IN THE SUPREME COURT OF FLORIDA

Case No. 87,364

On Appeal From the Eighteenth Judicial Circuit
In and For Seminole County, Florida

STATE OF FLORIDA,

Appellant,

v.

JOSEPH ROBERT SPAZIANO,

Appellee.

ANSWER BRIEF OF JOSEPH ROBERT SPAZIANO

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PRELIMINARY STATEMENT

This Answer Brief will refer to the appellant, the State of Florida, as the State. The appellee, Joseph Robert Spaziano, will be referred to as Mr. Spaziano.

The record on appeal consists of 25 volumes. Volumes 1 through 19 include pleadings. Citations to these volumes will be made by the volume number, the letter "R.", and the appropriate page number. For example, the citation "V.18, R. 3812" refers to volume 18, page 3812 of the record.

Volumes 20 through 25 contain the transcript of the evidentiary hearing conducted before Circuit Judge O.H. Eaton, Jr. in Seminole County on January 8-15, 1996. Citations to this transcript will be made by the volume number, the letters "Tr.", and the appropriate page number. For example, the citation "V.20, Tr. 1" refers to volume 20, page 1 of the evidentiary hearing transcript.

This Answer Brief includes references to the transcript of Mr. Spaziano's first-degree murder trial in January 1976, State v. Spaziano, Case No. 75-430-CFA, Seminole County Circuit Court, Eighteenth Judicial Circuit. Citations to this transcript will be made by the phrase "Trial Tr." and the appropriate page number. For example, the citation "Trial Tr. 1" refers to page 1 of the 1976 trial transcript.

This Answer Brief includes citations to exhibits introduced at the evidentiary hearing. Citations to these exhibits

introduced by Mr. Spaziano will be made by the phrase "Def. Exh.", followed by the exhibit number.

This Answer Brief includes a two-part Appendix. Appendix A is Circuit Judge O.H. Eaton's Order Vacating Judgment and Sentence and Setting Trial Date (the "Order") dated January 22, 1996. Citations to Appendix A will be made by the phrase "App. A," followed by the page number. The citation will also include a reference to the volume and page in the record on appeal. For example, the citation "App. A-18; V.18, R. 3812" refers to page 18 of Appendix A and volume 18, page 3812 of the record.

Appendix B is Judge Eaton's order concerning litigation costs dated June 18, 1996. Mr. Spaziano respectfully requests that this Court allow him to supplement the record with this order. Citations to Appendix B will be made by the phrase "App. B," followed by the page number. For example, the citation "App. B-1" refers to page 1 of Appendix B.

REQUEST FOR ORAL ARGUMENT

Mr. Spaziano requests that this Court grant an oral argument for this case. This case involves the trial court's vacation of a first-degree murder conviction and a death sentence. Mr. Spaziano respectfully suggests that oral argument would be helpful to this Court.

STATEMENT OF THE CASE

This is an appeal from the Seminole County circuit court's Order vacating Joseph Robert Spaziano's first-degree murder conviction and death sentence and ordering a new trial. (A copy of this Order is attached as Appendix A.)

Mr. Spaziano was convicted of first-degree murder and sentenced to death in 1976 for the death of Laura Harberts. Ms. Harberts' body was one of two found at a Seminole County dump in August 1973. The other body was never identified.

Mr. Spaziano's conviction was upheld on direct appeal, but the case was remanded for resentencing. Spaziano v. State, 393 So. 2d 1119 (Fla.), cert. denied, 454 U.S. 1037, 102 S. Ct. 581, 70 L. Ed. 2d 484 (1981). In Spaziano, this Court recognized that the principal witness against Mr. Spaziano was Anthony DiLisio,[1] a sixteen-year-old acquaintance of Mr. Spaziano who testified that he saw corpses when he accompanied Mr. Spaziano to a dump site in August 1973. Id. at 1120.

After the remand for resentencing, this Court upheld the reimposition of the death sentence on Mr. Spaziano. Spaziano v. State, 433 So. 2d 508 (Fla. 1983), aff'd, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984). Since then, Mr. Spaziano has

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[1] The Court mistakenly referred to this witness as Ralph DiLisio, which is the name of Anthony DiLisio's father. Spaziano, 393 So. 2d at 1120. Anthony--not Ralph--DiLisio was sixteen years old at the time of Mr. Spaziano's trial.

pursued postconviction and habeas corpus claims in state and federal courts.[2]

In September 1995, this Court ordered the Seminole County circuit court to conduct an evidentiary hearing "based only on the newly discovered evidence of the recantation of the testimony of a significant witness [Mr. DiLisio]." Spaziano v. State, 660 So. 2d 1363, 1365-66 (Fla. 1995), cert. denied, 116 S. Ct. 722, 133 L. Ed. 2d 674 (1996).

Judge Eaton conducted an evidentiary hearing from January 8-15, 1996. (V.20-25, Tr. 1-1090.) He subsequently entered an Order finding that Mr. DiLisio's testimony was credible. (App. A-4; V.18, R. 3808.) He found that the recantation was newly discovered evidence that could not have been discovered earlier through the use of due diligence by Mr. Spaziano's attorneys. (App. A-7; V.18, R. 3811.) Judge Eaton ordered Mr. Spaziano's judgment and sentence vacated based on this newly discovered evidence and ordered a new trial for the term beginning on March 25, 1996. (App. A-8; V.18, R. 3812.)

The State filed a notice of appeal on January 30, 1996. (V.19, R. 3816.) The trial court entered an order on February

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[2] See Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994), cert. denied, 115 S. Ct. 911, 130 L. Ed. 2d 793 (1995); Spaziano v. Singletary, No. 91-850-CIV-ORL-18 (M.D. Fla. Nov. 30, 1992); Spaziano v. Dugger, 584 So. 2d 1 (Fla. 1991); Spaziano v. State, 570 So. 2d 289 (Fla. 1990); Spaziano v. Dugger, 557 So. 2d 1372 (Fla. 1990). Spaziano v. State, 545 So. 2d 843 (Fla. 1989); Spaziano v. State, 489 So. 2d 720 (Fla.), cert. denied, 479 U.S. 995, 107 S. Ct. 598, 93 L. Ed. 2d 598 (1986).

20, 1996, that stayed the proceedings and extended the speedy trial period. (V.19, R. 3850.) This appeal followed.

Judge Eaton subsequently entered an order on litigation costs. By separate motion, Mr. Spaziano has asked this Court to supplement the record with this order. The order is attached to this Answer Brief as Appendix B.

STATEMENT OF FACTS

The facts as presented by the State in its Initial Brief do not present a fair and accurate description of the proceedings below. Thus, Mr. Spaziano restates the facts as follows:

I. INTRODUCTION

During Mr. Spaziano's first-degree murder trial in January 1976, the principal witness against him was Anthony DiLisio. At the time, Mr. DiLisio was a troubled, drug-addicted teenager. Buckling under pressure from an overbearing father, suggestive police interrogation, and seriously flawed hypnotic techniques, Mr. DiLisio gave detailed testimony about a purported trip that he took with Mr. Spaziano and another man to a Seminole County dump in August 1973. (Trial Tr. 618, 628, 631-34, 645, 665-66, 688.) He testified extensively about two dead bodies that he claimed to have seen at the site.

Mr. DiLisio's testimony was central and essential in convicting Mr. Spaziano. No other witness placed Mr. Spaziano with the body of Ms. Harberts, and no physical evidence linked Mr. Spaziano either to the victim or to the dump site. As the State said during Mr. Spaziano's trial in 1976, "If we can't get in the testimony of Tony DiLisio, we'd have absolutely no case whatsoever." (Trial Tr. 614.) Both the defense and the State steered the jury toward Mr. DiLisio's testimony as the key to deciding Mr. Spaziano's guilt or innocence. (Trial Tr. 761, 776.)

Reviewing courts have also recognized that Mr. DiLisio's testimony was the key to convicting Mr. Spaziano. See Spaziano, 660 So. 2d at 1367 (Kogan, J., concurring in part, dissenting in part) (noting that on direct appeal, the entire analysis of sufficiency of evidence was based on Mr. DiLisio's credibility); Spaziano, 393 So. 2d at 1119 (describing Mr. DiLisio as "the principal witness for the state").

In addition, Judge Eaton found that Mr. DiLisio provided crucial testimony against Mr. Spaziano:

> It was [Mr. DiLisio] who provided the only evidence of the cause of death of the decedent and it was he who supplied the jury with the evidence connecting this tragic event to the defendant. Without his testimony, there simply is no corroborating evidence in the trial record that is sufficient to sustain the verdict - not even any evidence from the medical examiner who performed the autopsy.

(App. A-3; V.18, R. 3807.)

II. DUE DILIGENCE

For nearly twenty years after Mr. Spaziano's conviction, Mr. DiLisio refused to discuss his trial testimony. (V.20, Tr. 42-43, 65-66, 83, 92, 112-13.) In 1995, however, Mr. DiLisio recanted his 1976 trial testimony, initially to a Miami Herald newspaper reporter (V.21, Tr. 372-73), and later in a sworn affidavit filed with this Court. In his affidavit, Mr. DiLisio unequivocally denied accompanying Mr. Spaziano to a dump site:

> . . . I, Anthony Frank DiLisio . . . do make, publish and declare freely that I never under any circumstances went to the dump sight [sic] with Joseph Spaziano. I went there in the company of law enforcement investigators and only in the company of law enforcement investigators.

See Spaziano, 660 So. 2d at 1364 (reciting Mr. DiLisio's affidavit in full).

Over the years, Mr. Spaziano's attorneys and investigators made diligent efforts to talk with Mr. DiLisio about his trial testimony. First, Jerry Justine, an investigator with the public defender's office in West Palm Beach, testified at the evidentiary hearing that he located Mr. DiLisio in Vista, California, in 1985 and traveled from Florida to talk with him. (V.20, Tr. 40-41.) Mr. Justine said Mr. DiLisio became "quite hostile" when approached at his home on April 17, 1985, and would not discuss the trial. (V.20, Tr. 42.) In fact, Mr. DiLisio told Mr. Justine: "I don't want any fucking thing to do with it." (V.20, Tr. 42.)

Second, Edward Stafman, a Tallahassee lawyer who represented Mr. Spaziano in postconviction proceedings from 1986 through 1993, testified that he and an investigator made at least two attempts to contact Mr. DiLisio in the fall of 1989. (V.20, Tr. 61-62.) Mr. Stafman reached Mr. DiLisio by telephone that fall, but, he testified, Mr. DiLisio "would not talk to me about the substance of the facts." (V.20, Tr. 65.)

Third, Mike Hummill, an investigator for the Office of the Capital Collateral Representative ("CCR") in Tallahassee, testified that he spoke with Mr. DiLisio twice after CCR began representing Mr. Spaziano in early 1995. (V.20, Tr. 79, 88.) Mr. Hummill testified that he traveled to Mr. DiLisio's home in

Pensacola on February 22, 1995, but Mr. DiLisio would not discuss his trial testimony. (V.20, Tr. 83.)

Fourth, Mr. Hummill returned to Pensacola with another CCR investigator, Rick Hays, on May 26, 1995, two days after Governor Lawton Chiles signed Mr. Spaziano's death warrant. (V.20, Tr. 88, 110-11.) See also Def. Exh. 54 (certified copy of death warrant). Mr. Hummill and Mr. Hays both testified that Mr. DiLisio still refused to discuss his trial testimony. (V.20, Tr. 106, 112-13.)

The evidence of Mr. DiLisio's recantation was not available to these attorneys and investigators, despite their diligence in trying to find it. Thomas H. Dunn, Mr. Spaziano's expert witness on the standards of practice in postconviction proceedings in capital cases, testified that Florida Rule of Professional Conduct 4-1.3 requires a lawyer to act with "reasonable diligence and promptness in representing a client," within the confines of the law and ethics. (V.20, Tr. 145-46.) Mr. Dunn testified that Mr. DiLisio's refusal to discuss his trial testimony has no impact on due diligence. (V.20, Tr. 151-52.)

Mr. Dunn testified that proper representation in a capital postconviction case requires reinvestigation at several points. (V.20, Tr. 140.) Attorneys or investigators contacted Mr. DiLisio at these critical stages:

- Before the first motion was filed under Florida Rule of Criminal Procedure 3.850[3] (V.20, Tr. 140-41);
- Before Mr. Spaziano's case entered federal court[4] (V.20, Tr. 142-43); and
- After the completion of federal habeas corpus proceedings.[5] (V.20, Tr. 143-44.)

Mr. Dunn concluded that the efforts of investigators and attorneys to contact Mr. DiLisio constituted due diligence because they "they used every approach possible to try to get Mr. DiLisio to talk to them about the substance of his testimony in Mr. Spaziano's trial." (V.20, Tr. 152.) Judge Eaton found as a matter of law that "[t]he evidence of recantation in this case is newly discovered evidence which could not have been discovered earlier through the exercise of due diligence." (App. A-7; V.18, R. 3811.)

III. MR. DiLISIO'S UPBRINGING

In addition to establishing that Mr. DiLisio's recantation is newly discovered evidence, Mr. Spaziano presented testimony of

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[3] Mr. Spaziano's direct appeals concluded in 1984, when the United States Supreme Court affirmed the death sentence imposed on resentencing. See Spaziano v. State, 433 So. 2d 508 (Fla. 1983), aff'd, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

[4] Mr. Spaziano filed his final motion under Florida Rule of Criminal Procedure 3.850 on November 26, 1989. The trial court denied relief, and this Court affirmed in Spaziano v. State, 570 So. 2d 289 (Fla. 1990). His case then entered federal court.

[5] Federal habeas corpus proceedings concluded in Mr. Spaziano's case in January 1995, when the United States Supreme Court denied certiorari from Mr. Spaziano's appeal of the denial of federal habeas corpus relief. See Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994), cert. denied, 115 S. Ct. 911, 130 L. Ed. 2d 793 (1995).

Mr. DiLisio and other witnesses that shows the development of Mr. DiLisio's trial testimony in 1976 and, later, his recantation in 1995 and 1996. The evidence shows that Mr. DiLisio's recantation is truthful, unwavering, and uncoerced. It also shows that Mr. DiLisio's trial testimony in 1976 was so seriously flawed by faulty police techniques and an overbearing father that it cannot be accepted as credible. The State's witnesses never seriously challenged this testimony. Judge Eaton found in his Order that Mr. DiLisio's testimony at the evidentiary hearing "is credible and is corroborated by other evidence to a significant extent." (App. A-4; V.18, R. 3808.)

To fully understand the truthfulness of Mr. DiLisio's recantation, it was necessary to explore the factors that produced his 1976 testimony. Judge Eaton found that Mr. DiLisio and his five siblings "lived in a dysfunctional family ruled by his father, Ralph Delisio [sic], who physically abused them. Delisio [sic] tried to please his father but he never succeeded." (App. A-4; V.18, R. 3808) (footnote omitted).

Ralph DiLisio owned a boat dealership called Maitland Marine on Highway 17-92 near Orlando. (V.21, Tr. 219.) As a teenager, Mr. DiLisio frequented the business. (V.21, Tr. 220, 224; App. A-4; V.18, R. 3808.) In May 1972, Mr. DiLisio's parents separated, and Mr. DiLisio and his father eventually moved into a home behind Maitland Marine. (V.21, Tr. 221-22, 228.)

In 1972, at the age of fifteen, Mr. DiLisio was seduced by Mary ("Keppie") Kepley Epton, an employee at Maitland Marine.[6] (V.21, Tr. 225-27, 234.) Judge Eaton found that Mr. DiLisio and Ms. Epton had "frequent sexual intercourse for about two and one half years." (App. A-4; V.18, R. 3808.) While this sexual relationship continued, Ms. Epton also was engaged in a relationship with Mr. DiLisio's father that culminated in their marriage in December 1973. (V.21, Tr. 227.) Mr. DiLisio had sex with Ms. Epton for the last time on the wedding day of his father and Ms. Epton. (V.21, Tr. 226-27, 254-55; App. A-4; V.18, R. 3808.)

During this time, Mr. Spaziano worked at Maitland Marine, and Mr. DiLisio knew who he was. (V.21, Tr. 232-33; App. A-4; V.18, R. 3808.) Judge Eaton found that there was "a conflict as to just how close their relationship was but none of the witnesses who testified were able to establish a fast friendship." (App. A-4; V.18, R. 3808.)

Mr. DiLisio testified that in August 1973 he went on a ten-day vacation with his father and Ms. Epton to Jamaica for his sixteenth birthday. (V.21, Tr. 230-31.)

In the fall of 1973, while his sexual relationship with Ms. Epton was ongoing, Ms. Epton asked Mr. DiLisio to leave Orlando and travel with her and Mr. Spaziano to California. (V.21, Tr. 253.) Mr. DiLisio declined because he thought this would

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[6] "Keppie" Epton did not testify at the hearing before the trial court.

hurt his father, who was in love with Ms. Epton. (V.21, Tr. 253-54.)

Mr. DiLisio testified that he began to use illegal drugs shortly after his fourteenth birthday (V.21, Tr. 223), which was in 1971. After Mr. DiLisio's father and Ms. Epton married in December 1973 (Def. Exh. 56 (Dec. 2, 1973, marriage certificate for Ralph DiLisio and Ms. Epton)), Mr. DiLisio was thrown out of his father's home--the home where he lived with his father and stepmother--because of his drug use. (V.21, Tr. 256-57.) He stayed with his mother until she, too, kicked him out. (V.21, Tr. 257.) Thereafter, he stayed at friends' houses, including a friend's closet. (V.21, Tr. 257-58.) He later lived on the streets and under park benches. (V.21, Tr. 260.)

