IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

vs. Case No. 72,464

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a denial of Rule 3.850 relief in a death case, where the trial court ruled that Mr. Spaziano had abused the writ by filing a second Rule 3.850 motion, even though the issue raised therein was not raised in the first 3.850 motion. References to the record on appeal will be made by use of citation to the appropriate document, rather than a record number, because there are only a few documents within the record. Where appropriate, a page reference within the cited document will be given. To the extent that Mr. Spaziano relies on documents within the record previously before this Court, references to that record will be made by citing to that record on appeal, followed by the record page number from that record.

STATEMENT OF THE FACTS AND CASE

The majority of the statement of the facts and case may be found in this Court's opinion in Spaziano v. State, 489 So.2d 720 (Fla. 1986):

> In 1976, Spaziano was convicted of the first degree murder of Laura Harberts and, over the jury's recommendation that a life sentence be imposed, sentenced to death by the trial judge. On direct appeal, this Court affirmed Spaziano's conviction but vacated the death sentence and remanded for resentencing on the grounds that the trial court relied upon nonstatutory aggravating factors in violation of Section 921.141, Florida Statutes (1975), and that it did not comply with the requirements of Gardner v. Florida, 430 U.S. 349 (1977). Spaziano v. State, 393 So.2d 1119 (Fla.), cert, denied, 454 U.S. 1037, (1981). The trial judge again imposed the death sentence and entered a new sentencing order. On appeal, [this court] affirmed. Spaziano v. State, 433 So.2d 508 (Fla. 1983), aff'd, 468 U.S. 447 (1984).

Id. at 720.

Spaziano then filed a Rule 3.850 petition, contending, inter alia, that his sentence was imposed in violation of Lockett v. Ohio, 438 U.S. 586 (1978), because he was denied the opportunity to present non-statutory mitigating evidence at his sentencing proceeding. That petition was denied and on appeal, this Court affirmed. Spaziano v. State, 489 So.2d 720 (Fla. 1986). This Court concluded that at his Gardner sentencing hearing, Spaziano was entitled to present evidence of non-statutory mitigating factors.

Spaziano then filed the instant 3.850 proceeding which chal-

lenged the effectiveness of his counsel at his Gardner sentencing hearing. Particularly, the petition alleges that:

> [B]oth in preparation for and at that hearing, Mr. Spaziano's attorneys believed that they were limited to responding to the presentence investigation, inasmuch as this seemed to be the purpose of a Gardner remand. Moreover, this Court had ruled just prior to the hearing in State v. Harvard that the scope of the hearing was limited to responding to the PSI and counsel was made aware of that ruling. Further, counsel was operating under an incredible workload and a Florida Supreme Court order establishing a strict briefing schedule in other cases. Thus, as a combined result of each of these reasons, Mr. Spaziano's attorneys failed to investigate or otherwise attempt to discover evidence of non-statutory mitigating circumstances, and they failed to introduce any such evidence. **This unreasonable failure to investigate or present non-statutory mitigating evidence was conduct measurably below the standard of competent counsel and so deprived Mr. Spaziano of the effective assistance of counsel at the penalty phase so as to violate Mr. Spaziano's rights under the sixth, eighth and fourteenth amendments.** Counsel's choice was not one of strategy, and was made without the benefit of any investigation. See attached affidavit of counsel.

Amended Petition at p. 3, 28-30.

The simple facts are that no attempt was made to investigate or present non-statutory mitigating evidence at the Gardner remand hearing because of counsel's belief that same was not permitted. Id.; see transcript of Gardner hearing. It was not until this Court's opinion affirming the denial of Rule 3.850 relief that counsel became aware that he was permitted to present non-statutory mitigating evidence.

The amended petition further alleges the existence of substantial non-statutory mitigating evidence, so that the failure to investigate and present such evidence was certainly prejudicial. See Amended Petition at pp. 3-25. By way of brief summary, that evidence includes the fact that Mr. Spaziano has long suffered from an organic brain disorder as a result of head injuries he sustained in an automobile accident at the age of 20. This disorder resulted in an acute personality change which caused "dream-like" states, and "almost primitive emotional and cognitive control." "There are also indications of possible petite mal seizures as the client appears to "blank out" or lose his focus of consciousness periodically." In addition, there was abundant evidence from family and friends attesting to Mr. Spaziano's radical change in personality as a result of the accident, changes so significant that he became known as "Crazy Joe" because he would act so "spacey." Id. at 15-25.

