IN **THE SUPREME COURT OF FLORIDA**

JOSEPH ROBERT SPAZIANO,

Appellant,

vs. **Case** No. **50,250**

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S INITIAL BRIEF ON APPEAL FROM SUMMARY DENIAL OF POST-CONVICTION RELIEF

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PRELIMINARY STATEMENT

This brief sets out Mr. Spaziano's arguments which support his appeal from a summary denial of his Rule 3.850 motion. Relief was summarily denied based upon a procedural bar despite the fact that Mr. Spaziano had ample justification for not raising the claims presented in the 3.850 motion -- claims which relate to his innocence -- earlier and despite the fact that Mr. Spaziano was prepared to demonstrate that justification.

References to the record on appeal will be made by use of the letter "R", followed by the appropriate page number in parentheses. To the extent that Mr. Spaziano relies on the trial transcript previously before this Court, references to that transcript will be made by use of the letter "T" followed by the transcript page number in parentheses.

STATEMENT OF THE FACTS AND CASE

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

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

Id. at 720.

Following the affirmance of his conviction and sentence, Mr. Spaziano filed a Rule 3,850 motion raising numerous claims. That motion was summarily denied, and on appeal, this Court affirmed. Spaziano v. State, 489 So.2d 720 (Fla. 1986). With respect to a claim raised in that motion that the limitations placed upon Mr. Spaziano regarding the presentation of non-statutory mitigating evidence violated the eighth and fourteenth amendments, this Court concluded that although the original sentence may have violated this constitutional command, as announced in Lockett v. Ohio, Mr. Spaziano was later entitled to present evidence of non-statutory mitigating factors at his Gardner remand hearing, and any problem was therefore cured, i.e., because he was entitled to

present such evidence, there was no eighth amendment violation. 489 So.2d at 721 (Fla. 1986).

Mr. Spaziano then initiated a second Rule 3.850 proceeding which claimed that if he was indeed entitled to present non-statutory mitigating evidence at his Gardner remand hearing, then his counsel was ineffective for failing to present such evidence. The trial court again summarily denied relief, and on appeal, this Court affirmed, holding that the claim was procedurally barred for failure to raise it in the first post-conviction motion,[1] and that, on the merits, any error was harmless. Spaziano v. State, 545 So.2d 843 (Fla. 1989).

Subsequent to the filing of the second post-conviction motion, the United States Supreme Court decided Hitchcock v. Dusser, 481 U.S. 393 (1987). This Court had held in a number of cases, including Hall v. State, 541 So.2d 1125 (Fla. 1989), that Hitchcock is new law and that claims based on Hitchcock are properly raised in a successor Rule 3.850 motion.[2] As a result, while the appeal of the second 3.850 motion was pending, Mr. Spaziano moved this Court for a remand so as to permit him to

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[1] Mr. Spaziano argued that he was excused for failing to raise the issue in his first motion because he did not know it was an issue until this Court, in its decision rejecting his first 3.850 motion, held that he was indeed entitled to present non-statutory evidence at his Gardner remand. This Court rejected that argument.

[2] See, e.g., Hall, supra; Cooper v. Dusser, 526 So.2d 900 (Fla. 1988); Zeigler v. Dusuer, 524 So.2d 419 (Fla. 1988); Downs v. Dusser, 514 So.2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

amend the second Rule 3.850 motion to specifically add the Hitchcock/Hall claims. This Court denied that motion. The obvious explanation for the denial was that in light of Hall, the Court believed that the claim could be raised in a successor motion.

Consequently, on or about June 26, 1989, Mr. Spaziano filed a third post-conviction motion raising claims based on Hitchcock and Hall, in accordance with this Court's numerous holdings that the proper way to raise such a claim is through a successor Rule 3.850 motion. Hall, supra; Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988); Downs v. Dusser, 514 So.2d 1069 (Fla. 1987); Adams v. Florida, 543 So.2d 1244 (Fla. 1989); Meeks v. Dusser, 548 So.2d 184 (Fla. 1989). The State filed a response, and Mr. Spaziano then filed a reply and supplemental memorandum in support of the motion.

