

IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO,

Appellant,

vs.

CASE NO. SC99-32

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF THE APPELLEE

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CERTIFICATE OF TYPE SIZE AND STYLE

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

STATEMENT OF THE CASE AND FACTS

Appellant Thomas Provenzano was convicted of first degree murder and two counts of attempted first degree murder and sentenced to death in 1984. This Court affirmed his convictions and sentences in Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987). Postconviction relief has been repeatedly denied in state and federal courts. See, Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Provenzano v. State, 616 So. 2d 428 (Fla. 1993); Provenzano v. State, 739 So. 2d 1150 (Fla.), cert. denied, 120 S. Ct. 13 (1999); Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), affirming, Provenzano v. Singletary, 3 F. Supp. 2d 1353 (M.D. Fla. 1997).

On June 9, 1999, Governor Jeb Bush signed a warrant for Provenzano's execution on July 7, 1999. On July 5, 1999, Provenzano invoked the provisions of Section 922.07, Florida Statutes, by notifying the Governor of his claim of insanity for execution. On July 6, 1999, Governor Bush appointed a three-member commission to determine Provenzano's mental competency. The Commission consisted of three psychiatrists who reviewed Provenzano's Department of Corrections records and medical records; interviewed corrections officers; and conducted an 80-minute clinical interview with Provenzano. They concluded that Provenzano did not suffer from any mental disease, disorder, or defect that

would impair his ability to understand and appreciate the nature and effect of the death penalty and why it is to be imposed on him. The trial court thereafter denied Provenzano's motion for a hearing on insanity at time of execution, but this Court ultimately remanded the case for an evidentiary hearing. Provenzano v. State, 24 Fla. L. Weekly S406 (Fla. Aug. 26, 1999). The Honorable E. Randolph Bentley, Senior Judge, was assigned to the Eighth Judicial Circuit to hear and determine the issue of Provenzano's competency to be executed.

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

Following the conclusion of the evidentiary hearing, Judge Bentley entered an extensive order detailing his findings and concluding that Provenzano was competent to be executed:

In considering the evidence and testimony, the Court has given great weight to the testimony of Leslie

Parsons, D.O., Alan J. Waldman, M.D., and Wade C. Meyers, M.D. These three doctors are the psychiatrists who were appointed by the Governor to examine Provenzano's competency to be executed. The three doctors testified that although the conditions under which they examined Provenzano were not optimal, they were adequate, and that they were able, with a reasonable degree of medical certainty to opine that Provenzano does not suffer from any mental disease, disorder, or defect that would impair his ability to understand and appreciate the nature and effect of the death penalty and why it is to be imposed upon him.

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

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

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

Robert Pollack, M.D., a psychiatrist who examined

Provenzano before trial, testified regarding his belief that the report generated by Doctors Meyers, Parsons, and Waldman was not adequate. The Court did not give great weight to this testimony because it did not address the matter before the Court for consideration. Instead, this testimony was directed at alleged problems with the examination conducted by Dr. Meyers, Dr. Parsons, and Dr. Waldman. Dr. Pollock's main complaint was that there were too many individuals present in the room during the examination. He testified that it was not a generally accepted procedure to have other individuals present during a psychiatric examination. Further, Dr. Pollock specifically testified that he could not testify as to whether Provenzano is competent to be executed.

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

...

[Provenzano's counsel] presented some evidence of unusual behavior by Provenzano. Such behavior includes covering his face with rags or towels, sleeping on the floor under his bunk, and his self-diagnosed phobia of strip searches. However, the testimony at the hearing established that it is not uncommon for inmates at Florida State Prison to sleep on the floor because it is hot in the prison and the concrete floor is cooler. Further, sleeping under his bunk puts Provenzano in a position where he is closer to a fan, and thus, but sleeping under his bunk, he is cooler and more comfortable. Moreover, despite his phobia of strip searches, Provenzano willingly succumbs to the strip searches when it suits his personal desires. For example, Provenzano willingly submits to strip searches so that he may have his teeth cleaned and so that he may

meet with his attorneys. The only time he expresses concern over the strip searches and refuses to subject himself to them is when a mental health issue is involved.

Assuming for the sake of argument that some of Provenzano's behavior is bizarre, bizarre behavior does not render one incompetent to be executed. As the court in Martin [v. Dugger], 686 F. Supp. 1523 (S.D. Fla. 1988) stated: "A defendant may be mentally ill and still be competent enough to be executed." Martin, 686 F. Supp. at 1572-73. The Court finds that Provenzano may have mental health problems, but that these problems do not prevent him from having the required mental capacity to understand the fact of the impending execution and the reason for it. Further, as Dr. Waldman testified, one would have to virtually be unable to clean himself, feed himself, or otherwise function in order to meet the low threshold [sic] of incompetency to be executed. Aside from the above behavior, the main evidence of Provenzano's incompetency is Dr. Fleming's report, coupled with the opinion expressed in the continuance affidavit. The Court does not find her analysis as convincing as that of the State experts and, for reasons given earlier, does not find her testimony entitled to great weight.

...

This Court, as the finder of fact, has considered the demeanor of the witnesses, has carefully considered the testimony and evidence presented at the hearing, and has weighed the credibility of the evidence and witnesses. Additionally, the Court has had the opportunity to personally observe Provenzano over the course of two and one-half days. Throughout the hearing on this matter, Provenzano has at all times acted appropriately. He has, at times, appeared sad, and he appeared to become more melancholy when the State's experts testified or when the attorney for the State was providing argument against him.

Dr. Waldman, a well-credentialed expert with a subspecialty in malingering, finds that Provenzano is malingering mental illness.

The Court finds Provenzano has failed to prove incompetence for execution by clear and convincing evidence.

(PR. 98-103).

On appeal from the finding of competency, this Court again

remanded so that additional evidence could be presented. Provenzano v. State, 24 Fla. L. Weekly S434 (Fla. Sept. 23, 1999). Further hearings were conducted October 11 - 13, 1999 and November 15 - 16, 1999. Over the course of these hearings, Provenzano presented the testimony of Dr. Patricia Fleming of Wyoming; Dr. Henry Lyons; Dr. Henry Dee; Dr. Robert Berland; Mark Gruber, staff attorney at CCRC-Middle; Catherine Forbes, Provenzano's sister; and Shannon Loveday, CCRC-Middle investigator. The State presented Dr. Leslie Parsons; Dr. Harry McClaren; Dr. Alan Waldman; and Frederic Lyle, medical technologist with the Memorial PET Center in Jacksonville.

The trial court's final order summarizes the testimony presented on remand:

All of these witnesses named directly above, except Dr. Henry Dee, testified at the October hearing. Thus, the scope of the hearing was expanded beyond merely taking the testimony of Dr. Fleming and permitting Provenzano to cross-examine Dr. Parsons. Portions of these witnesses' testimony which the Court finds to be particularly relevant are set forth below.

Dr. Leslie Parsons testified in pertinent part as follows:

[MR. REITER]: During the last examination of yourself, I asked you whether you had evaluated Mr. Provenzano to -- were you able to determine from your evaluation whether Mr. Provenzano -- let's see if I can form this question right -- understood the relationship between the death penalty and the crime for which he was accused and convicted.

