IN THE
SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 7 1989
CLERK, SUPREME COURT
By ____
Deputy Clerk

JOSEPH ROBERT SPAZIANO,

Prisoner #
Florida State Prison
Starke, Florida

Petitioner,

v.

RICHARD L. DUGGER,

Secretary, Florida
Department of Corrections,

and

TOM BARTON,

Superintendent, Florida
State Prison, Starke,
Florida,

Respondents.

Case No. 74675

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, AND REOUEST FOR STAY OF EXECUTION

Petitioner, Joseph Robert Spaziano, was convicted of one count of first degree murder and, following a jury recommendation of life, was sentenced to death by The Honorable Robert B. McGregor of the Eighteenth Judicial Circuit Court, in and for Seminole County. Mr. Spaziano's conviction was affirmed on direct appeal by this Court, but his sentence was vacated and a resentencing ordered because of error under Gardner v. Florida, 430 U.S. 349 (1977), and because the trial court improperly

considered as aggravation circumstances not set out in Florida's capital sentencing statute. Spaziano v. State, 393 So.2d 1119 (Fla. 1981) (Spaziano I). At resentencing, the trial judge again imposed a death sentence. On direct appeal, the death sentence was affirmed. Spaziano v. State, 433 So.2d 508 (Fla. 1983) (Spaziano 11). On appeal to the United States Supreme Court, Mr. Spaziano's conviction and sentence were affirmed. Spaziano v. Florida, 468 U.S. 447 (1984) (Spaziano 111). Subsequently, the trial court denied two Motions to Vacate Judgment and Sentence filed pursuant to Rule 3.850, Fla. R. Crim. P., and in each instance this Court affirmed. Spaziano v. State, 489 So.2d 720 (1986) (Spaziano IV); Spaziano v. State, 545 So.2d 843 (Fla. 1989) (Spaziano V). A third Motion to Vacate Judgment and Sentence based on changes in the law subsequent to the filing of the earlier 3.850 motion was denied by the trial court on September 6, 1989, and an appeal is pending in this Court.

This is Mr. Spaziano's first and only habeas corpus petition in this Court. It is being filed now because recent decisions of this and other courts have established that Mr. Spaziano is entitled to habeas corpus relief, and that the prior dispositions of Mr. Spaziano's claims by this Court were in error.

The claims presented include the following:

a) that in light of Stokes v. State, No. 71,485 (Fla. July 6, 1989), Mr. Spaziano's rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, their Florida counterparts, and Florida law were violated by the admission of

the inherently unreliable hypnotically refreshed testimony of Tony Dilisio, a 16-year old and admitted drug abuser, who was the state's key witness both as to guilt/innocence and penalty;

b) that in light of Cochran v. State, No. 67,972 (Fla. July 27, 1989) to allow the jury override to stand would result in a death sentence being given to Mr. Spaziano in an arbitrary and capricious manner in violation of his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts;

c) that Mr. Spaziano did not receive the effective assistance of counsel on direct appeal following his sentencing after the Gardner remand in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts because his appellate counsel failed to fully argue why there was a reasoned basis for the jury recommendation of life;

d) that in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts, Mr. Spaziano did not receive the effective assistance of counsel on appeal since his appellate counsel failed to argue that his death sentence was disproportionate;

e) that Mr. Spaziano's death sentence is disproportionate when compared with other jury override cases;

f) that the Florida Supreme Court's application of its standards governing the propriety of jury overrides violates the Eighth and Fourteenth Amendments to the U.S. Constitution and

their Florida counterparts because it fails to allow for consideration of mercy or sympathy rooted in record based mitigating evidence;

g) that it was in violation of Mr. Spaziano's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts for the sentencing court and this court to evaluate the reasonableness of the jury recommendation of life based on the belief that a jury recommendation of life was proper only if the mitigating circumstances outweighed the aggravating circumstances;

h) that findings by the trial court and this Court that the killing was heinous, atrocious or cruel were in violation of Mavnard v. Cartwriaht, 108 S.Ct. 1853 (1988), Hamilton v. State, No. 72,502 (Fla. July 27, 1989), and the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts.

i) that Mr. Spaziano's sentence is bottomed on an unconstitutional conviction rendering his death sentence unreliable and arbitrary in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts;

j) that the failure of the Florida courts to consider Mr. Spaziano's organic brain damage in mitigation violates his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts;

k) that Mr. Spaziano's death sentence was imposed in violation of Hitchcock v. Dugger, 481 U.S. 383 (1987).

Given the merit of each of these claims, pursuant to Subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, this Court should grant the petition of habeas corpus, and either set aside Mr. Spaziano's conviction or vacate his death sentence and enter a life sentence or require a new sentencing hearing or grant Mr. Spaziano a new direct appeal.

11. STATEMENT OF THE CASE

Death Warrant

The Governor of the State of Florida signed a death warrant on August 29, 1989, providing for Mr. Spaziano's execution. The execution has been scheduled for September 14, 1989.

Mr. Spaziano includes herewith (and has filed as a separate motion) a request for a stay of his execution from this Court pending consideration of this petition for habeas corpus. Such a stay is required by due process so that he can receive a full and fair hearing on this petition, Barefoot v. Estelle, 103 S.Ct. 3383 (1983) (expedited review process is permitted in capital cases only if counsel is given an "adequate opportunity" to address the merits).

111. PROCEDURAL HISTORY

1. The Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, entered the judgment and sentences at issue.

2. On September 12, 1975, a grand jury indicted Mr. Spaziano on one count of first degree murder.

3. Mr. Spaziano entered a plea of not guilty to the indictment.

4. Mr. Spaziano's guilt-innocence trial was before a jury, and his sentencing proceeding included a jury. The jury recommended that Mr. Spaziano be sentenced to life imprisonment.

5. Mr. Spaziano did not testify at the guilt-innocence phase of his trial. He testified briefly and for a limited purpose at the penalty phase.

6. Judgment of conviction was entered on January 23, 1976. The penalty phase was conducted on January 26, 1976. The jury recommended a sentence of life imprisonment. On July 16, 1976, the judicial sentencing proceeding was conducted. At the conclusion of this sentencing proceeding, the Court imposed a sentence of death.

7. Mr. Spaziano's conviction was affirmed on direct appeal by the Florida Supreme Court on January 8, 1981. Spaziano I, 393 So.2d 1119. His sentence was vacated and a Gardner remand was ordered. Rehearing was denied by this Court on March 6, 1981. The United States Supreme Court denied Mr. Spaziano's petition

for writ of certiorari. Spaziano v. Florida, 454 U.S. 1037 (1981).

8. The Gardner remand hearing was held before the trial judge on May 28, 1981. On June 4, 1981, the court issued its sentencing order, again imposing a death sentence. The reimposed death sentence was affirmed by this Court on May 26, 1983. Spaziano 11, 433 So.2d 508. Rehearing was denied by this Court on July 13, 1983.

9. The United States Supreme Court granted Mr. Spaziano's petition for writ of certiorari on January 9, 1984. It affirmed his conviction and sentence on July 2, 1984. Spaziano 111, 468 U.S. 447.

10. On March 13, 1985, counsel appeared on behalf of Mr. Spaziano before the Board of Executive Clemency. During the week of August 12, 1985, Mr. Spaziano filed a supplemental clemency memorandum. His clemency application was denied on November 4, 1985, when the Governor signed a death warrant.

11. On November 20, 1985, Mr. Spaziano filed an application for a stay of execution and a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 in the Circuit Court of the Eighteenth Judicial Circuit. The application and motion were denied on November 22, 1985.

12. Mr. Spaziano appealed from the trial court's denial of his Rule 3.850 motion and application for stay of execution. On November 25, 1985, the Florida Supreme Court granted a stay of execution. On May 22, 1986, the Florida Supreme Court affirmed

the trial court's denial of relief. Spaziano IV, 489 So.2d 720. Rehearing was denied on July 7, 1986. The United States Supreme Court denied his petition for certiorari on December 1, 1986. Spaziano v. Wainwright, 479 U.S. 995 (1986).

13. On December 23, 1986, Mr. Spaziano filed a second motion for post-conviction relief. The trial court denied this motion on April 22, 1988. On June 15, 1989, the Florida Supreme Court affirmed the trial court's denial of relief. Spaziano V, 545 So.2d 843 (Fla. 1989). This Court denied rehearing on July 25, 1989.

14. On June 26, 1989, Mr. Spaziano filed a third motion for post-conviction relief in the state trial court.

15. On August 29, 1989, the Governor signed a second death warrant for Mr. Spaziano. His execution was scheduled for September 14, 1989.

16. On September 6, 1989, the trial court denied the pending 3.850 motion and application for a stay of execution which had been filed on August 31, 1989.

IV. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. Jurisdiction

It is clear that, pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, the Court has jurisdiction to entertain the claims presented. This Court has repeatedly

said that it has habeas jurisdiction to entertain claims alleging errors impacting on or relating to its appellate review process, i.e., ineffective assistance of counsel on appeal, arbitrary application of jury override standards or proportionality review, see for example, Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985), and Knight v. Florida, 394 So.2d 997 (Fla. 1981). This Court also has accepted habeas jurisdiction to entertain claims based on changes in the law where it had previously rejected such claims, see Jackson v. Dugger, Nos. 73,982 and 74,067 (Fla. July 6, 1989). Clearly, where this Court has previously explicitly or implicitly considered and rejected a claim, it is logical for this Court to assert jurisdiction over the claim if new developments in the law warrant further consideration. Finally, this Court has accepted habeas jurisdiction for other record based change of law claims. See Card v. Dugger, 512 So.2d 829 (Fla. 1987), and Kennedv v. Wainwriuht, 483 So.2d 424 (Fla. 1986).

Given the pendency of an execution date of September 14, 1989, for the Court not to accept jurisdiction of any of the claims raised herein could lead to piecemeal adjudication and runs the risk that Mr. Spaziano might be executed notwithstanding the merits of his claims. This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Wilson v. Wainwriaht, 474 So.2d 1163, 1165, and has not hesitated in exercising its inherent jurisdiction to

remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Johnson (Paul) v. Wainwright, 498 So.2d 938 (Fla. 1987); Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985). This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Spaziano's sentence of death and of this Court's appellate review. Mr. Spaziano's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Johnson; Wilson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The petition also includes claims predicated on significant, new developments in the law. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Spaziano's claims.

B. Request for Stay of Execution

Mr. Spaziano's petition includes a request that the Court stay his execution presently scheduled for September 14, 1989. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when needed to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright, 517 So.2d 656 (Fla. 1989); Groover v. State, 489 So.2d 15 (Fla. 1986); Copeland v. State, 457 So.2d 1012 (Fla. 1986); Jones v. State 478 So.2d 346 (Flsa. 1985); Bush v. State, 461 So.2d 936 (Fla. 1986); Spaziano v. State, 489 So.2d 720 (Fla. 1986); Mason v. State, 489 So.2d 734 (Fla. 1986). See also Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) (granting stay of execution and habeas corpus relief; Kennedy v. Wainwright, 483 So.2d 426 (Fla.), cert. denied, 107 S.Ct. 291 (1986). Cf. State v. Sireci, 502 So.2d 1221 (Fla. 1987); State v. Crews, 477 So.2d 984 (Fla. 1985). In fact, due process demands that result have to present a reasoned consideration of the claims presented.

Mr. Spaziano's claims are presented below. They demonstrate that habeas corpus relief is proper.

This is Mr. Spaziano's first petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his

execution and thereafter, that the Court grant habeas corpus relief.

