IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,
Appellant,

vs. CASE NO. 87,364

JOSEPH ROBERT SPAZIANO,
Appellee.
_____/

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

In the manifest interests of justice the appellant requests that oral argument be granted. The appellee concurs.

STATEMENT OF THE CASE AND FACTS

Appellant rejects those statements of appellee that are argumentative and appropriately addresses them in the argument section of this brief.

Appellant objects to the editorialization that "Buckling under pressure from an overbearing father, suggestive police interrogation, and seriously flawed hypnotic techniques, Mr. DiLisio gave detailed testimony..." about the trip to the dump with Spaziano where he saw the bodies. Ans. Brf. p.7 Conveniently enough, this recantation did not occur until after the death of DiLisio's father. Judge Eaton noted DiLisio's many brushes with the law (R 3809). DiLisio was not simply a "troubled" teenager; he was a "troublesome" teenager. He was also thrown out of his mother's house (T 257). He sold drugs and was stoned all the time (T 259-260). None of the other DiLisio siblings at the hearing below joined in DiLisio's damning description of their father. Not one suggestive interrogation procedure was identified by DiLisio or cited in the order of the lower court. The hypnotic techniques used in 1975 are not state of the art 90's procedures. But Spaziano chose to commit the murder in 1973 and the justness of his conviction and judgment is not diminished by technological advances. For this reason, this court applies the decision in

Bundy v. State, 471 So.2d 9 (Fla. 1985), prospectively only. That Spaziano now suggests that the 1973 procedures were seriously flawed betrays his position below that hypnosis was explored only in regard to DiLisio's credibility at trial to be a subterfuge to reopen the hypnosis issue.

Contrary to appellee's assertion, Spaziano was independently linked to the dump site at trial apart from DiLisio. In the summer of 1973 Mike Ellis and "Buzzard" went in Spaziano's truck with him to the area of the crime scene. Buzzard asked Ellis to stay in the truck and Buzzard and Spaziano walked off for fifteen or twenty minutes (ROA 585-615). In fact, Spaziano lived in a trailer near the dump. Spaziano even discussed seeing "bones" there with William Coppick, which suggests the possibility, testified to by the deputy who processed the scene, that Spaziano could have returned to the scene after DiLisio had viewed the bodies, which would explain why DiLisio's description of the bodies did not correlate entirely with the manner in which they were found. (ROA 558-585;T 209) Spaziano was independently linked to the victim by her roommate and Jack Mallen (ROA 401-402). The testimony of Henrietta Young, which could have placed Spaziano with Laura Harberts shortly before the murder was kept from the jury because other line-up photos did not closely enough resemble Spaziano (ROA 543). How the police were to find

others with the appearance of a wild-looking derelict who resembled both Jesus Christ and John the Baptist remains unanswered (T 915).

DiLisio did not "initially" recant to a Miami Herald newspaper reporter. DiLisio indicated to Lori Rozsa that he "remembered being married at twenty-one but the years before that were a void." (T 455). Rozsa, who thought the police had manipulated DiLisio, told him there were "loopholes" in the case (T 450). DiLisio, who still could not remember anything, since his teenage years were a blank, then began making statements to the press such as "How do I know what I said back then was reliable? Especially if it came out under hypnosis?" (T 454-455). Rozsa had brought doubt to his mind (T 451).

Since DiLisio's teenage years were a blank until shortly before the evidentiary hearing his legally insufficient affidavit, in which he indicated that he never went to the dump with Spaziano, must be construed to mean that he did not *recall* going to the dump with Spaziano. It is apparent in the June 14, 1995, videotape of DiLisio's interview with FDLE that if he did not recall something he assumed it never happened or attributed the occurrence to something or someone else. When asked by an FDLE agent if the police had fed him information he responded "Well, I don't know if you could say they fed me anything. You know I can't-- I can't

recall what they said to me. *But I know that what I said had to come from somewhere.*" S. Ex.B p.25 (emphasis added). Evidently, DiLisio had not yet realized that he had been influenced by his father.

Thomas H. Dunn's views on "due diligence" can hardly be uncolored by his long-time collateral defense of death row inmates (T 128-144). This is an example of the use of another unwarranted expert. The lower court could well have decided the due diligence issue without the assistance of a committed defense attorney.