[DR. PARSONS]: Correct.

[MR. REITER]: Did you make any determinations as to that issue?

[DR. PARSONS]: Yes. I believe that he does

understand the connection between his crime and why the penalty is being imposed upon him.

[MR. REITER]: Okay. Now, is that a factual understanding? In other words, let me see if I can separate it out. You believe that Mr. Provenzano factually understands what the death penalty is and the electric chair, correct?

[DR. PARSONS]: That's correct.

[MR. REITER]: And you believe that Mr. Provenzano understands that he was accused and convicted of a crime, correct?

[DR. PARSONS]: That's correct.

[MR. REITER]: Now, are you saying that it's your opinion that he associates the two together?

[DR. PARSONS]: Yes.

[MR. NUNNELLEY]: Dr. Parsons, just a couple of questions. Did you make any interpretation or determination as to Mr. Provenzano's rational understanding?

[DR. PARSONS]: Yes, I did.

[MR. NUNNELLEY]: And what is your opinion with regard to Mr. Provenzano's rational understanding of the death penalty?

[DR. PARSONS]: It is my opinion that he does have a rational understanding of the -- how the crime that he committed is connected to his punishment.

(Transcript of Hearing held October 11-13, 1999 (hereinafter referred to as "T" followed by the corresponding page number), pages 15-18.)

Patricia Fleming, Ed.D., was accepted by the Court as an expert for Provenzano in the field of clinical and forensic psychology. Dr. Fleming testified that in her opinion, Provenzano is not competent to be executed. Dr. Fleming testified about the different mental tests, including the Wechsler Adult Intelligence Scale Revised test ("WEIS-R"), selected parts of the Wechsler Memory Scale III, the Structured Interview of Reported Symptoms test ("SIRS"), and the Minnesota Multiphasic Personality Inventory ("MMPI"), that she performed on Provenzano during her examinations of him in 1989 and in July of 1999. Dr. Fleming also testified about all of the documents she reviewed and individuals with whom she spoke in order to reach her opinion regarding Provenzano's mental status. Additionally, she testified that Provenzano understands that he has been sentenced to death for the courthouse shootings in Orlando, and that

he understands that when he is executed, he will die. (T. 76-77, 100, 156-157) Dr. Fleming stated that the difference with Provenzano, and with most inmates that have been sentenced to death, is that they have a different belief about what happens to them after they die. (T. 77, 99-100, 102-104) According to Dr. Fleming, Provenzano "believes that his afterlife is different than the traditional concept of being dead." (T. 78, 120-126) She also testified that Provenzano thinks he is going to be executed because there is a conspiracy to kill him because he is Jesus Christ, and that he is not being executed because he is being punished for a crime. (T. 40-41, 47-48, 100, 156-157, 174, 178)

Henry Lyons, M.D., was accepted by the Court as an expert for Provenzano in the field of forensic psychiatry. Dr. Lyons examined Provenzano in 1984 before Provenzano stood trial for the murder which he was convicted and sentenced to death, and he examined Provenzano again on September 22, 1999. (T. 201, 202-204) Dr. Lyons testified that based upon the examination of Provenzano that he conducted on September 22nd, and based upon his review of the documents provided to him by counsel for Provenzano, he believes Provenzano is not competent to be executed. (T. 206-208)

Dr. Lyons testified that Provenzano understands that he was convicted of first degree murder arising out of a courthouse shooting in Orange County; that Provenzano understands that the Orange County jury that heard his case recommended by a vote of seven to five that he be sentenced to death; that Provenzano understands he was in fact sentenced to death in accordance with the jury's recommendation; and that Provenzano understands the sentence of death imposed upon him came as a result of the murder conviction. (T. 227-228, 231) Dr. Lyons also testified that Provenzano does not think he committed a crime, but that he was acting in self-defense against the people who are out to get him. (T. 209-210) Dr. Lyons further testified that Provenzano knows what occurred when he went to court and what happened, but that he disagrees with the verdict and sentence because he doesn't feel guilty of any crime. (T. 209-210, 231) Moreover, Dr. Lyons testified that Provenzano thinks he's being executed because he is Jesus Christ. (T. 210, 230-231) Dr. Lyons also testified "I asked him point blank whether he would rather be executed or serve 30 more years in prison and he stated he would rather serve the 30 years." (T. 214, 220)

Mark Gruber, staff counsel with the Office of the

Capital Collateral Regional Counsel - Middle Region, testified that he was present for a portion of the evaluation of Provenzano conducted by the commission of experts appointed by Governor Bush pursuant to section 922.07, Florida Statutes, to examine Provenzano and determine whether he is competent to be executed. (T. 240-241) Gruber testified that during the commission's examination of Provenzano, Dr. Waldman initiated the line of questioning with Provenzano regarding the meaning of the phrase "eye for an eye" and that Provenzano did not spontaneously use that phrase, but rather used it in response to questions that were posed to him by the doctors in which the phrase was used. (T. 242-243; see also Tr. pages 254, 334-335) Gruber testified that he specifically recalled this line of questioning because he felt it was unfair. (T. 243-244)

With the stipulation of counsel for Provenzano, Harry McClaren, Ph.D., was accepted by the Court as an expert for the State in the field of forensic psychology. Dr. McClaren testified that on October 5 and 6, 1999, he spent several hours with Provenzano, performing tests on Provenzano, including the MMPI, the WEIS-R test, and the Bender-Gestalt test, and conversing with him to form an opinion as to whether Provenzano is competent to be executed. (T. 251-252) Dr. McClaren also interviewed several other individuals employed by the Florida Department of Corrections. (T. 289-292) Dr. McClaren testified that Provenzano told him "he realized the State was trying to put him in the electric chair because of being convicted of first degree murder." (T. 255, see also T. 287, 316, 371-372) Provenzano informed Dr. McClaren that the jury that heard his case found him guilty and recommended by a vote of seven to five that he be sentenced to death. (T. 256, 278, 316, 371-372) When asked whether he thinks execution kills a person, Provenzano told Dr. McClaren "no." (T. 257) When Dr. McClaren asked him how that could be, Provenzano stated, "Well, there is life after death. So many religious groups try to build up these things in you." (T. 257)

Provenzano also informed Dr. McClaren of his belief that he is Jesus Christ. (T. 263-264, 362-364) When Dr. McClaren asked Provenzano how long he has been Jesus Christ, Provenzano responded "Well, that's a very touchy and painful subject. I wish I was in the hospital." (T. 264-266) Dr. McClaren testified that Provenzano repeatedly asked to be put into a mental hospital. (T. 264) When asked whether the State of Florida is trying to execute him because he is Jesus Christ, Provenzano

stated, "Yes, you can bet your life I honestly believe that." (T. 266, see also T. 372) Dr. McClaren perceived this as an effort by Provenzano to make him (Dr. McClaren) believe that he (Provenzano) actually holds this belief. (T. 263-264)