While that proceeding was pending before the trial court, on August 29, 1989, the Governor signed a death warrant. Mr. Spaziano's execution was then set by the Superintendent of the Florida State Prison for September 14, 1989. The trial court once more summarily denied relief, and this Court, after granting a stay of execution, ultimately affirmed. Spaziano v. State, ____ So.2d _____, 15 F.L.W. 151 (Fla. March 15, 1990).

In preparing for the initial 3.850 proceeding, Mr. Spaziano attempted to obtain from the State records of the investigation of the crime and of the trial of Mr. Spaziano. (R-197, para. 4; R-7-9,391. However, as alleged by Mr. Spaziano, his investigator was informed by a representative of the State that the records

were believed to have been lost or destroyed, but that if they were located, he would be notified. (R-8). No further contact was initiated by the State regarding this information and, accordingly, no further action was taken in an effort to locate any additional records. Id.

In September, 1989, while the above-referenced death warrant was active, Mr. Spaziano made a Public Records Act demand of law enforcement, pursuant to chapter 119, Florida Statutes. He did not expect to discover anything new, but because of the pending execution date, for obvious reasons, he did not wish to leave any stone unturned. To his surprise, he received copies of materials which significantly negated Mr. Spaziano's guilt, which had not been previously disclosed. Accordingly, almost immediately, on or about November 3, 1989, he brought a successor Rule 3.850 proceeding alleging these Bradv violations.[3]

Simultaneous with the filing of this successor 3.850 motion, Mr. Spaziano asked the trial court *to* expedite consideration of the claims. (R-146). In response, on December 20, 1989, the trial court held a status conference. At that proceeding, the office of the Attorney General, who had been representing the State's interest in this matter for quite some time, chose not to appear.

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[3] At that time, the previous appeal was pending in this Court. Mr. Spaziano notified this Court of the discovery of these materials and suggested a remand to consider the claims. However, the Court indicated that the filing would not alter the course of the proceeding that was pending before it. Mr. Spaziano certainly did not delay therefore in bringing these Bradv claims to the attention of the trial court and this Court.

Instead, word was sent through the office of the State Attorney that it (the office of the Attorney General) wished an additional sixty (60) days to respond to the motion. The trial court granted this request over Mr. Spaziano's specific objection that he wished to proceed to a hearing on his claims as quickly as possible. At the status conference, the trial court did indicate, however, that Mr. Spaziano would be given additional time in which to file responsive pleadings to any response filed by the State, after which the Court would determine what further action was appropriate. A written order was later entered memorializing the court's ruling as set out above. (R-149-150).

The State failed to respond to the 3.850 motion within the sixty (60) day period ordered by the court. After allowing a short grace period, Mr. Spaziano wrote the trial judge requesting relief given the State's disregard of the Court's order. (R-160).[4] Also, on March 22, 1990, Mr. Spaziano's counsel met with Michelle Russell, assistant counsel to the Governor, who, as he understood it, had recently assumed responsibility for advising the Governor regarding the signing of death warrants, and explained his frustration at the State's failure to adhere to the trial court order requiring a response to his motion. He also informed her that he had a difficult trial schedule **during** the month of April. (R-162-164). Within a week, on March 29, 1990,

[4] This letter was erroneously dated November 3, 1990. As explained in a later letter, it was in fact sent on or about March 27, 1990. (R-183).

however, a death warrant was signed and Mr. Spaziano's execution was set for May 1, 1990. (R-159). At this point, the State had still not responded to the 3.850 petition. Apparently, a decision was made to accelerate the judicial review process by the signing of a warrant rather than to simply have the State respond in a timely fashion to the trial court's earlier order so that the pending claims could be heard in an orderly fashion.

Immediately after the death warrant was signed, on April 2, 1990, Mr. Spaziano's counsel wrote trial Judge McGregor a letter requesting a stay of execution so that an evidentiary hearing could be held and his claims could be given the reasoned consideration they deserved. (R-162-164). On April 11, 1990, nearly two months after the expiration of the time in which the State was required to respond to Mr. Spaziano's 3.850 motion, the State filed a response.[5] (R-165). Thereafter, the trial court set a non-evidentiary hearing for April 20, 1990.

