IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs. **CASE NO. SC00-1222**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

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STATEMENT OF THE CASE AND FACTS

Appellant Thomas Provenzano was convicted of first degree murder and two counts of attempted first degree murder and sentenced to death in 1984. This Court affirmed his convictions and sentences in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987). Postconviction relief was denied in state and federal courts. See, Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), affirming, Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M.D. Fla. 1997).

On June 9, 1999, the Governor signed a second death warrant for Provenzano's execution on July 7, 1999. Provenzano filed a 3.850 motion to vacate which was summarily denied. The denial of relief was upheld by this Court. Provenzano v. State, 739 So. 2d 1150 (Fla.), cert. denied, 120 S. Ct. 13 (1999); see also, Provenzano v. Moore, 737 So. 2d 551 (Fla. 1999) (denying state habeas petition during warrant); In re: Provenzano, 179 F.3d 1326 (11th Cir. 1999) (denying application for successive federal habeas petition during warrant).

On July 5, 1999, Provenzano invoked the provisions of Section 922.07, Florida Statutes, by notifying the Governor of his claim of insanity for execution. After the Governor determined that Provenzano is sane, a motion for a hearing on insanity was filed in

the Eighth Judicial Circuit. Provenzano was granted a brief stay for consideration of the motion but then, following the execution of Allen Lee Davis, this Court mandated that an evidentiary hearing be held with regard to the constitutionality of Florida's electric chair. Ultimately, Provenzano was also granted an evidentiary hearing on his claim of insanity. Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Provenzano v. State, 750 So. 2d 597 (Fla. 1999). However, relief as to both the electric chair and competency issues was eventually denied. Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999), cert. denied, 120 S. Ct. 1222 (2000); Provenzano v. State, 25 Fla. L. Weekly S408 (May 25, 2000).

On May 30, 2000, Governor Bush designated the week beginning at 9:00 a.m. on June 19, 2000, for Provenzano's execution, and the execution was thereafter scheduled for June 20, 2000, at 6:00 p.m. Provenzano filed a motion for postconviction relief and for a stay of execution on June 15, 2000. The motion for postconviction relief raised six issues: (1) whether Florida's procedures for lethal injection violated the constitutional prohibitions against cruel and unusual punishment; (2) whether the Department of Corrections (DOC) had complied with Provenzano's requests for the disclosure of public records; (3) whether newly discovered evidence established Provenzano's innocence; (4) whether newly discovered evidence established that Provenzano was innocent of the death penalty; (5) whether Provenzano was entitled to a new trial due to

the instructions given to his jury on his defense of insanity; and (6) whether Provenzano's right to due process would be violated by restrictions on public access to procedures conducted in preparation of his execution. The Honorable O.H. Eaton, Jr., was temporarily assigned to the Ninth Judicial Circuit in order to consider the motion. A hearing was granted as to all issues raised in the motion, and the hearing was conducted on June 17 and 18, 2000.

Provenzano presented the testimony of William Matthews, a physician's assistant employed by DOC that witnessed the execution of Bennie Demps; George Schafer, the attorney that had represented Demps; James Crosby, Warden of Florida State Prison; Dr. William Kremer; Dr. Denise Clark; and Dr. Scott Morrow. The State presented the testimony of Dr. William Hamilton, Medical Examiner for the Eighth Judicial Circuit; John Burke, a Special Agent from the Florida Department of Law Enforcement that witnessed the Demps execution; and Dr. Tim Bullard, Director of Emergency Services for Orlando Regional Health Care. Chain of custody witnesses were also presented by each side.

Following the hearing, Judge Eaton denied the motions. His written order addressed each of the issues raised in the motion to vacate:

> The defendant, Thomas Harrison Provenzano, who is scheduled for execution two days hence for the January 10, 1984, murder of William Arnold Wilkerson, has filed a successive motion for post conviction relief alleging

six separate grounds. The court scheduled an evidentiary hearing beginning on June 17, 2000. The court took an evening recess and continued the hearing during the morning of June 18, 2000.

The six grounds will be addressed in turn.

Ground one of the motion claims the procedures for lethal injection in Florida constitute cruel and unusual punishment because of severe pain and mutilation is suffered by the condemned prior to injection of the chemicals used in the actual execution. The evidence presented on this issue was actually a critique of the latest execution involving Bennie Demps. Several witnesses who were present at the Demps execution testified.[1]

William F. Matthews is a physician's assistant who was present during the proceedings prior to Demps being taken into the execution chamber. He testified to the events in great detail. Demps was cooperative and even joked with the execution team. An IV was successfully inserted into Demp's left arm but the team had trouble with the right arm. They tried a vein in Demp's [sic] thigh but were unsuccessful and then attempted a "cut down" on his right ankle. After consulting with a member of the team, Warden Crosby decided to abort any attempt to start another IV and Demps was taken into the execution chamber. Other witnesses, including Agent John Burke of the Florida Department of Law Enforcement, testified substantially the same. A local anesthesia was used before the procedures were started and Demps was made as comfortable as could be under the circumstances.

Several physicians testified. None of them were present at the execution but they all agreed that a "cut down" procedure is rarely used today to insert an IV. Dr. Bullard, who is Director of Emergency Services for Orlando Regional Health Care stated that other methods

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[1]Certain witnesses who were members of the execution team, including the persons who actually inserted the syringes and performed the cut down procedure were excluded pursuant to F. S. 922.10, 922.106 and 945.10(e). Some of the provisions of these statutes have been recently enacted. Exclusion of the witnesses may have been incorrect but the court is satisfied that their testimony would have been merely cumulative. For instance, it is doubtful that the exact amount of anesthesia used during the procedure could be determined and other witnesses testified that anesthesia was used and that Demps had minimal complaints of pain.

are used because they are quicker and, in a hospital setting, there is equipment available to take care of complications that may arise. Since the execution preparation room could hardly be called a hospital setting, the "cut down" procedure was appropriate. Dr. Bullard stated that the procedure is "perfectly safe. No one has ever died from it." He believed the procedures used were well thought out and met the standard of medical care expected.