At one point during the second day he spent with Provenzano, while discussing Provenzano's situation, Provenzano told Dr. McClaren that he understood they might possible [sic] electrocute him in the future, but that he hoped they switched to lethal injection. (T. 278-279) Dr. McClaren testified that they discussed this subject further, and Provenzano told him that if he had the choice between electrocution and lethal injection, he would choose lethal injection. (T. 279) Provenzano also told Dr. McClaren that he hoped he would get a new trial or a new sentencing proceeding, and that he hoped he would receive a life sentence rather than a death sentence. (T. 281-282)

Dr. McClaren testified that he has no doubt that Provenzano understands the fact of his impending execution and that the reason he is to be executed is because he was sentenced to death, in accordance with the jury's vote of seven to five in favor of death, for his conviction for killing a bailiff. (T. 293, 316-317, 371-372)

With the stipulation of counsel for Provenzano, Alan J. Waldman, M.D., testified on behalf of the State as an expert in the field of forensic psychiatry. Dr. Waldman testified that in addition to being a member of the Governor's commission appointed to examine Provenzano pursuant to section 922.07, Florida Statutes, he examined Provenzano at the request of the State on October 4 and 8, 1999. (T. 385-386, 423-424) Dr. Waldman testified about the problems he encountered interviewing Provenzano on October 4th, and about the successful interview he conducted of Provenzano on October 8th. (T. 388-407) Dr. Waldman testified that at the end of their meeting on October 8th, he asked Provenzano if he thought he was Jesus Christ. (T. 407) Provenzano responded "yes." (T. 407) Provenzano further stated that he didn't feel comfortable talking about that, but he would talk to Dr. Waldman about it if he were in a hospital. (T. 407-408)

Dr. Waldman also testified that he and Provenzano discussed the gunshot wound Provenzano received during the courthouse shooting. (T. 409-410) Dr. Waldman asked Provenzano how he got shot, and Provenzano responded, "Well, that's kind of why I'm here." (T. 410) When Dr. Waldman asked him what he meant by that, Provenzano

stated he was shot in the courthouse. (T. 410) Additionally, Provenzano admitted shooting one person, but stated that he did not shoot the others. (T. 410) Provenzano told Dr. Waldman details about his trial in Orlando. (T. 411-413)

Dr. Waldman testified that in his opinion, although Provenzano may suffer from mental illness, Provenzano is competent to be executed. (T. 415, 426-427) When asked about the reasons for his opinion that Provenzano is competent to be executed, Dr. Waldman responded:

Well, he clearly knew, understood from both a factual and a rational level, what was going on with him in the trial, in the sentencing phase, knew and appreciated the difference between a life sentence and a death sentence, expressed his desire to have the sentence changed to life, which tells me that he knows the difference between a life sentence and a death sentence. In order to have a desire, you have to know what you're desiring. That we just had a normal conversation, where he was able to tell me all the things that led him to his current situation on death row, and then he would get highly inconsistent. And the two things that stand out -- I guess the three things that stand out, he talked a good bit about death warrants. He talked about the death warrants being signed of the two individuals that he shares the death watch area with. He talked about not having the death warrant signed at the time of his being brought from UCI [Union Correctional Institution] to Florida State Prison but made it a point to tell me that he knew it hadn't been signed yet but that the death warrant was signed shortly after his arrival.

(T. 415-416; see also T. 469-470) When asked why Provenzano's comment about the death warrant was significant, Dr. Waldman responded, "Well, it was significant because he both rationally and factually understood it." (T. 416-417) Dr. Waldman also testified that at times, Provenzano seemed to catch himself once he realized that he had been freely talking with Dr. Waldman, and that he would then respond to questions with "I don't know." (T. 417-418) Dr. Waldman felt that Provenzano was being deceptive with his "I don't know" responses. (T. 417-419) Dr. Waldman testified that the time he spent with Provenzano on October 4 and 8, 1999, reinforced the opinion regarding Provenzano's competency that he had reached as a member of the Governor's commission. (T. 419, 484-485)

Catherine Forbes, Provenzano's sister, testified that she informed Provenzano that the jury at his trial recommended death by a vote of seven to five, and that she told Provenzano he should not have been convicted and sentenced to death because it was "politics." (T. 494-496).

...

On November 15 and 16, 1999, these proceedings resumed. At that time, Provenzano presented the testimony of Henry Dee, Ph.D., Robert Berland, Ph.D., and Shannon Loveday. The State presented the testimony of Harry McClaren, Ph.D., and Frederic Mitchell Lyle.

Dr. Dee was accepted by the Court as an expert on behalf of Provenzano in the field of forensic psychology. (Transcript of Hearing held November 15 and 16, 1999 (hereinafter "TT" followed by the corresponding page number), page 30). He testified about the examination of Provenzano that he conducted on September 20, 1999. Dr. Dee opined that Provenzano is not competent to be executed. Dr. Dee testified regarding the psychological testing that he performed on Provenzano, and about the materials, which were submitted to him by Provenzano's counsel, that he reviewed before reaching his conclusion regarding Provenzano's competency to be executed. Dr. Dee testified that at the beginning of his interview of Provenzano, Provenzano's behavior was similar to the behavior Provenzano engaged in during Dr. Waldman's interview of him, in that Provenzano behaved peculiarly and seemed to be posturing. (TT. 37, 42-43) Dr. Dee testified that he ignored Provenzano's behavior, and it subsequently went away. (TT. 37, 42-43) Dr. Dee also testified that there were times during his examination of Provenzano when he felt that Provenzano was not being entirely forthcoming, and that he thinks Provenzano may have malingered at times not only with him, but also with the other doctors who examined him. (TT. 42-45)

Dr. Dee testified that he and Provenzano discussed the death penalty. He stated that Provenzano has a detailed grasp and knowledge of his trial, conviction, and sentencing, but that Provenzano claims he is innocent and that he was convicted and sentenced as a result of a conspiracy. (TT. 48-50, 53-54, 72) Dr. Dee testified that Provenzano understands he is going to be executed, but that Provenzano was not overly concerned about this because he does not think the State is actually going to execute him. (TT. 53-54)

Dr. Dee testified that near the end of his examination of Provenzano, he and Provenzano spoke about

Provenzano's belief that he is Jesus Christ. (TT. 47-48) Dr. Dee testified that Provenzano has held this belief that he is Jesus Christ since the 1970s. (TT. 57) Dr. Dee stated that Provenzano told him it was torturous to be Jesus Christ, and that individuals who do not believe in Jesus Christ were torturing him. (TT. 47-50) Dr. Dee further stated that Provenzano has a delusional belief that he is going to be executed because he is Jesus Christ. (TT. 47-50) As part of his delusional belief, Provenzano believes that his trial, conviction, sentence of death, and impending execution were simply a ruse, and that he really was tried and sentenced to death because he is Jesus Christ. (TT. 63-66)

When asked why he opines that Provenzano does not meet the standard of competency for execution, Dr. Dee stated his opinion is based on Provenzano's long-standing delusion that he is Jesus Christ, and Provenzano's belief that his conviction and pending execution are because he is Jesus Christ. (TT. 62-66, 76, 95) Dr. Dee testified that although Provenzano has a factual understanding of his impending execution, his delusion of being Jesus Christ prevents him from having a rational understanding as to why he will be executed. (TT. 62-66, 104) Dr. Dee testified that it is possible for Provenzano to have the understanding that he is being executed because he is Jesus Christ and still have an understanding that he is being executed because of his conviction for murder. (TT. 101-102)

Robert Berland, Ph.D., testified on behalf of Provenzano regarding the MMPI. He was accepted by the Court as an expert in the area of clinical psychology and as an expert in MMPI analysis. (TT. 131) Dr. Berland testified about the results of the MMPIs performed on Provenzano by Dr. Fleming, Dr. McClaren, and himself. (TT. 131-133) The crux of Dr. Berland's testimony is that there is a dispute among psychologists as to whether results of MMPI examinations that are scored by computers, and which produce results that state the test was "invalid" may be interpreted rather than being automatically dismissed. (TT. 148-159) This testimony was presented because the results of the MMPI examinations performed on Provenzano by Dr. Fleming and Dr. McClaren, both of which were scored by computer, were invalid. (TT. 106-119)

Additionally, on cross examination and over the objection of Provenzano's counsel, Dr. Berland testified that he examined Provenzano in June of 1999 at the request of Provenzano's counsel. (TT. 189-192) Dr.

