IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1222

THOMAS H. PROVENZANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's order denying Mr. Provenzano's Successor Motion to Vacate Judgement and Sentence and Motion to Stay Execution.

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

"T1" --; Transcript from telephonic hearing held June 16, 2000.

"T2" –- ; Transcript from hearing held June 18, 19, 2000.

REQUEST FOR ORAL ARGUMENT

This court has scheduled oral argument at 9:00 a.m., June 20, 2000.

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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. Provenzano[1] to determine if he was 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

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

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. This Court affirmed the Circuit Court's ruling. Provenzano

v. State, 2000 WL 674703 (Fla. May 25, 2000). The Governor rescheduled Mr. Provenzano's execution for June 20, 2000, beginning at 6:00 p.m. On June 14, 2000, Mr. Provenzano filed a Successor Motion to Vacate Judgment and Sentence and Motion to Stay Execution. Judge Eaton, Circuit Court Judge in Seminole County was appointed to review this motion. Judge Eaton conducted an evidentiary hearing on the motions on June 17 and 18, 2000. Judge Eaton entered his order denying the motions on June 18, 2000. Mr. Provenzano filed his Notice of Appeal on June 19, 2000.

STATEMENT OF FACTS

Due to the extreme shortage of time from the receipt of the transcripts and the time for submission of briefs, Mr. Provenzano relies upon the transcripts themselves as a statement of the facts. However, those facts necessary to establish his claim have been included.

SUMMARY OF ARGUMENT

The Trial Court erred by restricting the witnesses Mr. Provenzano was permitted to call. Mr. Provenzano should have been permitted to have the persons who performed the procedures testify. Further, the Trial Court should not have permitted testimony via telephone.

The Trial Court erred by declaring Mr. Provenzano's newly discovered evidence claim as procedurally barred.

The Trial Court erred is finding that the practical reasons for DOC to preclude public viewing of the preparation outweighs the inmates Fourteenth Amendment right to insure that his Eights Amendment rights are not violated.

ARGUMENT I

THE TRIAL COURT ERRED IN FINDING THAT FLORIDA'S METHOD OF LETHAL INJECTION DOES NOT CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT BECAUSE THERE WAS NO SHOWING OF SEVERE PAIN OR MUTILATION BEING INFLICTED ON THE CONDEMNED PRISONER.

> **"They butchered me back there," Mr. Demps said from the gurney. "I was in a lot of pain. They cut me in the groin; they cut me in the leg. I was bleeding profusely."**
>
> **New York Times, June 9, 2000. (Exh. 1).**

A. The Lower Court violated Mr. Provenzano's right to due process by denying him the right to call pertinent and necessary witnesses, or to allow for an extension of time to establish his claim.

In its order, the lower court stated that certain witnesses of the execution team were excluded pursuant to F.S. 922.10, 922.106 and 945.10(e), and that although that decision may have been wrong, their testimony would have been cumulative. [Order at ___]. The testimony of the persons conducting the procedure are not excluded pursuant to the statutes cited by the court. The pertinent parts of the statutes cited by the lower court state:

> 922.10. Execution of death sentence; executioner
>
> . . . Information which, if released, would identify the executioner is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

. .

* * * *

922.106 Exemption from public records requirements.

Information which, if released, would identify the person administering the lethal injection pursuant to s. 922.105 is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

* * * *

945.10. Confidential information

(1) Except as otherwise provided by law or in this section, the following records and information of the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(e) Information which if released would jeopardize a person's safety.

(2) The records and information specified in paragraphs (1)(b)-(h) may be released as follows unless expressly prohibited by federal law.

Furthermore, during the telephonic hearing held June 16, 2000, the lower court specifically instructed the state to have the individuals who performed the medical procedures present to testify, and the Assistant Attorney General, Carol Dittmar agreed.

THE COURT: - - that would be helpful.

I would like to also have someone here to testify,

and I don't know who that person would be, who actually did the surgical procedure on Demps in order to find the vein if, you know – And I know very little about what happened, and maybe you don't either, but it would really be helpful if that person was here to testify. (T1-4)

****

THE COURT: uh-huh.

Well, I'm hoping Ms. Dittmar will be able to get the person here who actually is the person that inserts the IV prior to the . . . prior to the prisoner going to the execution chamber.

Ms. Dittmar, that would be the person that would be the best.