At that hearing, the trial court denied Mr. Spaziano's request for an evidentiary hearing and issued an order denying all relief to Mr. Spaziano. (R-186). The trial court did permit Mr. Spaziano to amend his petition and an amendment to the petition was filed on or about April 23, 1990. (R-195-203).

The trial court ostensibly based its ruling on a procedural bar, apparently holding that the claims should have been raised in an earlier 3.850 proceeding within the two year time frame

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[5] Counsel, however, did not receive a signed copy of the response until April 17, 1990. (R-4).

mandated by Rule 3.850. This was done despite a proffer (and an allegation in the petition made by amendment) that the records in which the Brady materials were discovered were reasonably believed not to exist because of prior representations by officers of the State. (R-7-9,39,197). Mr Spaziano offered to produce evidence to prove this allegation, but the Court denied him any opportunity to do so. (R-37-39). Rather, the trial court apparently took the position that there could be no justification for Mr. Spaziano not filing this claim earlier.[6]

Mr. Spaziano filed his notice of appeal from that order on April 23, 1990. (R-204). By separate motion, Mr. Spaziano requested a stay to enable this court to give full consideration to the important and meritorious issues raised therein. Separate and apart from the merits of the claims presented, particularly given the State's delay in responding to his motion, Mr. Spaziano argued that his due process right to a full and fair hearing and reasoned consideration of his claims would be violated absent a stay. See Barefoot v. Estelle, 103 S.Ct. 3383, 3395 (1983) (an expedited review process is permitted in capital cases, only if

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[6] The trial court simply modified an order prepared before the hearing by the Attorney General to rule that Mr. Spaziano was procedurally barred. (R-186,40). However, the trial court's oral pronouncements indicated that it was predisposed to deny Mr. Spaziano relief and was merely searching for the method to do so that would be most effective (R-34); perhaps this is not surprising given the time constraints placed on the trial court by the pending execution date. Thus, the trial court never offered any cogent reason for why the reasons offered by Mr. Spaziano for not previously raising the Brady violations were insufficient.

counsel is given an "adequate opportunity to address the merits."). This Court apparently agreed, unanimously granting an indefinite stay and noting "that we should grant the motion for a stay since it is clear that the state's untimeliness substantially reduced the amount of time Spaziano had to present the issues to this court." ~~Spaziano v. State~~, No. 75,874 (Order dated April 24, 1990).

SUMMARY OF THE ARGUMENT

The Bradv claims asserted herein were brought as soon as they were discovered. Reasonable efforts had been made to obtain law enforcement files in the past, but Mr. Spaziano had been led to believe that he had all such materials that existed. When he recently discovered that this was not true, he immediately brought the proceeding below. Under these circumstances, there should be no procedural bar that would prohibit the trial court from hearing these claims on the merits. Moreover, because these claims raise a colorable claim of factual innocence, they must be heard on the merits. Finally, at the least, an evidentiary hearing is mandated on the facts underlying the recent discovery of the Bradv materials and the relationship of these materials to Mr. Spaziano's innocence to determine whether a procedural bar should preclude merits consideration of the claims presented.

A hearing on the merits would show that the ~~Bradv~~ materials are substantial and their non disclosure material. Together, they negate nearly all of the State's evidence and show that two other persons were far more likely suspects than Mr. Spaziano. The materials show that the telephone call from "Joe" who, given the call, was the last known person to speak to the victim, was not from Joe Spaziano, as the State had asserted: that Joe Suarez, a known exhibitionist had been with the victim on the night preceding the crime, despite his contrary denials; that an eyewitness identified another suspect at the dump where the body was discovered and that the police came to the conclusion that

this individual who failed a polygraph test was in fact the murderer; and that Tony Dilisio -- who testified that Mr. Spaziano had taken him to the scene and bragged about the murder -- in an undisclosed interview had originally told the police that all he knew of the murder was that Mr. Spaziano said "that's my style."

Given the failure to disclose this information as was constitutionally mandated, Mr. Spaziano is entitled to relief since there is a reasonable probability that the outcome would have been different had it been presented to the trial jury.

