IN THE SUPREME COURT OF FLORIDA

JOSEPH ROBERT SPAZIANO,

Appellant,

v. CASE NO. 73,874

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SUMMARY DENIAL OF POST CONVICTION RELIEF OF THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE:

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 7

ARGUMENT

THE TRIAL COURT PROPERLY FOUND THE INSTANT CLAIMS PROCEDURALLY BARRED 8

CONCLUSION 16

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES: **PAGES:**

Agan v. State,
15 F.L.W. S209 (Fla. April 2, 1990).....8,10

Clark v. State,
533 So.2d 1144 (Fla. 1988).....8

Demps v. State,
515 So.2d 196 (Fla. 1987)..... 8,10

Hall v. State,
541 So.2d 1126 (Fla. 1989).....8

Sireci v. State,
502 So.2d 1221 (Fla. 1987).....10,11

Spaziano v. Dugger,
15 F.L.W. S151 (Fla. March 15, 1990).....1,10

Spaziano v. State,
433 So.2d 511 (Fla. 1983).....1

Spaziano v. State,
545 So.2d 843 (Fla. 1989).....10

State v. Meneses,
392 So.2d 905 (Fla. 1981).....11

OTHER AUTHORITES:

Fla.R.Crim.P. 3.850.....8

STATEMENT OF THE CASE AND FACTS

Appellee rejects appellant's statement of the case and facts as it contains nonrecord material, omits record references at certain points, and at other points is more in the form of subjective argument rather than an objective statement. For purposes of this appeal, appellee sets forth the following statement of the case and facts:

This is the sixth time Spaziano has been before this court. The facts underlying Spaziano's conviction are set forth in this court's opinion on the direct appeal of Spaziano's conviction. See Spaziano v. State, 433 So.2d 511 (Fla. 1983). The course of prior proceedings in this court is set forth in this court's opinion affirming the denial of Spaziano's third motion for post-conviction relief and denying Spaziano's petition for a writ of habeas corpus. See Spaziano v. Dugger, 15 F.L.W. S151 (Fla. March 15, 1990). The instant case involves an appeal from the trial court's order summarily denying Spaziano's fourth motion for post-conviction relief. The instant motion was filed on or about November 6, 1989 (R 82-145). At that time, an appeal from the denial of Spaziano's third motion for post-conviction relief and a petition for writ of habeas corpus were pending in this court. See Spaziano v. Dugger, Case No. 74,675 and Spaziano v. State, Case No. 74,686. Spaziano filed a "Notice of appellant/petitioner Mr. Spaziano of filing of successive post-conviction motion in the trial court" in those two cases, wherein he suggested to this court that it may wish to hold those proceedings in abeyance. Id. This court stated that it would not

hold up the cases pending before it. Id. In this fourth motion for post-conviction relief, Spaziano alleged:

> During the brief warrant period, Mr. Spaziano was successful in obtaining, for the first time, certain police reports, which until then had been undisclosed. Those reports were first disclosed to counsel on or about September 8, 1989. These police reports contained important exculpatory information which significantly negated Mr. Spaziano's guilt, but which the state had previously failed to disclose to the defense, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. U.S., 405 U.S. 150 (1972).

(R 84). After listing "the particular matters that were improperly withheld," Spaziano stated:

> The grounds presented herein, were not raised on direct appeal or in any prior 3.850 proceeding or appeal therefrom because they were not known until on or about September 8, 1989. Therefore, these grounds could not have been raised in these earlier proceedings.

(R 89).

The material that Spaziano alleged the state had withheld was attached as exhibits to the motion. Exhibit A is a copy of what appears to be a transcription of notes taken by one of the investigating officers, reflecting a date of August 28, 1973, which indicates the writer confirmed a phone call at 6:30 p.m. on August 5, 1973 (R 99). Exhibit B contains handwritten notes, which Spaziano alleged indicated that this was precisely the time that the roommate reported the phone call in her initial

conversations with the officer (R 100). Exhibit C, which appears to contain more transcribed investigative notes, dated October 10, 1973, supposedly establishes that the police had documents concerning an interview with Joe Suarez where he gave them information positively indicating that he was with the victim the night preceding the murder (85, 101).