V. GROUNDS FOR HABEAS CORPUS RELIEF

Through this petition for a writ of habeas corpus, Joseph R. Spaziano asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

CLAIM I

THE RECENT CASE OF STOKES V. STATE, NO. 71,485 (FLA., JULY 6, 1989), REQUIRES THAT MR. SPAZIANO'S CONVICTION AND/OR SENTENCE BE SET ASIDE BECAUSE OF THE ADMISSION OF INHERENTLY UNRELIABLE HYPNOTICALLY REFRESHED TESTIMONY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THEIR FLORIDA COUNTERPARTS

Habeas corpus jurisdiction is clearly appropriate to consider constitutional questions which directly challenge a prior ruling of this court when those claims are premised on changes and evolutionary refinements in the law. Jackson v. Dugger, Nos. 73,982, 74,067 (Fla. July 6, 1989); Card v. Duuser, 512 So.2d 829 (Fla. 1987); Kennedy v. Wainwriuht, 483 So.2d 424 (Fla. 1986). Particularly when the claim has or could have been considered by this court and is record based, it is appropriate for this court to consider the claim if a petitioner asserts that new developments warrant further review. Jackson, supra. This is

particularly true in capital cases where this court has a special and unique responsibility to insure that any death sentence is reliable and that it has not been imposed in an arbitrary or capricious manner. Given this court's special responsibility, the recent ruling in Stokes v. State, No. **71,485** (Fla. July **6, 1989)** mandates that the Court revisit Mr. Spaziano's claim that his conviction and/or sentence be vacated because both were attributable to the admission of inherently unreliable hypnotically refreshed testimony in violation of his rights as guaranteed by the sixth, eighth and fourteenth amendments to the **U.S.** Constitution and their Florida counterparts.

In Stokes, this Court reversed a first degree murder conviction and death sentence because of the admission of hypnotically refreshed testimony. The Court took this action notwithstanding the fact that there was other competent evidence linking Stokes to the crime. The Court's decision was based in part on decisions from other jurisdictions, a **1985** American Medical Association study and other scientific research into the accuracy of hypnotically enhanced memory. This court concurred in the conclusion of "most members of the scientific community . . . that hypnotically refreshed memory is not reliable for use as testimony in court." Slip opinion at p. **15.** Accordingly it held

> that the testimony of a witness who has undergone hypnosis for the purpose of refreshing his or her memory of the events at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward. **A** witness who has been hypnotized may testify to statements made before the hypnotic session,

> if they are properly recorded. Any hypnosis shall act as a time barrier, after which no identifications or statements had been made.

Slip opinion at p. 15, 16.

As discussed, infra, if applied to the facts of Spaziano, Stokes would clearly entitle Spaziano to relief since the state's crucial witness both as to guilt/innocence and penalty, Tony Dilisio, a 16 year old with an admitted drug problem, was only able to recount crucial information after he had been hypnotized. Specifically, it was only after he had been hypnotized that he remembered that Spaziano had allegedly taken him to the site, i.e., a dump, where the body of the victim had previously been found, that he, Dilisio, had observed the blood splattered victim there, and that Spaziano had made a number of incriminating statements about how the victim had died.

The decision in Stokes followed this court's earlier holding in Bundv v. State, 471 So.2d 9 (Fla. 1985). In Bundv, this court endorsed the conclusion of the Michigan Supreme Court in People v. Gonzalez, 329 N.W.2d 743 - 748 (1982) and other courts that hypnotically refreshed testimony was inherently reliable. In language which this court specifically approved, the Michigan court had written:

> Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse and prejudice.
>
> . . . [U]ntil hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are

> accurately improved without undue danger of distortion, delusion, or fantasy and until the barriers which hypnosis raises to effective cross-examination are somehow overcome, the testimony of witnesses which has been tainted by hypnosis must be excluded in criminal cases.

Accordingly, this court held that "hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state." Bundv, **471** So.2d **9, 18** (Fla. 1985).

Interestingly, the decision in Bundv was foreshadowed by Justice McDonald in an opinion dissenting in Dobbert v, State, **456** So.2d **424** (Fla. **1984),** which opinion was joined by Justice Overton. There, in urging that a stay of execution be granted because of questions about the reliability of a crucial witness, Justice McDonald wrote:

> At this juncture it is unclear whether young Dobbert's testimony was convoluted as a result of these hypnotic sessions. Neither trial counsel, appellate counsel, nor other post trial motions have raised this issue. Perhaps they could have and because of that it should not be a matter of concern to me now. Nevertheless, since Dobbert's life depends on the correctness of his son's testimony, and there appears to be a substantial argument that testimony did not reflect the untainted or accurate memory of the son, I would grant a stay in this proceeding and delve more deeply into this matter.
>
> I am not unmindful of the age of this case. The trial judge has reviewed and given detailed thought to all of these proceedings. But the inherent unreliability of hypnotic testimony is so great that these other considerations should yield, at least temporarily, to the doubt created by the effect of drugs and the hypnotic sessions on this critical testimony.

Dobbert, 456 So.2d 424, 432. It is worth emphasizing that Justices McDonald and Overton saw a need to address this issue notwithstanding the fact that it apparently had not been raised earlier. Their decision to do so must be attributable to the court's special and unique role in capital cases.

Although the views of Justices McDonald and Overton were endorsed in Bundv, the Court was unwilling to have its decision apply retroactively. Rather, applying the three pronged test set out in Stovall v. Denno, 388 U.S. 293 (1967) and endorsed in Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), it concluded that although the reason for its new rule -- to insure reliability -- warranted retroactive application, this concern was counterbalanced by the fact that law enforcement had acted reasonably in relying on the old rule and that retroactive application would have a negative impact on the administration of justice. Bundv, 471 So.2d 9, 18. Accordingly, it held that

> any post-hypnotic testimony is inadmissible in a criminal case if the hypnotic session took place after this [Bundy] case becomes final. We further hold that any conviction presently in the appeals process in which there was hypnotically refreshed testimony will be examined on a case-by-case basis to determine if there was sufficient evidence, excluding the tainted testimony, to uphold the conviction.

Bundv, 471 So.2d 9, 18, 19.

A claim premised on the admission of Dilisio's hypnotically refreshed testimony was first considered by this court on the direct appeal of Mr. Spaziano's initial 3.850 motion. It had

been raised in Mr. Spaziano's initial 3.850 motion immediately following the Bundv decision. In that proceeding, Spaziano alleged that his trial counsel provided ineffective assistance by failing to discover that the testimony of the state's key witness, a 16 year old drug abuser, Ralph Dilisio, was the product of grossly suggestive police hypnosis. He also alleged that the state's use of hypnotically induced testimony violated his sixth, eighth and fourteenth amendments to the U.S. constitution. As recounted earlier, both claims were premised on the fact that Dilisio had only been able to recount crucial information after he had been hypnotized. On direct appeal, this court only specifically addressed the ineffective assistance of counsel claim, finding that trial counsel was not ineffective for failing to anticipate Bundy and that any decision to not raise this issue was strategic. 480 So.2d 720, 721. The court also noted that "Spaziano contends that the state's use of this hypnotically refreshed testimony violated his right to fair trial under the United State Constitution,'' 489 So.2d 720, 721. But it seemed to equate this claim with the ineffectiveness assertion, noting that the trial judge denied relief on this issue finding trial counsel's actions to be strategic. Although it was given the opportunity to do so, this court then never directly addressed Spaziano's claim that the admission of hypnotically refreshed testimony violated his rights under the sixth, eighth, and fourteenth amendments to the U.S. Constitution. Given Bundv, this court's recent decision in Stokes, and its special

responsibility to insure that death sentences are reliable and are not imposed arbitrarily and capriciously, as reflected in Justices McDonald's and Overton's dissent in Dobbert, it is imperative that it now do so.

Despite the fact that in Bundv, the court wrote that its decision should not apply retroactively, such a conclusion should not bar consideration of this claim here for a number of reasons. First, unlike the claim in Bundv, Spaziano's claim is not only based on state evidentiary law but also his sixth amendment right to confront witnesses against him,[1] his eighth amendment right to a reliable and accurate determination that death is appropriate in his case and his fourteenth amendment right that his conviction and death sentence not be obtained in an arbitrary and capricious manner. Clearly each of these constitutional guarantees which go to the fairness, accuracy and factual integrity of his conviction and death sentence dictate that he should not be precluded from raising a claim based on the admission of hypnotically refreshed testimony simply because the law in this area did not evolve until after his conviction and direct appeal. Second, and more significantly, in light of the Bundv court's willingness to give the appellant Bundy the benefit of the decision in his case and its emphasis on the effect on the

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[1] "A witness who has been hypnotized prior to testifying becomes very difficult to cross-examine on any subject discussed in the hypnotic session, raising questions which involve a defendant's sixth amendment right to confront witnesses against him." Stokes, supra, slip opinion at p. 7.

administration of justice if its decision was applied retroactively, it is clear that the Bundv court did not address the retroactivity question in the specific context of capital cases with their unique constitutional requirements as to the reliability, accuracy and factual integrity of any capital conviction and death sentence. Rather, its retroactivity analysis was in the context of the universe of cases in which hypnotically refreshed testimony had been utilized. When the universe of those cases is limited in number to capital cases, it is clear that any concern about the practical problems of retroactive application which could lead to "the taxing of trial and appellate courts," i.e., impact on the administration of justice, is considerably lessened while the concerns about the purpose to be served by the new standard -- reliability -- are heightened. In this context, it is worth emphasizing that in reviewing the application of the Stovall v. Denno standards which, as noted previously, govern the question of retroactive application in Florida, the U.S. Supreme Court has written that:

> the court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'"

U.S. v. Johnson, 457 U.S. 537, 544 (1982).

Given the rationale for the rule in Bundy/Stokes, there is no question that the decisions in both cases fall within the

category mandating retroactive application. This is not only true when this hypnotically refreshed testimony claim is viewed in the abstract, but also when the specifics of how the hypnosis of Dilisio was in fact conducted is considered.[2]

Third, and finally, even if this court is unwilling to apply Bundy/Stokes retroactively to errors occurring during the guilt/innocence phase of capital litigation, it certainly should do so with errors occurring during capital sentencing proceedings. As discussed below, the hypnotically refreshed testimony of Dilisio infected not only the guilt/innocence determination but was also the primary basis of the trial court finding that the aggravating circumstance that the killing was heinous, atrocious, or cruel was present. Given the jury recommendation of life, there is no question that absent this aggravator, life would be the only appropriate sentence. Clearly someone should not be put to their death because of fortuities concerning the timing and pace of their litigation, fortuities over which they obviously have no control.

Turning to the merits of this claim, it is undisputed that the state's key witness regarding both the guilt/innocence and penalty determination was a 16-year-old admitted drug abuser, Anthony Dilisio. Without his testimony, as the prosecutor

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[2]For a complete discussion of the unprofessional and suggestive police hypnotic sessions of Dilisio, see appellant's brief on the direct appeal of his initial 3.850 motion at pages 40 - 48. Whatever little reliability hypnosis in general may have, the record in this case shows that the hypnotist did not have proper training and his methods were completely improper.

conceded in his closing argument, there was simply insufficient evidence to convict.[3] Similarly, since Dilisio provided the only testimony regarding the presence of the aggravating circumstance that the killing was heinous, atrocious or cruel, his testimony was crucial to that determination as well. Yet, he did not remember the information that was the crux of his testimony until after he had been hypnotized. Specifically, until his hypnotic sessions, he did not remember that Mr. Spaziano had taken him to the site, i.e. a dump, where the body of the victim was found, nor that he had seen the blood splattered body of the victim and observed the physical condition of the corpse, nor that while at the dump, Mr. Spaziano had made incriminating statements to him about how the victim died, statements obviously relevant to both the guilt/innocence determination and punishment. Without this testimony, there was simply insufficient evidence linking Mr. Spaziano to the death of the victim in this case and detailing the manner of the killing, information necessary to a finding that the killing was heinous, atrocious or cruel. Yet, this crucial information, the trip to the dump, was the product of hypnosis, a process which this court has concluded results in inherently unreliable testimony. Bundv, supra; Stokes, supra.

