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IN THE SUPREME COURT OF FLORIDA

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NOV 25 1985
CLERK, SUPREME COURT
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JOSEPH ROBERT SPAZIANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. _____

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This case has been before this court numerous times and before the United States Supreme Court. Due to the time constraints herein the state will reference and rely on the facts as set forth in those cases: Spaziano v. State, 393 So.2d 119 (Fla. 1981); 433 So.2d 508 (Fla. 1983) and Spaziano v. Florida, 104 S.Ct. 3154 (1984).

Due to the time constraints herein, a summary of argument has not been provided but all arguments are contained in the headings and table of contents for easy reference.

STAY OF EXECUTION

The state herewith opposes a stay of execution in this case as the claims herein do not meet the standards of Sullivan v. State, 372 So.2d 938, 941 (Fla. 1979) and reflect no liklihood of ultimate success on the merits and should be summarily disposed of.

ARGUMENT

I. THE CLAIM THAT THE DEFENDANT WAS DENIED AN INDIVIDUALIZED AND ACCURATE SENTENCING HEARING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE FLORIDA CAPITAL SENTENCING STATUTE WAS BEING INTERPRETED AT THE TIME OF TRIAL IN 1976 TO RESTRICT CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE SET OUT IN SECTION 921.141(6) IS ONE THAT COULD HAVE BEEN PRESENTED ON APPEAL; DOES NOT REPRESENT A CHANGE IN THE LAW WHICH WOULD GIVE RELIEF UNDER WITT V. STATE, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980) AND DOES NOT LIE SINCE THE DEFENDANT WAS AFFORDED A RESENTENCING HEARING.

The issue of whether the appellant was denied a fair and individualized capital sentencing determination by the preclusion of nonstatutory mitigating factors is an issue that should have been raised on appeal. Sireci v. State, 469 So.2d 119 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985); Tafero v. State, 459 So.2d 1034 (Fla. 1984); Smith v. State, 457 So.2d 1380 (Fla. 1984); Magill v. State, 457 So.2d 1367 (Fla. 1984); Cooper v. State, 437 So.2d 1070 (Fla. 1983). Lockett v. Ohio, 438 U.S. 586 (1978) was decided in 1978. The initial brief on the first direct appeal to this court was served on September 7, 1978 and the case was not decided until January 8, 1981. Upon resentencing the initial brief on the second direct appeal was served on February 9, 1982 and the case was not decided until May 26, 1983. This was an issue that clearly could have been raised on direct appeal.

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), precludes consideration of this issue as well.

The treatment of mitigating evidence has not evolved into a change in the law which would give relief under Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Jackson v. State, 438 So.2d 4,6 (Fla. 1983). "The right to 'an individualized determination on the basis of the character of the individual and the circumstances of the crime' . . . is not a change in law." State v. Washington, 458 So.2d 389, 392 (Fla. 1984). This court has consistently adhered to this principle in death penalty cases in Florida. This is true also because Lockett does not mandate the entertaining of irrelevant evidence.

The statutorily enumerated mitigating circumstances are those judges everywhere would agree may make a difference in the sentencing decision. There is no constitutional preference for rehabilitation over retribution. As has been recognized, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grevous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 184, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). In Spaziano v. Florida, 104 S.Ct. 3154, 3164 (1983), the United States Supreme Court accepted retribution as a prominent element in capital cases.

To extend relief under Witt in such circumstances

would present the ludicrous scenario in this case of having to weigh acts insufficient to reflect good character or provide an excuse for the crime against barbarous acts of butchery, torture and sexual disfigurement and killing, all of which demand retribution to the degree that these facts do not produce even the most minute nagging doubt as to the correctness of the sentence imposed. None of them excuse the act itself. In Pulley v. Harris, 104 S.Ct. 871, 880-81 (1984), the court determined that a proportionality review of death sentences was not required, which evidences a concern with the atrocity of the act and whether such act is deserving of the death penalty. It is not the mandate of Lockett or Witt to occasion resentencing in an endeavor to temper the atrocious by consideration of the inane.