The photographs in evidence were taken at the office of the medical examiner in Gainesville and at the funeral home in Tallahassee. The medical examiner testified that he made the incision that appears on Demp's [sic] leg but he did not perform an autopsy at Demp's [sic] request due to religious reasons. The photographs taken by the medical examiner's staff show the area of the leg both before and after the incision was made and the court is satisfied that Demps was not mutilated in any way. The execution was carried out in a professional, respectful manner.

The testimony in the Sims case was admitted into evidence by the parties. This court presided over that hearing and recalls the testimony concerning the manner and procedure used in lethal injection executions by the Department of Corrections. This court found that procedure to be appropriate and constitutional.

The difficulties incurred in the Demps execution were not linked by evidence to any potential problem facing Mr. Provenzano. For instance, there was no testimony that it will be difficult to establish an IV in his veins or that a secondary method would be unsuccessful. The court is convinced that even if such difficulty is encountered, it is not unusual and medical solutions to rememdy [sic] the difficulty are not unnecessarily cruel or painful.

Ground II complains of lack of production of public records. On June 16, 2000, the court held a telephonic scheduling hearing with counsel and addressed this issue. The court requested defense counsel to disclose exactly what he wanted by way of public records and ordered produced everything he requested. Thus, this ground is moot.

Grounds III, IV and V are claims of newly discovered evidence which are not new and are procedurally barred.

Ground VI claims that witnesses are excluded from viewing the entire execution which amounts to a due process violation and an Eighth Amendment violation. It is undisputed that the condemned prisoner is "prepared"

for execution in a room adjacent to the execution chamber. That room is the same room in which the prisoner's cell is located. The prisoner is taken from his cell and strapped to a gurney. Then two IV's are inserted - normally one in each arm - and the prisoner is moved into the execution chamber. Once the prisoner is positioned in the execution chamber the curtain closing the chamber off from the witnesses is opened. The prisoner is given an opportunity to speak after which the Warden signals to begin the execution. After the prisoner is pronounced dead the curtain is closed. No witnesses listed in 922.11(2) are allowed in the execution chamber itself or in the area where the prisoner is prepared for execution.

The defense has cited two cases for the proposition that witnesses should be present from the time the prisoner is placed in restraints until the time death is pronounced. The first case is Oregon Newspaper Publishers Asso. v. Oregon Dept. of Corrections, 988 P.2d 359 (Or. 1999). The case is readilly [sic] distinguishable from the Florida scheme in that the Oregon statute is different from Florida's. F.S. 922.11 regulates who shall be present at the execution and does not provide for witnesses to be present during the time the prisoner is being prepared for execution. Never the less, the Warden has some discretion and has made it a practice, as in the Demps case, to have an Agent from FDLE present as an observer.

The other case relied upon by the defense is California First Amendment Coalition v. Calderon, 956 F.Supp. 883 (N. D. Cal. 1997), which is also reported at 88 F.Supp.2d 1083. In that case witnesses were allowed into the observation room after the condemned had been strapped to the gurney and the intravenous tubes had been inserted into his arms. The witnesses did not hear the execution order. After several minutes in the observation room, the witnesses were told that the prisoner was dead. Apparently, the prisoner made no statement and the witnesses could not tell if he was alive or dead during their observation.

Judge Walker wrote the opinion in the case and held that the First Amendment protects access to executions and directed the Warden of San Quintin to "allow the witnesses to view the procedure at least from the point in time just prior to the condemned being immobilized, that is strapped to the gurney or other apparatus of death, until the point in time just after the prisoner dies."

> That is Judge Walker's opinion and he is entitled to it. However, this court does not find it persuasive. Under the Florida procedure, the condemned is brought into the execution chamber and given an opportunity to speak. Thus, there can be no doubt that the condemned is alive at the time and, like Demps, able to register any complaint he may have, exaggerated or not. Only after the prisoner makes his final statement does the Warden order the execution to proceed and the witnesses can see him do it.
>
> Additionally, it should be noted that execution by electrocution also requires some preparation. The prisoner has his head and ankle shaved and a gel is applied to the scalp. This is done outside the presence of witnesses and is certainly not part of the execution itself.
>
> There are practical reasons to limit witness access to the preparation process including the varying degrees of cooperation prisoners may give to corrections officials prior to being strapped to the gurney. In any event, this court does not take the narrow view of the definition of execution as was taken in the cases cited.
>
> CONCLUSION
>
> Based upon the evidence presented the court concludes the procedures for lethal injection used by the Department of Corrections are appropriate and pass constitutional muster. The court further concludes that the defendant is entitled to no relief.

(Order Denying Motion to Vacate Judgment and Sentence and Denying Motion for Stay of Execution, rendered by the Honorable O.H. Eaton, Jr., on June 18, 2000). This appeal follows.

SUMMARY OF THE ARGUMENT

Provenzano has failed to demonstrate any error in the trial judge's ruling to deny his motion to vacate. The court below conducted an evidentiary hearing and thereafter made factual findings which are supported by competent, substantial evidence. The order entered below must be affirmed in all respects.

ISSUE I

PROVENZANO IS NOT ENTITLED TO RELIEF ON HIS CLAIMS THAT FLORIDA'S PROCEDURES FOR LETHAL INJECTION CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT AND ITS USE OF LETHAL INJECTION IS UNCONSTITUTIONAL BECAUSE SEVERE PAIN AND MUTILATION ARE INFLICTED ON THE CONDEMNED PRISONER.

Provenzano initially challenged the constitutionality of Florida's execution procedures in light of the recent execution of Bennie Demps. In rejecting this claim, the court below found that Demps' "execution was carried out in a professional, respectful way." (V6/1026).[2] This finding is supported by competent, substantial evidence, and therefore must be affirmed on appeal. Furthermore, this finding clearly refutes any claim of Eighth Amendment error with regard to the Demps execution, as well as any claim of a potential Eighth Amendment violation with regard to Provenzano's scheduled execution.