There is no question that it was not until after he had been hypnotized that Dilisio first remembered that Mr. Spaziano had

[3] Referring to Dilisio, the prosecutor said, "he is the most important witness in this case, and I would submit to you that if you don't believe Tony Dilisio, then find this Defendant guilty in five minutes -- not guilty, excuse me." (T. 775 - 776)

allegedly taken him to the site/the dump where the body of the victim was found. He had been previously questioned by the police several times but had never mentioned the trip. As he said at his pre-trial deposition (R. 82 - 85):

> Q. What caused you to finally tell him about this sighting you made and this conversation you had about these bodies?
>
> A. When I went to the hypnotist.
>
> . . .
>
> Q. Explain that, if you would.
>
> A. I went to a hypnotist and told him about it, and I knew about it and it wouldn't come out because it was in my subconscious.
>
> Q. In other words, the times you were talking to Abbgy [police lieutenant] about various incidents or what was being said between you and Joe Spaziano, you felt like you were telling him the whole truth and not holding back?
>
> A. It felt like it was. I wasn't sure what it was, do you understand?
>
> Q. At the time it was not in your conscious mind that Joe had taken you to see dead bodies?
>
> A. Yes, sir.
>
> Q. And, it was in your subconscious mind?
>
> A. Yes.
>
> Q. And, somebody brought those things out to the point where you could relate them?
>
> A. Yes, sir.
>
> Q. And, it was a hypnotist?
>
> A. Yes, sir..

. . .

Q. Actually before you went under hypnosis, you didn't recall any of these events but the conversation and bodies?

A. Right.

Q. Yes. I found there was something there but **I** wasn't sure what it was, just pictures of different things.

. . .

Q. Finally then, as I understand, from the time that you say you went over to this area that you described and viewed what appeared to be two bodies to the time that you went under hypnosis, your mind was blank concerning what you saw and what Joe Spaziano said to you about those bodies?

A. No. I didn't -- I said I remember pictures. I knew part of it but I didn't remember the whole thing. I was not sure **I** knew there was more there. **Do** you know what I'm saying?

Q. Then, after you were hypnotized all of it came back?

A. Most of it, not all of it. I remembered --

Q. The details?

A. Yes.

Q. And, what you said today essentially concerned that trip and what you viewed has surfaced in **your** memory since your hypnosis?

A. Yes.

Id. (emphasis added).

It was the testimony about the alleged visit to the site/dump where the victim's body was found which was the crux of the prosecution's case both as to guilt/innocence and penalty.

In his closing argument at guilt/innocence, the prosecutor emphasized the visit to the dump:

> He [Dilisio] says that he met this Defendant at his father's marina about three years ago. He says that they became friends. He says that just a few days before he turned 16, when he was 15 years old, Tony Dilisio went on what was probably the most horrifying voyage of his entire life with the Defendant.
>
> He says they started out at the Defendant's home somewhere in Casselberry and they rode around for awhile, three of them, with the Defendant driving his blue pickup truck. He says that finally they crossed Interstate 4 and they were somewhere down in the Ben White Raceway area and ultimately they worked their way up north. Finally, they left the paved road surface, as he indicated on the diagram, using this aerial photo which he says he recognizes. They came down this dirt road, took a right and went around a circular drive, that circled the dirt road. He says they parked right about in this area. He got out and walked back this way, and in that area he saw the bloody, naked body of Laura Lynn Harberts.
>
> Now he doesn't tell you that it was Laura Lynn Harberts, but the evidence would clearly show that was the body of Laura Lynn Harberts. He says that one of the bodies was more decomposed than the other. And we know from the testimony of Chuck Wehner, Dr. Garay and all the other witnesses in this case that one body had to be more decomposed than the other because all that was left of the other body out there was a bunch of scattered bones.
>
> But Laura Lynn Harberts' body with the light brown hair, as Tony recalls seeing on the bloody, cut-up body, was the only intact or semi-intact body at the dump scene on August 22, 1973. He says that just before they got there, just before he saw Laura Lynn Harberts' body, that the Defendant told him he was going to show Tony some of his girls. He says that two or three days before, the

Defendant had related to Tony what he does to some of his girls.

And you all heard Tony's testimony on that. The Defendant told Tony -- I'm not going to use the words, Tony used the words -- that the Defendant cuts off their breasts, cuts off their vagina and shows it to them. He rapes them and mutilates them the Defendant told him.

And on that day Tony went out there, the Defendant was taking him out there to show him some examples, some of his girls. The Defendant in this case didn't only confess to the murder of Laura Lynn Harberts, but he even showed Tony her body. He says that after he stood there for awhile, he saw those bodies, he left and went back towards the truck. The Defendant passed him as Tony was going back to the truck, and the Defendant suggested that he pop some acid, so he did.

He looked back and saw this Defendant with some other person standing over those bodies, and they were there for 15 minutes. Then when the Defendant got back in that truck, he said, now do you believe me about my girls? And I bet you sure enough that Tony believed him then, if he never did.

We know that Tony Dilisio -- and I don't care where the heck they went on that diagram, they could have gone all over Central Florida, but when they were done, they wound up right here (indicating on exhibit). Tony says they did, utilizing this photograph and that photograph and all these other photographs. He says he remembers tar paper out there, and there it is. He says that looks like the tar paper. He didn't point out anything else in this photograph, just the tar paper he remembers. He says there were some orange crates out there: he says this orange crate looks like the orange crates he saw when he was out there with the Defendant and saw those bodies. He says he remembers fruit top lids out there, and there they are.

. . .

> He says it took him some time to recall all this, and it all came to light through cross-examination and some redirect by the State.
>
> Tony gave us several reasons. He was on drugs that day and admitted it. Tony admitted that on the State's direct examination of him. He had nothing to hide and he was frank with you, ladies and gentlemen. He admitted the bomb deal; he admitted he'd been in trouble for drugs. But on redirect by the State, some more was brought out, that the reason he didn't make a report of those bodies out there right away was because he wanted to become a member of the Outlaws, an organization that the Defendant belonged to -- his idol.
>
> Once again, the testimony of Tony Dilisio was corroborated by Mike Ellis and Bill Coppick, so you don't have to rely on Tony. <u>But once again, if you don't believe him, you cannot convict the Defendant.</u> If you do believe Tony, then that's all you've got to decide here.
>
> With respect to Tony hallucinating, I would submit to you that it would be extremely difficult for somebody to envision a place that they'd never been to. How could Tony imagine a place he's never been to in his lifetime? And Tony said he wasn't hallucinating. And he says when he hallucinates, he hallucinates about cartoon people. And I would submit to you, ladies and gentlemen, that anybody who's ever seen naked, cut-up, bloody, dead bodies in the woods is going to remember it for the rest of his life.

T. 778-82.

The prosecutor's argument urging the jury to recommend death also focused on the visit to the dump.

> THE COURT: The State may proceed with final argument.
>
> MR. VAN HOOK: Ladies and gentlemen, in your deliberations with respect to whether or not you would recommend the death penalty, the

State is asking you to rely on all the evidence, all the testimony, which it has already presented in these proceedings.

I would indicate that the State presented all the evidence that it has, all the evidence that it was permitted to do so under the law; and the main witness aoina to the heinousness, cruelty, and atrociousness of this crime, was Tonv Dilisio.

And I think you can all recall his testimony very vividly. Specifically the statements made by the Defendant when this defendant took Tony -- or two or three days before the defendant took Tony out to view the body of Laura Lynn Harbert -- the defendant told him that he rapes, mutilates, stabs, cuts off the breasts and the vaginas of girls, and then on occasion he even shows them that vagina.

I submit to you that nothing could be more heinous or atrocious or more cruel than an act like that.

And the defendant took Tony out to see some of his girls, and Tony saw the body of Laura Lynn Harberts, and he saw that, indeed, her breasts had been cut up. The complete upper portion of her body was covered with blood, her breasts were covered with blood, and her face was covered with blood.

And the defendant showed no remorse whatsoever. He told Tony to get in the truck and pop some acid. Tony looked back from the truck and saw the defendant standing over the body of Laura Lynn Harberts and the other body, and he engaged in some conversation with the third gentleman.

I would submit to you that the defendant's acts were not only extremely cruel, but he showed no remorse. He was cold and calloused about the entire murder. And when Tony got back in the truck, all the defendant had to say was, 'Now do you believe me about my girls?'

The defendant showed absolutely no mercy to Laura Lynn Harberts, none whatsoever. And the State asks you to show him no mercy.

Thank you.

Original Sentencing Proceeding at **13-16.**

Finally, the trial court in concluding that the killing was heinous, atrocious or cruel once again focused almost exclusively on Dilisio's testimony concerning the visit to the site/dump.[4]

> It might be possible that, absent medical examiner verification of such butchering (the victim's body was found 24 months after her death and in an advanced state of deterioration) one should not put too great a reliance upon what the Defendant may have stated in braggadocio fashion to his young companion. However, all of the evidence before the Court confirms that the Defendant was speaking factually. The youthful

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[4] It is true that the trial court also relied on the "Orange County" case to corroborate Dilisio's testimony that the killing was especially heinous, atrocious or cruel. It noted that the use of a knife to stab the victim in the Orange County case indicated a "modus operandi" of "inflicting tortuous cuts upon his victims" and that when asked why he did it that way "stated" 'man that's my style."' It is obvious that neither piece of corroborative evidence has any significant evidentiary value. Regarding the use of a knife in the Orange County case, there was no evidence that Mr. Spaziano used or even had a knife during the Orange County incident. The victim's testimony at the Orange county trial, introduced under the resentencing record, stated that the other unknown perpetrator (identified as "Ronnie") had the knife and not Mr. Spaziano (whom the victim identified as "Dennis"). Resentencing Record on Appeal at 77. Further, the victim was unconscious when she sustained her wounds and did not know who inflicted them. Id. at 91-92.

Regarding Mr. Spaziano's alleged statement about why he did it that way, this comment did not come from any evidence presented by the State; rather it came from the trial court's previous written findings, which in turn came directly from page 2 of the original PSI. The comment itself was the hearsay report **of** the probation officer as to what Dilisio allegedly said to Lt. Abbgy during an interview. The statement's truth cannot be trusted because of Dilisio's hypnosis, and in any case, an aggravating circumstance cannot rest upon a totally unproven double hearsay statement contained in a PSI that the judge claimed not to consider. Id. at 230.

> companion testified that he observed the body of the victim shortly after her death and found it to be "blood spattered." The stabbing of the victim in the Orange County case indicated that the Defendant's use of knife to inflict torturous cuts upon his victims was his modus operandi. The Defendant when asked by a friend as to why he did it that way stated, "man that's my style."
>
> This crime appears to this Court to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Trial court order resentencing Mr. Spaziano to death, at p. 4.

It is clear then that both the guilt/innocence and penalty determination were infected by the use of hypnotically refreshed testimony, testimony which is inherently unreliable. It is also undisputed that reliability is the linchpin of both the U.S. Supreme Court[5] and this court's capital punishment jurisprudence. Given the court's recent decision in Stokes, Mr. Spaziano's conviction and/or sentence must be vacated.

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[5] ". . . the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349, 357 (1977) (death is different in kind from any other punishment).

CLAIM II

IN LIGHT OF THE FLORIDA SUPREME COURT'S ADMISSION IN COCHRAN V. STATE, NO. 67,972 (FLA., JULY 27, 1989), THAT IT APPLIED THE TEDDER STANDARD GOVERNING JURY OVERRIDES INCONSISTENTLY DURING THE PERIOD IN WHICH MR. SPAZIANO'S SENTENCE WAS AFFIRMED, THIS COURT SHOULD VACATE ITS EARLIER DECISION THAT THE JURY OVERRIDE WAS PROPER IN THIS CASE

As noted earlier, habeas corpus jurisdiction is appropriate for this Court to revisit its earlier decisions in light of changes and evolutionary developments in the law, Jackson, supra. Given this Court's recent implicit admission in Cochran v. State, No. 67,972 (Fla. July 27, 1989), that it had inconsistently applied the Tedder jury override standard during the period in which Mr. Spaziano's sentence was affirmed, it should revisit its earlier decision that the jury recommendation of life in this case could be properly disregarded. Any other outcome would result in Mr. Spaziano's death sentence being arbitrarily and capriciously imposed in violation of his rights as guaranteed by the Eighth and Fourteenth Amendments to the U. S. Constitution and their Florida counterparts.

