IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Petitioner,

vs. CASE NO. 74,675

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100(h), responds to Spaziano's Petition for Writ of Habeas Corpus, filed on or about September 8, 1989, and moves this court to deny all requested relief for the reasons set forth in the instant pleading.

I. PRELIMINARY STATEMENT

The facts of this case as set forth in this court's prior opinions will be specifically relied upon by respondent. See Spaziano v. State, 393 So.2d 1119 (Fla. 1981); Spaziano v. State, 433 So.2d 508 (Fla. 1983); Spaziano v. State, 489 So.2d 720 (Fla. 1986); Spaziano v. State, 545 So.2d 843 (Fla. 1989). The procedural history is set forth in the state's response to Spaziano's motion for post-conviction relief. See Case No. _____, pending contemporaneously with the instant petition.

I. THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED BECAUSE SPAZIANO HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANT OF APPELLATE COUNSEL, AND AS TO THE OTHER CLAIMS, HAS IMPROPERLY RAISED ISSUES THAT

EITHER COULD HAVE BEEN RAISED ON APPEAL OR HAVE ALREADY BEEN RESOLVED AGAINST HIM BY THIS COURT.

A. PROCEDURALLY BARRED CLAIMS:

Of the claims presented, all but those involving ineffective assistance of appellate counsel are improperly raised. This court has consistently held that habeas corpus cannot be used as a vehicle for presenting issues which should have been raised at trial, on direct appeal, or in motions for post-conviction relief; or for relitigating issues already actually decided on direct appeal. See, McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Witt v. State, 465 So.2d 510 (Fla. 1985); Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986); Kennedy v. Wainwright, 484 So.2d 1235 (Fla. 1986); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Parker v. Dugger, 537 So.2d 969 (Fla. 1989); Hall v. State, 541 So.2d 1139 (Fla. 1989); White v. Dugger, 511 So.2d 554 (Fla. 1987). Moreover, habeas corpus should not be used as a vehicle to circumvent the two year time period of Florida Rule of Criminal Procedure 3.850, which is obviously being done in this case. Accordingly, the state maintains that claims not alleging ineffectiveness of appellate counsel should be stricken or summarily denied. In light of the recent decision of Harris v. Reed, 109 S.Ct. 1038 (1989), respondent asks this court for a "plain statement" as to all barred claims. Each claim will be briefly addressed.

CLAIM I

THE RECENT CASE OF STOKES V. STATE, 14 F.L.W. 349 (FLA. JULY 6, 1989) DOES NOT REQUIRE THAT SPAZIANO'S CONVICTION OR SENTENCE BE SET ASIDE.

Spaziano contends that the recent case of Stokes v. State, 14 F.L.W. 349 (Fla. July 6, 1989), requires that his conviction and/or sentence be set aside because the admission of Anthony Dilisio's hypnotically refreshed testimony violates the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and their Florida counterparts. Spaziano states that habeas corpus jurisdiction is appropriate to consider constitutional questions which directly challenge a prior ruling of the court when those claims are premised on changes in the law, and it is appropriate for this court to consider the claim if a petitioner asserts that new developments warrant further review. Respondent contends that Spaziano's claim is not properly before this court in .a petition for writ of habeas corpus and is procedurally barred as well.

Collateral attacks on trial court judgments and sentences may only be brought by 3.850 motions for post-conviction relief. Rose v. Dugger, 508 So.2d 321 (1987). An application for writ of habeas corpus shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. Fla.R.Crim.P. 3.850; Parker v. Dugger, 537 So.2d 969 (Fla. 1989). Appellate

courts are reviewing courts, not fact-finding courts. Hall v. State, 541 So.2d 1139 (Fla. 1989). Habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised or should have been raised on direct appeal, which were waived at trial, or which could have, should have, or have been raised in post-conviction proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987).

In terms of the law upon which Spaziano is basing his claim for relief, it must first be noted that Stokes, supra, is not a change or new development. It is nothing more than a re-examination of the issue originally decided in Bundy v. State, 471 So.2d 9 (Fla. 1985), with this court reaching the same conclusion it had in Bundy. The Bundy court also specifically held that holding would not be given retroactive application. Id. at 18. Further, both cases involve a state law evidentiary issue rather than a constitutional claim.