MS. DITTMAR: Yes. Yes, I agree. We are trying to line that up. (T1-6).

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MR. REITER: And my only other point being is, and it hasn't been asserted yet, I guess my concern is DOC may say, well, they are exempted, but based on the concern, that could be protected by the fact the Court can have a closed courtroom and the name doesn't have to be divulged and something we know –

THE COURT: Well, let me – Mr. Reiter, I've gotten past that. I don't think there is any exemption. The only exemption that I think applies in the situation is that identity of the executioner, and that's not relevant, so . . . But how this thing goes on and who is involved with it, and who does what, I don't know how courts are supposed to determine that this procedure passes constitutional muster if the Court can't hear testimony from the people that do the procedure. So, you know, I just don't think that's going to be much of an issue. (T7).

At the hearing beginning on June 17, 2000, the state changed their position in presenting the individuals who actually performed the procedure. The following colloquy occurred.

> MR. REITER: Judge, at present, I have been given the name of Warden Crosby, Bill Matthews, and Jim Burkette, FDLE.
>
> MS. DITTMAR: John.
>
> MR. REITER: John.
>
> And my understanding is, if I'm accurate, and correct me if I'm wrong, neither of these three performed any physical function with regard to any syringes, making any cutdowns on Mr. Demps, and we intend to ask questions regarding what took place, why they did what they did, what they did, and how things happened. Without knowing who they are, I can't call them as a witness to get that information.
>
> For instance, the individual who performed what we believe was the cutdown, we need to have that individual take the stand and testify to the performance of what he did and how he did it.
>
> THE COURT: Is that person here?
>
> MS. SNURKOWSKI: Your Honor, that person, as I understand, is present. We would like to protect the confidentiality of their identification.
>
> MS. SWARTZ: I'm Susan Swartz, from the Department of Corrections.

I know this is a difficult situation, but under 922.10 and 945.10, they are subject to risk. So we asking for some kind of protective order so their identities are not revealed.

THE COURT: What do you want me to do?

MS. SWARTZ: Either hear from them in camera, or clear the courtroom. Don't make their names part of the official record.

THE COURT: How am I supposed to do that?
This is a public hearing. I have no idea.

MS. SWARTZ: Their identities are confidential, pursuant to the statute and we might not be able to get people to do these duties if we cannot guarantee their confidentiality.

THE COURT: Well, the issue that I have to decide is whether or not the procedures that are being performed are passing constitutional muster. I don't know how to do that unless I hear them. I don't know how they are excluded, or have them excluded in a public hearing. (T2-7-9).

* * * *

THE COURT: I know. But the problem is in these cases is that I'm under a time restraint.

MS. SNURKOWSKI: Right.

THE COURT: And if I make any kind of ruling that requires review by the Supreme Court, then a stay of execution is going to have to be granted.

MS. SNURKOWSKI: Okay.

And we're ready to go forward, Your Honor, with regard to complying with the Court's statements yesterday.

> As I said, we're trying to go exert a right that this individual has with regard to privacy and to privilege, and if there is any way the Court can accommodate that, we will ask the Court to try to do so.
>
> THE COURT: Y'all need to figure out a way, I guess Start off by having Mr. Matthews testify. (T14-15)

Although the lower court had previously ruled that the individuals who performed the procedures upon Mr. Demps would be required to testify, the lower court subsequently denied Mr. Provenzano's request to call them as witnesses.

> MR. REITER: Thank you, Your Honor.
>
> First, I would like to renew my request to call the individuals who actually performed the procedures.
>
> THE COURT: Okay. I'm satisfied that the testimony here from the witnesses, including independent witnesses, is sufficient for me to make the decision without requiring the other witnesses to be called, so I'm going to deny your request. (T2-374)

In footnote one of the lower court's order at page 2, he stated: "Exclusion of the witnesses may have been incorrect but the court is satisfied that their testimony would have been merely cumulative." Obviously this statement is somewhat inaccurate, because there was no witness who testified that could state: the qualifications of the person(s) performing the procedures, what the dosage of anesthesia injected in Mr. Demps was at each location, and whether the injection process was performed adequately. Further, the testimony of Mr. Matthews and Warden Crosby left much to

be desired in determining the exactness of the procedures and what they may have missed.