It is axiomatic that the jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano 111, 468 U.S. 446, 465. The eighth amendment requires "significant safeguard[s]," id., to be built into the override

process.[6] Although in Spaziano III the Supreme Court found no indication that the override procedure had been applied arbitrarily, id. at 466, subsequent developments make it clear that Mr. Spaziano's death sentence was arbitrary and capricious, inasmuch as this Court has candidly admitted that it inconsistently applied the Tedder jury override standard during the period when Mr. Spaziano's conviction and sentence were affirmed and inasmuch as there is no rational basis to distinguish Mr. Spaziano's case from other cases in which a sentence of life imprisonment has been imposed.

Even when the death penalty is facially constitutional, its application in any particular case must still be reviewed. Compare Proffitt v. Florida, 428 U.S. 242 (1976) (Florida death penalty statute constitutional on its face) with Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified 706 F.2d 311 (11th Cir.), cert. denied, 464 U.S. 1002 (1983) (death sentence in same case reversed and remanded because of errors in sentencing proceeding). Moreover, a conclusion by the Supreme Court that a statute may be applied constitutionally does not preclude review of the statute's actual application. Compare Jurek v. Texas, 428 U.S. 262 (1976) (Texas statute is constitutional when jury instructions permit jury to consider all

[6] See, e.g., Maynard v. Cartwright, 108 S.Ct. 1853 (1988), (state courts free to establish definition of and parameters under which aggravating circumstances may be applied, but the propriety of the application of such factors under the state's established standards is a federal constitutional question).

relevant mitigating evidence) with Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (jury instructions precluded sentencing jury from considering relevant mitigating evidence). Changes in the Florida Supreme Court's application of the Tedder standard that have taken place since Spaziano III was decided make clear the arbitrary and discriminatory application of Tedder in this case. See Spaziano V, 545 So.2d 843 (Fla. 1989) (Kogan, J., dissenting):

> The [Tedder] standard . . . has not remained static in the last fourteen years. To the contrary, the Tedder standard has evolved, and been refined to a far more detailed and viable rule. Our cases now require that a jury recommendation of life be upheld if there is *any* reasonable basis on the record for that recommendation. Spivey v. State, 529 So.2d 1088, 1095; Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987); Fead v. State, 512 So.2d 176, 178 (Fla. 1987). At Spaziano's sentencing proceeding, ample evidence was introduced supporting the mitigating factor that Spaziano suffered from extreme emotional distress. Spaziano, 433 So.2d at 512 (McDonald, J., dissenting).
>
> * * *
>
> Since the time Spaziano was sentenced to death, and this Court affirmed that sentence, our cases have more fully refined the standards under which the death penalty may be imposed over a recommendation of life. These cases clearly enunciate that in the presence of any reasonable basis for such a recommendation, that recommendation must be upheld. While aggravation and mitigation are not irrelevant, there is no weighing process involved here. Even when the judge determines that the aggravating circumstances outweigh the mitigating circumstances, we are obligated to view a jury recommendation of life with the highest regard. Under our present law, a life recommendation can only be overridden in cases where there is

> absolutely no basis for the recommendation, when the recommendation appears based on emotion, caprice, or some other irrelevant factor. Otherwise, the life recommendation must be upheld.
>
> If we are to administer a death penalty that is not arbitrary, then we must do so in a consistent fashion. The standards by which the majority justified the jury override are no longer acceptable. We are empowered to correct a sentence according to our evolving standards, as we did in Proffitt v. State, 510 So.2d 896 (Fla. 1987). To allow the execution of Spaziano to proceed would defy our own cases, as well as common sense and logic. (Emphasis in original)

To insure that the death sentence in this case is not arbitrary and capricious, the Court must recognize that its earlier decision to disregard the jury recommendation of life was improper.

Although the language of the Tedder standard has not changed, as a majority of the Court recognized in Cochran, its application has changed in a fundamental way. Between 1984 and 1985, jury overrides were almost always affirmed by the Florida Supreme Court; after 1986 and before 1984-1985, they have almost always been reversed. **See** Grossman v. State, 525 So.2d 833, 850-51 (Fla. 1988) (Shaw, J., concurring).

In Cochran v. State, No. 67,972 (Fla., July 27, 1989) this court acknowledged this change and implicitly recognized that its application of the Tedder standard has been arbitrary, particularly as to Mr. Spaziano and several other individuals. In Cochran, Chief Justice Ehrlich, dissenting, specifically noted that under the current application of the Tedder override

standard, Mr. Spaziano's sentence of death was not sustainable. He wrote:

> In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the Court advised that to impose a death sentence where the jury has recommended life imprisonment rather than death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." This often quoted formulation expresses a preferred policy and provides a general principle to which sentencing judges and this Court may look in evaluating an override sentence. However, as all students of the common-law tradition know, legal precedent consists more of what courts do than what they say. So we must look to this Court's decisions applying the Tedder rule if we are to understand its proper meaning.
>
> As refined by subsequent decisions, Tedder requires that the jury's life recommendation be followed if there is a reasonable basis for it in the evidence. **See**, e.g., Porter v. State, 429 So.2d 293, 296 (Fla.) (override proper where jury was probably influenced in favor of life by an improper factor), cert. denied, 464 U.S. 865 (1983). But the reasonableness of the jury's recommendation should be evaluated in light of all the evidence considered, see, e.g., Hoy v. State, 353 So.2d 826, 832 (Fla. 1977) (jury override sentence was proper "under the totality of the circumstances"), cert. denied, 439 U.S. 920 (1978), including that in the judge's possession which was not revealed to the jury. As the majority opinion acknowledges, it is permissible for the sentencing judge to receive evidence of aggravating factors not provided to the jury and such evidence can provide a basis for overriding the jury's life recommendation. Spaziano v. State, 433 So.2d 508 (Fla. 1983), aff'd, 468 U.S. 447 (1984); Porter v. State, 429 So.2d 293 (Fla.), cert;. denied, 464 U.S. 865 (1983); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1983). In all of these cases, there was information presented that could conceivably have influenced the jury to recommend life.

> Spaziano v. State, 433 So.2d at 512 (defendant was not "normal" and his crime was "bizarre") (McDonald, J., dissenting); Porter v. State, 429 So.2d at 296 n.2 (the mitigating evidence was found by the judge to carry "little or no weight"); White v. State, 403 So.2d at 340 (defendant was non-triggerman who acquiesced in the murders). Thus. a mechanistic application of the Tedder dictum would have resulted in reversals of the death sentences in these cases.

Cochran, slip op. at 13-14 (emphasis supplied).

In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):
>
>> During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation.
>
> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable

person could differ.'' Tedder, 322 So.2d at 910.

Cochran, slip op. at 9-10.

The response of the majority to Chief Justice Ehrlich's dissent indicates that in retrospect they believe that the jury override question in Spaziano was improperly decided. Though both Chief Justice Ehrlich and Justice Shaw believe that the Tedder standard as construed today is wrong and the Court should return to the standard applied in Mr. Spaziano's case, both correctly note that shifting the standard results in an eighth amendment violation because the imposition of the death penalty becomes arbitrary and freakish. Given the shifting standards, there is no discernible difference between those who get death and those who do not, other than the time when this court reviews a sentencing judge's determination to override a life recommendation.

This court's application of the Tedder standard has not only changed by virtue of its more refined application of the language of Tedder, but also in this court's present willingness to thoroughly review the record to determine whether there was any valid mitigating evidence to support the jury's life recommendation. See Fead v. State, 512 So.2d 176, 178; Ferry v. State, 507 So.2d 1373, 1376. This is precisely the approach taken by Justice McDonald on Mr. Spaziano's direct appeal, Spaziano 11, 433 So.2d 508, 512, but rejected by the majority of the Court at that time.

The record here demonstrates that there was clearly a reasonable basis for the jury's life recommendation. First, there was ample evidence available to the trial judge and this Court in support of both the statutory mitigating circumstance of extreme mental or emotional disturbance and the non-statutory mitigating circumstance of mental or emotional disturbance not rising to the level of the statutory mitigating circumstance. Spaziano II, 433 So.2d 508, 512 (McDonald, J., dissenting); Spaziano V, 545 So.2d 843 (Kogan, J., dissenting); Cochran v. State, slip op. at 14 (Ehrlich, C.J., dissenting). This evidence indicated that Mr. Spaziano was in a serious accident at the age of 20, which caused severe head injuries, partial paralysis of his face and a personality change (Resent. Rec. 209): that his intelligence was dull normal: that he was tortured by the Hell's Angels after leaving the group; and that he intervened to prevent gang members from beating a man to death and attempting to rape a woman, himself suffering injuries on the first occasion. (Resent. Rec. 209-211).

Second, only two aggravating circumstances were found -- heinous, atrocious, or cruel, and conviction of a prior violent felony. Spaziano I, 393 So.2d 1119, 1121. Only the heinous, atrocious or cruel aggravator was presented to the jury. (Sent. Tr. 15-16, 20). Aggravating circumstances must be proved beyond a reasonable doubt. Hamilton v. State, No. 72,502, slip op. at 5 (Fla. July 27, 1989). There was clearly a basis for the jury to have reasonable doubts concerning the existence of the heinous,

atrocious, or cruel aggravator. **As** the trial judge acknowledged, (R-203), (Sent. Tr. 18, July 16, 1976), there was no objective medical evidence to establish that the crime was "unnecessarily torturous to the victim." State v. Dixon, 282 So.2d 1, 9 (Fla. 1973). Instead, the trial judge relied on Dilisio's hypnotically refreshed and as a result inherently unreliable testimony -- that the corpses he saw were bloody and that **Mr.** Spaziano told Dilisio he had tortured the victim (R-203); see Spaziano 11, 433 So.2d 508, 511. Given the existence of reasonable doubts about Dilisio's veracity, perception, and recall, see Claim **I,** supra, the jury may reasonably have concluded that this circumstance was not proven beyond a reasonable doubt, see Claim VII, infra.

In cases decided after Mr. Spaziano's direct appeal, Spaziano 11, 433 So.2d 508, this Court has not hesitated to carefully scrutinize the record and find the jury's recommendation reasonable, even when there are more aggravating factors present and less mitigating evidence than is present here. For example, in Freeman v. State, No. 71,756 (Fla., July 27, 1989) the evidence showed that the defendant broke into the victim's house, stabbed the victim repeatedly and stole a number of items from the victim's house. The trial judge found three aggravating factors -- heinous, atrocious or cruel, that the murder was committed in the course of a burglary, and conviction of a prior violent felony (an attempted burglary in which the defendant threatened a neighbor with a knife). The trial court found no mitigating circumstances. In reversing the override,

the Florida Supreme Court searched the record and found that the jury could have relied on the defendant's age (22), his dull normal intelligence and a history of abuse during childhood. Id., slip op. at 7. By comparison, Mr. Spaziano's intelligence was also dull normal, and he suffered severe head injuries from a near fatal automobile accident at the age of 20, causing partial paralysis of his face and a personality change, after which he was known as "Crazy Joe."

In Perry v. State, 522 So.2d 817 (Fla. 1988) the evidence reflected that the defendant "tried and tried again to kill" the victim. She was "brutally beaten in the head and face," choked and "repeatedly stabbed in the chest and breasts" and died of strangulation associated with the stab wounds. Id. at 821. The attack took place within the victim's home during a robbery. The trial court found two aggravating circumstances that were upheld on appeal -- heinous, atrocious or cruel and commission during a robbery -- and no mitigating circumstances. On appeal, the Supreme Court once again carefully reviewed the record and found that there was evidence of the defendant's good character, his psychological stress and his age (21) which the jury could have relied on in recommending life. Id. Certainly, the jury could have given equal consideration to the circumstances of Mr. Spaziano's life.