Judge Eaton did, indeed, find that DiLisio and Keppie Epton, who was never called to corroborate DiLisio's story of "seduction", had "frequent sexual intercourse for about two and one half years." (R 3808). This finding is clearly erroneous. DiLisio testified to a much different timeline. He claimed he began the affair in August 1973 and that it continued until Keppie married his father in December 1973 (T 226); Ans. Brf. p.14 ("After Mr. DiLisio's father and Ms. Epton married in December 1973...) By any mathematical calculation that is a five-month relationship. By August 1975 DiLisio was in Volusia House (T 281;283-284). By 1975 he was also intimate with Annette Jones and had, apparently, well recovered from the seduction (T 809).

DiLisio did, in fact, testify that the police took *him* to the

dump site after the first hypnosis session (T 296). That testimony is contradicted by a pretrial deposition in which he indicated that it was he who had shown the police landmarks; his statements to Bill O'Connell before hypnosis about having visions of bodies; his own testimony on cross-examination that he could have told O'Connell he was good friends with Crazy Joe, who had shown him the bodies; and by the fact that the first hypnosis session reveals him giving directions, without suggestion, to an area where Spaziano stashed stolen bikes, the description of which just happens to match directions to the grave site that he testified to at trial (ROA 623-624; T 415).

Contrary to appellee's assertion, it is of little significance that "details of the trip to the dump site with Mr. Spaziano grew in ever-increasing specificity and detail." Ans. Brf. p.20-21 The details of DiLisio's recantation also evolved in much the same manner: from remembering nothing before age twenty-one to recalling a torrid seduction, physical abuse, and bearing false witness. If it is true that this lack of expedience leads to the ultimate conclusion, as appellee suggests, that DiLisio's trial testimony was generated not by his own beliefs or first-hand knowledge, but by what the police wanted him to believe, then it must also be true that his recantation was generated not by his own beliefs or first-

hand knowledge, but by what those who believe Spaziano to be innocent wanted him to believe. A more reasonable explanation was provided by DiLisio years ago: (1) His first reaction when he saw the bodies was that he was scared because he knew too much and would have been killed and (2) He was not too sure about telling Lieutenant Abbgy what he knew about Spaziano when he was approached by him because he didn't trust him and didn't want to tell the whole truth. Spaziano Ex. 80(10) p.74-76;85. Much as appellee may like the State to rely on the concept of repressed memory recalled to explain DiLisio's so called "evolution" in memory, to justify the presence of experts below, it does not. Appellee accepts DiLisio at his word in 1976 that he was scared and didn't *want* to tell the whole truth, which is corroborated by the belief of Lieutenant Abbgy that DiLisio was holding back information and DiLisio's eagerness to be hypnotized and his teasing of the police with information in statements such as "I go under hypnosis and you find out what I used to know that I don't know now." Spaziano Ex.80(1)(2) and (3)p.3. A witness who has to have information dredged from him would provoke the ire of Spaziano and the Outlaws much less than a volunteering stoolie and any subsequent disavowal would certainly be more believable.

The testimony of Dr. Stein and sociology professor Richard

Ofshe has previously been discussed and is treated in the argument section herein. As far as the hypnosis is concerned, too much is read into poor quality tapes, and it should not be overlooked that a federal district judge who reviewed the transcripts thereof found no suggestiveness. *Spaziano v. Singletary,* No. 910850-CIV-ORL-18 (M.D. Fla. Nov. 30, 1992); *Spaziano v. Singletary,* 36 F.3d 1028 (11th Cir. 1994)(Appendix). It should also be noted that the "standards" used by Dr. Stein to evaluate the hypnotic procedure were promulgated long after the hypnosis in this case (T 640, 647; Spaziano Ex. 107). Ofshe's opinions are premised upon a belief in DiLisio's recantation, the truth of which was not an issue for Ofshe but for the court below. Ofshe is incorrect in his testimony that the police threatened DiLisio with prosecution for his delinquent acts and not one record cite is provided to support this unfounded statement.

It is unfair to characterize DiLisio's descriptions in interviews after the hypnosis sessions as the result of suggestions when Spaziano has raised this claim twenty years later, after the investigating officer has died. Such assertion is based on the premise that Spaziano's counsel has secured physical evidence of every conversation DiLisio ever had with the police, which fact can not be known after the passage of some twenty years, especially

when evidence has been retrieved from a widow's attic. Spaziano must bear the brunt of that time lapse.

It still cannot be discerned what relevance the traumatic events DiLisio experienced in 1994 have to do with this case. Whether or not his new wife refused to live with him in Pensacola and whether he was involved in a frightening boat accident, while having no bearing on whether he lied at trial, would seem to indicate a clear penchant for storytelling, as would his appearance on the Maury Povich show (T 463).