Moreover this court in Spaziano v. State, 393 So.2d 119 (Fla. 1981) ruled that Spaziano be given another sentencing hearing because of a violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). This claim and its parasitic ineffective assistance of counsel claim do not lie as to the original sentencing since Spaziano was afforded a resentencing. See, Raulerson v. State, 437 So.2d 1105 (Fla. 1983).

Reasonable judges everywhere could have imposed this sentence based on retribution alone and in the case of such a hideous crime, nonstatutory mitigating factors rise to the level of irrelevance. This court and the United States Supreme Court found death to be the appropriate sentence. Now Spaziano seeks

a retrial of the original trial because the slowness of the system has allegedly allowed for change since trial, and while we ponder this there will be more change. Time has not changed the barbaric nature of Spaziano's acts, however, or bathed him with innocence, yet he hopes to prevail by the passage of time because the criminal justice system, like a snake, grows and lengthens every year to such a degree that it ultimately swallows its own tail, with the taxpayer bearing the brunt of this unfolding drama.

The trial judge had the bulk of this information before him in the PSI at sentencing and resentencing and it was again placed squarely before him at the hearing on the Florida Rule of Criminal Procedure 3.850 motion and were these factors that would have made a sentencing difference he had only to grant the motion to vacate. It must be presumed that these factors would not have changed his sentencing decision. If the appellant can rely on the trial judge's off-the-cuff remarks in State v. Harvard, No. 74-173-CF-A-01 regarding nonstatutory mitigating circumstances, then the state will rely on the fact that in Harvard and this case the stays and motions were denied. Actions speak louder than words. Even the trial judge's tone in this case at the hearing below indicates, however, that these factors would have made no difference in his sentencing decision and who would know better than he. Even considering this claim on the merits accords Spaziano no relief.

Prior to resentencing the state filed a motion to compel disclosure/statement of particualars of nonstatutory

mitigating circumstances alerting defense counsel that non-statutory mitigating circumstances could be considered and presented (Index to record on resentencing, pages 33-34). A hearing was held on this and various other matters. Lockett was discussed in depth and all parties including the court, agreed that the defendant had the right at resentencing to present nonstatutory mitigating factors. The defense contemplated only putting on evidence of Spaziano's record in prison and arguing that the jury voted the way it did because of doubt of guilt (Index to record on resentencing, pages 353-366). At the resentencing hearing doubt of guilt to sentence to death was clearly argued to the court (Index to record on resentencing, pages 278-285; 289). The juror affidavit expressing doubt about guilt submitted by opposing counsel below is entirely improper as it represents an inquiry into the validity of a verdict and a juror is not competent to testify as to any matter which inheres in the verdict. See, Songer v. State, 463 So.2d 229 (Fla. 1985). Moreover this jury did recommend life rather than death. Defense counsel Ed Kirkland did put Spaziano's role as a father before the court in the most effective and melodramatic manner, in tunes of if she were here she would say "please don't kill my daddy" (Index to record on resentencing, pages 286; 290). Moreover the fact that he was an attentive father was before the court in the PSI as well as his mental status and his good, outgoing personality and acts of stopping fights and violence in his motorcycle club (Index to record on resentencing, pages 207-215).

Thus on resentencing all known nonstatutory mitigating factors were presented and considered by the court and counsel was not ineffective for failing to present mitigating evidence where the trial record indicates that the sentencing judge was aware of the mitigating factors. Lightbourne v. State, 471 So.2d 27 (Fla. 1985). The fact that these matters were not before the sentencing jury is especially unimportant in this case considering that the jury recommended life. See, Magill v. State, 457 So.2d 1367, 1370 (Fla. 1984); Raulerson v. State, 437 So.2d 1105 (Fla. 1983). That these nonstatutory mitigating factors were presented to the trial judge for consideration is admitted by Spaziano in his brief before this court on the second direct appeal from resentencing where he complained that although these factors were placed before the trial judge, he failed to find nonstatutory mitigating factors (Initial Brief of Appellant on second direct appeal, pages 10-11).