In terms of the procedural history of this case, it must first be recognized that there was no objection to the testimony in issue at trial, and defense counsel in fact vehemently objected to any mention of hypnosis. It must further be recognized that Spaziano has had two direct appeals from his sentence, and at neither time was this issue raised. In addition, Spaziano has applied for post-conviction relief in the trial court three times. On appeal from the denial of Spaziano's first 3.850 motion for post-conviction relief, in which Spaziano thoroughly argued Bundy, this court specifically rejected his contention that the state's use of hypnotically refreshed

testimony violated his right to a fair trial under the United States Constitution. See Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986).

In sum, Spaziano is attempting to utilize a recent case which merely reexamines a state law evidentiary rule which was formulated over four years ago, to bring before this court a constitutional claim which could have been raised at trial, and was in fact before this court in his first motion for post-conviction relief. As this court recently stated:

> The credibility of the criminal justice system depends upon both fairness and finality. The time limitation of rule 3.850 accommodates both interests. It serves to reduce piecemeal litigation and the assertion of stale claims while at the same time preserves the right to unlimited access to the courts where there is newly discovered evidence or where there have been fundamental constitutional changes in the law with retroactive application.

Johnson v. State, 536 So.2d **1009** (Fla. **1988).** Spaziano's claim does not fall within the two exceptions prescribed by that: rule, and he should not be permitted to flaunt Florida's procedural rules. The instant claim is improperly raised in a petition for writ of habeas corpus and procedurally barred as well.

Respondent would further point out that while Spaziano has attacked the reliability of hypnotically induced testimony in general, to this day Dilisio's testimony remains unrefuted, by either Dilisio himself, Spaziano, the other evidence adduced in the case, or any subsequent events. Spaziano knew the victim (TR

401-02). Spaziano had taken another person out to the same place where the victim was found (R 590-600). Even prior to hypnosis, Dilisio stated that Spaziano had told him how he would pick up women and bring them to the clubhouse to "pull a train" for the club, and take them out and stab them, cut off their breasts, poke their eyes out, make a disgusted mess of their faces, and kill them. As Spaziano said, "that's my style." (See Appendix L to first motion to vacate judgment and sentence.) Spaziano was also convicted of forcible carnal knowledge and aggravated assault stemming from an incident where a sixteen year-old girl was raped and had her eyes slashed. Further, the record does not even conclusively demonstrate that Dilisio's recollection of events was actually hypnotically induced. Defense counsel objected to the mention of hypnosis at trial. Even in the reports submitted in support of Spaziano's first motion for post-conviction relief, one of the experts bases his findings on the "assumption" that Dilisio was hypnotized, while the other notes that no effort was made to even determine whether the witness was hypnotized. See, Appendix H, p. 3 and Appendix J, p. 11 to first motion to vacate.

CLAIM II

THIS COURT CANNOT VACATE ITS EARLIER DECISION THAT THE JURY OVERRIDE WAS PROPER IN THIS CASE.

Spaziano contends that in light of this court's recent decision in Cochran v. State, F.L.W. 406 (Fla. July 27, 1989), it should vacate its earlier decision in Spaziano v. State, 433 So.2d 508 (Fla. 1983) that the jury override was proper in this

case. The jury override was thoroughly addressed on Spaziano's direct appeal, and any attempt to relitigate that issue in the instant petition is improper. White, supra. Further, this court's finding that the jury override was proper is the law of the case, even if it might not have been sustained today. Johnson v. Duqqer, 523 So.2d **161** (Fla. **1988).** Finally, the United States Supreme Court has determined that the jury override in the instant case did not result in arbitrary or discriminatory application of the death penalty. Spaziano v. Florida, **468** U.S. **447 (1984).**

This court specifically stated in Cochran that the override in Spaziano was consistent with Tedder v. State, 322 So.2d **908** (Fla. 1975). It noted that the trial court had before it evidence in aggravation not considered by the jury. Cochran at **407.** Respondent would further point out that the additional evidence the trial court had before it was prior convictions for forcible carnal knowledge and aggravated assault, where the victim's eyes had been slashed. Not only was this aggravating factor not considered by the jury, the lack of it was argued in mitiqation. Defense counsel specifically argued:

> If anything speaks for a person on trial for his life, it's his prior record. The prior record submitted to you by this Defendant, and unrebutted by the State, is that back eight years ago he had a couple of larceny charges lodged against him.
>
> The State has not seen fit, I assume, because they have nothing to aggravate in addition to what you already heard, to put on any additional testimony.