At the hearing below, several witnesses to Demps' execution offered testimony about the circumstances involved. William Matthews, a licensed physician's assistant, testified that he observed a medically trained person successfully insert an IV line into Demps' left arm (V1/34). However, the secondary IV line which was attempted on Demps' right arm did not work properly, so a decision was made by a medical member of the execution team to

[2]References to the record on appeal are designated by the volume number, followed by the appropriate page number.

attempt to insert an IV line into Demps' femoral vein (V1/38). This procedure was performed in the area of Demps' right groin (V1/44). Matthews observed the administration of an anesthetic, Lidocaine, at the area (V1/45). Matthews noted that a bottle of 50 ccs of Lidocaine was used, and that over the course of the preparation, almost the entire bottle was used (V1/47). He estimated that at least 20 ccs were used at the groin site (V1/47). A scalpel was used to place a small nick or puncture in the skin, much smaller than what might occur if a person cut themselves while shaving (V1/48). Then a needle was used to attempt to insert a J-wire into Demps' femoral vein (V1/51).

Although the color of the blood indicated that the syringe was properly inserted into the vein, once again the execution team could not get a proper flow from the attempted IV (V1/50, 63). At that point, a decision was made by a member of the execution team with the appropriate qualifications and training, to perform a cut down procedure (V1/63). The procedure was performed on Demps' right ankle by a person with appropriate qualifications and training, and involved anesthetizing the skin and making a small incision (V1/63-69). Prior to the completion of the procedure, an administrative decision was made to abandon the attempt to complete an alternate line and to proceed with the execution utilizing the primary IV line that had been inserted in the left arm (V1/71).

Warden James Crosby affirmed that the insertion of the IV line

into the left arm and the attempts to insert a line into the right arm, groin, and ankle were conducted by individuals with appropriate training and qualifications (V1/134, 137). Warden Crosby noted that he spoke with inmate Demps prior to the preparation for his execution, and that Demps had declined a sedative and had walked, at Demps' request, unrestrained to the gurney (V1/147, 149). Crosby observed the insertion of the primary IV and the attempts to insert the alternate IV (V1/133-136). The cut down procedure had been anticipated by DOC in the event that there was difficulty finding a vein during an execution (V1/138). An anesthetic was used, and a medical person assured Crosby that Demps' could not feel pain based on the amount of anaesthesia that had been used (V1/154). During the preparation time, Demps talked about everybody singing "Hang down your head Tom Dooley" and commented that this was the best treatment he had gotten while at DOC (V1/149). Crosby stated directly that there were no out-of-state personnel involved in the earlier lethal injection executions on inmates Sims and Bryan (V1/142).

Florida Department of Law Enforcement Special Agent John Burke also testified as to his observations during the preparation for Demps' execution (V2/309-346). According to Burke, the execution staff explained all of the medical procedures to Demps before they were initiated, from the first IV through the cut down procedure (V2/313). Burke noted that the attempt to insert an IV into the

femoral vein and the cut down procedure were performed after the administration of Lidocaine, and that the execution team was responsive to any concerns or complaints by Demps (V2/314). Demps' demeanor was composed, and he joked with the execution staff during the preparations (V2/311). Throughout the preparation procedures, the execution team was professional and respectful, and Demps did not appear to be in any unnecessary or severe pain (V2/320).

The State and the defense both admitted photographs into evidence at the hearing. Defense Composite Ex. 1 was identified as photographs taken at the funeral home after Demps' body had been released from the medical examiner's office (V1/84). State's Composite Ex. 1 was identified as photographs taken at the medical examiner's office at the time of the examination of Demps' body (V2/214). The Medical Examiner, Dr. William Hamilton, testified that he did not conduct an autopsy because Demps had requested, for religious reasons, that no autopsy be conducted (V2/288). However, Dr. Hamilton conducted an external examination of Demps' body, and his report of this inspection was admitted into evidence at the hearing below (V2/297). Dr. Hamilton stated that, as part of his inspection, he made an incision to Demps' right groin area where Hamilton had observed a small puncture (V2/291). The purpose of the incision was to determine whether there was blood in the tissues around the area to indicate what had happened during the attempt to insert the IV in Demps' femoral artery (V2/296). The

pictures from the medical examiners' office depict Demps' groin area before, during and after Hamilton's inspection through the incision (V2/291).

Provenzano presented three doctors that testified that cut down procedures were no longer used as often in the medical community as there were other procedures preferred to accomplish the same purposes (V1/163, V2/226,252). Dr. William Kremer testified that it would be more common a practice to insert a catheter into a jugular or subclavicle vein rather than doing a cut down (V1/164). Kremer had reviewed the photographs from the funeral home and previously assumed that the incision depicted at Demps' groin had been made by DOC at the execution rather than by the medical examiner; if this had been true, Demps may have been in a great deal of pain (V1/170, V2/218). Kremer could not find anything to criticize about the cut down incision at the ankle and could not say, without knowing how much anesthetic was used, whether this would have caused pain (V1/167).

Drs. Denise Clark and Scott Morrow confirmed that cut down procedures are uncommon in today's medical society, and that using a central line through the jugular or subclavicle was the better approach (V2/226, 252). Dr. Morrow estimated that it would take about 2 to 5 ccs of Xylocaine or Lidocaine to relieve the pain from the incision in the ankle and 10 to 20 ccs for the longer incision in the groin, which Dr. Morrow also believed had been done by DOC

rather than the medical examiner (V2/257). Dr. Morrow noted that, based on the evidence he had heard and his review of information about the Demps' execution, he believed that DOC had done a good job of keeping Demps comfortable (V2/271).

