzano informed him that he hears voices [R249]. Sgt. Sanders testified that Mr. Provenzano wears a pillow tied around him [R277], and he wears a thermal shirt around his nose and mouth every day [R279, 281]. Sgt Ford testified that Mr. Provenzano wears a towel around his

mouth [R370]. Sgt. Fogg testified that Mr. Provenzano wears a cloth over his face [R384].

The three Doctors appointed to the commission to examine Mr. Provenzano testified that Mr. Provenzano understands "the nature and effect of the death penalty and the reason for it."

Dr. Parsons testified that:

(1) She does not normally have other people in the room when she does an evaluation [R431].

(2) There is no widely accepted standardized procedure for doing this type of evaluation [R432].

(3) If she was not instructed by the Governor, she would not have had attorneys present [R432].

(4) With more time, she would have talked to family, friends, people who have known him in the past and present [R433].

(5) She would have liked to look at more records, but was under a time constraint [R434].

(6) In her experience, malingering is rare [R437].

(7) The records she reviewed did not state that Mr. Provenzano was malingering [R437].

(8) Given the time frame she was not able to do all of the things she would like to have done [R440].

(9) There is a difference between factual understanding and rational understanding [R451].

(10) That Mr. Provenzano understands factually the nature and effect of the death penalty [R452].

(11) The correction officers made no mention of Mr. Provenzano acting in unusual behavior [R413].

Dr. Waldman testified that:

(1) The corrections office indicated that Mr. Provenzano did not act unusual or bizarre [R507].

(2) That Mr. Provenzano stated that he did not remember having a visit from his son and began tearing. Dr. Waldman believed that Mr. Provenzano knew exactly what was being asked

because Mr. Provenzano had a visit from his son and probably for the last time[3] [R517].

(3) That Mr. Provenzano is malingering [R540].

(4) He did not perform other functions for the evaluation because they continuously busy [R576].

(5) The correction officers did not tell him that Mr. Provenzano placed rags over his fact [R578].

(6) The correction officers did not tell him that Mr. Provenzano mentioned that he was hearing voices [R579].

Dr. Meyers testified that:

(1) The Governor's letter influenced the method and time to perform the evaluation [R721, 729].

(2) There is no standardized method to perform evaluations [R732, 733].

(3) The evaluation was reliable or accurate [R735].

(4) Mr. Provenzano is malingering [R739].

(5) An individual can be mentally ill and still malinger [R739].

Dr. Smith testified that:

(1) Dr. Smith opined that the evaluation by the commission doctors, as outlined by their report, was not an adequate evaluation [R695-698].

Dr. Pollack testified that:

(1) That he could not make a determination of whether Mr. Provenzano was incompetent to be executed because he did not have enough information and that he need additional time to examine him [R316-317].

(2) Dr. Pollack opined that the evaluation by the commission doctors, as outlined by their report, was not performed in an acceptable scientific method [R317-370].

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3Mr. Provenzano has never had a visit from his son. He believes that his nephew is his son and he only visits by phone.

## SUMMARY OF ARGUMENT

1. The trial court ultimately blocked the Appellant's ability to investigate, prepare, and present evidence in order to meet his burden to establish his incompetence to be executed. The trial court set the hearing with only one working day for Appellant to obtain doctors willing and able to the examine Appellant and to testify. The trial court failed to extend the hearing to allow Appellant's primary witness to testify. The trial court sustained objections to questions which went to the heart of the State doctors' examinations and conclusions. The trial court expressed bias towards the Appellant's primary witness, which was shown by his comments on the record and failure to consider the witness as an expert in clinical psychology, even though the witness testified that she was entitled to the same rights and privileges as a Ph.D.

2. Florida Rules of Criminal Procedure, Rule 3.811(b) and Rule 3.812(e) are unconstitutional.

## ARGUMENT I

**WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S FOURTEENTH AMENDMENT RIGHTS BY FAILING TO PROVIDE A FULL AND FAIR HEARING AS TO APPELLANT'S COMPETENCY TO BE EXECUTED.**

**The Court abused it's discretion by denying Appellant's motions to continue.**

On August 26, 1999, this Court entered its opinion declaring that the Appellant was entitled to an evidentiary hearing. On August 27, 1999, Appellant's counsel was informed by Judge Bentley, via a telephonic conference, that the hearing would be conducted on Tuesday, August 31, 1999 [R114]. Appellant's counsel objected to the short notice to investigate and prepare [R114] and informed the court that the short time restraints might prejudice the Appellant [R122]. It appears from the record that the trial court's primary concerns about a continuance were:

> "When we finish the hearing I need to prepare an order, the mechanical physical part of getting that done, plus there's a decision-making process part of that"[4] [R122]; and
>
> "Well, I'm not so sure that I'm in a position to enter a stay. The Supreme Court obviously can, but they haven't done that. They know what the time frame is, so they hadn't set the time for a hearing, but it seems to me that if I issued one, obviously, it might not stick, even if you are right that I have the authority to do it. That doesn't mean that it's going to prevail.So what I am saying, if I even thought about that, I would want some record assurances from you and your client that everybody understood that might have a dramatic effect on your time for appeal. Because there is no guarantee that the

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4The trial court's order was issued and received in less than 24 hours from the close of the hearing.

> Supreme Court would say well oh sure we will continue this. They may, they might not, I don't know. That is a concern of mine and I think that has to be balanced against your need to get ready for this hearing, which I appreciate, that there is a need" [R123].

The Court overruled the objection and set the hearing for Tuesday, August 31, 1999 [R124]. However, on page 2 of the trial court's order, he suggests that the reason he denied the continuance was:

> "However, in light of the fact that Provenzano's counsel made the claim that Provenzano is not competent to be executed over one and one-half months ago, and therefore that counsel has had adequate time to prepare for this matter, the motion to continue was denied" [R89].

Nowhere in the transcript of the hearing held August 27, 1999, does the Court express the above reason for denial of Appellant's motion for continuance.

Subsequent to the hearing, Appellant's counsel sent a preliminary witness list to the Court and the state, via facsimile, informing them that Dr. Fleming would not be available to attend the hearing until September 7, 1999. Upon the Court's request, an affidavit from Dr. Fleming was faxed to the State and the court [R1378]. On August 30, 1999, the Court faxed to Appellant's counsel a transport order, which stated: "...Said evidentiary hearing may continue on Wednesday, September 1, 1999, Thursday, September 2, 1999, and Tuesday, September 7, 1999, if necessary" [R32-33]. Another hearing was conducted on August 30, 1999, wherein Appellant's counsel requested a continuance for the second time [R66]. Again, the Court denied the continuance

[R78]. It appears that the Court's primary concern was with the date scheduled for the execution, rather than the purpose of the hearing.

With regard to a continuance being granted, the court in McKay v. State, 504 So.2d 1280 (Fla. App. 1st DCA 1986), acknowledged the standards to be utilized for a continuance on the eve of trial: (1) the time available for preparation, (2) the likelihood of prejudice from the denial, (3) the defendant's role in shortening preparation time, (4) the complexity of the case, (5) the availability of discovery, (6) the adequacy of counsel actually provided, and (7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

There is no question that a majority of the issues stated above apply to the Appellant's case. (1) Appellant's counsel had practically no time to prepare. Witnesses were unavailable to be interviewed and scheduled, experts needed to be acquired, and documents needed to be reviewed; (2) The prejudice of an erroneous ruling is obvious; (3) The Appellant's role in shortening the time is non-applicable; (4) The complexity of any death case is inherent; (5) Very little discovery was provided. The state employees have been totally unavailable to Appellant prior to the hearing; (6) Adequacy of counsel is certainly affected by counsel's inability to properly prepare for the hearing; and (7) Experience with the crime is non-applicable to the issues before the court.

In Jones v. Butterworth, 695 So.2d 679 (Fla. 1997), this Court relinquished jurisdiction to the trial court to continue an evidentiary hearing because: the State's conclusion about the cause of the Medina incident had changed shortly before the hearing; that petitioner did not have the benefit of examining the State's new protocols at the beginning of the hearing; and that he was unable to present any live testimony from expert witnesses [emphasis added].

Many of the facts in Jones are similar to the circumstances in the instant case. In Jones: (1) a telephonic hearing was conducted by the circuit court scheduling the hearing in four days, (2) counsel objected to the scheduled date, and (3) prior to the hearing, counsel informed the court that his expert witnesses were unavailable. In the instant case: (1) a telephonic hearing was conducted wherein the court scheduled the hearing within four days [R106-133], (2) counsel objected to the shortness of time to investigate and prepare [R114], (3) another telephonic hearing was conducted one day prior to the scheduled hearing wherein counsel requested a continuance because his expert was unavailable, and supported his claim by the witness' affidavit [R66]. The trial court denied the motions to continue.

Further, Dr. Robert Pollack was called by Appellant as an expert witness. Dr. Pollack indicated that he was only contacted the day before his testimony [R315-316]. Based upon the information that was available for his perusal, he was unable to make a determination as to Appellant's competency to be executed

[R316]. Dr. Pollack also stated that in order for him to make that determination he would need several hours for interviews and perhaps some additional time to question people who had observed Appellant [R316-317].

By Thursday morning, September 1, 1999, it became rather apparent that Dr. Fleming would be unavailable to testify. Appellant's counsel requested the court for a two- to four-week continuance to allow Dr. Pollack and Dr. Lyons to examine the Appellant [R828]. In denying the motion, the following transpired:

> 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?
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> 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 get 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 the 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 are. I'm not continuing this case for those reasons at this time. Now, actually, what I was starting out to ask is what we should – maybe I should have restricted my question – what we need to do about the Witness Fleming. I am and have been and still am concerned about a number of things, one of which doesn't really bear on my decision in this hearing, and that is the professionality, if that's a word, or lack of it, of her conduct under these circumstances. Somebody is under sentence of death to – unless there is an explanation not been made available to the court now, a pretty clear inference at this point that the information we have is right, that she's avoiding testifying for whatever reason, but that doesn't really bear on my decision here today, it has nothing to do with it. I am concerned about whether that's appropriate professional conduct when I hear a professional's office doesn't have a phone number, it's – I am pleased that she made some effort yesterday evening apparently to contact us, and we are going to take another recess and see what more I can learn about what that was and when it happened. The question is where do we go from here [R830-834].

This is just one example of the court's attitude toward Dr. Fleming throughout the hearing. The court was well aware by her

affidavit that Dr. Fleming was not available to testify while she was out of town, plus it would be extremely difficult to even contact her while she was away. Since the Court was well aware of Dr. Fleming's unavailability, I am, quite frankly very surprised that the court would act in this manner. All of the requests for continuances and the frustrations of attempting to contact Dr. Fleming could certainly have been avoided if the court had granted an extension until September 7, 1999.

The court's offer to accommodate Dr. Fleming to testify by phone, early in the morning, or by video deposition – although appreciated – [page 4 of order] was really an empty offer, knowing she could not be readily contacted.

There was no reason -- legal or rational -- for the court not to extend the hearing to September 7, 1999, in order to accommodate Dr. Fleming's appearance. The court left Appellant with no other option but to request a continuance to obtain examinations by Dr. Pollack and Dr. Lyons. The State and the Court conveniently failed to recognize that Dr. Pollack testified as to what he would require in order to properly examine the Appellant, and that he had only been contacted the day before his testimony. The trial court failed to provide a full and fair hearing and abused his discretion by denying Appellant's motions for continuance.

**The court erred by refusing to accept Dr. Fleming as an expert in Clinical Psychology because she didn't have a Ph.D, and thereby gave her testimony little weight.**

Dr. Fleming testified that she obtained her bachelor's and master's degree from the University of Wyoming and her doctoral degree from the University of Northern Colorado in 1971 [R870]. Her curriculum vitae indicates that her doctoral degree is designated as an Ed.D. [1386-1391]. Dr. Fleming also testified that she has previously been admitted as an expert in psychology in state and federal courts [R873]. Dr. Fleming also testified that she enjoys the same benefits and responsibilities as a Ph.D. psychologist does in the state of Wyoming [R885].

In the Court's order, the Court stated:

> "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" [R97].

Although a trial court's decision about qualifications of an expert is ordinarily conclusive, an appellate court can come to an opposite conclusion when it determines that the trial court reached its decision by applying erroneous legal principles. McBean v. State, 688 So.2d 383 (Fla. App. 4th DCA 1997). Judge

Bentley arrived at an erroneous legal principle. Section 490.033, Florida Statutes, defines the following terms as:

490.033(3)(a): Prior to July 1, 1999, “doctoral-level psychological education” and “doctoral degree in psychology” mean a Psy.D., and Ed.D. in psychology, or a Ph.D. in psychology from:

1. An educational institution which, at the time the applicant was enrolled and graduated, had institutional accreditation from an agency recognized and approved by the United States Department of Education or was recognized as a member in good standing with the Association of Universities and Colleges of Canada; and

2. A psychology program within that educational institution which, at the time the applicant was enrolled and graduated, had programmatic accreditation from an accrediting agency recognized and approved by the United States Department of Education or was comparable to such program.

490.033(7) “Psychologist” means a person licensed pursuant to s. 490.005(1), s. 490.006, or the provision identified as s. 490.013(2) in s. 1, chapter 81-235, Laws of Florida.

One requirement to be a “Psychologist” under Section 490.005(1) is: received doctoral-level psychological education, as defined in s. 490.003(3). Dr. Fleming certainly meets that standard.

The Court believes that a “Clinical Psychologist” requires a Ph.D. That belief is erroneous. In footnote five of the court’s order, the Court acknowledges that: Dr. Fleming is an Ed.D, or

doctor of education in psychology, not a Ph.D. in clinical psychology. There is no definition in Section 490 for “clinical psychology,” only “psychologist.” An Ed.D (doctoral-level psychological education) enjoys the same dignity and respect as a Ph.D. (doctoral degree in psychology) in the state of Florida.

The Assistant Attorney General called Dr. Fleming a “charlatan” [R761], apparently, without referring to the statutes to determine whether someone without a Ph.D. can be considered a psychologist. The Court demeans Dr. Fleming’s qualifications, as stated above, also, apparently without first referring to the statutes. This type of attitude implies a lack of professionalism and certainly doesn’t set well with the standards of our profession.

## ARGUMENT II

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

Florida Rules of Criminal Procedure 3.811 and 3.812 are unconstitutional as applied.

**Rule 3.811 (b)** reads as follows:

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

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

However, the finding of this Court was predicated upon the dicta of Justices Powell and O'Connor in Ford, suggesting that because the prisoner has been through trial, sentence, and appeals, the state's interest was substantial. But Justice Marshall in Ford, along with three other justices, indicated that the states should look to other laws of its state to determine the standards to be utilized. As pointed out by Justice Anstead (concurring opinion) in Medina, 3.210(b) establishes the standards to be utilized for competency at time of trial.

Justice Anstead listed a number of cases supporting the theory that 3.210(b) is the standard to be utilized for determination of competency, whether at time of trial or at time of execution.

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

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

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

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

> "This appreciation of the connection between crime and punishment is very similar to Justice Powell's `perceives the connection' requirement...

> The perceive the connection phrasing is not the complete description of the Powell requirement. Powell believed that the eighth amendment forbids the execution of condemned prisoners who are unaware of the punishment they are about to suffer and why they are to suffer it."

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

American Bar Association Standards for Criminal Justice, Standard 7-5.6(b) reads as follows:

> A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

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

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

In the instant case, Judge Bentley rejected Appellant's contention of unconstitutionality because:

> 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 [R92].

However, during cross-examination of Dr. Parsons, Judge Bentley sustained the State's objection to the question of Mr. Provenzano's rational understanding.

> Q. Thank you. In your experience, is there a difference between rational and cognitive understanding? [R451].
>
> A. Is there a difference between rational and cognitive?
>
> Q. Uh-huh.
>
> A. Yes.
>
> Q. Could you explain that?
>
> A. Could you give me a context, like a sentence?
>
> Q. Well, you indicated that Mr. Provenzano understands, I believe you said, the nature of the death penalty and the reason for it. Is that what you said?
>
> A. Nature and effect of the death penalty.
>
> Q. Okay. And that's a factual understanding, or a cognitive one, one's present ability in the mind to relate to?
>
> A. Yes.
>
> Q. Would a rational one be with regard to if a person suffers from delusions, and although he understands the factual aspect, in combining the two with regard to rational

> and factual, is it possible for a person to have not a rational understanding, but a factual one?
>
> A. I would say so.
>
> Q. Did you make any interpretations or determination as to Mr. Provenzano's rational understanding?
>
> Mr. Nunnelley: Your Honor, that not the legal standard. I object.
>
> The Court: Sustained [R452-453].

If Judge Bentley's finding that Rule 3.811(b) allows for the prisoner's rational understanding is wrong, then the rule is unconstitutional. If Judge Bentley's finding is correct, than his reliance upon the State's three experts, in contradiction to the Appellant's witnesses, was in error, because none of the three experts testified as to considering Mr. Provenzano's rational understanding.

**Rule 3.812 (e)** reads as follows:

> "If, at the conclusion of the hearing, the court shall find, by clear and convincing evidence, that the prisoner is insane to be executed, the court shall enter its order continuing the stay of the death warrant..."

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

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

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

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

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

2. The prisoner is required to establish his proof in an adversarial process with contradicting experts.

3. The courts in both Ford and Cooper acknowledge that psychiatrists disagree widely and frequently on what constitutes mental illness and on the appropriate diagnosis to be attached to given behavior and symptoms.

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

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

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

> "Difficulty in ascertaining whether a defendant is incompetent or malingering may make it appropriate to place the burden of proof on him, but it does not justify the additional onus of an especially high standard of proof.
>
> Although it is normally within a State's power to establish the procedures through which its laws are given effect, the power to regulate procedural burdens is subject to proscription under the Due Process Clause when, as here, the procedures do not sufficiently protect a fundamental constitutional right." Cooper at 349.

Inasmuch as Rule 3.812(e) requires proof by clear and convincing evidence, the rule is unconstitutional.

## CONCLUSION AND RELIEF SOUGHT

Based upon the facts and arguments raised above, the Court should remand to the trial court to allow Mr. Provenzano sufficient time to properly prepare and present his case.

**CERTIFICATE OF FONT SIZE AND SERVICE**

I HEREBY CERTIFY that the foregoing **INITIAL BRIEF OF APPELLANT**, which was typed in Font Size Courier 12, has be furnished by either United States Mail, first-class/federal express/facsimile transmission/hand delivery this 10th day of September, 1999.

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