IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

vs.

CASE NO. 72,464

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The instant appeal represents one taken from the denial of appellant's second Motion for Post-Conviction Relief. To some extent, the records and briefs in appellant's prior proceedings before this Court are relevant. Accordingly, appellee will, at times, refer to the record on appeal and briefs filed in appellant's first direct appeal in this Court in regard to his conviction of first degree murder and sentence of death; such appeal was styled Spaziano v. State, Florida Supreme Court Case No. 50,250. Appellee will also make reference to the record on appeal and briefs filed in the appeal following resentencing; such appeal was also styled Spaziano v. State, Florida Supreme Court Case No. 50,250. Further, the record on appeal and briefs filed in regard to appellant's first Motion for Post-Conviction Relief will also be cited; such appeal was styled Spaziano v. State, Florida Supreme Court Case No. 67,929.

The following symbols will be utilized. (R) represents a citation to the record on appeal in this case, such record filed on or about September 27, 1988. (OR) represents a citation to the record on appeal prepared in regard to appellant's conviction and original sentence; this record is not consecutively numbered and, at times, citation will be made to the actual proceeding at issue. (RS) represents a citation to the record on appeal in regard to appellant's resentencing in 1981. Appellee has no formal record on appeal in regard to appellant's first Motion for Post-Conviction Relief, inasmuch as such was filed, and disposed

of, under the exigency of a death warrant; accordingly, citation will be made to the specific document at issue.

STATEMENT OF THE CASE AND FACTS

Appellee does not accept those portions of Appellant's Statement of the Case and Facts, which represent argument, as opposed to representation of fact. Thus, appellee does not accept any representation of fact to the effect that counsel, at the resentencing of 1981, made no attempt to investigate or present nonstatutory mitigating evidence (Brief of Appellant at 3). Likewise, appellee did not accept the characterization of the order denying relief below as "incorrect" (Brief of Appellant at 3).

Because the issue which appellant presented in his second Motion for Post-Conviction Relief relates to the presentation of evidence in mitigating, appellee suggests that some recitation of the procedural history of this entire case, as well as the events which occurred at the original sentencing and resentencing, is appropriate. Appellant was originally indicted on September 12, 1975, on one count of first degree murder, in regard to the 1973 premeditated murder, by stabbing, of Laura Harberts. Appellant was tried before a jury in Seminole County Circuit Court on January 20-23, 1976, and found guilty as charged. Appellant was represented by private counsel, Edward Kirkland.

The original sentencing hearing was held on January 26, 1976. At the beginning of such hearing, Judge McGregor announced that he would not allow the State to introduce evidence concerning appellant's prior convictions for forcible carnal knowledge and aggravated battery, because such convictions were then pending on appeal (Proceedings of January 26, 1976 at 3-

4). The following exchange then took place:

> THE COURT: The court would not ordinarily let the State counter mitigating circumstances, unless there is some evidence presented on behalf of the defendant as to mitigation.
>
> MR. KIRKLAND (Defense Counsel): We don't intend to show any...
> (Proceedings of January 26, 1976 at 4)

It was then decided that appellant himself would testify as to his "limited" criminal history, i.e., those convictions other than those relating to the rape and aggravated battery of Vanessa Croft. At the actual sentencing hearing before the jury, the State presented no evidence. Appellant himself testified, advising the jury that he had been convicted in New York of grand larceny in 1967, as well as a petty larceny in such state in 1968; other than that, appellant stated that he had no other "final judgments of convictions" (Proceedings of January 26, 1976 at 13-14).

When asked if he had any other matters to present, defense counsel stated, "No, your honor. Under the statutes there are certain limitations there." (Proceedings of January 26, 1976 at 14). Both counsel then presented their closing arguments to the jury, and defense counsel, at such time, pointed out to the jury that, "If anything speaks for a person on trial for his life, it's his prior record," such prior record consisting of only the eight year old larceny convictions, "unrebutted by the State." (Proceedings of January 26, 1976 at 18). Defense counsel also assured the jury that:

> There is simply no evidence that this defendant has ever been involved in any kind of crime or offense where physical harm or violence was done to any person. This, as far as the law is concerned, is a first and only offender (Proceedings of January 26, 1976 at 19).

Further, defense counsel noted the length of the jury's deliberations during the guilt phase, and stated that he assumed that one reason for the length of such was a question in their minds as to whether they fully believed the state's main witness; when the prosecutor objected to this latter argument, the judge stated, "I don't think the defense is necessarily limited to rebutting the aggravation. I think the statute is broad enough to permit the named matters in mitigation to be offered." (Proceedings of January 26, 1976 at 18).

Following instruction by the judge, the jury returned an advisory verdict of life imprisonment. The judge continued sentencing for six months and, on July 16, 1976, appellant again appeared before him. At this proceeding, a discussion occurred as to the scope of matters which could be considered, and the judge stated, in apparent reference to his prior exclusion of appellant's conviction of rape and aggravated battery, that he had limited the scope of matters which were presented to the jury. Judge McGregor, however, then went on the state:

> THE COURT: ...I think at least sofar (sic) as the judge is concerned that the judge can, of course, consider the entire life of the defendant, and can consider all of his background life history, and any prior conviction which may have occurred. (Transcript of Proceedings

of July 16, 1976 at 6).

Defense counsel then argued to the judge that his client should be spared due to residual doubt as to guilt. Judge McGregor then overruled the jury and sentenced appellant to death, finding two aggravating circumstances and nothing in mitigation. In aggravation, the judge found that appellant had previously been convicted of a felony involving violence, pursuant to Section 921.141(5)(b), Florida Statutes (1973), relying upon the criminal history listed in the presentence investigation report. The judge also found that the homicide had been especially heinious, atrocious or cruel, pursuant to Section 921.141(5)(h) Florida Statutes (1973). In support of this finding the judge relied upon the testimony of Tony Dilisio who had stated that he had seen the body of the victim, covered with blood, with cuts around the breasts, stomach and chest (OR 633-4); Dilisio had stated that appellant had boasted to him about what he had done to "his girls", such activities included raping them, stabbing them, cutting their breasts, cutting out their vaginas and showing them to them and torturing them (OR 627).

In rendering his sentence, the judge acknowledged having used a presentence investigation report which included a confidential section. This presentence investigation report, which was filed with this Court on or about June 7, 1977, includes some family history, as well as reference to the fact that appellant had been struck by an automobile when he was twenty years old, resulting in lengthy hospitalization and recovery, as well as a subsequent voluntary admission to the

state mental hospital. The confidential portion of his report indicates that appellant suffered "a very serious accident", which resulted in "severe head injuries", and facial paralysis. The confidential portion of the report likewise reflected that, according to appellant's parents, he had begun to undergo personality changes after the accident, but had been discharged from the state mental hospital, with a diagnosis indicating a lack of mental disorder. The confidential portion of the investigation further contained details of appellant's growing up, his involvement with motorcycle gangs, including the torture he suffered when he sought to quit one. The report included references to appellant's schooling, including his "dull normal intelligence level", and comments from appellant's ex-wife concerning the fact that he was a good father and had attempted to break up fights and beatings committed by some of his peers in the motorcycle gang (Response of Trial Judge, filed July 8, 1977 in Spaziano v. State, Florida Supreme Court Case No. 50,250).