The testimony of Elmer Leidig is poor corroboration for DiLisio's insight into having borne false witness prior to having been exposed to CCR investigators and Lori Rozsa. Leidig testified that DiLisio only told him the full details of his past testimony in the Spring of 1995 (T 525). Lori Rozsa's June 11, 1995, article, however, reflects no memory on the part of DiLisio for the trial, his testimony or the hypnosis (T 530).

DiLisio's statement to Annette Jones may have been consistent with his testimony that he had falsely told others after the hypnosis that he had seen dead bodies. But DiLisio also told Jones that he was in fear for his life and her's, as well (T 813). That statement is consistent with his statements to FDLE that as a result of testifying against Spaziano he went through living hell

and was always moving and running because he was worried he would be killed. S. Ex.B p.8. Most importantly, it was entirely consistent with the reason for recanting that he gave to his sister Fran, that he was harassed by the Outlaws and feared for his and his daughter's safety (T 901-902). Jones was not using alcohol or drugs when DiLisio revealed this to her and her testimony was consistent with that of DiLisio's sister as to a similar statement DiLisio made years later.(T 858). Lepine's testimony hardly bolsters Spaziano's claim that DiLisio recanted for religious reasons. DiLisio told her was being harassed, all the bikers had previously been after him, causing him to always move and run, and the statement that he would have to pay for Spaziano's life with his own hardly has false witness/repentance connotations (T 901); S.Ex.B p.16. Guilt over bearing false witness would not cause him to presently fear for his daughter's well being.

SUMMARY OF ARGUMENT

1. While the lower court recognized in theory that recanting testimony should be viewed as exceedingly unreliable pursuant to *Henderson v. State*, 135 Fla. 548, 185 So. 625 (1938), and *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), it never questioned the truth of DiLisio's recantation and started with the premise that DiLisio had lied at trial, based on the incompetent opinion of a repressed memory expert that DiLisio's description of the bodies did not match the crime scene, despite the fact that there was competent, substantial, forensic evidence that the remains had been interveningly disturbed.

2. The order of the lower court is erroneous on its face. It reflects that the court treated DiLisio not as a recanting witness whose testimony should be viewed with at least some modicum of suspicion but as an ordinary witness, on equal footing with all other witnesses, and, in view thereof, the lower court erroneously attempted to resolve conflicts in the evidence without imputing the least untruthfulness to DiLisio's testimony, even though apparent in the record.

3. The presumption of finality is strongest in collateral attacks. *Strickland v. Washington*, 466 U.S. 668 (1984). It was grievous, reversible error for the lower court to ignore the

decisions of this court cautioning of the unreliable nature of recanting testimony, to abdicate its responsibility to fairly make credibility determinations to experts, and to accept DiLisio's recanting testimony at face value, even where significantly impeached, as though he was an ordinary nonrecanting witness, and to treat the State's witnesses as mere interlopers, either ignoring their testimony altogether or reconciling it with the recanting testimony, with an absurd result.

ARGUMENT

I. THE LOWER COURT ABUSED ITS DISCRETION IN VACATING THE JUDGMENT AND SENTENCE AND ORDERING A NEW TRIAL AS THE COURT UTILIZED AN ERRONEOUS STANDARD, ITS DECISION IS ARBITRARY, FANCIFUL AND UNREASONABLE, IS NOT SUPPORTED BY THE EVIDENCE, AND NO REASONABLE MAN WOULD TAKE THE VIEW ADOPTED BY THE LOWER COURT.

The appellee defends the lower court's decision to vacate the long standing judgment and sentence of convicted murderer Joseph Spaziano by pointing to its methods. In particular, appellee relies on the standards set out by Judge Eaton in his order:

> Trial judges are taught to determine the credibility of a witness and the weight to be given the 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 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 principles have been applied here, although it has not always been easy.*

(R 3807).

The State would first submit that it never would be easy to apply these principles to a case such as Spaziano's and the reason is clear: these are not the standards of a *recantation* case. These are the standards of the ordinary case in which the judge beholds

the witness for the first time and assesses him in order to determine the truth of his words, and only upon finding some indicia of untruthfulness, does the judge begin to explore the issue of motive. These are not the standards to be applied to the recycled/turncoat witness, already pregnant with motive, who first takes one position, then another. The standard for evaluating such witnesses is set forth in *Henderson v. State*, 135 Fla. 548, 561, 185 So. 625, 630 (1938) (Brown, J., concurring specially), where this court indicated that "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."

The lower court should not have been looking for simple indicia of lying, if it even went that far, but should have viewed the recanting testimony from the unqualified vantage point of being exceedingly unreliable, until proven otherwise, and should have explored DiLisio's motive to lie *presently*, evidence of which there was a plethora, namely his fear of retaliation by Spaziano, instead of searching for evidence, no matter how farfetched, to support a presumption that DiLisio had lied at the time of trial. The basis for this presumption is discussed more fully in part II herein.

