

IN THE SUPREME COURT OF FLORIDA

CASE NO. 99-32

THOMAS H. PROVENZANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CORRECTED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order declaring that Mr. Provenzano is competent to be executed. The motion was brought pursuant to Fla. R. Crim. P. 3.811 and 3.812.

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

"PR" --; Record on appeal for hearing conducted from August 31 through September 2, 1999.

"PR1" -; Record on appeal for hearing conducted October 11 through 13, 1999, and November 15 and 16, 1999.

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	22
ARGUMENT	
THE TRIAL COURT ERRED IN APPLYING THE STANDARD TO BE UTILIZED TO DETERMINE COMPETENCY TO BE EXECUTED.	23
CONCLUSION	47
CERTIFICATE OF FONT SIZE AND SERVICE	48

TABLE OF AUTHORITIES

Barnard v. Collins,
13 F.3d 871 (5th Cir. 1994) 34, 37

Fearance v. Scott,
56 F.3d 633 (5th Cir. 1995) 34

Ford v. Wainwright,
477 U.S. 399,
106 S.Ct. 2595,
91 L.Ed.2d 335 (1986) 30, 34

Greg v. Georgia,
428 U.S. 153,
96 S.Ct. 2909 (1976) 34

Lowenfield v. Butler,
843 F.2d 183 (5th Cir. 1988) 34

Marks v. United States,
430 U.S. 188,
97 S.Ct. 990 (1977) 34

Martin v. Dugger,
686 F. Supp. 1523 (S.D. Fla. 1988) 23

Martin v. State,
514 So.2d 189 (Fla. 1987) 46

O'Dell v. Netherland,
521 U.S. 151,
117 S.Ct.1969 (1997) 34

Provenzano v. State,
497 So. 2d 1177 (Fla. 1986),
cert denied, 481 U.S. 1024 (1987) 2

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 2

Provenzano v. State,
616 So.2d 428 (Fla. 1993) 2

Provenzano v. State,
1999 WL 742293 (Fla. Sept. 23, 1999) 23

<u>Provenzano v. Florida,</u>	
U.S. S.Ct. Case No. 99-5107 (July 6, 1999)	2
<u>Romano v. Okalahoma,</u>	
512 U.S. 1,	
114 S.Ct. 2004 (1994)	34
<u>Shaw v. Armontrout,</u>	
900 F.2d 123 (8 th Cir. 1990)	36
<u>United States v. Blohm,</u>	
579 F. Supp. 495 (S.D. N.Y. 1983)	24
<u>Weeks v. Jones,</u>	
52 F.3d 1559 (11 th Cir. 1995)	40
<u>Whitmore v. Lockhart,</u>	
834 F.Supp. 1105 (E.D. Ark 1992)	39

STATEMENT OF CASE

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 had been denied on appeal on his postconviction motions. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So.2d 428 (Fla. 1993); Provenzano v. State, Fla. S. Ct. Case No. 95,849, (opinion filed July 1, 1999), cert. denied, Provenzano v. Florida, U.S. S.Ct. Case No. 99-5107 (July 6, 1999).

On June 9, 1999, the Governor of Florida signed a death warrant for Mr. Provenzano. Mr. Provenzano's execution was first scheduled for July 7, 1999, at 7:00 A.M. On July 5, 1999, Mr. Provenzano filed a notice to the Governor, pursuant to Section 922.07, Florida Statutes, that Mr. Provenzano was insane to be executed. On July 6, 1999, the Governor appointed three mental health experts to examine Mr. Provenzano¹ to determine if he was

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

insane to be executed.

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

On August 26, 1999, this Court remanded the case for an evidentiary hearing and assigned the Honorable Randolph Bentley to preside over the hearing. A hearing was conducted on August 31 through September 2, 1999. The trial court entered an order finding Mr. Provenzano competent to be executed on September 3, 1999. Thereupon, Mr. Provenzano filed his notice of appeal.

On September 23, 1999, this Court entered an order remanding the case for a continuation of the evidentiary hearing. In accordance with this Court's order, further proceedings began on October 11 through October 13, 1999. Due to an unexpected illness, one of Mr. Provenzano's witnesses was unavailable until

November 15, 1999. The trial court continued the proceeding until that time. The remainder of the proceedings were conducted on November 15 and November 16, 1999. On December 8, 1999, the Honorable Randolph Bentley entered his order finding Mr. Provenzano competent to be executed. Mr. Provenzano filed his notice of appeal on December 9, 1999.

STATEMENT OF FACTS

On August 27, 1999, Judge Bentley conducted a telephonic hearing scheduling an evidentiary hearing for August 31, 1999. Mr. Provenzano's counsel requested a continuance, but was denied.

On August 31 through September 2, 1999, an evidentiary hearing began for the determination of Mr. Provenzano's competency to be executed. At that hearing, Mr. Provenzano presented testimony of five doctors; Dr. Anil Arora [PR 208], Dr. C. Deocampo [PR 219-224], Dr. Robert Pollack [PR 308-346], Dr. Harold Smith [PR 674-712], and Dr. Patricia Fleming [PR 869-910]; six Florida State Correctional Officers; two Florida State Medical Social Workers; and Mr. Provenzano's sister.

Both Dr. Pollack, a psychiatrist who testified at Mr. Provenzano's trial regarding Mr. Provenzano's sanity, and Dr. Smith, a psychologist, testified that the examination for competency to be executed performed by the doctors appointed by the Governor was less than adequate to arrive at a proper determination. Neither Dr. Pollack nor Dr. Smith had evaluated Mr. Provenzano for competency to be executed.

The Florida State Correctional Personnel testified that although Mr. Provenzano appeared normal at times and was able to converse in what appeared to be a rational manner and follow

directions, they had observed bizarre behavior by Mr. Provenzano on a number of occasions: asserting that he was Jesus Christ, yelling at someone who was not there, complaining of seeing ghosts, sleeping under his bed, continuously covering his mouth with either a bandana or a mask, and covering his ear.

Dr. Fleming testified, via telephone, that she was unable to speak to substantive issues regarding Mr. Provenzano because she was out of town and did not have her records. Dr. Fleming merely offered her credentials as an expert.

Dr. C. Deocampo, a psychiatrist employed by the Florida Department of Corrections, testified that she had examined Mr. Provenzano and had prescribed him antipsychotic medication, due to his hallucinations.

The State called to testify: several Florida State Correctional Officers, the three doctors appointed by the Governor to examine Mr. Provenzano -- Dr. Leslie Parson, Dr. Alan Waldman, and Dr. Wade Meyers and Dr. Harry McClaren.

The consensus of the three doctors appointed by the Governor was that Mr. Provenzano was competent to be executed and that Mr. Provenzano did not suffer from any mental disease 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. However, all three admitted that the examination lasted approximately 90 minutes, while six individuals, including themselves, were present during the examination. Further, no testimony was presented that the examination of the three doctors established whether Mr. Provenzano had a rational understanding of the standard for execution.