II; III. THE ISSUE OF WHETHER HYPNOTICALLY INDUCED TESTIMONY AT TRIAL VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IS NOT COGNIZABLE IN POST-CONVICTION PROCEEDINGS AND COUNSEL DOES NOT HAVE TO ANSWER TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BOOTSTRAPPED ONTO CLAIMS NOT COGNIZABLE AS A CHANGE IN LAW WARRANTING RELIEF.

Post-conviction relief is not available for a reappeal or a rereview or to reraise issues that could have been raised on initial appeal. Alvord v. State, 396 So.2d 184 (Fla. 1981). Accepting Spaziano's claims in the accompanying ineffective assistance of counsel claim that counsel should have known to have raised this issue at trial on the basis of scientific studies and trends of other jurisdictions results in the conclusion that this is an issue that should have been objected to at trial and raised on direct appeal and cannot be the topic of collateral relief. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); Alvord, supra.

Disregarding Spaziano's unreasonable expectations of counsel, the issue cannot be entertained as a change of law. This court in Bundy v. State, 471 So.2d 9, 18 (Fla. 1985), held that such testimony must be excluded as per se unreliable, but made its per se ruling prospective only. The court further stated ". . . We further hold that any conviction presently pending in the appeals process in which there was hypnotically refreshed testimony will be examined on a case-by-case basis to determine if there was sufficient evidence, excluding the tainted testimony to uphold the conviction." (Emphasis added)

471 So.2d at 19. Collateral remedies are not part of the appeals process. "These post-conviction collateral remedies are not steps in a criminal prosecution but are in the nature of independent collateral civil acitons . . ." State v. White, 470 So.2d 1377, 1378 (Fla. 1985). Thus this case is neither subject to the per se rule nor the case-by-case analysis reserved for cases "in the appeals process" which this case is not. The presumption of finality is greatest in collateral attacks. This court's language in Bundy precludes rule 3.850 consideration and no analysis is necessary under Witt v. State, 387 So.2d 922 (Fla. 1980). This court discussed the burden that retrospective application would place on the administration of justice and the need for finality in criminal cases and undertook the three-fold test Spaziano now urges upon it and decided that there is no denial of a basic right of constitutional magnitude to warrant retroactive application. 471 So.2d at 18. Moreover Spaziano's experts acknowledge that one does not lose control under hypnosis and is capable of lying. Dilisio's credibility was well tested at trial and on appeal this court found the evidence sufficient to support the conviction.

It is clear that counsel need not stand trial himself every time this court or the United States Supreme Court announces a change in law. If the claim itself is precluded from retroactive application as lacking sufficient magnitude, the ineffective assistance of counsel claim should be rejected as well, for it is every bit as "in the guise of" as counsel's

actions in Hitchcock v. State, 432 So.2d 42 (Fla. 1983). Moreover, there is no requirement that counsel anticipate changes in the law. Knight v. State, 394 So.2d 997 (Fla. 1981).

Furthermore, the court felt that counsel's actions were strategic. Under the state of the law at the time of trial hypnotic induced testimony was not forbidden and an attack upon it would probably have been doomed. Counsel sought instead to impeach Dilisio with his drug use, hallucinations and bad motives. Impeachment on the basis of bad motive could hardly have been established if the jury was aware he didn't remember the incidents until hypnotized. Kirkland, in fact, objected to any reference to the hypnotism. (Trial transcript, page 641).

IV; V; VI. THE APPELLANT WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS HE WAS TRIED AND CONVICTED WHEN LEGALLY COMPETENT AND WAS COMPETENT TO MAKE DECISIONS WAIVING THE PRESENTATION OF MITIGATING EVIDENCE IN THE SENTENCING PHASE AND TRIAL COUNSEL WAS NOT INEFFECTIVE BY NOT PETITIONING THE COURT FOR A HEARING ON THE APPELLANT'S COMPETENCY TO BE SENTENCED.