Appellant, of course, appealed such judgment and sentence to this Court and, in his initial brief filed on or about September 7, 1978, raised seven primary points on appeal. In addition to his attacks upon the conviction, appellant argued that his sentence had to be vacated, inter alia, due to the improper finding of aggravating circumstances and the fact that the judge had considered the confidential portion of the presentence investigation report, which appellant had had no chance to rebut. In its opinion of January 8, 1981, this Court affirmed appellant's conviction, but remanded for resentencing, "because

the trial judge relied in part on information not available to the jury or the defendant in imposing the death sentence, contrary to Gardner v. Florida, 430 U.S. 349 (1977), and also relied upon nonstatutory aggravating factors, in violation of Section 921.141 Florida Statutes". See, Spaziano v. State, 393 So.2d 1119, 1120 (Fla.), cert. denied, 454 U.S. 1037 (1981).

Pursuant to this Court's mandate, appellant again appeared before Judge McGregor for sentencing on May 28, 1981. Prior to such time, however, counsel for both sides had filed a number of pertinent motions. On April 21, 1981, Judge McGregor had rendered an Order Pursuant to Mandate, which formally vacated appellant's sentence, and directed that a new presentence investigation report be prepared, without any confidential section, and that such be supplied to counsel (RS 12-13). On May 5, 1981, appellant's original counsel, Edward Kirkland, entered his notice of appearance as co-counsel on behalf of appellant; appellant's other counsel was Jerry L. Schwarz, who had represented appellant on direct appeal (RS 15). After the state had filed various notices indicating that it formally intended to introduce evidence pertaining to appellant's convictions of rape and aggravated battery, such convictions excluded from the first sentencing hearing, defense counsel filed a motion in limine to preclude the state from introducing any evidence which had not been presented to the advisory jury in 1976 (RS 19-21). Appellant subsequently filed another motion in limine, with the same purpose, arguing that the scope of any resentencing, conducted to pursuant to Gardner v. Florida, was limited to

allowing the defense the opportunity to rebut information contained in the PSI (RS 27-8). The State likewise filed a number of motions, including one to determine the nature of the proceedings and a motion to compel disclosure of nonstatutory mitigating circumstances; the purpose of the latter motion was to require the defense to disclose any nonstatutory mitigating evidence which it intended to present, whereas the former motion noted that this Court's opinion had expressed "no specific guidelines" as to how the resentencing was to be accomplished (RS 32, 33-4).

All of the above motions were called up for a hearing on May 21, 1981 (RS 295-381). A lengthy argument occurred, during which Attorney Schwarz repeatedly contended that the scope of the hearing should be limited and that the State, in effect, had no role at the proceeding (SR 15). The State contended that the only evidence which it wished to present was that relating to appellant's Orange County convictions which had been excluded from the prior proceedings, and, following such representation, Judge McGregor denied appellant's motions in limine (RS 341-2). During the course of the presentation, defense counsel Schwarz asserted that, at the original sentencing in 1976, "everyone" had been under the impression that only statutory mitigating circumstances could be considered, but that, subsequently, such had been found "not to be the case" (RS 345). When the judge asked defense counsel whether he contemplated introducing any evidence of nonstatutory factors in mitigation, Attorney Schwarz stated that he would only be arguing "the weakness of the

evidence" (RS 354); Schwarz also contended that the jury recommended life based upon "factors which fell outside the statutory list of mitigating circumstances", including alleged residual doubt as to guilt (RS 358-9). The prosecutor then offered an explanation for why he had filed the motions at issue, seeking notice of what evidence the defense was intending to introduce so that the State could be prepared, noting:

> Because there is a big word (sic) out there that the defendant is entitled to avail himself of, especially after **Lockett v. Ohio**, which says he is not bound by the ones that are listed by the legislature so that we can be prepared (RS 361).

Attorney Schwarz responded,

> "The only thing that we, at the present time, Mr. Kirkland and I, contemplating presenting in the way of evidence, would be the defendant's record at the Florida State Prison, over the last five years (RS 362).

Counsel stated that he also contemplated bringing in physical documents as well as live testimony in this regard, to show that appellant had been "no problem" while incarcerated (RS 363). Judge McGregor ruled that the above constituted sufficient notice to the State, and further recognized that, in view of Lockett, he did not think that he could "put a straightjacket on Mr. Schwartz (sic) and Mr. Kirkland here." (RS 364).

The resentencing hearing was held on May 28, 1981 (RS 219-293). At the beginning of such hearing, Attorney Schwarz renewed his objections to allowing the State to introduce any "new" evidence which had not been presented to the jury in 1976 (RS

221). Judge McGregor noted that the State would only be presenting evidence after the defense had had the opportunity to rebut matters contained in the presentence investigation report, as desired, further stating that he viewed the proceedings as a Gardner remand, limited in scope (RS 221). The State then announced that the only evidence which it intended to introduce was that relating to appellant's prior convictions from Orange County, excluded from the first sentencing hearing; defense counsel Schwarz announced that the appellant would be presenting no physical or testimonial evidence (RS 223-6). Attorney Schwarz then orally moved to strike the newly-drafted presentence investigation report, on the grounds that there was nothing therein that the judge could consider in aggravation (RS 228). The State, noting that it intended to independently prove the existence of the aggravating circumstances, did not oppose the motion, observing that omission of the report would, in all likelihood, prejudice the defense more, in that the report contained evidence of nonstatutory mitigation (RS 228-9). Attorney Schwarz then withdrew his motion to strike the entire presentence investigation report, arguing instead that certain portions of it should be stricken (RS 230). Attorney Schwarz continued:

> We do feel that Your Honor is bound by the law to consider the circumstances contained in the original pre-sentence investigation report which was the report which we were sent back for an opportunity to consider and to have an opportunity to rebut.
> We would not move to strike that report. That would not be within

> the scope of the Supreme Court's opinion. They sent the case back for an opportunity to rebut and consider the original PSI to the extent that the original PSI includes matters in mitigation, the court would be bound to weigh those before determining the appropriate sentence. (RS 229).

The State then called a corrections officer who identified appellant's fingerprints on the Orange County judgments (RS 236-7). The State also introduced the formal judgments and sentences, as well as a transcript of the victim's testimony at trial (RS 51-198). The defense presented no evidence, and counsel proceeded to present argument. Attorney Schwarz argued extensively that the jury's recommendation of life should be followed (RS 273-284). Attorney Kirkland argued against capital punishment, and speculated what appellant's daughter, if present in the courtroom, would say, suggesting, "Don't kill my daddy." (RS 286, 290); Attorney Kirkland likewise argued residual doubt as to guilt as a reason for mitigation, and further noted appellant's good behavior while on Death Row (RS 287-90). Following these arguments the proceedings were recessed until June 4, 1981, at which time, Judge McGregor again sentenced appellant to death (RS 388-390).