Finally, in Amazon v. State, 487 So.2d 8 (1986), this court reversed a jury override although the trial court had found four aggravating circumstances and no mitigating circumstances. The

evidence reflected that the defendant broke into the victims' house, bound Joy Chapin, inflicted a "taunting" knife wound to her buttocks, raped her and then forced her to go through the house with him as he looked for valuables. When the defendant found Joy's daughter phoning for help he stabbed her eighteen times and inflicted multiple stab wounds on Joy Chapin when she tried to protect her daughter. He also knocked Joy backwards down a flight of stairs. Both victims bled to death from their wounds. Id. at 16 - 17 (Boyd, C.J., concurring and dissenting). The trial judge found that the murders were committed during a rape, burglary and kidnapping; that they were committed to avoid arrest; that they were committed for pecuniary gain; that they were especially heinous, atrocious or cruel; and that there were no mitigating circumstances. Id. at 12 - 13.

This Court again carefully scrutinized the record for evidence to support the jury's recommendation of life imprisonment. It noted that the jury may have discounted a detective's "unsupported assertion" that the defendant told him the defendant killed the Chapins to avoid arrest. Of course, in Mr. Spaziano's case the jury may have discounted what the trial judge admitted Mr. Spaziano "may have stated in braggadocio fashion to his young companion." (Resent. Rec. 203). In Amazon, the Supreme Court also noted that there was evidence from which the jury could have found the mitigating factors of extreme emotional disturbance, a history of drug abuse and a low emotional age, as well as "inconclusive" evidence of drug use.

Amazon, 487 So.2d 8, 13. In Mr. Spaziano's case, there was similar evidence to support a finding of extreme emotional disturbance, see Spaziano 11, 433 So.2d 508, 512 (McDonald, J., dissenting), and evidence of his dull normal intelligence and the traumatic effects on him of a near fatal automobile accident. There was at least as much evidence in the record to support the jury's recommendation in Mr. Spaziano's case as in Amazon. Unfortunately for Mr. Spaziano, his appeal was decided three years too soon.[7]

This Court has a special and unique role to insure that the death penalty is not imposed in an arbitrary and capricious fashion. Given this Court's decision in Cochran, it must revisit the earlier determination that it was legally proper to disregard the jury recommendation of life. If the Court does not do so, Mr. Spaziano's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts will be violated.

[7] See also the following post-Spaziano cases in which this Court has searched the record for mitigating evidence not found by the trial judge: Pentecost v. State, No. 71,851 (Fla., June 29, 1989); Harmon v. State, 527 So.2d 182 (Fla. 1988); Brown v. State, 526 So.2d 903 (Fla. 1988); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Burch v. State, 522 So.2d 810 (Fla. 1988); DuBoise v. State 520 So.2d 260 (Fla. 1988); Masterson v. State, 516 So.2d 256 (Fla. 1987); Fead v. State, 512 So.2d 176; Wasko v. State, 505 So.2d 1314 (Fla. 1987).

CLAIM III

MR. SPAZIANO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND THEIR FLORIDA COUNTERPARTS BECAUSE APPELLATE COUNSEL FAILED TO ARGUE AND EXPLAIN TO THIS COURT THAT THERE WAS A REASONED BASIS FOR THE JURY'S LIFE RECOMMENDATION AND AS SUCH THE JURY DECISION COULD NOT BE OVERRIDDEN BECAUSE IT COULD REASONABLY HAVE BEEN PREMISED UPON A FINDING OF NO AGGRAVATING CIRCUMSTANCES AND/OR A FINDING OF VALID MITIGATING CIRCUMSTANCES SUFFICIENT TO SUSTAIN THE LIFE RECOMMENDATION

A habeas corpus petition is the appropriate vehicle for raising the issue of ineffective assistance of counsel on direct appeal in a capital case. E.g., Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). In order to prevail, the petitioner must identify a specific "omission of appellate counsel as having been a serious and substantial deficiency" and that but for that omission there is a reasonable probability that the outcome would have been different. Id. at 940. In this case, appellate counsel's performance was deficient, and, but for that deficiency, the result could likely have been different, entitling Mr. Spaziano to relief.

On appeal following the Gardner remand, Mr. Spaziano's appellate attorney raised the issue that the trial judge applied the incorrect standard in overriding the jury's life recommendation and imposing the death sentence. See Brief on

Appeal from Resentencing, Point V.[8] He also argued that, under Tedder, a reasonable person could find that life was appropriate, but premised this conclusion solely on the presence of a lingering doubt about guilt. Brief at 29 - 30. This was the ~~only~~ justification offered by appellate counsel to this Court to support the reasonableness of the jury's recommendation,' despite this Court's previous rejection of precisely the same argument in Buford v. State, 403 So.2d 943 (Fla. 1981).[10]

In fact, there are two other compelling reasons to support the reasonableness of the jury's recommendation which appellate counsel never explained or argued to this Court: the jury decision to impose life had a reasoned basis because the jury could reasonably have found that none of the aggravating circumstances had been proven beyond a reasonable doubt ~~and/or~~ there were sufficient mitigating circumstances in the record to

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'In his order, the trial judge never mentioned Tedder v. State, which sets out the governing standard for determining whether a trial judge may disregard a jury recommendation of life. Nor did he ever state or find that no reasonable person could differ that only death is an appropriate sentence, as is required by Tedder. Rather, he engaged in his own weighing analysis and imposed a death sentence without seemingly any regard for the deference due the jury's life recommendation.

'Appellate counsel also suggested that the judge erred by finding that the killing was "especially heinous, atrocious, and cruel,'' and that therefore the override could not be supported. This Court rejected that argument. 433 So.2d at 511. However, this sufficiency of the evidence argument is a qualitatively different argument than the question of whether the jury could have reasonably concluded that that aggravating circumstance was not proven beyond a reasonable doubt.

"Appellate counsel was aware that this argument had been rejected because he cited Buford in his brief.

support a jury verdict of life. Either of these reasons would be sufficient to support a finding that the jury's decision to recommend a life sentence was a reasonable one and if so, it could not be legally disregarded.

The Tedder standard for overriding a jury recommendation of life is as follows:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910.

There can be no serious argument with the proposition that the testimony of Tony Dilisio, the state's crucial and only witness regarding the aggravating circumstance that the killing was heinous, atrocious, and cruel, was suspect, see Claim I, supra. The need for an Allen charge indicates that the jury obviously had trouble in deciding whether to believe him. The jury could easily and reasonably have decided to believe some parts of his testimony and to disbelieve other parts. The jury may reasonably have concluded that Mr. Spaziano had taken Mr. Dilisio to the body and indicated involvement in the killing, but that Dilisio had fantasized, exaggerated or lied about the actual

details of the killing.[11] Likewise, the jury may have believed Mr. Dilisio entirely, but also believed that Mr. Spaziano was exaggerating in his alleged statements to Mr. Dilisio.[12] Still further, the jury may have believed that Mr. Spaziano's alleged description of the killing, without more, did not establish the aggravating circumstance beyond a reasonable doubt. Hamilton v. State, No. 72,502 (Fla. July 27, 1989). The jury then could have reasonably concluded that the State had not proved beyond a reasonable doubt that the killing was "especially heinous, atrocious and cruel." As this Court wrote on direct appeal in affirming the conviction, the jury "had a superior vantage point to weigh the credibility of Dilisio's testimony." Spaziano v. State, 393 So.2d 1119, 1122 (Fla. 1981). Their vantage point, by definition, was the same in assessing both guilt and penalty.

Assuming that the jury did not find the killing to be "especially heinous, atrocious or cruel," then there were no

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"Indeed, from what we now know about hypnosis and hypnotically refreshed testimony, this is likely. See Stokes v. State, No. 71,485 (Fla. July 6, 1989). Indeed there is no question that Dilisio would not have been permitted to testify about his trip to the site/dump where the victim's body was found if Mr. Spaziano's trial were to take place today because of, among other things, doubts as to his reliability.

[12]There was no medical corroboration about the manner of death. Indeed, even the judge acknowledged in his sentencing order:

> It might be possible that, absent medical examiner verification . . . one should not put too great a reliance upon what the Defendant may have stated in braggadocio fashion to his young companion.

aggravating circumstances presented to it to justify overriding the jury recommendation of life.[13]

In addition to finding that the aggravator of "heinous, atrocious, and cruel" was not present, a reasonable jury wauld well have found that there was sufficient mitigating evidence in the record to warrant a life recommendation. Yet the presence of this mitigating evidence was not argued by appellate counsel. The PSI contained mention of Mr. Spaziano's automobile accident, mild depression, a personality change, a mental hospitalization, low intelligence, severe abuse by a motorcycle gang, his attentiveness as a father, as well as other mitigating facts.[14] Although Justice McDonald was astute enough to independently identify some of these factors, the Court's review of the propriety of death sentences and the proceedings in which they are imposed "is no substitute for the careful, partisan scrutiny of a zealous advocate." Fitzpatrick, supra, citing Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). It is simply indefensible that counsel did not present this argument to the

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[13]Although Mr. Spaziano's prior conviction was not revealed to the jury, even if it could be considered for purposes of addressing the Tedder issue, there is no question that by itself it would not be insufficient to justify the override.

[14]Although not apparent from the transcripts, it may also be that the jury simply decided to recommend life based upon its observation of Mr. Spaziano's demeanor and other facts and perceptions it learned about him during the trial. The Constitution requires that a sentencer be permitted to extend mercy in such a case, assuming it is premised upon legitimate record based considerations. See Claim VI, infra.

court. Given this failure, Mr. Spaziano was denied the appellate counsel to which he was constitutionally entitled.

Counsel's failure to raise and argue these perfectly reasonable justifications for the jury's recommendation is a serious and substantial deficiency. The prejudice arising from this deficiency is plain. Had counsel explained that the jury could reasonably have found no aggravating circumstances, the jury recommendation would not only be reasonable, but clearly would be the proper verdict. Similarly, had counsel argued the substantial mitigating evidence in the record, there also would have been a reasonable basis for the recommendation. Tedder, supra. Accordingly, the prejudice prong of the ineffective assistance of counsel claim has been met. For these reasons, this Court should find that Mr. Spaziano's constitutional right to the effective assistance of counsel was violated.

CLAIM IV

MR. SPAZIANO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND THEIR FLORIDA COUNTERPARTS BECAUSE APPELLATE COUNSEL FAILED TO CHALLENGE MR. SPAZIANO'S DEATH SENTENCE ON THE GROUND THAT IT WAS DISPROPORTIONATE IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THEIR FLORIDA COUNTERPARTS

As noted earlier, a habeas corpus petition is the appropriate vehicle for raising the issue of ineffective assistance of counsel on direct appeal in a capital case. E.g., Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). To

prevail, the petitioner must identify a specific "omission of appellate counsel as having been a serious and substantial deficiency" and that but for that omission there is a reasonable probability that the outcome would have been different. Id. at 940. In this case, appellate counsel's performance was deficient, and, but for that deficiency, the result could likely have been different, entitling Mr. Spaziano to relief.

On appeal following the Gardner remand, Mr. Spaziano's appellate attorney inexplicably failed to raise or argue the fact that Mr. Spaziano's death sentence was disproportionate.