On the basis of affidavits and psychiatric reports presented by Spaziano, and on the record of trial proceedings, it cannot be concluded that Spaziano was tried and convicted when legally incomptent. The report from Harry Kropp, PHD of Community Behavorial Services of October 14, 1985 and the neuropsychological evaluation by James F. Vallely, PHD of Community Behavorial Services of November 28, 1984, both fail to reflect an opinion or conclusion that Spaziano was incompetent to stand trial, or was tried and convicted while legally incompetent, nor does the affidavit of trial counsel Ed Krikland reflect that Spaziano at any time did not possess a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and lacked a rational as well as factual understanding of the proceedings against him" pursuant to Dusky v. United States, 362 U.S. 402 (1960). As a matter of procedural due process, a criminal defendant is entitled to an evidentiary hearing on his claim of incompetency if he presents clear and convincing evidence to create "a real, substantial and legitimate doubt as to mental capacity . . . to meaningfully participate and cooperate with counsel . . ."

Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973). No real, substantial and legitimate doubt as to his mental capacity to meaningfully participate and cooperate with counsel at the time of trial has been presented by Spaziano. Any such conclusion would be inconsistent with Spaziano's own experts view as to his mental condition. If the expert's view is correct that Spaziano suffers from impaired judgment under stressful conditions, it cannot be concluded that stress was a factor in his decision not to waive the statute of limitations and thereby forego lesser included jury instructions but such decision must be considered a rational one in view of the affidavit of trial counsel Kirkland. According to Kirkland's affidavit, Spaziano appeared to be "totally and completely devastated" following the jury's verdict as at no time had he anticipated a guilty verdict. Thus, Spaziano was not operating under stress at trial as he harbored the belief that he would be found not guilty and there is absolutely no evidence that his decision to accept the risk of a first degree murder verdict or acquittal with nothing in between was the result of mental illness rather than the product of a rational belief that he would be found not guilty and did not desire to spend time in jail on lesser charges.

Moreover, a mere diagnosis of organic personality disorder does not lead to a finding of incompentence under Dusky. In footnote 32, page 98 of Spaziano's motion to vacate, he sets forth the diagnostic criteria for organic personality syndrome set forth in Diagnostic and Statistical Manual of Mental Disorders, 119-20 (3rd Ed. 1980) ("DSM III"); See, American

Psychiatric Association. In subsection B of the diagnostic criteria for organic personality syndrome, the syndrome is explained as "no clouding of consciousness, as in delirium; no significant loss of intellectual abilities, as in dementia; no predominent disturbance of mood, as in organic affective syndrome; no predominent delusions or hallucinations, as in organic delusional syndrome or organic hallucinosis. Thus the mere opinion that Spaziano may have suffered from organic personality syndrome does not lead to the conclusion that he was unable to meaningfully participate and cooperate with counsel at trial and none of the experts have reached such a conclusion in their reports. Thus Spaziano has not presented sufficient evidence to create a real, substantial, and legitimate doubt as to his mental competence to stand trial and was not entitled to an evidentiary hearing. It is highly significant that Spaziano's counsel did not later claim during trial or sentencing that he was in fact incompetent and the failure to riase the competency issue is persuasive evidence that mental competence was not in doubt and therefore Spaziano was entitled to no evidentiary hearing. E.g., Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir.), cert. denied, 444 U.S. 983 (1979). The opinions contained by counsel in his affidavit are quite diffrent from a contention that Spaziano lacked the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and lacked a rational as well as factual understanding of the proceedings against him. The right to be tried and sentenced unless mentally competent does

extend so far as to insure the upmost wisdom, judgment and recall on the part of the defendant.