In the contemporaneous sentencing order, Judge McGregor outlined the procedural history of the case, noting that at the hearing of May 28, 1981:

> The Court received in evidence the judgment of such conviction as well as a transcript of testimony of the victim and trial leading to such prior conviction. The Defendant was then afforded the opportunity to

> present any evidence he might have and to respond to the PSI report (RS 200-1).

The judge further noted that he had considered, inter alia, the new PSI report, other than those portions which he had stricken on appellant's motion (RS 201); this report was attached to the sentencing order (RS 207-215). Judge McGregor again found the same two aggravating circumstances, relating to the homicide being especially heinious, atrocious, or cruel and appellant having been previously convicted of violent felonies; the judge stated that he had considered each of the statutory categories of mitigating circumstances and found there was no evidence presented during trial or found during the pre-sentence investigation which would give rise to any such mitigating circumstances (R 203-4).

The pre-sentence investigation report included information concerning the "severe head injuries" which appellant had sustained when he was struck by a car; such injuries resulting in facial paralysis and, according to family members, "a slow personality change" (RS 209). The report likewise detailed how appellant had been tortured when he had sought to drop out of the Hell's Angels Motorcycle Gang (RS 209). In other portions of the report, appellant's ex-wife described appellant as a very attentive father and further stated how she had witnessed appellant perform such "good deeds" as preventing other members of his gang from beating and raping other persons (RS 212). There were statements from appellant's parents which went into more detail as to the personality change which appellant had

undergone following the automobile accident (RS 210-212). The report contained information derived from appellant's school records, including an indication that he had a dull-normal intelligence level or I-Q of 76 to 89 (RS 210); the report likewise detailed appellant's mental health history, and included the result of an MMPI test (RS 211).

Appellant, of course, appealed such new sentence of death to this Court. In his Initial Brief, filed on or about February 9, 1982, Attorney Schwarz argued that Judge McGregor had erred in expanding the scope of the sentencing hearing to allow the State to present "new" evidence in aggravation. The attorney likewise contended that Judge McGregor had considered only statutory mitigating circumstances, claiming that he had overlooked, "the aspects of the defendant's character and background which were included in the PSI." (Initial Brief of Appellant, Spaziano v. State, Florida Supreme Court Case No. 50,250, filed on or about February 9, 1982, at pages 10-11). Counsel specifically argued:

> For example, the judge should have considered the fact that Appellant suffered severe head injuries at age 20 when struck by an automobile as a pedestrian. Family members began to notice a personality change after the accident and Appellant voluntarily admitted himself to the Rochester State Hospital for evaluation as a result of his head injuries, complaining of mild depression. It was shortly after the accident and his release from the hospital that appellant first joined a motorcycle club (R 209). Finally, appellant's IQ was in the dull-normal range (R 210) (Initial Brief of Appellant, **Spaziano v. State**, Florida Supreme Court Case

No. 50, 250, filed on or about February 9, 1982, at page 11).

On May 26, 1983, this Court affirmed appellant's sentence, rejecting his argument that Judge McGregor had impermissibly exceeded the scope of hearing on remand. This Court did not expressly address appellant's contention regarding the alleged restriction in consideration of mitigating circumstances. This Court did, however, observe:

> In **White v. State**, 403 So.2d 331, 339 (Fla. 1981), we upheld the sentence of death imposed by the trial judge in the face of the jury's recommendation of life where the trial judge "noted that as a result of the pre-sentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider." Because the aggravating circumstances outweighed any possible mitigating circumstances, the trial judge concluded that the death sentence was appropriate and we affirmed. We reach the same conclusion in this case. **Spaziano v. State**, 433 So.2d 508, 511 (Fla. 1983).

Following such opinion, appellant's counsel filed a Motion for Rehearing on or about June 9, 1983, which, while reiterating the contention that Judge McGregor had failed to consider nonstatutory evidence in mitigation, also contended, in complete contrast, that the sentencing judge had in fact found evidence in mitigation. Citing to the language in the sentencing order which stated that the mitigating circumstances were insufficient to outweigh the aggravating, appellant argued that it was quite evident, unless such language was surplusage, "that the lower

court recognized the existence of mitigating circumstances" (Motion for Rehearing, Spaziano v. State, Florida Supreme Court Case No. 50,250, filed on about June 9, 1983). Defense counsel then reviewed the nonstatutory mitigating circumstances present the record "for the court's consideration" (Motion for Rehearing at 2). Such motion was denied on July 13, 1983, and appellant subsequently sought review by the United States Supreme Court. Such Court, of course, granted review, and in its opinion approved the propriety of Florida's jury override system. In setting out the facts of the case, the United States Supreme Court noted, in a footnote:

> The Florida capital sentencing statute in effect at the time of petitioner's trial, January 1976, is not identical to that currently in effect. In 1976, the statute directed the sentencer to determine whether statutory aggravating circumstances were outweighed by statutory mitigating circumstances. See 1972 Fla. Laws., ch. 72-724. The current statute directs the sentencer to determine whether statutory aggravating circumstances are outweighed by any mitigating circumstances. §§921.141(2)(b), (3)(b) (1983), as amended by 1979 Fla. Laws, ch. 79-353. There is no suggestion in this case that either the jury or the trial judge was precluded from considering any nonstatutory mitigating evidence. Cf. **Barclay v. Florida**, 463 U.S. 939, 947, n.2, 103 S.Ct. 3418, 3423, n.2, 77 L.Ed.2d 1134 (1983) (STEVENS, J., concurring in judgment) (emphasis supplied). **Spaziano v. Florida**, 468 U.S. 447, 104 S.Ct. 3154, 3157, n.4, 82 L.Ed.2d 340 (1984).

On November 4, 1985, the governor signed a death warrant in this case, and, on or about November 22, 1985, appellant filed his first Motion for Post-Conviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850. The motion raised (10) claims for relief: (1) that Spaziano had been denied an individualized sentencing, due to the unconstitutional application of the Florida capital sentencing statute, which was reasonably interpreted at the time of his trial in 1976 to restrict consideration of mitigating circumstances to those set forth in the statute; (2) that trial counsel had been ineffective in failing to inform the jury that the state's star witness, Anthony Dilisio, had been hypnotized; (3) that use of hypnotically-generated testimony had violated appellant's rights; (4) that appellant had been denied due process, because he had been incompetent to waive the presentation of mitigating evidence at sentencing; (5) that appellant had been denied due process, because he was tried while mentally incompetent; (6) that trial counsel had been ineffective in failing to petition the court for a hearing on appellant's competency; (7) that the jury override is unconstitutional; (8) that the death penalty in Florida is applied arbitrarily; (9) that execution constitutes cruel and unusual punishment and (10) that the aggravating circumstance relating to a homicide being especially heinious, atrocious, or cruel is unconstitutionally applied. As to the first claim, those matters allegedly not considered in 1976 were those contained in the presentence investigation report, including appellant's severe head injury in the auto accident, his ensuing

personality change, his dull-normal intelligence, his membership in the Outlaws, as well as residual doubt as to guilt (Motion to Vacate Judgment and Sentence, filed November 22, 1985, at n.6, page 15). The only reference to the resentencing in 1981, was a footnote, which contained the assertion that "a similar limitation on the consideration of non-statutory mitigating circumstances" had occurred on remand, in that such remand had been for a limited purpose; the fragmentary footnote goes on to suggest that the judge had limited his consideration to statutory mitigating circumstances in reimposing the death penalty (Motion to Vacate, Judgment and Sentence, filed November 22, 1985, n.9, pages 18-19).