Surely no reasonable man, using the "reasonable man" standard of *Canakaris v. Canakaris*, 382 So.2d 1197,1203 (Fla. 1980), cited by appellee, would have come to the conclusion that DiLisio lied at trial to please his father when he cared so little for his father and was in so little fear of him that he stashed marijuana by his house, and slept with his own father's mistress right under his nose and even did so on the day of his father's wedding. A reasonable person, utilizing the correct *Henderson* standard would have come to no other conclusion but that DiLisio, who has been in dread fear of the Outlaws since the time of trial, and who has never been put in a witness protection program, had finally capitulated under pressure because of fear for the safety of himself and his daughter. That conclusion would have been based on DiLisio's own more believable statements to FDLE and his sister, and Spaziano's own corroborated admission, not the obviously irrelevant, recently contrived tale of the soapbox *genre* of sexual liaisons and tortured family relationships. It is also clear that the lower court did not even follow its own standards and, furthermore, rejected evidence worthy of belief in favor of evidence unworthy of belief.[1]

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[1]It should not go unnoticed that "Keppie" the protagonist in this vignette was conspicuously absent from the hearing below and DiLisio's father had recently died so DiLisio's account of "the

The principles set out by Judge Eaton for determining witness credibility are fine in the abstract but are hardly applicable to a recantation case. For instance, the lower court could not possibly reconcile conflicts in the evidence without imputing untruthfulness to witness DiLisio, since it was known from the outset that DiLisio either lied in 1976 or was now lying in his recantation. Despite this fact, utilizing the above standards, the lower court put a recanting witness on equal footing with all other witnesses and reconciled conflicts in the evidence without imputing untruthfulness to any witness with the anomalous result that no credence was given to the testimony of any the State's witnesses; the lower court finding that they and *not* the *recanting* witness, who is a *known* liar, had major credibility problems. Where the testimony of the State's witnesses was not outright discounted it was subjected to the most strained of interpretations, even when corroborated by DiLisio's own statements.

Adhering to these standards, the lower court interpreted the statements of convicted murderer Spaziano, expressing concern over having taken the young boy (DiLisio) to see the bodies, to be simple talk about DiLisio's expected trial testimony and not an

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affair" and strained familial relationships was uncorroborated.

admission of guilt (R 3810). The lower court evidently felt that a convicted murderer with a valid final judgment and sentence stood on higher ground than a murderer redeemable enough to be in a federal witness protection program. The lower court ignored the fact that Yannotta's testimony was supported by the testimony of Spaziano's own brother, Michael, who indicated that shortly after his arrest Spaziano had talked about DiLisio and said "if he told on him he would be telling on himself" and was still looking for DiLisio in 1980 (T 1018;1025). It is obvious that the lower court improperly used the recanting witness, DiLisio, as the standard of truthfulness by which to measure other witnesses and thereby "reconcile" conflicting testimony.[2] In doing so, the lower court selectively gave credence to some of DiLisio's statements and ignored other statements and evidence. Unfortunately, this evidence supported the testimony of the State's witnesses. There is evidence DiLisio had been in the area where the bodies were found.

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[2]This is further apparent in the Order in which Judge Eaton assigned new time slots to the conversations with DiLisio testified to by witnesses Bill O'Connell and Annette Jones without any record support. The record reflects DiLisio told O'Connell that he had memories of dead bodies before undergoing hypnosis or going to the scene with police (T 947;953). DiLisio even admitted on cross-examination that he could have told O'Connell that he was good friends with Crazy Joe who had shown him bodies and he was afraid for his safety (T 414). This finding is also erroneous on its face and unsupported by the evidence.

He gave directions in the first hypnosis session, without suggestion, to an area where Spaziano had put stolen bikes, which description matches the route to the grave sites that DiLisio described at trial. There were numerous statements by DiLisio that reflect that he was in terror of the Outlaws and had been harassed, which certainly corroborates the testimony of Ralph Yannota and Michael Spaziano that Spaziano was worried about DiLisio's forbidden knowledge and wanted to find him. Admitting to taking a young boy to see bodies goes far beyond just discussing expected trial testimony and this finding is erroneous on its face.