According to Mr. Matthews:

> MR. REITER: Was there an individual who was - - Do you know how many people - - Before I find out, let me ask you. Could you please describe what you observed at the preparation of the execution of Mr. Demps?
>
> MR. MATTHEWS: Any particular aspect?
>
> MR. REITER: From the beginning to the time they were brought him to the chamber?
>
> MR. MATTHEWS: There were probably parts that occurred - - Let me qualify what I'm saying. Probably parts that occur that I didn't recollect due to the fact that I might not have been paying attention to all the details. But the details that I observed, he was asked to - - There was some talk he had a religious leader of some sort, - -
>
> MR. REITER: Where are you at this point in time with regard to preparation? I mean, are you in the preparation room when this is going on?
>
> MR. MATTHEWS: Yes.
>
> MR. REITER: And what condition is he in, standing, sitting, strapped?
>
> MR. MATTHEWS: I wasn't paying attention.

(T2-30-31).

Near the end of the direct examination of Mr. Matthews, Mr. Matthews viewed

the photographs of Mr. Demps' body (Defense composite exhibit 1) and indicated that the marks on Mr. Demps' body were consistent with how he last saw Mr. Demps (T2-85-87). After the close of the direct examination of Mr. Matthews, a recess was taken. Upon returning from recess, Mr. Matthews was cross-examined. On cross-examination Mr. Matthews changed his testimony and denied that the marks reflected in Defense composite exhibit 1 was consistent to how he last observed Mr. Demps (T2-89-91).

With regard to Warden Crosby's testimony, he testified to his observations during the preparation stage of Mr. Demps. At no time did Warden Crosby state that he was "in and out" of the preparation chamber. However, according to Mr. John Burke, the "independent" observer from FDLE, he stated on cross-examination by Mr. Reiter:

> Q. So you did see the Warden write something down?
>
> A. Is it Mr. Crosby? No, sir. He was not in with me. It was one of the Associate Wardens. It was a form that indicated time into the execution chamber, and I believe time that either the order was given or something was given, and then a time of pronounced death. There was a form that had three times on it to be filled in.
>
> Q. You're saying an Associate Warden was in the chamber with you?
>
> A. Yes, in the preparation area.

Q. Was Mr. Crosby in the preparation area?

A. He came in and out several times during the course of the procedure.

Q. So he left a number of time.

A. Yes, sir.

(T2-325)

Mr. Burke, although not a medical person, testified that an incision was made in Mr. Demps' groin area.

EXAMINATION OF MR. BURKE BY MS. DITTMAR

Q. Okay. And you saw them do at least more than one syringe in the groin?

A. Yes, ma'am.

Q. An then at that time they used the needle or what did you observed after it was anesthetized?

A. Again, because they were moving around, we were orbiting them as they conducted their procedure, but it appears as if they used, initially, a small scalpel to make type of incision and then a hypo went in.

(T2-31).

It is clear from the testimony of the individuals who testified and who were also present at the preparation of Mr. Demps, that they did not observe all that happened, leaving much information not answered.

However, the state attempted to establish - - through photographs purportedly obtained from the M.E.'s office and via testimony by Dr. Hamilton - - that there was no incision made in Mr. Demps' groin are by DOC, but was made postmortem at the M.E.'s office. Mr. Zeller, M.E. investigator, testified via telephone that he had provided Ms. Snurkowski photographs he made of Mr. Demps. (T2-196-205). Ms. Snurkowski testified that the photographs introduced as State's exhibit 2 were received from Mr. Zeller. (T2-208-211).

However, during the testimony of Dr. Hamilton, taken by telephone, he stated that the photographs in his possession did not have a date on the photographs. Upon viewing the photographs introduced as State's exhibit 2, it can be seen that some of the photographs do in fact have dates on them and some do not. Inasmuch as Mr. Zeller and Dr. Hamilton testified via telephone it could not be established wether the photographs that Dr. Hamilton was viewing were the same as those introduced as State's exhibit 2.

Due to the extreme time constraints for hearing the case in time for Mr. Provenzano's execution, the Trial Court restricted Mr. Provenzano's ability to fully present his issues. The Trial Court changed his ruling regarding the testimony of the individuals who performed the procedures. The Trial Court's finding that they would have been cumulative was erroneous, because had they been permitted to be called the

need for Mr. Crosby's and Mr. Matthew's may not have been necessary. Further, the testimony of the individuals who performed the procedures would have been more comprehensive. The questions of their qualifications, the inconsistences regarding the conditions of Mr. Demps' body would have been eliminated, the procedures utilized would have better informed the court as to whether Mr. Demps was suffering from pain.