Berland testified that when he conducted his examination of Provenzano, he literally had copies of section 922.07, Florida Statutes, and Florida Rule of Criminal Procedure 3.812 sitting on the table before him. (TT. 220-221) He stated that based upon additional information he has received and heard since the time he conducted the examination, he might have doubts about whether Provenzano is competent to be executed, but that at the time he prepared his report dated July 9, 1999 on Provenzano's competency to be executed, he opined that Provenzano was competent to be executed. (TT. 198-200, 202-207, 212-218)

Dr. McClaren testified once again on behalf of the State as an expert in the area of forensic psychology. (TT. 236) At this proceeding, Dr. McClaren testified in depth regarding the MMPI. Further, in response to a question posed by the Court, and over the objection of Provenzano's counsel, Dr. McClaren testified he had no doubt that although Provenzano has a delusional belief that he is Jesus Christ, Provenzano has both a factual as well as a rational understanding of the fact that he committed a crime for which he is facing execution. (TT. 251-252, 254-257, 259-260) Dr. McClaren testified that although Provenzano has three reasons why he should not be executed, i.e., because he is innocent, because he is Jesus Christ, and because he is a victim of a conspiracy, these alternative reasons do not affect Provenzano's rational appreciation of the sentence of death that has been imposed upon him. (TT. 261-262)

Frederic Mitchell Lyle, nuclear medicine technologist with Memorial PET Center in Jacksonville, testified that he performed a PET scan on Provenzano. (TT. 12-13) Mr. Lyle testified that when he performed the PET scan on Provenzano, Provenzano did not have any difficulty interacting with him or following directions from him. (TT. 17, 23) He testified that at no time during the scan or the time leading up to it did he have reason to question Provenzano's competency to sign the informed consent form which Provenzano was required to sign before the test could be performed. (TT. 17-19)

Shannon Loveday, an investigator with the Office of the Capital Collateral Regional Counsel - Middle Region, testified that she took the informed consent form for the PET scan to Provenzano to obtain his signature thereon. (TT. 228-230) She testified that Provenzano tried to read and understand the form, but that he told her he was unable to understand it and concentrate about it. (TT. 228-230) Ms. Loveday testified that she had to explain

the form to Provenzano. (TT. 228-230)

(PR1. 97-108). Judge Bentley's Order concluded with the following findings:

Based upon the totality of the evidence and testimony presented to this Court, the Court makes the following findings:

1) Thomas Provenzano does, at times, engage in bizarre behavior.

2) Based upon the various tests performed on Provenzano by Dr. Fleming, Dr. Dee, and Dr. McClaren, Thomas Provenzano is not mentally retarded.

3) It was not proven that Thomas Provenzano suffers from brain damage.

4) Although Thomas Provenzano suffers from mental illness, he also exaggerates symptoms of mental illness and he utilized deception while he was being examined by the various doctors. It is difficult to delineate Provenzano's exact mental status, however, it is not necessary to do so for these proceedings.

5) Thomas Provenzano factually and rationally knows and understands that he was involved in an incident in the Orange County Courthouse during which he shot and killed Orange County Courthouse Bailiff Arnie Wilkerson. Provenzano factually and rationally knows and understands that he was convicted of murder for killing Bailiff Arnie Wilkerson.

6) Thomas Provenzano has a factual and rational understanding of the details of his trial, his conviction, and the jury's recommendation by a vote of seven to five that he be sentenced to death.

7) Thomas Provenzano has a factual and rational understanding of the fact that in accordance with the jury's recommendation, he was sentenced to death for the murder of Bailiff Arnie Wilkerson, and that he will die once he is executed.

8) Thomas Provenzano has, for over twenty years on occasion, believed that he is Jesus Christ. In conjunction with his delusional belief, Provenzano believes that he is not going to be executed because he murdered another human being, but that he really will be executed because he is Jesus Christ. However, Provenzano's delusional belief that his conviction and sentence of death are not the real reasons for his impending execution does not impair his factual and rational understanding of the fact that he is facing

pending execution for his conviction and sentence of death for murdering Bailiff Arnie Wilkerson during a shoot-out at the Orange County Courthouse.

(PR1. 114-115). This appeal follows.

SUMMARY OF THE ARGUMENT

Provenzano has failed to demonstrate any Eighth Amendment error in the application of the standard employed by the trial court in finding him to be competent for execution. Since there is no dispute as to Provenzano's competence under this standard, relief must be denied.

ARGUMENT

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

The question presented in this appeal is whether the Eighth Amendment prohibits the execution of a person who rationally understands the connection between the crime for which he was convicted and his sentence of death, but who irrationally refuses to accept the legitimacy of his conviction. As Judge Bentley found below, the Eighth Amendment is satisfied once a factual and rational understanding of the imposition of the death penalty and the reason for it have been established, and therefore the order finding Provenzano competent for execution must be affirmed.

Judge Bentley's Final Order Declaring Provenzano Competent To Be Executed thoroughly reviews the factual and procedural background of the case; analyzes the testimony that was presented in October and November, 1999; recites the factual findings determined from the testimony; and discusses the proper application of the law to the facts of this case. The court extensively delineated the reasons for its ultimate finding of competency:

The Court has reviewed the evidence submitted during the September, October, and November hearings, and has reviewed the transcripts of these proceedings. Based upon the totality of the evidence presented to this Court at all three hearings, this Court is confident that no stone has been unturned in this matter and that Provenzano has had an extensive adversarial hearing regarding his competency to be executed. In fact, at the

conclusion of the November hearing, Provenzano's counsel stated on the record in open court that he had presented everything he had to present to the Court on behalf of Provenzano. (TT. 265-266)

The Court, sitting as the finder of fact, has determined the appropriate weight to be given to each of the witness' testimony.

The Court has given great weight to the testimony of Dr. McClaren, and finds him to be the most persuasive of all of the State's witnesses. Dr. McClaren was candid about his concerns about Provenzano's mental health status, but at the same time was specific in his conclusion that Provenzano is competent to be executed.