During this period, Mr. DiLisio used drugs with great frequency. (V.21, Tr. 259.) In fact, he testified at the evidentiary hearing that he was "[s]taying stoned all the time." (V.21, Tr. 259.) Mr. DiLisio testified that he bought and sold drugs and lived off his drug activity. (V.21, Tr. 259-60.)

Judge Eaton found that Mr. DiLisio's "mid-teenage years included several brushes with the law." (App. A-5; V.18, R. 3809.) In April or May 1974, Mr. DiLisio and several friends called his junior high school and made a bomb threat. (V.21, Tr. 260.) Mr. DiLisio was arrested and prosecuted for making the threat, then placed on probation in the summer of 1974. (V.21, Tr. 261; Def. Exh. 42.) Mr. DiLisio was released into the custody of his father. (V.21, Tr. 262.)

Mr. DiLisio testified that his relationship with his father was always troubled. He said his father routinely beat him, his natural mother, and other family members. (V.21, Tr. 262-63.) On one occasion, Ralph DiLisio put Mr. DiLisio's head between the door and the door jamb, then slammed the door repeatedly, because Mr. DiLisio failed to close the door properly. (V.21, Tr. 263-64.) Mr. DiLisio testified that he stopped attending school in junior high. He said he was embarrassed to change clothes for physical education classes because he did not want other students to see the marks left by his father's use of a razor strap. (V.21, Tr. 264-66.) Judge Eaton found that Mr. DiLisio's father physically abused him. (App. A-4; V.18, R. 3808.)

Sometime in early 1974, Mr. DiLisio's father learned that Mr. Spaziano and Ms. Epton were having a sexual relationship. (V.21, Tr. 266; App. A-5; V.18, R. 3809.) In fact, Mr. DiLisio subsequently learned that Ms. Epton had accused Mr. Spaziano of raping her on December 26, 1973. (V.21, Tr. 267; Def. Exhs. 64, 64A.) Thereafter, his father repeatedly referred to Mr. Spaziano as "Crazy Joe." (V.21, Tr. 268). He told Mr. DiLisio that Mr. Spaziano would "pick up niggers" and "cut off their dicks," and pick up girls and "cut off their tits." (V.21, Tr. 268.) Mr. DiLisio testified that he never heard Mr. Spaziano make those statements. (V.21, Tr. 269-70.) He also said he did not believe that Mr. Spaziano had raped his stepmother. (V.21, Tr. 270.)

Mr. DiLisio was arrested for possession of marijuana in October 1974. (V.21, Tr. 271, 272.) When Ralph DiLisio learned

that Mr. DiLisio had stashed marijuana at their home, he beat Mr. DiLisio and kicked him repeatedly from the garage through the pool to the outside of their house. (V.21, Tr. 271-72.) Mr. DiLisio pleaded guilty to possession of marijuana (Def. Exh. 42) and was ordered into a residential drug treatment center called "Thee Door." (V.21, Tr. 273-74.) He was also found to have violated probation. (Def. Exh. 42). He ran away from Thee Door in a stolen car with two other juveniles, but was arrested in New Jersey and returned to Florida. (V.21, Tr. 275-77.) Mr. DiLisio was sent to Volusia House, a confinement facility for juveniles in Daytona Beach, where he remained until his eighteenth birthday on August 16, 1975. (V.21, Tr. 278.)

IV. HYPNOSIS SESSIONS

Police officers first approached Mr. DiLisio about the bodies at the dump site in the fall of 1974, while he was confined without bail in the Seminole County Juvenile Detention Center. (V.21, Tr. 280; Def. Exhs. 28, 29, 80 (tabs 1 and 2)). This was more than a year after the bodies were discovered at the dump site. When asked specifically about the bodies, Mr. DiLisio said only that Mr. Spaziano had commented about reports of the murders and stated "man, that's my style." (Def. Exhs. 28, 29, 80 (tabs 1 and 2)). Mr. DiLisio made no other statements about the bodies at the dump site. (Def. Exhs. 28, 29, 80 (tabs 1 and 2)).

Seven months later, on May 13, 1975, Lt. Abbgy and Sgt.

Martindale[7] of the Altamonte Springs Police Department interviewed Mr. DiLisio again. (Def. Exhs. 30, 80 (tab 3)). Before the officers visited Mr. DiLisio at Volusia House, Mr. DiLisio's father told him the police were coming and instructed him to cooperate. (V.21, Tr. 282.) When the officers asked Mr. DiLisio about Mr. Spaziano, Mr. DiLisio unequivocally denied any knowledge of two bodies at the dump site. (Def. Exhs. 30, 72A (tape recording of interview), 80 (tab 3)). But the police encouraged Mr. DiLisio through implied leniency toward his previous crimes:

> Q [by Lt. Abbgy]. Ah, I didn't ask you about anything else. About B&E's you've committed. I know you have committed some so that's past. That's under the bridge. That's all, that's gone.

(Def. Exhs. 30 at 3; 80 (tab 3)). Judge Eaton found that the officers "induced Delisio [sic] to cooperate by inferring that his cooperation would get him out of Volusia House and would result in several serious criminal charges being dropped." (App. A-5; V.18, R. 3809.)

Also during the May 13, 1975, interview, the police told Mr. DiLisio for the first time that they wanted to subject him to hypnosis. (Def. Exhs. 30 at 3; 80 (tab 3)). Mr. DiLisio indicated that he was willing to cooperate in any way he could. (Def. Exhs. 30 at 6-7; 80 (tab 3)). Judge Eaton found that "[a]fter being encouraged by his father to cooperate with the police, he agreed to be hypnotized in order to refresh his

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[7] Sgt. Martindale did not testify at the evidentiary hearing before the trial court. Lt. Abbgy is deceased.

memory. . . . He went along with the police in an effort to please them and his father." (App. A-5; V.18, R. 3809.)

On May 15, 1975, police officers went to Volusia House and took Mr. DiLisio to a hypnotist in Orlando.[8] (V.21, Tr. 290-91.) The hypnotist, Joe McCawley, tried to hypnotize Mr. DiLisio and asked him numerous leading questions about the murder of two girls whose bodies were found at a dump site in August 1973. (Def. Exhs. 31, 72B (tape recording of hypnosis session), 80 (tab 5)). In that first hypnosis session, Mr. DiLisio related stories similar to those that his father had told him, i.e., that Mr. Spaziano had done horrible things to blacks and girls, including stabbing the girls, cutting off their breasts, and cutting out their vaginas. (Def. Exhs. 31 at 3, 72B, 80 (tab 5)). However, Mr. DiLisio specifically denied that Mr. Spaziano had ever shown him any bodies.[9] (Def. Exh. 31 at 5, 72B, 80 (tab 5)). In fact, during this first hypnosis session, Mr. DiLisio stated that Mr. Spaziano never even offered to show him any of the

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[8] The hypnotist, Joe McCawley, did not testify at the evidentiary hearing.

[9] See Def. Exh. 31 at 5:

Q. Did he ever show you a body?

A. No.

Q. Any part of a body?

A. No.

bodies.[10] (Def. Exh. 31 at 10, 72B, 80 (tab 5)). At the evidentiary hearing, Mr. DiLisio recalled feeling some slight trance in the first session, but said he knew the police thought he was not doing a very good job and that the officers seemed discouraged after the hypnosis session ended. (V.21, Tr. 291-92, 294.) As Judge Eaton found, Mr. DiLisio "recalled" very little during this session. (App. A-5; V.18, R. 3809.)

After the first hypnosis session, the same two police officers, Lt. Abbgy and Sgt. Martindale, took Mr. DiLisio to the dump site where the bodies were found in August 1973. (V.21, Tr. 294-96.) This testimony is confirmed by statements that Mr. DiLisio made during a second hypnosis session on May 16, 1975.[11] Mr. DiLisio testified at the evidentiary hearing that he did not direct the police to the dump site. (V.21, Tr. 296.) During the thirty minutes he spent with police at the dump site, he saw lid covers, tar paper, and cardboard. (V.21, Tr. 297.)

On May 16, 1975, the police treated Mr. DiLisio to lunch (V.21, Tr. 298-99) and took him to the hypnotist for a second

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[10] See Def. Exh. 31 at 10:

Q. Did he ever offer to show you any of the bodies?

A. No.

[11] See Def. Exhs. 32 at 8; 72C (tape-recording of hypnosis):

Q. What lake is this where the girls are?

A. I saw it yesterday.

Q. You saw it yesterday?

A. Yeh.

session. (V.21, Tr. 300.) Mr. DiLisio testified that he felt "mental pain" during the second hypnosis session and felt like he was making "a story or a movie." (V.21, Tr. 300.) He said he started to feel like his imagination was becoming real. (V.21, Tr. 300-01.) He started to smell the bodies, and he began to visualize the entire scene. (V.21, Tr. 301.) Mr. DiLisio testified that "[b]etween all of the stuff that they told me, I was able to complete, like, a story." (V.21, Tr. 301.) Mr. DiLisio testified that he knew he was lying, but the further he got into the lie, the more difficult it became to retreat from it. (V.21, Tr. 302.) Moreover, because of the hypnosis, he actually began to believe the visualizations to the point that he believed he had really seen dead bodies. (V.21, Tr. 302.)

During that second hypnosis session on May 16, 1975, Mr. DiLisio stated for the first time that Mr. Spaziano took him to the site where the bodies were found and made statements to the effect that "this is the way I take care of my girls." (Def. Exhs. 32, 72C (tape recording), 80 (tab 6)). This story, developed nearly two years after Mr. DiLisio purportedly saw bodies, became the basis of Mr. DiLisio's January 1976 trial testimony.

Throughout subsequent sworn statements,[12] details of the trip to the dump site with Mr. Spaziano grew in ever-increasing

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[12] Including the May 16, 1975, statement (Def. Exhs. 33, 80 (tab 7)); the May 18, 1975, statement (Def. Exhs. 34, 80 (tab 8)); Mr. DiLisio's deposition testimony on November 2, 1975 (Def. Exhs. 36, 80 (tab 10)); and Mr. DiLisio's trial testimony in January 1976 (Def. Exhs. 37, 80 (tab 11)).

specificity and detail. By the time of trial in January 1976, Mr. DiLisio was able to testify where the trip started (Trial Tr. 620) and where the trip ended. (Trial Tr. 637.) He was able to specifically identify the garbage at the dump site. (Trial Tr. 637, 645-47.) He was able to testify about statements made by Mr. Spaziano. (Trial Tr. 624-27, 635, 637.) He was able to provide a vivid description of the person who allegedly accompanied Mr. Spaziano and him to view the bodies. (Trial Tr. 620-21.) Mr. DiLisio was able to "recall" that all three of them ingested purple microdot LSD as they were leaving the dump site in August 1973. (Trial Tr. 635.) The record shows that this trial testimony was generated not by Mr. DiLisio's own beliefs or first-hand knowledge, but by what police wanted him to believe. Judge Eaton concluded that it is "most likely that the crime scene depicted by Delisio [sic] is a scene that he created for the purpose of pleasing the police and his father." (App. A-6; V.18, R. 3810.)

V. EXPERT WITNESSES

Judge Eaton, noting in his Order that the tapes and transcripts of the two hypnosis sessions are in evidence, found that "[t]he hypnotist does not give the listener confidence in his abilities." (App. A-6; V.18, R. 3810.)

Mr. Spaziano's two expert witnesses agreed. Dr. Barbara Stein and Dr. Richard Ofshe both explained that the techniques used to develop Mr. DiLisio's trial testimony were seriously flawed and thus cast doubt on the credibility of that testimony.

Dr. Stein,[13] a board-certified forensic psychiatrist, reviewed the transcripts (and audiotapes, where available) of Mr. DiLisio's May 13, 1975, pre-hypnotic interview; his May 15, 1975, and May 16, 1975, hypnosis sessions; his sworn statements of May 16, 1975, and May 18, 1975; his deposition of November 12, 1975; and his trial testimony of January 23, 1976. (V.23, Tr. 613.) Dr. Stein also reviewed numerous textbooks and articles about hypnosis, repressed memories, and the accepted clinical standards for the conduct of hypnosis. (V.23, Tr. 613.)

Dr. Stein testified that Mr. DiLisio's statements and testimony given in 1975 and 1976 show a progressive evolution in details and "facts." (V.23, Tr. 634.) The record demonstrates this evolution: When police questioned Mr. DiLisio on May 13, 1975, he had difficulty providing relevant information and eventually told the officers that "I'd like to help you but I don't know what you're looking for." (Def. Exhs. 30 at 6; 80 (tab 3)). Subsequently, the police tried to place Mr. DiLisio under hypnosis, but he still could not give more than a few broad statements about his knowledge of Mr. Spaziano. At the second hypnosis session, which occurred <u>after</u> the police took Mr. Spaziano to the dump site, Mr. DiLisio was able to describe the dump site and a few facts about bodies that he purported to have

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[13] Dr. Stein's name is misspelled in the transcript of the evidentiary hearing as "Stine." Mr. Spaziano will use the correct spelling in this Answer Brief.

seen almost two years before.[14] Two days later, Mr. DiLisio returned to the dump site with the police and his father, and gave another statement embellishing his earlier testimony. (Def. Exhs. 34 at 19; 80 (tab 8)). In a deposition taken November 12, 1975, Mr. DiLisio developed a few more facts, and finally, at trial on January 23, 1976, Mr. DiLisio's testimony was marked by a level of detail previously unheard of.

Defendant's Exhibit 85, which summarizes critical elements of Mr. DiLisio's trial testimony and compares them with earlier statements, illustrates this evolution:

- Date of the visit to the dump. (Summary # 1). At trial, Mr. DiLisio was "sure" that the visit to the dump occurred before his sixteenth birthday. (Trial Tr. 618.) At his deposition, he was not sure of that fact (Def. Exhs. 36, 80 (tab 10) at 16), and at the first hypnosis session, he could not even recall the month. (Def. Exhs. 32 at 2-3, 72C, 80 (tab 6) at 2-3.)

- Relationship with Joe Spaziano. (Summary # 2). At trial, Mr. DiLisio testified that he and Mr. Spaziano were "friends." (Trial Tr. 617, 639.) In his statement after the second hypnosis session, he stated that he "wasn't real tight" with Mr. Spaziano. (Def. Exhs. 33, 80 (tab 7) at 23.)

- Hair color on the body. (Summary # 7). Mr. DiLisio noted at his deposition and at trial that one body had "brown hair." (Trial Tr. 632.) He never mentioned that important fact previously.

- Bodies in relation to trees. (Summary # 9). At trial and at his deposition, Mr. DiLisio noted that the bodies were "beside" trees or a tree. (Trial Tr. 631.) He had never previously mentioned that important fact.

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[14] The "facts" related by Mr. DiLisio in his testimony of May 16, 1975, however, do not agree with the facts in the police report made when bodies were discovered at the dump site. (Def. Exh. 84).

- Basket tops at dump site. (Summary # 10). At trial, Mr. DiLisio testified that he saw basket tops at the dump site. (Trial Tr. 637, 645.) His only previous statement regarding baskets or the like occurred in his statement of May 18, 1975, when he stated that he saw "a bushel basket, or a basket . . . I don't know." (Def. Exhs. 34, 80 (tab 8) at 7.)

- Tar paper at dump site. (Summary # 11). At trial and at his deposition, Mr. DiLisio testified that he saw tar paper at the dump site. (Trial Tr. 637, 645.) His only previous statement about tar paper was in response to a leading question about "roofing material" given in his statement of May 18, 1975, when he said, "I think there was some tar paper. I'm not positive." (Def. Exhs. 34, 80 (tab 8) at 7.)

- Orange crates at dump site. (Summary # 12). Mr. DiLisio never, at any time prior to the trial, mentioned orange crates at the dump site. (Trial Tr. 637, 646.)

- Cardboard at dump site. (Summary # 13). Mr. DiLisio never, at any time prior to the trial, mentioned cardboard at the dump site. (Trial Tr. 637, 646.)

- Feeling toward Mr. Spaziano. (Summary # 14). At trial, Mr. DiLisio was very neutral about his feelings toward Mr. Spaziano, stating only that he "disliked" him. (Trial Tr. 681.) In his second hypnosis session, Mr. DiLisio stated that he "couldn't stand" Mr. Spaziano, and he stated seven times that he would like to kill him. (Def. Exhs. 32 at 13-14, 72C, 80 (tab 6) at 13-14.)

If Mr. DiLisio's testimony of January 23, 1976, is to be considered genuine--as the State insisted at Mr. Spaziano's murder trial, and continues to insist--the State can explain the evolution of Mr. DiLisio's testimony after May 13, 1975, only by relying on the psychological concept of "repressed memory." Although the State presented no expert witnesses on this issue at the evidentiary hearing, its implicit theory apparently is that Mr. DiLisio repressed his memory of visiting the dump site with Mr. Spaziano in August 1973 and that this memory was "refreshed" through the use of hypnosis. The State's apparent theory is that

hypnosis allowed Mr. DiLisio to recall facts about the dump site visit that he could not remember during the police interrogations on October 7, 1974, October 8, 1974, and May 13, 1975, and at the May 15, 1975, first hypnosis session.

Dr. Stein testified that the theory that traumatic events (such as viewing dead bodies) can be repressed and later refreshed through hypnosis has been thoroughly discredited by the leading scholars in the relevant scientific community. (V.23, Tr. 618-19.) In 1990, psychologist David Holmes examined sixty years of empirical research on the subject of repression and found no empirical evidence for the presence of repression. (V.23, Tr. 619.) Dr. Stein also testified that studies[15] reveal that rather than repressing the memory of a traumatic or significant life event, most people experience the opposite reaction: "hypermnesia," which is the vivid recall of a traumatic event. (V.23, R. 620.)