Spaziano further alleged that the police had a host of information on Lynwood Tate, suggesting that he was the killer, as reflected in the reports included in Exhibit D (R 85, 102-41). Exhibit E is supposedly an eyewitness report of a William Garvin Enquist reflecting his identification of a picture of Lynwood Tate as a person he saw at the murder scene on a Saturday in June (R 142-44). As supposedly reflected in Exhibit F, during Tony Dilisio's hypnosis interview on July 15, 1975, he told the police that Spaziano never offered to show Dilisio any of the bodies (R 85, 145). Spaziano also alleged that at one point Dilisio was given immunity for his testimony (R 85). A letter was sent to Judge McGregor by Spaziano's attorney, requesting that the matter be expedited (R 146).

A hearing was held in Judge McGregor's chambers on December 20, 1989, and the state requested an extension of time for filing a response to the motion (R 149). On January 3, 1990, Judge McGregor entered an order nunc pro tunc December 20, 1989, granting the state sixty days from December 20 in which to file a response (R 150). On March 15, 1990, this court affirmed the denial of Spaziano's third motion for post-conviction relief and denied Spaziano's petition for writ of habeas corpus. Spaziano,

supra. On March 29, 1990, Governor Martinez signed Spaziano's fourth death warrant (R 159).

On April 2, 1990, Judge McGregor received a letter from Spaziano's attorney, expressing concern over the lack of a response by the state, and requesting the court to take "appropriate action" with regard to the state's failure to comply with the court's order (R 160). Judge McGregor responded the following day, asking that such request be reduced to the form of a motion and filed with the court (R 161). That same day, April 3, 1990, Spaziano's attorney wrote another letter to Judge McGregor, requesting that he enter a stay of execution, and further stating that he had begun to make his sentiments about the state's deliberate failure to comply with the court's order known to appropriate persons, which apparently is a Michelle Russell, Assistant General Counsel to the Governor (R 162-64). On April 9, 1990, Spaziano's attorney sent another letter to Judge McGregor, stating that he had been in trial since April 2 and had not had time to file a formal motion, but requested that the court treat his letter of April 3 as a formal motion (R 183-84).

The state filed a response on April 11, 1990, an unsigned copy of which was sent by overnight mail to Spaziano's attorney, with a signed copy sent out by regular mail that same day (R 4, 16, 165-82). A hearing was held on April 20, 1990, at which both parties presented argument (R 1-43). Counsel for Spaziano acknowledged that the interview with Dilisio had previously been disclosed, so his last contention did not constitute a valid

claim, but stated that he had discovered another matter involving Dilisio, which apparently involved another statement given by him to the police, and requested leave to amend his motion to include the additional claim (R 4, 35). Counsel also stated that he had spoken with an investigator who worked with Spaziano's previous attorney, and was told that the investigator had spoken with representatives of the State Attorney's Office at the time the first 3.850 was filed, and was told that the State Attorney's Office had moved and the file had gone to a warehouse somewhere and nobody could find it (R 8). Apparently these representatives told the investigator they would look for them, and if they were ever found he would be notified. (R 8). No formal public records act request was ever made until Spaziano's 1989 warrant was signed, when one was sent "more or less on a lark" to the Sheriff's Department (R 6, 9). A "big box" of materials was returned (R 7).

Following argument, the trial court summarily denied the motion, finding that it was procedurally barred (R 186-88). The trial court permitted Spaziano, over the state's objection, to amend his motion to include the additional claim regarding Dilisio's statement (R 4-5, 35-6). On April 24, 1990, Spaziano filed an amendment to his motion and a notice of appeal (R 195-204). On or about April 23, Spaziano filed an emergency application for stay of execution in this court. This court granted an indefinite stay of execution, finding that it was "clear that the state's untimeliness substantially reduced the amount of time Spaziano had to present the issues to this Court."

References to the instant record on appeal are designated as (R __). References to the original trial record are designated as (TR __).

SUMMARY OF ARGUMENT

The trial court properly found that the instant claim is procedurally barred. Spaziano did not even allege, nor has he demonstrated, that the facts underlying such claim could not have been ascertained through the exercise of due diligence. Such documents would not have affected the outcome of the trial, and certainly do not support a claim of innocence.

ARGUMENT

THE TRIAL COURT PROPERLY FOUND THE INSTANT CLAIMS PROCEDURALLY BARRED.

Spaziano's claim is procedurally barred, as it was raised in a successive (fourth) motion, which was filed beyond the two year time limitation set forth in Florida Rule of Criminal Procedure **3.850**. Aqan v. State, **15** F.L.W. **S209** (Fla. April 2, **1990**); Hall v. State, **541** So.2d **1126** n.1 (Fla. **1989**); Clark v. State, **533** So.2d **1144** (Fla. **1988**); Demps v. State, **515** So.2d **196** (Fla. **1987**). Florida Rule of Criminal Procedure **3.850** specifically states:

> No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence became final unless it alleges **(1)** the facts upon which the claim is predicated were unknown to the movant or his attorney, and could not have been ascertained by the exercise of due diligence**...**

That rule further states that a successive motion may be dismissed where new and different grounds are alleged if the judge finds that failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure.