The Court has not given great weight to the testimony of Dr. Fleming. One of several reasons that the Court did not find Dr. Fleming particularly persuasive is the fact that when she was asked about statements that Provenzano made to her, Dr. Fleming testified regarding her interpretation of Provenzano's statements rather than simply testifying to the actual statements made by Provenzano during her examinations of him. (See, e.g., T. 77-79)

The Court has given great weight to the testimony of Dr. Dee. He was frank about the problems he encountered while examining Provenzano, including his belief that there were times when Provenzano was not being completely candid with him. Further, Dr. Dee was candid about his belief that Provenzano may have malingered not only at times with him, but also at times with other doctors who examined him. Dr. Dee felt Provenzano's behavior was rational behavior under the circumstances. Dr. Dee was forthcoming about Provenzano's knowledge of the facts surrounding his trial, conviction, and sentence. Dr. Dee is of the opinion that except for the Christ delusion, the other mental problems, which include bizarre behavior such as sleeping on the floor, placing rags over his face, and the strip search phobia, do not impair Provenzano's ability to understand the process and therefore are not relevant. As the Court understood this testimony, Dr. Dee believes that but for the Christ delusion, Provenzano would be competent for execution under the minimal standard that is in place. Furthermore, and most importantly, Dr. Dee's testimony about Provenzano's dual belief system helped this Court narrow the issue to be decided.

In addition to reviewing the testimony and evidence presented at the hearings, and in addition to determining the weight to be given to each witness' testimony, the

Court has had the opportunity to observe Provenzano throughout the course of these proceedings. Throughout all the days that these proceedings have taken place, Provenzano has consistently appeared neat and well-groomed. He has behaved appropriately, stood when he was required to stand, and he has not ever appeared to have had difficulty sitting still for extended periods of time in court. Further, the Florida State Prison guards escorting him throughout these proceedings were not ever required to take any action that was observable to the Court in order to get Provenzano to behave appropriately.

The record before this Court contains evidence that Provenzano has engaged in unusual behavior. Additionally, the record contains evidence that Provenzano has held the belief that he is Jesus Christ, at least at times, for over twenty years, including times when he had no apparent secondary gain. Provenzano's belief, if it is one that he truly holds, obviously renders him delusional, and quite possibly, insane for execution. But, the record before this Court also contains ample evidence that Provenzano is sane for execution. The question for this Court to decide is whether Provenzano has met the burden of proof imposed upon him by Florida Rule of Criminal Procedure 3.812 to prove by clear and convincing evidence that he is insane to be executed.

As the October and November hearings on this matter proceeded, the issue in this case narrowed. Originally, the issue was very broad and seemed to be whether Provenzano suffers from mental health problems in general, and whether those problems indicate he is unable to understand the fact of his impending execution and the reason for it. Thus, at the September hearing, the evidence presented to the Court covered a wide range of Provenzano's unusual behavior and extraordinary beliefs. Now, it is clear that Provenzano does indeed, at least at times, engage in bizarre behavior, and that he does suffer from mental health problems of some degree. Additionally, it is clear that Provenzano has a factual understanding that he was convicted by a jury of murder for the killing that occurred during the courthouse shootings in Orlando, and that he has a factual understanding that in accordance with the jury's recommendation, he was sentenced to death. Further, it is clear that Provenzano knows that his execution is pending and that when it is carried out, it will cause him to die.

The pivotal issue before the Court, however, stems

from Provenzano's delusional belief that he is Jesus Christ, and his belief that he will not be executed because he murdered Orange County Courthouse Bailiff Arnie Wilkerson, but that he will be executed because he is Jesus Christ.

Is Provenzano competent to be executed if, on the one hand, he can recite with specificity the details of his trial and sentencing proceedings, understand and rationally argue these details, factually and rationally understand that he is going to be executed for killing another human being, and understand that his execution will result in his death, and on the other hand have a delusional belief that the real reason all this is happening is because he is Jesus Christ?

What are the factual findings on this issue and how do they relate to the legal standard? There is clear and convincing evidence that Provenzano can rationally and factually discuss all aspects of the "process" as required by the current standard for competency for execution set forth in Florida Rules of Criminal Procedure 3.811 and 3.812. There is clear and convincing evidence that Provenzano has a delusional belief that he is Jesus Christ which predates the murder by several years.

The question of whether at present this delusion extends to the point that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus is a much closer question. There is clear and convincing evidence in the record that although Provenzano has real and present mental problems, he exaggerates them, either deliberately or because it is a characteristic of his mental health problems. The MMPI tests are of less value than they might otherwise be. Provenzano has high "fake" scores on the tests, but a legitimate dispute on the interpretation of the "fake" scale lessens the value of this evidence. We are ultimately left predominately with the subjective findings of the experts. Many of the experts are highly qualified and are of differing opinions. After struggling with the issue, the Court finds by clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ.

The Court is presented with a set of parallel beliefs that are in conflict. What does the standard for competency for execution, and specifically rules 3.811 and 3.812, require in this situation? If they require only a rational understanding of their elements, then

Provenzano clearly meets that standard. By the end of the hearing, Provenzano's counsel was not seriously contesting Provenzano's ability to recite the various facts surrounding the killing, his trial, his sentencing proceedings and the death sentence imposed upon him, and his pending execution. Provenzano's counsel contends that Provenzano's delusional belief, in spite of his ability to recite the facts, prevents Provenzano from having a truly rational understanding of the facts of the process. Provenzano's counsel contends, in other words, that rational acceptance of the reason for death and the process leading to it is inherent to a rational understanding of the facts. If this is found to be the law, then the Court must find Provenzano insane for execution.

In order to be competent to be executed, a prisoner must have "the mental capacity to understand the fact of [his or her] pending execution and the reason for it." Fla. R. Crim. P. 3.812. See also Fla. R. Crim. P. 3.811. The test for competency to be executed under rules 3.811 and 3.812 "contains a rationality element, albeit a limited one." Provenzano, 24 Fla. L. Weekly S434 (agreeing with Judge King's opinion in Martin v. Dugger, 686 F.Supp. 1523 (S.D. Fla. 1988)). The rationality to be demonstrated "is that of an objective rationality what would be regarded as rational to the average person." Martin, 686 F. Supp. at 1572 (quoting United States v. Blohm, 579 F. Supp. 495, 499 (S.D. N.Y. 1983)).

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

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

This Order should not be misinterpreted as a finding

that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not.

Based upon those findings, the Court concludes that Thomas Provenzano has failed to prove by clear and convincing evidence that he is not competent to be executed. In other words, he has failed to establish by clear and convincing evidence that he lacks the capacity to understand the fact of his impending execution and the reason for it.

(PR1. 108-114)(footnotes omitted). Judge Bentley concluded that Provenzano does not lack the mental capacity to understand the fact of his pending execution and the reason for it and is therefore sane and competent to be executed. Although Provenzano repeatedly notes that Judge Bentley expressed concern and trepidation with his legal reasoning and ultimate conclusion, Judge Bentley's thorough and painstaking analysis only highlights the correctness of his ruling.

Judge Bentley's findings are thoroughly supported by the record. Each of the doctors testifying at the October and November hearings about Provenzano's rational understanding of his death sentence stated that Provenzano understood that his sentence was the result of his first degree murder conviction:

[Dr. Parsons]:

Q. During the last examination of yourself, I asked you whether you had evaluated Mr. Provenzano to -- were you able to determine from your evaluation whether Mr. Provenzano -- let's see if I can form this question right -- understood the relationship between the death penalty and the crime for which he was accused and convicted.