Dr. Stein testified how false memories can be created through suggestions of post-event information. First, she noted the consensus among memory researchers is that memory consists of three stages: acquisition, retention, and retrieval. (V.23, Tr. 628.) A person's ability to remember an event, and to recall that event accurately, may be affected at each of the three stages. (V.23, Tr. 628.) Second, she said there is the

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[15] See Def. Exh. 98 (bibliography and synopses of trauma research studies).

opportunity--indeed, the probability--at each stage that memory will be altered in some way. (V.23, Tr. 628-29.)

Turning to the issue of hypnosis, Dr. Stein testified that a person under the influence of hypnosis is characterized by a greater susceptibility to suggestion. (V.23, Tr. 649-50.) This description is in accord with this Court's definition of hypnosis in Stokes v. State, 548 So. 2d 188, 190 (Fla. 1989) ("a hypnotized person is subject to a heightened degree of suggestibility"). Dr. Stein, reading from a report on the scientific status of refreshing recollection and hypnosis published in the Journal of the American Medical Association, noted that this increased suggestibility renders subjects more susceptible to incorporating hypnotically induced views into their recollection of events. (V.23, Tr. 642 (citing Def. Exh. 106).) The Stokes Court also stated that the heightened suggestibility of the hypnotic state allows the subject to readily absorb any leading questions or information proffered by the hypnotist, and weave these into the subject's account of his experiences. 548 So. 2d at 191.

Dr. Stein testified to other problems associated with hypnosis addressed in the American Medical Association report (Def. Exh. 106.) For example, she noted that when hypnosis is used for the purpose of recalling meaningful material, new information is often recorded. (V.23, Tr. 642.) However, the new material may include confabulations and false memories, as well as accurate information, and there is no way for either the

subject or the hypnotist to distinguish between the two. (V.23, Tr. 642.) These false memories may be the result of hypnosis transforming thoughts or fantasies into what the subject believes are actually memories. (V.23, Tr. 642.)

Because of the dangers involved in relying on hypnotically-induced testimony, leading mental health organizations have promulgated standards for the proper conduct of hypnosis. Dr. Stein testified about the standards set forth in the American Medical Association Council on Scientific Affairs' Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 J. Am. Med. Ass'n 1918-23 (1985) (Def. Exh. 106), subsequently reaffirmed by the Council in 1994. (Tr. 640, 647.) Dr. Stein also testified about safeguards published by the American Society of Clinical Hypnosis in a report entitled Clinical Hypnosis and Memory: Guidelines for Clinicians and for Forensic Hypnosis. (Def. Exh. 107). She testified that the hypnosis sessions administered to Mr. DiLisio in May 1975 uniformly fail to meet the standards promulgated by these organizations. For example:

> (1) The subject should be educated about the nature of hypnosis, and have their misconceptions clarified. "This education should acknowledge that memory is imperfect in or out of hypnosis and all demand characteristics regarding memory retrieval should be avoided. It is important that the witness understand that memory does not act as a tape recorder, and that new information may or may not be remembered with hypnosis, and may or may not be accurate."

(Def. Exh. 107; V. 23, Tr. 660.) Dr. Stein testified that the induction of Mr. DiLisio at the beginning of the May 16, 1975, session directly violated this standard. (V.23, Tr. 660-61.)

Mr. DiLisio was advised that hypnosis would allow him to accurately remember events which he had buried in his subconscious mind. (Def. Exhs. 32 at 1; 80 (tab 6)).

> (2) The clinician conducting the hypnosis session should take care to avoid leading or inadvertently cuing the subject.

(V.23, Tr. 659). Dr. Stein testified that there were numerous instances of leading and suggestive questions in Mr. DiLisio's transcripts. (V.23, Tr. 661.)

> (3) Prior to inducing hypnosis, a "free narrative recall" statement should be elicited to preserve the pre-hypnotic recollections of the witness. This establishes a "baseline" of the subject's knowledge of the facts. A second free narrative recall statement should be elicited from the subject immediately after a hypnotic state is induced.

(V.23, Tr. 654-55, 659.) There is no indication in either hypnosis session that this standard was observed. (Def. Exhs. 31, 72B, 80 (tab 5); 32, 72C, 80 (tab 6)). Alternatively, if Mr. DiLisio's testimony of May 13, 1975, constituted a "baseline," then Mr. DiLisio's had no prehypnotic knowledge of the bodies at the dump site. (V.23, Tr. 672.)

> (4) The hypnosis sessions should be videotaped so any non verbal cues given by the hypnotist to the subject are recorded.

Although the hypnosis sessions were audiotaped, there is no indication that either hypnosis session was videotaped.

> (5) The hypnosis sessions should not be "contaminated" by exposing the subject to external sources of information.

The police took Mr. DiLisio to the dump site between the first and second hypnosis sessions. (V.21, Tr. 294-96.) Dr. Stein

testified that this trip contaminated the second hypnosis session, as well as being "a blatant suggestion in the worst form." (V.23, Tr. 658.)

> (6) A subject should be tested to determine if he is actually under hypnosis.

(V.23, Tr. 659.) Dr. Stein stated that there was no indication that Mr. DiLisio was tested to determine if he had been hypnotized. (V.23, Tr. 660).

Dr. Stein concluded her testimony by grading the State's procedures used in hypnotizing Mr. DiLisio a "double F," a fact that Judge Eaton found in his Order. (V.23, Tr. 663; App. A-6; V.18, R. 3810.)

Richard Ofshe, who holds a Ph.D. in sociology and is a professor at the University of California at Berkeley, testified as an expert in the areas of repressed memory theory, hypnosis, and the use of coercive influences resulting in false witness statements. (V.23, Tr. 687-88.) He testified that there were numerous coercive influences in Mr. DiLisio's life when the police interrogated him in May 1975, and that these influences could lead Mr. DiLisio to give false statements:

- His troubled relationship with his father, who pressured him to give false testimony against Mr. Spaziano. His father had abused him, but Mr. DiLisio retained a desire to please his father and obtain his father's acceptance. (V.23, Tr. 691-92.)
- His complex relationship with his stepmother and Mr. Spaziano. His stepmother terminated their sexual relationship upon marriage to his father, but continued to maintain a sexual relationship with Mr. Spaziano. (V.23, Tr. 691.)

- The pressures brought to bear on him by the police, who alternatively threatened him with prosecution for his delinquent acts and promised to help secure his release from juvenile detention. (V.23, Tr. 692-94.)

- The specific procedures used by the police in his hypnosis and interrogation. (V.23, Tr. 693.)

Dr. Ofshe explained that the evolution of Mr. DiLisio's testimony in 1975 and 1976 can be explained by the interaction of these coercive influences. (V.23, Tr. 721.) He testified that a close reading of the May 13, 1975, and May 15, 1975, transcripts, shows that Mr. DiLisio was only able to parrot for the police negative, nonspecific comments about Mr. Spaziano, most--if not all--of which had been related to him by his father. (V.21, Tr. 268.) When pressed for "anything specific," the only information Mr. DiLisio could give was contrary to the known facts.[16] Judge Eaton found in his Order that an expert "even pointed out that the actual crime scene did not match Delisio's [sic] depiction in several material respects." (App. A-6; V.18, R. 3810.)

Mr. DiLisio's testimony changed over time because of his education by his father, who told him what to tell police, and by police, who asked numerous leading and suggestive questions and took Mr. DiLisio to the dump site after he had denied knowledge of its whereabouts or relevance. Dr. Ofshe testified that if Mr. DiLisio had been to the dump site previously, this trip might have helped refresh Mr. DiLisio's recollection. (V.23, Tr. 703.)

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[16] See, e.g., Def. Exh. 30 (May 13, 1975, transcript), where Mr. DiLisio insists he heard something about bodies in an orange grove, not a dump, and that bodies were mutilated.

But the police-sponsored trip to the dump site can only be seen as an attempt to "educate" him about the facts and to contaminate his recollection. (V.23, Tr. 703.)

After the visit to the dump site, Mr. DiLisio was able to testify to more "facts" under police interrogation. Dr. Ofshe testified, however, that Mr. DiLisio was careful to avoid mentioning facts that were subject to independent verification and that might reveal him as a fraud to the police. (V.23, Tr. 718-19.)

Florida law now regards hypnotically-induced witness testimony as inherently unreliable. The facts underlying Mr. DiLisio's hypnosis sessions in this case demonstrate the wisdom of this Court's decisions in Bundy v. State, 471 So. 2d 9 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S. Ct. 295, 93 L. Ed. 2d 269 (1986), and Stokes--even if all of the standards discussed supra had been followed.[17]

As Judge Eaton found in his Order:

> It is plain from the testimony of these two distinguished experts that the reliability of the procedure used should be seriously doubted and that the information which was produced as a result was unreliable. Both experts agreed that hypnosis cannot improve recall beyond that which can be recalled through conscious efforts and that is exactly what the hypnotist thought he could do.

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[17] Although under Bundy, hypnotically-induced testimony is per se inadmissible, that decision is not retroactive. Mr. Spaziano is not discussing Bundy and Stokes for the proposition that Mr. DiLisio's testimony is inadmissible. Instead, Mr. Spaziano cites these cases to show the unreliability of hypnotically-induced testimony. This is relevant because the credibility of Mr. DiLisio's 1976 testimony is at issue.

(App. A-6; V.18, R. 3810.)

VI. THE PHYSICAL EVIDENCE

In addition to the overwhelming specter of unreliability cast over Mr. DiLisio's 1976 trial testimony by these hypnotic influences, much of Mr. DiLisio's 1976 testimony was inconsistent with the physical evidence adduced by the police.

For example, Mr. DiLisio testified at trial that he saw two bodies at the dump, side by side. (Trial Tr. 632.) But Charles W. Wehner, a former evidence technician for the Seminole County Sheriff's Office who went to the scene, testified that it initially appeared that there was only one body at the dump site. (V.20, Tr. 194.) Only when a second jawbone was discovered did he realize that there were also the remains of second, more decomposed body. (V.20, Tr. 194-95.)

The evidence at trial clearly established that one of the dead bodies was two to eight months old and the other dead body was only two to three weeks old. (Def. Exh. 102, tabs 3, 4, 5, 8). The dump site photographs and autopsy reports demonstrate that the first corpse was severely decomposed and partially skeletalized. (Def. Exhs. 84; 102 (tabs 3, 6)). The second corpse was completely skeletalized and its remains scattered over the surrounding area, presumably by small animals. (Def. Exhs. 77, 102 (tabs 4, 7)). According to an investigator's notes, human bones were scattered over an area of approximately thirty to thirty-five feet. (Def. Exh. 84). Its skull was located approximately eighteen feet from the visible body. (Def. Exh.

84). Given the estimated date of death of the older body, it is simply unbelievable that Mr. DiLisio could have viewed two complete dead bodies no more than two weeks before the discovery of these almost completely skeletalized remains.

In his 1976 trial testimony, Mr. DiLisio also claimed that the first body was "covered with blood" on its upper aspect and "all cut up." (Trial Tr. 632-33.) However, the autopsy report reflected no evidence of trauma, stab wounds, or blood. In fact, the cause of death could never be determined. (Def. Exh. 102 (tab 5)).

Mr. DiLisio also testified in 1976 that the bodies were face up, side by side and head to feet. (Trial Tr. 632.) But Johnny Broner, who discovered the remains on August 21, 1973, testified in the 1976 trial that the one body was face down and covered with fruit box tops. (Trial Tr. 213-15.) The investigators also noted that the body was positioned face down. (Def. Exh. 84). Of course, the skeletal remains of the unidentified second corpse were widely dispersed. Id.

The evolution of Mr. DiLisio's various statements in 1975 into his 1976 trial testimony demonstrates that this evolution is the product of continuing police pressure and suggestive procedures. (See Def. Exhs. 29-34). When police first began questioning him, Mr. DiLisio knew nothing. (Def. Exhs. 30, 80 (tab 3)). Even during his initial hypnosis session, he denied being shown any dead bodies. (Def. Exhs. 31, 80 (tab 5)). Police then took Mr. DiLisio to the dump site. After that visit,

Mr. DiLisio began discussing his asserted trip to the dump with Mr. Spaziano. His subsequent statements demonstrated ever-increasing "recall," detail, and specificity. Although his description of the bodies was never consistent with the physical evidence, Mr. DiLisio's ultimate "recall" of the surroundings was remarkably similar to the crime scene that was shown to him more than once. (See Def. Exhs. 32 at 8 (May 16, 1975, hypnosis session in which Mr. DiLisio says he saw the scene "yesterday"); 34 at 18-19 (May 18, 1975, statement in which Mr. DiLisio said he went to the scene with police and his father "this morning")).

On May 16, 1975, during his second hypnosis session, Mr. DiLisio stated that he saw one unclothed body lying face up by a lake. (Def. Exhs. 32 at 1; 80 (tab 6)). It was bloody and had been stabbed in the chest. Id. at 2, 6. There was also an "old" body that smelled. Id. at 3-4. One body had "something on her head." Id. at 6. The chest of one body was "cut up." Id. at 7. Any description of the body as lying face up, bloody, stabbed, or cut up is inconsistent with the physical evidence. (Def. Exh. 84 (death investigation report describing body as lying face down in a badly decomposed condition). In that session, Mr. DiLisio also agreed with the suggestion that "Mark" or "Mike" wore a black patch over his right eye. (Def. Exhs. 32 at 5; 80 (tab 6)).[18]

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[18] In a police investigative report, Mr. DiLisio identified Bill Coppick as the other person present when Mr. Spaziano purportedly showed him the bodies. (Def. Exh. 83). Mr. Coppick testified at trial as a State witness, but said he had never been with Mr. Spaziano in the presence of dead bodies. (Trial Tr. at 558-84.) In any event, neither Mr. Coppick, "Mike," nor "Mark" testified at the evidentiary hearing before the trial court.

Mr. DiLisio added even more details in a sworn statement given on May 16, 1975--almost two years after the bodies were discovered at the dump site. He gave most details in direct response to suggestions by his interrogators: He agreed with the suggestion that he was taken to a place "back in the woods." He stated that "Mark" or "Mike" had brown, curly, collar-length hair. (Def. Exhs. 33 at 13-14; 80 (tab 7)). He agreed with the suggestion that the bodies were "one on top of another" and added that they were side-by-side.[19] Id. at 26. He agreed with the suggestion that there were trees around, including oak trees. (Def. Exhs. 33 at 16; 80 (tab 7)). He also agreed with the suggestion that there was trash all around. Id. at 16. In response to the suggestion that he stood more than a truck length from the bodies, he added that he was about twenty feet away. Id. at 13. He agreed with the suggestion that Mr. Spaziano carried a knife. Id. at 23. He now identified Mr. Spaziano's truck as a '72 blue pickup truck. Id. at 7-8.

In his May 18, 1975, sworn statement, after being taken again to the dump by Lt. Abbgy, Sgt. Martindale, and his father, Mr. DiLisio again supplied new details: On the way to the dump he sat between Mr. Spaziano and "Mark" or "Mike." (Def. Exh. 34 at 4, 18-19, 80 (tab 8)). He now recalled that Mr. Spaziano was wearing jeans, a black shirt, and a jeans jacket. Id. at 30.

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[19] This is inconsistent with the physical evidence from the crime scene. A report of the scene describes one body lying face down and, about thirty to thirty-five feet away, bones scattered throughout the areas. (Def. Exh. 84).

There were "wood or straw" bushel baskets or baskets. He agreed with the suggestion that they were "basket covers." Id. at 7. When it was suggested to him that there were discarded "roofing materials" on the scene, he suddenly recalled seeing "old tar paper." Id. He agreed with the suggestion that the bodies were "uncovered." Id. He agreed with the suggestion that Mr. Spaziano had used a knife on these bodies.[20] Id. at 11.

When he was deposed on November 12, 1975, Mr. DiLisio stated for the first time that he recalled clearly seeing the breasts on the body closest to him. (Def. Exhs. 36 at 24; 80 (tab 10)). He stated that they were all bloody and appeared to have been "cut off." Id. He also now recalled a piece of "underwear" near the head of one corpse. Id. at 23. This had been suggested to him during his May 16, 1975, hypnosis session and sworn statement. (See Def. Exhs. 32 at 7; 33 at 11, 23; 80 (tabs 6 and 7)). For the first time, he stated that one body had hair of "a brown color." (Def. Exhs. 36 at 25; 80 (tab 10)). He added that the bodies were lying "head to feet." Id. at 46. Now he identified Mr. Spaziano's vehicle as a two-toned blue Ford pickup truck. Id. at 17, 44. Details such as bloody breasts and bodies lying head to feet are inconsistent with the physical evidence from the crime scene of a badly decomposed body and other human bones scattered thirty to thirty-five feet away. (Def. Exh. 85).

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[20] Again, this is inconsistent with the physical evidence. (Def. Exh. 84).

Finally, at the January 1976 trial, Mr. DiLisio stated for the first time that he had seen "[c]ardboards, orange crates, tar paper, lids to baskets" and "[a] lot of newspaper." (Trial Tr. 637, 644-46). The least decomposed body had light brown hair and its "upper body and face" were all covered in blood. Id. at 632-33. It "looked like a mutilated body." Id. at 633. This fact had been repeatedly suggested to him during his May 16, 1975 statement. (See Def. Exh. 33 at 14, 16). There were cuts on the "breasts, stomach and chest." (Trial Tr. 634). He now identified Mr. Spaziano's vehicle as a light and dark blue truck. Id. at 619-20. Again, the physical evidence of a body exhibiting no evidence of trauma is plainly inconsistent with Mr. DiLisio's trial testimony concerning mutilation and blood. (Def. Exh. 84).