The motion was accompanied by a voluminous appendix, which included an affidavit from Attorney Kirkland, who had represented appellant at trial and sentencing; the appendix additionally contained affidavits from family members and from two doctors who had examined appellant in 1984, as well as medical records from 1967 and 1968. In the affidavit from Attorney Kirkland, the attorney stated that he had discussed with appellant prior to trial "certain aspects of his prior social and medical history"; Kirkland stated that after the jury's verdict of guilt, he had then sat down with appellant and discussed with him the statutory aggravating and mitigating circumstances. Kirkland stated that he had questioned appellant at length about whether he had suffered brain damage from the auto accident in 1967, but that appellant had stated adamantly that he had "no head problems" and did not want "any shrink" getting up and saying that he was

crazy; Kirkland likewise stated that appellant had told him that he had had no contact with his family recently. The attorney claimed that, while appellant understood the need to present evidence in mitigation, he did not want to "beg mercy" from anyone, given his status as a member of the Outlaws Motorcycle Gang. Kirkland stated that he made no further effort to obtain appellant's prior medical records, "in view of the defendant's absolute and irreversible attitude about presentation of any mitigating evidence including any psychiatric or medical evidence" (emphasis supplied) (Affidavit of Edward R. Kirkland, attachment KK, Motion to Vacate Judgment and Sentence, filed November 22, 1985). The Motion to Vacate was accompanied by a Memorandum of Law in Support of Defendant's Motion for Stay of Execution, in which defense counsel requested a stay of execution so that the circuit court could hold a full hearing on the accompanying Motion to Vacate Judgment and Sentence; in such pleading, defense counsel represented, "This is Mr. Spaziano's first and only 3.850 Motion." (emphasis in original) (Memorandum of Law in Support of Defendant's Motion for Stay of Execution, filed on or about November 22, 1985 at page 8).

The matter was called up for a hearing on November 22, 1985. At such time Attorney Mello briefly outlined the nonstatutory mitigating evidence which he felt that the court had failed to consider, such as the fact that appellant had been a good father, that he had stopped fights between members of the motorcycle gang and that there was residual doubt as to guilt (Transcript of Proceedings of November 22, 1985 at 46-7). The

Circuit Court summarily denied the Motion for Post-Conviction Relief, as well as the accompanying Motion for Stay, and appellant immediately appealed to this Court. This Court granted a stay of execution, and the parties submitted briefs; in appellant's brief, he argued on appeal that the 1981 resentencing had been too limited in scope to have allowed him to present additional evidence in mitigation (Brief of Appellant, Spaziano v. State, Florida Supreme Court Case No. 67, 929, filed on or about November 25, 1985, at pages 20-24). On May 22, 1986, this Court rendered its opinion, affirming Judge McGregor's order. This Court expressly rejected appellant's first contention, that his sentence had been imposed in violation of Lockett v. Ohio, 438 U.S. 586 (1978) finding:

> The record establishes, prior to re-sentencing, the state filed a pleading entitled "Motion to Compel Disclosure/Statement of Particulars of Non-statutory Mitigating Circumstance." At the hearing held on this motion, the prosecutor conceded that, under **Lockett**, Spaziano was entitled to present evidence of non-statutory mitigating factors. The trial judge agreed: "I don't think, in view of **Lockett** I can put a straightjacket on [defense counsel] here." On the basis of this record, we distinguish this case from **Harvard v. State**, 486 So.2d 537 (Fla. 1986), and find no violation of **Lockett**. **Spaziano v. State**, 489 So.2d 720, 721 (Fla. 1986).

This Court similarly affirmed the denial of the motion as to appellant's other claims, and the United States Supreme Court denied certiorari review on December 1, 1986. See, Spaziano v. Florida, ___ U.S. ___, 107 S.Ct. 598 (1986).

On or about December 24, 1986, appellant filed a second Motion for Post-Conviction Relief in the state circuit court, raising one claim for relief, that Spazanio's attorney, at his resentencing in 1981, had unreasonably failed to investigate and present nonstatutory mitigating evidence, thus rendering ineffective assistance of counsel (R 38-69). The nonstatutory mitigating evidence, allegedly neither investigated nor presented, consisted of the matters presented in the first Motion for Post-Conviction Relief, and the appendices to such Motion were expressly incorporated by reference in the second Motion for Post-Conviction Relief (R 41). Such materials comprised those relating to appellant's head injury in 1967 and 1968 and his ensuing personality change (R 40-62). Appellant's attorney contended that "none of the grounds presented herein" had been raised on direct appeal or on the prior 3.850 proceeding.

Appellant's counsel further asserted that the issue could not have been raised earlier, "because it had not become an issue prior to the Florida Supreme Court's opinion affirming the denial of 3.850 relief"; he further argued that appellant had been represented by the same attorney, Mike Mello, or a member of his firm, at both the resentencing hearing in 1981 and the 3.850 proceeding in 1985, thus allegedly precluding the raising of any issue of ineffective assistance of counsel, as such would have "required counsel to attack himself as being ineffective." (R 62). Attached to this pleading was an affidavit from Attorney Schwarz, in which he represented that he had believed that the resentencing hearing on 1981 had been a limited Gardner remand,

and that, accordingly neither he, nor anyone on his behalf, had conducted "any investigation into the background or non-statutory mitagating circumstances that may have been present on behalf of Mr. Spaziano." (R 65-67). Counsel further asserted that he had "recently been provided with copies of mitigating evidence discovered following [his] representation of Mr. Spaziano", and that, had he investigated or discovered these facts, he would have "wanted" to offer them to the court for consideration in the sentencing proceeding (R 65-67).

On or about February 3, 1988, the State filed its answer to this pleading, contending that the successive motion was an abuse of procedure, in that the arguments contained therein could and should have been presented in appellant's first Motion for Post-Conviction Relief (R 70-3). On April 22, 1988, Judge McGregor summarily denied appellant's motion, finding that appellant had shown no justification for failing to raise the claims therein in his prior motion (R 74-5). Appellant, of course, has appealed such order to this court (R 76).