The State presented the testimony of Dr. Tim Bullard, Director of Emergency Services for Orlando Regional HealthCare (V2/347). According to Dr. Bullard, performing a central line access IV involved risks which should not be undertaken unless there was a proper facility to handle any complications (V2/356). Dr. Bullard noted that the jugular and subclavicle veins are much deeper than the femoral vein, and that it is not possible to use pressure to stop hemorrhaging if there was an accidental puncture to the heart or to an artery (V2/352). Such procedures are usually done in a hospital setting, where an X-ray could be used to confirm the proper placement of the catheter and there is the ability to insert a chest tube in the event a lung is punctured (V2/356-358). This procedure would not be performed at a doctor's office or by paramedics in the field (V2/356, 357).

The doctors acknowledged that most IVs in a hospital setting are started by nurses rather than doctors and that paramedics and other properly trained individuals are authorized to start IVs in non-hospital settings (V1/176). In addition, there was agreement that some body types, such as heavy or overweight individuals, can contribute to a difficulty in finding an appropriate vein (V1/177).

It was noted, in the record, that Demps appeared to be overweight (V1/177).

Despite Provenzano's desperate attempts to sensationalize Demps' execution by characterizing it as "botched" and resulting in a "butchered" body, the evidence presented below demonstrated nothing more than the fact that Demps' execution was briefly delayed due to difficulty in locating a suitable vein for the insertion of the IV catheter. Such difficulty is hardly unknown in lethal injection executions, and this incident clearly does not render Florida's method of execution unconstitutional. See, Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997) (acknowledging report of difficulties with lethal injection executions in Texas, Arkansas, and Oklahoma, including "problems in finding a suitable vein").

In Sims v. State, 754 So. 2d 657 (Fla. 2000), and Bryan v. State, 753 So. 2d 1244 (Fla. 2000), this Court rejected similar attacks on the constitutionality of lethal injection. In Sims, this Court stated, "we conclude that the procedures for administering lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. Nothing presented at the hearing below casts any doubt as to the propriety of this Court's holdings in Sims.

In rejecting this claim, the court noted that Demps was

cooperative and joking during the preparation procedures (V6/1025). The court found that a local anesthesia was used before the procedures were started and that Demps was made as comfortable as he could be under the circumstances (V6/1025). The court also found the cut down procedure was safe and appropriate since the execution preparation room was not a hospital setting (V6/1026). The court specifically noted that Demps "was not mutilated in any way" and that the execution was conducted in a professional, respectful manner (V6/1026). Finally, the court observed that there had been no evidence which suggested that the difficulties encountered during the Demps execution presented any potential problem for Provenzano, but that even if such difficulty were to be incurred, it would not be unusual and that medical solutions to remedy the difficulty are not unnecessarily cruel or painful (V6/1027).

To the extent that Provenzano may complain about the court's refusal to compel the State to furnish the individuals that performed the medical procedures on Demps as witnesses at the hearing, no error can be demonstrated. Obviously, the identification of these individuals is confidential, and the court could not protect this confidentiality if they were presented as witnesses. As noted in Issue II, this confidentiality has previously been upheld in constitutional challenges. The State recognizes that there might be situations where overriding

constitutional concerns are presented which might require the disclosure of the identification of execution team members, such is not the case at bar. Provenzano cannot identify any particular information from these individuals that is necessary to the resolution of his claims. Although he may prefer to know minute details of the Demps' execution which could not be provided by the witnesses below, such as the exact amount of Lidocaine administered or the exact depth of the incision used for the cut down procedure, it is not clear that the individuals involved could even provide such information beyond what Matthews testified to but, more importantly, such specifics are not necessary to resolve the Eighth Amendment claim presented. Judge Eaton specifically noted that he was satisfied that any testimony from the excluded persons would have been cumulative; "[f]or instance, it is doubtful that the exact amount of anesthesia used during the procedure could be determined and other witnesses testified that anesthesia was used and that Demps had minimal complaints of pain" (V6/1025).

To the extent that Provenzano has alleged a violation of the federal Controlled Substances Act, he has not offered any argument as to what violation has occurred or what relief he is claiming to be entitled to. Regardless, however, this Court clearly has no jurisdiction over the alleged violation of a federal law, and therefore this Court need not review this allegation.

Provenzano's conclusion on this claim may allege that DOC

failed to follow its procedures during the Demps execution. Testimony at the hearing below established that Warden Crosby made an administrative decision, after consulting medically trained members of the execution team, to forego further attempts to establish an alternate IV line once it was determined that the primary IV line would be sufficient. To the extent that Provenzano claims that any deviation from the written procedures compels relief, he is mistaken. Warden Crosby's testimony establishes that the decision to deviate from the intended guidelines was a good faith effort to prevent any further discomfort to Demps. Furthermore, case law clearly establishes that any such deviation does not provide any basis for a claim of constitutional error. Provenzano, 739 So. 2d at 1153-54 (despite questions about whether protocols were followed, in the absence of any showing of unnecessary and wanton pain or torture or lingering death, no stay would be granted); In re: United States, 197 F.3d 310, 315 (8th Cir. 1999) (noting federal death penalty protocols create no enforceable procedural or substantive rights for criminal defendants). DOC's execution day procedures are intended to be guidelines which may be altered to the extent necessary to assure that the execution is carried out properly and effectively. There is no allegation in the instant case that any possible deviation from these guidelines increased the risk of an Eighth Amendment violation in the Demps execution, and again no relief is warranted.

The Eighth Amendment does not guarantee a painless execution. Rather, a punishment only constitutes cruel and unusual punishment if it involves "torture or a lingering death" or the infliction of "unnecessary and wanton pain." Gregg v. Georgia, 428 U.S. 153 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Jones v. State, 701 So. 2d 76, 79 (Fla. 1997). In Jones, this Court rejected a claim that execution by electrocution violated the Eighth Amendment, quoting the Resweber Court:

> The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.