VII. THE RECANTATION

As Judge Eaton found in his Order, "[i]t is most likely that the crime scene depicted by Delisio [sic] is a scene that he created for the purpose of pleasing the police and his father." (App. A-6; V.18, R. 3810.) In 1995, however, Mr. DiLisio recanted his trial testimony. He repeated his recantation at the evidentiary hearing in January 1996.

The roots of the recantation were cultivated during his conversations with Elmer Leidig, a man who has spent many of his eighty-four years counseling troubled individuals. As Mr. DiLisio's friendship with Mr. Leidig grew, and Mr. DiLisio came to trust and respect him, Mr. DiLisio shared with him a secret that had troubled him for many years. (V.21, Tr. 326, 329.) At

some point between 1992 and 1994, Mr. DiLisio told Mr. Leidig that in his youth, he had testified falsely in a murder trial. (V.21, Tr. 329.) It was through Mr. Leidig that Mr. DiLisio became aware of the concept of restitution. Mr. Leidig told him that God would provide an opportunity for the restitution to occur. (V.21, Tr. 328-29.)

Mr. DiLisio experienced a series of traumatic events in 1994 and early 1995. First, his brother Nick died in January 1994. (V.21, Tr. 330; Def. Exh. 89.) Next, Mr. DiLisio, his new wife, stepdaughter, and sister were involved in a serious auto accident. (V.21, Tr. 334.) Then, fire damaged a house in central Florida that belonged to Mr. DiLisio's new wife and was being rented by his sister. (V.21, Tr. 333-34.) After repairing the house, Mr. DiLisio's wife refused to return to Pensacola with him. (V.21, Tr. 334-36.) In November 1994, Mr. DiLisio was involved in a boating accident that left him clinging to the damaged craft for several hours during a storm in the Gulf of Mexico. (V.21, Tr. 340-44.)

It was in this context that Mr. DiLisio was first approached by CCR investigator Mike Hummill in early 1995. (V.21, Tr. 344.) Although greatly disturbed by Mr. Hummill's visit (V.21, Tr. 344-45, 349), Mr. DiLisio refused to speak to him about his 1976 trial testimony. (V.21, Tr. 345.)

In March 1995, about a month after Mr. Hummill's visit, Mr. DiLisio's father died. (V.21, Tr. 350.) Two CCR investigators, Mr. Hummill and Mr. Hays, visited Mr. DiLisio in

May 1995 (V.21, Tr. 345), but Mr. DiLisio still would not discuss his trial testimony. (V.21, Tr. 347-48.) However, the investigators gave Mr. DiLisio a fact that weighed further on his mind: Mr. DiLisio had been the key witness at Mr. Spaziano's trial. (V.21, Tr. 347.) He testified at the evidentiary hearing that he was "floored" by this information. (V.21, Tr. 347.) Mr. DiLisio testified that he experienced great turmoil after the investigators' visit, wanting to release the truth inside of him, but finding himself unable to do so. (V.21, Tr. 361-62.)

On June 8, 1995, Miami Herald reporter Lori Rozsa came to Mr. DiLisio's home on three occasions to speak with him about his testimony at Mr. Spaziano's trial, but Mr. DiLisio "still wasn't ready to deal with it." (V.21, Tr. 362-64.) That evening, Mr. DiLisio felt that he had come to a "Y" in the course of his life. (V.21, Tr. 366.) He testified that he thought he had to pursue the path of truth, even though he believed he would be thrown in jail for perjury. (V.21, Tr. 364-65.) He also thought he would lose "my house, my business, my daughter." (V.21, Tr. 368.) Ms. Rozsa returned to his home on June 9, 1995, and Mr. DiLisio chose the path that ultimately led to the evidentiary hearing in January 1996: He recanted.

Mr. DiLisio recanted his 1976 trial testimony in a non-confidential conversation for the first time on June 9, 1995, when he told Ms. Rozsa that he lied during Mr. Spaziano's murder trial. (V.21, Tr. 372-73.) Mr. DiLisio then told Warren Holmes, a professional polygraph examiner, former Miami police officer,

private criminal investigator, and consultant to the Miami Herald, that he had lied at the 1976 trial. (V.21, Tr. 374). He later told Florida Department of Law Enforcement ("FDLE") agents the same thing. (Def. Exh. 38 (videotape of FDLE's interview of Mr. DiLisio on June 14, 1995)).

The core of these recantations remains unchanged to this day: Mr. DiLisio's testimony at Mr. Spaziano's trial in January 1976 was false. Significantly, during the evidentiary hearing before the trial court, the State and Mr. Spaziano stipulated that Mr. DiLisio's recantation since June 1995 has been unwavering. (V.23, Tr. 589-90.)

At the evidentiary hearing, Mr. DiLisio specifically recanted every statement of substance made in his January 1976 trial testimony, including: denying that he saw in August 1973 at a dump site near Forest City Road: a dead female body (V.21, Tr. 235; compare Trial Tr. 631); a mutilated female body (V.21, Tr. 235; compare Trial Tr. 633); a "cut up" female body (V.21, Tr. 235; compare Trial Tr. 633); a female body with cuts on its breasts (V.21, Tr. 235; compare Trial Tr. 634); a female body with cuts on its stomach (V.21, Tr. 235; compare Trial Tr. 634); a female body with cuts on its chest (V.21, Tr. 235-36; compare Trial Tr. 634); a dead body with light brown hair around the head area (V.21, Tr. 236; compare Trial Tr. 632); a dead body where the upper part of the body was covered with blood (V.21, Tr. 236; compare Trial Tr. 632); two unclothed dead bodies (Tr. 236; compare Trial Tr. 631); decomposing dead bodies (V.21, Tr. 236;

compare Trial Tr. 632); orange crates (V.21, Tr. 236; compare Trial Tr. 637, 645); tar paper (V.21, Tr. 236; compare Trial Tr. 637, 645); cardboard (V.21, Tr. 237; compare Trial Tr. 637, 646); basket tops (V.21, Tr. 237; compare Trial Tr. 637, 646); newspapers (V.21, Tr. 237; compare Trial Tr. 637). Moreover, Mr. DiLisio denied smelling an odor associated with a dead body (V.21, Tr. 236; compare Trial Tr. 631).

Mr. DiLisio further denied that he was ever at the place depicted in the aerial photographs introduced as Defendant's Exhibits 82A and 82B in August 1973. (V.21, Tr. 237; compare Trial Tr. 642-44.) He denied seeing the scenes in August 1973 depicted in the thirty-three individual crime scene photographs introduced as Defendant's composite Exhibit 81. (V.21, Tr. 237-43; compare Trial Tr. 644-46.)

Mr. DiLisio also denied other critical trial testimony. Specifically, he denied that he went in August 1973 to the dump site in a blue, two-tone pickup truck (V.21, Tr. 244; compare Trial Tr. 619); with a man who had a patch over one eye (V.21, Tr. 244; compare Trial Tr. 662); with Mr. Spaziano (V.21, Tr. 245; compare Trial Tr. 620-21); or with any other human beings, or by himself. (V.21, Tr. 245.) He also denied taking LSD, acid, or purple microdot at the dump site. (V.21, Tr. 245; compare Trial Tr. 635.)

Mr. DiLisio specifically denied that in August 1973 he knew where Mr. Spaziano lived (V.21, Tr. 245-46; compare Trial Tr. 620); that he smoked marijuana at Mr. Spaziano's apartment (V.21,

Tr. 246; compare Trial Tr. 626); that Mr. Spaziano told him in a conversation at Mr. Spaziano's apartment that he would show Mr. DiLisio some girls that he had "raped," "stabbed," "cut their tits," "cut their cunts," and "tortured" (V.21, Tr. 246-47; compare Trial Tr. 627); that Mr. Spaziano had ever made such statements to him (V.21, Tr. 247; compare Trial Tr. 627); that he had ever been to Mr. Spaziano's Casselberry apartment with Mr. Spaziano, another person, or alone (V.21, Tr. 248; compare Trial Tr. 626); that Mr. DiLisio had taken a ride in any truck from Mr. Spaziano's apartment to the dump site (V.21, Tr. 248-49; compare Trial Tr. 619-21); and that he had taken such a trip with Mr. Spaziano, another person, or alone (V.21, Tr. 249-50; compare Trial Tr. 621).

Finally, this colloquy occurred:

> Q. And at that trial, in January of 1976, the Spaziano murder trial, did you testify truthfully or falsely in this court, on these factual points which I have just described to you, both this morning and this afternoon, involving this Forest City Road dump site and the month of August of 1973?
>
> A. Falsely.

(V.21, Tr. 251.)

Mr. DiLisio clearly and repeatedly stated that he recanted because of his relationship with God and his desire to be free from the terrible burden that he had carried since his 1976 trial testimony. (V.21, Tr. 327-30, 360, 361, 365-68, 382-83, 384.) In his testimony about the events that occurred just before his recantation to Ms. Rozsa, Mr. DiLisio spoke repeatedly of seeking God's guidance and of God showing him the way. (V.21, Tr. 365-

68.) Mr. DiLisio's motivation to recant was summed up by this testimony:

> Q. My final question to you is: Why is it now? Now, almost twenty years later, after you gave this false testimony, that you have come forward and stated here in this courtroom and stated to others since early June of 1995, that you testified falsely in 1976, and that you are now recanting your testimony?
>
> A. I don't want to say that it's a selfish reason, but in a way, I feel that it is, because it's given me freedom that I've never known, that I've longed for all my life. But even more than that, I'm doing what is right.
>
> And as I make right decisions, it has a great effect on who I am inside and how I feel about myself as a man. All I can say is, I just feel that I had to do what was right when I came to that "Y" in the road.
>
> I wished--at times, I think I wished I was able to come forth sooner, because it's such a bad thing that I did. I'm very sorry I didn't, but I'm also very grateful that I still have the opportunity to come forth at this day and time. . . .
>
> Q. Are you doing this to save Joe Spaziano from being electrocuted by the State of Florida?
>
> A. No, that's not my motive at all here.
>
> Q. And your motive . . .
>
> A. My motive is to do what I believe that the Farther [sic], my God wants me to do, to set the slate clean for what I did wrong then.
>
> I don't know if Joe Spaziano is innocent or guilty. I know that I testified twenty years ago falsely, and when I realized that my testimony had a great deal to do with him being where he's at, I realized, at that point, that why it was such a powerful stronghold in my life, and why God detests and hates a false witness.

(V.21, Tr. 383-84.)

Mr. Leidig corroborated Mr. DiLisio's testimony about the recantation. Several years after Mr. Leidig met Mr. DiLisio in

1989, Mr. DiLisio suggested to Mr. Leidig that he had a "problem" but did not offer any specifics. (V.22, Tr. 505.) During subsequent conversations, Mr. DiLisio told Mr. Leidig that when he was "a tough youngster," he was hypnotized and "coached" to say things in a murder trial that were not true. (V.22, Tr. 507-09.) Mr. Leidig suggested that Mr. DiLisio repent and turn the matter over to God. (V.22, Tr. 509.) Mr. DiLisio later told Mr. Leidig that the Lord had heard him, but that he did not know what the Lord had in mind for him. (V.22, Tr. 511.) Mr. Leidig testified that he observed a great change in Mr. DiLisio thereafter. (V.22, Tr. 512.)

VIII. THE STATE'S WITNESSES

The State called witnesses in an attempt to attack Mr. DiLisio's testimony and destroy his credibility. But, as Judge Eaton found in his Order, "[m]any of these witnesses had major credibility problems themselves." (App. A-6; V.18, R. 3810.) These witnesses failed to attack the core of Mr. Spaziano's case and failed to rebut the truthfulness of Mr. DiLisio's 1995 recantation.

Darcy Lynn Fauss, an admitted drug user and Mr. Spaziano's girlfriend during the time that he and Mr. DiLisio purportedly knew each other in the 1970s, claimed that she frequently saw Mr. Spaziano and Mr. DiLisio together. (V.23, Tr. 744.) She stated that she saw them together in a truck. (V.23, Tr. 746.) She also claimed that she saw Mr. DiLisio at Mr. Spaziano's residence up to nine times and had been to the DiLisio residence three

times. In her opinion, Mr. Spaziano and Mr. DiLisio were "very good friends." (V.23, Tr. 747.) But when Ms. Fauss gave a statement to police in May 1975, she could not even remember Mr. DiLisio's name. (State Exh. D for identification only (transcript of Ms. Fauss' statement to police)); see also (V.23, Tr. 760.)

Confronted with her admitted lengthy drug use history, Ms. Fauss admitted to committing perjury (V.23, Tr. 768-71), but claimed that she had been "forced" to say everything in her May 31, 1975, statement. (V.23, Tr. 772-74, 776, 777.) While Ms. Fauss testified that Mr. Spaziano instructed her to be very careful in her police interview, she freely admitted in her May 1975 statement that Mr. Spaziano had marijuana stashed around his home. (State Exh. D for identification only); see also (V.23, Tr. 765-66). Ms. Fauss also confirmed that Ralph DiLisio and Mr. Spaziano had a falling-out in 1974. (V.23, Tr. 761-62.)

Timothy Loughrin, who met Mr. DiLisio through a former girlfriend (V.24, Tr. 796), briefly testified through a proffer that on one occasion while he and Mr. DiLisio were smoking marijuana at a friend's house in 1975 or 1976, Mr. DiLisio told him that a man named "Crazy Joe" had shown him some bodies. (V.24, Tr. 803-05.) Of course, Mr. DiLisio was confined to a drug treatment center or a juvenile detention facility from his arrested for possession of marijuana in October 1974 until his eighteenth birthday August 1975. The State presented no evidence that this conversation predated Mr. DiLisio's August 1975 release

from the Volusia House. Thus, this testimony is entirely consistent with Mr. DiLisio's admissions that after the hypnosis session in May 1975, he falsely told other people that he had seen dead bodies. (V.22, Tr. 418-20, 421-22.)

Annette Jones, a high school dropout, two-time convicted felon, and admitted drug addict and alcoholic, also testified for the State. Ms. Jones said she moved to Florida after her fifteenth birthday (V.24, Tr. 808-09), which would have been on March 8, 1975. Sometime thereafter, but still in 1975, she and Mr. DiLisio went to the Prairie Lake seawall. (V.24, Tr. 810.) Mr. DiLisio told her that he was involved in some "serious stuff" and that Mr. Spaziano had "showed him two bodies." (V.24, Tr. 813.) She claimed that Mr. DiLisio told her that he was afraid for his and Ms. Jones' lives and would probably have to leave. (V.24, Tr. 813.)

At the time, Ms. Jones was admittedly using both marijuana and alcohol (V.24, Tr. 828-29, 853-55) up to thrice weekly (V.24, Tr. 856) and had probably used both the day before her conversation with Mr. DiLisio. (V.24, Tr. 858.) At the time, she was admittedly a drug addict and an alcoholic. (V.24, Tr. 871.) She also acknowledged that alcohol impaired her ability to recall. (V.24, Tr. 893-895.)

Most significantly, Ms. Jones could not narrow the time frame beyond "some time in 1975," although she stated that it "was not cold" and it "could have been" July, August, or September 1975. Mr. DiLisio did not leave confinement from a

juvenile facility until August 16, 1975--long after the hypnosis sessions in May 1975. And this purported conversation could not have occurred until after Ms. Jones moved to Florida sometime after March 8, 1975. The lack of probative value of Ms. Jones' testimony is underscored by the fact that Mr. DiLisio was committed to a drug treatment center or a juvenile detention center from October 1974 until August 16, 1975, more than three months after the hypnosis took place. The State failed to present any evidence that this conversation either predated Mr. DiLisio's police interrogations or post-dated Mr. DiLisio's August 1975 release from the Volusia House, a fact that Judge Eaton pointed out in his Order. (App. A-7; V.18, R. 3811.)

Frances Lepine, one of Mr. DiLisio's younger sisters, testified that after she read a Miami Herald article about this case in June 1995, she called Mr. DiLisio to find out why he was doing this. (V.24, Tr. 900-01.) Mr. DiLisio told her he was "thinking of his own death," "concerned with going before the Lord," and "that he would have to pay for Spaziano's life himself when he died." (V.24, Tr. 901.) According to Ms. Lepine, he complained that he was being "harassed" by attorneys, the press, and "Spaziano's people." (V.24, Tr. 901.) She further testified that Mr. DiLisio said his daughter had answered the phone and the door on such occasions and that "they could not even go to the store without being harassed." (V.24, Tr. 902.)

This testimony is consistent with Mr. DiLisio's testimony that he had several contacts with CCR investigators Mr. Hummill

and Mr. Hays, whom he characterized as "aggressive." (V.22, 435-37.) He also testified that he had several contacts from Ms. Rozsa, whom he characterized as a "bitch" and "persistent." (V.22, Tr. 448.) Except for a vague and ambiguous statement about "Spaziano's people," Ms. Lepine's testimony bolsters Mr. DiLisio's testimony that he recanted because of his religious concerns that his soul would be forever endangered by his prior false testimony against Mr. Spaziano. (V.21, Tr. 382.)

Edwin Householder, a two-time convicted felon and admitted drug and alcohol user, testified for the State that he dated Mr. DiLisio's sister Anna (V.24, Tr. 907) while employed by Ralph DiLisio as a boatrigger for six to eight months from late 1972 to early 1973. (V.24, Tr. 905-06.) Mr. Householder testified that he saw both Mr. DiLisio and Mr. Spaziano around the marina. (V.24, Tr. 907-08.) He testified that Mr. Spaziano and Mr. DiLisio "looked like good buddies." (V.24, Tr. 909.) Testimony that an employee was friendly with the boss's son hardly establishes, as the State would suggest, that the two were "constant companions." This testimony simply did not impact on the truthfulness of Mr. DiLisio's recantation.