First, the instant motion contained no allegation that the facts upon which the claim is predicated could not have been ascertained by the exercise of due diligence. Spaziano merely alleged that at the time his third motion for post-conviction relief was pending, he "was successful in obtaining, for the first time, certain police reports, which until then, had been

undisclosed" (R **84).** The only further allegation was that the grounds were not raised on direct appeal or in any prior **3.850** proceeding because they were not known until on or about September **8, 1989** (R **89).** There is no statement as to where the documents came form or how they were obtained, and certainly no allegation that they could not have been previously obtained through the exercise of due diligence.

The instant claim is procedurally barred, and there is no need for an evidentiary hearing to determine such. Even assuming, arguendo, that counsel's representations at the hearing that Spaziano's previous attorneys had spoken with representatives from the State Attorney's Office and were told that their files could not be located, this provides no excuse. In the first place, the documents at issue were not obtained from the State Attorney's Office, but rather from the Sheriff's Office, and were disclosed almost immediately after the public records demand was made (R *6).* While Spaziano states that he should not be penalized because counsel failed to make continued and frequent formal demands for the records, appellee contends that at least one formal demand, to the agency holding the records, is required. It does not constitute due diligence to make an oral inquiry and sit back to wait to see if one file out of no doubt thousands surfaces somewhere at some point thereafter and if the someone who finds it will contact whoever, if anyone, is representing that defendant at that point, then four years later, "on a lark," finally follow up with a written demand to a different agency.

A review of the extensive procedural history of this case demonstrates that Spaziano had filed three motions for post-conviction relief prior to this one, in **1985**, **1988**, and **1989**. See, Spaziano v. State, **489** So.2d **720** (Fla. **1986**); Spaziano v. State, **545** So.2d **843** (Fla. **1989**); Spaziano v. Dugger, **15** F.L.W. **S151** (Fla. March **15**, **1990**). The public records act was clearly available prior to January **1**, **1987**, the cut off date for post-conviction relief in this case, and available in **1988** and **1989** as well. Appellee contends that as such, the instant case is controlled by this court's prior holdings in Demps, supra and Aqan, supra, where it found claims pursuant to Brady, supra, procedurally barred where the public records act had not been timely utilized.

While Spaziano attempts to analogize his situation to that in Sireci v. State, **502** So.2d **1221** (Fla. **1987**), it is readily distinguishable. The facts giving rise to Sireci's claim first became known during the pendency of the appeal from the denial of his first **3.850** motion, and he immediately moved this court to relinquish jurisdiction of his case to the circuit court to allow any claim to be ruled upon there. Id. at **1224**. The previously unrequested documents in the instant case giving rise to Spaziano's current claim apparently became known during the pendency of the appeal from the denial of his third **3.850**, which itself had been filed beyond the time limit. Spaziano also had a petition for writ of habeas corpus pending in this court. He did not file a motion to relinquish jurisdiction, but instead filed a "notice" that he had filed a successive **3.850**, suggesting to this

court that it may wish to hold the proceeding pending before it in abeyance, which this court declined to do. Spaziano thereafter somehow expected the two courts to exercise concurrent jurisdiction, which this court has previously acknowledged results in "considerable confusion as to the status of each remedy as well as needless expenditure of judicial time and effort on remedies later mooted at both the trial and appellate levels." See, State v. Meneses, 392 So.2d 905, 906-7 (Fla. 1981), which is cited in Sireci, supra.

Spaziano also contends that his claims raise a colorable claim of factual innocence, stating that while the materials recently disclosed do not conclusively demonstrate his innocence, they do significantly negate his guilt. Spaziano states that these materials give strong indications that two other men may have killed Laura Harberts, and claims the police seemed convinced they had their man in Lynwood Tate. The record refutes such allegations.

Regarding Joe Suarez, it is clear from the record that defense counsel knew who he was, knew he had dated the victim, and even knew that Suarez had in the past exposed himself to several women, which resulted in criminal charges. (See TR 408-15). It would seem that if defense counsel wanted to "prove" that the caller was Suarez, he could simply have contacted him to find out. Further, the phone call that the roommate testified about occurred the night before the victim disappeared, which would have been August 4, 1973, not August 5 as the notes reflect. In addition, defense counsel was able to cast doubt on

who made the call on August 4 during his cross-examination of the roommate, so it cannot be said that there is a reasonable probability that the outcome would have been affected had the defense known, if it already did not, that Suarez called the victim on August 5. Finally, Spaziano has failed to demonstrate how such evidence would have been admissible without Suarez testifying, or how it demonstrates his innocence.