Finally, and critically to this appeal, the instant Rule 3.850 petition alleges that Spaziano was precluded from asserting the ineffectiveness of counsel at the resentencing in the initial Rule 3.850 motion:

> The issue raised herein could not have been raised before now because it had not become an issue prior to the Florida Supreme Court's opinion affirming the denial of 3.850 relief. Moreover, defendant was represented by the same attorney, Mike Mello, or a member of that attorney's firm, at both the resentencing hearing and during the 3.850 proceeding. This prevented the raising of this issue until now because to do so would have required counsel to attack himself as being ineffective.

Amended Petition at 25.

The trial court ordered that the State respond to the petition, which it did. On April 22, 1988, the trial court issued an order incorrectly finding that "since the present motion does not allege that Defendant was precluded from asserting the issue of ineffectiveness of counsel at the resentencing in the initial [Rule 3.850] motion," the instant motion must be summarily denied. In essence, the trial court found that petitioner abused the writ. However, not only does the face of the petition show that Defendant alleged that he was precluded from asserting the issue of an effectiveness in the initial 3.850 motion, see Amended Petition at 25, but Spaziano, in fact, was so precluded.

This timely appeal followed the trial court's summary denial of relief.

SUMMARY OF THE ARUGMENT

Contrary to the trial court's finding, the instant Rule 3.850 petition clearly alleged at page 25 that, at the time of Mr. Spaziano's first Rule 3.850 motion, he was precluded from asserting the ineffectiveness of his counsel at the Gardner remand proceeding. This is clearly not a case where this issue was omitted from the first 3.850 petition because of some tactical reason; rather, this issue was not raised at that time because counsel erronerously believed that he was not permitted to present non-statutory mitigating evidence at the Gardner remand hearing and that he therefore could not have been ineffective for failing to do so. It was not until after this Court ruled that counsel was permitted to present such evidence that counsel realized his ineffectiveness. Moreover, because the same attorney represented Mr. Spaziano at both the Gardner remand proceeding and the 3.850 motion, the raising of his early ineffectiveness would have required counsel to attack himself. This, of course, presented Mr. Spaziano's attorney with a conflict of interests. Because the courts have now determined that a death-sentenced individual is entitled to effective (conflict free) representation at the state post-conviction level, this conflict of interests clearly violated that right.

ARGUMENT

I. THE TRIAL COURT ERRED IN SUMMARILY CONCLUDING THAT PETITIONER HAS ABUSED THE WRIT IN THIS SUCCESSOR 3.850 PETITION

The trial court erronerously determined that Spaziano abused the writ. While the trial court said that "the present motion does not allege that [Spaziano] was precluded from asserting the ineffectiveness of counsel at the resentencing," in fact, the present motion explicitly alleges precisely that:

> The issue raised herein could not have been raised before now because it had not become an issue prior to the Florida Supreme Court's opinion affirming the denial of 3.850 relief. Moreover, defendant was represented by the same attorney, Mike Mello, or a member of that attorney's firm, at both the resentencing hearing and during the 3.850 proceeding. This prevented the raising of this issue until now because to do so would have required counsel to attack himself as being ineffective.

See Amended Motion at 25. Thus, the trial court was simply in error. At the least, it sould have conducted a hearing to determine whether or not Spaziano was, in fact, precluding from asserting his present claims in his first 3.850 motion. However, that is not necessary because a review of the record shows that Spaziano was precluded from doing so because 1) his attorney was unaware of his right to do so, and 2) because his attorney had a conflict of interests.