Next, the State called Bill O'Connell, who worked as a counselor at Volusia House when Mr. DiLisio was incarcerated there in 1975. Mr. O'Connell testified that Mr. DiLisio told him he had trouble sleeping because he "complained of having memories, or, I don't know, visions was the words he used, but some imagines [sic] of dead people, dead bodies." (V.24, Tr.

953.) He said he thought that the complaints occurred "in late '74 early '75" (V.24, Tr. 922), and before Mr. DiLisio was hypnotized. (V.24, Tr. 933, 947.) Even assuming this to be the case, the probative value of such a vague and ambiguous comment is negligible. Mr. DiLisio had been subject to police interrogation in the preceding seven months about the alleged murders. It is conceivable that a seventeen-year-old recovering drug addict would find such discussions disturbing enough to evoke unpleasant dreams or images.

Mr. O'Connell also testified that Mr. DiLisio "spoke of taking the police to grave sites." (V.25, Tr. 1064.) He told Mr. O'Connell that he was "acquainted" with Mr. Spaziano. (V.25, Tr. 1066.) However, because Mr. DiLisio did not deny that he told people these things after being hypnotized, this testimony has no probative value and does not impeach Mr. DiLisio's truthfulness. Judge Eaton found in his Order that the statement that Mr. DiLisio had taken police to a gravesite "does not agree with other credible evidence in the case unless it was made after Delisio [sic] developed his testimony for the trial." (App. A-6; V.18, R. 3811.)

Ralph "Lucifer" Yannotta, a convicted murderer in the federal witness protection program and a former Outlaw, testified he saw Mr. Spaziano at Union Correctional Institution "some time [in] 1976" (V.24, Tr. 962) and that Mr. Spaziano made admissions about the murders of two "nurses." (V.24, Tr. 970.) According to Mr. Yannotta, Mr. Spaziano said he had shown two bodies to a

"young boy" or a "boy" and was concerned about the boy testifying against him. (V.24, Tr. 969, 971.) The time frame within which this conversation could have taken place is exceedingly narrow: Mr. Spaziano left Union Correctional Institution on January 14, 1976, to attend his murder trial in Seminole County. (See generally Trial Tr. (reflecting Mr. Spaziano's presence at his trial).)

Mr. Yannotta first began cooperating with the State of Florida in 1978, when he was facing the death penalty for five murders. (V.25, Tr. 988-91.) At that time, investigators debriefed Mr. Yannotta about his knowledge of bad acts by Outlaws. (V.25, Tr. 992-93.) He admitted, however, that he had no "direct knowledge" about the murders. (V.25, Tr. 995.)

Significantly, Judge Eaton found "questionable" the reliability of Mr. Yannotta's testimony that Mr. Spaziano had expressed concerns in 1976 about the boy he had taken to see the bodies. (App. A-6; V.18, R. 3810.) "If the statement was made, it is likely that the defendant was discussing the testimony he had learned Delisio [sic] was going to give at trial." (App. A-6; V.18, R. 3810.)

Although Mr. Yannotta testified that his testimony was motivated by a civic duty to tell the truth (V.25, Tr. 1009-10), this State witness has major credibility problems. He testified that he has been convicted of six felonies (V.24, Tr. 971), including the murders of five people. (V.25, Tr. 990.) He is an admitted perjurer with three prior convictions for crimes

involving dishonesty or false statement. (V.24, Tier. 972; V.25, Tier. 982, 983.) In addition, Mr. Yannotta has testified as a government informant on many occasions. (V.25, Tier. 1008.) In informing, he avoided the death penalty for his own participation in five execution-style murders. (V.25, Tier. 988-89.)

Michael Spaziano, a convicted murderer and cocaine trafficker who is the brother of Joseph Spaziano, also testified for the State. (V.25, Tr. 1015.) He testified that he received a telephone call from Mr. Spaziano after his arrest in 1975 or 1976. (V.25, Tr. 1016.) Mr. Spaziano was "upset" about "a young kid named DiLisio." (V.25, Tr. 1016, 1018.) Michael Spaziano also testified that in 1980, he received a letter stating that "someone" would contact him to find out where Mr. DiLisio is. (Tr. 1018, 1025.) Michael Spaziano provided no information about who that "someone" was.

In support of the State's claim that Mr. DiLisio recanted out of fear of Outlaw retribution, it presented the testimony of Elton Grantham, a former law enforcement officer. Mr. Grantham testified that he took a complaint from Mr. DiLisio in 1978, which relayed statements by Mr. DiLisio and his brother regarding perceived threats and unidentified cars driving by Mr. DiLisio's home. (V.25, Tr. 1069-70; State Exh. 1.)

The State suggests that this testimony supports the theory that a subjective fear motivated Mr. DiLisio to recant his story seventeen years later--and after Mr. Spaziano had been the subject of four prior death warrants. While this evidence is

consistent with Mr. DiLisio's acknowledgement that he feared retaliation from the Outlaws after he testified against Mr. Spaziano, (V.22, Tr. 414, 437-38, 444), it does not tend to prove that Mr. DiLisio recanted in 1995 out of fear of retribution. In fact, Mr. DiLisio testified that Outlaws never personally confronted or threatened him. (V.22, Tr. 438, 440, 443.) He denied recanting because he fear the Outlaws' intimidation. (V.22, Tr. 458.)

The final State witness was Donna DiLisio Yonkin, another of Mr. DiLisio's younger sisters. She testified that she saw Mr. Spaziano and Mr. DiLisio together at least two or three times and that she saw them together in vehicles. (V.25, Tr. 1073-74.) This does not contradict Mr. DiLisio's testimony that he had spent some time with Mr. Spaziano and that he had ridden in his vehicle, and it certainly has no bearing on Mr. DiLisio's credibility in this case.

IX. DIFFERENT RESULT ON RETRIAL

Since mid-1995, Mr. DiLisio has been absolutely unwavering in his recantation and his desire to tell the truth. The State failed to present any evidence that the recantation was not truthful. The evidence shows that Mr. DiLisio recanted because of his deeply-held belief in God and his desire to make restitution for testifying falsely in 1976. Judge Eaton found that without Mr. DiLisio's testimony from the 1976 trial, this would "probably produce a different result on retrial." (App. A-7; V.18, R. 3811.)

SUMMARY OF THE ARGUMENT

ISSUE I: A trial court's findings are entitled to great deference on appeal, particularly when the appellate court is reviewing an order granting a new trial. The trial court's findings must not be disturbed absent an abuse of discretion. The record in the case below reveals substantial, competent evidence to support the trial court's decision to vacate Mr. Spaziano's judgment and sentence and to grant him a new trial. Thus, this Court cannot overturn the trial court's decision.

ISSUE II: A trial court has broad discretion to admit expert testimony when it will assist the trier of fact in understanding the evidence or determining a fact in issue. A trial court's decision to admit expert testimony will not be disturbed absent a clear showing of error. The record from the evidentiary hearing demonstrates that the trial court had ample reason to admit expert testimony to assist it in determining the complex issues such as repressed memories. In addition, the record reveals no bias by the experts. Therefore, the trial court's decision should not be disturbed.

ARGUMENT

I. THERE IS AMPLE EVIDENCE TO SUPPORT THE LOWER COURT'S DECISION TO VACATE MR. SPAZIANO'S JUDGMENT AND SENTENCE; THEREFORE, THE LOWER COURT DID NOT ABUSE ITS DISCRETION (restated).[21]

Florida courts treat recanted testimony the same as a claim of newly discovered evidence when raised in a Florida Rule of Criminal Procedure 3.850 motion. See, e.g., Venuto v. State, 615 So. 2d 255, 256 (Fla. 3d DCA 1993); Hickox v. State, 604 So. 2d 528, 528 (Fla. 1st DCA 1992); Cammarano v. State, 602 So. 2d 1369, 1370 (Fla. 5th DCA 1992); Herrick v. State, 590 So. 2d 1109, 1109 (Fla. 2d DCA 1991). Because this Court treated the claim of Mr. DiLisio's recantation as a successive rule 3.850-3.851 motion, see Spaziano, 660 So. 2d at 1365, the issue before the trial court was properly considered as a motion for a new trial based on the newly discovered evidence of this recantation.

Florida courts have long held that such a motion for a new trial based on newly discovered evidence will be granted if a petitioner demonstrates these elements:

(1) the evidence has been discovered since the former trial;

(2) the evidence could not have been discovered earlier through the exercise of due diligence;

(3) the evidence must be material to the issue;

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[21] This issue responds to Issue II of the Initial Brief (the lower court abused its discretion in assessing the truthfulness of recantation testimony and erred in vacating Spaziano's judgment and sentence and ordering a new trial). The State's Issue II is found in its Initial Brief at 69-82.

(4) the evidence must go to the merits of the cause and must not be merely to impeach the character of a witness;

(5) the evidence must not be merely cumulative; and

(6) the evidence must be such that it would likely produce a different result on retrial.

Henderson v. State, 135 Fla. 548, 560, 185 So. 625, 629-30 (1938).[22] The record shows ample evidence that Mr. Spaziano has satisfied each one of these tests.

DUTY AND AUTHORITY OF THE TRIAL COURT

In the recantation context, the trial judge must examine all the circumstances of the case, including the testimony of the witnesses submitted on the issue. Armstrong v. State, 642 So. 2d 730, 735 (Fla. 1994), cert. denied, 115 S. Ct. 1799, 131 L. Ed. 2d 726 (1995); Bell v. State, 90 So. 2d 704 (Fla. 1956). Recanting testimony is considered exceedingly unreliable, and a trial court must deny a new trial where it is not satisfied that the testimony is true. Armstrong, 642 So. 2d at 735. "Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted." Id.; see also Swafford v. State, No. 85,682, 1996 WL 385505, at *4 (Fla. July 11, 1996) (trial court must determine whether newly discovered evidence

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[22] This Court has recently given a more succinct definition of newly discovered evidence: "[T]he asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Jones v. State, 591 So. 2d 911, 916 (Fla. 1991) (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)).

"would have probably produced an acquittal"). The record demonstrates that Mr. Spaziano has satisfied the Armstrong requirements.

A trial court's discretion to grant a new trial must not be disturbed absent an abuse of discretion. Castlewood Int'l Corp. v. LaFleur, 322 So. 2d 520, 522 (Fla. 1975.) The trial court did not abuse its discretion in vacating Mr. Spaziano's judgment and sentence and ordering a new trial. To the contrary, there is competent, substantial evidence to support the trial court's findings and conclusions.

This Court has defined judicial discretion as:

> "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court."

Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) (quoting 1 Bouvier's Law Dictionary and Concise Encyclopedia (8th ed. 1914)). In his Order, Judge Eaton explained that to reach his decision, he evaluated:

> the credibility of a witness and the weight to be given to testimony by considering the demeanor of the witness; the frankness or lack of frankness of the witness; the intelligence of the witness; the interest, if any, that the witness has in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testifies; the ability of the witness to remember the events; and the reasonableness of the testimony considered in light of all of the evidence in the case. Additionally, trial judges attempt to reconcile any conflicts in the evidence without imputing untruthfulness to any witness. However, if conflicts cannot be reconciled, evidence unworthy of belief must be rejected in favor of evidence which is worthy of belief.

(App. A-3; V.18, R. 3807.) Judge Eaton properly followed his role as a factfinder "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause." Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976.)

Factfinders are considered "the only proper resolvers of disputed facts and arbiters of witnesses' credibility." Scholastic Book Fairs, Inc., Great Am. Division v. Unemployment Appeals Comm'n, 671 So. 2d 287, 288 (Fla. 5th DCA 1996). A trial judge sitting as a factfinder is accorded this deference because the judge "'hears the testimony of the witness and observes their demeanor and conduct, and is thus in a better position to arrive at true findings of fact than is the appellate court, which is confined in its consideration to the "cold" typewritten transcript'." Tramel v. Bass, 672 So. 2d 78, 83 (Fla. 1st DCA 1996) (quoting Pope v. O'Brien, 213 So. 2d 620, 621 (Fla. 1st DCA), appeal dismissed, 219 So. 2d 695 (Fla. 1968)).

Thus, the factfinder is considered to be in a superior position to weigh conflicting evidence and to decide what evidence is reliable in light of the witnesses' credibility, interest in the case, and conflicts in their testimony. See, e.g., In re Forfeiture of the Following Described Property: 1981 Oldsmobile, VIN #1G3AZ57N2BE32296, 593 So. 2d 1087, 1089 (Fla. 1st DCA 1992).

A factfinder may disbelieve any part of a witness's testimony. Id. at 1089. Where there are conflicts in the

evidence, it becomes the province of the factfinder to reconcile, if possible, such conflicts and if not possible, to determine who was and was not speaking the truth. See, e.g., Taylor v. State, 98 Fla. 881, 883, 124 So. 445, 446 (1929); Kimbrough v. State, 219 So. 2d 58, 59 (Fla. 1st DCA) (per curiam), cert. denied, 225 So. 2d 540 (Fla. 1969).

DUTY AND AUTHORITY OF THE APPELLATE COURT

In short, Judge Eaton had the discretion to decide whether to grant Mr. Spaziano's motion for a new trial, and this Court must not overturn that decision unless it finds that the trial judge abused his discretion. See Castlewood, 322 So. 2d at 522. As this Court held in Shaw:

> It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record before it. The test . . . is whether the judgment of the trial court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable testimony or evidence," it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court.

334 So. 2d at 16 (footnote omitted).

A trial court abuses its discretion when it makes a decision that is "'arbitrary, fanciful, or unreasonable.'" Canakaris, 382 So. 2d at 1203 (quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)).

> "[This] is another way of saying that discretion is abused only where **no reasonable man** would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

Id. at 1203 (emphasis added) (quoting Delno, 124 F.2d at 967).

Where the record shows competent, substantial evidence to support to trial judge's findings, and there has been no showing of a misapprehension of the legal effect of the evidence as a whole, an appellate court will not interfere with the trial judge's findings of fact and conclusions of law. Williams-McWilliams Indus., Inc. v. Heart-a-Tampa, Inc., 201 So. 2d 920, 920 (Fla. 2d DCA) (per curiam), cert. denied, 207 So. 2d 691 (Fla. 1967).

"Competent substantial evidence" refers not to the "quality, character, convincing power, probative value or weight" of the evidence, but to "the existence of **some evidence** (quantity) as to each essential element and as to the legality and admissibility of that evidence." Scholastic Book Fairs, Inc., 671 So. 2d at 290 n.3 (emphasis added). "Competency of evidence" refers to admissibility under the rules of evidence. Id. "Substantial" evidence means that some real, material, pertinent, and relevant evidence that has definite probative value as to each essential element. Id.

Thus, if the trial court's "account of the evidence is plausible in light of the record viewed in its entirety, [an appellate] court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985). In other words, this Court cannot legally substitute its "factual"

judgment for that of the trier of fact. Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So. 2d 302, 304 (Fla. 1973). Given the overwhelming support in the record for Judge Eaton's findings and conclusions, this Court cannot reject those findings in favor of the State's preferred interpretation.

Appellate deference to a trial judge's findings applies to cases of recantation. Thus, in Mollica v. State, the appellate court affirmed the denial of a new trial based on the recantation of a state's witness, noting that "[w]here, as here, the trial judge has personally observed the recanting witness and has painstakingly set forth findings which the record supports, we will not disturb his conclusion." 374 So. 2d 1022, 1026 (Fla. 2d DCA 1979), cert. denied, 386 So. 2d 639 (Fla. 1980).

A. THE RECORD SUPPORTS THE TRIAL COURT'S FINDINGS.

In Mr. Spaziano's case, the trial court conducted a lengthy evidentiary hearing and subsequently made thoughtful, considered, and detailed findings of fact. (App. A-1-A-9; V.18, R. 3805-3813.) The trial judge concluded that:

- Mr. DiLisio's recantation was newly discovered evidence that could not have been discovered earlier through the exercise of due diligence (App. A-7; V.18, R. 3811);
- Mr. DiLisio's testimony was credible (App. A-4; V.18, R. 3808); and
- the recanted testimony probably would produce a different result on retrial. (App. A-7; V.18, R. 3811.)

Because competent, substantial evidence in the record supports Judge Eaton's carefully considered findings of fact and the legal conclusions drawn therefrom, this Court cannot legally overturn

his Order vacating Mr. Spaziano's judgment and sentence and ordering a new trial.

The State has the burden of demonstrating both that the findings are incorrect and that they are not supported by the record. See, e.g., Metropolitan Dade County v. Bleaufontaine, Inc., 332 So. 2d 143, 144 (Fla. 3d DCA 1976) (per curiam). The State has utterly failed to meet its burden.

First, there is overwhelming evidence in the record that Mr. Spaziano has satisfied the Jones and Henderson elements and has shown that Mr. DiLisio's recantation was newly discovered evidence.