> The Court will instruct you what items are admissible, or what may be considered by you in aggravation or in mitigation of this offense. One of the things you may consider in mitigation is the lack of former criminal involvement.
>
> There simply is no evidence that this Defendant has ever been involved in any kind of crime or offense where physical harm or violence was done to any person. This, as far as the law is concerned, is a first and only offender.

(TR **18-19**, Vol. VII). Thus, not only did the trial judge in the instant case have additional evidence in support of aggravation, that same evidence negates one factor the jury may well have found in mitigation.

CLAIM III

SPAZIANO HAS FAILED TO DEMONSTRATE THAT APPELLATE COUNSEL WAS INEFFECTIVE.

To warrant relief, Spaziano must demonstrate, under Strickland v. Washington, **466** U.S. **668 (1984),** and Downs v. Wainwright, **476** So.2d **654** (Fla. **1985),** not only that appellate counsel performed deficiently, acting as no reasonable attorney would have under the circumstances, but also that such deficient performance prejudiced him to the extent that it can be said that the result of his appeal has been rendered unreliable. As to the latter, Spaziano must show that there is a reasonable probability that, absent these errors, this court would have reversed his sentence. Spaziano has failed to carry his burden in this regard, and the instant claim for relief must be denied.

Spaziano contends that appellate counsel was ineffective for failing to argue and explain to this court that there was a reasoned basis for the jury's life recommendation. The record demonstrates that appellate counsel thoroughly argued the applicability of Tedder v. State, 322 So.2d 908 (Fla. 1975). The majority of this court found pursuant to Tedder, that the facts suggesting that the death sentence be imposed over the jury's recommendation of life, including the prior conviction of a violent felony which the jury did not have the opportunity to consider, met the clear and convincing test to allow override of the jury's recommendation. Spaziano, 433 So.2d at 511. Justice McDonald on the other hand, dissented because the jury recommended life, and specifically stated that the jury could have concluded a life sentence was appropriate based on mental mitigating factors. Id. at 512. In a motion for rehearing, appellate counsel focused on Justice McDonald's dissent and the "reasonable basis" for the jury's life recommendation. See Motion for Rehearing, pp. 7-8.

First, it is apparent from this court's opinion that it considered all factors in finding the override appropriate. Further, appellate counsel no doubt found it more strategic to concentrate on there not being sufficient facts suggesting that the death sentence be imposed over the jury's recommendation of life, rather than arguing the basis for the recommendation of life. As noted under point 11, supra, the jury's recommendation may also have been based on what defense counsel found to be a very important factor where a person is on trial for his life,

and that is no record of prior violent crimes. As also noted under point 11, this mitigating factor is not present in the instant case, and Spaziano's prior conviction involved forcible carnal knowledge as well as slashing the victim's eyes with a knife.

Spaziano has failed to demonstrate that counsel's performance was deficient, as the jury override issue was thoroughly argued on direct appeal. Indeed, appellate counsel was even successful in obtaining certiorari review from the United States Supreme Court on this issue. Spaziano v. Florida, **468** U.S. **447 (1984).** Spaziano has also failed to demonstrate prejudice, as it is apparent that this court considered all relevant factors in finding the jury override appropriate. Strickland, supra.

CLAIM IV

SPAZIANO WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL BECAUSE APPELLATE COUNSEL FAILED TO CHALLENGE SPAZIANO'S DEATH SENTENCE ON THE GROUND THAT IT WAS DISPROPORTIONATE.

As fully argued in the next point, this court undertakes a proportionality analysis in all capital cases as a matter of course so counsel could not have been ineffective for not raising such issue.