The tools to construct the proportionality argument were readily available to Mr. Spaziano's appellate attorney in 1982. This Court adopted proportionality review in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Moreover, the Florida Supreme Court had engaged in proportionality review prior to 1982. For example, in Blair v. State, 406 So.2d 1103 (Fla. 1981), this Court reviewed a case in which the defendant murdered his wife and buried her remains in the back yard of their home. The Court found that there was insufficient proof of several aggravating factors. The Court remanded the case for imposition of a life sentence after comparing the case with Halliwell v. State, 323 So. 2d 557 (Fla. 1975). Blair, 406 So.2d 1103, 1109. In Halliwell, this Court had reversed a jury recommended death sentence where the sentence rested in part on the fact that the defendant mutilated the victim's body after death. Similarly, in Alvord v. State, 322 So.2d 533 (Fla. 1975), this Court reviewed the sentence "in the

light of the facts presented in the evidence, as well as other decisions, to determine whether or not the punishment is too great." See also McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977) (proportionality review of robbery-murder cases).

Thus, it is clear that this Court's practice of reviewing death sentences to determine whether or not they were proportionate with the sentences in other similar case was well established by the time of Mr. Spaziano's appeal following the Gardner remand. And, as shown in Claim V, infra, Mr. Spaziano's death sentence was disproportionate. Therefore, the failure to raise this issue on appeal was a "serious and substantial deficiency," and in the absence of that failure there is a reasonable probability that the outcome of Mr. Spaziano's appeal would have been different. Fitzpatrick v. Wainwright, 490 So.2d 938, 940. Accordingly, Mr. Spaziano is entitled to relief because he was denied his right to effective assistance of counsel.

CLAIM V

MR. SPAZIANO'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF FLORIDA LAW, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

No proportionality review was apparently undertaken by the Florida Supreme Court in Mr. Spaziano's case. See Claim IV, supra. In the absence of same, this Court must review this case in accordance with "death sentence law as it now exists." Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987). Comparison of this case with the numerous cases in which the Florida Supreme Court has reversed death sentences imposed by trial judges in the face of jury recommendations of life imprisonment, both before and after Mr. Spaziano's appeal was decided, reveal that imposition of the death penalty in this case would be arbitrary and disproportionate.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georsia, 408 U.S. 238, 306 (1972)(Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 238 So.2d 1, 17 (Fla. 1973), cert. denied sub nom. Dixon v. United States, 416 U.S. 943 (1974). See also Coker v. Georsia, 433 U.S. 584 (1977)(the requirement that the death penalty be reserved for the

most aggravated crimes is a fundamental axiom of eighth amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," id. at 822, is missing in this case, and the death penalty is plainly inappropriate on this record.

In order to prevent the disproportionate application of the death sentence, the Florida Supreme Court has undertaken to review death sentences to make sure that the death sentence is proportionate when compared with other similar cases. See State v. Dixon, 283 So.2d 1, 10 (1973); Banda v. State, 536 So.2d 221, 225 (Fla. 1988); Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988); Fead v. State, 512 So.2d 176, 179 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081, 1086-87 (Fla. 1987); Wilson v. State, 493 (So.2d 1019, 1023 (Fla. 1986); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); Blair v. State, 406 So.2d 1103, 1109 (1981); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). The purpose of this proportionality review is to ensure that the death penalty

is "reserved only for the most aggravated of murders. . . ." Banda, 536 So.2d 221, 225. It is particularly important in jury override cases, because in such cases a jury has found that the murder in question does **not** fall into the "most aggravated" category.

The trial judge found only two aggravating circumstances in Mr. Spaziano's case -- heinous, atrocious or cruel and conviction of a prior violent felony. As discussed in detail in Claim I, infra, the finding of heinous, atrocious or cruel was premised on inherently unreliable hypnotically refreshed testimony and as such, the finding is therefore constitutionally infirm. Moreover, as discussed previously, there was substantial record based evidence of statutory and nonstatutory mitigating circumstances which was ignored by the trial judge. The PSI made reference to Mr. Spaziano's automobile accident, mild depression, a personality change, a mental hospitalization, low intelligence, severe abuse by a motorcycle gang, his "attentive[ness]" as a father, as well as other mitigating facts. (Resent. Rec. 209-11). Additionally, after Mr. Spaziano's sentence was affirmed, additional evidence concerning Mr. Spaziano's mental condition was obtained. This evidence, which this Court has described as "merely cumulative," Spaziano V, supra, shows that Mr. Spaziano has suffered from organic brain disorder since the automobile accident in which he suffered severe head injuries. See [First]

Motion to Vacate and Amend Sentence at 90-101 and Appendices N - O.[15]

The mitigating evidence concerning Mr. Spaziano's mental condition is thus substantial, indeed compelling. See, Spaziano II, 433 So.2d at 512 (McDonald, J., dissenting); Spaziano V, supra (Kogan, J., dissenting). By comparison with the powerful mitigating evidence present in Mr. Spaziano's case, in a number of cases decided before Mr. Spaziano's appeal, the Florida Supreme Court reversed jury overrides in which there were as many or more aggravating circumstances and the mitigating evidence was less persuasive.

In Brown v. State, 367 So.2d 616 (Fla. 1979), the evidence indicated that the victim had been kidnapped in a shopping mall, placed in the trunk of his own car, and driven to a lake where the defendant and two accomplices struck him with their fists and with boards, and the defendant and one accomplice took turns shooting at him. As they were leaving the lake, the defendant and his accomplices observed the victim climbing out of the water; they returned, forced him back into the water, and held him below the surface until he drowned.

The jury recommended a sentence of life. However, the trial judge imposed the death sentence, finding two aggravating factors

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[15] This "cumulative" evidence includes the conclusion by two mental health experts that as a result of Mr. Spaziano's head trauma, he has impaired judgment and would lose control of his behavior in stressful situations. Id. at 90-91, Appendices N and O.

(heinous, atrocious or cruel and committed during a robbery and kidnapping) and no mitigating factors. There was no evidence of mental or emotional disturbance. The trial judge, despite the defendant's youth, found that he was mature, so age was not a valid mitigating factor. Id. at 619. Despite the fact that there was no mitigating evidence to alleviate the brutality of the murder, the Supreme Court reversed the sentence on appeal, noting that the "jurors in this case had all the information appropriate to their 'weighing' responsibilities under the statute, and they found that it favored life imprisonment. The more severe penalty is not so clearly directed by the sentencing evidence that it should override the considered judgment of Brown's jury." Id. at 625.

Another case involving minimal mitigating evidence in which this Court found a jury override to be improper is Swan v. State, 322 So.2d 485 (Fla. 1975). In Swan, the trial judge found that the murder was heinous, atrocious or cruel based on the following facts: The victim was found in a semi-conscious condition, badly bruised and beaten. Her hands, neck and left foot were tied so that any efforts she might have made to free herself could have choked her to death. Her mouth was gagged with a silk stocking. She never fully regained consciousness and died roughly one week later. The evidence also showed that the murder was committed during a robbery or burglary.

The only mitigating evidence in the record was that the defendant was nineteen years old at the time the crime was

committed. There was no evidence that the defendant was immature for his age or suffered from any mental or emotional disease or defect. By comparison, in Mr. Spaziano's case there was significant evidence of mental or emotional disturbance. It would clearly be disproportionate to grant one defendant life based solely on his chronological age while condemning Mr. Spaziano to death despite severe mental defects.

Two cases involving crimes comparable to the one Mr. Spaziano was found to have committed and comparable mitigating evidence are Jones v. State, 332 So.2d 615 (Fla. 1976) and Burch v. State, 343 So.2d 831 (Fla. 1977). In Jones v. State, 332 So.2d 615 (Fla. 1976), the victim died from blood loss resulting from multiple stab wounds. The pathologist found 38 significant wounds as well as many superficial scratches. There was sperm in the victim's vagina and a laceration in the back part of the lower end of the vagina. The evidence showed that murder was committed during the course of burglary or rape, that the defendant had prior robbery convictions, and that the crime was heinous, atrocious or cruel. The Supreme Court reversed the jury override, noting that there was evidence of the defendant's mental illness and that the jury "had the benefit of seeing and hearing Appellant as he testified in the courtroom, and all twelve members of the jury thought that Appellant should not die in the electric chair." Id. at 619. In Mr. Spaziano's case, also, what may have been a unanimous jury had the "benefit of seeing and hearing" Mr. Spaziano testify, along with the other evidence in

the case, and thought that he should not die. It is disproportionate to sentence one defendant to death and one to life on such virtually identical facts.

Similarly, in Burch v. State, **343** So.2d **831** (Fla. **1977),** the evidence revealed that the victim had been stabbed to death, the victim having received 35 or **36** knife wounds. The defendant confessed to having attempted to rape the victim. The trial judge found in aggravation that the murder was committed during rape or attempted rape and that the crime was especially heinous, atrocious or cruel. The defendant had no prior history of criminal activity, and the trial judge found his capacity to appreciate the criminality of his conduct was substantially impaired. The Florida Supreme Court reversed the trial court's jury override because it was "apparent that the jury's recommendation for a life sentence was predicated upon the appellant's mental condition." Id. at **834.** Unlike Burch, despite the fact that the jury's recommendation of a life sentence in Mr. Spaziano's case was supported by evidence of his mental condition, the Supreme court affirmed the jury override in his case.

On the basis of Burch and Jones, the Florida Supreme Court reversed a jury override as disproportionate in Hansbroush v. State, **509** So.2d **1081 (1987).** In Hansbrouuh, the defendant stabbed the victim to death, inflicting numerous wounds after she resisted him during a robbery. The trial court properly found two aggravating circumstances -- committed during a robbery and

heinous, atrocious or cruel. The trial judge found that there was nonstatutory mitigating evidence concerning the defendant's difficult life and emotional problems, but after carefully weighing that evidence, he overrode the jury's life recommendation. The Florida Supreme Court reversed, finding that when compared to Burch and Jones it would be disproportionate to sentence Hansbrough to death. Id. at 1087. On similar facts, Mr. Spaziano's death sentence was just as disproportionate.

It is clear that by comparison with Brown, Swan, Jones, and Burch Mr. Spaziano's death sentence was disproportionate and unwarranted.[16] Had the Florida Supreme Court reviewed Mr. Spaziano's case by comparing it with other jury override cases -- as it indicated it would do in Dixon, 283 So.2d 1, 10 and as it was required to do in order to ensure that the death sentence was not imposed in an arbitrary manner -- it would have concluded that the death sentence in Mr. Spaziano's case cannot stand. Therefore, reviewing Mr. Spaziano's death sentence under current

[16] See also Fead v. State, 512 So.2d 176 (Fla. 1987) (death penalty disproportional in jury override case despite two aggravating circumstances where evidence was that the defendant was under extreme emotional disturbance, influence of alcohol and was a good father): Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986) (death penalty not proportionate despite two aggravating factors, including heinous, atrocious or cruel and no mitigating circumstances where crime took place during domestic confrontation): Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985) (same); Barclay v. State, 470 So.2d 691 (Fla. 1985) (jury override not proper despite two aggravating factors, including heinous, atrocious or cruel and no mitigating evidence; Richardson v. State, 437 So.2d 1091, 1093 (Fla. 1983) (jury override improper despite four aggravating and no mitigating circumstances).

death penalty law, Proffitt, 510 So.2d 896, 897, this Court must conclude that his death sentence was arbitrary and disproportionate. As such, his sentence must be vacated and reduced to a sentence of life imprisonment. Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988).

CLAIM VI

THE FLORIDA SUPREME COURT'S APPLICATION OF ITS STANDARDS GOVERNING JURY OVERRIDES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THEIR FLORIDA COUNTERPARTS BECAUSE IT FAILS TO ALLOW FOR THE CONSIDERATION OF MERCY OR SYMPATHY WHICH IS ROOTED IN THE EVIDENCE AS A MITIGATING CIRCUMSTANCE.