It is quite clear that the testimony of a recanting witness should not be the standard of truthfulness by which to measure the testimony of other witnesses, especially where the court has to selectively ignore corroborating facts and statements by the recanting witness, in a misguided effort reconcile all the witnesses' testimony without imputing untruthfulness to anyone. The lower court had the tools to determine which of DiLisio's statements were true and which were false but did not use them. A trial judge is required to weigh *both* the *evidence presented at the trial* and the evidence offered on a postconviction or timely motion for a new trial. *Jent v. State*, 408 So.2d 1024 (Fla. 1981). Otherwise, a trial judge could not possibly determine on which of

the two occasions a recanting witness was telling the truth. Judge Eaton, instead, ignored DiLisio's prior testimony and statements that were consistent with the testimony of the State's witnesses, left unexplored the issue of a motive for DiLisio's recantation and was satisfied to either rely on the experts' opinions as to the untruthfulness of the trial testimony or to consider DiLisio's demeanor at the hearing as though he was a clean slate witness and, finding him to be credible, reconciled all other evidence in accordance with the recantation, which by any standard, ought to have been considered suspect.

As a longstanding general rule, a court will not grant a new trial on statements made by a witness after a criminal trial tending to show that his testimony was perjured, whether the witness himself makes oath to the statement or not. 158 A.L.R. 1062 (1945). "The proposition that an essential prosecution witness can later recant his testimony and Automatically bring about a new trial is ominous." *Mollica v. State*, 374 So.2d 1022, 1026 (Fla. 1979).

The Order Setting Fees and Expenses later entered by Judge Eaton on June 18, 1996, and submitted by counsel for Spaziano as Appendix B to the Answer Brief further sheds light on the reasoning of the lower court. Rather than viewing this case of decades-later

recanted testimony with the proper suspicion required by the opinions of this court in *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), and *Henderson v. State*, 135 Fla. 548, 185 So. 625 (1938), the Order reflects that Judge Eaton, instead, viewed the case as "one that is out on the edge of American jurisprudence" and felt that "a man's life was at stake on the outcome of these proceedings" and that "death is different." Order Setting Fees and Expenses, App.B to Answer Brief, p.3-4. In reality a man's life is at stake the moment a murder weapon is picked up and death is not *that* different.[3] A court should not dwell on the result of its

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[3]Liberal scholars such as John Stuart Mill have found death not to be that different:

> I defend this penalty, when confined to atrocious cases, on the very ground on which it is commonly attacked--on that of humanity to the criminal; *as beyond comparison the least cruel mode in which it is possible adequately to deter from the crime.* If, in our horror of inflicting death, we endeavor to devise some punishment for the living criminal which shall act on the human mind with a deterrent force at all comparable to that of death, we are driven to inflictions less severe indeed in appearance, and therefore less efficacious, but far more cruel in reality....What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards-- debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

John Stuart Mill, SPEECH IN FAVOR OF CAPITAL PUNISHMENT, April 21, 1868.

decision or the nature of the punishment, particularly in a collateral recantation case, since it involves a narrow, precise credibility determination which should be free of outside influence or considerations. Courts have long cautioned against making the nature of the punishment a paramount consideration.[4] One would wonder how any judge could impartially preside over a recantation case with the thought in the back of his mind that a man's life was at stake. Even if the court viewed the recantation with proper suspicion and properly considered it unreliable it may be reluctant to so hold based on its assessment of another human being's truthfulness. Yet that is the job of the judge and the court must carry out its duties unfettered by thoughts of the consequences of its decision for if it did not, judges would always find recanting testimony to be truthful and criminals would escape just punishment.

The order of the lower court is, furthermore, not supported by competent, substantial evidence and this court has the right and

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> What I do suggest is that we should not be seen as creating a particular category of jurisprudence especially favorable to people who commit such acts because of the consequent imposition upon them of the death penalty.

Gibson v. Jackson, 578 F.2d 1045, 1052 (5th Cir. 1978)(Gee J. joined by Coleman, J. concurring).

duty to reject inherently incredible and improbable testimony or evidence. *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976). The finding of the lower court that DiLisio lied in 1976 is based on just such evidence and should be rejected by this court. DiLisio's recantation testimony was inherently incredible, unworthy of belief, and was contradicted not only by his trial testimony but by other recent statements.

Judge Eaton also found that "The defendant worked at the marina and DiLisio 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." (R 3808). DiLisio testified at the hearing below that he did not have a relationship with Spaziano (T 233). There was, however, a wealth of evidence that DiLisio was lying in his recantation and knew Spaziano very well. Edwin Householder who worked for DiLisio's father testified that Spaziano and DiLisio looked like good buddies (T 909). Spaziano's former girlfriend, Darcy Fauss, testified that DiLisio and Spaziano were very close, were very good friends, and smoked pot together (T 744, 747). Donna Yonkin, DiLisio's younger sister, testified that it was not unusual to see Spaziano and DiLisio together (T 1073). In October 1974, DiLisio told detectives that he was a friend of Spaziano and Tall Paul (T 26).