CLAIM V

THE CLAIM THAT SPAZIANO'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE AND INAPPROPRIATE AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS NOT

COGNIZABLE AND IS PROCEDURALLY BARRED.

Habeas corpus is not the vehicle for obtaining a second appeal of issues decided on direct appeal. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Proportionality review is an inherent aspect of this court's review in all capital cases. Booker v. State, 441 So.2d 148 (Fla. 1983). Such review has been previously undertaken by this court in this case. This court's original affirmance of Spaziano's sentence of death for murder implicitly found the sentence appropriate to the crime under proportionality principles. Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). Such issue should not be revisited on habeas corpus. Foster v. Wainwright, 457 So.2d 1372 (Fla. 1984). Proportionality review hardly encompasses reopening every prior death case when a new one is decided to determine whether a previous decision is consistent with a later one. Sullivan v. State, 441 So.2d 609 (Fla. 1983). Proffitt v. State, 510 So.2d 896 (Fla. 1987) hardly stands for such proposition. Proffitt involved a resentencing proceeding directed by the federal courts, not a habeas proceeding. The present case, in any event is more akin to Mason v. State, 438 So.2d 374 (Fla. 1983), cited in Proffitt, in which a prior violent felony for attempted murder and rape was found to be of importance. Unlike Proffitt, Spaziano has a history of violent behavior and had clear criminal intentions at the time of the murder.

Like Proffitt, Brown v. State, 367 So.2d 616 (Fla. 1979), involved a murder during the course of a robbery in which Brown,

unlike his conspirators, wanted to leave the victim alive in an isolated area. The codefendant in Swan v. State, 322 So.2d 485 (Fla. 1975), received a life sentence and death again occurred in connection with a robbery or burglary. Unlike Spaziano, a sociopath, the defendant in Jones v. State, 332 So.2d 615 (Fla. 1976) suffered paranoid pyschosis with hallucinations. Burch v. State, 343 So.2d 831 (Fla. 1977) involved a "frenzied" stabbing attack by a mentally disturbed defendant as did Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), in which the murder also occurred during a robbery. Spaziano's acts are akin to the acts of executed killer Ernest John Dobbert, involving deliberate mutilation and torture, in which case the jury had also recommended life imprisonment. Dobbert v. State, 328 So.2d 433 (Fla. 1976). Spaziano, no more than Dobbert should escape his just fate. Even the undertaking of another belated proportionality analysis could not aid Spaziano.

CLAIM VI

THE CLAIM THAT THE FLORIDA SUPREME COURT'S APPLICATION OF ITS STANDARDS GOVERNING JURY OVERRIDES VIOLATE THE EIGHT AND FOURTEENTH AMENDMENTS BECAUSE IT FAILS TO ALLOW FOR THE CONSIDERATION OF MERCY OR SYMPATHY IS BARRED.

Spaziano, in essence, contends that if no mitigating circumstances were, indeed, found that the jury recommended a life sentence based on mercy and that the trial judge's override of that recommendation violates the Eighth and Fourteenth Amendments.

On direct appeal from resentencing Spaziano argued that the jury felt that although the evidence was sufficient to convict it was insufficient to warrant imposition of the extreme penalty and returned a life recommendation as an extension of mercy as a safeguard against the overall weakness of the evidence and that the sentence of death was imposed in violation of the Eighth and Fourteenth Amendments. (Initial Brief of Appellant on Appeal from Resentencing, p. 28-31). This court found that the clear and convincing test of Tedder v. State, 322 So.2d 908 (Fla. 1975) to allow override of the jury's recommendation was met. Spaziano v. State, 433 So.2d 508 (Fla. 1983). Florida's jury override system was subsequently upheld by the United States Supreme Court. Spaziano v. Florida, 468 U.S. 447 (1984). Habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised on direct appeal. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

Even if this claim could be considered Spaziano is entitled to no relief. In Franklin v. Lynaugh, 108 S.Ct. 2320 (1988)(plurality opinion) the court rejected the claim that a capital defendant has a constitutional right to have a sentencing jury consider as a mitigating factor "residual doubts" about his guilt. Nothing precluded the sentencer, the trial judge in this case from considering mercy, in any event.