ARGUMENT

I. THE TRIAL COURT ERRED BY SUMMARILY DENYING MR. SPAZIANO'S RULE 3.850 MOTION

A. There Is No Procedural Bar Which Should Preclude Consideration of Mr. Spaziano's Bradv Claims in a Successor Rule 3.850 Motion

Mr. Spaziano acknowledges that, under appropriate circumstances, this Court has held that Bradv claims may be foreclosed by a procedural bar. Agan v. State, No. 74,729 (Fla. April 12, 1990); Demps v. State, 515 So.2d 196 (Fla. 1989). However, common sense dictates that application of procedural bars is to be guided by equitable considerations. As argued below, under the circumstances of this case, any procedural bar should be excused. At the very least, given the allegations in the petition and the proffer made, Mr. Spaziano is entitled to an evidentiary hearing to determine whether he acted diligently in obtaining the records that give rise to the Bradv claims presented and their relation to his innocence and consequently whether any procedural bar should preclude consideration of these claims. As is demonstrated below, Mr. Spaziano has acted reasonably and in good faith and as such his claims deserve merits consideration. Moreover, since his claims call into question the factual accuracy of his conviction and sentence, procedural bar principles are simply inapplicable.

1. Mr. Spaziano recently discovered the records giving rise to his Bradv claims, had previously reasonably believed that such records were unavailable, and promptly upon discovery raised these claims in the trial court; any procedural bar to merits consideration of these claims is therefore inapplicable.

The 3.850 motion alleges that Mr. Spaziano could not have raised this Bradv claim earlier because the State wrongfully withheld the materials which are the basis of the claim and misled Mr. Spaziano as to the availability of these materials. Mr. Spaziano proffered at the hearing that he had previously made reasonable efforts to obtain the State's files, records, etc., but had been told that they did not exist or were lost, and that if these materials could be located he would be contacted. (R-6-9,17,39). It was not until the signing of a death warrant in September, 1989, when in an exercise of caution he made a routine public records act request, that he found that in fact he had not been provided all the exculpatory material in the state's possession.

Florida Rule of Criminal Procedure 3.850, provides that a successive motion "may be dismissed if the judge finds . . . that the failure of the movant or his attorney to assert those grounds in a prior motion constitute an abuse of the procedure governed by these Rules." Moreover, Rule 3.850 requires that motion to be made within two years of the conviction becoming final unless it

"alleges 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 . . . ."

Contrary to the apparent belief of both the State and the trial court, these provisions do not mean that a successive post-conviction motion must always be dismissed. Rather, they mandate that each case must turn on its own facts. State v. Sireci, 502 So.2d 1221 (Fla. 1987) and that equitable considerations must govern in determining whether there has been "an abuse of the procedure."

A review of the transcript of the hearing below indicates that the trial court applied a procedural bar, as urged by the State, but made no finding that the failure to assert the Bradv claims in any prior motion constituted an abuse of the process, intentional or otherwise. Indeed, neither the State nor the trial court are able to offer any salient explanation for why Mr. Spaziano should be precluded from raising his Brady claims at this time given his allegations that 1) it is the State that wrongfully withheld the Brady materials, materials which raise the spectre that it is an innocent man who is facing execution, 2) it is the State that misled Mr. Spaziano to believe that the Brady materials, which have now been uncovered, did not exist, 3) it is the State that failed to follow the trial court's order and timely file a response to the 3.850 motion which if filed would have allowed for the orderly presentation of this claim in the trial court, and 4) Mr. Spaziano has been wholly reasonable in

his actions, and in pursuing the claim he is now presenting.

As demonstrated in his 3.850 motion and proffer to the trial court, Mr. Spaziano exercised due diligence in 1985 to obtain the information which contained the Brady materials. He should not be penalized now because pro bono counsel failed to make continued and frequent formal demands for the records thereafter when, by all indications, all records in existence had been disclosed.

In many respects, the situation presented here is analogous to State v. Sireci, supra. In Sireci, the court held that consideration of a claim that the psychiatrists appointed to examine Sireci did not provide a competent evaluation was cognizable in a successive 3.850 motion. This Court reached this conclusion in part because "the facts giving rise to the claim . . . first became known during the pendency of the appeal from the denial of the initial 3.850 motion." Id. at 1224. It found this to be the case even though there would appear to be no reason why those same facts could not have been uncovered prior to the initial 3.850 motion. Clearly, this Court's action was influenced by the equitable propriety of foreclosing merits consideration of the claim.