329 U.S. at 464.

Lethal injection as a method of execution has repeatedly been upheld by every court to have considered its constitutionality. Thus, Provenzano's claim that lethal injection is violative of the Eighth Amendment of the United States Constitution and of Article I, Section 17 of the Florida Constitution is foreclosed by binding precedent as well as being without merit. Numerous courts have addressed the constitutionality of execution by lethal injection, and have uniformly found that that method of carrying out a sentence of death comports with prevailing constitutional and societal norms. See, LaGrand v. Lewis, 883 F. Supp. 469 (D. Ariz. 1995) (collecting cases); Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997), cert. denied, 118 S. Ct. 1533 (1998); Woolls v.

McCotter, 798 F.2d 695, 697-98 (5th Cir. 1986). And, as previously noted, Florida's lethal injection act and execution procedures have specifically been upheld. Sims; Bryan. This Court must deny this claim in accordance with these precedents and in light of the evidence presented below that the execution of Bennie Demps was conducted in full compliance with our state and federal constitutions.

ISSUE II

PROVENZANO IS NOT ENTITLED TO RELIEF DUE TO HIS DISSATISFACTION WITH RESPONSES TO PUBLIC RECORDS REQUESTS DIRECTED TO THE DEPARTMENT OF CORRECTIONS.

Provenzano's next claim offers the familiar allegation that there may be records maintained by the Department of Corrections which have not been disclosed in response to his requests. The fact of the matter is that no such records exist. The only records requested for which DOC claimed an exemption and refused to disclose are those identifying the members of the execution teams from past lethal injection executions, or providing security information. See, Exhibit B, DOC's Response to Request for Public Records, Dated June 10, 2000.

In order to ensure that Provenzano received all records to which he was entitled, the court below entered an Order compelling disclosure of all records that Provenzano identified at a telephonic hearing on June 16, 2000. Although Provenzano's attorneys complained during the evidentiary hearing about the "late" disclosure of documents which had never been requested, such as photographs from the medical examiner's office, there was no allegation that any State agency had withheld documents which Provenzano claimed that he was entitled to review.

Clearly, the exemptions invoked by the DOC for any records identifying execution team members and other security information

were proper. See, §§ 922.10, 922.106 Fla. Stat. (2000); Bryan, 753 So. 2d at 1251 (upholding constitutionality of exemptions on identification of individuals involved in lethal injection execution process). In addition, Provenzano fails to show how any undisclosed information could provide a basis for relief. Bryan, 753 So. 2d at 1252-53; Buenoano v. State, 708 So. 2d 941, 947 (Fla.) (public records request cannot justify a basis for stay of execution without showing that documents sought contain evidence likely to entitle inmate to relief), cert. denied, 523 U.S. 1043 (1998). No relief is warranted on this issue.

ISSUES III AND IV

PROVENZANO IS NOT ENTITLED TO RELIEF ON HIS CLAIMS THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES HIS INNOCENCE AS TO HIS GUILT OR AS TO THE DEATH PENALTY.

Provenzano's next two claims will be addressed together, as they both suggested that newly discovered evidence, in the form of Judge Bentley's Order finding Provenzano competent to be executed, would have precluded his convictions and death sentence in this case. Provenzano's argument is based upon Judge Bentley's underlying finding that Provenzano suffers from paranoid delusions and has believed, at times, that he is Jesus Christ. The court below properly found these claims to be procedurally barred.

Provenzano presented expert testimony at trial, including testimony that he suffered from paranoid ideations, encompassing the claim that Provenzano believed he was Jesus Christ (DA-R. 1159-1160, 1172-1173).[3] Thus, this issue was clearly procedurally barred as the issue of his sanity was raised at trial and rejected.

Both the State and the defense presented expert evidence on the question of his sanity. The jury's rejection of this claim at trial was not raised on direct appeal. See generally, Johnston v. Dugger, 583 So. 2d 657, 660 (Fla. 1991), cert. denied, 131 L.Ed.2d 141 (1992)("Johnston's claim that he was not competent to stand

[3]References to the record on appeal in Provenzano's direct appeal of his judgments of conviction and sentences will be cited as "DA-R." followed by the appropriate page number.

trial in 1984 is procedurally barred because he did not challenge the competency finding on direct appeal"). Consequently, this aspect of Provenzano's claim was not properly raised before the court below.

Provenzano's attempt to revive this claim at this late date under the guise of newly discovered evidence must be rejected. By definition, newly discovered evidence concerns facts which existed at the time of trial and were unknown by the trial court, by the party, or by counsel at that time, and which could not have been discovered by the defendant or counsel through the use of due diligence. Porter v. State, 653 So. 2d 374, 380 (Fla. 1995); Downs v. State, 740 So. 2d 506, 514 (Fla. 1999).

Provenzano has filed two prior motions for postconviction relief that have been denied on the merits and affirmed on appeal. This Court has noted that Rule 3.850(b)(1) prohibits filing successive motions unless the defendant shows "both that this evidence could not have been discovered with the exercise of reasonable diligence and that the motion was filed within one year of the discovery of the evidence upon which avoidance of the time limit was based." Mills v. State, 684 So. 2d 801, 804 (Fla. 1996). In Mills, this Court denied the defendant's successive motion on a Brady claim where variations of the issue had been presented in state and federal courts. This Court observed: "Mills has failed to demonstrate that the present claim is not just a variation of

his prior *Brady* claims or that the assertions now made could not have been a part of the prior *Brady* claims." Mills, 684 So. 2d at 805.