(1) It is undisputed that Mr. DiLisio has only recently recanted his trial testimony. Mr. DiLisio testified at Mr. Spaziano's trial in 1976 that he accompanied Mr. Spaziano to a dump site and saw corpses there. (Trial Tr. 618, 628, 631-34, 645, 665-66, 688). Not until 1995 did Mr. DiLisio swear out an affidavit stating that he had never accompanied Mr. Spaziano to a dump site. See Spaziano, 660 So. 2d at 1364 (reciting affidavit in full). At the evidentiary hearing, Mr. DiLisio specifically recanted every statement of substance made during his 1976 trial testimony. (V.21, Tr. 235-251.) Mr. Holmes corroborated Mr. DiLisio's testimony that he had only recently recanted his trial testimony. Mr. Holmes spoke with Mr. DiLisio on the telephone immediately after the recantation to Ms. Rozsa, the Miami Herald reporter, on June 9, 1995. Mr. DiLisio told Mr. Holmes that he

had lied at the 1976 trial. (V.22, Tr. 564-65, 567-68; V.23, Tr. 579-81.)[23]

(2) Mr. DiLisio's recantation could not have been discovered earlier through the exercise of due diligence. (App. A-7; V.18, R. 3811.) Mr. Spaziano's attorneys and investigators have always recognized that Mr. DiLisio's trial testimony provided the crucial evidence against Mr. Spaziano. Four lawyers and investigators testified at the evidentiary hearing that they tried to talk to Mr. DiLisio about his 1976 testimony, but their efforts were met with hostility and a refusal to discuss the testimony. (V.20, Tr. 42-43, 65-66, 83, 92, 106, 112-13.) Mr. Spaziano's expert on the issue of due diligence, Mr. Dunn, testified that these attorneys and investigators were diligent in their efforts. (V.20, Tr. 152.)

The fact that Mr. DiLisio refused to discuss his 1976 trial testimony with these attorneys and investigators has no bearing on the issue of diligence. Without a witness's cooperation, "any prior interviews with him would not have brought forth his recantation, however diligently his interviewer questioned him." Cammarano, 602 So. 2d at 1371.

The State did not even try to dispute the first two elements of newly discovered evidence and due diligence in its Initial Brief.

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[23] Although this testimony was initially offered on a proffer of Mr. Holmes, the trial court later decided to admit the testimony into evidence. (V.23, Tr. 582-83.)

(3) Mr. DiLisio's testimony is material to the issue. Judge Eaton found that Mr. DiLisio provided "crucial testimony" at Mr. Spaziano's 1976 trial. (App. A-3; V.18, R. 3807.) In his Order, he found that it was Mr. DiLisio "who provided the only evidence of the cause of death of the decedent and it was he who supplied the jury with the evidence connecting this tragic event to the defendant." (App. A-3; V.18, R. 3807.) Judge Eaton specifically found that there was no corroborating evidence in the record that is sufficient to sustain the verdict. (App. A-3; V.18, R. 3807.)

The significant detail that Mr. DiLisio provided in his 1976 trial testimony could not have helped but influence the jury in reaching its guilty verdict. Indeed, during the 1976 murder trial, both the defense and the State steered the jury toward Mr. DiLisio as the key to deciding Mr. Spaziano's guilt or innocence. The defense attorney said in his closing statement that "without absolute, total irreversible belief in Tony DiLisio's testimony, they simply don't have a case." (Trial Tr. 761.) The prosecutor said in his closing statement:

> DiLisio is the most important witness in this case, and I would submit to you that if you don't believe Tony DiLisio, then find this defendant guilty in five minutes--not guilty, excuse me. . . . If you believe his testimony, then this Defendant is guilty.

(Trial Tr. 776.)

Reviewing courts have also recognized the importance of Mr. DiLisio's testimony. See Spaziano, 660 So. 2d at 1367 (Kogan, J., concurring in part, dissenting in part) (noting that on

direct appeal, the Court pegged its entire analysis of the sufficiency of the evidence on Mr. DiLisio's credibility); Spaziano, 393 So. 2d at 1120 (describing Mr. DiLisio as "the principal witness for the state").

At the evidentiary hearing, the State did not even try to rebut the evidence that the newly discovered evidence, as Judge Eaton found, "goes to the merits of the case." (App. A-7; V.18, R. 3811.) Nor did the State discuss this in its Initial Brief.

(4) The newly discovered evidence does not merely impeach the character of a witness. Indeed, Mr. DiLisio's testimony does not concern the character of any other witness. It is a recantation of his own trial testimony that he had once accompanied Mr. Spaziano to a dump site to view dead bodies. In its Initial Brief, the State offered no argument that the newly discovered evidence merely impeached the character of a witness.

(5) The newly discovered evidence is not cumulative. (App. A-7; V.18, R. 3811.) No other evidence linked Mr. Spaziano to the dump site or any bodies, so the recantation is not cumulative. (App. A-3; V.18, R. 3807.) As Judge Eaton said in his Order, "[w]ithout [DiLisio's] testimony, there simply is no corroborating evidence in the trial record that is sufficient to sustain the verdict - not even any evidence from the medical examiner who performed the autopsy." (App. A-3; V.18, R. 3807.) The State did not try to rebut this point in its Initial Brief.

(6) The newly discovered evidence would likely produce a different result if this Court grants a retrial. (App. A-7;

V.18, R. 3811.) The State did not present any evidence to rebut this point. The State itself said during closing argument at Mr. Spaziano's trial in 1976, "DiLisio is the most important witness in this case, and . . . if you don't believe Tony DiLisio, then find this defendant guilty in five minutes--not guilty, excuse me." (Trial Tr. 776.) Without Mr. DiLisio's trial testimony, there would likely be a different result on retrial. (App. A-7; V.18, R. 3811.) The State did not present any evidence at the evidentiary hearing to rebut this point. Nor does the State challenge this point in its Initial Brief.

* * *

In addition, Mr. Spaziano has satisfied the Armstrong requirements for granting a new trial based on newly discovered evidence of the recantation of a significant witness.

First, a trial court must determine that the recantation is true. Armstrong, 642 So. 2d at 735. Judge Eaton was aware that recanting testimony is considered exceedingly unreliable. (App. A-2; V.18, R. 3806.) Yet he found that Mr. DiLisio's testimony at the evidentiary hearing was credible. (App. A-4; V.18, R. 3808.)

Since recanting in mid-1995, Mr. DiLisio has been unwavering in his statements that he never went to a dump site to view dead bodies with Mr. Spaziano. Cf. Brown v. State, 381 So. 2d 690, 692, 705 (Fla. 1980), cert. denied, 449 U.S. 1118, 101 S. Ct. 931, 66 L. Ed. 2d 847 (1981); Bell, 90 So. 2d at 705 (both finding that witnesses' recantations were not truthful after

witnesses repeatedly changed their testimony). Mr. DiLisio's recantation was motivated simply by a desire to tell the truth. (Tr. 383-84.) Cf. Armstrong, 642 So. 2d at 735-36 (denying new trial where witness changed testimony only after she learned that Armstrong was the father of her twin children and she began communicating with him). There were no extraneous influences used to secure Mr. DiLisio's recantation. The State's witnesses did not destroy Mr. DiLisio's credibility. (App. A-6-7; V.18, R. 3810-11.)

Second, after finding that Mr. DiLisio's testimony was credible, the trial court had to determine whether the recantation would probably result in a different verdict at a new trial.[24] Glendening v. State, 604 So. 2d 839, 840-41 (Fla. 2d DCA), review denied, 613 So. 2d 4 (Fla. 1992). To make this decision, the trial court examined all circumstances of the case, including testimony of the witnesses submitted on the motion for new trial. Armstrong, 642 So. 2d at 735. Judge Eaton found that Mr. DiLisio's 1976 trial testimony was not only crucial, but was uncorroborated. (App. A-3; V.18, R. 3807.) Given the absence of

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[24] Even when the jury heard Mr. DiLisio's trial testimony in 1976, it had difficulty reaching a verdict in the guilt phase. Jurors deliberated about six and one-half hours before finding Mr. Spaziano guilty. (Trial Tr. 808-21.) During deliberations, they told the trial judge that they were having trouble reaching a unanimous verdict. (Trial Tr. 813, 816, 820.) The judge eventually gave jurors an "Allen" charge instructing them to continue their deliberations (Trial Tr. 817), and the guilty verdict followed. (Trial Tr. 820-21.) The jury recommended a life sentence, but the trial judge overrode that recommendation and sentenced Mr. Spaziano to death. Spaziano, 393 So. 2d at 1120.

corroboration, Judge Eaton decided that the recanting testimony "would probably produce a different result on retrial." (App. A-7; V.18, R. 3811.)

B. THIS COURT NEED NOT INTERPRET THE EVIDENCE IN THE SAME BIASED MANNER AS THE STATE.

The State argues in its Initial Brief that Judge Eaton abused his discretion in finding Mr. DiLisio's testimony credible and in reconciling any conflicting testimony of the witness. (Initial Brief at 69-82.) Each of the State's arguments ignores the deference that this Court must pay to Judge Eaton's assessment of the credibility of witnesses, his obligation to reconcile conflicting testimony where possible, and his prerogative as the factfinder to disregard testimony that he considers unworthy of belief. Shaw, 334 So. 2d at 16. These arguments also ignore the presumption of correctness that this Court must give a trial court's order granting a new trial. See Castlewood, 322 So. 2d at 522.

Specifically, the State contends that Judge Eaton should have interpreted ambiguous witness statements out of context in the same biased manner as the State would. As but one example, the State argues that Mr. DiLisio was incredible because he had previously acknowledged his fear of the Outlaws. (Initial Brief at 75.) The State apparently contends that it was an abuse of discretion for Judge Eaton not to conclude that because Mr. DiLisio feared for his safety years ago, his recantation was not truthful. (Initial Brief at 75.)

The State argues that it was an abuse of discretion to believe Mr. DiLisio over Mr. Yannotta. (Initial Brief at 78-80.) Mr. Yannotta is, of course, an admitted five-time murderer and perjurer. Although Mr. Yannotta testified that Mr. Spaziano had spoken to him in prison about two bodies (V.24, Tr. 969-71), Mr. Yannotta subsequently disavowed knowledge of the Harberts case to police investigators. (V.25, Tr. 995.)

The State scoffs at Mr. DiLisio's explanation that he lied during his trial testimony in 1976 to please his father, with whom he did not get along. According to the State, it is implausible that a son would want to please his father when there were strained relations between the two. (Initial Brief at 72-73, 74.) This sweeping conclusion is wholly without evidentiary support. Indeed, two of Mr. Spaziano's expert witnesses, Dr. Stein and Dr. Ofshe, testified at length that Mr. DiLisio's desire to please his father contributed greatly to the development of his 1976 trial testimony. The State presented no witnesses to rebut these experts' testimony.

Although it pays lip service to the dictates of Armstrong that the trial court must consider "all the circumstances of the case" (Initial Brief at 73, 74, 75), the State in reality argues that Judge Eaton abused his discretion by not extrapolating certain narrow items of testimony and ignoring everything else that was unfavorable to the State's case.

The State suggests that Mr. DiLisio's conversion to Christianity in 1985 dictates a conclusion that he is now lying

because he did not come forward sooner. (Initial Brief at 76.) However, the evidence presented by Mr. Spaziano paints a picture of a man whose conscience was torn by guilt and who, with the assistance of spiritual counseling and increasingly persistent external influences, eventually garnered the courage to come forward with the truth. See Statement of Facts at 37-39, 44.

The State focuses on the perceived evidentiary disputes as to the closeness of the relationship between Mr. Spaziano and Mr. DiLisio. (Initial Brief at 76.) However, this is a distinction without a difference. Whether Mr. Spaziano and Mr. DiLisio were together three times or a dozen times simply has no bearing on the truthfulness of Mr. DiLisio's recantation.

The State apparently believes that the trial court should have ignored the criminal backgrounds of its witnesses. (Initial Brief at 78.) However, Judge Eaton was clearly entitled, as is any factfinder, to consider the existence of prior felony and dishonesty convictions as bearing on the credibility of the witnesses. § 90.610, Fla. Stat. (1995). To suggest otherwise merits no discussion.

Mr. Spaziano will not focus on the State's approach to the evidence below at any greater length because such an approach misconstrues this Court's obligation to defer to Judge Eaton's factual findings. The trial court's findings are all supported by substantial, competent evidence. Whether this Court might have construed the evidence differently does not alter the extreme deference that must be afforded Judge Eaton's findings.

The trial court's discretionary power to grant a new trial stems from the common-law principle that the trial judge has the duty to prevent what he or she perceives to be a miscarriage of justice. Castlewood, 322 So. 2d at 523 (Overton, J., concurring). The State faces a heavy burden in asking this Court to overturn the trial court's Order granting a new trial. Id. at 522 (majority opinion). Yet the State does not--and cannot--rebut the reality that each factual finding made by Judge Eaton is supported by competent, substantial evidence in the record. Therefore, any further inquiry into the reasonableness of his conclusions must end.

II. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN ADMITTING EXPERT TESTIMONY ABOUT THE FACTS AND CIRCUMSTANCES THAT LED TO MR. DiLISIO'S TRIAL TESTIMONY (restated).[25]

A. EXPERT TESTIMONY WAS PROPERLY ADMITTED TO ASSIST THE TRIAL COURT IN DETERMINING MR. DiLISIO'S CREDIBILITY.

Florida law permits a trial court to admit expert testimony when it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Angrand v. Key, 657 So. 2d 1146, 1148 (Fla. 1995); see also § 90.702, Fla. Stat. (1995) (expert testimony in the form of an opinion is admissible "[i]f scientific, technical or other specialized knowledge will assist the trier of fact"). A trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify. Angrand, 657 So. 2d at 1148; State v. Townsend, 635 So. 2d 949, 958 (Fla. 1994); Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981).[26] Unless there is a clear showing of error, the court's decision to admit expert testimony will not be disturbed on appeal. Johnson, 393 So. 2d at 1072; see also Angrand, 657 So. 2d at 1148 ("The trial court's decision will only be disregarded if that discretion has been abused.").

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[25] This issue responds to Issue I of the Initial Brief (the lower court erred in allowing and then relying upon the testimony of two experts on repressed memory and hypnotic procedure). The State's Issue I is found in its Initial Brief at 55-68.

[26] Johnson implies that the court's discretion is limited only when the facts are such that no special knowledge or expertise is required to understand them. Johnson, 393 So. 2d at 1072.

The trial court did not abuse its discretion in admitting the expert testimony in this case.

The truthfulness of Mr. DiLisio's recantation was the critical issue before the trial court at the evidentiary hearing in January 1996. In considering whether a witness's recantation of testimony warrants a new trial, a trial judge must examine "all the circumstances of the case." Armstrong, 642 So. 2d at 735 (emphasis added) (relying on the fact that a witness's testimony remained consistent from the time of the incident in question through trial to affirm the trial court's decision); Brown, 381 So. 2d at 693; see also Bell, 90 So. 2d at 705.

The circumstances of Mr. Spaziano's case include not only Mr. DiLisio's testimony at the evidentiary hearing in January 1996 and his recantations in 1995, but also his statements in 1974 and 1975 and his trial testimony in 1976. Therefore, the trial court was not only within its discretion in examining all the circumstances surrounding Mr. DiLisio's testimony at Mr. Spaziano's trial in 1976, but it was required by clear precedent to do so. See Armstrong. The relevance and critical nature of Mr. DiLisio's trial testimony was even acknowledged by the State in its Initial Brief.[27]

The trial court allowed the defense to present testimony from two experts about hypnosis in general, the specific hypnotic procedures used on Mr. DiLisio in 1975, and the concept of

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[27] "Thus, the critical issue, even according to the experts, was whether DiLisio had lied at the time of trial[.]" (Initial Brief at 63.)

repressed memory. The trial court also allowed testimony about coercive influences exerted on Mr. DiLisio and their possible effect, including: Mr. DiLisio's physically and psychologically abusive relationship with his father; his sexual relationship with a woman who was to become his stepmother, a woman who also had a sexual relationship with Mr. Spaziano; police promises of leniency about certain charges pending against Mr. DiLisio in exchange for his cooperation; and improper police conduct, including unduly suggestive interrogation techniques. (V.23, Tr. 691-94, 697-98.) As the trial court stated in its order on litigation costs, these factors created a case "that is out on the edge of American jurisprudence. Seldom, if ever, is a criminal case brought before a court with issues as difficult as those presented here." (App. B-3.)

All of these complex factors played a part in the formation of young Anthony DiLisio's account of what transpired during his alleged trip to the murder scene with Mr. Spaziano, an account that culminated in his testimony at Mr. Spaziano's trial in 1976. The trial court has pointed out that the experts' testimony assisted the court in its decision and, in fact, the testimony was <u>critical</u> to its understanding. As the trial court noted,

> [T]he issues at the post conviction relief evidentiary hearing involved the credibility of the only witness whose testimony condemned the defendant. The question of whether or not the [trial] testimony of this witness was the result of improper suggestion by the police and a hypnotist had to be answered. <u>This issue could only have been presented by witnesses who have recognized reputations for dealing with hypnotically refreshed testimony.</u>

(App. B-4 (emphasis added).)

As noted in the Statement of Facts,[28] Mr. DiLisio's statements about the critical facts of Mr. Spaziano's case underwent a remarkable transformation from his first October 1974 interviews with the police until his trial testimony in 1976.[29] From October 1974 until May 16, 1975, Mr. DiLisio denied having any knowledge of the dump site or any bodies there. (See Def. Exhs. 28, 29, 80 (tabs 1 and 2) (October 1974 police interview); Def. Exhs. 30, 80 (tab 3) (May 13, 1975, police interview); and Def. Exhs. 31, 72B (tape recording of hypnosis session), 80 (tab 5) (May 15, 1975, first hypnosis session)).

However, Mr. DiLisio implicated Mr. Spaziano during a second hypnosis session on May 16, 1975, (Def. Exhs. 32, 72C (tape recording), 80 (tab 6)). Mr. DiLisio later testified in great detail at Mr. Spaziano's 1976 trial (Def. Exhs. 37, 80 (tab 11)).

In reviewing this remarkable progression, the critical dates of May 15, 1975, and May 16, 1975, stand out. In those two days, Mr. DiLisio went from knowing nothing about the bodies to stating that Mr. Spaziano had shown the bodies to him. This phenomenon--the lack of awareness or memory of an event from the time of its occurrence until some time later--is known as "repressed memory." Repressed memory is a difficult and complex concept. The trial court found that expert testimony was appropriate and necessary

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[28] See Statement of Facts at 16-24.