Prior to this Court's opinion in Spaziano v. State, 489 So.2d 720 (Fla. 1986), the law in Florida, both at the Supreme Court and circuit court (of the Eighteenth Circuit) level, seemed to be that a Gardner remand was limited in scope to rebutting the pre-sen-

tence investigation, and was not an opportunity to present additional non-statutory mitigating evidence. The trial judge (Judge McGregor) had interpreted the law in this manner in Harvard v. State, 486 So.2d 537 (Fla. 1986), although this Court later reversed, holding that a Gardner remand hearing is wide open.[1] This Court and the federal courts also seemed to interpret Florida law in this manner. Songer v. State, 365 So.2d 696, 699-700 (Fla. 1978);[2] Dougan v. State, 398 So.2d 439, 440 (Fla. 1981);[3]

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[1] Besides the rulings in Harvard, Judge McGregor's comments in this case may have been interpreted as expressions of his view that the Gardner hearing was limited in scope. He, stated that: "I view this as a Gardner remand hearing. And it's limited in scope." (Record on Appeal from Initial 3.850 Appeal at 220). The judge noted that

> this matter has been returned by the Florida Supreme Court for purposes of holding a hearing to give the Defendant the opportunity to respond to the presentence investigation report. The Court, a week ago, held a hearing for that purpose, at which it received some additional information presented by the State. The Defendant was then given the opportunity to respond to such evidence and the presentence investigation report.

Record on Appeal of Remand at 3. Earlier, at a hearing on various motions, the court stated: "I don't believe, from what has been pointed out, that it gets into a wide-open, you know, full-blown hearing on -- as considered by the Court at the time of sentencing." Id. at 47.

[2] In Songer, this Court wrote:

> The evidence offered in mitigation of the sentence by asserted character witnesses . . . was not relevant at the hearing on remand. That hearing was only for the purpose of allowing the defendant an opportunity to rebut what was contained in the pre-sentence investigation report.

(continued...)

Barclay v. State, 408 So.2d 1020 (Fla. 1982), aff'd on other grounds, 103 S.Ct. 3418 (1983);[4] Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (Gardner resentencing in Florida is "limited . . . to reviewing and rebutting the presentence investigation report").[5] Indeed, this Court's opinion denying Mr. Spaziano relief following the remand seemed to indicate that the remand was limited in scope. Spaziano v. State, 433 So. 2d at 510-11.[6]

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[3](...continued)
[3] In Dougan, this Court declared that a Gardner remand is not "a full-blown sentencing proceeding," but is

> technically-based, serving the sole purpose of allowing [defense] counsel to demonstrate that matters in the presentence investigation report were improper and prejudicial.

[4] The Barclay Court explained that the inquiry is limited to whether there is a "defect in the original sentencing order . . . stemming from improper material in the PSI."

[5] The State's brief to this Court following the resentencing also suggested that a Gardner remand is limited in scope:

> We view the remand as serving the purpose of correcting two errors made by the trial court made at the first sentencing procedure: (1) consideration of nondisclosed material and (2) relying on nonstatutory aggravating factors contained in that nondisclosed material.

State's Brief at 3.

[6] In the Gardner remand, the State sought to introduce additional evidence concerning another offense. Judge McGregor ruled this evidence admissible reasoning that because the offense itself was before the Court at the time of original sentencing, consideration of evidence bearing on that offense was not "new" and did not expand the scope of the remand. By contrast, the judge totally excluded from his consideration, at the original sentencing, any non-statutory mitigating features of this case.
(continued...)

Nevertheless, this Court found, based upon an explicit remark by the trial judge, that the instant Gardner remand was indeed wide open and that Mr. Spaziano had been given the opportunity to present non-statutory mitigating evidence. If this opportunity was apparent, as this Court evidently believed it was, counsel was surely ineffective for failing to investigate and present the substantial non-statutory mitigating evidence that existed. That ineffectiveness at the resentencing carried over to the initial Rule 3.850 proceeding, because, at that time, the same counsel was under the same belief that his ineffectiveness was not the issue, but, rather, the issue was the trial court's unwillingness to consider non-statutory mitigating evidence. Because counsel maintained this belief, there was neither reason nor opportunity to raise his ineffectiveness in the initial Rule 3.850 petition.