Here, the equities suggest an even more compelling justification than what was presented in Sireci for considering the claim presented because the action of the State in misleading Mr. Spaziano was the reason that the factual basis for the claim

now being presented was not reasonably available earlier.[7] Fundamentally, the basic question here is whether Mr. Spaziano acted reasonably in attempting to uncover and presenting this claim. Since he clearly did so, his claim is entitled to merits consideration.

2. Procedural bars are inapplicable because Mr. Spaziano's claims raise a colorable claim of factual innocence.

It is well settled that procedural bars do not apply when, in light of the claims presented, a petitioner raises a colorable claim of factual innocence. Murray v. Carrier, 106 S.Ct. 2639 (1986); Smith v. Murray, 106 S.Ct. 2661 (1986); Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986). "In appropriate cases, the principles of . . . finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration." Carrier, supra, 106 S.Ct. 2639, 2650 (1988). Although it may fairly be argued that the Bradv materials which were recently disclosed do not conclusively demonstrate Mr. Spaziano's innocence, they do significantly negate his guilt. As explained in more detail below, they completely undercut a crucial portion of the State's case, that the last person the decedent spoke with was Joe Spaziano. Indeed, they indicate that in fact the person the decedent last spoke with was Joe Suarez. They also gave strong

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[7] Interestingly, as was the case here, in Sireci, this Court noted, "As soon as the facts were available, Sireci moved the Supreme Court to relinquish jurisdiction of his case to the circuit court . . . to allow the facts and any claim derived from them to be ruled upon in the circuit court.'' This Court denied Sireci's motion. Sireci, supra.

indications that two other men may have killed the decedent. In fact, the police seemed convinced they had their man in Lynwood Tate. Given that these facts, when coupled with the deficiencies in the evidence against Mr. Spaziano at trial.,as illustrated by the difficulty the jury had in reaching a verdict, strongly suggest innocence, any procedural bar to the consideration of the Bradv claim is simply inapplicable.

3. At a minimum, Mr. Spaziano is entitled to an evidentiary hearing as to whether his claim was procedurally barred since the resolution of this question requires the resolution of disputed issues of fact.

An evidentiary hearing should have been conducted regarding the appropriateness of any procedural bar finding because to resolve that issue, disputed questions of fact must be resolved. Although this Court has not had specific occasion to address procedural bar questions that involve issues of disputed fact, that issue has arisen in the federal courts, and uniformly the courts have mandated evidentiary hearings when the resolution of disputed factual questions is necessary to resolve the procedural bar issue. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 234-35 n. 1 (1980); Humphrey v. Cadv, 405 U.S. 504, 517 (1972); Amadeo V. Kemp, 773 F.2d 1141, 1145 (11th Cir. 1985); Hall V. Wainwrisht, 733 F.2d 766 (11th Cir. 1984).

As set forth earlier, Mr. Spaziano has offered two legally recognized justifications for why his claim is not procedurally barred. First, because given the facts of this case, he exercised due diligence in seeking the exculpatory materials which were

recently uncovered and second because given this information he has made a colorable showing of factual innocence. Whether in fact either of these justifications should excuse his failure to raise his Bradv claims earlier is dependent on the resolution of factual questions. For example, did the State mislead Mr. Spaziano regarding the existence of these records; given the information disclosed, does it give rise to a colorable showing of factual innocence? Unless this Court is willing to say after accepting as true the allegations and proffer of Mr. Spaziano on these questions that procedural bar principles foreclose consideration of his Bradv claim, then Mr. Spaziano must be afforded an evidentiary opportunity so as to afford him an opportunity to show why any failure to raise this Bradv claim earlier must be excused.