[29] The evolution is illustrated by Defendant's Exhibit 85, which compares critical elements of Mr. DiLisio's trial testimony with his earlier statements.

to assist in its understanding. (V.23, Tr. 601-02.) Indeed, other courts have noted the absolutely imperative nature of expert testimony when repressed memory is an issue.[30]

After considering the issue of recovered memory--that is, Mr. DiLisio's recapture of his dump site memory--the next issue for the trial court to consider was the process for this retrieval. In this case, the so-called "repressed memories" were recovered via hypnosis. As with repressed memory, hypnosis and hypnotic procedures in general are specialized and complex topics. Further, the use of hypnosis to recover repressed memories is certainly an issue for which expert testimony is not only appropriate, but is necessary.[31] The trial court was

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[30] The New Hampshire Superior Court found that:

> [T]he very concept of a "repressed" memory, that is, that a person can experience a traumatic event, and have no memory of it whatsoever for several years, transcends human experience. There is nothing in our development as human beings which enables us to empirically accept the phenomenon, or to evaluate its accuracy or the credibility of the person "recovering" the memory. The memory and the narration of it are severed from all the ordinary human processes by which memory is commonly understood. To argue that a jury could consider such a phenomenon, evaluate it and draw conclusions as to its accuracy or credibility, without the aid of expert testimony is disingenuous to say the least.

State v. Hungerford, Nos. 94-S-045 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571, at *3 (N.H. Super. May 23, 1995).

[31] As this Court stated in Stokes, weighing the probative value against the prejudicial effect of hypnotically refreshed testimony would be complicated for a court and would undoubtedly "require the parties to call numerous expert witnesses to advocate or oppose the use of the testimony." 548 So. 2d at 195.

clearly within its broad discretion to hear expert testimony on these topics.

The defense called Dr. Barbara Stein,[32] who was qualified and accepted without objection as an expert in forensic psychiatry, including such issues as repressed memory and the legal ramifications of forensic hypnosis. (V.23, Tr. 612-13.) The defense also called Dr. Richard Ofshe,[33] who was qualified

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[32] Dr. Stein is board-certified in the fields of general psychiatry and the subspecialty of forensic psychiatry. She is one of only thirteen board-certified forensic psychiatrists in Florida, and is one of only four physicians to have completed both a fellowship and achieved board certification in forensic psychiatry.

Dr. Stein has been involved in approximately 1100 civil and criminal trials and has been retained by both the State and the defense. She is a past president of the Florida Chapter of the American Academy of Psychiatry and the Law. In 1994, after conducting a four-month review of the literature on hypnosis and repressed memory, she presented a workshop on the issues of hypnosis and repression for the Florida Psychiatric Society.

Dr. Stein testified extensively about her education, professional affiliations, experience, and preparation for this matter. (V.23, Tr. 604-12.) Dr. Stein's curriculum vitae was also admitted into evidence (Def. Exh. 100).

[33] Dr. Richard Ofshe is a Pulitzer Prize-winning sociologist who has taught since 1967 at the University of California at Berkeley. He holds a Ph.D. in Sociology from Stanford University, and in 1994 he published Making Monsters: False Memories, Psychotherapy, and Sexual Hysteria (New York: Charles Scribner's Sons). Dr. Ofshe is co-author of the article Recovered-Memory Therapy and Robust Repression: Influence and Pseudomemories, 42 Int'l J. of Clinical and Experimental Hypnosis 391-410 (1994), which was awarded that journal's award for best article of the year.

Dr. Ofshe has testified as an expert in fifty-four trials, including six in Florida. He has been retained by both the State and the defense. Dr. Ofshe testified extensively about his education, professional affiliations, experience, and preparation for this matter. (V.23, Tr. 680-87.) Dr. Ofshe's curriculum vitae was also admitted into evidence. (Def. Exh. 99).

and accepted without objection as an expert in repressed memories, hypnosis, and coercive influences that result in false confessions. (V.23, Tr. 687-88.)

The record is clear that the trial court admitted this expert testimony to assist its understanding of "the facts surrounding how the first statement came about." (V.23, Tr. 602.) The trial court was entirely within its broad discretion to admit the testimony for that purpose, and indeed was required under Armstrong, Brown, and Bell to look at all the circumstances of the case.

Nevertheless, the State incorrectly argues that the expert testimony was an improper attempt at collateral relief based on evolutionary developments in the field of hypnosis. (Initial Brief at 59-60.) Quite to the contrary, the testimony was relevant and necessary to the issue of Mr. DiLisio's credibility, which was the issue before the trial court. The fact that Mr. Spaziano's prior counsel raised issues about hypnosis in previous postconviction proceedings did not preclude the introduction of relevant testimony concerning issues at the evidentiary hearing.

Instead of recognizing clear law that required the trial court to consider all the circumstances of the case, the State argues that the trial court should have only considered Mr. DiLisio's testimony.[34] In so urging, the State would have this

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[34] The State argues, for example, that "the sole issue for Judge Eaton to decide was whether DiLisio's recantation, in which he claims he lied in 1976, was truthful, which clearly had nothing to do with the procedures employed by the hypnotist." (Initial Brief at 62-63 (emphasis added).) The procedures

Court ignore Mr. DiLisio's complex family life, his extensive drug use, his age, the police procedures employed, the "ridiculously flawed"[35] hypnotic procedures, as well as the extensive body of scientific research and conclusions on the working of the human mind and the concept of repressed memory. Had the trial court proceeded as the State suggests, it would have committed error.

The State also engages in extensive argument about specific points raised either in Mr. DiLisio's testimony at the hearing or from his statements of twenty some years ago, presumably as a basis to urge that the trial court abused its discretion in relying on the testimony of the experts. (Initial Brief at 61-67.) The State, unhappy with the trial court's ultimate decision, presents one side of these factual issues in its Initial Brief, ignores the extensive contrary evidence--including the testimony of Mr. DiLisio and the experts--and attempts to argue that no other interpretation was possible. To the contrary, the trial court's resolution of these and other factual

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employed by the hypnotist had a direct impact on DiLisio's statements at the 1976 trial, and the court was bound to consider the circumstances surrounding the statement. The State also argues that "the critical issue, even according to the experts, was whether DiLisio lied at the time of trial, not how his statements came about." (Initial Brief at 62-63 (emphasis added).) Again, the State incorrectly argues that the court should have ignored the 1974-75 circumstances relating to Mr. DiLisio's 1976 trial testimony.

[35] Dr. Stein testified that the hypotist's procedures were "ridiculously flawed." (V.23, Tr. 673.) She graded those procedures as a "double F." (V.23, Tr. 663.) Dr. Ofshe rated the hypnotist's skill level at "zero." (V.23, Tr. 729.)

issues may not be disturbed by this appellate court. See, e.g., Shaw, 334 So. 2d at 16.

In raising these factual points, the State urges this Court to reweigh the evidence and substitute its judgment for that of the trial court. This is clearly improper. Shaw. The legal issues of the duties and authorities of the trial and appellate court are more fully addressed in Issue I at 55-60, supra, and Mr. Spaziano will not belabor the clear legal standards set forth in that discussion. See e.g., Clegg v. Chipola Aviation, Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984) ("'The resolution of factual conflicts by a trial judge in a nonjury case will not be set aside on review unless totally unsupported by competent substantial evidence.'") (quoting Concreform Syss., Inc. v. R.M. Hicks Constr. Co., Inc., 433 So. 2d 50, 50 (Fla. 3d DCA 1983)).

The State also contends that the trial court improperly allowed the experts to testify as to the ultimate issue of Mr. DiLisio's credibility. (Initial Brief at 64.) The statements at issue were Dr. Ofshe's expert opinions about the possibility of "confabulation" during Mr. DiLisio's hypnosis session of May 16, 1975.[36] Dr. Ofshe explained that "confabulation" is the practice of

> making up reasonable fillers for things that he doesn't know about. Confabulation is extremely important, because we know, first, that confabulation routinely occurs when people surrender to the hypnotic induction, and that it is, by looking at what is confabulated, or what is said, and comparing it to the available facts,

[36] This was DiLisio's second hypnosis session, which occurred after police took him to the dump site.

> that we can get some indication of whether or not what is being described is accurate or inaccurate. If it's inaccurate, that would be evidence that it is hypnotic fantasy.

(V.23, Tr. 710.) Dr. Ofshe's explanation was precipitated by his observation that Mr. DiLisio "appeared to be confabulating" during the second hypnosis session. (V.23, Tr. 710.)

This Court has recognized the nature and problems associated with confabulation in Stokes:

> Another serious problem associated with the use of hypnotically refreshed testimony is the tendency of the hypnotic subject to "confabulate," or invent details that he or she does not actually recall. Much research into the effects of hypnosis on the human memory has revealed that a hypnosis subject will invent or fabricate facts that he or she does not actually remember. Worse still, the subject is unable to distinguish between these confabulations and the true facts. . . . Thus, neither the hypnotist nor the subject is able to separate fact from fantasy when the hypnosis session is completed.

548 So. 2d at 191.

Dr. Stein testified that hypnosis increases true and false memories, often produced through the process of confabulation, at a great rate. (V.23, Tr. 653.) She also stated that "[t]he other thing that we know, is that there's no way that I, as a hypnotic subject, or you, as a hypnotist can decipher true memories from false memories." (V.23, Tr. 653.) Thus, testimony before the trial court showed that neither Dr. Stein nor Dr. Ofshe could testify with certainty that any specific comment of Mr. DiLisio's was, in fact, true or false.

Judge Eaton clearly recognized his role as factfinder in determining the credibility of witnesses, and he specifically

prohibited Mr. Spaziano's attorneys from eliciting testimony that directly commented on Mr. DiLisio's credibility. (V.23, Tr. 614-15.) Ruling on an objection to a question of Dr. Stein about Mr. DiLisio's testimony at Mr. Spaziano's trial in 1976, the court stated, "the finder of fact, as I understand it, has the responsibility of determining the truth or the non-truth of a statement. And I just don't know of any exception to that." (V.23, Tr. 615.) The court was acutely aware of the danger of permitting expert testimony about credibility and thus took pains to keep such testimony out. Dr. Ofshe's testimony did not comment directly on Mr. DiLisio's credibility.

To make Dr. Ofshe's testimony meaningful, the trial court permitted Dr. Ofshe to point out instances where, in his opinion, the possibility of hypnotically induced confabulation existed. (V.23, Tr. 712.) This was done by comparing specific comments made by Mr. DiLisio while under hypnosis with the physical evidence of the dump site. Dr. Ofshe did not comment on Mr. DiLisio's general credibility, or the credibility of his testimony, at the evidentiary hearing. Nor did he testify about the credibility of Mr. DiLisio's trial testimony in 1976. Rather, Dr. Ofshe pointed out instances in Mr. DiLisio's statements, while under hypnosis, where he believed confabulation was likely. (V.23, Tr. 712-18.)

In Hunter v. State, 660 So. 2d 244, 252 (Fla. 1995), cert. denied, 116 S. Ct. 946, 133 L. Ed. 2d 871 (1996), a State psychiatric expert testified that, after observing the defendant,

he "found him to be an absolute liar." The defense moved for a mistrial, which was denied, then raised the issue on appeal. This Court found that sustaining the objection and giving a curative instruction, along with the context of the comment, did not require a mistrial. Id. Relying on Morgan v. State, 639 So. 2d 6 (Fla. 1994) (holding that testimony regarding the validity of statements made under hypnosis in general were not improper comments regarding the credibility of a witness), this Court noted that "the doctor's testimony here pertained to his mental health analysis and diagnosis of Hunter rather than to any particular assertions by Hunter as to his involvement in the crime." Hunter, 660 So. 2d at 252.

In Mr. Spaziano's case, none of the expert testimony remotely approached the level of the "absolute liar" statement made in Hunter. Testimony about likely confabulations while under hypnosis does not impact on Mr. DiLisio's ultimate credibility; rather, this testimony helped the trial court understand the circumstances surrounding the evolution of Mr. DiLisio's testimony as elicited through hypnosis.

In Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994), cert. denied, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995), a defense expert was allowed to testify that the defendant's "borderline personality disorder" was responsible for inconsistent confessions, so the statements should not be considered "lying." The State used the opportunity to cross-examine the expert on confessions relating to collateral murders,

and the defendant appealed. This Court noted that it was the factfinder's role to determine what motivated the inconsistency in the statements, and "to that end, qualified experts should certainly be permitted to testify on the question, but the finder of fact is not necessarily required to accept the testimony." Id.

At the evidentiary hearing, Dr. Ofshe gave his opinion of how and why some of Mr. DiLisio's statements made under hypnosis came to be, i.e., because of confabulation. The trial court was within its discretion, as pointed out in Wuornos, to accept or reject these opinions. However, whatever the trial court's ultimate decision, Mr. Spaziano was certainly permitted to introduce expert testimony on this issue.

In addition, Mr. Spaziano as a criminal defendant is given additional latitude to elicit this type of testimony. In State v. Malarney, 617 So. 2d 739 (Fla. 4th DCA 1993), the court reversed a trial court's decision to prohibit defense expert testimony concerning the suggestive interviewing techniques used on an alleged victim. The court noted that

> the defense should be allowed broad leeway in offering contrary evidence on the subject of an alleged victim's credibility. While it might not be proper for the state to bolster its case in chief with psychological expert testimony to the effect that the victim's story is psychologically credible or believable [citation omitted], it is not necessarily equally improper far a defendant to show that the interviewing techniques and procedures of the abuse treatment experts played a role in planting a story in a young, impressionable child's mind.

Id. at 740-41.

* * *

Even if this Court finds that Judge Eaton erred in admitting testimony that improperly commented on the ultimate issue of Mr. DiLisio's credibility, this Court must affirm Judge Eaton's decision because the error was harmless. The testimony at issue was a very small portion of the total testimony of the experts, which in turn was only a very small part of the evidence brought forth at the evidentiary hearing. Mr. DiLisio testified extensively, including statements about the second hypnosis session in which he noted that it was like he was making "a story or a movie" (V.21, Tr. 300-01), and that the further he got into the lie, the more difficult it was for him to retreat from it. (V.21, Tr. 302.)[37]

The trial court had ample evidence, apart from Dr. Ofshe's testimony about confabulation during hypnosis, on which to base its finding of fact. Inadmissible expert testimony is harmless error where there is other sufficient evidence to justify the factfinder reaching the same conclusion as the expert. School Bd. of Broward County v. Surette, 394 So. 2d 147, 152 (Fla. 4th DCA), review dismissed, 399 So. 2d 1146 (Fla. 1981); see also Gulley v. Pierce, 625 So. 2d 45, 50 (Fla. 1st DCA 1993) (noting that "the rule is well established that even if error exists in the admission of expert testimony, the harmless error rule will

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[37] Mr. DiLisio made other statements that provide independent support for Dr. Ofshe's opinion that Mr. DiLisio was confabulating during the second hypnosis session. See Statement of Facts at 19-20.

be applied if such evidence is simply cumulative to other evidence admitted without objection"), review denied, 637 So. 2d 236 (Fla. 1994).

In addition, the factfinder at the evidentiary hearing was the court--not a jury--and therefore the dangers associated with prejudicial effect of improper comments were severely lessened. See Daniels v. State, 634 So. 2d 187, 190 (Fla. 3d DCA 1994) (when a trial judge sitting as factfinder erroneously admits evidence, he is presumed to have disregarded the evidence, and the error is deemed harmless); State v. Arroyo, 422 So. 2d 50, 51 (Fla. 3d DCA 1982) (same).

B. THE ISSUE OF BIAS PROVIDES NO BASIS FOR REVERSAL.

Despite the State's oblique allegations of bias against Mr. Spaziano's experts stemming from their desire to recover their fees (Initial Brief at 55-57), the record is clear that no bias was present. Furthermore, despite having the opportunity to do so, the State chose not to cross-examine either expert on the issue of fees. (V.23, Tr. 666-74; 722-26.)

The State implies that the testimony of Dr. Stein and Dr. Ofshe about their fees was "untrue or inaccurate" (Initial Brief at 56), but the testimony was in fact neither. As noted by the State,

> Barbara Ann Stine [sic], M.D., testified that she was guaranteed a total of Two Thousand and Five Hundred Dollars ($2,500.00) for her testimony on behalf of Spaziano, but the law firm of Holland & Knight promised to make every possible effort to ensure that her fees were paid by the Court (T 609). Sociology Professor Richard Ofshe testified that he was guaranteed expenses from the firm, and the firm would diligently try to

> recover from the lower court his Four Thousand Dollar ($4,000.00) court appearance fee, as well as his customary consulting fee of Two Hundred and Fifty Dollars ($250.00) per hour (T 688).

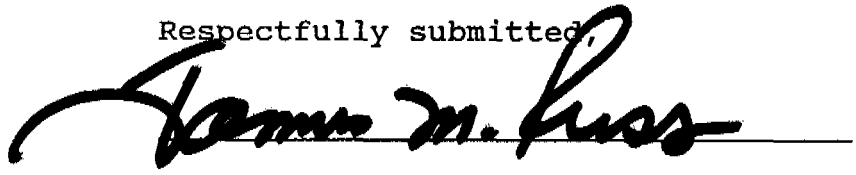
(Initial Brief at 55.) These statements were accurate, as is reflected in the bills submitted by the experts and noted in Mr. Spaziano's costs motion, which the State attached to its Initial Brief as an appendix. As such, it is difficult to determine what the State believes was "untrue or inaccurate."