In regard to the issue of whether Spaziano was incompetent to make decisions waiving the presentation of mitigating evidence in the sentencing phase, defense counsel proposes a unique standard, in that, "the defendant is not competent to waive this right if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented, and to understand the nature and consequences of the waiver." This claim of incompetency, in the present case, must fail under Spaziano's own proposed standard as the past medical and psychiatric history on Spaziano concludes that he does not suffer from mental illness but personality disorder or sociopathy. Moreover, Spaziano does not view himself as incompetent or insane and told Kirkland that he had recovered from the affects of the accident, "had no head problems" and "didn't want no shrink getting up and saying he was crazy." Again, Kirkland's affidavit does not conclude that he was unable to consult with him with any rational degree of understanding but only that he desired not to present such mitigating factors (assuming they exist) on what Kirkland perceived to be the basis of his affiliation with the Outlaws motorcycle gang and their peculiar ethic. Even if this were Spaziano's reason, the mere holding of an ethical system outside the main stream of mid-America does not lead to a conclusion of incompetence. If that were the case, no member of a motorcycle gang would ever be convicted or punished. The opinions held by

Spaziano's experts that upon examination he exhibited suspiciousness, anger, and resentment were no doubt the product of his unwillingness to proceed with after the-fact-mental defenses. As previously discussed, the diagnoses of Krupp and Vallely do not, in themselves, lead to a conclusion of incompetence at the sentencing phase, and Spaziano, himself, denies ever having hallucinations, delusions or paranoid ideation. The affidavits of lay witnesses merely bespeak of a personality change and have no opinion regarding Spaziano's competence. Moreover, Kirkland's affidavit indicates that the unwillingness to present factors in mitigation occurred at the first sentencing hearing and virtually ignores the fact that Spaziano was, indeed, resentenced on June 25, 1981 and at that particular time mitigating factors were presented to the court. The crux of the present mental history was contained in a PSI considered by the trial court. The conduct at the August 16, 1967 original sentencing hearing bespeaks merely of strategy rather than confusion or incompetence on the part of either the defendant or counsel. Spaziano's position has always been and is argued herein and below that there exists in this case an extreme "doubt of guilt." That doubt of guilt was highligted to the jury. To come forth at sentencing in 1979 and change course in midstream and in effect tell the jury that Spaziano either committed the murder, or if he committed the murder, there were compelling psychiatric reasons why he should not receive the penalty of death, surely would destroy any doubt of guilt the jury may have harbored. Kirkland's affidavit re-

flects that Spaziano was convinced that he could be found innocent presumably based on such doubt of guilt and Kirkland had every reason to believe he would not be punished by death because of this same doubt of guilt. The jury did see Spaziano as a human being, contrary to his present assertion and recommended life imprisonment. His mental history was before the trial court at sentencing and was found not to mitigate against the imposition of the death penalty. Aside from attempting to have this court retroactively find incompetence upon the part of Spaziano on the basis of insufficient evidence, Spaziano also seeks a second bite at the apple to present the same sort of mitigating factors that were considered by the trial judge at sentencing. The court below found that Spaziano did not present sufficient evidence to create a real, substantial and legitimate doubt as to his mental competence to stand trial and be sentenced and he was, therefore, not entitled to an evidentiary hearing and on the basis of the record, which reflects no incompetence on the part of Spaziano, the reports of doctors and the affidavit of Spaziano's attorney, this court cannot find that the trial court's conclusion is erroneous.

VII. THE CLAIM THAT SPAZIANO WAS SENTENCED TO DEATH IN VIOLATION OF THE FLORIDA CONSTITUTION WAS AN ISSUE THAT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL; THE CLAIM THAT THE SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS PRESENTED ON DIRECT APPEAL AND IRREVOCABLY DISPOSED OF BY THE UNITED STATES SUPREME COURT.