In the context of reviewing the summary denial of 3.850 motions, this Court has made clear that trial judges should hold evidentiary hearings whenever issues are presented for which the resolution of disputed factual questions is necessary. See, e.g., Jones v. State, 446 So.2d 1059 (Fla. 1984). Such evidentiary hearings are particularly warranted given the presumption of correctness afforded state court fact finding, see 28 **U.S.C.** s 2254 (d) and Sumner v. Mata, 449 U.S. 539 (1981), in any subsequent federal collateral review proceeding. With regard to this principle, there is simply no logical reason to differentiate between claims whose resolution necessitate resolving disputed factual questions and procedural bar issues

which also need the resolution of fact issues to be resolved.

B. The Motion and Files Do Not Conclusively Show that Mr. Spaziano is Entitled to No Relief Because the Brady Claims Presented Are Meritorious

It is well-settled and not disputed that the State has an obligation to disclose exculpatory evidence, including any evidence which tends to negate a defendant's guilt or is exculpatory as to punishment. Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972). The State ignored that constitutional obligation in this case by withholding a number of pieces of exculpatory evidence. Each piece of exculpatory evidence is discussed individually below.

1. The Joe Suarez Telephone Call

At trial, Beverly Fink, the roommate of the decedent, testified that the decedent received a telephone call from "Joe" just before the time of her disappearance. (T-399). The State implied and has argued that the telephone call was from Joe Spaziano. Although Mr. Spaziano, through cross-examination, was able to argue that the call may have been from any other "Joe," including Joe Suarez, an exhibitionist whom the decedent dated,[8] the jury was clearly led to believe by the State that the caller

[8] Suarez was connected to five (5) sexual assaults in the area around the time of this murder. (R-193, par. 3, 202-03). Indeed, the first was on the day of the decedent's disappearance. Several of the victims made positive identifications. After he was interviewed by the police, Suarez left town. If Mr. Spaziano had the information that it was Mr. Suarez who made the call, the sexual assaults of Mr. Suarez may well have been admissible as reverse "Williams rule" evidence. See Rivera v. State, Case No. 70,563 (Fla. April 19, 1990).

was Mr. Spaziano. This was an important incriminating piece of circumstantial evidence militating conviction.

We now know that the caller was indeed Joe Suarez nd that the State knew this fact, but did not disclose it.[9] Indeed, at trial, the State Attorney claimed that he "had never heard of" Joe Suarez (T-411). It is obvious that the State's failure to disclose this exculpatory information violates Brady and Giglio.

2. Joe Suarez and The Victim Were Together On the Night of Her Disappearance

Joe Suarez denied to the police that he had been with the decedent on August 5, 1973. Yet, in an undisclosed interview, the police were able to conclude that Suarez was with the decedent on the night of her disappearance. (R-101).

3. The Lvnwood Tate Information

During the investigation, the State came to the conclusion that the decedent's killer was Lynwood Tate. Notwithstanding Brady, however, nothing about Mr. Tate was disclosed to the defense. Mr. Tate was given several polygraph tests about his role in the killing and failed. He was a known rapist and all of the investigators involved concluded that Tate had committed the murder. Tate told the investigators "on several occasions'' that

[9] Although the records indicate some confusion about the date of the call (August 4 or 5, 1973), the original report to the police by Ms. Fink (R-201) shows that the victim was last seen by Ms. Fink at 2:00 P.M. on August 5, and therefore the 6:30 P.M. phone call referenced would have to have occurred on August 4, as Fink testified at trial. In later interviews, Ms. Fink makes clear that "Joe" on the telephone was the last person that she knew that the decedent spoke with. (R-196, para. 2).

"he didn't know whether he committed the murder" and "that if he did, he would like to know it." (R-103). At one time, "an indication was made [by Tate] that there was a possibility that he may have done this and did not know it." (R-103). Most important, the police located an eyewitness, Mr. William Enquist, who positively identified Tate as the individual he observed at the scene of the crime with several women near the time of the killing. (R-142). There is no question that this material was exculpatory and should have been disclosed even if the State subsequently came to the conclusion that Mr. Tate was not the murderer.

4. The Dilisio Impeachment

The State failed to disclose the contents of an interview with Mr. Dilisio, the crucial State witness, conducted in October, 1974 (about 6 months before the first disclosed police interview with this witness). Although only police notes confirm this interview (as opposed to a transcript or tape), it appears that this was the first police interview with Dilisio where the subject of the murders in the dump arose. The police notes indicate that all Mr. Spaziano had ever (allegedly) said to Dilisio about the murder was "man, that's my style." (R-199-200). The report does not indicate that Spaziano admitted to the murder, that he knew how the murder occurred, or that he gave any other information to Mr. Dilisio, but only that he supposedly claimed that it was his "style."