A. Correct.

Q. Did you make any determination as to that

issue?

A. Yes. I believe that he does understand the connection between his crime and why the penalty is being imposed upon him.

Q. Okay. Now, is that a factual understanding? In other words, let me see if I can separate it out. You believe that Mr. Provenzano factually understands what the death penalty is and the electric chair, correct?

A. That's correct.

Q. And you believe that Mr. Provenzano understands that he was accused and convicted of a crime, correct?

A. That's correct.

Q. Now, are you saying that it's your opinion that he associates the two together?

A. Yes. (PR1. 154-155)

[Dr. Fleming]:

Q. You're aware that there is testimony that Mr. Provenzano told a Department of Corrections officer that he needed a stay of execution, aren't you?

A. Yes.

Q. And that certainly indicates an awareness of his impending execution, doesn't it?

A. Oh, yes. He knows that he has been executed -- I mean he has been sentenced or -- the execution date has been set, he knows that. (PR1. 214)

...

Q. You read all of the testimony at the last proceeding?

A. I did.

Q. And in fact, there is testimony in there that indicates rather clearly, I believe, that Mr. Provenzano understands that he has been sentenced to death for the courthouse shootings in Orlando, isn't there?

A. He understands that he has been sentenced to death for that reason, yes, he understands that. (PR1. 215)

...

Q. If he told another mental state professional that being put in the electric chair would kill him, that would be something that would undercut the accuracy of your opinion, wouldn't it?

A. No, not at all.

Q. That wouldn't affect your opinion?

A. Well, no, because he knows the electric chair kills. (PR1. 216)

...

A. He understood that he was to -- that the -- that he was sentenced to a crime, and this is important. He knows that and he knows that the result of that is an execution. The thing that he differs from almost anyone that I've talked to in some ways is that due to his delusional system and the conspiracy against him, that the reason is not because he had committed a crime but because of the evil forces that want to get rid of him, so that is the difference. He does not -- he does not believe or does not know that he committed a crime, and this is the reason for it, the execution is the consequence of that. (PR1. 239)

...

Q. Mr. Provenzano understands that his penalty phase jury recommended death by a vote of seven to five, doesn't he?

A. Yes.

Q. He understands that he was sentenced to death by the trial judge, doesn't he?

A. I'm sorry?

Q. He understands that he was sentenced to death by the trial judge, doesn't he?

A. Yes. That's the factual basis, yes.

Q. He hopes he gets a new sentencing procedure, doesn't he?

A. I'm sure he does.

Q. Did you ask him?

A. I don't know that I said do you want a new sentencing, but yes, he does.

Q. He also hopes for a new trial, doesn't he, or did you ask him that either?

A. I didn't ask him that but I'm assuming he would.

Q. But you didn't ask him?

A. I don't know if I did or not.

Q. Wouldn't his understanding of those legal concepts be relevant to your determination of his competence for execution?

A. I had enough information to know that he does understand the factual basis. He understands there was a trial, he understands that he was charged, that he was convicted, he does know that. He understands the basis of an execution. (PR1. 306-308)

...

Q. You were asked by Mr. Nunnelley before that if Thomas had said to someone -- and he was paraphrasing -- that he was being executed because of a killing in the courthouse, that statement alone, do you know whether

Tommy has been told that in the past?

A. Oh, yes. He's read the newspaper articles, he's done -- that he was the one that committed the crime. (PR1. 324)

[Dr. Lyons]:

Q. Do you know what Thomas's understanding is with regard to or what he believes regarding the standard?

A. Well, he knows he's going to be killed in the electric chair.

Q. Okay.

A. He does not think he committed a crime in the courtroom in 1984. He thinks he was defending himself against the people who were out to get him.

THE COURT: You're saying he disagrees with what happened in court in 1984?

THE WITNESS: He doesn't feel that he committed a crime, that's correct, Your Honor.

THE COURT: He feels he's, in effect, not guilty because of self-defense?

THE WITNESS: That's correct, sir.

THE COURT: But he understands that he went to court and what happened although he disagrees with the verdict and the sentence?

THE WITNESS: Yes, sir, he knows what occurred, yes sir.

THE COURT: Okay.

BY MR. REITER:

Q. Why does he think he's being executed? What is his belief on why he's being executed?

A. The people who have been out to get him since 1974 are having their way with him, they are going to kill him.

Q. Does he associate the death penalty or the execution, the cause of that to be the accusation and conviction that occurred in 1984?

A. He knows that's it but he can't accept it.

Q. When you say he can't accept it, what does that mean?

A. He doesn't feel guilty of any crime.

Q. Does he believe he's being executed for that crime though?

A. He understands that that's the reason he's being executed but because of his psychosis, he thinks he's innocent and should not be executed for that crime. He thinks he's being executed because he's Jesus Christ. (PR1. 358-359)

...

Q. Now, Thomas Provenzano understands, doesn't he, Doctor, that the electric chair will kill him, doesn't he?

A. Yes, he does.

Q. And he understands that he was convicted of first degree murder arising out of a courthouse shooting in Orange County, doesn't he, sir?

A. That's correct.

Q. And he understands, doesn't he, Dr. Lyons, that the Orange County jury that heard his case recommended by a vote of seven to five that he be sentenced to death, doesn't he?

A. You're correct.

Q. And he understands that he was, in fact, sentenced to death as a result of that jury recommendation?

A. That's correct.

Q. And he understands, doesn't he, that sentence came as a result of the murder convictions, doesn't he?

A. That's correct.

...

Q. When Mr. Nunnelley asked you if he understood about the sentence back in 1984, I guess it was, you indicated to Mr. Nunnelley that he understood that.

A. He knew it and understood what the court had done to him, yes.

Q. But does that understanding, in your opinion, rise to the level of his understanding as to why he's being killed for that reason?

A. You've got to do that again.

Q. Okay. I guess there is only two choices based on your testimony. Does Thomas believe he's being executed because he's Jesus Christ or does Thomas believe he's being executed because of the crime that was committed in 1984?

A. He understands that the State is executing him for what he was tried for; however, he understands that he is being executed because he's Christ.

Q. Okay. Do you know whether or not Thomas has been told that he was going to be executed because of the crime that he committed, do you know if he was told that before?

A. I don't know exactly but I'm sure he knows what the State is trying to do.

Q. Okay. Do you know if that is something that he's just repeating or is it something he rationally understands?

A. Well, he was at his trial and he knows what the trial conclusion was. He disagrees with it, however. (PR1. 376-380)

[Dr. McClaren]:

Q. I asked him why this was happening and he said that he realized the State was trying to put him in the electric chair because of being convicted of first degree murder. He said, "In Orange County court they accused me of murder in the first degree, I think. The jury found me guilty. The jury recommended death seven to five. One juror said it was harder than hard." Again he said you can read it in the newspaper. (PR1. 415-416)

...