In a 1975 deposition, DiLisio stated that he and Spaziano were friends and would go to Spaziano's apartment and various houses and take drugs. D Ex 80(10)p.48. He testified at trial that they were friends (ROA 617;621). Spaziano attended his father's wedding (T 252). DiLisio admitted on cross-examination at the hearing below that he could even have told Bill O'Connell that he was good friends with Crazy Joe who had shown him the bodies (T 29). Most recently, DiLisio told FDLE agents that Spaziano would give him pot (T 401). The lower court should have conclusively found that Spaziano and DiLisio were friends but did not because it gave credence only to DiLisio's recantation, even where impeached, and treated the State's witnesses as interlopers and discounted their testimony. Again, the problem can be traced back to the fact that the lower court used the wrong standard and did not view DiLisio's recantation with the proper suspicion.

It is true, as appellee states, that DiLisio only recently recanted his trial testimony. This is all the more reason that his recantation should have been viewed suspiciously pursuant to *Henderson v. State*, 135 Fla. 548, 561, 185 So. 625, 630 (1938), rather than having been blindly accepted as though he had never testified before, especially where such testimony was significantly impeached by other recent statements and contradicted by the

testimony of the State's witnesses. When trial testimony of two-decades-standing is drawn into controversy the first thing that should be looked to is motive.

It is disputed that DiLisio's recantation could not have been discovered earlier through the exercise of due diligence. Reporter Lori Rozsa was the first to "bring doubt" to DiLisio's mind about his testimony twenty years earlier because of the hypnosis and to advise him of "loopholes." (T 450-451) Those loopholes could have been explored with DiLisio by the lawyer who, ostensibly, created them in 1986, Michael Mello, with presumably the same result, especially since DiLisio's fear of the Outlaws is longstanding. *Cammarano v. State*, 602 So.2d 1369 (Fla. 5th DCA 1992), cited by appellee, is inapposite. Mr. Mello, however, did not appear to testify at the hearing below and he is simply the most important link in the broken chain of "due diligence." Furthermore, DiLisio, who was believed in all respects by Judge Eaton, did not seem to even know who Mr. Stafman was (T 429).

It is clear that the "newly discovered" evidence goes to the merits of the case, does not merely impeach the character of the witness and is not cumulative. It is less than clear, however, that it would likely produce a different result. In *Armstrong v. State*, 642 So.2d 730 (Fla. 1994), a witness, upon learning

Armstrong was the father of her twins, recanted testimony placing the murder weapon in Armstrong's possession during the robbery. Although the court found that even without her testimony sufficient testimony existed to support the conviction, the court still considered the evidence in the case *as a whole* and found it important that the recanting witness' testimony was consistent from the time of the incident to the conclusion of the trial and did not change until she found through a blood test that Armstrong was the father of her twins and until she began communicating with him after trial. In the present case DiLisio was similarly consistent in his testimony, despite a fearful state, until the time he was actually approached, two decades later, by Spaziano's representatives. It is not likely that a jury, provided with an opportunity to consider *all* the circumstances of both the trial testimony and recantation, would have come to the same conclusion as the lower court. The lower court should have considered all such circumstances, as did this court in *Armstrong*.

A simple viewing of the recent videotaped interview of DiLisio by FDLE reveals that DiLisio fears for his safety as much today as he did years ago and corroborates the testimony of his sister, Frances Lepine, that he was concerned for the safety of himself and his daughter. Appellee's assertion that it was years ago that

DiLisio feared for his safety is incorrect. Ans. Brf of Appellee, p.67.

To summarize, the lower court blindly accepted the recantation of two-decades-old testimony without question. DiLisio was not treated as a recanting witness and was given the same credibility margins as a witness testifying for the first time. In doing so, Judge Eaton also gave the testimony of the State's witnesses short-shrift, even when consistent with DiLisio's own recent, impeaching, statements. While it is true that some of the State's witnesses had criminal convictions, it is not true of all of them, and these were the associates of both Spaziano and DiLisio. Although Judge Eaton recognized DiLisio's brushes with the law in his order, he did not seem to notice that, at the time period in question, DiLisio was himself an unsavory character. Phoning in a bomb threat is an act of terrorism and, when there is no bomb, is an act of dishonesty. The recanting testimony of DiLisio should have been doubly suspect.