Because the experts' statements conform to the expenses that they ultimately sought, it appears that the gist of the State's argument is that the experts somehow misled the trial court by not testifying to the total amount of their fees. Despite the fact that neither Dr. Stein nor Dr. Ofshe would have known the total amount until their testimony was concluded, and despite the fact that Dr. Stein testified that she had spent more than 100 hours preparing for the hearing (V.23, Tr. 609), the State fails to recognize that it voluntarily passed up the opportunity to cross-examine either witness about any aspect of their fees, including the anticipated totals. Despite this fact, the State argues that its cross-examination was "limited" (Initial Brief at 57), although though it never explains exactly how. The State's bias argument is without merit, and therefore fails.

CONCLUSION

Based on these legal authorities, analyses, and arguments, Mr. Spaziano respectfully states that this Court must affirm Judge Eaton's Order Vacating Judgment and Sentence and Setting Trial Date.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Mr. Spaziano's Answer Brief has been furnished by U.S. Mail to Margene A. Roper, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, on this 17 day of July, 1996.

James M. Russo
Attorney

TPA2-351689

Appendix A

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA

CASE NO. 75-430-CFA

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH R. SPAZIANO,

Defendant.
_____/

ORDER VACATING JUDGMENT AND SENTENCE
AND
SETTING TRIAL DATE

On September 12, 1995, the Supreme Court of Florida entered an order treating two out-of-time motions for rehearing as a successive Rules of Criminal Procedure 3.850-3.851 motion based upon newly discovered evidence of the recantation of the testimony of a significant witness and remanded this case to this court for consideration of that issue. Spaziano v. State, 660 So.2d 1363 (Fla. 1995). By separate order dated October 12, 1995, the Supreme Court directed this court to commence an evidentiary hearing no later than January 15, 1996. The hearing commenced on January 8, 1996, and was completed on January 15, 1996. At that time the matter was taken under advisement.

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The Issue

The issue to be decided is whether, due to the newly discovered evidence of the recanted testimony of Anthony Delisio, the defendant is entitled to a new trial.

The Law of Newly Discovered Evidence and Recanted Testimony

In order to prevail on newly discovered evidence the defendant must prove:

1. the evidence has been discovered since the former trial;
2. the evidence could not have been discovered earlier through the exercise of due diligence;
3. the evidence is material to the issue;
4. the evidence goes to the merits of the case and not merely impeachment of the character of a witness;
5. the evidence must not be merely cumulative; and
6. the evidence must be such that it would probably produce a different result on retrial.

Jones v. State, 591 So.2d 911 (Fla. 1992); Henderson v. State, 185 So. 625 (Fla. 1938); Smith v. State, 158 So. 91 (Fla. 1934); Beasley v. State, 315 So.2d 540 (Fla. 2d DCA 1975); Weeks v. State, 253 So.2d 459 (Fla. 3d DCA 1971).

In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the issue. Armstrong v. State, 642 So.2d 730 (Fla. 1994); Bell v. State, 90 So.2d 704 (Fla. 1956). Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied

that such testimony is true. Especially is this true where the recantation involves a confession of perjury. Id. at 705; Henderson v. State, supra.

Findings of Fact

Trial judges are taught to determine the credibility of a witness and the weight to be given to testimony by considering the demeanor of the witness; the frankness or lack of frankness of the witness; the intelligence of the witness; the interest, if any, that the witness has in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testifies; the ability of the witness to remember the events; and the reasonableness of the testimony considered in light of all of the evidence in the case. Additionally, trial judges attempt to reconcile any conflicts in the evidence without imputing untruthfulness to any witness. However, if conflicts cannot be reconciled, evidence unworthy of belief must be rejected in favor of evidence which is worthy of belief. These principals have been applied here, although it has not always been easy.

The crucial testimony at the trial of this case in 1976 came from the mouth of Anthony Delisio. It was he who provided the only evidence of the cause of death of the decedent and it was he who supplied the jury with the evidence connecting this tragic event to the defendant. Without his testimony, there simply is no corroborating evidence in the trial record that is sufficient to sustain the verdict - not even any evidence from the medical examiner who performed the autopsy.

Delisio now testifies that he did not tell the truth during the trial and provides a complicated explanation of the events which led up to his trial testimony. This testimony is credible and is corroborated by other evidence to a significant extent.

Delisio testified that he and his five siblings lived in a dysfunctional family ruled by his father, Ralph Delisio, who physically abused them.[1] Delisio tried to please his father but he never succeeded. His father owned a boat dealership known as Maitland Marine and Delisio frequented the business as a young teenager.

Ralph Delisio started an affair with a younger woman employee named Keppy who seduced Delisio when he was fifteen and with whom he had frequent sexual intercourse for about two and one half years. His father and Keppy ultimately married. Delisio had sex with her for the last time on their wedding day. It was during this time that Delisio started using drugs including marijuana, hash and alcohol.[2]

The defendant worked at the marina and Delisio knew who he was. There is a conflict as to just how close their relationship was but none of the witnesses who testified were able to establish a fast friendship.

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[1]Two of Delisio's sisters testified at the hearing. Neither of them were directly asked to corroborate the testimony of systematic physical abuse. However, Donna Yonkin indirectly corroborated the testimony when she related the physical altercation which occurred when Delisio was arrested for drug possession at his father's residence. The testimony concerning abuse is accepted as true.

[2]He stated that he tried an animal tranquilizer called T. H. C. but he must have meant P. C. P. T. H. C. is the active chemical agent in marijuana.

Not surprisingly, Keppy began to have a sexual relationship with the defendant. Ralph Delisio found out and became angry. At some point Keppy accused the defendant of raping her. It was about that time that Ralph Delisio asked his son if the defendant had told him that he mutilated women. Delisio testified that the defendant never said anything like that to him. But the idea was planted in his mind.

Delisio's mid-teenage years included several brushes with the law. He ran away from a drug treatment center in a stolen car with two other juveniles and ended up in Volusia House. It was there that Detectives Abbgy and Martindale, who were investigating the homicide in this case, approached Delisio for information. After being encouraged by his father to cooperate with the police, he agreed to be hypnotized in order to refresh his memory.

The detectives induced Delisio to cooperate by inferring that his cooperation would get him out of Volusia House and would result in several serious criminal charges being dropped. They also supplied him with bits of information prior to the hypnosis session. He was scared. He went along with the police in an effort to please them and his father.

After the first hypnosis session was over, Delisio did not think the police believed he cooperated. In fact, he "recalled" very little during the first session. It was then that the police took him to the scene of the homicide. A second hypnosis session was scheduled the next day.

Tapes of the sessions are in evidence as are the transcripts. The hypnotist does not give the listener confidence in his abilities. The defense experts who testified about the sessions and procedures agreed. One of them gave the hypnotist a "double F" and the other rated his skill level at "zero". It is plain from the testimony of these two distinguished experts that the reliability of the procedure used should be seriously doubted and that the information which was produced as a result was unreliable. Both experts agreed that hypnosis cannot improve recall beyond that which can be recalled through conscious efforts and that is exactly what the hypnotist thought he could do. It is most likely that the crime scene depicted by Delisio is a scene that he created for the purpose of pleasing the police and his father. One of the experts even pointed out that the actual crime scene did not match Delisio's depiction in several material respects.

The State called several witnesses in order to attack Delisio's testimony and destroy his credibility. Many of these witnesses had major credibility problems themselves. One of the witnesses, a murderer in the Federal witness protection program, testified that he and the defendant were in prison together after the defendant was sentenced to life for rape but before the trial in this case. The witness heard the defendant express concern over a young boy whom he had taken to see some dead bodies. The reliability of that statement is questionable. If the statement was made, it is likely that the defendant was discussing the testimony he had learned Delisio was going to give at trial. That

is the only way to reconcile the testimony with Delisio's version of the events without rejecting it as being untruthful.

Another witness, Bill O'Connell, was a counselor at the Volusia House and knew Delisio while he was there. He stated that Delisio was having trouble sleeping and told him that he had taken the police to a grave site. However, that statement, if made, does not agree with other credible evidence in the case unless it was made after Delisio had developed his testimony for the trial. The same is true of the statement Annette Jones says Delisio made to her and the statement Delisio says he made to Sandy Vehman.

Conclusions of Law

In the United States of America every person, no matter how unsavory, is entitled to due process of law and a fair trial. The defendant received neither. The validity of the verdict in this case rests upon the testimony of an admitted perjurer who had every reason to fabricate a story which he hoped would be believed. The courts of this country should not tolerate the deprivation of life or liberty under such circumstances. A fair trial requires a determination of the truth by an informed jury. The verdict of an uninformed jury results in an unfair trial. An unfair trial is an unlawful trial because it produces an illegal result.

The evidence of recantation in this case is newly discovered evidence which could not have been discovered earlier through the exercise of due diligence. It is material evidence which goes to the merits of the case. It is not cumulative evidence and it would probably produce a different result on retrial. As Justice Kogan

stated in his concurring opinion remanding this case to this court:

> "Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without careful consideration of this newly discovered evidence under the only legal method available, Rule of Criminal Procedure 3.850 or 3.851."

Spaziano v. State, supra at 1367. That careful consideration has now been given and the validity of the Judgment and sentence has been found to be so questionable that it cannot stand.

IT IS ADJUDGED:

1. The Judgment rendered on January 23, 1976, and the sentence entered on June 4, 1981, are vacated.

2. This case is set for trial during the trial period commencing March 25, 1996, with docket sounding on March 12, 1996.

ORDERED at Sanford, Seminole County, Florida, this 22nd day of January, 1996.

O. H. EATON, JR.
Circuit Judge

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Appendix B

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY,
FLORIDA

CASE NO. 75-430-CFA

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH R. SPAZIANO,

Defendant.
_____/

ORDER SETTING FEES AND EXPENSES

A Petition for Reimbursement of Costs was filed by counsel for the defendant. The court reviewed the Petition and conducted an evidentiary hearing on the issue on June 14, 1996.

Prior to the hearing, counsel for Seminole County and counsel for the defendant agreed on the amount of $20,000.00 to settle all issues except for payment of expert witnesses and investigative expenses. Thus, the court is only called upon to determine the amounts to be paid for those services rendered.

The defendant has been declared to be indigent. Indigent defendants are entitled to court appointed counsel and to have Seminole County pay the reasonable costs

expended in their defense. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This is true in proceedings for post conviction relief. Brevard County Board of County Commissioners v. Moxley, 526 So.2d 1023 (Fla. 5th DCA 1988).

At the hearing on the petition, counsel for Seminole County moved to strike the request for payment because the defendant did not seek prior approval before incurring expert and investigative expenses. The court entered an order requiring "investigative and expert witness expenses must be approved before they are incurred." This order is dated October 5, 1995. The order was entered for the purpose of giving defense counsel an opportunity to obtain a ruling on the payment of expenses before they were incurred and not for the purpose of precluding application for payment of expenses for which a ruling had not been obtained. Indeed, it is doubtful that such an order could be enforced even if its language was taken literally as counsel for Seminole County urges. Louis v. State, 667 So.2d 851 (Fla. 2d DCA 1996); Carrasquillo v. State, 502 So.2d 505 (Fla. 1st DCA 1987). Accordingly, the motion to strike was denied.

Robert Wesley, Esq., an attorney who has considerable experience representing defendants in capital cases, testified that it was both reasonable and necessary in this

case to incur expert and investigative expenses. He reviewed the bills submitted by the experts and the investigator and did not think they were excessive. The bills were introduced into evidence without objection. Therefore, any complaint about the court considering them as evidence was waived. Cauldwell v. People's Bank of Sanford, 75 So. 848 (Fla. 1917); see Ehrhardt, Florida Evidence, 1996 ed., sec. 104.2.

The bills submitted in evidence lack a certain amount of detail and appear to have been reconstructed for the purpose of the hearing. It would have been helpful to have the experts and the investigator present to elaborate on several of the entries. However, Seminole County presented a witness, Dr. Jeffrey Danziger, who questioned some of the entries and who provided other assistance in understanding how experts bill governmental entities. In all, or nearly all, instances, experts reduce their fees when public funds are involved. This is as it should be.

In approaching how to compensate the experts and the investigator, the court has considered the fact that this case is one that is out on the edge of American jurisprudence. Seldom, if ever, is a criminal case brought before a court with issues as difficult as those presented here.

First, a man's life was at stake on the outcome of these proceedings.

Second, the court, the attorneys, the experts and the investigator were under tremendous pressure due to time limitations imposed by the Supreme Court of Florida.

Third, the issues at the post conviction relief evidentiary hearing involved the credibility of the only witness whose testimony condemned the defendant. The question of whether or not the testimony of this witness was the result of improper suggestion by the police and a hypnotist had to be answered. This issue could only have been presented by witnesses who have recognized reputations for dealing with hypnotically refreshed testimony. This is not a case where a local expert could have sufficed. The issue here was not a common one such as the effects drug abuse may have on a person. See, Burch v. State, 522 So.2d 810 (Fla. 1988).

As the United States Supreme Court has noted, "death is different." Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976). In a case with stakes as high as in this one, counsel cannot be faulted for obtaining the best experts available.

Additionally, it was absolutely crucial that the state's witnesses be investigated for impeachment at trial and their testimony be questioned.

The defense hired two expert witnesses.

Dr. Richard J. Ofshe, a professor of sociology, traveled to Seminole County from San Francisco. He stayed at the Orlando World Center Resort and Convention Center at a cost of $120.99 per night. Additionally, he rented an automobile at a cost of $199.00 and incurred parking expenses amounting to $42.40. His room service bill came to $44.57. Other expenses included meals in the hotel restaurants and "refreshments" which totaled $53.20.

The court declines to order Seminole County to pay these expenses beyond the rate charged by local lodging facilities in Seminole County and the per diem rate paid to state and county employees while traveling. While the per diem rate is a matter of common knowledge among state and county employees ($21.00 per day) there is no evidence in the record to establish a reasonable nightly rate for lodging in the local area. Additionally, Dr. Ofshe is entitled to reasonable expenses for travel to Sanford from Orlando International Airport and return. The court will hold another hearing to determine these amounts if counsel cannot agree to a figure.

Dr. Ofshe spent a total of fifty-five hours on this case. Thirteen of these hours are air travel time. It is not uncommon for expert witnesses to charge "portal to portal" when they must be out of their local area to

testify. Some experts, e.g. Dr. Stein, charge a per diem rate in lieu of an hourly rate when they travel. However, as Dr. Danziger testified, in cases where public funds are expended, experts often waive these per diem charges.

After subtracting travel time, Dr. Ofshe spent thirty-four hours on this case. That amount is reasonable, especially considering that over half of it was attending court proceedings. Dr. Danziger testified that experts in the local area charge Seminole County $150.00 per hour. However, that hourly rate does not adequately compensate Dr. Ofshe considering the time constraints under which he was working and his level of expertise. The requested rate of $250.00 per hour is reasonable and, in addition to the expenses set forth above, Dr. Ofshe's fee is set at $8,500.00.

Dr. Barbara A. Stein, a board certified forensic psychiatrist, submitted a bill for 90.5 hours plus per diem and expenses. The bill includes sixty-nine hours for review of literature and preparation for her testimony. Dr. Danziger thought that time to be excessive and the court finds that not more than three full days (24 hours) is reasonable. The court declines to order professional fees for making copies and faxing them on January 7, 1996. The other hourly charges were not seriously challenged and the court finds that a total of 59.05 hours is reasonable.

Dr. Stein charges $300.00 per hour for her services. However, she charges a per diem rate of $3500.00 to $4000.00 when she appears in court. Considering her experience and the time constraints under which she was working, the court finds that $300.00 per hour is reasonable. The per diem rate of $3500.00 to $4,000.00 per day is rejected in lieu of the actual hourly rate. Dr. Stein's fee is set at $17,715.00. She is also to receive reasonable lodging expenses, travel expenses or mileage and the per diem rate for meals ($21.00 per day). The court will hold another hearing to determine these amounts if counsel cannot agree to a figure.

The defense hired Steve Gustat as an investigator at the rate of $1,100.00 per week and expected him to be available at all times. That was reasonable considering the issues involved and the time constraints imposed by the Supreme Court of Florida. His billing also lacks detail but considering the fact that he was being compensated by the week instead of by the hour, it is easier to accept than the other billings. At the weekly rate, Mr. Gustat was available full-time at $27.50 per hour (assuming a forty hour week) and that is reasonable for this case. The expenses charged for meals are less than the per diem rate allowed by the State and Seminole County. Most of the other expenses incurred, such as lodging, mileage, gas and tolls

appear to be reasonable as well. Defense counsel have agreed to reduce the investigative expenses by ten percent and the court accepts that reduction instead of holding another hearing on individual charges that may exceed the per diem rate allowed by the state and Seminole County.. The total investigative costs are set at $14,727.82.

The defense seeks reimbursement for the travel expenses of one other witness, Thomas H. Dunn, Esq. Mr. Dunn testified at the trial to establish that the discovery of the recanted testimony of Anthony Delisio was timely. His travel expenses include an airline ticket and meals that amount to less than the per diem rate. The total is $686.09, which the court finds to be reasonable.

IT IS ADJUDGED:

1. Seminole County is directed to pay expert witness fees, investigative expenses and related costs as follows:

A. Dr. Richard Ofshe - $8,500.00

B. Dr. Barbara A. Stein - $17,715.00

C. Thomas H. Dunn - $686.09

D. Holland and Knight - $14,727.82 (investigative expenses)

2. Counsel for the defendant may schedule a hearing for the purpose of determining the amount of additional

compensation due to the expert witnesses as is set forth above.

ORDERED at Sanford, Seminole County, Florida, this 18 day of June, 1996.

O. H. EATON, JR.
Circuit Judge

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DATED June 18, 1996