SUMMARY OF ARGUMENT

The instant appeal represents one taken from the summary denial of appellant's second Motion for Post-Conviction Relief, which raised ineffective assistance of counsel as a ground. Appellee suggests that such ruling, finding appellant's motion to be an abuse of procedure, was correct, and should be affirmed. While appellant did seek to allege some justification for his procedural default, his allegations were insufficient under prevailing precedent. Similarly, appellant's allegations of "ethical constraint" or ineffective assistance of collateral counsel are either not well taken, improperly presented, or both.

The claim which appellant sought to present below was that relating to the effectiveness of counsel at his 1981 resentencing. No good cause was shown for the omission of this claim from appellant's first Motion for Post-Conviction Relief, filed in 1985. Additionally, even were a claim to be addressed on the merits, appellant would still fail. The allegation that his attorney regarded himself as limited by the scope of the resentencing hearing, as far as his ability to investigate and present evidence in mitigation, is squarely contradicted by the record. Further, the evidence which appellant now asserts should have been presented is either cumulative to that already before the sentencer or, in the case of later-acquired psychiatric reports, of dubious value; appellant has also failed to demonstrate that competent counsel would have been able to secure comparable experts in 1981. Inasmuch as it can be said, with confidence, that no reasonable probability exists that, had this

evidence been presented to sentencer in 1981, a life sentence would have resulted, appellant's claim would have been found to be without merit, even had it not been found, correctly, to be procedurally barred. The order of the circuit court below should be affirmed in all respects.

ARGUMENT/POINT ON APPEAL

DENIAL OF APPELLANT'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF, SUCH MOTION FOUND TO BE AN ABUSE OF PROCEDURE, WAS NOT ERROR.

Appellant asserts on appeal that the circuit court erred in summarily denying his second Motion for Post-Conviction for Relief, in that, allegedly, justification existed for his failure to previously present the claims for relief raised therein. Appellee disagrees, and suggests that the order below was correct and in accordance with this Court's many prior precedents involving successive motions for post-conviction relief. See, e.g., Witt v. State, 465 So.2d 510 (Fla. 1985). Appellant is certainly not the first Death Row inmate who, after being unsuccessful in his first allegation of ineffective assistance of counsel, has simply chosen to "recycle" his arguments, with slight alteration, in a second successive motion, such pleading correctly found to be an abuse of procedure. See, e.g., Christopher v. State, 489 So.2d 22 (Fla. 1986); Tafero v. State, 524 So.2d 987 (Fla. 1987). The trial court's order, summarily denying appellant's post-conviction motion, should be affirmed, as it should be undisputed that, in his first motion for post-conviction relief filed in 1985, appellant, while otherwise attacking the competence of counsel, failed to include the allegations raised in 1986. In addition to the circuit court's correct finding of a procedural bar, appellee would further assert, in the alternative, that appellant would have been entitled to no relief on the merits, as will be discussed more fully infra.

It should be clear that appellant's somewhat conflicting arguments seeking to excuse his procedural default are simply not persuasive. Appellant contends initially that, prior to this Court's decision in Spaziano v. State, 489 So.2d 720 (Fla. 1986), the law had "seemed" to be that Gardner remands were limited in scope; appellant then cites a number of this Court's precedents to such effect. Appellant next contends that this Court's decision affirming the denial of his first Motion for Post-Conviction Relief was somehow a "revelation", in that such opinion made clear, apparently for the first time, "that Mr. Spaziano had been given the opportunity to present non-statutory mitigating evidence." (Brief of Appellant at 10). Thus, according to Spaziano, his counsel at the 1981 resentencing "was surely ineffective for failing to investigate and present the substantial non-statutory mitigating evidence that existed." (Brief of Appellant at 10). No such claim of ineffectiveness, however, could have been presented in the 1985 Motion for Post-Conviction Relief, because, according to appellant: (1) the legal basis for such claim was not known at the time, inasmuch as this Court's 1986 opinion had not yet been rendered and (2) counsel representing appellant in 1985 would have had to attack his own competence, or that of one of his associates, in that Attorney Mello and Attorney Schwarz, at one point, worked in the same office. Appellant also seems to suggest that Attorney Mello may not have rendered effective assistance of collateral counsel in his omission of this claim from the 1985 post-conviction motion.

There are more than a number of problems with the above "analysis". First of all, if, as appellant seems to posit, it was at least reasonable for Attorney Schwarz to have viewed the sentencing proceeding of 1981 as limited in scope, given other decisions of this Court, then it would hardly seem that a successful claim of ineffective assistance of counsel can be maintained, inasmuch as such action by counsel would not fall outside the range of reasonably competent assistance. If, as appellant asserts, the scope of the 1981 resentencing was not clear until this Court's 1986 opinion, then counsel surely cannot be faulted for failing to anticipate a "change in the law". cf., Darden v. State, 475 So.2d 217 (Fla. 1985) (counsel not ineffective for failing to anticipate Lockett , and thus, for failing to introduce nonstatutory mitigating evidence); Muhammed v. State, 426 So.2d 533 (Fla. 1982) (same). Additionally, it is interesting to note that appellant's contention, that counsel was ineffective for failing to present nonstatutory evidence in litigation, apparently means that he has abandoned any contention, such as that raised in his brief in 1982, that Judge McGregor limited his consideration to statutory mitigating circumstances. Certainly, if the judge were of this view, any deficiency on the part of counsel could not be prejudicial, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in that there could be no prejudice in regard to counsel's failure to present evidence which the sentencer would not consider. Further, Spaziano's current position in this regard would seem to mean that he is estopped from later seeking

relief on the grounds of Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987).

These contradictions aside, appellant's entire premise is faulty. The fact that he received two sentencing hearings hardly entitles him to file one post-conviction motion per hearing; it should be remembered that in his memorandum accompanying his motion for stay of execution in 1985, he represented that he had filed his first and only 3.850 motion. (See Memorandum of Law in Support of Defendant's Motion for Stay of Execution, filed on or about November 22, 1985, at page 8). When appellant prepared his Motion for Post-Conviction Relief in 1985, he had every opportunity, but for a strategic reason not to do so, to raise any claim of error which he desired in regard to the 1981 resentencing. Any suggestion of "ethical conflict" cannot be taken seriously, given the fact that not only was Attorney Schwarz not appellant's only attorney at the 1981 resentencing, but Attorney Mello was not appellant's only attorney at the time of the post-conviction motion in 1985. At the resentencing in 1981, Spaziano was represented by both Attorney Schwarz, who had represented him on appeal in regard to his first sentence of death, and by Attorney Edward Kirkland, who had represented appellant at the original sentencing in 1976. In his first motion for post-conviction relief in 1985, appellant's attorney had no compunction against attacking the competence of Attorney Kirkland, as to his handling of the original sentencing; inasmuch as Attorney Kirkland had some responsibility at the 1981 resentencing, and inasmuch as no showing has been made that