In Provenzano v. State, 750 So.2d 597 (Fla. 1999), this Court remanded to the Circuit Court to resume an evidentiary hearing because the Trial Court rushed the proceedings due to an execution date having been set.

> Unfortunately, it appears that these proceedings were driven by the perceived need to be certain there would be no delay in the date of execution set for the defendant. We must share the blame for that perception by not being more explicit in our opinion that the critical focus of the trial court should be on determining the competency of the defendant, rather than on rushing to get the proceedings over in time for the scheduled execution to take place.

Id. at 603 (Justice Anstead concurring opinion).

> I concur in the majority opinion and write only because we again encounter imposition of the ultimate penalty without the full measure of the deliberative process. The issue of competency for execution, by its very nature, can only be confronted i close proximately to an execution. That does not mean, however, that the process to resolve the issue deserves less conseration than other steps in the judicial processing of this type of case.

Id. at 604 (Justice Lewis concurring opinion).

B. The Trial Court erred in finding that Florida's lethal injection procedure does not violate the Eighth Amendment's ban on cruel and unusual punishment.

The Trial Court stated:

> The difficulties incurred in the Demps execution were not linked to 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 remedy the difficulty are not unnecessarily cruel or painful. (Court Order page 4).

However, every doctor -- including Dr. Bullard, who was called by the state -- could not refute Mr. Demps' claim that he was in a lot of pain, given the absence of testimony. (T2-166; T2-229; T2-255; T2-366-367). All the doctors who testified, stated that a cutdown was rare, which was acknowledged by the Trial Court. Obviously then, the Trial Court's finding that the procedures were not unusual was incorrect. Further, some of the doctors testified that other procedures could have been utilized, short of a cutdown, which would produce less unnecessary pain, if the qualifications of the persons performing the procedures are adequate. As of the close of the hearing, neither Mr. Provenzano nor the Trial Court has a clue as to what those qualifications are.

THE LAW

The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits punishments that "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Gregg, 428 U.S. at 183; citing Gamble, 429 U.S. at 103). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict[] bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," *id*. at 366, or to "circumstances of *terror*, pain, *or disgrace*" "superadded" to a sentence of death. *Id*. at 370 (emphasis supplied). See In re Medley, 134 U.S. 160, 171, 172 (1890) (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary confinement induces "further terror," while "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *See also* Trop v. Dulles, 356

U.S. 86, 101 (1958).[2] A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" Gregg, 428 U.S. at 173 (citing Trop , 356 U.S. at 100). The court must be concerned with assuring that general procedures themselves are adequately designed and maintained to avoid undue risks of inflicting inhumane punishments. *Compare* Maynard v. Cartwright, 486 U.S. 356 (1988), *with* Lewis v. Jeffers, 497 U.S. 764 (1990).[3]

Recently Justice Lewis explained his understanding of the cruel and unusual prohibition:

> The Jones decision is facially predicated upon the existence of competence substantial evidence to support very specific findings of fact, including the condition of mechanisms existing at that time and the status of scientific information available. The absence of conscience pain was an essential factual element of the judgment affirmed by this court. The entire execution process in Florida is grounded in an understanding that once subject to death by electrocution is rendered unconscious so as to eliminate the infliction of unnecessary pain, as opposed to the ultimate punishment of

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[2]*See* Hudson v. McMillian, 503 U.S. 1, 16-17 (1992) Blackmun, J., concurring) ("As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of 'pain,' not 'injury.' . . . 'Pain' in its ordinary meaning surely includes a notion of psychological harm. . . . I have no doubt that to read a 'physical pain' or 'physical injury' requirement into the Eighth Amendment would be no less pernicious and without foundation than the 'significant injury' requirement we reject today.").

[3]Farmer v. Brennan, 511 U.S. 825, 846 (1994) (the focus of the inquiry is whether there exists an "objectively intolerable risk of harm").

death.

Provenzano v. State, 739 So.2d at 1156 (Lewis, J. specially concurring, joined by Pariente, J.).