Post-conviction relief is not available for a reappeal or a rereview or to raise issues that could have been raised on initial appeal. An issue cannot be raised in the initial appeal on another theory of law and rejected. Alvord v. State, 396 So.2d 184 (Fla. 1981). On direct appeal from resentencing Spaziano argued that the extreme penalty of death was impermissibly imposed over the jury's recommendation of life imprisonment in contravention of the statute and the eighth and fourteenth amendments (Initial Brief of Appellant on second direct appeal, pages 26-33). Nowhere was the novel theory presented that Spaziano was sentenced to death in violation of the Florida Constitution. This issue is waived. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Even were this issue cognizable no relief is merited. If the critical issue is whether judges or juries sentenced in capital cases in 1845 and an expedition into an archive (something that should not be required in collateral proceedings where the presumption of finality is strongest and the temptation to file late motions the strongest also) would reflect that juries were capital sentencers as their verdict of guilt

meant a mandatory death sentence clearly this court is not empowered to call for jury sentencing again on the basis of a history violating the standards of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). A capital sentencing proceeding is not like a trial in respects significant to the Florida Constitution's guarantee of a jury trial in any event.

Any claim that the jury override violates provisions of the United State's Constitution was raised on direct appeal to this court from resentencing and finally disposed of in Spaziano v. Florida, 104 S.Ct. 3154 (1984) which found no eighth amendment violation.

VIII. THE DEFENDANT HAS WAIVED THE RIGHT TO RAISE THE ISSUE THAT THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY, DISCRIMINATORY MANNER--ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCING DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE RACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND REQUIRES THAT SPAZIANO'S DEATH SENTENCE, IMPOSED DURING THE PERIOD IN WHICH THE DEATH PENALTY WAS BEING APPLIED UNCONSTITUTIONALLY, BE VACATED.

This claim should have been properly presented in the first instance to the trial court. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984). The claim was improperly presented to the state court in collateral proceedings, as statistical studies were not even presented to the lower court, but the court was asked to take judicial notice of volumes of unavailable material. This issue need not be reached on the merits. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

It is the state's clear position that this matter is waived, especially in view of the fact that the state never received the proffered studies. However, should this court insist on reaching this claim on the merits, even though the state maintains that the claim was insufficiently presented and thereby waived, this court will find no constitutional de-

privation. When an appellant proffers the statistical evidence of the kind relied upon by Spaziano in the instant case, the court need not hold an evidentiary hearing, unless the proffer demonstrates a reasonable possibility that the evidence might compel an inference of purposeful discrimination. Ross v. Kemp, 756 F.2d 1483, 1491 (11th Cir. 1985). The proffer, in the instant case, falls far short of demonstrating a reasonable possibility that the evidence might compel such an inference. The main reason for this is that no proffer was made of the studies along the way, and it is not the state's responsibility, in view of the time constraints of a warrant, to search for or send for by mail or request such studies. Spaziano seems to simply ignore the Governor's power to sign a warrant and impose a lawful execution by requiring courts to take judicial notice of studies not before them, and undertake a prolonged search for such studies before deciding. This is indicative of the worth of the studies and should be considered, by all means, as a staying and delaying tactic. Nevertheless, the state would point out to this court that just such studies were rejected in Ross v. Kemp, 756 F.2d at 1492 and prior decisions. The remaining studies are either historical and pre-Furman in nature or not studies at all. Such broad based proffers fall short of demonstrating a reasonable possibility that the evidence might compel such an inference and have been rejected. E.g., State v. Washington, 453 So.2d 389 (Fla. 1984); Sullivan v. State, 441 So.2d 609 (Fla. 1983); Adams v. State, 449 So.2d 819 (Fla. 1984).