Of course, six months later in the first recorded statement of Dilisio, his story had radically changed. And by the time of trial (following hypnosis), Dilisio's memory had improved even further and he now claimed still far more extensive statements were made to him by Mr. Spaziano.

At trial, the prosecutor perpetuated the Bradv violations by allowing the jury to think that the first time Dilisio spoke with the police was in March, 1975 (6 months after the undisclosed interview):

> Q. Mr. Dilisio, how many times have you given statements concerning the subject matter you've discussed here this morning under oath or to investigators or State Attorneys?
>
> A. I can't recall, several.
>
> Q. Several? Several times?
>
> A. Yes.
>
> Q. You gave a statement to Lieutenant Abbgy. Was that the first time you recall talking about this incident?
>
> A. To Lieutenant Abbgy?
>
> * * *
>
> Q. And when was that?
>
> A. I'm not sure.
>
> Q. Well, relate it to some -- your birthday, for example. Was it a year ago, two years ago, six months ago, what?
>
> MR. VAN HOOK: Your Honor, I'm going to object to that. It's immaterial and irrelevant where he was at that time.
>
> MR. KIRKLAND: The date is what I'm looking for, Your Honor.

THE COURT: Proceed.

THE WITNESS: I can't recall the date.

BY MR. KIRKLAND:

Q. No? Approximately.

A. The first time I talked to Lieutenant Abbgy?

Q. Yes.

A. Approximately, around March of last year.

(T-647-648). The Assistant State Attorney made no effort to correct this misstatement of his key witness.

Clearly, if defense counsel had available to him the contents of the first interview, this would have constituted strong impeachment of Dilisio's trial testimony. Indeed, given the importance of Dilisio's testimony to the State's case, this failure of the State to produce this material in and of itself clearly undermines confidence in the guilty verdict. This becomes crystal clear in light of the prosecution's closing argument:

> MR. VAN HOOK: It's never been shown in this case that Tony Dilisio ever at any time said anything different about what the Defendant told him that he does to girls before Tony went out there to that dump; about what the Defendant told him he was taking him there to see -- some of his girls -- and about what he said after they got back in the truck. Never has it been shown in this case that he said anything different about it. Never has it been shown in this case that he ever said anything different about the different things he saw out there and about his description of Laura Lynn Harbert's body.
>
> Never has it been shown that he said anything different about seeing this Defendant

standing over her body.

(T 784). Ironically, what the above prosecutorial comments do not point out is that if Mr. Spaziano was unable to show any prior inconsistent statements of Mr. Dilisio it is precisely because the State wrongfully withheld them.

5. The Brady Violations Entitle Mr. Spaziano to Relief

In Miller v. Wainwright, No. 83-849 (M.D. Fla. Nov. 13, 1987) (Carr, J.), the federal district court felt it necessary to remind the State that

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Id. at 7, quoting Bradv, 373 U.S. at 87.

In Miller, the court held that the State's failure to disclose certain police investigative reports which tended to negate guilt violated Bradv. Indeed, the court held that

> by withholding such favorable evidence, the state has demonstrated a callous and deliberate disregard for the fundamental principles of truth and fairness that underlie our criminal justice system. Of equal concern to the Court is the state's attempt to justify its withholding of this evidence by denying that it failed to observe its duties and obligations under Bradv.

Miller at 7.

The police reports at issue in Miller were remarkably similar to those which were not disclosed in the instant case. The same can also be said about the State's attempted justification for its failure to disclose the reports. Both cases

in part involve police reports in which the police drew conclusions negating the guilt of the defendants. Also, both cases were based exclusively on eyewitness testimony of doubtful reliability[10] without any meaningful physical corroboration. The State has argued herein that the reports at issue were merely investigative materials gathered early on, and not admissible evidence. This argument should be rejected as a similar argument was flatly rejected by the court in Miller:

> Initially, the state attempts to argue that the Armstrong and the Sheppard police reports are not admissible and, therefore, are not evidence pursuant to Bradv. Even assuming, arguendo, that the reports themselves are not admissible, that fact is not justification for the state's failure to produce such material where it may have'led petitioners' counsel to admissible evidence or where the information was material to the preparation of petitioners' defense. See Sellers V. Estelle, 651 F.2d 1074, 1077 n. **6** (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982).