Even if Mr. Demps was rendered dead without suffering any severe pain, any mutilation that occurred, such as multiple, crude, excessive, unnecessary, gaping wounds, offends notions of basic human dignity underlying the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 372 (1910) (noting that Eighth Amendment prohibition on cruel and unusual punishment bars punishments that "inflict [] bodily pain or mutilation"); Wilkerson v. Utah, 99 U.S. 130, 135 (1879) (noting constitutional bar on draw and quartering and on beheading). See also Jones v. McAndrew, No. 4:97-CV-103-RH at 34-35 (N.D. Fla. February 20, 1998) (holding that fire about head of judicially electrocuted person implicates Eighth Amendment). Cf. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari); Furman v. Georgia, 408 U.S. 238, 266 (1972) (Brennan, J., concurring); Jones v. State, 701 So.2d at 84, 88 (Kogan, C.J., Shaw and Anstead, JJ. dissenting). Human dignity "is the basic concept underlying the Eighth Amendment." Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

Additionally, the Florida courts are required to protect Mr. Provenzano's Eighth Amendment rights under the federal Constitution. Under the Eighth Amendment to

the United States Constitution, Florida courts must make an independent determination of whether a method of execution is cruel and unusual. Contemporary Eighth Amendment jurisprudence upholds the authority of the courts to review a state legislature's decision generally, and specifically to review a legislature's enactments regarding criminal punishment. See Rummell v. Estelle, 455 U.S. 288, 304 (1980); Coker v. Georgia, 433 U.S. 591, 602 (1977). See also Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir.), cert. denied, 408 U.S. 942 (1972). The fact that a state statute authorizes capital punishment does not conclusively establish the punishment's constitutionality because the Eighth Amendment is a limitation on both legislative and judicial action. Robinson v. California, 370 U.S. 660 (1962).

Thus, it is firmly within the "historic process of constitutional adjudication" for this court to consider, through a "discriminating evaluation" of all available evidence, whether a particular means of carrying out capital punishment is barbaric and unnecessary. Furman, 408 U.S. at 238, 420 (1972)(Powell, J., dissenting). The Florida Supreme Court has previously recognized its obligation to apply Eighth Amendment analysis to challenged Florida law. See, e.g., Jackson v. State, 648 So.2d 85 (Fla. 1994)(holding that Florida "cold, calculated, premeditated" aggravator is unconstitutionally vague under Eighth Amendment principles). Consistent with that duty, this court must independently evaluate Florida's use of judicial electrocution

under Eighth Amendment principles.

Essentially, where constitutional rights - whether state or federal - of individuals are concerned, this court may not abdicate its responsibility in deference to the legislative or executive branches of government. Instead, this court is required to exercise its independent power of judicial review. Ford v. Wainwright, 477 U.S. 399 (1986).

ARGUMENT II

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. PROVENZANO IS INNOCENT OF THE DEATH PENALTY.

This Court has an obligation to insure the integrity of the process in capital cases. As Justice Anstead once explained:

> The thoroughness and quality of this Court's review is relied upon by our society as an important safeguard for preventing executions where a serious question remains as to the fairness of the proceedings leading up to the imposition of the death penalty. That reliance is to be expected, even though it places an enormous burden on this Court.

White v. State, 664 So.2d 242, 245 (Fla. 1995)(Anstead, J. dissenting, joined by Shaw and Kogan, JJ.).

Similarly, Justice O'Connor explained while casting the deciding vote reversing the death sentence in Eddings v. Oklahoma, 455 U.S. 104, 119 (1982): "Lockett

compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"

Here, the situation calls for action by this Court. At his penalty phase, Mr. Provenzano's jury recommended a death sentence by a 7 to 5 vote. It could not have been any closer. The judge imposed a sentence of death specifically finding no mental health mitigating circumstances. Thus, the judge conducted a sentencing calculus without mental mitigation being placed upon the scales. See Richmond v. Lewis, 113 S.Ct. 528 (1992). On appeal, Justice McDonald dissented from the affirmance of the death sentence, saying "I believe the evidence is overwhelming that Provenzano's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Provenzano v. State, 497 So.2d at 1185.