Attorney Kirkland was ever employed by the Office of the Public Defender for the Fifteenth Judicial Circuit, no "ethical constraint" precluded appellant from attacking the competence of this attorney as to his performance at resentencing, which would have, of course, placed the reliability of the new death sentence squarely at issue.[1]

Similarly, while one of the attorneys representing appellant at the first post-conviction proceeding was Michael Mello, then an employee of the Office of Capital Collateral Representative and a former employee of the Office of the Public Defender for the Fifteenth Judicial Circuit, it should be clear from the face of the pleadings filed in this court that Mello was not appellant's sole representative. This court's opinion affirming the denial of the motion lists no fewer than five (5) counsel appearing on behalf of Spaziano; in addition to Mello, these include Thomas A. Horkan, Jr., Executive Director of Florida Catholic Conference, Richard W. Ervin, of Ervin, Vaughn, Jacobs, Odom and Kitchen, and Larry Helm Spalding, Capital Collateral Representive, as well as Mark Evan Olive, Assistant Capital Collateral Representive. No "ethical constraint" could have precluded any of these gentlemen from attacking the competence of Attorney Schwarz, should such have truly been desired. While mindful of this court's decision, Adams v. State, 380 So.2d 421

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[1]The instant motion seems to make no assertion of ineffective assistance of counsel as to Kirkland's handling of the 1981 resentencing. One can only hope that such allegation will not surface in appellant's third motion for post-conviction relief.

(Fla. 1980), which appellant has not cited, appellee maintains its position that no conflict of interest can be said to provide justification for appellant's failure to comply with state procedure. See also, Demps v. State, 416 So.2d 808 (Fla. 1982) (attorney asserts his own ineffectiveness).

Appellee also finds it unnecessary for this court to reach any question as to ineffective assistance on the part of collateral counsel Mello. While it is true, as appellant notes, that this court, in Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), cited to Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988), whether or not such citation was "with approval", as appellant maintains, is a question which can safely be left to the future. The motion for post-conviction relief filed in 1986 contained no assertion of ineffective assistance of Attorney Mello and, thus, it cannot be said that any such issue has been properly preserved for, or presented on, appeal (R 38-64). Cf. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Perri v. State, 441 So.2d 606 (Fla. 1983); Tillman v. State, 471 So.2d 32 (Fla. 1985). As in Spalding itself, appellant is seeking resolution of an "unripe" and highly questionable claim; as will be discussed more fully infra, no viable claim of ineffective assistance of counsel as to Attorney Schwarz existed, thus rendering Mello's failure to raise such an act or omission without constitutional significance.

The above window-dressing aside, the instant successive motion for post-conviction relief should be recognized for what it is, yet another piecemeal and dilatory attempt to endlessly

litigate a sentence of death. Florida Rule of Criminal Procedure 3.850, as amended in 1985, expressly prohibits the filing of successive motions for post-conviction relief, where such motion fails to allege new or different grounds for relief and the prior motion has been determined on the merits or where, if new and different grounds are asserted, the failure of the movant to present such in the earlier motion constitutes an abuse of procedure; justification for failing to previously present new and different grounds can be established by showing a changen in law or that the facts could not have been discovered at the time of the first petition. See, Witt, supra. The successive motion sub judice, in a sense, violates both of the above provisions, in that, to a large extent, it alleges the same basis for relief as that presented in the 1985 motion, i.e., denial of an individualized sentencing due to the sentencer's failure to consider certain nonstatutory mitigating evidence, albeit with a different emphasis. Any suggestion that the two motions for post-conviction relief in this case are independent of each other is belied by the fact that the same "evidence" is at issue in both. In the second motion, appellant expressly incorporates by reference the voluminous appendix filed in 1985 (R 41); thus, the only difference is that, in 1985, appellant alleged that the sentencer had failed to consider this evidence for Reason A, whereas in 1986, he asserted Reason B.

Additionally, to the extent that the allegation of ineffective assistance of Attorney Schwarz was a "new or different ground", justification for its lack of prior

presentation was not shown. While appellant is technically correct in noting that Judge McGregor should have indicated in his order of denial that appellant had attempted to show justification for his procedural default (R 62-63), the trial court's ultimate denial of relief was proper, and in accordance with a long line of precedent, some preceding the Witt decision itself. See, Sullivan v. State, 441 So.2d 609 (Fla. 1983); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Raulerson v. State, 462 So.2d 1085 (Fla. 1985); Witt, supra; Clark v. State, 467 So.2d 699 (Fla. 1985); Francois v. State, 470 So.2d 687 (Fla. 1985); Christopher, supra; Stewart v. State, 495 So.2d 164 (Fla. 1986); Darden v. State, 496 So.2d 136 (Fla. 1986); Booker v. State, 503 So.2d 888 (Fla. 1987); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987); Tafero, supra. To the undersigned's knowledge, the only case in which this court has found cause to exist to justify a successive motion is State v. Sireci, 502 So.2d 1221 (Fla. 1987). Although appellant has made no attempt to analogize his situation to that before this court in Sireci, any such attempt would be fruitless. In such latter case, new evidence was presented in the form of evaluations from psychiatrists who had conducted their interviews after the denial of the first motion for post-conviction relief; as noted, appellant sub judice has simply "recycled" the factual allegations from one post-conviction motion to the next. The finding of a procedural bar in this case was correct, and should be affirmed.

Having asserted the above procedural arguments, which the

state fully maintains justified the denial of the instant motion, appellee would briefly present an alternative address of the merits. In order to have been entitled to relief on his allegation of ineffective assistance of counsel as to Attorney Schwarz, appellant would have had to satisfy both "prongs" set forth in Strickland v. Washington. Thus, he would have had to show not only deficient performance on the part of counsel, i.e., that counsel acted as no reasonable competent attorney would have done under the circumstances of the case, but also that resultant prejudice existed. In the context of a capital sentencing procedure, appellant would have had to show that, but for counsel's errors, a reasonable probability exists that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. See also, Downs v. State, 453 So.2d 1101 (Fla. 1984). Appellee suggests, based on the record below and the allegedly "omitted" evidence, contained in the appendix to the post-conviction motion at issue, that appellant simply had no case on the mertis.

Although there has been no evidentiary hearing on this specific claim and, aside from the record, there exists only an rather ambiguous affidavit from Attorney Schwarz, who is now apparently located in Vermont, the value of such an affidavit best summed up by this court in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), appellee suggests that the record is, in any event, sufficient to refute much of appellant's claim. See also, Francis v. State, 529 So.2d 670, 672 n.4 (Fla. 1988) (value of counsel's latter-day assessment of own conduct). Thus, despite

whatever position Attorney Schwarz may now wish to take as to his belief concerning the scope of the resentencing hearing in 1981, it must be noted that when he was specifically asked in May of 1981 by Judge McGregor what evidence he intended to introduce at such proceeding, he stated that the only thing that he and Attorney Kirkland were contemplating introducing would be "the defendant's record at the Florida State Prison over the last five years." (RS 362). Whereas counsel later chose not to introduce this evidence, such omission says nothing as to the issue of what counsel believed he could introduce; Attorney Kirkland argued the matter anyway (RS 289). The contemporaneous statement by counsel obviously cannot be squared with any latter-day assertion that he regarded himself as limited by the scope of a Gardner remand, inasmuch as the above evidence concerning appellant's behavior in prison since the time of the first sentencing would be exactly the type of evidence which would be excluded if the hearing were one so limited. See, e.g., Songer v. State, 365 So.2d 696 (Fla. 1978).