In this case, as in Mills, the issue of Provenzano's mental state has been extensively litigated. In fact, a review of the various court decisions indicates, and the direct appeal record reveals, that claims regarding Provenzano's mental condition have been repeatedly made, addressed, and rejected. Although as noted above Provenzano did not challenge the jury's rejection of the insanity defense on direct appeal, he did claim the trial court erred in failing to find the statutory mental mitigators. Provenzano, 497 So. 2d at 1185. In affirming the trial court's failure to find the statutory mental mitigators, the Florida Supreme Court noted that three of the five experts who testified at trial found that Provenzano knew "right from wrong on the day of the shootout." Provenzano, 497 So. 2d at 1184. Provenzano admitted on cross-examination at trial that "it was a crime to carry concealed weapons." The Court also noted the abundant evidence of deliberate, goal directed conduct on the day of the murder:

> In addition, several actions taken by Provenzano on the day of the shootout support a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired. The fact that Provenzano secreted the weapons indicates that he knew it was unlawful. Minutes before the shootout he put change in the parking meter so he would not get a ticket. Further, rather than submit to a search of his knapsack that would have exposed his illegal possession of weapons, Provenzano decided to take his knapsack out to his car.

Provenzano, 497 So. 2d at 1184.[4]

Provenzano's mental state was again at issue on appeal from the denial of his first motion for postconviction relief, where he challenged counsel's effectiveness, for among other things, not presenting mental health expert testimony during the penalty phase. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). This Court rejected this contention, observing:

> First, he faults counsel for not presenting expert testimony during the penalty phase concerning his mental condition. However, the defense presented extensive medical testimony during the guilt phase that Provenzano was paranoid. Both Drs. Pollack and Lyons expressed the opinion that Provenzano was insane when the shootings occurred. Such testimony as might have been presented during the penalty phase would have been largely repetitive...

Provenzano, 561 So. 2d at 546. Finding the additional proposed testimony largely cumulative, this Court found that even without reaching the question of deficient performance, Provenzano had failed to show prejudice. This Court was convinced that even if the proffered mental mitigating testimony and additional family

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[4]The court also rejected a challenge to the State's evidence of premeditation, noting, in part, the following facts:

> Provenzano saw Wilkerson advancing, removed a loaded shotgun from a pocket inside his coat, and screamed "I'm going to kill you, M____ F____, I'm going to kill all of you," and fired the fatal shot when Wilkerson was two to three feet away...

Provenzano, 497 So. 2d at 1181.

members had been presented, the "result would have been the same."[5] Id.

On appeal from the denial of a second postconviction motion, issues relating to Provenzano's mental state were again addressed under a claimed Brady violation, or in the alternative, as an allegation of ineffective assistance of counsel. Provenzano v. State, 616 So. 2d 428 (Fla. 1993). In rejecting a claim that counsel was ineffective for failing to discover or utilize a doctor's report made shortly after the offenses, the court stated:

> Although Abraham's report corroborated the conclusions of defense experts that Provenzano had a paranoid psychosis, this was not the issue the jury was asked to decide at trial. The State experts also agreed that Provenzano suffered from paranoia, but then went on to opine that the paranoia did not render him insane. Given that the jury found Provenzano to be sane and recommended a death sentence despite the testimony of two defense experts and one State expert that Provenzano had severe paranoid delusions, the introduction of another report discussing Provenzano's paranoia was not likely to have made a difference. We cannot conclude that there is a reasonable probability that the introduction of this report would have changed the outcome of the trial.

Provenzano, 616 So. 2d at 432. Later variations of these mental health issues were also raised and rejected in federal court. Provenzano v. Singletary, 3 F.Supp.2d 1353 (M.D. Fla. 1997), aff'd 148 F.3d 1327 (11th Cir. 1998).

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[5]The court also found that a recent report from Dr. Pat Fleming did not provide any basis for renewing an examination into Provenzano's competency to stand trial. The court observed:
"The record reflects, however, that this issue was thoroughly explored before the trial commenced. Several doctors were appointed to examine Provenzano, and each of them concluded that he was competent to stand trial..." Provenzano, 561 So. 2d at 544.

Thus, even a cursory review of the history of this case reveals that issues surrounding Provenzano's mental condition, including his delusional beliefs, have been repeatedly raised and rejected. Subsequent litigation regarding the distinct issue of Provenzano's competency to be executed provides no legitimate basis for opening a new inquiry into his guilt or innocence. See, Pope v. State, 702 So. 2d 221, 223 (Fla. 1997)(affirming denial of successive motion for postconviction relief where defendants "did not allege new or previously unknown evidence" or that a "fundamental constitutional right has been established which should apply retroactively to his case"). The largely cumulative evidence of Provenzano's mental condition developed during the hearing on his competency to be executed is not newly discovered, nor would it "probably" result in an acquittal on retrial. See, Scott v. Dugger, 634 So. 2d 1062, 1063 (Fla. 1993)(upholding summary denial of successive motion for postconviction relief where evidence alleged as "newly discovered" was merely a variation of evidence litigated earlier at trial and a previous collateral proceeding).

Provenzano's reliance upon Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992), is misplaced. In Scott, the Florida Supreme Court recognized that subsequent disparate treatment of an equally culpable co-defendant can be considered newly discovered evidence. The court noted that disparate treatment of a co-defendant is an important consideration in its proportionality analysis.

In this case, Provenzano has not even articulated any legitimate basis for admission of Judge Bentley's ruling finding Provenzano competent to be executed during either the guilt or penalty phases of a trial. And, the underlying facts of the competency to be executed claim, that Provenzano suffers from paranoid ideations, was litigated at trial and, in some variation, in previous postconviction motions.

Since evidence was presented at trial with regard to Provenzano's mental state, including his delusions, he cannot show that no reasonable juror would have convicted him of first degree murder even if the allegedly "new" evidence had been presented, and he has not established actual innocence of the crime to set aside his conviction under the precepts of Schlup v. Delo, 513 U.S. 298 (1995). Of course, in Schlup, the Court noted that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare," and must be supported by "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." Clearly Provenzano's allegations do not meet this standard.

As to Provenzano's claim of being innocent of the death penalty, he fails to allege that the "newly discovered evidence" he offers would preclude the application of even a single aggravating factor. Absent such allegation, he cannot prevail on this claim.

Provenzano has clearly not satisfied the test of Sawyer v. Whitley, 505 U. S. 333 (1992); under this decision, a defendant must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. Furthermore, Sawyer rejects any reliance on mitigation that was not presented at trial to establish actual innocence, even if such evidence was not introduced as a result of claimed constitutional error. 505 U.S. at 348.

For all of these reasons, Provenzano's newly discovered evidence claims were properly summarily rejected.

ISSUE V

PROVENZANO IS NOT ENTITLED TO RELIEF ON HIS CLAIM OF JURY INSTRUCTION ERROR.

Provenzano's next claim was properly summarily denied as procedurally barred. His challenge to the jury instructions provided at the time of his 1984 trial is clearly barred and without merit. This Court has repeatedly recognized that such arguments have no place in postconviction motions, much less in eleventh-hour successive motions during an active death warrant. Furthermore, the validity of this jury instruction was previously addressed in Provenzano's initial postconviction proceedings with regard to his counsel's alleged ineffectiveness for failing to object to the instruction as given:

> Provenzano points out that his counsel did not object to the standard jury instruction on insanity, which was later determined to be erroneous in Yohn v. State, 476 So. 2d 123 (Fla. 1985). In Yohn, this Court held that the instruction did not properly reflect Florida law concerning the burden of proof on insanity. The instruction that was given in Provenzano's trial was the standard jury instruction on the subject and had been given for many years. As we explained in Smith v. State, 521 So. 2d 106 (Fla. 1988), there was no constitutional infirmity in the old standard jury instruction, and, even though it erroneously set forth Florida law, it was not so flawed as to deprive a defendant claiming insanity of a fair trial. Furthermore, defense counsel twice told the jury during closing argument, without objection from the state, that the defense did not have to prove that Provenzano was insane and that the defense only had to show that there was a reasonable doubt as to his sanity. The fact that a lawyer in another case raised an objection to this instruction and ultimately succeeded in having it set aside does not mean that Provenzano's counsel was ineffective for not also attacking the

instruction.

Provenzano v. Dugger, 561 So. 2d 541, 545 (Fla. 1990). This Court's previous finding that there was no constitutional infirmity in the jury instruction given in this case compels the rejection of this claim both procedurally and substantively.

ISSUE VI

PROVENZANO IS NOT ENTITLED TO RELIEF ON HIS CLAIM OF A DUE PROCESS VIOLATION IN RESTRICTING PUBLIC ACCESS TO SOME PREPARATORY EXECUTION PROCEDURES.

Provenzano's last claim asserts that the Department of Corrections' practice of not allowing witnesses to view the procedures conducted in the preparation room outside of the execution chamber violates his right to due process because it prevents counsel, as well as other witnesses, from ensuring that Provenzano is not subjected to cruel and unusual punishment banned by the Eighth Amendment. This claim was considered by the court below and rejected as follows:

> Ground VI claims that witnesses are excluded from viewing the entire execution which amounts to a due process violation and an Eighth Amendment violation. It is undisputed that the condemned prisoner is "prepared" for execution in a room adjacent to the execution chamber. That room is the same room in which the prisoner's cell is located. The prisoner is taken from his cell and strapped to a gurney. Then two IV's are inserted - normally one in each arm - and the prisoner is moved into the execution chamber. Once the prisoner is positioned in the execution chamber the curtain closing the chamber off from the witnesses is opened. The prisoner is given an opportunity to speak after which the Warden signals to begin the execution. After the prisoner is pronounced dead the curtain is closed. No witnesses listed in 922.11(2) are allowed in the execution chamber itself or in the area where the prisoner is prepared for execution.
>
> The defense has cited two cases for the

proposition that witnesses should be present from the time the prisoner is placed in restraints until the time death is pronounced. The first case is Oregon Newspaper Publishers Asso. v. Oregon Dept. of Corrections, 988 P.2d 359 (Or. 1999). The case is readilly [sic] distinguishable from the Florida scheme in that the Oregon statute is different from Florida's. F.S. 922.11 regulates who shall be present at the execution and does not provide for witnesses to be present during the time the prisoner is being prepared for execution. Never the less, the Warden has some discretion and has made it a practice, as in the Demps case, to have an Agent from FDLE present as an observer.

The other case relied upon by the defense is California First Amendment Coalition v. Calderon, 956 F.Supp. 883 (N. D. Cal. 1997), which is also reported at 88 F.Supp.2d 1083. In that case witnesses were allowed into the observation room after the condemned had been strapped to the gurney and the intravenous tubes had been inserted into his arms. The witnesses did not hear the execution order. After several minutes in the observation room, the witnesses were told that the prisoner was dead. Apparently, the prisoner made no statement and the witnesses could not tell if he was alive or dead during their observation.

Judge Walker wrote the opinion in the case and held that the First Amendment protects access to executions and directed the Warden of San Quintin to "allow the witnesses to view the procedure at least from the point in time just prior to the condemned being immobilized, that is strapped to the gurney or other apparatus of death, until the point in time just after the prisoner dies."

That is Judge Walker's opinion and he is entitled to it. However, this court does not find it persuasive. Under the Florida procedure, the condemned is brought into the execution chamber and given an opportunity to speak. Thus, there can be no doubt that the condemned is alive at the time and, like Demps, able to register any complaint he may have, exaggerated or not. Only after the

> prisoner makes his final statement does the Warden order the execution to proceed and the witnesses can see him do it.
>
> Additionally, it should be noted that execution by electrocution also requires some preparation. The prisoner has his head and ankle shaved and a gel is applied to the scalp. This is done outside the presence of witnesses and is certainly not part of the execution itself.
>
> There are practical reasons to limit witness access to the preparation process including the varying degrees of cooperation prisoners may give to corrections officials prior to being strapped to the gurney. In any event, this court does not take the narrow view of the definition of execution as was taken in the cases cited.
>
> (V6/1029-30)

The lower court properly rejected the claim as there has been no showing that the DOC's practices violate due process or that the use of lethal injection constitutes cruel and unusual punishment.