In 1999 at proceedings to determine Mr. Provenzano's competency to be executed, the State disclosed records documenting Mr. Provenzano's mental condition for the past 15 years and presented testimony in November of 1999 from its chosen expert acknowledging that Mr. Provenzano is in fact mentally ill and suffers from the delusional belief that he is Jesus Christ.[4] On December 8, 1999, the circuit court

[4]This Court has recognized that the due process obligation for a State to disclose exculpatory evidence to a criminal defendant extends into the post-conviction process. Roberts v. Butterworth, 668 So.2d 580, 582 (Fla. 1996). Until during the

presiding over a 3.811 hearing found that "Provenzano has a delusional belief that he is Jesus Christ which predates the murder by several years." Order at 22-23. This factual conclusion was made after considering the long documented history which did not exist at the time of trial.

Thus, we are left with the two simple factual determinations by Florida courts in Mr. Provenzano's case that are inconsistent and cannot both possible be true. First, Mr. Provenzano's sentence of death is premised upon the presence of no mental health mitigation.[5] Second, it has been determined that Mr. Provenzano is and has been mentally ill suffering from the delusion that he is Jesus Christ. This delusional belief predates the homicide.

What we have hear is two inconsistent statements by two different judges. The evidence that was adduced by Judge Bentley was unavailable to Judge Sheppard and was something which could only be determined over a period of time. And the State's own experts acknowledged that Mr. Provenzano suffered from the delusion that he was Jesus Christ.

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course of the 3.811 hearings, the court records reveal that the State had not disclosed evidence demonstrating Mr. Provenzano's mental illness.

[5]This Court defined mitigation in Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), as including "frailties in the human condition." Certainly, the delusional belief that one is Jesus Christ must certainly constitute such a frailty.

The State asserted below "even the delusion of his being Jesus Christ was something that was known by the jury, by the expert that the Defense presented at the time of trial. That allegation is not new." (T2. 394). Even though the defense at trial presented evidence of the delusion, IT WAS REJECTED by the sentencing judge as not having been established. The State did not concede then what it acknowledge in the 3.811 proceedings.

Moreover had the State conceded then what it conceded during the 3.811 proceedings, we know what we have happened from justice McDonald's dissent. The death sentence would have been vacated.

The State's argument has missed the point of this Court's jurisprudence. Newly discovered evidence under Jones v. State, may supported a contention previously asserted by the defendant. In Jones, the evidence was in support of his contention that he was innocent, his defense at trial.

Here, Mr. Provenzano has always contended that he was mentally ill. The State's response was that he may have problems but he is faking and he has an anti-social personality disorder. What is new is the State's experts have now ackowledged, what as a matter of law has to be mental health mitigation. And now, the prison's documentation have shown consistent symptoms for over 15 years which established that the sentencing judge failed to properly weigh the mitigating circumstances

because he excluded mitigation from the balancing process.

This is new. The State never made this concession before. The State never delivered to Mr. Provenzano's records to collateral counsel and said these records now establish a mental illness, and you now have one year to file something raising any issues which might arise as a result. The State never revealed that its mental health experts now recognized that Mr. Provenzano has a mental illness.

The State below also asserted that the State trial experts acknowledged "paranoid traits." (T2. 394). Apparently ignoring the difference between "paranoid traits" and a delusional belief that one is Jesus Christ, the State argues this was considered before. Yet, this Court on direct appeal at the State's urging affirmed the sentencing judge's determination that no mental health mitigation was present. The State's position can only make sense if a delusional belief that one is Jesus Christ is not a mitigating. And the law is clear that such a belief is a mitigating circumstance that should be weighed during the sentencing calculus. See Cheshire v. State. Mr. Provenzano's sentence of death is premised upon a false fact, that there is no mental health mitigation.

The new evidence establishes that mental health mitigation in fact does exist and is established by clear and convincing evidence. Under Florida law, "[w]henever a reasonable quantum of competent, uncontroverted evidence of mitigation has been

presented, the trial court must find that the mitigating circumstance has been proved." Spencer v. State, 645 So.2d 377, 385 (Fla. 1994)(citing Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). Not only has the State's expert, Dr. McClaren, now conceded the presence of a longstanding delusional belief that Mr. Provenzano is Jesus Christ, but the 3.811 court found clear and convincing evidence that this delusional belief predates the homicide.

This new evidence not only establishes the presence of two statutory mitigating factors specifically rejected by the sentencing judge is also negates the mens rea element of four of five aggravating factors relied upon by the sentencing judge. See Besaraba v. State, 656 So.2d 441, 444-45 (Fla. 1995).

The death sentence was "imposed in spite of factors which may call for a less severe penalty." Eddings, 455 U.S. at 119 (O'Connor, J., quoting Lockett). A reversal is required.