Mr. Spaziano readily acknowledges that the U.S. Supreme Court has upheld on its face Florida's jury override system. Spaziano v. Florida, 468 U.S. 447 (1984). However, that action occurred prior to California v. Brown, 479 U.S. 538 (1987), and Parks v. Brown, *sub.* nom., Saffle v. Parks, 860 F.2d 1545 (10th Cir. 1988) (en banc), cert. sranted, April 24, 1989, 45 Crim. L. Rept. 4021 (April 26, 1989). The issues decided and to be decided in these cases were not considered by the Supreme Court in Spaziano. These decisions represent new developments in the law which justify further consideration of the claim presented below.

If we assume arsuendo, as the trial court and apparently this court did, that valid aggravating circumstance(s) existed and that no mitigating circumstances were found by Mr. Spaziano's jury,[17] but that the jury nevertheless recommended a life sentence, there can be only one logical explanation for its decision: based upon what had been presented to it and what it

[17]Mr. Spaziano adamantly denies this. He contends that the jury found no aggravating circumstances and may very well have found mitigating circumstances.

otherwise observed, it decided to extend mercy or sympathy to Mr. Spaziano. It is impossible to determine precisely what evidence caused the jury to so recommend: it could have been Mr. Spaziano's facial paralysis, his small stature, the fact that he was known as "Crazy Joe," the bizarreness of the killing, his courtroom behavior or innumerable other factors. However, because no mitigating factors were identified by the trial court, the trial court found that the jury verdict was unreasonable and overrode it, imposing death and this court concurred. This approach has a built-in constitutional flaw: it equates the dispensation of record-based mercy with irrationality and authorizes the rejection of a jury recommendation of life based upon that supposed irrationality, which is actually record based mercy. By authorizing this approach, this Court has effectively precluded the consideration and application of record-based mercy as a circumstance warranting life imprisonment. This procedure is contrary to the views of the eight Justices as expressed in California v. Brown, supra, and by the 10th Circuit Court of Appeals in Parks.

As early as Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court made clear that "the fundamental respect for humanity underlying the Eighth Amendment" compels attention to "the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Recognizing "the possibility of compassionate or

mitigating factors stemming from the diverse frailties of humankind," the Court has consistently reaffirmed its commitment to the capital defendant's right to present and have the sentencer consider any such evidence in mitigation. See, e.g., California v. Brown, 479 U.S. at 541; Id. at 545 (O'Conner, J., concurring); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). Summarizing this well-settled doctrine, Justice Blackmun, speaking for the Court in Mills v. Marvland, 108 S. Ct. 1860, 1866 (1988), noted that barriers to consideration of mitigating evidence will be overturned whether they are imposed by statute, by the sentencing court, by an evidentiary ruling, or by a charge or verdict sheet. In other words, the existence -- not the form -- of the obstacle counts.

In Brown, at least eight justices agreed that sympathy rooted in the evidence at trial may properly influence the penalty decision. Hence the Court necessarily determined that an instruction (or other device) barring such factually tethered sympathy would constitute a forbidden obstacle to full consideration of mitigating proof since it would "preclude[] precisely the response that a defendant's evidence of character and background is designed to elicit," 470 U.S. at 548 (Brennan, J., dissenting), rather than "only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id. at 542 (Rehnquist, C.J., for the Court) (emphasis added); see Parks v. Brown, 860 F.2d 1545, 1553 (10th

Cir. 1988) (en banc). The Court divided only on the question whether the specific charge at issue, which told the jury it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," at 539, could have caused a reasonable juror to feel obliged to repress sympathy evoked by the proof.[18] Dwelling heavily on the adjective "mere," which was thought to convey the notion of sympathy extraneous to the record, the majority determined that this instruction had not risked diverting the jury from its duty to consider mitigating evidence -- especially where, at the sentencing trial, the defendant had presented thirteen witnesses in his behalf.

In Parks, which like Brown also involved an ani-sympathy instruction, Judge Ebel, the author of the Circuit majority opinion, "focused initially on the specific language challenged" -- most pertinently: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrarv factor when imposing sentence." Finding that it "fail[ed] constitutional muster" by globally banning all Sympathy, whether or not rooted

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[18] Compare Id. at 542 (opinion for the Court) with Id. at 549-550 (Brennan, J., dissenting) and Id. at 563 (Blackmun, J., dissenting); see Id. at 544-45 (O'Connor, J., concurring). Justices Blackmun and Marshall, in fact, wrote separately in order to stress their view that compassion and mercy play a critical role in capital sentencing. While Justice O'Connor viewed the life-or-death inquiry as based more appropriately on moral rather than emotional reactions to evidence about the crime and the criminal, she expressed concern lest charges of this type mislead jurors into believing that mitigating evidence about a defendant's background or character must also be ignored. Id. at 545-46.

in the record, he then "review[ed] the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." Because it did not, "the substantial possibility" that the "jury felt constrained in its ability to consider the mitigating evidence because of the absolute bar to its ability to consider sympathy" necessarily compelled reversal.

A similar and related issue is before the Supreme Court in Blvstone v. Pennsylvania, **549** A.2d **81** (Pa. **1988)**, cert. uranted, March 27, **1989, 44** Crim. **L.** Rept. **4210** (March 29, 1989).[19] The question posed in Blvstone is whether the provisions of the Pennsylvania death penalty statute which mandated a death sentence if there was at least one aggravating circumstance and no mitigating circumstance, or if the aggravating circumstances outweighed any mitigating circumstances, violate the eighth amendment because they preclude an individualized determination that death is the appropriate sentence. Put another way, to insure reliability, Blvstone argues that the sentencer must ultimately remain free to determine the appropriateness of a death sentence irrespective of its specific conclusions regarding the presence and weight of the aggravating and mitigating circumstances. For example, even if the sentencer finds one aggravating circumstance and no mitigating circumstances (as was the case in Blvstone), it may conclude, given the nature of the

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"The identical issue to that presented in Blvstone is also before the Court in Bovde v. California, **758** P.2d **25 (1988);** cert. uranted, June **5, 1989, 45** Crim. **L.** Rept. **4067** (June 21, **1989).**

aggravator, that the accused is not sufficiently culpable to warrant the death penalty. Yet the mandatory features of the Pennsylvania statute, which features were also reflected in the jury instructions given and in the argument of the prosecutor, would preclude such a result. Analogously this Court's application of its jury override standards does not allow a jury to dispense mercy, irrespective of the quality of the aggravating circumstances and the record based facts calling for mercy or sympathy. Such a practice violates the admonition set out earlier that the sentencer must consider all relevant mitigating circumstances.

As Justices Marshall and Brennan, in their dissent from a denial of certiorari in Britz v. Illinois, Case No. 88-6078, 44 Cr. L. Rptr. 4174, February 1, 1989 emphasized, the failure to consider sympathy rooted in mitigating evidence results in constitutional violations.

> We have recognized repeatedly that, in a capital case, the sentencer must not be precluded from considering any mitigating evidence relating to the defendant or the crime. See, e.g., Eddinas v. Oklahoma, 455 U.S. 104, 111-112 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mitigating evidence is allowed at the penalty phase so the sentencer may consider "compassion . . . stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Greaa v. Georgia, supra, at 199; see also Caldwell v. Mississippi, 472 U.S. 320, 330-331 (1985).

And, as the Eleventh Circuit explained in Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985):

> Just as retribution is an appropriate justification for imposing a capital sentence, Brooks v. Kemp, 762 F.2d at 1407, a jury may opt for mercy and impose life imprisonment at will. The ultimate power of the jury to impose life, no matter how egregious the crime or dangerous the defendant, is a tribute to the system's recognition of mercy as an acceptable sentencing rationale.
>
> To state that mercy towards a defendant in a capital case contravenes the law or is frowned upon by the Supreme Court of Georgia strikes at the core of the jury's role in capital sentencing. Huff's (the prosecutor) claims that mercy is "sickly sentimentality," "false humanity," and a "dangerous element for the peace of society," are fundamentally opposed to current death penalty jurisprudence. Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law, but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life.

Mr. Spaziano's jury probably found no aggravating and substantial mitigating circumstances and thus recommended life. However, even assuming arguendo that it found an aggravating circumstance and decided to extend mercy based upon what it had observed of and heard about Mr. Spaziano, that result is not irrational. By implicitly ruling that this result is irrational, this Court would effectively hold that record-based mercy has no place in Florida's death penalty scheme in violation of Brown, Parks and Drake.

This Court's application of its jury override standards which authorizes and indeed, seems to mandate, the imposition of the death sentence without regard to whether mercy based on record based mitigation is appropriate, acts precisely as does the jury instruction in Parks, and is contrary to the views of eight Supreme Court justices as expressed in California v. Brown, supra. It also is inconsistent with the arguably anticipated rulings in Blvstone and Bovde. This Court's application of its jury override standards presumes that a jury verdict based upon record-based sympathy cannot be reached by a reasonable juror and therefore requires an override, and the imposition of a death sentence. This approach violates the Eighth Amendment and Fourteenth Amendment to the U.S. Constitution and their Florida counterparts.

CLAIM VII

IT WAS ERROR, IN VIOLATION OF MR. SPAZIANO'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THEIR FLORIDA COUNTERPARTS, FOR THE SENTENCING COURT AND THIS COURT TO EVALUATE THE REASONABLENESS OF THE JURY RECOMMENDATION OF LIFE BASED ON THE BELIEF THAT A JURY RECOMMENDATION OF LIFE WAS PROPER ONLY IF THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES

At the original penalty phase before the jury, the trial judge instructed the jury that it had to determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (Sent. Tr. 20.) It is clear from the judge's instructions that if the jury found **any**

aggravating circumstances, they were required to recommend the death penalty unless they found mitigating circumstances that outweighed the aggravating factors. (Id. at 20-23.) Similarly, when the trial judge initially pronounced sentence he found "that the mitigating factors do not outweigh the aggravating factors as required by the Court to consider." (Sent. Tr., July 16, 1976, 19-20.) Finally, in his order imposing death after resentencing the judge found that "sufficient aggravating circumstances exist to justify the death sentence and that the mitigating circumstances are insufficient to outweigh such aggravating circumstances and that a sentence of death should be imposed in this case." (Resent. Rec. 201.) It is clear then that the trial judge only believed that a jury would be acting reasonably in recommending life if the mitigating circumstances outweighed the aggravating circumstances. This Court in reviewing the sentence obviously shared this same belief. However, when this Court opted for this approach, Mr. Spaziano was denied his right to an individualized and reliable sentencing determination as guaranteed by the Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts. Mr. Spaziano raises this claim now based on anticipated significant potential changes in the law.

On March 27, 1989, the United States Supreme Court granted certiorari review in Blvstone v. Pennsylvania, 109 S.Ct. 1567 (1989), to determine whether the Eighth Amendment was violated by a Pennsylvania capital sentencing proceeding in which the jurors

were informed that death must be the appropriate penalty when the sentencer finds that the aggravating circumstances outweigh any mitigating circumstances. The petitioner in Blvstone asserted that such an instruction violated his rights (under Lockett v. Ohio and Hitchcock v. Dugger) to an individualized and reliable sentencing determination because the mandatory nature of the statute restricted the jury's full consideration of mitigating evidence. Specifically, the jury was led to believe that it was inappropriate to recommend life notwithstanding a compelling case in mitigation or their independent assessment of the aggravation unless they believed the aggravating circumstances did not outweigh any mitigating circumstances. Petition for Writ of Certiorari, Blvstone.

On June 5, 1989, the United States Supreme Court granted certiorari review in Bovde v. California, 45 Cr. L. Rptr. 4058, 4067 (U.S. June 5, 1989), to consider the question whether the Eighth Amendment was violated by a similar penalty phase jury instruction that if the jury concludes that the "aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death."

The approach of the trial and this Court to determining the reasonableness of the jury recommendation in this case is more egregious than those under challenge in Bovde and those in Blvstone, where the presumption of death only took effect if aggravating factors outweighed mitigating factors. This Court should stay Mr. Spaziano's execution pending the United States

Supreme Court's decision in Blystone and Boyde, which may fundamentally alter this Court's previous analysis of the propriety of the jury override.