A. And I asked him is Florida trying to execute you because you are Jesus Christ?" And he says, "Yes, you can bet your life I honestly believe that." He was definitely making an effort for me to believe him about this, again, a somewhat dramatic presentation of this. I think he knew how important this was.

Q. What, if any, significance do you attach to Mr. Provenzano apparently realizing that this was important?

A. I think he understands that his competence for execution involves this kind of thinking. (PR1. 426-427)

...

A. Well, I tried to draw the focus back on the competency for execution, and I said, "What's your legal situation?" "I don't know. I'm worse now, possibly they might execute me, electrocute me, unless they change to lethal injection." "Why?" "I think that's what the judge decided and the jury recommended." "What did you do wrong?" "They decided it was first degree murder. The judge decided it was death by electrocution." "What did it involve?" "They said it was a courtroom bailiff was killed, a first degree murder of a bailiff named Wilkerson, I think, I'm pretty positive." (PR1. 437-438)

...

A. Well, we talked more about this execution process and he said, "If I had the choice between the two, it would be a lethal injection." I said, "Well, is there any other reason that you're being executed?" And he says, "It's a psychological, a political torture because I'm really innocent. The trial was a mass confusion for jurors. It's a conspiracy for politics." (PR1. 439)

...

A. [B]ut in my view there is no doubt in my mind

that he understands the fact of his impending execution and the reason for it being that he was convicted of killing a bailiff and a jury -- by a jury, the jury recommended death seven to five, which is true, and the judge imposed it. (PR1. 453)

...

A. Well, he told me why, that he was about to be executed because of being found guilty of first degree murder by jury, seven to five recommendation for death, the judge imposed it, people that had been around him told me that he had made comments indicating that he understood an impending execution. He is not retarded. He is -- while I believe that he is mentally ill and has some delusional thinking, he is not so impaired that he does not recognize the fact of the impending execution and the reality-based reason for it. (PR1. 484-485)

...

THE WITNESS: Right. I believe that they are intertwined, that he has had the idea that he is Jesus Christ, but he also understands the reason that he is being executed, not punished in some other way, is because of the homicide. (PR1. 1133)

[Dr. Waldman]:

A. We got on the subject of his gunshot wound.

Q. And what did he say about his gunshot wound?

A. He told me that it entered through his back, it struck a rib, went down into his belly, ricocheted around and ended up on his diaphragm. From there I asked him, "Well, how did you end up being shot?" He said, "Well, that's kind of why I'm here." I said, "What do you mean?" "I got shot in the courthouse." I said, "Well, what happened in the courthouse that you ended up getting shot?" He said, "They said that I shot some people." I said, "Did you?" And he said, "I shot one person but I didn't shoot the others." I said, "Well, how many people in total got shot at this time?" He said, "Well, four including me, maybe five." (PR1. 577-578)

...

A. Well, he clearly knew, understood from both a factual and a rational level, what was going on with him in the trial, in the sentencing phase, knew and appreciated the difference between a life sentence and a death sentence, expressed his desire to have the sentence changed to life, which tells me that he knows the difference between a life sentence and a death sentence. (PR1. 584)

...

A. Well, just that he is able to both rationally and factually take it from the time of trial, the sentencing phase, being sentenced, through his incarceration, death warrant, he had spoke to others about knowing that he had been there before, and being here. (PR1. 586)

[Dr. Dee]:

A. He went on to talk about his placement in the prison and that, of course, provided an opportunity for me to talk to him about the death penalty. And the situation there is I think both clear and confusing to me. He says on the one hand that, yes, he's aware that he was convicted of murder and, as he did with other examiners, he talked to me at length about his innocence, his belief that there was some sort of conspiracy to have him found guilty, and he really went on at great length and great detail and presented me with what he considered a lot of compelling evidence. (PR1. 904-905)

...

A. He did seem to have a very detailed grasp of what had happened in the courtroom. There was no confusion about that. (PR1. 906)

...

Q. Mr. Provenzano knows that he's under a sentence of death, doesn't he?

A. He does.

Q. He knows that he was convicted for killing a courtroom deputy in Orange County, doesn't he?

A. He does.

Q. And he knows that he was sentenced to death for that, doesn't he?

A. Yes. (PR1. 928)

...

Q. Dr. Dee, it's possible, isn't it, for Mr. Provenzano, while he may think that he is being executed because he is Jesus Christ, to also separately understand that he is being executed because he was convicted of murder in Orange County, isn't it?

A. I think it's possible. (PR1. 956-957)

The testimony outlined above clearly establishes that Provenzano meets the test for competency to be executed required by Florida law and the federal constitution. Even Provenzano's

experts repeatedly acknowledged that Provenzano understands the fact of his impending execution, and rationally connects his death sentence with his conviction for first degree murder stemming from the shooting of Bailiff Wilkerson at the Orange County Courthouse in 1984. Although the experts also noted Provenzano's delusional belief that he is Jesus Christ, which the trial judge accepted below, their testimony that this belief did not negate his understanding of the murder conviction as the reason for his death sentence, also accepted by Judge Bentley, clearly demonstrates Provenzano's competency. Provenzano's claim that the Eighth Amendment commands more is not persuasive.

As found by the trial court, Provenzano has a dual belief system that permits him to understand the fact of his death sentence and the reason for it, while also "believing" that the State is seeking to execute him because he is Jesus Christ. A careful review of the expert testimony suggests that these beliefs can be reconciled; in fact, Provenzano makes the connection that his death sentence is a direct consequence of his conviction for first degree murder, but he believes that the charges, trial, and conviction are all the result of a conspiracy against him as Jesus Christ.¹ He acknowledges that his convictions result from his

¹Although Provenzano's Christ delusion predates the courthouse shootings, it did not interfere with his sanity at the time of the crime or his competence to stand trial.

actions in the courthouse shootings, but his belief that he was acting in self-defense feeds the delusion that his conviction was wrongly obtained. Thus, his delusion does not affect his perception of his sentence as rationally flowing from his conviction, but serves to reject the conviction altogether. His current claim of incompetence insists that he must rationally accept the validity of his conviction in order to "rationally understand" the nature of his sentence. As will be seen, case law provides no support for this position.

The State agrees that the appropriate standard to be applied in this case must be gleaned from the requisite mental state as defined by Justice Powell in his concurring opinion in Ford v. Wainwright, 477 U.S. 399 (1986).² Of course, Justice Powell concluded that the Eighth Amendment only prohibits execution of those inmates "unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422. According to Provenzano, Judge Bentley did not correctly follow Justice Powell's analysis because Justice Powell acknowledged that Ford's belief

²The State takes issue with Provenzano's assertion that Powell's opinion must be deemed controlling as the more narrow opinion in the fragmented Ford decision; the State would offer Justice O'Connor's opinion as narrower than Justice Powell's, since O'Connor rejected a constitutional prohibition on execution of an incompetent defendant, but found such prohibition had been granted by state law in Florida. However, since the standard introduced by Justice Powell is currently codified in Florida law, reliance on Powell's analysis of the issue is appropriate.

that the death penalty has been invalidated appeared to preclude Ford's ability to understand that he was going to be executed. On the other hand, according to Provenzano, Judge Bentley did not give sufficient weight to Provenzano's belief that the real reason for his execution is that he is Jesus Christ because Bentley found that this belief did not impair Provenzano's ability to understand that the reason for his execution was his first degree murder conviction of Bailiff Wilkerson.