Certiorari was recently denied by the United States Supreme Court in Britz v. Illinois, No. 88-6078, 44 Cr.L.Rptr. 4174 (Feb. 1, 1989); the Court declining to review or vacate a death sentence in which a jury instruction was given that sympathy

should not influence a decision regarding the imposition of the death penalty. In Saffle v. Parks, No. **88-1264**, certiorari was granted to review the decision below that an instruction to the capital sentencing jury to avoid sympathy in imposing sentence did create an impermissible risk that the jury did not consider all mitigating factors alleged by the defense. **860** F.2d **1545** (10th Cir. **1988**). Thus, it is easy to discern the likely direction the Court is headed, which is certainly not in Spaziano's favor. Such pending cases do not constitute a change in the law, in any event, and Spaziano cannot bootstrap onto them, especially where there is nothing the death penalty statute or in this record to reflect that the trial judge failed to consider *any* evidence offered by Spaziano in mitigation.

CLAIM VII

THE CLAIM THAT THE BURDEN WAS SHIFTED TO SPAZIANO TO PROVE THAT A JURY RECOMMENDATION OF LIFE WAS PROPER ONLY IF THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES IS NOT COGNIZABLE AND IS PROCEDURALLY BARRED.

This claim is properly raised by Rule **3.850** motion and it is clear that it is now being raised on habeas corpus to circumvent the two year time period in Rule **3.850**. See, Adams v. State, **543** So.2d 1244, **1249** (Fla. **1989**).

The claim that the jury and the trial judge believed that a recommendation of life was only reasonable if the mitigating circumstances outweighed the aggravating circumstances is further procedurally barred because no objection to the instruction to

the jury was made at trial and the point was not raised on direct appeal. Adams v. State, 543 So.2d at 1249. Such claim obviously would not be raised on the first direct appeal as to the jury, since the jury did recommend life, but as far as the trial judge's understanding of weighing aggravating and mitigating factors is concerned, it is clear that such claim could have been raised at the latest on the second direct appeal to this court after resentencing. In his second appeal Spaziano complained that the death sentence was impermissibly imposed over the jury's recommendation of life and had the tools to argue that the trial judge believed that the burden was improperly shifted to Spaziano to prove that the mitigating circumstances must outweigh the aggravating circumstances by virtue of such decisions as Arango v. State, 411 So.2d 172 (Fla. 1982), which was decided during the pendency of appeal and Mullaney v. Wilbur, 421 U.S. 684 (1975).

The granting of certiorari by the United States Supreme Court in Blystone v. Pennsylvania, No. 88-6222 provides no basis for delay in this case. The Pennsylvania death penalty statute is different that Florida's statute and mandates that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance...and no mitigating circumstance." Comm. v. Blystone, 549 A.2d 81 (Pa. 1988). There is no similarity in Florida's statute or the present jury instructions and any decision in Blystone would have no ramifications as to this state. Boyde v. California, No. 88-6613 is also dissimilar to the circumstances in the present case. In Boyde the trial judge instructed the penalty phase jury that

"[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances you shall impose a sentence of death," and the prosecutor repeatedly stressed to the jurors during both voir dire examination and the penalty phase argument that they must impose the death sentence if aggravation preponderated by even "a slight outweigh" regardless of whether they personally found such sentence not otherwise warranted by the evidence. Boyde v. People, 46 Cal.3d 212, 250 Cal.Rptr 83, 758 P.2d 25 (1988).

Even if this claim was cognizable no relief could be granted. The jury recommended a life sentence and there is absolutely nothing in the record and nothing is pointed to to demonstrate that the trial judge improperly weighed the factors in aggravation and mitigation. The judge is presumed to know the law and would not have been misled at resentencing by earlier jury instructions that were, in any event, correct. The jury was preliminarily instructed at the penalty phase that:

> You are instructed with this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if *any*. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(TR Penalty Phase, Jan. 26, 1976, p. 12)

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(TR Penalty Phase, Jan. 26, 1976, p. 20).

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:

(TR Penalty Phase, Jan. 26, 1976, p. 21).