This claim is a far cry from a frivolous one. In both Jackson v. Dugger, 837 F.2d 1469 11th Cir., 1988) and in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir., 1988) (en banc), the courts found that presumptions of death deprive a capital defendant of his constitutional rights to an individualized and reliable capital sentencing determination. If the holding of those cases is adopted by the U.S. Supreme Court, then this Court will have erred in the approach it utilized in determining the reasonableness of the jury override in this case. A stay of execution is warranted for this reason.

CLAIM VIII

MR. SPAZIANO'S SENTENCING JUDGE AND THIS COURT IMPROPERLY FOUND THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MAYNARD V. CARTWRIGHT, HAMILTON V. STATE AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THEIR FLORIDA COUNTERPARTS.

Petitioner was sentenced to death based on a finding that the murder was "especially heinous, atrocious and cruel." (Resent. Rec. 202-03). Such a vaguely worded aggravating circumstance is impermissible under the eighth and fourteenth amendments unless the jury is provided with and the courts articulate and apply a "narrowing principle" which goes beyond merely reciting the specific facts that may speculatively support

the finding of such an aggravating circumstance in the particular case. Maynard v. Cartwright, 108 S. Ct. 1853 (1988). No court in this case articulated and applied a "narrowing principle" to the "especially heinous, atrocious and cruel" aggravating circumstance. No limiting construction was provided to the jury or applied by the judge. Accordingly, petitioner's death sentence violates the eighth and fourteenth amendments.

In Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) the United States Supreme Court saved Florida's use of an "especially heinous, atrocious, or cruel" aggravating circumstance from the charge that it was unconstitutionally vague on its face by holding that the aggravator was "construed" to be "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So.2d [1,1 9 [(1973)]." This narrowing construction was not properly applied in petitioner's case.

This Court has made clear that, in order for the "especially heinous, atrocious or cruel" aggravator to apply, there must be evidence of the defendant's "unnecessarily torturous" actions prior to the death of the victim. As this Court recently explained:

> [T]he prosecutor argued that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. We have stated that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984);

> Herzog v. State, 439 So.2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Rhodes v. State, _____ So.2d _____, No. 57, 842, slip op. at 7-8 (Fla., July 6, 1989) (emphasis added). Moreover, aggravating circumstances must be proved beyond a reasonable doubt, State v. Dixon, 283 So.2d 1, 9, and cannot be based on speculation or conjecture.

In Hamilton v. State, _____ So.2d _____, No. 72, 502 (Fla., July 27, 1989), this Court stated:

> Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Slip op. at 5.

In Mr. Spaziano's case, the trial judge failed to articulate and apply the limitations of Cartwright and Hamilton on the "heinous, atrocious or cruel" aggravating factor. Indeed, the approach rejected by the Supreme Court in Cartwright and this Court in Hamilton is precisely the approach Mr. Spaziano's trial judge and this Court employed.

The "heinous, atrocious or cruel" aggravator was the only aggravating factor argued to the jury (Sent. Tr. 15-16) and the only one on which they were instructed (Sent. Tr. 20). In arguing that the murder was especially heinous, atrocious or cruel, the prosecution relied totally on the testimony of Tony Dilisio. (Sent. Tr. 15-16), see Claim I, infra. As the defense argued, there was good reason to doubt the veracity and accuracy of Dilisio. (Sent. Tr. 17). The jury apparently must have agreed that the heinous, atrocious or cruel aggravating circumstance was not present given its life recommendation. The sentencing judge in overriding the jury's recommendation never explained what was unreasonable about the jury's finding. The judge even had to resort to speculation about what may have happened and how possibly the victim may have suffered. The judge's instructions and findings clearly violated both Cartwright and Hamilton.

In instructing the jury on the "heinous, atrocious or cruel" aggravator the judge merely defined those terms without providing any limiting construction or narrowing principle. (Sent. Tr. 20-21). Since the judge failed to limit the jury's discretion, he undoubtedly did not himself apply any limiting construction. Moreover, his findings indicate that he relied on vague, speculative characterizations of the murder as "atrocious" and "shockingly evil". (Resent. Rec. 203).

Further, the judge did not specifically find that the "heinous, atrocious or cruel" aggravator was proved beyond a

reasonable doubt. Nor did he explain his failure to give deference to the jury. There was no direct evidence of the manner in which the victim met her death. In finding the heinous, atrocious or cruel aggravator, the judge relied primarily on Dilisio's testimony concerning what Spaziano told Dilisio about the murder. However, the judge himself acknowledged that this testimony was open to question:

> It might be possible that, absent medical examiner verification of such butchering (the victim's body was found **24** months after her death and in an advanced state of deterioration) one should not put too great a reliance upon what the Defendant may have stated in braggadocio fashion to his young companion.

(Resent. Rec. 203). While thus admitting that the primary evidence supporting the heinous, atrocious or cruel aggravator was open to question, the judge nevertheless speculated that the victim had been tortured prior to her death. Id.

On appeal, this Court affirmed the trial court's findings concerning the heinous, atrocious or cruel aggravator, without inquiring into whether the trial judge had articulated and applied **any** narrowing principle. Spaziano II, 433 So.2d 508, 511. This Court's finding on appeal that the facts supported the judge's finding of the aggravator does not satisfy the Cartwright requirement that the sentencer's discretion be appropriately limited. Cartwright, 108 St. Ct. 1853, 1859. Nor did this Court require, as mandated by Hamilton, slip op. at 5, a basis in the

record "beyond speculation" for the findings concerning the heinous, atrocious or cruel aggravator.

Accordingly, Mr. Spaziano is entitled to relief under this Court's Hamilton opinion and the Supreme Court's standards in Maynard v. Cartwright. The Eighth Amendment and Fourteenth Amendment error here is plain.

CLAIM IX

BECAUSE MR. SPAZIANO'S SENTENCE IS BOTTOMED ON AN UNCONSTITUTIONAL CONVICTION, HIS DEATH SENTENCE IS ARBITRARY AND UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION AND THEIR FLORIDA COUNTERPARTS.

In Johnson v. Mississippi, 108 S. Ct. 1961 (1988), the Supreme Court established that the State may not use an unconstitutional conviction as a basis for an aggravating circumstance, and that where a prior conviction which forms the basis of an aggravating circumstance is later overturned, the death sentence cannot stand, see also Burr v. State, Case No. 71,234 (Fla., August 31, 1989).

Mr. Spaziano's sentence is bottomed upon two aggravating circumstances, one of which was established by virtue of his conviction of another offense. That conviction was per curiam affirmed by the Florida Second District Court of Appeal, but is currently under attack in the United States District Court for the Middle District of Florida, Case No. 89-638-CIV-ORL. The petition was filed well before this death warrant was signed. An

order to show cause why the petition should not be granted was issued on July **28, 1989,** a copy of which is appended hereto as Appendix "A". The pending federal habeas petition demonstrates the underlying basis for the unconstitutionality of the prior conviction and concomitant aggravating circumstance.

Obviously, this issue does not become fully ripe until a ruling is reached on that pending case. Until then, a stay of execution should be entered to preserve this Court's jurisdiction and to enable this Court to consider the claim raised herein.

CLAIM X

THE FAILURE OF THE FLORIDA COURTS TO CONSIDER MR. SPAZIANO'S ORGANIC BRAIN DAMAGE IN MITIGATION OF THE CRIME VIOLATES MR. SPAZIANO'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION AND THE FLORIDA COUNTERPARTS.

Mr. Spaziano's original sentencing proceeding undoubtedly violated Lockett and Hitchcock, see his pending 3.850 motion. Moreover, his Gardner remand proceeding was conducted at a time when all concerned based on existing precedent understood that the proceeding was designed solely to allow a defendant to rebut confidential and undisclosed portions of the pre-sentence investigation (PSI). Because the PSI did not contradict Mr. Spaziano's organic brain damage, all believed that such evidence could not be presented.

This Court has continued to uphold Mr. Spaziano's sentence, despite the fact that he has not been offered a meaningful opportunity for the sentencer to consider the evidence of his

organic brain damage. The Florida courts continued rejection of this evidence is not supported by any valid reason and violates his Eighth and Fourteenth Amendment rights to a reliable determination that death is the appropriate sentence in his case.

Not only have the Florida courts refused to consider the evidence of organic brain damage, but so too have they refused to consider other non-statutory mitigating evidence. For example, the pre-sentence investigation (PSI) contained non-statutory mitigation that was not even mentioned by the sentencing judge. The mitigation included Mr. Spaziano's near fatal automobile accident, mild depression, a personality change, a mental hospitalization, low intelligence, severe abuse by a motorcycle gang, his "attentive[ness]" as a father, etc. Also, at the resentencing hearing, Mr. Spaziano argued that his good jail behavior ought to be considered. See Skipper v. South Carolina, 476 U.S. 1, (1986). Despite all of this, the sentencing order concludes that there are no mitigating circumstances. The refusal of the state courts to consider this evidence violates the Eighth and Fourteenth Amendments. Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). Given this Court's special responsibility to insure reliability and preclude arbitrariness in the imposition of a death sentence, it must act to correct this error.

CLAIM XI

MR. SPAZIANO'S DEATH SENTENCE VIOLATES HITCHCOCK V. DUGGER, 481 U.S. 383 (1987)

Mr. Spaziano is fully aware that this Court nas held that the proper method to raise claims under Hitchcock v. Duaaer, 481 U.S. 373 (1987) is through a Rule 3.850 motion. Hall v. State 541 So.2d 1125 (Fla. 1989); Meeks v. State, No. 71,947 (Fla. June 22, 1989). Mr. Spaziano did just as this Court directed and filed his Hitchcock claims in a Rule 3.850 motion. He was then told by the trial court that he abused the writ.

From the time Hitchcock was decided until May, 1989 when Hall was decided, the routine and approved procedure for raising Hitchcock claims was through a habeas corpus petition. See e.q., Thompson v. Duaaer, 515 So.2d 173 (Fla. 1987), cert. denied, 108 S.Ct. 1224 (1988); Demps v. Duaaer, 514 So.2d 1092 (Fla. 1987); Delap v. Duaaer, 513 So.2d 659 (Fla. 1987); Rilev v. Wainwriaht, 517 So.2d 656 (Fla. 1987); Tafero v. Duqqer, 520 So.2d 287 (Fla. 1988); Cooper v. Duqqer, 526 So.2d 900 (Fla. 1988); Downs v. Duqqer, 514 So.2d 1069 (Fla. 1987); Zeiqler v. Duaaer, 524 So.2d 419 (Fla. 1988); Meeks v. Duaaer, No. 71,947 (Fla. June 22, 1989).

Mr. Spaziano relied on this procedure until Hall was decided, which case instructed litigants to file such claims in successor Rule 3.850 motion. Mr. Spaziano did just that and was told he abused the writ by failing to file his claims earlier,

when the proper procedure earlier was to raise such claims through a petition for habeas corpus.

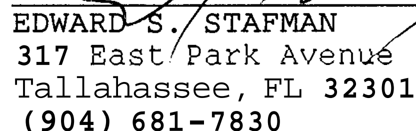
If Mr. Spaziano has indeed abused the writ by filing his <u>Hitchcock</u> claim in the manner directed by this Court, then this Court ought to hear his claims, as it has the claim of every other death row inmate, by petition for writ of habeas corpus.

Mr. Spaziano adopts and incorporates herein his brief on appeal from the denial of Rule 3.850 relief as his argument on the merits in support of this claim.

VI. CONCLUSION

For the foregoing reasons, Mr. Spaziano respectfully requests that the petition for habeas corpus be granted and he be given the relief requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was furnished by ~~[illegible]~~ Federal Express to Kellie Anne Nielan, Assistant Attorney General, 1825 North Atlantic, Number 101, Daytona Beach, Florida 32771, this 7th day of September 1989.

EDWARD S. STAFMAN