Such studies are not based upon "white-on-white" homicides. Spaziano, in essence, is saying that if he had killed another, at another time and place, he would not be subject to the death penalty. Even were this premise true, it would not relieve him of culpability. The fact that society may not punish all those who commit crimes or sentence all those who deserve death, to death, does not mean that those who are so sentenced should not pay for their awful deeds. In Pulley v. Harris, 104 S.Ct. 871, 880-81 (1984), the United States Supreme Court determined that a proportionality review of death sentences was not required. This would seem to evidence a concern with the act itself committed by the defendant and its atrociousness, and whether such act is in itself deserving of punishment. Even if such discrimination did exist in sentencing, a sure way not to be subject to it is not to murder in the first instance, thereby never coming into contact with those who may be less than sympathetic to a defendant's proclivities. In Spaziano v. Florida, 104 S.Ct. 3154, 3164 (1983), the United States Supreme Court accepted retribution as a prominent element in capital cases. What Spaziano suggests is that society can never exact retribution until it is free of all vestiges of prejudice. What he overlooks is that aside from retribution, deterrence justifies capital punishment. Spaziano v. Florida, 104 S.Ct. at 3163. Those free of prejudice have a right to be protected from violent acts, even if it is accomplished through the sentencing decisions of the prejudiced. All that is required is that the sentencer act through

a properly drawn statute such as Florida's. In Florida, the jury's advisory verdict, if accepted by the sentencer, must be justified in writing and is further scrutinized by appellate review. No showing has been made that the sentencer or this court have such prejudices or have acted on them in this or past cases. Thus, the effect of Florida's sentencing scheme is to eliminate, to the degree humanly possible, the imposition of a discriminatory sentence. In the history of mankind many ethnic groups have served an apprenticeship in slavery or have been subject to discrimination. Contrary to Spaziano's assertions, this society need not be utopian before it is entitled to exact retribution for awful deeds or to deter the commission of such deeds. Were that the case, there would be no murders to begin with. History is simply not on Spaziano's side.

IX. THE CLAIM THAT THE EXECUTION OF A CONDEMNED PERSON BY ELECTROCUTION AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT, IN LIGHT OF EVOLVING STANDARDS OF DECENCY AND THE AVAILABILITY OF LESS CRUEL BUT EQUALLY EFFECTIVE METHODS OF EXECUTION SHOULD HAVE BEEN RAISED ON DIRECT APPEAL.

This court has correctly determined that this was an issue that should have been raised on direct appeal in Booker v. State, 441 So.2d 148 (Fla. 1983), and more recently in Porter v. State, 10 F.L.W. 573 (Fla. Oct. 25, 1985). See, Harvard v. State, 414 So.2d 1032, 1037 (Fla. 1982). Two such opportunities have also passed in this case. Thus, review is precluded. See also, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

It is the state's clear position that this matter cannot be heard on appeal, but even if it could, federal courts have uniformly rejected this claim. Sullivan v. Duggar, 721 F.2d 719, 720 (11th Cir. 1983); Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978). Spaziano has further provided no compelling evidence to the contrary. His "articles" indicate that the massive jolt explodes the mind -- and in Florida, the first jolt is massive, beginning at 2,250 volts, as opposed to states with botched executions.

X. THE CLAIM THAT THE AGGRAVATING CIRCUMSTANCE, "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IS AN ISSUE THAT WAS RAISED ON DIRECT APPEAL AND IS NOT NOW COGNIZABLE ON COLLATERAL ATTACK.

The claim that the aggravating circumstance "especially heinous, atrocious or cruel" is unconstitutional on its face and as applied is one that was raised on direct appeal and is not, therefore, cognizable on collateral attack. Porter v. State, 10 F.L.W. 573 (Fla. Oct. 25, 1985). This issue was raised and discussed in Spaziano's initial brief on his first direct appeal to this court (Initial Brief of Appellant, pages 107-110). In post-conviction relief proceedings an issue cannot be raised which has been raised in the initial appeal on another theory of law or refinements added to the argument by way of post-conviction motion. See, Alvord v. State, 396 So.2d 184 (Fla. 1981).

CONCLUSION

Based upon the above and foregoing arguments the state requests that this court affirm the order of the lower court denying the appellant post-conviction relief as the motion and the files and records in this case conclusively show that the prisoner is entitled to no relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by hand delivery to Michael A. Mello, of 225 West Jefferson Avenue, Tallahassee, Florida 32301, Assistant Capital Collateral Representative as counsel for defendant/appellant on appeal. N.R. This 25th day of November

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