II. THE LOWER COURT ERRED IN ALLOWING AND THEN RELYING UPON THE TESTIMONY OF TWO EXPERTS ON HYPNOTIC PROCEDURE AND REPRESSED MEMORY.

From the very beginning this case involved a concerted effort to circumvent the prospective application of *Bundy v. State*, 471 So.2d 9 (Fla. 1985), and to wrest free from the decision of the

United States Court of Appeals for the Eleventh Circuit barring from consideration a substantive hypnosis claim under *Teague v. Lane*, 489 U.S. 288 (1989). All that was needed was, apparently, DiLisio. DiLisio's credibility, however, was fully tested at trial before the jury. It was not the province of the court below to reopen, in the guise of making credibility determinations, an issue upon which any subsequent decision would not be susceptible to retroactive application, which issue, hypnosis, this court has long declined to reopen and did not so instruct the lower court. The narrow duty of the court below was to determine whether DiLisio was lying or telling the truth in his recantation, not to explore irrelevant circumstances to demonstrate that DiLisio's trial testimony was *somehow* flawed, in accordance with what could only be a presumption that his recantation was truthful.

The futility and error in admitting the testimony of the two experts is no better demonstrated than by the fact that the testimony of each, when aggregated, canceled out the testimony of the other,[5] which ought to have taken the lower court back to

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[5]Dr. Stein testified that there was no support for the theory of repressed memory as a result of seeing bodies (T 635). Dr. Ofshe testified that hypnosis does not improve recall beyond that which can be accomplished through conscious effort and that individuals in deep hypnosis are able to exert considerable control over their statements and may willfully lie or willfully tell the truth (T 699;706;723) Ofshe further opined that it is not possible to repress knowledge of a traumatic event and then return it through hypnosis (T 686).

square one, the simple issue of whether DiLisio had lied at trial, rather than giving it a peg to hang its hat on and accept Dilisio's recantation at face value and reconstruct the testimony of the State's witnesses accordingly.

DiLisio's story was that he flat-out lied to please his father. The only issue is whether this is true. Unfortunately, the lower court, while recognizing the irrelevance of hypnosis, and acknowledging the fact that it cannot even improve recall, found that because the hypnotist twenty-five years ago did not use today's state of the art procedures on a witness, who claimed *he knew at the time that he was lying,* that DiLisio's trial testimony was "unreliable." (R 3810). The lower court then turned one hundred and eighty degrees and went on to find, to the contrary, that DiLisio simply lied and "created" the crime scene to please his father and the authorities, all of whom are not alive to dispute this claim (R 3810). This finding was not even based on credibility determinations. The true role of the sociology professor becomes apparent at this juncture. Not content to dabble in the entirely separate field of repressed memory, Dr. Ofshe offered himself to the court as a second-hand forensic expert as well. Unfortunately, the court fell into grievous error and accepted Ofshe's offer. Ofshe's postulations form the bedrock upon

which the lower court wrote its order and such error, unlike the error in the cases cited by appellee, could never be considered harmless. This testimony did not just assist the lower court in its decision, it was incorporated in the court's order. The lower court found DiLisio's trial testimony to be untruthful and, *a fortiorari,* that he *was* truthful in his recantation, based on Ofshe's "forensic" postulations, in the guise of an also irrelevant "confabulation" analysis, that the crime scene as later found by investigators did not match DiLisio's descriptions of the bodies (R 3810). Again, the State's witnesses were either totally ignored or treated as intruders. *This* action by the lower court *cannot* be justified by the disclaimer that the State's witnesses had "major credibility problems" since the witness, unlike Ofshe, was someone who would have forensic knowledge-- a law enforcement officer who processed the crime scene and certainly had never been convicted of a felony. Thus, the testimony of a sociology professor demanding that a crime scene stay forevermore as described by the tortured DiLisio trumped the testimony of a knowledgeable law enforcement officer that: decomposition would be rapid in August in central Florida, but that there was still flesh left on the bone structure; that animals had, indeed, disturbed the remains; and that there would be no way of knowing whether the defendant or anyone else had

disturbed the remains or gone back to the scene and repositioned or tried to secrete the bodies (T 174;208;209).