Dr. Harry McClaren did not personally speak to Mr. Provenzano, but merely observed him at the Orlando hearing, as well as the August hearing in an attempt to interpret Mr. Provenzano's body language. Dr. McClaren opined that Mr. Provenzano did not express any symptoms of someone who suffers from a serious mental illness. Dr. McClaren did not express an opinion as to whether Mr. Provenzano was competent to be executed.

On September 3, 1999, an order was entered finding Mr. Provenzano competent to be executed. Mr. Provenzano appealed the order. This Court remanded the cause for an additional hearing.

Prior to the commencement of the hearing scheduled for October 11, 1999, counsel for Mr. Provenzano filed a supplemental witness list, which included: Dr. Patricia Fleming, Dr. Henry Dee, Dr. Henry Lyons, and Mark Gruber, an attorney employed by the Office of the Capital Collateral Regional Counsel - Middle

Region. The State then filed their supplemental witness list, to include: Dr. Harry McClaren, Dr. Alan Waldman, Dr. Leslie Parsons. The State further filed a motion to request that either or both Dr. McClaren and Dr. Waldman be permitted to conduct an individual examination of Mr. Provenzano because:

2. The State has never had the opportunity to have its experts examine Provenzano. Although three psychiatrists evaluated Provenzano for competency at the request of the Governor on July 6, 1999, this evaluation by law had to be conducted in the manner prescribed by Section 922.07. Provenzano has forcefully attacked the adequacy of that evaluation based on the manner in which it was conducted and the procedures utilized.

3. In remanding this cause for further proceedings, the Florida Supreme Court directed that Provenzano's attorney be permitted to explore Provenzano's rational appreciation of the connection between his crime and the punishment he is to receive... Examination by the State experts is necessary in order for the State to have the opportunity to present testimony regarding Provenzano's rational understanding of the death penalty.

[PR1 39] [emphasis added].

The court granted the State's motion, and Dr. McClaren and Dr. Waldman individually examined Mr. Provenzano.

The hearing began on October 11, 1999, and was temporarily concluded on October 13, 1999. The witnesses who appeared at the October hearing were: Dr. Parsons, Dr. Fleming, Dr. Lyons, Dr.

McClaren, Dr. Waldman, and Catherine Forbes.

Dr. Parsons testified that she believed that Mr. Provenzano has a rational understanding of the connection between his crime and punishment [PR1 155-157].

Dr. Fleming testified that Mr. Provenzano is not competent to be executed [PR1 165]. She based her opinion on her examination of Mr. Provenzano over the years and the high volume of documentation she had reviewed [PR1 165-169]. She also relied upon Dr. Lyons evaluation, Dr. Dee's evaluation and the report of Dr. Richardson, a psychiatrist employed by the Florida Department of Corrections who administered antipsychotic medication to Mr. Provenzano in 1997 [PR1 170]. Dr. Fleming further testified that she had given Mr. Provenzano a MMPI test and a SIRS test. The tests indicated to her that Mr. Provenzano suffers from a server mental illness and is not malingering [PR1 173-177].

In response to inquiry as to Mr. Provenzano's functional abilities and his deterioration, Dr. Fleming testified:

[Mr. Reiter]: Would you have an opinion as to from the first time that you saw Thomas to the most recent time that you saw Thomas whether he has improved or deteriorated?

[Dr. Fleming]: No. There was some deterioration. He - in addition, I gave some - in 1999, in addition to the SIRS test, I

sampled his ability to track, to remember some complicated passages and things like that, but overall, he was less responsive, he was - then he was in 1989. He was more - I'd say more rigid. He was cooperative but he was - he was more tangential than he was in 1989. He didn't stay on track. I had a hard time. That's what took me so long, is that I had a hard time getting specific information. He speaks quite - I mean well, actually, but he had a hard time staying on track.

[Mr. Reiter]: Does a person who suffers from the diagnosis you gave Thomas have the ability to clean themselves, to take care of themselves with good hygiene?

[Dr. Fleming]: Well, unless they have - like if it's a catatonic diagnosis, then they are more immobile, but yes, they have - they can actually do all their daily functioning.

[Mr. Reiter]: Does a person who suffers from the diagnosis you provided have the ability to have conversations with individuals?

[Dr. Fleming]: Certainly. The paranoid schizophrenic with those delusions actually do that better than others. They appear to understand and to be quite aware, although - and they can talk in quite intricate conversations. The only difference is they are off-base on their major premise.

[PR1 177].

Dr. Lyons, a psychiatrist who testified at Mr. Provenzano's trial, testified at the evidentiary hearing that Mr. Provenzano is not competent to be executed. Although Mr. Provenzano knows that he was accused of a crime, went to trial, and was sentenced

to execution, Mr. Provenzano believes that the real reason he is being executed is because he believes he is Jesus Christ. [PR1 377-380].

Mark Gruber, an attorney for CCRC-M, testified regarding his recollection of the subject of Mr. Provenzano's mention of the query about an "eye for an eye."

[Mr. Reiter]: Let me ask you this question. There was testimony earlier with regard to Mr. Provenzano's understanding or statement of a phrase eye for an eye. Do you recollect that phrase ever being stated within that evaluation?

[Mr. Gruber]: I do.

[Mr. Reiter]: Do you have a recollection as to what took place and how that came about?

[Mr. Gruber]: Yes. It was the doctors, and I'm fairly certain it was Dr. Waldman who initiated that line of questioning. The questioning - the line of questioning started off with a question about the doctors having read I suppose some reports or something to that nature, that Mr. Provenzano had a concern with the Bible and with scripture and he responded affirmatively to that, and said something like yes or what have you, no more than that. And then he was asked by the doctors are you familiar, or words to that effect, with the phrase an eye for an eye and a tooth for a tooth, and he responded yes. Then they went on to ask and what does that mean, and he gave a response that - did explain what it meant, it was that if someone takes an eye, then an eye will be taken, or words to that effect.

[Mr. Reiter]: Who was the first person that mentioned eye for an eye?

[Mr. Gruber]: It was Dr. Waldman.

[Mr. Reiter]: Did Mr. Provenzano, during that evaluation, give spontaneous statements or was he responding to questions? How did that transpire?

[Mr. Gruber]: None of the meaning, the substance or the purpose of the questions or any of that was initiated by Mr. Provenzano. It was entirely initiated by the doctors.

[PR1 401-403].

Dr. McClaren expressed his opinion that Mr. Provenzano is competent to be executed [PR1 453]. Dr. McClaren also expressed his opinion of Mr. Provenzano's factual and rational understanding in relation to his delusion that he is being executed because he is Jesus Christ.

[Mr. Reiter]: Okay. When you say earlier that when Thomas had indicated to you that he had knowledge or understanding of the fact that he was tried and convicted by a jury - correct?

[Dr. McClaren]: Yeah.

[Mr. Reiter]: All right. Did you ever ask the people that you spoke to whether they had told him that?

[Dr. McClaren]: No.

[Mr. Reiter]: Did you try to make a determination as to the statements that Thomas was making with regard to his

knowledge, whether that information was something that had been told to him over time or whether it was something that he believed?

[Dr. McClaren]: I think both are true. I think he believed it. I mean he knew it, and he - I'm sure that he's heard it over time ad nauseam.