The inability to raise ineffectiveness in the initial Rule 3.850 proceeding because of counsel's lack of knowledge that it was an issue ties in with his conflict of interests because, in order to properly raise the issue, he would have been required to attack himself. Recent decisions of this Court and the federal courts seem to have established a right to counsel residing in death-sentenced individuals in state post-conviction proceedings. Thus, in Spalding v. Dugger, Case No. 72,475 (Fla. June 10, 1988),

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[6](...continued)
It therefore would have improperly expanded the scope of the Gardner remand for the judge to have considered this material at that time. This Court analyzed the scope of the Gardner hearing on appeal, and accepted the State's argument that the scope had not been improperly expanded.

this Court cited approvingly to Giarratano v. Murray, Nos. 87-7518 & 87-7519 (4th Cir. June 3, 1988), which held that as a matter of federal constitutional law, a State is absolutely obligated to provide counsel for death-sentenced defendants in collateral relief matters. This Court further noted that under Section 27.702, Florida Statutes (1987), each defendant under sentence of death is entitled, as a statutory right, to "**effective** legal representation . . . ." Effective legal representation in Mr. Spaziano's initial 3.850 proceeding would have required an attorney who does not have a conflict of interests. Inasmuch as Spaziano's attorney had an apparent conflict of interests in that he could not raise an issue that required him to attack himself, Mr. Spaziano had not been afforded effective legal representation during that first proceeding.

Thus, both because of the fact that ineffective assistance of counsel was not an issue at the time of filing of the inital Rule 3.850 petition, and because the same lawyer represented Mr. Spaziano in that proceeding and at resentencing, the issue could not have been raised at the time of the first petition.

In Witt v. State, 465 So.2d 510, 512 (Fla. 1985), the Court held that a second 3.850 petition may be dismissed as an abuse of procedure where the petitioner does not show justification for the failure to raise the issue in the first petition. The Court suggested two such justifications: a change in the law, or new facts which could not have been discovered; but also noted that these two justifications were merely examples, and were not ex-

haustive. Spaziano does not quarrel with the rule of Witt, but asserts that he has shown justification. This in not a case, like Witt, where the petitioner made a conscious decision not to raise the issue in the first petition; rather, Spaziano was precluded from raising the issue. He could not know that his counsel was ineffective for failing to investigate or present non-statutory mitigating evidence when he, through counsel, believed that he was prohibited from presenting such evidence. It was not until the opinion of this Court declaring that Spaziano was indeed permitted to present non-statutory mitigating evidence that Spaziano fully realized he was able to do so. Moreover, raising the issue in the first petition would have required counsel to attack himself.[7]

The justification that may be shown for the failure to raise an issue in an earlier petition, as explained by this Court in Witt, is analogous to the federal requirement of a habeus corpus petitioner to establish "cause" for any procedural default in which he may have engaged.[8] In the recent opinion of the United

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[7] The other cases cited by the trial court, Christopher v. State, 489 so.2d 22 (Fla. 1986), and Tafero v. State, 13 F.L.W. 8 (December 23, 1987), are likewise inapposite. Like Witt, these cases deal with claims that could have been raised in the inital 3.850 peitions, and for one reason or another, the Defendants chose to omit them.

[8] Florida's procedural default doctrine may also be compared to that found in the federal habeus corpus rules, which prohibit successor petitions unless the petition shows that the earlier failure to raise the claim was not the result of intentional abandonment, withholding or inexcusable neglect. Rule 9(B) of the Rules Governing Section 2254 Cases. Clearly, Mr. Spaziano has demonstrated that he never attempted to abandon or withhold this issue and that there was no inexcusable neglect. Rather, at the time of the first petition, he simply did not know of the issue,
(continued...)

States Supreme Court in Amadeo v. Zant, ___ U.S. ___, Case No. 87-5277 (May 31, 1988), the Court noted that a tactical or intentional decision to forego a procedural opportunity normally cannot constitute cause but that "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the cause requirement is met." Slip opinion at 6, citing Reed v. Ross, 468 U.S. 1 (1984). The Court continued, relying upon Ross, and noted that the existance of cause for a procedural default ordinarily turns on whether the petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule. Id., citing Murray v. Carrier, 477 U.S. 478, 488 (1986). In this case, it is clear that the failure to raise ineffectiveness at resentencing in the initial 3.850 Petition was not a tactical or intentional decision. Rather, the claim was "reasonably unknown to" Spaziano. Because of counsel's erroneous belief in the state of the law, the "tools to construct his constitutional claim" were unavailable. See Engle v. Isaac, 456 U.S. 107, 133 (1982); Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 108 S.Ct. ___ (1987).