Additionally, while it is not without risk to seek to infer strategy or tactics from a silent record, there are a number of observations which simply must be made sub judice. To the state, it is highly instructive to note what it was that Attorney Schwarz did immediately upon being appointed co-counsel. He filed a motion in the circuit court seeking to preclude the state from introducing any "new" evidence, on the grounds that such would "expand" the scope of the resentencing hearing (RS 19-21, 27-28); as counsel for Spaziano on appeal, Schwarz was well aware

of the fact that the judge had erroneously excluded evidence concerning appellant's 1975 rape and aggravated battery convictions from the first sentencing hearing in 1976. Although Schwarz ended up losing this battle, his subsequent failure to introduce any "new" evidence of his own at the 1981 resentencing allowed him to preserve his argument for appeal, i.e., that the judge had erred in "expanding the scope" of the hearing by allowing this evidence in, and, on appeal in 1982, Schwarz took full advantage of his opportunity and argued this point vehemently (See, Initial Brief of Appellant, Spaziano v. State, FSC 50,250 filed on or about February 9, 1982, at pages 6-11). The defense decision to argue extensively at the resentencing hearing that residual doubt as to guilt was a nonstatutory factor in mitigation was not unwarranted, especially given the other potential evidence which the defense had to argue, inasmuch as it was not until this year that the United States Supreme Court conclusively held that residual doubt plays no role at sentencing. See Franklin v. Lynaugh, ____ U.S. ____, 108 S.Ct. 2320 (1988).

In any event, it is clear that Schwarz was aware that, despite the defense's failure to formally call any witness, evidence in mitigation was before the sentencer; Schwarz withdrew his motion to strike the presentence investigation report in toto, following a reminder by the prosecution that such action would prejudice the defense, inasmuch as the document contained nonstatutory evidence in mitigation (RS 228-229). Again, Schwarz's understanding of the importance of the evidence

contained in the presentence investigation report is underscored by his argument on appeal, wherein he contended to this court that the sentence of death had to be vacated because Judge McGregor had failed to consider this evidence (see, Initial Brief of Appellant, Spaziano v. State, FSC 50,250, filed on or about February 9, 1982, at pages 10-11).

Thus, the record in this case reveals an attorney vigorously defending his client and taking certain strategic positions consistent with that defense. In evaluating prejudice under Washington, the question then becomes whether the newly-proffered evidence, if presented to the sentencer in 1981, would have created the reasonable probability of a different result or, in this case, a life sentence. Before turning to this question, there are two matters which must be noted. As part of the appendix to his first motion for post-conviction relief, appellant attached an affidavit from Attorney Kirkland; in such affidavit, the attorney represented that, at the sentencing of 1976 appellant had advised him that he had "no head problems", that he not seen his family for years and, in general, that he wanted no mitigating evidence, especially that from psychiatrists, presented on his behalf. (Attachment KK to Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985). Obviously, if appellant was still of that frame of mind in 1981, Attorney Schwarz could hardly be deemed ineffective for failing to present evidence which his client forbade him to present. Cf., Henderson v. Dugger, 522 So.2d 835 (Fla. 1988) (counsel not ineffective for failing to call family

members at the penalty phase, where, inter alia, defendant precluded such). Additionally, while some of the evidence now presented was, in all likelihood, available in 1981, i.e., the medical reports from 1966, 1967 and 1968, concerning appellant's accident, and, to the extent noted above, the affidavits of various family members and friends, no showing has been made that psychological reports, such as those of Doctors Krop and Vallely, were available at such time. These reports were not compiled until 1984, most likely for use in clemency, and even then, appellant would seem to have expressed a reluctance to be evaluated. Appellant's attitude aside, he has entirely failed to establish that these doctors, or comparable experts, would have rendered similar opinions in 1981, and that competent counsel could have discovered and utilized such. The Eleventh Circuit Court of Appeals resolved a similar question in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), wherein it noted that,

> Merely proving that someone - years later - located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort. Id. at 1446.

It certainly cannot be said that appellant has made this showing.

Further, it is clear that the evidence in mitigation now adduced is either cumulative to that already presented to the sentencer, by means of the presentence investigation report, or of insignificant value. The fact that Joseph Spaziano had been

struck by a car in May of 1966 and had suffered "severe head injuries", including facial paralysis, and had then had to undergo a lengthy recovery, was well known to Judge McGregor, as per his consideration of the presentence investigation reports of 1976 and 1981[2]; the sentencing order of June 4, 1981, contains the assertion that the judge considered the presentence investigation report and, indeed, such report is actually attached to the order (RS 200-215). While the actual medical records from 1966 and 1967 contained greater detail, it cannot be said that they offer anything new in mitigation (Attachments T, U, V, W, X and Y; Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985); indeed, the medical records indicate that an EEG taken shortly after appellant's release from the hospital was normal, thus suggesting the absence of any lingering trauma (Attachment W). Similarly, the fact that appellant's friends and relatives detected a personality change following the accident was not unknown to Judge McGregor, in that the presentence investigation report contains statements from both of appellant's parents, as well as his ex-wife, in which

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[2]At the time he imposed sentence on July 16, 1976, Judge McGregor stated that, while the jury's consideration of matters at the penalty phase had been limited, he felt that, as far as the judge was concerned, "The Judge can, of course, consider the entire life of the defendant, and can consider all of his background life history, and any prior convictions that may have occurred" (Transcript of Proceedings of July 16, 1976 at 6). Appellee takes this statement at face value and, accordingly, credits the judge with having considered the entire PSI in originally sentencing appellant to death in 1976. Of course, it would be anomalous to disagree with this conclusion, inasmuch as appellant's first sentence of death was reversed exactly on this basis. The 1976 PSI is very similar to its successor in 1981, in terms of the nonstatutory mitigating evidence contained therein.

each detailed the consequences of the accident, i.e., personality change, facial paralysis, hostility from others due to change in appearance (RS 210-211). While the affidavits from these and other family members go into more detail as to these matters, it likewise cannot be said that they truly add anything new in mitigation (Attachments Z - JJ, Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985).