Spaziano next states that in an undisclosed interview, the police were able to conclude that Suarez was with the victim on the night she disappeared (R 101). This is based on the statement:

> During the interview, Suarez was asked by me if he had ever taken Laurie Harberts to see the movie "Jesus Christ Superstar," in which he answered 'no, but she told me she had seen it.' The only way this could be possible is if he had met with Laurie Harberts later on on the night of the 5th of August because Laurie had gone to this movie on the evening of the 5th of August with two other subjects.

This document contains nothing more than the writer's inferences from the situation as it stood at the time of the interview, which was early in the investigation (October 10, 1973). A later deposition of Henrietta Young, who worked at the movie theater, shows that while the victim was at the theater on the night she disappeared, she did not go to the movie, but merely talked to the manager, was there about fifteen minutes, and left [1] (TR 525-

[1] Ms. Young also identified Spaziano as one of the people with the victim that night, but the identification was later suppressed due to the suggestive nature of the photo lineup. (TR 554).

27). Again, there is no possibility, much less a reasonable one, that such document would have been admissible or could have affected the outcome of the trial, and clearly does not indicate Spaziano's innocence.

Spaziano next claims that during the investigation, the state came to the conclusion that the victim's killer was Lynwood Tate, and more important, the police located an eyewitness who positively identified Tate as the individual he observed at the scene of the crime with several women near the time of the killing. It seems odd that if the state concluded that Tate committed the murder it never presented this information to a grand jury, but instead spent an additional two years investigating the case. In fact, the only information that the officers had on Tate was that he showed deception on a lie detector test. It also appears that the "eyewitness" was shown only pictures of Tate, who he identified as the man he saw at the dump in June, two months before the murder. Further, the man he identified as Tate was in an unknown type of vehicle, and was not with the women the witness also saw at the dump, as Spaziano states. Again, such information would have been of ***no use*** in the trial of this matter, and does not demonstrate the innocence of Spaziano, himself a known rapist as well as mutilator of women, who was placed at the dump by two witnesses, one of which was his long time friend (TR 560-61, 574).

Finally, Spaziano points to an interview with Tony Dilisio, conducted in October of 1974, which he claims indicates all Spaziano had ever said to Dilisio was "man, that's my style."

Spaziano omits the fact that this statement was in response to Dilisio's question concerning the girls at the Altamonte Dump: "Why did you do that to them chicks". The state submits that this is hardly exculpatory evidence, and in fact serves only to bolster the testimony of Dilisio, as such statement was made prior to any hypnosis statement, and indicates that Dilisio was well aware of what Spaziano had done "to them chicks", as he was inquiring why Spaziano had done it.

Further, during the deposition of Dilisio conducted November 12, **1975**, defense counsel asked him the first time he had spoken to the police regarding this matter, and though he was not exactly sure of the date, he knew he was at the Seminole County detention center, and thought that it had been in October (R **33**). Dilisio also stated that although he had not told the police "the whole thing", he did tell part, and everything that he had related was truthful, if not complete (TR **34-5**). Consequently, defense counsel had sufficient impeachment available to him regarding the first time Dilisio had spoken with the police, and the instant document would have had no impact on the outcome of this trial, other than to perhaps boost Dilisio's credibility.

The trial court properly found the instant motion procedurally barred, as the facts underlying the claim could have been ascertained with the exercise of due diligence. The instant documents in no way support a claim of innocence. As the trial court stated at the instant hearing,

Mr. Spaziano is not innocent. Ain't no way.

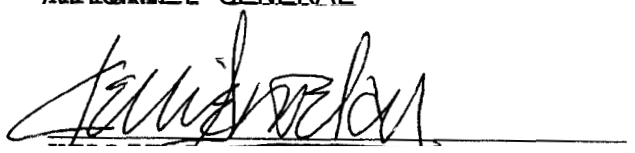
(R 32).

CONCLUSION

Appellee respectfully requests this court affirm the trial court's order summarily denying Spaziano's fourth motion for post-conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to Edward S. Stafman, 424 East Call Street, Tallahassee, Florida, 32301, this 25th day of May, 1990.

of Counsel