This claim could not have been presented before because previously there was no judicial determination that Mr. Provenzano suffered from the delusion that he was Jesus Christ. Therefore, it is not procedurally barred.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. PROVENZANO IS NOT GUILTY, HAD THE JURY KNOWN OF THIS EVIDENCE IT PROBABLY WOULD HAVE FOUND THAT THE

STATE HAD NOT CARRIED ITS BURDEN TO PROVE MR. PROVENZANO'S SANITY BEYOND A REASONABLE DOUBT.

At trial, Mr. Provenzano's defense was not guilty by reason of insanity. His jury received the then standard instruction on Mr. Provenzano's insanity defense. After Mr. Provenzano's trial, this Court found that the standard jury instruction was "not adequate and [did not] correctly charge the jury of the substantive law in Florida applicable to this issue." Yohn v. State, 476 So.2d 123, 127, 128 (Fla. 1985)("The jury is never told that the state must prove anything in regard to the sanity issue. * * * In sum, the law in Florida [ ] puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense."). When this Court denied Mr. Provenzano's first 3.850 motion, this Court indicated that the failure to object to the standard jury instructions was not ineffective assistance of counsel. Provenzano v. Dugger, 561 So.2d 541, 545 (Fla. 1990).

However, there is now new evidence of prejudice to Mr. Provenzano. During the 3.811 proceedings the State's experts in November ackowledged that Mr. Provenzano was in fact delusional and believed he was Jesus Christ. Below, the State seemed to assume that Mr. Provenzano's argument here was premised upon new experts that he obtained. The State apparently missed the point that its experts contradicted the State's experts at trial and established that the State's trial experts

were in fact wrong.

At trial, five psychiatric experts testified, two for the defense and three for the State. One of the State experts, Dr. Gutman concluded that Provenzano was not delusional. Another, Dr. Wilder believed that Mr. Provenzano's paranoia did not rise to the level of a mental illness. The third, Dr. Kirkland acknowledged that Mr. Provenzano had some delusional paranoid beliefs, but concluded that Mr. Provenzano actually suffered an antisocial personality disorder.

However on December 8, 1999, the 3.811 court found that "Provenzano has a delusional belief that he is Jesus Christ which predates the murder by several years." Order at 22-23. This factual conclusion was made after considering the long documented history which did not exist at the time of trial. In fact, the circuit court's original order dated September 3, 1999, did not reach this conclusion. It was only after additional evidence not previously available was presented, thoroughly explained and explored by mental health experts that the circuit court made this factual determination. In fact in November, 1999, the State's expert, Harry McClaren, even conceded that he had no doubt that "Provenzano has a delusional belief that he is Jesus Christ." Order at 18.

In Jones v. State, 591 So.2d 911 (Fla. 1991), this Court held Rule 3.850 motions could be premised upon newly discovered evidence of innocence. To

establish an entitlement to relief, "the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial." Id at 591 So.2d at 915 (emphasis in original). In addition, the newly discovered facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Id. 591 So.2d at 916.

Here, the circuit court order at issue was entered in December of 1999. This akin to the situation in Scott v. Dugger, 604 So.2d 465 (Fla. 1992), where after the conclusion of his direct appeal, Mr. Scott's co-defendant, who had previously received a death sentence, was resentenced to life imprisonment. Subsequently, Mr. Scott's sentencing judge wrote a letter to the Clemency Board indicating that had she known of the life sentence that the co-defendant ultimately received she would have sentenced Mr. Scott to life imprisonment as well. This Court found these facts qualified as newly discovered evidence under Jones.[6]

The 3.811 court's order entered in December of 1999 establishes that Mr. Provenzano has had a delusional belief that he is Jesus Christ which predates the

[6]It should be observed that the Florida Supreme Court did not say that the facts which gave rise to the co-defendant's life sentence had to have been unknown at the time of Abron Scott's trial. It was sufficient that the court order imposing a life sentence did not exist at the time.

crime of which he stands convicted. The 3.811 court concluded that this had been established by clear and convincing evidence.

The evidence which convinced the circuit court included the compilation of prison records since 1985 which document Mr. Provenzano's behavior over a long period of time, and Dr. McClaren's concession on behalf of the State in November of 1999 that Mr. Provenzano has a delusional belief that he is Jesus Christ. Order at 18.