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

> Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be wholly disregarded.
>
> If an aggravating circumstance has been established, you should consider all the evidence tending to establish that circumstance and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.
>
> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

(TR Penalty Phase, Jan. 26, 1976, p. 22-23).

These standard instructions taken as a whole did not allocate the burden of proof. The jury was first told that the state must establish the existence of aggravating circumstances beyond a reasonable doubt before the death penalty could be imposed and that, in essence, such circumstances must outweigh the mitigating circumstances. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). The trial judge also informed the jury that they were duty-bound to recommend a sentence of life imprisonment if, in their opinion, the aggravating factors found were not

"sufficient" to justify imposing the death penalty. "In sum, the sentencing instructions would encompass the broadest exercise of a jury's discretion in mercifully recommending a life sentence." Adams v. Wainwright, 764 F.2d 1356, 1368-1369 (11th Cir. 1985).

The sentencing order also reflects no impermissible burden-shifting. The judge indicated that:

> This court in reaching its sentence has considered the facts heard during the trial and during the separate sentencing proceeding, the evidence of prior conviction presented by the State on May 28, 1981, the new PSI Report (other than portions stricken, see record of hearing held May 28, 191), has carefully considered the arguments presented by counsel, and has weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of jury, finds that "sufficient aaaravatina circumstances" exist to justify the death sentence and that the mitigating circumstances are insufficient to out weigh such aggravating circumstances and that a sentence of death should be imposed in this case. The Court makes the following findings of fact upon which the sentence of death is based:
>
> There exists in this case two aggravating circumstances as contemplated by Section 921.141(5), Florida Statutes, viz, subsections (5)(b) and (5)(h)...(Emphasis added)

(TR Resentencing, p. 201)

> This Court has considered the other statutory categories of aggravating circumstances and finds them inapplicable.
>
> This Court has also considered each of the statutory categories of

> mitigating circumstances and finds that there was no evidence presented during trial or found during the presentence investigation that would give rise to any such mitigating circumstances.
>
> It is the finding and judgment of this Court that the Defendant be put to death in the manner and means provided by law (Section 922.10, F.S.). The Court informed the Defendant of his right to appeal from this sentence.

(TR Resentencing, p. 203-204).

The transcript of the second penalty phase proceeding and actual sentencing also reflect no misunderstanding on the part of the judge. The instant claim is purely speculative.

CLAIM VIII

> THE CLAIM THAT THE AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WAS IMPROPERLY FOUND IN VIOLATION OF MAYNARD V. CARTWRIGHT AND HAMILTON V. STATE IS NOT COGNIZABLE AND IS PROCEDURALLY BARRED.

Spaziano contends that the aggravating circumstance of heinous, atrocious and cruel is vaguely worded and impermissible under the Eighth and Fourteenth Amendments and that the jury was not provided with and courts have not articulated a narrowing principle. This contention is properly raised by way of a Rule 3.850 motion, not by habeas corpus. Moreover, this claim concerns matters that Spaziano knew or should have known at trial or upon filing his initial 3.850 motion. Harich v. State, 542 So.2d 980, 981 (Fla. 1989). Spaziano attacked the application of the heinous, atrocious and cruel factor in his first direct

appeal as vague and overbroad (Initial Brief of Appellant, p. **107-110).** Although Spaziano was resentenced, on his appeal from resentencing he argued only that this factor was not proven beyond a reasonable doubt (Initial Brief of Appellant on Resentencing, p. **22-26).** The issue of the constitutionality of this factor was then raised by Spaziano in his first Rule **3.850** motion but he declined to brief it on appeal therefrom (Brief of Appellant on first **3.850** appeal, p. **140).** Such claim is procedurally barred as it should have been raised in Spaziano's second direct appeal from resentencing but was abandoned. Adams v. State, **543** So.2d **1244, 1249** (Fla. **1989).** Habeas corpus is not a vehicle for obtaining a second appeal of issues that should have been raised at trial, on direct appeal or in post-conviction proceedings. White v. Dugger, **511** So.2d **554, 555** (Fla. **1987).**

Even if the claim could be entertained no relief could be accorded Spaziano. In Maynard v. Cartwright, **108** S.Ct. **1853 (1988)** the Court relied upon its early decision in Godfrey v. Georgia, **446** U.S. **420 (1980),** to hold that Oklahoma's aggravating factor of "especially heinous, atrocious, or cruel" was unconstitutionally vague. Although both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel," there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is

possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious or cruel.