Finally, the fact that appellant voluntarily admitted himself to the state mental hospital in late 1967 was, again, a matter known to Judge McGregor (RS 211). Whereas the matters contained in the appendix to the motion to vacate are again more detailed, their value is debatable (Attachment S, Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985). These medical records make clear the fact that when appellant was discharged in January of 1968, his diagnosis was "without mental disorder, psychopathic personality with asocial or amoral trends." They likewise indicate that appellant sought asylum at the hospital after having fled from a North Carolina courtroom, during a trial recess, where, apparently, appellant was to be tried for grand larceny; these reports include other details of appellant's criminal history, not otherwise known to the court, including reference to a New York robbery conviction and the commission of this last offense in North Carolina, while on parole for the noted robbery conviction. Appellant was formally released into the custody of New York officials. Appellee suggests not only that appellant had a quite "rational" basis for seeking asylum at the state mental hospital at such

time, but also that admission of these records in 1981 could quite well have done more harm than good. As to all three of the above matters, appellee further concludes that no claim of ineffective assistance of counsel could be maintained in regard to counsel's alleged failure to investigate or present this evidence, inasmuch as the underlying facts concerning all these matters were already before the sentencer. See, Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986) (counsel's failure to present in greater detail testimony concerning defendant's background and mental and emotional problems not ineffective assistance, where it was highly doubtful that such testimony would have affected sentence); Lightbourne v. State, 471 So.2d 27 (Fla. 1985) (counsel not ineffective for failing to present evidence in mitigation at sentencing, where newly-proffered evidence cumulative and sentencing judge aware of defendant's background); Porter v. State, 478 So.2d 33 (Fla. 1985) (counsel not ineffective for failing to present evidence as to defendant's background where, inter alia, jury recommended life); Lusk v. State, 498 So.2d 902 (Fla. 1986) (same, especially where such new evidence cumulative).

This leaves only the evidence adduced from appellant's newly-acquired experts; as noted previously, no showing has been made that comparable evidence could have been discovered by reasonably competent counsel in 1981. The material contributed by Dr. Vallely need not be considered in great detail, inasmuch as the doctor's report, prepared on November 24, 1984, in reference to an examination conducted on the same date, was

apparently intended to assess appellant's "current cognitive and behavioral status relative to being convicted of two homicides." (Attachment N, Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985, at page 4) (emphasis supplied). This report, which was, in all likelihood, prepared for presentation at clemency, did opine that appellant suffered from organic personality disorder. The report of Dr. Krop, on the other hand, while also premised upon an examination conducted in 1984, contained conclusions relating to appellant's emotional or mental state at the time of the homicide in 1973. Dr. Krop, based upon a two and one-half hour interview with appellant, some eleven (11) years after the homicide, stated that, in his opinion, "several mitigating factors may have influenced Mr. Spaziano's behavior at the time he allegedly committed the offense." (Attachment O, Appendix to Motion to Vacate Judgment and Sentence, filed November 22, 1985, at page 5) (emphasis supplied). Krop offered the same diagnosis as his colleague, that of organic personality disorder, stating that Spaziano had committed the offense while he was under the influence of extreme emotional distress, given the fact that any amount of stress apparently proved too much for appellant.[3]

While the undersigned is not a psychologist, appellee

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[3]One of Dr. Krop's more interesting conclusions is that the Outlaws motorcycle gang was "a stabilizing force in Mr. Spaziano's life." (Report at 4) Inasmuch as from evidence otherwise in the record, it would appear that the very code of the Outlaws was to disobey any law, and that a prerequisite for admission into the gang was the commission of a violent felony, one shudders to think what the doctor would have characterized as a "bad" influence upon Spaziano.

suggests that even a layman may safely criticize the above report. Initially, it must be recognized that appellant has continued to deny committing the instant offense. Thus, it seems highly questionable how the doctor could conclude that appellant committed the offense while "under the influence of extreme emotional distress", inasmuch as the circumstances of the offense remain totally unknown. Further, if appellant's past behavior is any guide, it is difficult to find any "stressful" motive for the instant killing. When appellant committed his rape and aggravated battery of Vanessa Croft, neither the victim nor anyone else did anything to precipitate the offense. Rather, Miss Croft was abducted at knifepoint, taken to the Outlaws' "clubhouse", where she was raped repeatedly, and then abandoned, after being strangled with her own belt and slashed across the eyes and throat (SR 68-94). Similarly, the only way that appellant's participation in the instant homicide came to light was the fact that he boasted about it, going into great detail as to how he had tortured the victim, and even taking his young companion to view the victim's bloody body.

To the undersigned, this conduct does not seem consistent with that of one who has been "driven" by outside forces to commit a crime. As this court observed in James v. State, 489 So.2d 737, 739 (Fla. 1986), which similarly dealt with an after-the-fact diagnosis by Dr. Krop:

> The possibility of organic brain damage, which James now claims he has, does not necessarily mean that one is incapable or that one may engage in violent, dangerous behavior and not be held

> accountable. There are many people suffering from varying degrees of organic brain disease who can and do function in today's society.

See also, State v. Sireci, supra (subsequent finding of organic brain damage does not necessarily warrant a new sentencing hearing); Bush v. Wainwright, 505 So.2d 409 (Fla. 1987) ("Diffuse organic brain damage" does not raise a valid question as to defendant's competence).

Appellee suggests that even if the above evidence had been adduced in 1981, no reasonable probability exists of a different result at sentencing. The instant sentence of death is a jury override, premised upon the finding of two strong aggravating circumstances. While appellee does not begrudge appellant his success with the jury, it must also be remembered that the jury in this case was deprived of extremely probative evidence, i.e., that relating to appellant's prior conviction for the extremely violent rape and battery of Vanessa Croft; indeed, defense counsel was able to argue to the jury that appellant's seemingly nonviolent past was the "best indicator" of his character (Proceedings of January 26, 1976 at 18). The judge, of course, knew better, and Judge McGregor was similarly justified in imposing death based upon the truly heinous nature of the instant homicide. Appellee suggests that appellant's sentence of death remains reliable. The evidence now presented is largely cumulative to that actually considered by the sentencer and/or such is certainly less than credible. Appellant's claim of ineffective assistance of counsel in regard to Attorney Schwarz's handling of the resentencing of 1981 is totally without merit,

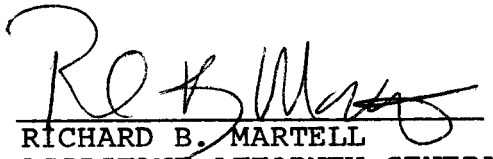
and, even if this court should disagree as to the correctness of the application of the procedural bar sub judice, the order of denial below should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the judgment below, denying appellant's motion for post-conviction relief, should be affirmed in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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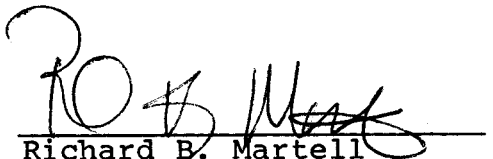
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a coy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Edward S. Stafman, Esquire, counsel for appellant, at 317 East Park Avenue, Tallahassee, FL 32301, this 11 day of October, 1988.



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