This Court has long recognized that the execution of condemned prisoners is clearly a matter within the province of the executive branch of government, Goode v. Wainwright, 448 So. 2d 999, (Fla. 1984); Sandlin v. Criminal Justice Standards & Training Com'n, 531 So. 2d 1344 (Fla. 1988), and it must be presumed that members of the executive branch will properly perform their duties. Buenoano v. State, 565 So. 2d 309 (Fla. 1990); §922.052, Fla. Stat. (1999); Provenzano, 739 So. 2d at 1153. This Court has further recognized that DOC is authorized by law to establish rules, regulations or minimum standards reasonably necessary to carry out the expressed purpose of the lethal injection act. Moreover, this Court has

affirmed the sufficiency of the DOC's lethal injection procedures and concluded that the new law authorizing the use of lethal injection does not improperly delegate legislative authority to an administrative agency. See, Sims v. State, 754 So. 2d 657 (Fla. 2000); Bryan v. State, 753 So. 2d 1244 (Fla. 2000).

Accordingly, although, §922.11 Fla. Stat. (1999) regulates who shall be present at the execution and does not provide for witnesses to be present during the time the prisoner is being prepared for execution, the statute gives the Warden discretion as to who is present during the preparation. In the instant case, the record shows that Warden Crosby has made it a practice, as in the Demps case, to have a neutral witness present as an observer. FDLE Agent Burke testified that he was directed to be present during the preparation of Demps for execution as an impartial observer. (V2/310) Agent Burke then testified as to his observations of the execution team and Demps during the preparation of Demps for execution. Burke concluded his testimony by stating that he would have "trouble envisioning a group of people could have been any more professional, respectful, and compassionate than they were given the circumstances of an execution." (V2/344) Thus, the need to insure that the process is conducted in a constitutionally appropriate manner is satisfied by the presence of a neutral observer.

Moreover, as Judge Eaton noted that "there are practical

reasons to limit witness access to the preparation process including the varying degrees of cooperation prisoners may give to corrections officials prior to being strapped to the gurney." (V6/1030) The practicality of limiting access to the preparation area is underscored by the testimony of Demps' attorney George Schaefer.

Attorney Schaefer testified that had he been in the preparation room and that, "if what Mr. Demps described as being true occurred in my presence, I would have done everything humanly possible to convince the warden that this is . . .*this needs to be stopped*, give me a chance to take the appropriate measures. I mean, what Mr. Demps described was that he was cut in the groin, cut in the leg, he was butchered and he was bleeding profusely, and if I had seen those things, yes, I would done something, I'm sure, as I'm sure anybody in that situation representing their client would have tried to do something." (V1/122) The Constitution does not require the Department of Corrections to invite an individual into the preparation room who may be disruptive and intervene in a process that has been approved by this Court and every other court that has considered it.

Neither Oregon Newspaper Publishers Ass'n v. Oregon Department of Corrections, 329 Or. 115, 988 P.2d 359 (Or. 1999), nor California First Amendment Coalition v. Calderon, 150 F.3d 976 (9th Cir. 1998), as relied upon by appellant, undermine the fact that

these procedures are constitutionally sound. As noted by the court below, these cases are distinguishable by the statutory schemes involved as well as the procedures used during the execution and preparation processes. In Oregon Newspaper Publishers, the Oregon court concluded, based on an interpretation of Oregon state law, that the Oregon DOC did not have the statutory authority to make rules prohibiting certain witnesses from viewing the insertion of the IVs despite DOC's claim that such rules were meant to protect identity of the executioners. In contrast, this Court has recognized the Florida Legislature granted the Florida DOC the authority to make such rules and regulations as necessary to effectively carry out the proceedings. See, Sims; Bryan. Moreover, unlike Oregon, Florida law requires that "information which, if released, would identify the person administering the lethal injection pursuant to §922.105 is confidential." §922.106 Fla. Stat. (1998). See, also, §945.10. Accord, Bryan, 753 So. 2d at 1251. The remainder of the decision, as did the decision in California First Amendment Coalition, rested on First Amendment considerations which are not presented herein.

Judge Eaton also rejected the suggestion that the preparation of the inmate is part and parcel of the execution and that witnesses should be allowed to see the entire procedure beginning with the inmate getting on the gurney. This conclusion is supported by the finding of the Ninth Circuit Court of Appeals in

California First Amendment Coalition v. Calderon, 150 F.3d 976 (9th Cir. 1998), which reversed the District Court's finding in California First Amendment Coalition v. Calderon, 956 F. Supp. (N.D. 1997). The lower court had held that the department's exclusion of witnesses from the preparation area is an exaggerated response to the confidentiality considerations and that witnesses should be allowed to view the preparation of the inmate for execution. Upon reversing for reconsideration, the Ninth Circuit noted, as this Court has in Bryan and Sims, that the procedures surrounding an execution are "peculiarly within the province and professional expertise of corrections officials. . . ." Id. at 982-83.

As Provenzano has failed to establish that Florida's procedures, as outlined in the record herein, constitute cruel and unusual punishment, he is not entitled to the relief requested. Poland v. Stewart, 151 F.3d 1014, 1023 (9th Cir. 1998); Vickers v. Stewart, 144 F.3d 613, 617 (9th Cir. 1998); Kelley v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir. 1988)(holding that lethal injection is not unconstitutional cruel and unusual method of imposing capital punishment). Accordingly, this claim was properly denied.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying the motions to vacate and for a stay of execution must be affirmed. Provenzano has failed to demonstrate any basis for relief, and no stay of execution is justified in this case. See, Bowersox v. Williams, 517 U.S. 345 (1996); Buenoano v. State, 708 So. 2d 941, 951 (Fla.), cert. denied, 523 U.S. 1043 (1998).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail/facsimile to Michael Reiter, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 19th day of June, 2000.

COUNSEL FOR STATE OF FLORIDA