The central fallacy with Provenzano's reliance on Justice Powell's opinion in Ford is that the distinction between Ford and the instant case is one of fact, not one of law. There is no suggestion in the Ford opinion of any evidence that, despite his delusion, Ford actually understood that he faced imminent execution. The evidentiary hearing below was replete with evidence that Provenzano, despite his delusion, does understand the fact of his impending execution and the reason for it. Indeed, such testimony was even provided by Provenzano's own experts. Provenzano faults Judge Bentley for attempting to "unravel or unintertwine Mr. Provenzano's delusional psyche from his intellectual psyche," but that is what is required by the Eighth Amendment (Appellant's Initial Brief, p. 31). Ford did not present a case where a dual belief system created difficulty in determining the defendant's true mental state; therefore Ford's unilateral

belief that he would not be executed could easily preclude a finding of competency. Such is not the case at bar.

The current claim that Provenzano lacks the rationality element in his understanding of his death sentence also misconstrues the definition of the rational element set forth in Judge King's decision in Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1988). According to Judge King, the rational element does not require an explanation as to why the conviction resulted in a death sentence; all that is required is for the defendant to perceive a "cognitive connection between two factual concepts," i.e., the conviction and the sentence. 686 F. Supp. at 1570-71. The evidence presented below clearly demonstrated that Provenzano makes this cognitive connection. As this Court has recognized, the rationality element for competency required by the Eighth Amendment is quite limited. Provenzano, 24 Fla. L. Weekly at S436; Martin, 686 F. Supp. at 1572.

Provenzano's ability to connect his conviction and sentence is objectively rational in that it is the same reasonable connection as would be made by the average person. Provenzano knows that his conviction rested upon the jury's finding him guilty of the murder of Bailiff Wilkerson, and that the sentence flowed from the jury's seven-to-five recommendation (noting that one juror had particular trouble with this) and the judge following that recommendation and

imposing a sentence of death. Provenzano knew, at least at the time of the hearing, that execution would be administered by electrocution, but also stated his hope that lethal injection would become an option.

None of the cases cited by Provenzano demonstrate any error in the finding of competency entered below. To the contrary, to the extent these cases are relevant, they support Judge Bentley's conclusion. Most notably on point is Barnard v. Collins, 13 F.3d 871 (5th Cir.), cert. denied, 510 U.S. 1102 (1994). The experts in Barnard all agreed that Barnard suffered from serious delusions of persecution, but the trial judge agreed with the State's expert that, despite these delusions, Barnard understood the fact of his impending execution and the reason for it. The circuit court's opinion recites the state court's factual findings, including its notation that

Applicants' experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia.

13 F.3d at 876. Provenzano's attempt to distinguish Barnard factually by speculating there may be differences which are not evident from the court's opinion is weak at best. For example, Provenzano notes that the Barnard court does not identify "whether

Mr. Barnard's delusions were based in reality," whereas Provenzano's delusions are not (Appellant's Initial Brief, p. 40); but, by its very definition, no delusion is going to be based in reality. Since Barnard cannot be factually distinguished on its face, Provenzano simply asserts that the state and federal courts' analysis in that case was wrong. The State disagrees.

Similarly, in Weeks v. Jones, 52 F.3d 1559 (11th Cir.), cert. denied, 514 U.S. 1104 (1995), neither the defendant's delusions of grandeur in being various manifestations of God nor his delusions of persecution based on racial/sexual bias interfered with Weeks' ability to understand the nature and consequences of his current legal situation and imminent execution. Thus, Weeks' competence for execution was upheld by every court to consider the issue, despite the fact that the Alabama standard for competency was higher than the standard to be applied in Florida. And although Provenzano alleges emphatically that Weeks "did not attribute his impending execution to the fact of his belief that he was God," (Appellant's Initial Brief, p. 44), Weeks' counsel had argued that Weeks "was a paranoid schizophrenic, who went to his death convinced that it was part of a millennial religious scheme." Weeks v. Jones, 100 F.3d 124, 126, n. 3 (11th Cir. 1996).

The State agrees that Shaw v. Armontrout, 900 F.2d 123 (8th Cir. 1990), cert. denied, 507 U.S. 927 (1993), and Whitmore v.

Lockhart, 834 F. Supp. 1105 (E.D. Ark. 1992), affirmed, 8 F.3d 614 (8th Cir. 1993), are only marginally relevant to the issue in this case, inasmuch as the defendants in those cases did not appear to suffer from delusions or psychosis. However these cases reaffirm the principle that neither brain damage nor neuropsychological impairment compels a finding of incompetency for execution. In addition, cases such as United States v. Blohm, 579 F. Supp. 495 (S.D. N.Y. 1983), which focus entirely on the standard for competency to stand trial enunciated in Dusky v. United States, 362 U.S. 402 (1960), have limited value in resolving the issue presented in the instant case.

It is noteworthy that, of all the cases cited in Provenzano's brief, the only defendant to ever ultimately succeed on a claim of incompetence to be executed was Alvin Ford.³ This is not only an indication of the rarity of truly incompetent-for-execution defendants, but illustrates that no court has ever applied a competency standard on similar facts in the manner suggested by Provenzano. There is no authority for his position that a defendant, in addition to having a rational understanding of the connection between his conviction and death sentence, must also

³Although Nollie Martin was granted an evidentiary hearing in federal court on his competency to be executed claim, the district court, following a three-day hearing, ruled Martin to be competent. Martin v. Singletary, 795 F. Supp. 1572, 1576 (S.D. Fla. 1992).

rationality accept the reasonableness of society's decision to exact the ultimate penalty.

Provenzano makes no due process argument that his claim of competency was not adequately explored by the court below. In fact, at the conclusion of the November hearing, counsel for Provenzano acknowledged that everything that he wanted the court to consider had been presented (PR. 1145). In addition, there is no claim by Provenzano that the trial court's factual findings are not supported by the evidence, or that he should have been found incompetent even if the standard applied by Judge Bentley was correct. Finally, it is clear that in interpreting the correct legal standard for incompetency to be executed, the standard as currently codified in Florida law must be construed in conformity with decisional law from the United States Supreme Court. See, Fla. Const., Art. I, § 17 (1998).

A person under sentence of death is insane for purposes of execution if he lacks the mental capacity to understand the fact of the impending execution and the reason for it. Rule 3.811(b), Fla.R.Crim.P. Rule 3.812(e) specifically requires a defendant to prove, by clear and convincing evidence, that he is incompetent to be executed. Inasmuch as Provenzano failed to meet this burden at the evidentiary hearing below, this Court must affirm the judicial finding of competency entered by Judge Bentley.

Provenzano has failed to demonstrate any basis for relief in this issue. No further stay of execution is justified in this case. See, Bowersox v. Williams, 517 U.S. 345 (1996); Buenoano v. State, 708 So. 2d 941, 951 (Fla.), cert. denied, 523 U.S. 1043 (1998).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order finding Thomas Provenzano to be competent for execution must be affirmed.

Respectfully submitted,

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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 9th day of February, 1999.

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