[Mr. Reiter]: So even someone who, let's assume for argument's sake, might be delusional and if they are told over time something, could that person generally repeat it back?

[Dr. McClaren]: They could repeat it back and they can know it.

[Mr. Reiter]: Even though they are delusional?

[Dr. McClaren]: Absolutely.

[Mr. Reiter]: But Thomas has indicated to you also that he's Jesus Christ, if it's delusional, belief is that he doesn't believe, based on that, that he's being executed for the crimes, correct?

[Dr. McClaren]: Actually, he sort of gives it as both are at work.

[Mr. Reiter]: Explain that, if you could.

[Dr. McClaren]: I wish I could.

[Mr. Reiter]: So you're really not concerned with regard to what his true understanding or belief is with regard to the connection of the electric chair and the relationship with the crime?

[Dr. McClaren]: Well, I know that he knows that it's because of his conviction for

murder, first degree murder, his seven to five jury recommendation and the imposition of sentence by the judge.

[Mr. Reiter]: And that factual claim, right?

[Dr. McClaren]: Absolutely.

[Mr. Reiter]: Okay.

[Dr. McClaren]: And rational, and it is rational.

[Mr. Reiter]: But if he believes he's Jesus Christ and believes his execution is because he is Jesus Christ, it could be a dual issue, correct?

[Dr. McClaren]: Might be.

[Mr. Reiter]: But it also could be that his belief of the execution is solely for Jesus Christ but he doesn't believe that they are executing him because of that crime?

[Dr. McClaren]: In my opinion, that's not true.

[PR1 538-540].

Dr. Waldman was called by the State, and testified that his opinion was that Mr. Provenzano was competent to be executed [PR1 583]. Dr. Waldman also testified that Mr. Provenzano was receiving medication [PR1 564], which is prescribed as a treatment for psychosis [PR1 566]. However, Dr. Waldman opined that Mr. Provenzano is neither psychotic nor suffers from Schizophrenia [PR1 583].

Dr. Waldman did testify that based upon his re-examination of Mr. Provenzano on an individual basis that Mr. Provenzano suffers from a mental illness [PR1 595].

Dr. Waldman was aware that Dr. Abramson had examined Mr. Provenzano around the time of the shooting and diagnosed Mr. Provenzano as suffering from paranoid delusions. However, Dr. Waldman opined that such a diagnosis was "irresponsible." [PR1 595]. Dr. Waldman was also aware that Dr. Richardson in 1997 had diagnosed Mr. Provenzano as a paranoid schizophrenic and that medication had been prescribed.

However, Dr. Waldman expressed his concerns and doubts for the methodology used at the Department of Corrections [PR1 596]. Dr. Waldman testified that while working at the Department of Corrections, he has never seen any policies there that permitted a doctor to prescribe medication to a person who was believed to be malingering [PR1 642]. Dr. Waldman testified that he had never prescribed medication to a patient who he believed was malingering. However, he later corrected his testimony and stated that while working at the Department of Corrections he had prescribed medication to a patient, at the request of another doctor, even though he believed the patient was malingering. Dr. Waldman believes that Mr. Provenzano malingers [PR1 604]. Dr.

Waldman did agree that a person can be determined to be mentally ill and still carry on conversations [PR1 597].

The hearing was recessed on October 13, 1999, until November 15, 1999. On November 15, 1999, Dr. Dee, a neuropsychologist, opined that Thomas Provenzano was incompetent to be executed [PR1 888]. Dr. Dee testified that this was the first time he had performed this type of evaluation and expressed his concerns as follows:

[Mr. Reiter]: Okay. Based upon the standard for competency in this particular case, it has been asked of previous doctors as to what they might expect to find in an individual who suffers from that type of competency. Did you have any previous position when you went there as to what an individual might be like who might not be competent to be executed?

[Dr. Dee]: Well, that's difficult to answer. Yes and no, I guess the answer is. Let me say straightforwardly that I had not done this type of assessment before and I reflected about doing it considerably before I agreed to do it. I did agree to do it and then reviewed this material on the criteria. And I suppose, like most people who read this standard, you form the opinion that it's a relatively simple and minimal standard for competence compared to other competencies. It seems relatively straightforward. It's difficult to conceive of a situation, at least before you do this type of assessment, where you might find someone incompetent actually. Those were some of my reflections on reading all this material.

I didn't have a preconceived notion of

what the patient or inmate might be like who met that standard. I did read other people's comments on it. I didn't share their expectation of dementia. It didn't seem to me to be particularly relevant to this, but I can see why they might think so. Certainly that is one situation in which incompetence might arrive, severe dementia, although there was nothing that I read or had heard that suggested severe dementia when I was on my way there. Beyond that, I didn't have any expectations.

[PR1 889].

* * * *

THE COURT: ...Before we begin the cross-examination, Dr. Dee, if you could maybe clarify something for me. I understand your conclusion and, of course, the standard. Could you kind of pull together your testimony for me as to which particular delusions or mental health aspects of the defendant reach which part of the standard, which is sort of a two-pronged standard, if you would? Kind of bring that together and relate which prongs you think which things apply to.

THE WITNESS: Well, it would appear to me that the most relevant delusion and finding would be that of this long-standing delusion that he's Jesus Christ and the additional delusional belief that he is being executed because he is Jesus. He really wasn't much more coherent than that when I pursued that with him at length, but at that point he was very uncomfortable, he was very evasive. He told me that people - it made people very uncomfortable for him to talk about that, he didn't like to get into that, it made him a bigger target and so forth, and that was near the end of the day, as I said.

* * * *

THE COURT: Well, let me ask you this. He also said, if I understand you, and I may be confusing some of your testimony with the other people who testified, it's also because he's innocent and also because of a conspiracy.

THE WITNESS: Well, I'm not sure that those are really mutually exclusive in the sense that he seemed to believe that the courtroom drama and the conviction and so forth are somehow related to his being executed for being Jesus Christ, as if that were some sort of ruse.

[PR1 918-919] [emphasis added].

* * * *

THE COURT: ...The other thing I'm struggling with, is it possible to say, based on your evaluation of the defendant, that he has a factual understanding of what he was convicted for and what the sentence is, this is what the court said and the court did, and on the other hand he simply says I also believe I'm Jesus Christ, therefore, that's why they did it to me? Does the standard require that the defendant accept reasons the court announced or is it simply sufficient in your view that he understand what the court said, whether he buys it or not?

THE WITNESS: It would seem to me that whether - I'm going to make a distinction that maybe you weren't making - whether he buys it or not isn't particularly the relevant part. I think, as I read the Supreme Court's opinion, and the statute, it appears to me that what's behind this issue of competence to be executed is that it seems to be an offense to

justice that a person who doesn't really appreciate why he's being put to death, and I think the continuing belief that one is being executed because one is Jesus Christ or some deity is the sort of thing they probably had in mind.

[PR1 958-959].