The instant situation is closely analogous to what occurred in the State of Florida and was ultimately resolved by the Supreme Court in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). In Hitchcock, and in the numerous other cases that were subject to its holding, the defendants had challenged the operation of Florida's

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[8](...continued)
and his attorney's conflict of interests prohibited it from being raised.

death penalty statute, charging that it prohibited them from presenting non-statutory mitigating evidence in the sentencing phases of their trials. This Court subsequently interpreted Florida's statute in such a way so as to hold that the statute did not preclude the presentation of non-statutory mitigating evidence. Songer v. State, 365 So.2d 696, 700 (Fla. 1978). Defendants then argued that their trial attorneys must have been ineffective because they, in practice, did not investigate or present non-statutory mitigating evidence. Essentially, the Defendants argued that either the statute precluded the presentation of non-statutory mitigating evidence or they had ineffective counsel. Eventually, the United States Supreme Court resolved this problem in Hitchcock, holding that the statute did, in practice, preclude the presentation of nonstatutory mitigating evidence during a certain period of time. The dispositive fact with reference to the instant case is that in no case where the petitioner alleged ineffectiveness in a successor 3.850 petition did any court hold that that petitioner abused the writ.

In the instant case, Mr. Spaziano finds himself presented with the almost identical dilemma as did Mr. Hitchcock. Mr. Spaziano's counsel believed that he was not permitted to present non-statutory mitigating evidence at the Gardner remand, because of earlier opinions of this Court, and of the trial court. As a result, no investigation was done and no non-statutory mitigating evidence was presented. Then, this Court held that Spaziano was in fact entitled to present such evidence. If such is the case,

and it was apparent as this Court evidently found it to be that Spaziano was entitled to present such evidence, then surely his counsel was ineffective. Moreover, the instant 3.850 petition plainly alleged that this issue could not have been raised in the prior 3.850 petition because counsel believed that he was in fact precluded from presenting such evidence and therefore he did not consider himself ineffective for failing to present that evidence. Further, his ethical inability to attack himself also made inclusion of the ineffectiveness claim in his first petition impossible.

At the very least, the trial court should have conducted a hearing on Mr. Spaziano's allegations that he was precluded from raising this issue in his original Rule 3.850 petition for the reasons asserted herein. For this reason, as well as the reasons presented above, it is clear that the trial court erred by summarily deciding that Mr. Spaziano has abused the writ.

CONCLUSION

The "critical and dispositive fact here is that the state trial judge . . . failed to consider any non-statutory mitigation at the time of imposing the death sentence." Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc). This Court has previously held that this failure was not due to any error of the trial court, because counsel was given the opportunity to present such evidence. Spaziano v. State, 489 So.2d 720 (Fla. 1986). If this was indeed the case, counsel was surely ineffective for failing to present the substantial mitigating evidence that existed in this case. The fact that substantial non-statutory mitigating evidence has **never** been considered by the sentencing authority should not be forgotten.

For all of the reasons asserted herein, it is respectfully submitted that the order below should be reversed, and the trial court should be directed to conduct a hearing on Mr. Spaziano's claims.

Respectfully submitted,

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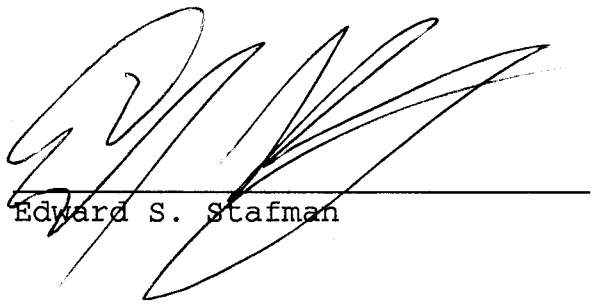
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered by U.S. Mail to **Stephen E. Plotnick, Esq.** Chief Trial Attorney, 100 E. First Street, Sanford, FL 32771; Office of the Attorney General, Dept of Legal Affairs, The Capitol, Plaza Level Rm 1, Tallahassee, FL 32399-1050 on this 4th day of August, 1988.



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