Also, the State's argument presented here that the defendant had equal access to the evidence and witnesses should be rejected as it was in Miller, because the defendants had done all that was reasonably necessary *to* have elicited the information, id. at 9-10, much in the same manner as Mr. Spaziano has done." Finally, the State's argument that the reports reflected only the

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[10] In Miller, one of the State's key witnesses was a woman who first saw the murder in a dream.

[11] Indeed, the State's response to discovery never indicated that Joe Suarez or Lynwood Tate may have knowledge about the case, or that there was a sworn statement placing Tate at the scene. In addition to violating the clear constitutional command of Bradv, this violated Fla.R.Crim. P. 3.220.

officers' opinions, was also rejected in Miller.

Of course, Bradv violations carry with them a materiality requirement. For purposes of Brady, evidence is material where:

> there is a reasonable probability that, had the evidence been disclosed the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987), quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). Given the extreme closeness of this case as evidenced by the obvious difficulty the jury had in reaching a decision, and the weaknesses of the State's case, the Bagley materiality standard is easily satisfied. There can hardly be a doubt that the undisclosed evidence undermines confidence in the outcome of Mr. Spaziano's trial.

In this context, it is important to note that Mr. Spaziano's conviction is highly suspect, based almost exclusively on the hypnotically refreshed testimony of a 16 year old who hated Mr. Spaziano, who was using LSD at the time that Mr. Spaziano allegedly incriminated himself, and whose initial story to the police changed radically as he continued to meet with the officers. Indeed, such testimony is patently unreliable and would clearly be inadmissible today. Stokes v. State, 548 So.2d 188 (Fla. 1989).[12] The jury was deadlocked, reached a verdict only

[12] This hypnotically refreshed testimony also goes to the reliability of the sentence as it formed the exclusive basis for the finding that the killing was "especially heinous, atrocious and cruel." Absent that aggravating circumstance, there is little

after receiving a "dynamite" charge, and thereafter came back with a quick recommendation of life imprisonment. These factors demonstrate that the slightest tipping of the scales in favor of Mr. Spaziano would likely have resulted in acquittal and that any confidence in the guilty verdict is severely undermined given the evidence that was improperly withheld.

Besides the testimony of Dilisio, the only other evidence of Mr. Spaziano's guilt at trial was **1)** at some indefinite and unknown time, Mr. Spaziano took a friend to an indefinite location in the dump where it was believed that he had stashed his personal marijuana, 2) he may have known the decedent, and 3) he may have been the last known person to speak with the decedent. The undisclosed evidence shows that Mr. Spaziano was <u>not</u> the last known person to speak with the decedent, that while he may have known the decedent, he did not know her as well as Joe Suarez and many others who were much more likely to have been involved with her, and 3) other persons had been to the dump, including a known rapist who was seen there with several women in the same general time as the decedent's disappearance. The undisclosed evidence completely negates the State's non-Dilisio evidence, and substantially undermines Dilisio's testimony through the disclosure of the first police interviews where a significantly different story was told by Dilisio than the one he told in later interviews and at trial. Under these circumstances,

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question that the trial judge's decision to override the jury recommendation would have been improper.

it should be obvious that the undisclosed materials seriously undermine confidence in the guilty verdict.[13]

[13] To the extent that the State takes issue with the above conclusions, this simply demonstrates the need for an evidentiary hearing on the merits of this matter.

CONCLUSION

Based upon the foregoing, Mr. Spaziano respectfully requests that this Court reverse and direct that the trial court hold an evidentiary hearing on this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US Mail to Kellie Anne Nielan, Esq., Assistant Attorney General, Suite 447, 210 North Palmetto Avenue, Daytona Beach, FL **32114**, this 14th day of May, 1990.

Edward S. Stafman