Under the Florida law at the time of Mr. Provenzano's trial, it was the State's burden to prove sanity beyond a reasonable doubt, once the defendant meets the burden of production:

> In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense.

Yohn v. State, 476 So.2d 123, 128 (Fla. 1985).

Given the State's burden of proof at trial, the Jones standard must apply to newly discovered evidence of insanity, just as it applies to any other evidence which would probably have resulted in an acquittal. See Holmes v. State, 374 So.2d 944 (Fla. 1979)("the sanity of the accused must be proved by the prosecution as any other element of the offense").

Here, the newly discovered evidence is of such a nature that it would probable produce an acquittal on retrial. See Order at 26 ("If the burden were on the State to

prove beyond a reasonable doubt that Provenzano is competent to be executed, the Court would conclude that there is a reasonable doubt."). Under Jones, a new trial is warranted.

ARGUMENT IV

MR. PROVENZANO WAS DEPRIVED OF DUE PROCESS AT HIS CAPITAL TRIAL WHEN HIS JURY WAS NOT INSTRUCTED THAT WHEN HE RAISED INSANITY AS AN ISSUE IN THE CASE THAT THE STATE BORE THE BURDEN OF PROOF AND WAS REQUIRED TO PROVE MR. PROVENZANO'S SANITY AT THE TIME OF THE CRIME BEYOND A REASONABLE DOUBT JUST LIKE EVERY OTHER ELEMENT OF THE OFFENSE.

Due process under the Fourteenth Amendment requires the State to prove each element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970)("[T]he Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Failure to instruct as to the necessity of proof as to each element of the offense violates due process. Osborne v. Ohio, 495 U.S. 103, 122-26 (1990). Due process is violated by an instruction which allows a finding of guilt based upon a degree of proof below that required by Winship. Cage v. Louisiana, 498 U.S. 39 (1990).

The United States Supreme Court has recognized that due process does "permit

state legislators to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes." Patterson v. New York, 432 U.S. 197, 210 (1977). For example, a State may determine that the accused's sanity at the time of the offense is not an element, but instead an affirmative defense. Leland v. Oregon, 343 U.S. 790 (1952). Thus, the due process implications are dependent upon what constitutes elements of the offense under state law. "The applicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged in any given case." Patterson v. New York, 432 U.S. at 211 n.12.

At the time of Mr. Provenzano's trial, Florida law provided that the accused's sanity was an element of the offense. Byrd v. State, 297 So.2d 22, 23 (Fla. 1974)(once sufficiently raised by the defense, "the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt.").

However, the standard jury instruction which was given to Mr. Provenzano's jury failed to adequately advise the jury of the State's burden to prove Mr. Provenzano's sanity beyond a reasonable doubt. Shortly after Mr. Provenzano's trial, the Florida Supreme Court specifically found the jury instruction inadequate. Yohn v. State, 476 So.2d 123, (Fla. 1985). The Florida Supreme Court explained:

> In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense.

Yohn v. State, 476 So.2d at 128. Because the standard instruction did not address the prosecution's burden of proof regarding sanity, the jury was not completely and accurately instructed.

Clearly, Florida law treated sanity as an element of the offense and subject to the beyond a reasonable doubt standard, "just like any other element of the offense." Yohn, 476 So.2d at 128. Thus, the failure to advise the jury of the burden of proof required by due process violated the Fourteenth Amendment. Cage v. Louisiana.

It is black letter law that a criminal defendant is entitled to have his jury "correctly and intelligently instruct[ed] . . . on the essential and material elements of the crime charged and required to be proven by competent evidence. Gerds v. State, 64 So.2d 915, 916 (Fla. 1953)." Chicone v. State, 684 So.2d 736, 745 (Fla. 1996). As the Court explained in Chicone:

> When an instruction excludes a fundamental and necessary ingredient of law required to substantiate the particular crime, such failure is tantamount to a denial of a fair and impartial trial.

Here, Mr Provenzano's jury as the Florida Supreme Court has recognized was not properly instructed upon the standard of proof required to establish the presence of

sanity, an element of the offense charged. This failure violated Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons expressed herein, Mr. Provenzano requests that this Court grant him the appropriate relief.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **INITIAL BRIEF OF APPELLANT**, which has been typed in TIMES NEW ROMAN, font size 14, 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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