The Supreme Court of Florida has narrowly construed the phrase "especially heinous, atrocious or cruel" *so* that it has a more precise meaning than the same phrase has in Oklahoma. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) this court stated:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). This court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g. Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986); Jackson v. State, 498 So.2d 906 (Fla. 1986); Teffeteller v. State, 439 So.2d 840 (Fla. 1983). That Proffitt continues to be good law today is evident from Maynard v.

Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See, Maynard v. Cartwright, 108 S.Ct. at 1859. Smalley v. State, 14 F.L.W. 342 (Fla. July 6, 1989).

This case is distinguishable from Hamilton v. State, 14 F.L.W. 403 (Fla. July 27, 1989). Although the trial judge in Hamilton found that the crimes were heinous, atrocious or cruel, there was no basis in the record for this finding as neither the state nor the trial court offered any explanation of the events of that night beyond speculation. In the present case Spaziano bragged to Dilisio of how he tortured his victims, cutting their breasts and removing their vaginas. The body seen by Dilisio at the dump indeed had cuts in such areas. Dilisio's testimony was credible enough to convict Spaziano and could certainly form the basis for a sentence.

CLAIM IX

THE CLAIM THAT SPAZIANO'S SENTENCE IS BOTTOMED ON AN UNCONSTITUTIONAL CONVICTION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE FLORIDA AND UNITED STATES CONSTITUTION IS NOT COGNIZABLE.

Because the violent felony conviction used to find the aggravating factor of conviction of a felony involving violence in imposing Spaziano's death sentence is now being challenged by him in the United States District Court for the Middle District of Florida, Case No. 89-638-CIV-ORL Spaziano contends that a stay of execution is in order. It is clear that such felony upon which the aggravating factor was found should have been attacked

at trial, raised on direct appeal or in Spaziano's previous motions to vacate judgment and sentence. Eutzy v. State, 541 So.2d 1143 (Fla. 1989).

CLAIM X

THE CLAIM THAT THE FLORIDA COURTS FAILED TO CONSIDER SPAZIANO'S BRAIN DAMAGE IN MITIGATION OF THE CRIME VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES AND FLORIDA CONSTITUTIONS IS PROCEDURALLY BARRED.

In his initial Florida Rule of Criminal Procedure 3.850 motion and in his second such motion Spaziano contended that mitigating evidence concerning his mental condition was not introduced at sentencing. This court previously indicated that the life recommendation of the jury was in all probability based on a finding that Spaziano was entitled to the statutory mental mitigating factors based on their observance of him and the bizarre nature of the crime. Spaziano v. State, 433 So.2d 508, 512 (Fla. 1983)(McDonald, J., dissenting). Additionally this court indicated that the trial judge on resentencing had considered matters in the PSI revealing the automobile accident which Spaziano was involved in and the accident's effect on his mental condition. Spaziano v. State, 545 So.2d 843, 845 (Fla. 1989). Indeed, the PSI reveals that at age twenty, he was struck by an automobile as a pedestrian and was hospitalized for a long period of time. He suffered severe head injuries and the left side of his face was paralyzed for a while. He voluntarily admitted himself to the Rochester State Hospital for evaluation as a result of the head injuries, complaining of mild depression

and according to family members, exhibiting a slow personality change (Record on resentencing p. 209) This precise issue has twice been before this court. The issue as now presented is but a variation of Claim XI raised herein and presently pending on appeal before this court from the denial of relief on Spaziano's third Rule 3.850 motion. Habeas corpus may not be used to obtain an additional appeal of issues which have previously been raised in post-conviction proceedings.