Dr. Robert Berland, a forensic psychologist, also testified to the following:

REDIRECT EXAMINATION OF DR. BERLAND

BY MR. REITER

Q. Assuming for argument sake that Thomas Provenzano's delusion of being Jesus Christ and the reason that he believes he's being executed is because of that reason, would you think at that point that he had a rational understanding as to why he's being executed?

A. If that were verified to be his true belief, it would appear to me that he did not have a rational understanding.

Q. Would that make him incompetent to be executed under a rational standard?

A. If that is part of the standard, then it would appear under that hypothetical that he wouldn't be.

THE COURT: Doctor, let me ask you, assuming that we have a situation in which a man has a rational factual understanding, if I can use the terms that way, of the process of conviction, vote, arguments about what the vote means, all those things that I think you mentioned in your report on the one hand, and then he has I guess an irrational failure to

accept that's really what happened, he can recite it, he understands it, but he also believes that he's Jesus Christ on the other hand, where does that leave you?

THE WITNESS: Are we responding hypothetically or in terms of -

THE COURT: Let's assume that's the case. I'm not ruling that, for the sake of the record, but for the sake of discussion, let's

assume that's the case here. **We have two realities.**

THE WITNESS: Well, if I didn't know anything else, I would assume there was some relationship between the two, but having read Dr. Lyons' testimony, it explained to me stuff I didn't know about with reference to Mr. Provenzano, and at least that testimony was that there was a relationship between two beliefs, that he understood that the machinations of the judicial system occurred and how they worked but that it was his belief that that was all a show, a ruse by the people who had this conspiracy against him since '74 to effect his imprisonment and ultimately his death. I'm sort of mixing hypothetical and real because I don't know - I don't have verification to my own satisfaction that that's his belief, but at least it explains a connection his factual understanding of what has happened in the judicial process and his irrational belief about what he really thinks it all means

[PR1 1072-1073][emphasis added].

By MR. REITER

Q. If I could ask you this, can an individual have two reality beliefs, two different beliefs about the same subject

matter?

A. In my business, you can't say anything never can or can't happen.

Q. Is it reasonable?

A. In my experience, you would usually expect that there is some connection between the two, that he wouldn't simply hold two independent realities that are in conflict with one another. [PR1 1073-1074]

Q. Is it possible that although he's understanding what's going on with regard to the trial factually and the sentencing factually and the electrocution factually, his belief for the whole thing might be because of the fact that he's Jesus Christ, not for what the reason they are saying but because I believe I'm Jesus Christ?

[PR1 1071-1074]

* * * *

A. My answer would be yes, it's possible... My experience would suggest that you wouldn't expect to find those two things existing simultaneously, it's one or the other or some relations between the two.

[PR1 1074].

Dr. McClaren was recalled by the state and was the concluding witness.

CROSS-EXAMINATION OF DR. MCCLAREN

THE COURT: ...I'm going to ask you to comment on your view of the delusion and its

effect on the defendant's factual understanding of the standard without reciting it to you. What's your view of that? Then I'm going to ask it to you in a slightly different form.

THE WITNESS: There is absolutely no doubt in my mind that he understands the reason that he is facing execution is because of being found guilty of shooting a security officer, bailiff, security deputy or however they are termed in the Orange County Courthouse. I believe he said Officer Wilkerson. He knows that a jury found him guilty of this. He knew that the recommendation was seven to five for death, and he knows that the judge sentenced him to death for this. So there is absolutely no doubt in my mind that he has a factual understanding.

THE COURT: If I change it and inquire the same question except rational and factual understanding of the same thing, would that affect your opinion?

THE WITNESS: No.

THE COURT: Okay. Thank you. Does that generate any further cross?

[PR1 1130-1132].

* * * *

BY MR. REITER:

Q. Dr. McClaren, do you believe that Thomas suffers from a delusion?

A. Yes, I believe he does at times.

Q. And do you believe that delusion has to do with Jesus Christ?

A. Yes.

Q. And do you believe that his delusion includes the fact that he believes there is a conspiracy, because he's Jesus Christ, to have him executed?

A. I'm not sure that I can go that far. I believe that for more than a 20-year period, maybe 25 years, he has had this kind of thinking; however, I believe that he knows that being Jesus Christ is not what is getting him killed. It's having killed a man, a bailiff or bailiff-like person in the Orange County Courthouse.

Q. Well, let me ask you this question just for argument's sake. If in fact Thomas Provenzano's delusion is real to him, that he believes that the reason why he is being executed is because he's Jesus Christ, given that fact, would you be able to say then that his rational understanding would impede his ability to accept another reality of the fact that he's being executed because of shooting someone in Orange County?

A. **It might.**

Q. So basically -

THE COURT: Let me rephrase, put the question - go back to my question. If you accepted the terms that counsel just gave you, that his delusion caused him to believe that's why he's being executed, if you found that to be factual, would that affect your opinion on the either factual understanding or rational - in fact, factual understanding?

THE WITNESS: **Well, I believe that he has them both intertwined, that his being -**

THE COURT: That's exactly what I want you to talk to me about.

THE WITNESS: Right. I believe that they are intertwined, that he has had the idea that he is Jesus Christ, but he also understands the reason that he is being executed, not punished in some other way, is because of the homicide.

THE COURT: Well, if you concluded that he believes, yeah, that's what the court said but my fundamental belief says that it's really because I'm Jesus Christ, and I'm oversimplifying, the court system needs to get rid of Jesus Christ, would that - what would your opinion be then, if you accepted - I know you do not, but if you did and thought he really believed that, although he rationally understood the reasons that were announced but simply it ain't so?

THE WITNESS: I guess that's the crux of the issue and it's just so hard to separate. My belief is that when I questioned him about this Jesus Christ delusion, that he doesn't get into it, doesn't explain it well like other men or people that have had this kind of delusion I have examined.

THE COURT: I understand your position and I really have two situations I at some point have to deal with; one, how far does his delusion go, and what is his beliefs about the reason for the sentence? And if I accept your view, then we don't get to the issue. But if I accept the other view, then I have this problem of do we have somebody who can rationally recite but really believes because of delusion that that isn't the real reason? Where does that leave us in

relationship to the standard? If you have an opinion, fine, if you don't, that's fine too.

[P1 R1132-1135] [emphasis added].

On December 8, 1999, an order was entered finding Mr. Provenzano competent to be executed. On December 9, 1999, Mr. Provenzano filed his Notice of Appeal.

SUMMARY OF ARGUMENT

Mr. Provenzano is not competent to be executed. Justice Powell's concurring opinion in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986) and the definition of "insane to be executed" announced in Florida Rules of Criminal Procedure 3.811 requires that a court analyze and utilize an inmate's entire mental capacity in a determination of competency to be executed. Judge Bentley erroneously unraveled Mr. Provenzano's psyche and merely applied Mr. Provenzano's intellectual ability to understand the legal process. Although Judge Bentley found that attorneys for Mr. Provenzano had proven by clear and convincing evidence that Mr. Provenzano believes that the real reason why he is being executed is because he is Jesus Christ, Judge Bentley erroneously failed to consider that belief as part of the standard for determination of execution.

ARGUMENT

**THE TRIAL COURT ERRED IN APPLYING THE
STANDARD TO BE UTILIZED TO DETERMINE
COMPETENCY TO BE EXECUTED.**

Thomas Provenzano is incompetent to be executed. The quote below by Judge Bentley is the proper standard that should have been utilized for the determination of Mr. Provenzano's sanity to be executed.

After struggling with the issue, the Court finds by clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ.

Provenzano's counsel contends, in other words, that rational acceptance of the reason for death and the process leading to it is inherent to a rational understanding of the facts. If this is found to be the law, then the Court must find Provenzano insane for execution.

[PR1 113].

However, after an admitted difficulty with the issue, the trial court ultimately found Mr. Provenzano competent to be executed². Judge Bentley's order indicated that he had utilized an "objective rationality" test in making his final

²The undersigned wishes to express thanks to Judge Bentley for having been so courageous and candid in explaining his concerns, confusions, and thought process about the execution standard in rendering his order.

determination. In support for using this test, Judge Bentley relied on the two cases cited by this Court in Provenzano v. State, 1999 WL 742293 (Fla. Sept. 23, 1999): Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1988) and United States v. Blohm, 579 F. Supp. 495 (S.D. N.Y. 1983). Although the court found that the objective test is regarded as rational to the average person, it also expressed reservation by stating: "The average person standard is troublesome to the court."

In applying what it deemed the objective standard to be, the court stated:

What does the standard for competency to be executed and specifically rules 3.811 and 3.812 mean? Is a rational acceptance of the reasons for execution necessary? No. Many defendants without mental health problems maintain their innocence though, under the facts, such a position is irrational. This can be said to be a fairly human reaction. The standard does not require this.

[PR1 112].

* * * *

Going one step further, we have a situation in which Provenzano's rejection is based on a delusional belief. The Court finds that the acceptance of the reasons for sentencing, whether rational, irrational, or delusional, is not part of the current standard for competency to be executed. In other words, under the current standard, acceptance of the reasons is a separate issue from a rational understanding of the process. The

present standard is a minimal standard. If the Court has wrongly interpreted the present legal standard, the ultimate finding of this Order will be in error.

[PR1 113] [emphasis added].

The above analysis of objective rationality by the court is not in conformity with the two aforementioned cases upon which it relied. It is quite apparent from the court's interaction with Dr. Berland and Dr. McClaren that the court had difficulty in assessing competency to be executed when an individual has the intellectual ability to understand the process, but his delusion prohibits him from rationally understanding the connection. This is evidenced by the following:

REDIRECT EXAMINATION OF DR. BERLAND

BY MR. REITER

- Q. Assuming for argument sake that Thomas Provenzano's delusion of being Jesus Christ and the reason that he believes he's being executed is because of that reason, would you think at that point that he had a rational understanding as to why he's being executed?
- A. If that were verified to be his true belief, it would appear to me that he did not have a rational understanding.
- Q. Would that make him incompetent to be executed under a rational standard?

A. If that is part of the standard, then it would appear under that hypothetical that he wouldn't be.

THE COURT: Doctor, let me ask you, assuming that we have a situation in which a man has a rational factual understanding, if I can use the terms that way, of the process of conviction, vote, arguments about what the vote means, all those things that I think you mentioned in your report on the one hand, and then he has I guess an irrational failure to accept that's really what happened, he can recite it, he understands it, but he also believes that he's Jesus Christ on the other hand, where does that leave you?

THE WITNESS: Are we responding hypothetically or in terms of -

THE COURT: Let's assume that's the case. I'm not ruling that, for the sake of the record, but for the sake of discussion, let's assume that's the case here. **We have two realities.**

THE WITNESS: Well, if I didn't know anything else, I would assume there was some relationship between the two, but having read Dr. Lyons' testimony, it explained to me stuff I didn't know about with reference to Mr. Provenzano, and at least that testimony was that there was a relationship between two beliefs, that he understood that the machinations of the judicial system occurred and how they worked but that it was his belief that that was all a show, a ruse by the people who had this conspiracy against him since '74 to effect his imprisonment and ultimately his death. I'm sort of mixing hypothetical and real because I don't know - I don't have verification to my own satisfaction that that's his belief, but at least it explains a connection his factual

understanding of what has happened in the judicial process and his irrational belief about what he really thinks it all means.

By MR. REITER

Q. If I could ask you this, can an individual have two reality beliefs, two different beliefs about the same subject matter?

A. In my business, you can't say anything never can or can't happen.

Q. Is it reasonable?

A. In my experience, you would usually expect that there is some connection between the two, that he wouldn't simply hold two independent realities that are in conflict with one another.

Q. Is it possible that although he's understanding what's going on with regard to the trial factually and the sentencing factually and the electrocution factually, his belief for the whole thing might be because of the fact that he's Jesus Christ, not for what the reason they are saying but because I believe I'm Jesus Christ?

A. My answer would be yes, it's possible... My experience would suggest that you wouldn't expect to find those two things existing simultaneously, it's one or the other or some relations between the two.

[PR1 1071-1074].

* * * *

CROSS-EXAMINATION OF DR. MCCLAREN

THE COURT: ...I'm going to ask you to comment on your view of the delusion and its effect on the defendant's factual understanding of the standard without reciting it to you. What's your view of that? Then I'm going to ask it to you in a slightly different form.

THE WITNESS: There is absolutely no doubt in my mind that he understands the reason that he is facing execution is because of being found guilty of shooting a security officer, bailiff, security deputy or however they are termed in the Orange County Courthouse. I believe he said Officer Wilkerson. He knows that a jury found him guilty of this. He knew that the recommendation was seven to five for death, and he knows that the judge sentenced him to death for this. So there is absolutely no doubt in my mind that he has a factual understanding.

THE COURT: If I change it and inquire the same question except rational and factual understanding of the same thing, would that affect your opinion?

THE WITNESS: No.

THE COURT: Okay. Thank you. Does that generate any further cross?

[PR1 1130].

* * * *

BY MR. REITER:

Q. Dr. McClaren, do you believe that Thomas suffers from a delusion?

A. Yes, I believe he does at times.

Q. And do you believe that delusion has to do with Jesus Christ?

A. Yes.

Q. And do you believe that his delusion includes the fact that he believes there is a conspiracy, because he's Jesus Christ, to have him executed?

A. I'm not sure that I can go that far. I believe that for more than a 20-year period, maybe 25 years, he has had this kind of thinking; however, I believe that he knows that being Jesus Christ is not what is getting him killed. It's having killed a man, a bailiff or bailiff-like person in the Orange County Courthouse.

Q. Well, let me ask you this question just for argument's sake. If in fact Thomas Provenzano's delusion is real to him, that he believes that the reason why he is being executed is because he's Jesus Christ, given that fact, would you be able to say then that his rational understanding would impede his ability to accept another reality of the fact that he's being executed because of shooting someone in Orange County?.

A. **It might.**

Q. So basically -

THE COURT: Let me rephrase, put the question - go back to my question. If you accepted the terms that counsel just gave you, that his delusion caused him to believe that's why he's being executed, if you found

that to be factual, would that affect your opinion on the either factual understanding or rational - in fact, factual understanding?

THE WITNESS: **Well, I believe that he has them both intertwined, that his being - .**

THE COURT: That's exactly what I want you to talk to me about.

THE WITNESS: Right. I believe that they are intertwined, that he has had the idea that he is Jesus Christ, but he also understands the reason that he is being executed, not punished in some other way, is because of the homicide.

THE COURT: Well, if you concluded that he believes, yeah, that's what the court said but my fundamental belief says that it's really because I'm Jesus Christ, and I'm oversimplifying, the court system needs to get rid of Jesus Christ, would that - what would your opinion be then, if you accepted - I know you do not, but if you did and thought he really believed that, although he rationally understood the reasons that were announced but simply it ain't so?

THE WITNESS: I guess that's the crux of the issue and it's just so hard to separate. My belief is that when I questioned him about this Jesus Christ delusion, that he doesn't get into it, doesn't explain it well like other men or people that have had this kind of delusion I have examined.

THE COURT: I understand your position and I really have two situations I at some point have to deal with; one, how far does his delusion go, and what is his beliefs about the reason for the sentence? And if I accept your view, then we don't get to the issue. But if I accept the other view, then

I have this problem of do we have somebody who can rationally recite but really believes because of delusion that that isn't the real reason? Where does that leave us in relationship to the standard? If you have an opinion, fine, if you don't, that's fine too.

[PR1 1132-1135][emphasis added].

What the trial court did in its analysis was to unravel or un-intertwine Mr. Provenzano's delusional psyche from his intellectual psyche. And in so unraveling, the court determined that Mr. Provenzano's factual appreciation is sufficient to meet the standard of competency, regardless of his delusional psyche.

Neither the court in Martin nor Blohm made such an analysis. Neither did Justice Powell in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

In its order, the trial court cites Martin for the proposition: [t]hat objective rationality is what would be regarded as rational to the average person. Id at p.1572. The trial court apparently failed to understand that that statement was a conclusion and not an analysis by the Martin court. The Martin court's analysis was expressed at p.1570, as follows:

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 part. 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. [FN20]

Martin, 686 F.Supp. 1523 at 1570.

In its footnote, the court further stated:

FN20. At first, this concept may appear more psychological than philosophical, but that is not the case. This objective determination is fairly cut and dry. A court must determine whether the defendant's logic behind this connection is reasonable; that is, whether the defendant's rationale is consistent with the ordinary experience of human beings. In essence, a judge must sit as a jury would in a negligence action to determine whether the defendant's understanding is rational. As the court analysis indicates *infra*, a similar requirement exists in the Dusky context.

Id. at 1570.

The court in Martin clearly requires the fact-finder to determine whether the defendant's subjective understanding is grounded in reality. In so doing, the fact-finder must determine whether the defendant's logic behind this connection is reasonable; that is, whether the defendant's rationale is

consistent with the ordinary experience of human beings. Had Judge Bentley utilized the analysis described in Martin, a case he cited for support, Judge Bentley would have ultimately found Mr. Provenzano incompetent to be executed. This is demonstrated by Judge Bentley's quote:

Provenzano's counsel contends, in other words, that rational acceptance of the reason for death and the process leading to it is inherent to a rational understanding of the facts. If this is found to be the law, then the Court must find Provenzano insane for execution.

[PR1 113].

The trial court did not utilize this standard in its ultimate finding of competency. However, the trial court did express that Mr. Provenzano had established by clear and convincing evidence that Mr. Provenzano believes that the real reason he is being executed is because he believes he is Jesus Christ [PR1 112]. This belief is not rational as being consistent with the ordinary experience of human beings, and therefore would render Mr. Provenzano incompetent to be executed.

The trial court also cited Blohm for the objective standard. However, the trial court again misapplied the standard. In Blohm, the Court stated the following:

All counsel agree as to the applicability of the Dusky standard. All conceded, and I

concur that Blohm has a factual understanding of the proceedings against him, including a factual understanding of the applicable statutes and procedures. It is the determination of rationality about which the dispute centers. I conclude that the rationality to be demonstrated is that of an objective rationality, what would be regarded as rational to the average person, not to the defendant, not to the psychiatrists, who in this instance considered Blohm competent because his perspective and his acts were consistent with his felt need, his delusion. I conclude that the technical standards which the psychiatrists considered were entirely appropriate for their professional purpose but failed to include the sense of rationality as it is commonly understood. Hence, in my view, the Government and Blohm have urged upon me too narrow a standard. "Rational," as used in the cases, must not be devoid of common understanding...

579 F.Supp. 495 at 499

* * * *

[The psychiatrists] testimony was simply that he could comprehend the possible consequences of his acts. However, their testimony included several observations that support the court's conclusion that Blohm is incompetent to stand trial. Perhaps the most important of these observations concerns Blohm's belief in a conspiracy, discussed in detail above...

Id. at 503

* * * *

The most persuasive evidence of Blohm's incompetency is his continued, irrational belief in the golf conspiracy and his hope to

use this criminal trial as a forum to
"expose" that conspiracy...

Id. at 504

* * * *

His understanding of the pending criminal proceedings is necessarily limited by his belief that there is a conspiracy against him involving a growing number of federal judges and magistrates, attorneys and others...

Id. at 505

Although in Blohm the issue before the court was Blohm's competency to stand trial, the court's analysis of objective rational understanding is the same as competency to be executed. Only the finding is different. The analysis by the court in Blohm did not stop at Blohm's intellectual understanding of the process of all the legal proceedings, but considered his delusional belief as part of Blohm's mental abilities. Obviously, the Court in Blohm considered whether a common understanding of an average person would be rational if they suffered from the same delusional beliefs as Mr. Blohm.

Justice Powell's concurring opinion in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), has been deemed controlling on the issue of insanity to be executed, because his opinion was the deciding vote to sustain a majority

of the court and was a more narrow opinion³. Since Justice Powell's concurring opinion, a number of courts⁴ have cited to his announced standard of "...those who are executed know the fact of their impending execution and the reason for it." Ford, 477 U.S. 399 at 422. However, all but two of the cases fail to examine the paragraph immediately following the announcement of Justice Powell's standard:

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

³Marks v. United States, 430 U.S. 188, 97 S.Ct. 990 (1977)(When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds')(citing Greg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976)); Romano v. Okalahoma, 512 U.S. 1, 114 S.Ct. 2004 (1994); O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct.1969 (1997).

⁴Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1988); Whitmore v. Lochart, 834 F.Supp. 1105 (E.D. Ark 1992); Barnard v. Collins, 13 F.3d 871 (5th Cir. 1994); Fearance v. Scott, 56 F.3d 633 (5th Cir. 1995); Martin at 1567.

Id at 422.

To the best of the undersigned counsel's knowledge, virtually every case addressing this issue has either ignored or overlooked the very next paragraph in Justice Powell's concurring opinion:

Petitioner's claim of insanity plainly fits within this standard. According to petitioner's proffered psychiatric examination, petitioner does not know that he is to be executed, but rather **believes** [emphasis added] that the death penalty has been invalidated. If this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted...[emphasis added].

Id at 422.

If Justice Powell's announced standard is the applicable law to be utilized, so should his analysis for the application of that standard. Justice Powell indicated that Ford would not be competent to be executed if he did not know that he was to be executed due to his belief that the death penalty had been invalidated. Nowhere does Justice Powell separate Mr. Ford's intellectual abilities from his delusions. To the contrary, Justice Powell considered Mr. Ford's belief in the application of the standard he announced; and in so applying the standard suggested that if the Doctor's assessment of Mr. Ford is correct

he could not be executed.

Since Ford, a number of Federal Courts have interpreted Justice Powell's concurring opinion in a literal fashion: does the prisoner understand the fact of his impending death and the reason for it. (See footnote 4). However, these cases fail to apply the standard with the same interpretation as did Justice Powell.

In Shaw v. Armontrout, 900 F.2d 123 (8th Cir. 1990), the Eighth Circuit Court of Appeals affirmed the district court's denial of Mr. Shaw's habeas petition to review the competency of Shaw to be executed. In reviewing the facts of Mr. Shaw's case the circuit court stated:

After a careful review of the record, we have no difficulty concluding there is fair support for the state court's findings. Having reached this conclusion, we must defer to the state court's relevant factual determinations... Thus, the state court's decision that Shaw "understand[s] the nature and purpose of the punishment about to be imposed upon him" and is competent to be executed disposes of Shaw's eighth amendment claim.

Id at 126.

Mr. Shaw's case is substantially distinguishable from the

case sub judice. Mr. Shaw's claim of competency to be executed was basically: "Shaw claims the eighth amendment categorically prohibits the execution of a brain damaged person like himself." Id. at 124. All of the medical experts in Mr. Shaw's case opined that the content of Shaw's thought does not reveal any delusions, obsessions, phobias, bizarre ideas, or any psychotic features. According to findings of the medical expert's in Shaw's case, Mr. Shaw's understanding of the nature and purpose of his punishment was based in reality. Id. at 125.

This is not the situation in Mr. Provenzano's case. Judge Bentley specifically found that Mr. Provenzano had proven by clear and convincing evidence that Mr. Provenzano believes that the **real** reason he is being executed is because he is Jesus Christ. Further, Judge Bentley specifically found that Mr. Provenzano suffers from delusions.

In Barnard v. Collins, 13 F.3d 871 (5th Cir. 1994), the Fifth Circuit Court of Appeals affirmed the district court's denial of Mr. Barnard's Certificate of Probable Cause. As part of Mr. Barnard's claims, the issue of Mr. Barnard's competency to be executed was raised. In finding that the state court had sufficiently complied with the Eighth Amendment, the court recited from the state court's findings, as follows:

In one of its factual findings, the state court stated that [b]ased on the reports and evaluations and testimony of Appellant's and the Court's mental health experts, Texas Department of Criminal Justice medial records, and the sworn statements of TDCJ personnel, the Court finds that Applicant comprehends the nature, pendency, and purpose of his execution. Applicant knows that he was found guilty of killing a young boy in a robbery in Galveston County and that his pending execution was because he had been found guilty of that crime. He knew of the date of his scheduled execution and that it would be lethal injection by use of an intravenous injection. Applicants' experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.

Id at 876.

The Fifth Circuit Court of Appeals found, in regard to the above quote, that Barnard knew that he was going to be executed and why he was going to be executed - precisely the finding required by the Ford standard of competency. Id at 877.

First, the finding by the state court acknowledged that Mr. Barnard's experts opined that Mr. Barnard's perceptions for the reason for his conviction and pending execution was at times distorted by a delusional system in which Mr. Barnard attributes

negative happenings to him as a conspiracy of Asians, Jews, Blacks, and the Mafia. The state court didn't verbalize whether the court found that that fact was proven by the requisite standard of proof or whether Mr. Barnard's delusions were based in reality, or whether the delusions had an interrelationship with his intellectual understanding. However, in Mr. Provenzano's case, all three situations do exist. Mr. Provenzano established by clear and convincing evidence that his delusions are not based on reality and his delusional beliefs are intertwined with his intellectual understanding of the legal proceedings.

Second, the state court ignored Mr. Barnard's "perception of the reason for his conviction and pending execution." Yet the Fifth Circuit Court of Appeals stated that the state court's finding was "precisely the finding required by the Ford standard of competency." Appellant respectfully contends that the analysis of both courts was erroneous. Justice Powell specifically established that a defendant's perception of the connection between the crime and punishment is required. Ford, 477 U.S. 399 at 422. Both the state court, as well as the federal court, erroneously failed to acknowledge that the defendant's perception is a requirement as part of the competency

standard as held by Justice Powell.

In Whitmore v. Lockhart, 8 F.3d 614 (8th Cir. 1993), the court affirmed the district court's finding that Whitmore was competent to be executed. The findings and ruling of the district court are found at Whitmore v. Lockhart, 834 F.Supp. 1105 (E.D. Ark 1992). No evidence was introduced that Mr. Whitmore suffered from any serious mental illness, psychosis, or delusions. Dr. Jackson, a neuropsychologist, found that not only did petitioner understand he had been sentenced to death and the reasons for that sentence, but that he was without significant neuropsychological impairment. Id. at 128. No evidence was produced by Mr. Whitmore's expert providing a basis for concluding that Mr. Whitmore was incompetent.

Mr. Provenzano's circumstance is substantially distinguishable from Mr. Whitmore's situation. Mr. Provenzano does suffer from a mental illness and delusions. Mr. Provenzano's delusions are specifically intertwined with his rational understanding of the impending death and the reason for it. Mr. Provenzano has proven by clear and convincing evidence that he believes that the reason he is being executed is because he is Jesus Christ and not for the crime for which is was convicted.

Perhaps the case most similar to the case sub judice is Weeks v. Jones, 52 F.3d 1559 (11th Cir. 1995). In reviewing the state court's finding that Mr. Weeks was competent to be executed, the circuit court made comment of the standard as to competency to be executed:

While our circuit has not articulated a standard as to competency to be executed under Ford, we need not determine this issue to decide Week's emergency motion for stay of execution and certificate of probable cause. Whatever the standard is, it is no higher than the ABA standard advanced by Weeks and used by the state trial judge. [See Martin v. Dugger, 686 F.Supp. 1523, 1572 (S.D. Fla. 1988)].

Id at 1562.

The circuit court found that the state trial judge had provided Mr. Weeks with every opportunity to present all witnesses and evidence in support of his claim. The circuit court further found that the state trial judge based its findings on facts presented at the evidentiary hearing and are not debatable among jurists of reason and could not be resolved differently. Id. at 1562.

As part of its opinion, the circuit court attached the state trial judge's order. The relevant circumstances of Mr. Weeks, as described by the state trial judge, was as follows:

All of the experts agree that the Defendant has the ability to respond appropriately to the concrete and specific questions relating to the present moment and to correctly relate back to an interviewer what, for lack of a better term, the undersigned Judge will call a public or common understanding of such matters. The intriguing argument of defense counsel and of the experts who have testified on behalf of the Defendant is that the Defendant himself does not actually participate in an "understanding" of these matters in the same way that a "normal" person would.

Id at 1570.

* * * *

...The undersigned Judge believes and finds that the attempts by expert medical witnesses for the Defendant to look beyond the objective data; i.e., the Defendant's response to direct questions, is speculative. Previously in this opinion, we have noted that the Defendant is schizophrenic, paranoid type and the suffers from delusions. The Defendant asserts that he is God in various manifestations, such as God the Father, Jesus Christ, Allah. But the Defendant knows that when he is executed, his physical life will come to an end. He believes that he will then be transformed. It is precisely here that the expertise of medical experts breaks down. April 14, 1995 - the final hearing date - was Good Friday; and there are millions of people who believe that death is merely a transformation as a result of what happened on Good Friday and the following Sunday morning... These are matters of religious belief, and there is a limit to human/scientific knowledge and expertise in these matters. Dr. Lyman, one of the experts for the Defendant responded, with appropriate

humor, that while millions of others may feel that death is a beginning of life immortal, in Heaven, most people "don't think they will be running the place." What the expert says may be true, but it is also true that what happens beyond death is beyond his expertise; and the Defendant and anyone else is free to believe what they wish about the hereafter. Likewise, the opinion expressed by experts - that the delusions associated with race evidence the Defendant's delusional understanding of the nature of his execution and death - will not stand close scrutiny. The majority of persons on death row, in fact, are Black, and there are many persons who correctly or incorrectly believe that racial persecution is associated with the death penalty. For the Defendant to make such an assertion, although this Court does not find such an assertion to be factually well-founded, is not so highly irregular and inappropriate as to cause his understanding of his pending execution to be attributable to delusion.

Id at 1571.

* * * *

The above analysis by the state judge in Weeks considered how Mr. Weeks' delusions affected his rational understanding of the impending death and the reason for it. The trial judge did not separate his intellectual abilities from his delusions, but reasoned that Mr. Weeks' understandings were no different than that of the normal average person, coupled with Mr. Weeks' delusional beliefs. Id at 1572. The trial judge was correct in assessing that Mr. Weeks' belief that he was God did not cause

any unrealistic understanding of the connection between his crime and punishment, because Mr. Weeks did not attribute his impending execution to the fact of his belief that he was God, but acknowledged that he was being executed because of his crime.

[emphasis added].

There is a major difference between the effect of Mr. Weeks' delusion and that of Mr. Provenzano's. Mr. Provenzano's reality - delusional belief -- is that the trial, conviction, sentence of death, and execution is a conspiracy to kill Jesus Christ. Because he is Jesus Christ, the state created this ruse to execute him. Mr. Provenzano's belief as to why he is being executed is not based on reality, or a common understanding of that of an average normal person.

Despite the fact that the state trial judge made an analysis of the interrelationship of Mr. Weeks' delusional system and his intellectual understanding, the court opined that such an analysis was not necessary:

If indeed the Defendant's understanding of his current status, the nature of the present proceedings, the role of the persons involved in those proceedings, and the nature and reason for his pending execution, are all the products of a delusional pattern, the extent to which his delusional pattern coincides with reality is truly remarkable. Under the

circumstances, the discovery of a delusional pattern and its products are quite mysterious, and can hardly form the basis for a predictable application of a rule that requires that a person be competent for execution. The open, apparent ability of the Defendant to respond cogently and appropriately to direct questions is a much more dependable guide to what the Defendant understands than is the vague and speculative suggestion of the experts.

Id at 1572,1573.

What the state trial judge in Weeks failed to acknowledge is that judges speculate everyday as to what was or is in the minds of the litigants before them. If looking only to the open, apparent ability of the defendant to respond cogently and appropriately to direct questions as the measuring stick to determine competency to be executed, experts and an evidentiary hearing would be unnecessary. All that would be required is for a judge to ask the defendant factual questions. If the Defendant can answer them openly and appropriately, he would be competent for execution. But what of those situations where a defendant is lying, was coached, or suffers from intermittent lucidity. A perfunctory inquiry, such as that suggested by the state trial judge in Weeks, might certainly lead to an inaccurate assessment without an in-depth analysis of the defendant's mental state.

That was not the intended holding of the plurality court in

Ford, nor of Justice Powell's concurring opinion. Just because an analysis of this type is difficult to assess, that does mean that the attempt should not be made.

Mr. Provenzano is not attempting to persuade this Court that all individuals who suffer from mental illness are incompetent to be executed or that all delusions prevent a prisoner from rationally understanding the fact of his impending death and the reason for it. However, it is contended by Mr. Provenzano that when a mental illness or a delusion is directly intertwined with the prisoner's factual understanding, a court must consider the perception of the prisoner and determine whether that prisoner's perception and beliefs, taken as a whole, are based in reality such as that of a normal average person.

It is also Mr. Provenzano's contention that the application of the standard for execution demands that a trial court consider a defendant's entire mental state in deciding whether he is competent to be executed. Further, Mr. Provenzano believes that had Judge Bentley not unraveled Mr. Provenzano's psyche, but had considered whether Mr. Provenzano's delusional system prevents him from understanding the reason for his execution as compared to that of an average normal person, Judge Bentley would have found Mr. Provenzano incompetent to be executed.

If the history and concept of the death penalty is in fact primarily for the purpose of retribution, and retribution is not inflicted on the insane as perceived by Justice Marshall and Justice Powell in Ford, 477 U.S. at 2610, then based upon the present mental state of Mr. Provenzano, society would certainly not be receiving their full-pound of flesh as retribution. Given Mr. Provenzano's present mental state, society would at best be receiving an once or two. As noted by Justice Powell, the issue of competency to be executed is not to establish **whether** but **when** the execution will occur. Id. at 2610.

The findings of the Ford Court did not provide much guidance in the specific application of awareness to the standard for sanity to be executed. The issue of how rational understanding is to be applied to the standard set out in Florida Rules of Criminal Procedure 3.811 is a quasi first impression issue to be decided in the State of Florida. Although this Court implied in Martin v. State, 514 So.2d 189 (Fla. 1987) that a rational understanding of the relation between the crime and punishment did not apply, this Court acknowledged in Provenzano, 1999 WL 742293 at 4, that the rationality to be demonstrated "is that of an objective rationality what would be regarded as rational to the average person". (citing Blohm at 499).

CONCLUSION

Judge Bentley's order finding Mr. Provenzano competent to be executed is riddled with concerns for and troubles with the application of the standard of competency for execution. In as much as Mr. Provenzano has established by clear and convincing evidence that he believes that the real reason for his execution is because he is Jesus Christ, the proper avenue is to assure that the spirit of the Eighth Amendment's prohibition of execution of the insane is to place Mr. Provenzano in a hospital until there can be a determination with reasonable certainty of Mr. Provenzano's competency.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **CORRECTED INITIAL BRIEF OF APPELLANT**, which has been typed in COURIER NEW font size 12, has been furnished by to all counsel of record by either United States Mail, first class /federal express /facsimile transmission and/or hand delivery on January 26, 2000.

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