The order granting postconviction relief should be reversed on this basis alone. This is not a simple harmless error case where inadmissible expert testimony was admitted. The lower court abdicated its responsibility to make fair credibility determinations in favor of relying on the far-afield forensic notions of a supposed repressed-memory expert and the only other "evidence" supporting Ofshe's postulation also came from Ofshe, who also testified at length to the numerous coercive influences in DiLisio's life, i.e., his relationship with his father and Keppie and the pressure by the police (T 691-694). The problem with this testimony is that Ofshe first had to accept DiLisio's recantation as true. When the lower court wholeheartedly endorsed Ofshe's opinions, it also implicitly accepted Ofshe's blindly favorable credibility assessment of DiLisio in his recantation and abdicated its responsibility to independently determine whether DiLisio was lying in his recantation, which was the sole issue before the court. Ofshe's opinion was not "cumulative" to other evidence as was the case in those cases cited by appellee, *School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4th DCA), review dismissed, 399 So.2d 1146 (Fla. 1981), and *Gulley v. Price*, 625

So.2d 45, 50 (Fla. 1st DCA 1993). Ofhse's belief in DiLisio's recantation paralleled DiLisio's wish to be believed and parroted DiLisio's testimony. But this unreliable bolstering of DiLisio's testimony led the court astray from its duty to assess DiLisio's demeanor and examine the trustworthiness of his recantation testimony. The order entered by the lower court is totally devoid of such findings. There is not one sentence commenting on DiLisio's demeanor, candor or forthrightness. There are no references to any evidence corroborating DiLisio's recanting testimony. There is only a reference to the "distinguished experts" and citation to the concurring, not the majority opinion, of a justice of this court, prior to the hearing below, referencing "testimony tainted by hypnotic procedure", which the court below evidently took in its literal sense (R 3812).

Appellee misapprehends the magnitude of the State's complaint. In *Hunter v. State*, 660 So.2d 244 (Fla. 1995), there was a jury and the judge recognized the error in a psychiatric expert's testimony finding the defendant to be a liar and gave a curative instruction. In the case at bar, all indications are that the judge, sitting alone, based his decisions on the experts' opinions of DiLisio's credibility. The dangers are no less and it is no consolation that the factfinder at the hearing below was the court and not a jury.

Cf. Daniels v. State, 634 So.2d 187, 190 (Fla. 3d DCA 1994). *Wuornos v. State*, 644 So.2d 1000 (Fla. 1994), in which the defense opened the door for the state to cross-examine an expert on confessions relating to collateral cases is not at all on point or relevant to this issue.

Quite simply put, in the United States of America, the opinion of an expensive expert in a credibility-fraught recantation case should not take the day. The function of a trial or hearing is to arrive at the truth. The truth needs no announcement or ambassador. It reveals itself to not only the credentialed but to all who seek it.

Had Judge Eaton known then what the experts had planned to charge the county of Seminole, which may reflect upon Ofshe's willingness to testify contradictorily, far beyond his expertise,[6] and upon the ultimate question to be answered by the court and Dr. Stein's readiness to form opinions based on 90's standards and a haggard twenty-six year old record she could only presume to be

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[6]It is a stretch in the first place to envision a sociology professor having expertise in the entirely separate fields of hypnosis and repressed memory and such would seem to indicate that the field of hypnosis is not highly regimented, its precepts easy to grasp, and that this is simply a case of a later expert second-guessing, years later, a previous hypnotist. Despite defense claims that the issue of hypnosis was not really being reopened on the merits the result is the same in that an earlier expert was condemned for not following later postulated standards, in violation of the prospective only application of *Bundy v. State*, 471 So.2d 9 (Fla. 1985).

complete, he may not have been so ready to base his decision on the hypnosis/forensics red herring. The experts' testimony below as to twenty-five hundred dollars fees and four thousand dollar expenses hardly conforms to their ultimate bill. Initial Brf. Of Appellant, App. A, p.3. The State had every right to rely on their testimony as to their fees as their testimony spoke of "guarantees" as though the charges had been decided, referred to no outstanding charges, and there was no reason to imagine a bill of such proportion would ever be submitted (T 609;688). Most importantly, if the state relied on their testimony regarding their fees, the lower court must have also. It had a right to know the truth, especially where it indicated in its order that "trial judges are taught to determine the credibility of a witness and the weight to be given to testimony by considering the interest the witness has in the outcome of the case." (R 3807) The court would have had no reason to imagine a bill of that dimension simply because "death is different."

CONCLUSION

Based on the above and foregoing arguments the order of the lower court granting postconviction relief should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the above Reply Brief has been furnished by U.S. Mail to James M. Russ, Esq., 18 West Pine Street, Orlando, FL 32801; Stephen F. Hanlon. Esq., Holland & Knight, 315 South Calhoun Street, Tallahassee, FL 32301; and Gregg Thomas, Esq., Holland & Knight, 400 North Ashley Drive, Suite 2300, Post Office Box 1288, Tampa, FL 33602, on this 12th day of August, 1996.

MARGENE A. ROPER