The words "organic brain damage" were first invoked by Spaziano in his first 3.850 motion in which he contended that he was thereby incompetent to stand trial and to direct trial counsel not to present a psychiatric defense at sentencing. This court specifically rejected such contention finding that counsel was not ineffective in failing to raise competency as an issue. Spaziano v. State, 489 So.2d 720, 721 (Fla. 1986). Spaziano now contends for the first time that the sentencer was precluded in violation of Lockett v. Ohio, 438 U.S. 586 (1978), and Hitchcock v. Duqqer, 481 U.S. 393 (1987), from considering evidence of his organic brain damage, despite the fact he was not examined by mental health experts and such theory was not even hypothesized until 1984. Having been raised in the context of a competency/sentencing claim, the present contention could certainly have been raised in the context of excluded nonstatutory mitigating circumstances under Lockett at the time of filing the first rule 3.850 motion. No relief could have been obtained at that time in any event since the obvious strategy of counsel at resentencing was to prevent Spaziano's later violent

felony from becoming known; Spaziano did not want evidence of his mental health admitted and it was before the judge in the PSI, in any event. See, Eutzy v. State, 536 So.2d 1014 (Fla. 1989). Habeas corpus is not a vehicle for obtaining additional appeals of issues wh ch should have been raised in post-conviction proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987). Moreover, the 1984 evaluations of Dr. Harry Krop and Dr. James Vallely do little more than add the label "organic personality disorder" to Spaziano's medical history and problems which were well known to the judge at the time of sentencing. See, (Appellant's Initial Brief, Point V, on appeal from the denial of the first 3.850 motion).

The simple fact that the sentencing order indicates there was no mitigating evidence does not mean that evidence in the PSI or the resentencing hearing was not considered. Indeed the judge's sentencing order indicates that he "has carefully considered the arguments presented by counsel, and has weighed the aggravating and mitigating circumstances and, notwithstanding the recommendation of jury, finds that sufficient aggravating circumstances exist to justify the death sentence and that the mitigating circumstances are insufficient to outweigh such aggravating circumstances..." (Record on resentencing, p. 201). The only reasonable conclusion is that the trial judge found at least some mitigating factors to be present but that they were not compelling or were outweighed by the aggravating factors. See, Parker v. Dugger, 876 F.2d 1470, 1475 (11th Cir. 1989). A trial judge's failure to articulate in his sentencing order what

weight he was giving to nonstatutory evidence does not constitute a Hitchcock violation. Harich v. State, 542 So.2d 980, 981 (Fla. 1989).

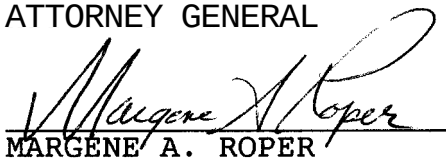
CLAIM XI

THE CLAIM THAT SPAZIANO'S DEATH SENTENCE VIOLATES HITCHCOCK V. DUGGER, 481 U.S. 393 (1987) IS NOT COGNIZABLE ON HABEAS CORPUS.

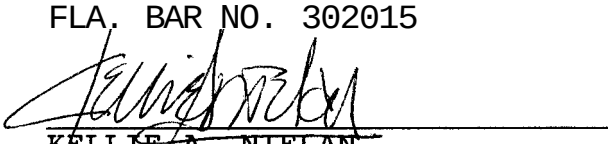
This court has made clear in recent opinions that the proper method to raise claims under Hitchcock v. Dugger, 481 U.S. 393 (1987) is through a Florida Rule of Criminal Procedure 3.850 motion. Hall v. State, 541 So.2d 1125 (Fla. 1989); Meeks v. State, No. 71,947 (Fla. June 22, 1989). Spaziano has raised an alleged Hitchcock claim in such motion and taken an appeal to this court from the denial of such motion. If the trial court incorrectly decided that he had abused the writ then the proper remedy is an appeal not a habeas petition.

Respecfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



MARGENE A. ROPER
FLA. BAR NO. 302015



KELLIE A. NIELAN
FLA. BAR NO. 618550
ASSISTANT ATTORNEYS GENERAL
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4996

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Habeas Corpus has been furnished by U.S. Mail and FAX to Edward S. Stafman, Esquire, counsel for petitioner, 317 East Park Avenue, Tallahassee, FL 32301, this 11th day of September, 1989.

Margene A. Roper

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL