

fact. Suarez was connected to five sexual assaults in the area around the time of this murder. Indeed, the first was on *the day* of Laura Harberts' disappearance. Several of the victims made positive identifications. After he was interviewed by the police, Suarez left town. Attempts by counsel to locate Suarez have, to date, been unsuccessful.

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

Joe Suarez denied to the police that he had been with Ms. Harberts on August 5, 1973. Yet, in an undisclosed documented interview, the police were able to conclude that Suarez *was* with Ms. Harberts on the night of her disappearance.

(3) The Lynwood Tate Information

During the investigation, the state believed that the decedent's killer was Lynwood Tate, although none of the documents suggesting Mr. Tate's guilt were disclosed to the defense. Mr. Tate was given several polygraph tests about his role in the killing and *failed*. He was a known rapist in the area and all of the investigators involved concluded that Tate had committed the murder. Tate told the investigators "on several occasions" that "he didn't know whether he committed the murder" and "that if he did, he would like to know it." At one time, "an indication was made [by Tate] that there was a possibility that he may have done this and did not know it." Most important, the police located an eyewitness, Mr. William Enquist, who positively identified Tate as the individual he observed at the scene of the crime with several women near the time of the killing. None of the documents containing this information were disclosed to the defense.

(4) The Dilisio Impeachment

The state failed to disclose the contents of an interview with Mr. Dilisio conducted in October, 1974 (about six months before the first disclosed interview). Although only police notes confirm this interview (as opposed to a transcript or tape), it appears that this was the first police interview with Dilisio where the subject of the murders in the dump arose. The police notes indicate that all Mr. Spaziano had ever (allegedly) said to Dilisio was "man, that's my style." The report does not indicate that Spaziano admitted to the murder or that he gave any other information to Mr. Dilisio, but he only supposedly claimed that it was his "style." Of course, six months later in the first recorded statement of Dilisio, the story had radically changed and by the time of trial, Dilisio claimed still much more extensive statements were made to him by Mr. Spaziano. Yet, defense counsel did not have available the contents of the first interview which would have constituted strong impeachment of Dilisio's trial testimony. Indeed, given the importance of Dilisio's testimony to the state's case, the failure of the state to produce this material clearly undermines all confidence in the guilty verdict.

- e. Why "Crazy Joe" Spaziano Has No Alibi: Quick: Where Were You Two Years Ago Today, and Could You *Prove It To A 1975 Orange County Jury Who Knew You Were an Outlaw?*

Antoinette R. Appel, Ph.D., P.A.
Southern Institute of Forensic & Neuropsychology
June 8, 1995

Michael Mello

Re: Joseph Spaziano

Dear Mr. Mello:

As per our discussion over the last few days, please be advised that the medical literature now available that was not available at the time of Mr. Spaziano's trial indicates quite clearly that severe closed head injuries result in what is known as post-traumatic amnesia with a loss of both recent memory and in more severe cases remote memory. Post-traumatic amnesias of less than two weeks in duration are typically associated with good recovery whereas post-traumatic amnesia durations greater than two weeks are typically associated with moderate to severe disability. (Capruso and Levin, Cognitive Impairment following closed head injury. *The Neurology of Trauma*, Neurologic clinics 10:4:879 at 883.) Levin et al (Levin, Goldstein, High, et al. Disproportionately severe memory deficit in relation to normal intellectual functioning after closed head injury. *J. Neurol. Neurosurg Psych* 51:1294, 1988) studied memory functioning in patients recovering from closed head injury who had post injury IQs within the normal range. They found that of 43 patients tested at 5-15 months postinjury 21% demonstrated impairments in memory despite their normal intellectual functioning. Of 42 patients tested 16-42 months postinjury 28% also had impairments in memory despite normal intellect indicating that disproportionate deficits in memory function are present in a substantial number of patients not suffering post-traumatic dementia. Obviously in Mr. Spaziano's case where he is known to be mentally retarded, the long term effects of memory deficits are much more pervasive and much more lasting. Ruff et al (Ruff, Young, Gautille, et al Verbal learning deficits following severe head injury: heterogeneity in recovery over one year. *J. Neurosurg* 75:850, 1991) found that significant recovery in a number of cognitive domains occur whereas minimal improvement in memory is observed. Smith, Lowenstein, Gennerelli, and MacIntosh (*Neuropsych letter* 1994 February 28:168 (1-2):151-154) have demonstrated that memory deficits following concussive injury are associated with the selective bilateral loss of neurons in the dentate gyrus region of the hippocampus. This study is important because it closely follows a study that appeared in *The Lancet* (October 15, 1994 Volume 344 at 1055 by Blumbergs, Scott, Manavis, Wainwright, Simpson, and McClean. The 1994 *Lancet* study revealed that in the cases of concussion followed by memory loss, even when MRIs are normal, the kinds of neuronal loss described by Smith et al are found at autopsy. Obviously none of this information was known at the time of Mr. Spaziano's trial. Most recently other groups have looked at beginning to tease apart the portions of memory that are specifically effected by trauma. The closed head groups typically perform the stimulus encoding and decision making response selection stages of processing significantly slower than do control groups. Because of the mechanics of brain injury of the type sustained by Mr. Spaziano certain brain injury profiles are common including orbito-frontal anterior and inferior temporal contusions, and diffuse axonal injury. The latter particularly effects the corpus callosum, superior cerebellar, peduncle, basal ganglia, and periventricular white matter. The neuropsychiatric

sequelae follow from the above injury profiles. Cognitive impairment is most frequently diffuse with prominent deficits in rate of information processing, attention, memory, cognitive flexibility, and problem solving. Even in so called minor or mild head injury these symptoms are likely to have an underlying neuropathological, neurochemical, or neuropsychological cause. Higher than expected rates of certain psychopathological disorders occur in the TBI population including psychotic syndromes and depressive syndromes. (McAllister, neuropsychiatric sequelae of head injuries. *Psychiat Clin North Am* 1992 June; 15(2):395-413).

Finally, I refer you to a 1991 article by Tate, Fenelon, Manning and Hunter (Patterns of neuropsychological impairment after severe blunt head injury. *J. Neuropsychol* 1991 Mar; 179(3):117-126). These authors looked at a consecutive series of 100 patients with severe blunt head injuries who were followed up six years after trauma. Neuropsychological test performances were analyzed using something called two principle component analysis. Overall, impairments occurred in 70% of the series. Disorders of learning and memory were the most common type of deficit occurring in 56.5% of the patients with disturbances in basic neuropsychological skills being the least frequent occurring in only 16.5% of the sample. Variability amongst subjects with respect to types and combinations of neuropsychological impairment was a characteristic feature of this clinical group.

Generally then the current literature is extremely clear about the relationship between closed head injury and the persistence of memory disturbances. This literature was not available at the time of Mr. Spaziano's initial trial nor was it available at the time of his rehearing on the sentencing. Having reviewed some documents, I am well aware of the fact that Mr. Spaziano is now mentally retarded with a left hemisphere deficit and there is no question in my mind based upon the material that I have reviewed that the verbal memory deficit is clearly responsible for his inability to provide information as to where he was two years prior to the date on which he was arrested. Moreover, it is my opinion based on the documents which I have reviewed copies of which are attached hereto in addition to the copies of the material that you sent me, that there is a great likelihood that Mr. Spaziano was particularly devastated by his closed head injury because of both his decrement in intellectual capacity and his history of substance abuse. You are referred to a recent Florida Supreme Case called Gregory Steven Bias, a copy of which is enclosed in which the Court finally addressed the issue as to specific intent in cases where folks have both closed head injuries and substance abuse problems. Also not known at the time of Mr. Spaziano's initial trial or at the time of his resentencing, was the fact that alcohol and other substances have a disproportionate effect on individuals who have underlying brain trauma.

I am sending you this material via Federal Express and we are faxing a copy of this letter to you so you have it available immediately. All of the information with respect to the medical literature can be considered to be with absolute medical certainty and it should be of no surprise whatever that your client was unable to provide information at the time of his arrest.

If I can provide you with any further information, please do not hesitate to call me.

Very truly yours,

Antoinette R. Appel, Ph.D., ABPN

You are probably wondering: "What's Spaziano's alibi? Where was he, if he wasn't killing Laura Lynn Harberts?" It's a fair question, and Mr. Spaziano wishes, more than you'll ever know, that he knew the answer — and so do we. But the truth is that he *doesn't* know where he was on the day Laura Harberts was murdered. He just doesn't know, and neither do we.

Recall that police suspicion did not focus on Mr. Spaziano until two years after Ms. Harberts was killed. Now, quick: Can you say where you were, and with whom, two years ago today — on June 4, 1993? We don't know where we were on that date — so early in the Clinton presidency; before Oklahoma City — but we're lawyers and we keep records, so we could find out.

Joe Spaziano didn't keep records in 1973, so he didn't know where he was or what he was doing when, in 1975, he was first questioned by the police about his whereabouts in 1973. Mr. Spaziano is not a good historian. Part of the reason for this is that in 1973, he was living the nomadic and chaotic life of an Outlaw. Mr. Spaziano wasn't taking notes in 1972, because at the time he had no forewarning that two years later, when he was arrested

in 1975, that his very life would depend on his ability to remember and document his whereabouts on one day of one week of one month in 1973.

There is another reason Mr. Spaziano is not a good personal historian. It's the same reason his Outlaw moniker was "Crazy Joe," and it's a subject about which Mr. Spaziano is, to this day, embarrassed. He would rather be executed for a crime he didn't commit than let me tell the world why his nickname was "Crazy Joe" long *before* he joined the Outlaws. You see, Mr. Spaziano *is* crazy. That's the truth. It's a truth that shames and humiliates himself in his own eyes.

Before we get into why Joe is "Crazy Joe," we want to make one thing clear. We are *not* arguing that Mr. Spaziano's craziness mitigates his culpability for his murder of Mr. Harberts. He didn't kill Ms. Harberts, period. Rather, we are going through this mental health material for only one limited reason: because it suggests that Mr. Spaziano is telling the truth when he says that he can't *remember* where he was on the day Laura Harberts was murdered.

The postconviction record shows the following about Mr. Spaziano's brain damage and other mitigating evidence. First, the actual diagnosis by Dr. Krop (never presented to the jury or the judge) was as follows:

[Mr. Spaziano suffers from] Organic Personality Disorder (DSM III 310.10) with congenital and head trauma etiological factors. As a result of Mr. Spaziano's head trauma, he exhibits impaired judgment and almost primitive emotional and cognitive control, particularly under stressful conditions.

See Appendix G, PC-R1-App. O-6. Dr. Vallely, another examining physician in conjunction with the state postconviction litigation, had the same clinical impression:

It is my clinical judgment that Mr. Spaziano is more accurately diagnosed as having Organic Personality Disorder (DSM III 310.10) with congenital and head trauma etiological factors.

See Appendix G, PC-R1-App. N-5.

Interestingly, the above diagnosis of organic brain damage by Doctors Krop and Vallely confirmed the earlier diagnosis by *Department of Correction (DOC) doctors*. On July 27, 1976, DOC's doctors prepared a psychological screening report, which states that Mr. Spaziano

was hospitalized after being hit by a car which resulted in the brain damage. [Mr. Spaziano] also reported a prior mental hospitalization. The brain damage is rather extensive, with complete post-traumatic amnesia symptoms.⁴⁸

See Appendix G, PC-R1-App. Q.-1. Similarly, a DOC evaluation performed on May 27, 1976, made the following diagnosis: "Organic brain syndrome is due to trauma." See Appendix G PC-R1-App. R-2. This diagnosis was made in 1976, long before the resentencing. It was therefore easily available to Mr. Spaziano's resentencing attorney.

All the doctors whose findings are summarized above based their conclusions upon Mr. Spaziano's medical history, the significant shift in Mr. Spaziano's personality following his severe head injury at age twenty, current mental status examinations, and a full battery of neuropsychological testing. All of the examining doctors concurred that each of these areas demonstrated that Mr. Spaziano suffered from severe organic mental disorder.

⁴⁸The report also indicates that Mr. Spaziano had serious problems with alcohol, another factor to which the Florida courts have repeatedly accorded significance as a non-statutory mitigating factor. See *Pentecost v. State*, 545 So. 2d 861, 863 (Fla. 1989); *Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988).

Specifically, Mr. Spaziano's medical history showed that on May 29, 1966, he suffered a severe head injury as a result of being run over by an automobile. He was admitted to Rochester, New York, General Hospital on May 29, 1966, with a "fracture of the skull in the right parietal area, contusion of the brain with accompanying coma, contusion of the urinary bladder (a fracture of the right ulna), a right peripheral facial paralysis, a 4" laceration of the scalp, and a 1" laceration of the right wrist." See Appendix G, PC-R1-App. T-1. Mr. Spaziano "remained in a coma for two to three weeks but slowly improved in all modalities and was discharged on 6-20-66 with only residual difficulty with paralysis over the right side of his face." *Id.*⁴⁹

Within two weeks of his discharge, on July 2, 1966, Mr. Spaziano "began to have odd feelings as if he were dreaming. Since then they have recurred every day. In some of them he feels as if he were going to die and wants to have his mother close to him. He has also felt as if his father didn't like him, for the past few days." See Appendix G, PC-R1-App. V-1. Because of the above reaction, Mr. Spaziano returned to Rochester General Hospital, where examination by a neurosurgeon, Dr. Leonard Zinker, revealed that Mr. Spaziano "was very unsure of himself and constantly looked to his mother to help him answer simple questions." *Id.* In addition to complaining of dream-like states, Mr. Spaziano demonstrated memory impairment: "He did recall being at a bar shortly before his injury [but] claimed he had no recall of ever having been in the hospital or having left the hospital. Apparent recall started about 1 wk. ago." *Id.* In light of these symptoms, as well as the

⁴⁹Upon discharge, however, Mr. Spaziano "was still somewhat confused and only semi-oriented. In general he appeared rather indifferent to his mental difficulties." See PC-R1-App. U-2.

history of his head injury and the continuing facial paralysis caused by that injury, Dr. Zinker concluded as follows: "DIAGNOSIS: Pt apparently developing post-traumatic temporal lobe seizures. Also to consider an intracranial hematoma in the right middle cranial fossa as a result of a serious head injury associated with a right facial paralysis and loss of hearing on the right." *Id.*

The significance of this injury in relation to the recent evaluations of Mr. Spaziano by Dr. Krop and Dr. Valley cannot be overstated. "Closed head injuries," such as the injury suffered by Mr. Spaziano, "are the most common cause of organic personality syndromes in peacetime," H. Kaplan & B. Sadock, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 877 (4th Ed. 1985). Further, the temporal lobe seizures, classically manifested as dream-like states which Mr. Spaziano began to experience after his head injury, augment the original damage, to the development of an organic personality syndrome. D. BLUMER, *PSYCHIATRIC ASPECTS OF EPILEPSY* 197-227 (1984); R. STRUB & F. BLACK, *ORGANIC BRAIN SYNDROMES: AN INTRODUCTION TO NEUROBEHAVIORAL DISORDERS* 342-43 & n.96 (1981).

Mr. Spaziano's history also revealed to Dr. Krop and Dr. Valley another hallmark of the organic personality syndrome: significant changes in Mr. Spaziano's personality in the months following the accident. On December 30, 1967, nearly two years after the automobile accident, Mr. Spaziano voluntarily admitted himself to the Rochester State Hospital. The admission note observed:

This 22-year old white single male was admitted to this hospital today on a Voluntary Application. He was accompanied by his mother and father, who stated that *since he was run over by a car two years ago and suffered extensive head injuries and brain concussion, he underwent personality changes characterized by quarrelsome temper and frequent fights with other siblings.*

See Appendix G, PC-R1-App. S-1 (emphasis added). A subsequent mental examination dated January 5, 1968, described his stream of mental activity as "incoherent," "flighty," and "blocked," and his emotional mood and affect as "depressed" and "flattened." *Id.* The evaluation mentioned that the accident had caused a "personality change."

These shifts in personality, which are frequently experienced by persons suffering from temporal lobe seizures, BLUMER, *supra*, at 201-02, are the benchmark symptoms of organic personality syndrome in people like Mr. Spaziano, "who have no history of psychiatric or behavioral dysfunction" prior to a serious head injury. KAPLAN & SADOCK, *supra*, at 877.

Dr. Krop's and Dr. Vallely's diagnosis of Organic Personality Disorder is also supported by their mental status examination of Mr. Spaziano. Dr. Krop observed the following on mental status examination:

Speech was clear and well-modulated with no articulation deficits noted. Some *pressuring of speech* was observed as it appears that Mr. Spaziano had difficulty monitoring the flow and content of his verbalizations. He was found to be alert and well-oriented to person, place and time. From the onset of the interview, Mr. Spaziano exhibited *marked suspiciousness* regarding the evaluation, despite being introduced to this examiner by one of his attorneys. Although the inmate attempted to relate in a friendly manner, marked suspiciousness pervaded the interview. *Anger and resentment* were evinced and overtly expressed following the examiner's refusal to permit the inmate to smoke in the office. His *affect was labile*, as he openly cried when discussing certain emotionally laden events such as his daughter's current drug treatment. *Anxiety* was exhibited throughout the evaluation, but increased when we discussed the aspect of administering some psychological tests. During that portion of the interview, Mr. Spaziano became markedly upset and his *thinking was increasingly looser and paranoid in content*. He exhibited a number of gestures and mannerisms consistent with his paranoia as he consistently looked around the room and even inspected the air conditioning vent. He became visibly upset at times and had difficulty concentrating and remaining on task. The inmate had *considerable difficulty presenting an organized chronological history*, particularly as related to events prior to his automobile accident. He

had difficulty recalling the exact number of siblings and even had a problem providing his age ("I'm either 39 or 40.").

Formal mental status examination found that his sensorium was generally intact as he knew the current president but could not provide his predecessor. His *thinking was concrete and rambling*, although generally logical and coherent. He exhibited *loose associations* and *overelaborated most of his responses*. He was able to recall only four digits in the forward direction and only three in the reverse order. He recalled two of three objects after five minutes, but had some difficulty recalling the events of the past 24 hours. Mr. Spaziano's *insight was minimal and his social judgment was very poor*.

Appendix G, PC-R1-App. O-4-5 (emphasis added). The picture of mental status observed by Dr. Vallely (eight days prior to Dr. Krop) was quite similar:

Mr. Spaziano was alert, attentive, and oriented in the three spheres of concern. Speech was articulate and fluent but *mild word retrieval problems* were noted during spontaneous conversation. The client was able to express thoughts in a logical, relevant, and coherent fashion. *Affect was labile* as he became upset easily, particularly when he perceived that he was being "tricked." At these times he became quite agitated and began to make *verbal statements of suspiciousness*. He acted this way during tasks that were fairly simple and not particularly threatening. He expressed verbal hostility but did not act in aggressive manner nor did he quit complying with the tasks.

Mr. Spaziano related in manner indicative of borderline intellectual abilities. Long term memory was generally adequate for personal and historical fact but *short term memory was impaired* upon informal inspection. He recalled 1 of 3 objects in five minutes. Verbal auditory attention was within the impaired range as he recalled only 4 digits forward and 3 digits backward. *Verbal insight was minimal but social judgment was very poor*. Reality contact appeared to be within normal limits relative to intellectual abilities. No indication of psychotic processes was noted either in the client's behavior or expression of ideas. He denies ever experiencing hallucinations, delusions, or paranoid ideation. *Suspiciousness and mild paranoia* were noted during portions of the evaluation. Mr. Spaziano also exhibited *odd behavior in that he would spontaneously stop talking and stare off for a while during conversation*. This behavior is suggestive of possible petite mal seizure activity.

Appendix G, PC-R1-App. N-2-3 (emphasis added).

The italicized language used by Dr. Krop and Dr. Valley to describe Mr. Spaziano's mental status is particularly important, because the characteristics which they describe are highly correlated with organic brain dysfunction. KAPLAN & SADOCK, *supra*, at 835. These characteristics may be categorized as a loss in "cognitive" functions or a loss in "emotional" functions. Dr. Krop and Dr. Valley observed cognitive loss in Mr. Spaziano: (1) impairment of memory; (2) impaired intellectual functioning, including "pressuring of speech," "word retrieval problems," concrete, rambling, loose thought processes and overelaboration; and (3) impaired judgment -- all of which are clear signs of cognitive loss associated generally with organic damage, *id.*, particularly when a component of that damage is temporal lobe seizure disorder. BLUMER, *supra*, at 204-16.

The emotional dysfunction suffered by brain-damaged individuals includes anger, irritability, aggression, and deepened emotions (*e.g.*, emotional lability, mood states, and fear-related experiences such as anxiety and paranoia). *Id.* at 201-12. Dr. Krop and Dr. Valley saw powerful evidence of this in Mr. Spaziano's mental status examination. These characteristics -- which were observed in separate mental status examinations by Dr. Krop and Dr. Valley, and which were observed and recorded as early as January 5, 1968⁵⁰ -- provide powerful corroboration for the diagnosis of Organic Personality Disorder.

Finally, the diagnosis of Dr. Krop and Dr. Valley is further supported by the neuropsychological testing conducted by Dr. Valley. Among all the available diagnostic tools for detecting organic brain damage, the specialized psychological tests developed to

⁵⁰See Appendix G, PC-R1-App. S-2 (noting that Mr. Spaziano's stream of cognitive mental activity was "incoherent," "flighty," and "blocked," and his emotional status was "depressed" and "flattened").

detect such damage -- "neuropsychological" tests -- have proven to be the most reliable diagnostic instruments available to the mental health sciences. See Filskov & Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. CONSULTING AND CLINICAL PSYCH. 382 (1974); Schreiber, et al, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. NERVOUS & MENTAL DISEASE 360 (1976). Utilizing these instruments, Dr. Vallely found:

a number of strong indications of unquestionable impaired brain functioning. His verbal intellectual skills are within the mentally deficient range while spatial intelligence is within the average range. Verbal memory is impaired but spatial memory is adequate. Tests of tactile sensation and motor functioning indicate left hemisphere impairments. Frontal lobe functioning is impaired bilaterally but the left hemisphere is more impaired than the right. These results indicate diffuse moderate to severe impairment of left hemisphere functioning. As the client does not present with a history of neurological impairment subsequent to his arrest and incarceration for the rape charge, it is clear that the impairment pre-dates that time period. The results also clearly suggest that these deficits are chronic, long standing difficulties probably related to congenital defects and deficits acquired from his auto accident. There is also indication of possible petite mal seizures as the client appears to "blank-out" or lose his focus of consciousness periodically.

Appendix G, PC-R1-App. N-4.

On the basis of Mr. Spaziano's medical history, his marked shift in personality following his severe head injury in 1966, his mental status examination, and neurophysical testing, Dr. Krop's and Dr. Vallely's diagnosis of Organic Personality Disorder, supported by the diagnosis of the DOC doctors, is manifestly correct.

Lay evidence concerning Mr. Spaziano's life history, along with expert opinion concerning his organic deficits, would have had, if presented, verified, and given human content to, the lifelong impact of the damage to Mr. Spaziano's brain. Specifically, they

would have presented a picture that normal life for Joseph Spaziano ended in the early morning hours of May 29, 1966, when he was struck by a car. Taken to the hospital in a comatose condition, close to death, he remained unconscious for several days, suffering from the severe head injuries already noted: skull fractures in two places, lacerations of right facial nerves, cerebral contusions. He was discharged three weeks later as improved (not recovered), confused, semi-oriented. The right side of his face was completely paralyzed.

Life for this previously good-looking and easy-going young man would never again be the same. Upon discharge from the hospital, Joe Spaziano went to his parents' home to recover. He could not walk. He could not remember the names or identities of friends and family. He could not care for his own physical needs. He could remember neither recent nor remote events from this past. Because of the paralysis on the right side of his face, which remains to this day, he would never again be able to eat or drink normally.

This twenty-year-old young man, whose primary assets until the accident had been his good looks and easy-going, friendly personality, regressed to the state of a disfigured, helpless child. Adding to the emotional trauma, the young woman to whom Joe had been engaged left him, apparently unable to withstand the uncertainties and tribulations of a long recovery process. Physically, psychologically, and emotionally, Joe Spaziano was devastated.

Family, friends, and acquaintances of Joe Spaziano are unanimous in their statements that after the accident, Joe Spaziano was never the same. The once easy-going young man became quarrelsome, hot-tempered, and difficult to live with. Once confident of his good looks, his self-image became very poor. He would often stare into space or forget what he was talking about in the middle of a conversation. Conversation with him became a test of

patience and endurance because of his disorganization and forgetfulness; it remains so today. He developed an extreme need to be surrounded by friends and approval, often compensating for his facial disfigurement by making funny faces and exaggerated body movements in order to make people laugh. It was at this time that friends began calling him "*Crazy Joe*."

His family's own words, as provided in affidavits in the appendices, speak most poignantly about the changes which overcame Joseph Spaziano. Joe's mother, Rose Spaziano, reports the following in her affidavit:

When Joe had the car accident, we thought he would die. He was in bed for months at home after they let him go from the hospital. After the accident, he just never was the same. He was always a good boy and a hard worker. But after the accident, he just seemed to be picking fights all the time and [could] not remember things and get angry and depressed very easily. I took him to doctors and we took him even to a mental hospital to get help.

* * *

After the accident Joe was always conscious of how he looked and would often ask his father or me if we thought he was ugly. Joe was engaged before the accident, but his girlfriend dropped him when he got hurt. Joe had a lot of headaches after the accident and blurred vision. He wasn't confident of himself anymore. His friends started calling him 'Crazy Joe' because he would act so 'spacey.'

Affidavit of Rose Spaziano, at 2.

Barbara Spaziano Walker, Joe's sister, is certain that the accident left permanent injury. In an affidavit, she reports the following:

After Joe's car accident, we were told that he was not expected to live and that he might never walk again. After the accident, Joe was very hard to live with. He was always very good looking before the accident and was very easy going. But it was never the same after he came home from the hospital. He would always ask me whether I thought he was ugly because the right side of his face was paralyzed. His head was shaved because of his head injuries. He always had beautiful dark curly hair and he really looked terrible after the accident.

* * *

After the accident, Joe couldn't recognize his good friends or even his aunts and uncles and cousins. It was very hard to talk to him. He wouldn't remember anything from our past at all. He seemed not to know anything. We would tell him things that had happened and show him places like the schools that he had gone to to give him back his history. Bobby stayed with him a lot then. He had to have everything done for him. He couldn't even feed himself for a long time.

Affidavit of Barbara Spaziano Walker, at 3, 4.

Robert (Bobby) Spaziano, Joe's brother, helped Joe recover from the accident. In an affidavit, he reports the following:

The accident that Joe had really changed his life. He seemed to be confused all the time and he always needed to have friends around for support. At the time of the accident, I was the youngest one at home. Tommy was born, but he was still just a baby. I would take Joe for walks. He was paralyzed. His memory was lost. He couldn't remember anything from our past, the things we did as kids. He thought he was very funny looking because of his face. He had to drink on one side of his mouth. He still does.

* * *

After the accident, Joe seemed to pick fights with us for nothing. I would spend a lot of time with him, trying to teach him how to walk again. When you would talk to him, he would just gaze off. He was never like that before the accident, but he is still like that today. He just seems 'spacy' a lot of the time.

After the accident, Joe started hanging out with bikers. He really needed friends and people who accepted him the way he looked and acted.

Affidavit of Robert Spaziano at 2, 3.

Ida Spaziano, the wife of Joe's fraternal uncle relates that the accident was a dramatic turning point for Joe.

Joe was never the same after his accident. Before the accident he was an outgoing and happy person who was always glad to see me and my husband. After the accident he hardly ever spoke to me and would avoid looking at me.

His face had been disfigured by the accident and one eye drooped. It was after the accident that he began hanging around with the wrong people.

* * *

I recall seeing Joe walking on a road sometime after the accident and it appeared that he did not know where he was going. When I stopped to talk to him he did not recognize me. I believe the accident had a severe effect on Joe's personality.

Appendix H.

Mary Spaziano, Joe's fraternal aunt, believes that Joe's accident "finished him off."

Prior to his accident, Joe was a very outgoing individual who was always polite around his elders. After the accident, Joe seemed withdrawn. I believe the accident had a great deal to do with the change in his personality.

Before the accident Joe was very handsome. He was always conscious of his physical appearance after the accident because of the facial injuries he received. I remember that Joe asked me on many occasions if I thought he looked bad and talked funny.

Joe was always very polite and courteous to women. He was not a violent person and I never knew him to be abusive to women.

I believe that the automobile accident had a severe effect on Joe's personality. He was never the same person after the accident.

Affidavit of Mary Spaziano at 1, 2.

Mary Bellavia is Joe's maternal aunt. She recalls that until the accident, Joe was just like any normal kid. Afterwards, he was nervous and uptight and lost his temper more easily. She notes that the accident changed his personality markedly.

Joe Danna, Joe's maternal uncle, also would have testified that the accident caused a severe change in Joe's personality:

Before the accident Joe was a normal, outgoing kid. He seemed to have friends, was respectful of adults, and didn't seem to get into trouble anymore than other kids his age. Joe always seemed to be in a jovial mood.

Joe suffered injuries to his face, particularly his left eye, from the accident. I think he was conscious of this as his eye seemed to glare at you. I don't think the eye would close for a while. Joe was also more sullen after the accident and did not have the jovial personality he had previously. I sincerely believe that the accident had a great deal to do with the change in Joe's personality.

Affidavit of Joe Danna.

Phyllis Mulee is Joe's fraternal aunt. She too believes that the accident "ruined" Joe:

I have always felt that the accident ruined Joe. Before the accident he was a normal boy who had an outgoing personality and had a lot of friends. He was always affectionate and visited me often at my home. He was a happy-go-lucky boy who always seemed to have a joke to tell.

I was ill myself at the time of Joe's accident. I recall that Joe was unconscious for some time after being struck by the car and it was feared that he might not live.

I remember that Joe visited me only twice after the accident. He seemed to be in some sort of a trance and it seemed like he didn't know if he wanted to talk to me or not. Joe didn't stay long and just didn't act like he did before the accident.

Joe was a very handsome boy before the accident. His face was disfigured in the accident and . . . I think Joe may have felt that people were always staring at him.

Affidavit of Phyllis Mulee.

Ross Bellavia, the husband of Mary Bellavia, echoes the sentiments of the rest of

Joe's family:

I believe that Joe's accident had a definite effect on his personality. Before the accident Joe was a very outgoing person who was able to show affection by hugging or shaking hands. Afterwards, he seemed to shy away and seemed to be more on his guard. Joe was always respectful of adults prior to the accident and was even tempered. He seemed to have a lower boiling point after the accident. Joe just wasn't the same person after the accident. He seemed more nervous and uptight.

Joe was a very handsome boy prior to the accident. He had a problem with his mouth and eye because of the accident and was very conscious of his looks. After the accident Joe just didn't seem to care about anything.

Affidavit of Ross Bellavia.

In addition to the above evidence of the impact of the accident on Mr. Spaziano, Joe's brothers, sisters, and other relatives can verify "evidence of a difficult family history," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), which could also have been introduced in mitigation.

In Robert Spaziano's affidavit, he recalls that:

[Our father] also drank a lot. When he was home, it seemed that he was always screaming and yelling about something or hitting us. We were all afraid of him. He never hit our sister Barbara, but he would never let her out of the house. Even on weekends, she would have to stay home and do housework.

It's hard to explain how we were all affected by this constant yelling and turmoil. Each of us left home as soon [as] we could. Barbara got married very young. I don't think all children react in the same way to a situation. Some of my brothers learned to react in the same way that my father did, while I became extremely passive. Each of us just had to find a way to cope.

Affidavit of Robert Spaziano, at 1, 2.

In Barbara Spaziano Walker's affidavit, she recalls:

The problem was that [our father] did not have much patience with us when he would come home from work. He drank a lot and he seemed to yell at us all of the time. We were all terrified of him. My mother tried to protect us as much as she could, but this was thirty years ago and my parents had an old fashioned, traditional Italian marriage with the husband being the total head of the household. It is very difficult to talk about these things in public because now we are older and our father is very ill and old and he cannot harm us any more. And my mother still lives with him. But it is true that it was really terrible for us as children and each of us left home as soon as we were old enough. I myself got married as a young teenager to escape the tyranny of my father. To say that we left home is accurate, but it is also that our father kicked the boys out of the house and made them be self supporting as soon as

they were teenagers. He never showed us kindness or affection. Although he never physically hit me, he would hit the boys with whatever was available.

I remember one time when the boys were in the yard and my father chased them and hit them into the ground with a two by four. I remember once when my brother Joe tried to hug our father and tell him that he loved him, but my father pushed him away. I remember once when our mother was pregnant with the twins and we were in a boat and our father made the boat jump on the waves while we were all helpless and terrified.

Even after Joe had the accident, our father did not stop. He did help take care of Joe by bathing him and dressing him, but still he would hit Joe.

Joe was always really hyper in school. It seemed that he could never sit still. I think it was because he was so nervous because of our father's constant yelling. I myself used to sit at the dinner table humming to drown out the noise of our father's screaming and yelling constantly. My brother, Tommy, constantly had hives, huge welts all over his body, when our father was around. I remember a time at the dinner table when one of my brother[s] reached for a second piece of chicken and our father stabbed him in the hand with his dinner fork. It was not just a light touch, but he really stabbed him and hurt him. Our father would ration the supply of butter in the house. To this day, because of those incidents, we take pleasure in eating an abundance of chicken and in cooking with butter.

Our father drank all the time it seemed. He drank everywhere, at work and at home. He would even have wine with his eggs for breakfast. As an adult I know now that his alcoholism was a disease, but as a child the yelling and screaming really terrorized all of us.

Affidavit of Barbara Spaziano Walker, at 1-3.

In Ida Spaziano's affidavit she recalls:

Joe's father was very strict with all the children although he worked hard to provide for his family. In my opinion, he provided very little love and understanding for Joe and the other children. He was always yelling at the children or beating them. I don't know another person who could be meaner.

I recall one winter day when my husband and I saw Joe's brother Tommy sitting on a bench crying. It was cold and Tommy did not have a jacket. He told me that his father had slapped him and told him to go out and get a job because Tommy had asked his mother for a cigarette. Shortly after this incident Tommy left home and has been on his own ever since.

Joe's father never had anything good to say about his children. He wanted all the boys to quit school, go to work and never took an interest in their school work. Joe's mother was afraid of her husband and was unable to do anything contrary to the wishes of her husband.

Affidavit of Ida Spaziano.

III. THE BRUTAL RAPE AND MUTILATION OF VANESSA DALE CROFT

In May, 1975, Mr. Spaziano was charged in a three count information with forcible carnal knowledge in violation of § 794.01, Florida Statutes (1973), assault with intent to murder in violation of § 784.06, Florida Statutes (1973), and with aggravated battery in violation of § 784.05, Florida Statutes (1973). The case was tried before a jury in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. On August 13, 1975, Mr. Spaziano was convicted of forcible carnal knowledge and aggravated assault, for which he was sentenced to life imprisonment and to five years, on each charge respectively.⁵¹ The conviction and sentence were affirmed by the Florida Second District Court of Appeal. *Spaziano v. State*, No. 75-1610 (Fla. 4th DCA 1977).

On July 24, 1989, Mr. Spaziano filed his petition for writ of habeas corpus in federal district court. The petition *only* raised the tattoo issue, discussed below. The district court issued a show cause order and the State responded. Mr. Spaziano then filed a reply memoranda attaching additional affidavits and exhibits.

On May 11, 1990, the district court denied relief, holding that Mr. Spaziano's claims were procedurally barred and, alternatively, that he had not established his claims on the

⁵¹Mr. Spaziano's motion for judgment of acquittal was granted as to court II, assault with intent to murder.

merits. On May 23, 1990, the district court issued a supplemental order to correct an error in its final order. The Eleventh Circuit affirmed the district court's order denying relief.

A. Dilisio Redux: Anthony Dilisio — Again

The only way to appreciate the importance of Dilisio's testimony at the rape trial is to read it in full:

MR. SHARPE: State would call Anthony Dilisio.

WHEREUPON:

ANTHONY DILISIO was called as a witness on behalf of the State, and after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SHARPE:

Q. State your full name, please.

A. Anthony Dilisio.

Q. How old are you?

A. Seventeen.

Q. Do you know a person by the name of Joseph Spaziano?

A. Yes, I do.

Q. Do you see him in the courtroom today?

A. Yes, I do.

Q. Point him out to the Court and to the jury, and describe what he is wearing.

A. Black shirt and gray pants.

Q. Is he seated next to Mr. Kirkland?

A. Yes, sir.

MR. SHARPE: Let the record show that he has identified the defendant, Your Honor.

THE COURT: It's done.

BY MR. SHARPE:

Q. How long have you known the defendant?

A. About four years.

Q. About four years. Did you associate with the defendant on any regular basis?

A. Would you repeat that.

Q. Did you associate with him on any regular basis, or have a friendly relationship of some sort?

A. Yes, sir.

Q. What was it about the defendant that you liked or enjoyed, that you maintained this relationship?

MR. KIRKLAND: We would object tot hat. That's irrelevant and immaterial.

THE COURT: Well, as framed, sustained. It is not irrelevant. The question is objectionable.

BY MR. SHARPE:

Q. Did you and Mr. Spaziano get to know each other very well?

A. I could say so, sir.

Q. Are you still in close association with him?

A. No, sir.

Q. Now, back in the early part of 1974, did you have an occasion to talk with Joseph Spaziano?

A. Pardon?

Q. Did you have an occasion to talk to Joe Spaziano back in the early part of 1974?

A. Yes, sir.

Q. Do you recall approximately when it was that you talked to him?

A. A little while before my mother's birthday.

Q. When was your mother's birthday?

A. March 28th.

Q. Sometime prior to March 28 of 1974?

A. Yes, sir. I don't remember exactly.

Q. Do you recall what you talked about?

A. Not all of it, sir.

Q. Do you recall any of it?

A. Yes, sir.

Q. As best as you can remember, why don't you tell the Court and the jury what conversation took place between you and the defendant.

A. I don't know the exact words. It was similar -- the impression I got --

MR. KIRKLAND: We would object to any impression that he has gotten out of a conversation.

THE COURT: He doesn't have to remember the exact words. He can give an assumption.

MR. KIRKLAND: That's another matter -- but not an impression.

THE COURT: Well, these are words that are used in another language. Just give us the substance of what you recall, and to that extent, the objection is sustained.

BY MR. SHARPE:

Q. If you would give us the substance, and not any opinion that you might have, what was the substance of the conversation that you had with the defendant?

A. That he raped a young girl.

Q. How did this subject come up?

A. He was bragging to me.

Q. He was bragging to you about it?

THE COURT: Speak into the microphone, please.

THE WITNESS: He was bragging to me.

BY MR. SHARPE:

Q. Did he tell you anything else about her?

A. Somewhere, like he slashed her eyes.

Q. He told you that he slashed her eyes?

A. Yes, sir.

Q. Did he tell you anything else?

A. That he stabbed her and raped her.

Q. Did he tell you when it took place?

A. No, sir.

Q. Do you know when it took place?

A. No, I don't.

Q. Did anything particularly, or anything unusual, or particular, about that time of the year that this occurred that drew your attention to this incident, or that conversation, to come up?

A. Yes, sir.

Q. What was that?

A. A couple of days later, I don't remember exactly, but my father read, or told me about an article that was in the newspaper that was similar to --

MR. KIRKLAND: We would object to any hearsay about his relating what somebody else told him about some newspaper.

THE COURT: This again is not induced for the truth of what was read in the newspaper, but rather why Mr. Dilisio remembers the conversation. It is not for the truth of what is said, but simply to show it was in fact said. It's admissible for that purpose only.

Once again, the jury is instructed that any hearsay statements of this nature on this particular question is not for the truth of what is said -- only that it was said.

BY MR. SHARPE:

Q. ?What was it that was unusual that drew your attention or caused this conversation to come up?

A. My father told me about it, you know, and I knew who it was that did it.

THE COURT: Wait a second. That's a variation from the last answer. Just ask specific questions and get specific answers. Then I can make rulings.

BY MR. SHARPE:

Q. You related that your father told you something. What was it your father told you?

A. About this article that was in the newspaper, that this girl was found.

Q. And did you question or have a conversation with Joe Spaziano with reference to the article or the subject of the article that your father told you about?

A. Yes, sir. This was after I found out about it.

Q. After you found out about it. What was said between you and the defendant about that article, or about the subject of that article?

A. Well, I don't remember his exact words, but it was like if he knew she was still alive, he would have went back and finished it.

Q. This is what Joe Spaziano told you?

A. Yes, sir.

Q. Now, at that time, this early time in 1974, do you recall the defendant's appearance, what his appearance was, his hair color, eyes, and whether he had a beard and that sort of thing.

A. Yes, sir. He had a beard and a moustache and longer hair.

Q. It's different than it is now?

A. Yes.

Q. Do you know whether or not Mr. Spaziano associated with any motorcycle clubs?

A. Yes.

Q. Okay. Which club was that?

MR. KIRKLAND: We would object. It is completely irrelevant and immaterial.

THE COURT: What is the relevancy of this?

MR. SHARPE: This witness has first-hand knowledge of his association with a club, and the rest of it is going to be tied up both as to the house that the beverage agent will testify to, and I think the jury is entitled to know.

THE COURT: He can be a Son of the American Revolution. It is not relevant.

MR. SHARPE: They can take it for whatever they want.

THE COURT: It is not relevant.

BY MR. SHARPE:

Q. Let me show you at this time, Mr. Dilisio, a photograph marked into evidence as State Exhibit 3.

Do you know what that photograph portrays?

A. Yes, sir.

Q. What does it portray?

MR. KIRKLAND: We would object to that. He cannot possibly testify from that. He can say what it appears to be, and if he was present when the photograph was taken.

THE COURT: He can testify as to what it appears to be. Go ahead.

THE WITNESS: It appears to be Joseph Spaziano.

BY MR. SHARPE:

Q. And, with reference to State Exhibit Number 2, who does that appear to be?

A. Joe Spaziano.

MR. KIRKLAND: We would object to that. That's a decision for the jury to make, and not for the witness to make.

THE COURT: Objection overruled. Have you seen those exhibits?

MR. KIRKLAND: I sure have. Go ahead.

THE COURT: Objection overruled.

MR. KIRKLAND: The Court isn't commenting about giving an opinion about it?

THE COURT: The Court is not commenting at all. This witness can testify as to what he knows. He has testified at some previous point in time Joe Spaziano was identified in the photograph. He said it was only an appearance.

BY MR. SHARPE:

Q. Did he have this type beard back when he made these comments to you?

A. Yes, sir.

Q. You have used drugs in the past, haven't you?

A. Yes.

Q. Did you use drugs in Mr. Spaziano's presence?

A. Yes, sir.

Q. Did you use drugs together?

A. Yes, sir.

MR. KIRKLAND: We would object to that. That's completely irrelevant and immaterial.

THE COURT: Sustained.

BY MR. SHARPE:

Q. You have used drugs?

THE COURT: Let me advise the jury. Mr. Spaziano is not on trial for use of drugs, sale of drugs, or association of drugs. It is totally irrelevant, and disregard it.

BY MR. SHARPE:

Q. You have used drugs yourself, is that right?

A. Yes.

Q. You have smoked marijuana?

A. Yes, sir.

Q. You have used other sorts of drugs?

A. Yes, sir.

Q. Cocaine??

A. Yes, sir.

Q. Have you ever used heroin?

A. No, sir.

Q. Have you ever used PCP?

A. Yes, sir.

A. Do you still use those drugs today?

A. No, sir.

Q. Have you undergone some sort of treatment for the use of drugs?

A. Yes, sir.

Q. What type of treatment?

A. I am right now -- I am president of Volusia Half-Way House.

Q. Is that for the purpose of treating drug dependency?

A. Before I was here, I was at another program called Thee Door. That's a drug rehabilitation center.

Q. Now, the conversations that you have related that you had with the defendant, are those the truth, to the best of your memory and recollections?

A. Yes, sir.

Q. Have I promised you anything in return for giving false information, or for giving that particular version of what you know?

A. No, sir.

Q. You are giving that information because it is in fact the truth?

MR. KIRKLAND: I object to that.

THE COURT: He said it is true, and he is under oath. I'm only curious about one thing. How can you promise this man anything? Is he under any charges?

MR. SHARPE: No, sir.

THE COURT: Well, that's irrelevant. Go ahead.

BY MR. SHARPE:

Q. You are presently then not under any charge pursuant to a prosecution in Orange County?

A. Yes, sir, that's right.

Q. I haven't promised you anything?

A. Right.

MR. SHARPE: That's all the questions I have at this time, Your Honor.

THE COURT: Mr. Kirkland?

CROSS EXAMINATION

BY MR. KIRKLAND:

Q. Would it be fair to say then that you were strung out on drugs pretty heavily back in 1974?

A. I wouldn't say strung out, sir.

Q. Isn't that the word you used yesterday, when I took a statement from you?

A. Not that I recall.

Q. You don't recall what was said yesterday?

A. No, I don't remember if I said I was strung out, sir.

Q. Now would you characterize yourself back in 1974 as far as drugs were concerned?

THE COURT: Mr. Kirkland, would you please step to one side or the other.

THE WITNESS: Pardon?

BY MR. KIRKLAND:

Q. How would you characterize your use of drugs back during this time?

A. was into drugs pretty heavily.

Q. Hallucinogenics?

A. All kinds of drugs.

Q. Hallucinogenics and LSD?

A. No, sir.

Q. None at all?

A. Yes, sir.

Q. Some acid?

A. Yes, sir.

Q. That's hallucinogenic then, isn't it?

A. I don't know the definition of --

Q. It causes you to freak out and to fantasize to some extent, and dream about things -- you know, to take trips and do weird things.

MR. SHARPE: I will object to Mr. Kirkland's characterization of what it is, and ask him whether or not he has used the drug.

MR. KIRKLAND: He has.

THE COURT: He is trying to explain what hallucinogenic is, and the witness can respond to that.

THE WITNESS: I understand, sir.

BY MR. KIRKLAND:

Q. Doesn't it cause you to freak out, in your language?

A. Get high, sir.

Q. Doesn't it cause you to do unusual things, and have hallucinations, and see things that are not there, and hear voices that are not there, and have contacts with spirits and that sort of thing?

A. Not that far, sir.

Q. Up to some one of those?

A. Not near that far a degree.

Q. You do hallucinate, don't you, Mr. Dilisio, when you take acid?

A. Yes, sir.

Q. LSD?

A. Yes, sir.

Q. And you were taking acid back in early 1974?

A. Yes, sir.

Q. And you were taking PCP?

A. Yes,, sir.

Q. And THC?

A. Yes, sir.

Q. And sniffing coke?

A. Yes, sir.

Q. And smoking pot?

A. Yes, sir.

Q. And shooting smack?

A. No, sir.

Q. Never?

A. No, sir.

Q. And Thee Door accepted you as a cocaine addict?

A. No, sir.

Q. As what -- an addict?

A. Possession of marijuana is what I got busted for.

Q. Well, but Thee Door is a treatment for use of drugs, isn't it?

A. It is a rehabilitation center for the use.

Q. And for addicts?

A. It is not an addict. One has been associated with drugs.

Q. All right. And during the period of time that you are talking about, then you were very heavy into drugs, and all kinds, short of heroin, right?

A. Yes, sir.

Q. Ups and downs, greens and reds.

A. Yes, sir.

Q. Okay. Explain to the jury what effect, if any, on your mind acid had back then, when you were using it back in early 1974. What would it do to your mind?

MR. SHARPE: I am going to object to what it would do to his mind, and whether or not it is relevant to the conversation.

THE COURT: Mr. Kirkland, it is only relevant if you can tie it into the conversation or sometime around then.

MR. KIRKLAND: Unless I can prove he was having a hallucination about the conversation.

THE COURT: Once again, the jury is instructed along a similar line. The defendant is not on trial for drugs. This witness is not on trial for drugs. That's, in effect, his recollection, and to that extent, it's permissible. Go ahead.

BY MR. KIRKLAND:

Q. Well, that's all. To what extent did the drugs that you were taking back in early 1974 affect your mind?

A. I was always high. I mean, I can't quite understand what you are saying, or how to answer your question.

Q. Where did this conversation take place?

A. With Joe?

Q. The one you have just referred to that took place sometime within a day or two before March 28 of 1974?

A. In Joe's truck.

Q. Where?

A. I'm not sure. We were driving.

Q. In what county?

A. I'm not sure of that, either.

Q. Okay. What was the date of this conversation?

A. I am not sure, sir.

Q. Approximately.

A. I wouldn't know. I would have to guess.

Q. It could have been before February 1 of 1974, couldn't it?

A. It could have been. I am not sure of the time, sir.

Q. So, it could have been before February 1st of 1974, as far as you recall.

A. It could have been, sir.

Q. When -- strike that. When did you come in contact with law officers? When was the first time you came in contact with law officers and decided to make up whatever this statement is and telling them whatever on what date it was?

A. I don't know the date, sir. I don't know when it was.

Q. Approximately.

A. Between three and four months ago, sir.

Q. Three and four months ago?

A. Yes, sir.

Q. A year and some time after you heard it?

A. Yes, sir.

Q. You didn't take this information to the police and report it?

A. No, sir.

Q. I see. You kept it locked up in you?

A. Yes, sir.

Q. I see. You decided at some point about three months ago to come forward?

A. Yes, sir.

Q. You came forward and volunteered the information. The police didn't dig it out of you by some kind of police activity; right?

A. Would you repeat that, please.

Q. You decided to come forward and volunteer this information.

A. The police got in contact with me, sir.

Q. All right. At your request?

A. Pardon?

Q. At your request. Who requested that they come and get you -- contact you about this event?

A. It was at my request, sir.

Q. At your request?

A. Yes, sir.

Q. Was there any suggestion about where the alleged event took place?

A. Sir, would you repeat that, please.

MR. KIRKLAND: Would you read the question back.

(Whereupon, the pending question was read by the court reporter.)

THE WITNESS: Are you talking about the event --

BY MR. KIRKLAND:

Q. The rape thing that you are talking about.

A. No. There wasn't -- He didn't tell me where it took place, sir.

Q. He didn't tell you when it took place?

A. Not that I can recall.

Q. Without going into the reasons, Dilisio, because I really don't want to embarrass you, but you hate Joe Spaziano at this point, don't you?

A. Pardon?

Q. You didn't hear my question?

A. Repeat it, please.

MR. KIRKLAND: Would you please read the question.

(Whereupon, the pending question was read by the court reporter.)

THE WITNESS: No, sir, I don't hate anybody.

BY MR. KIRKLAND:

Q. Didn't you tell me yesterday that you hated him?

A. I dislike him a great deal.

MR. KIRKLAND: I have no further questions.

THE COURT: Redirect?

MR. SHARPE: Yes, sir.

REDIRECT EXAMINATION

BY MR. SHARPE:

Q. Would your dislike for Mr. Spaziano cause you to fabricate any testimony or any version of what might have been said and cause you to dream up something?

A. No.

Q. What you have testified here to is not something you dreamed up?

A. Right, sir.

Q. Are these conversations that you testified about with Mr. Spaziano, are they hallucinations?

A. No, sir.

Q. Do you know whether or not -- Do you recall whether you were under the influence of any drugs at the time that conversation took place?

A. I think I was, sir.

Q. Are these statements that you related here to the Court today -- the substance of those statements -- are they accurate, to the best of your memory?

A. Yes, sir.

Q. You feel that the drugs that you were using, and used in the past, have cause you in any way to gloss over the facts, or add facts, to what might not have occurred?

MR. KIRKLAND: We would object to that. That's a double question. I think he might gloss over something that didn't occur.

THE COURT: Well, the form of the question is a little awkward. I will sustain that.

BY MR. SHARPE:

Q. Does the fact that you used drugs, has that caused you to create testimony or images in your mind with reference to the testimony you have given about he conversation with Mr. Spaziano?

Q: Did she mention any tattoos or distinguishing marks?

A: No, sir.

Q: Did you ask her about that?

A: Yes, sir I did.

[DEFENSE ATTORNEY] KIRKLAND (to Mr. Spaziano): Would you roll up your sleeve. (Whereupon the defendant rolled up his sleeves.)

BY MR. KIRKLAND (to the witness):

Q: Do you observe what appears to be a completely covered arm with tattoos?

A: Not completely covered. I can see the tattoo.

MR. SHARPE [the prosecutor]: I'm going to object to it, unless, of course, Mr. Kirkland can offer testimony or evidence of at which time Mr. Spaziano had those tattoos put on.

THE COURT: Wait a second. Mr. Spaziano, you sit down. Mr. Sharpe's motion is well taken. Mr. Kirkland, are you putting on any defense at this time or what?

MR. KIRKLAND: I'm having him make an identification.

THE COURT: Just limit it to cross examination and in the proper course of events you can present any evidence you wish to present.

MR. KIRKLAND: Thank you.

BY MR. KIRKLAND:

Q: Now, they did not mention what appeared to be very obvious tattoos, did they?

A: No, sir.

Q: In the description of this person.

A: No, sir.

Q: Did you ask her about any distinguishing marks such as tattoos?

A: Yes.

(T 187-189).

Mr. Anthony Dilisio testified he knew Mr. Spaziano and that on March 28, 1974, Mr. Spaziano bragged to him that he [Spaziano] had raped and stabbed a woman (T 205). This was the same testimony that was used in connection with the unrelated murder case against Mr. Spaziano, where he was convicted and remains on death row. In that case, it was shown that Mr. Dilisio had an intense dislike for Mr. Spaziano and was later given immunity in the murder case in exchange for this testimony.

Dr. Garret J. Crotty, an ophthalmologist, testified as to the extent of Ms. Croft's eye lacerations (T 235) and that her wounds were caused by a sharp instrument (T 237, 241).

Mr. Jack Wallace, of the State Beverage Department, stated that he previously had come into contact with Mr. Spaziano in a bar while looking for another individual of Mr. Spaziano's general description (T 259). He observed a knife on Mr. Spaziano (T 259).

Sergeant H.A. Tillman, Orange County Sheriff's Department, testified that he arrested Mr. Spaziano in Chicago, on a warrant for current charges (T 270-271).

Mr. Robert Barnett, a loan officer at a bank, testified that his bank had an installment loan with Mr. Spaziano on a 1973 pickup truck (T 279).

Mr. Spaziano presented three witnesses on his behalf. Detective Marianne Pearch, of the Orange County Sheriff's Office, testified that she was called to the Florida Hospital where she spoke to Vanessa Croft on four occasions (T 310-311). She related that, in the interviews, Ms. Croft described "Dennis" as short, with reddish-color hair (T 322-335).⁵²

⁵²Mr. Spaziano has dark hair.

A: I probably would not have.

(T 336-338).

Theresa Frederick, a friend of the victim testified that Ms. Croft indicated to her that she consumed marijuana on the night in question (T-342, 348-349). Ms. Croft also told her that one of Ms. Croft's assailants had reddish-blonde hair (T 358). Ms. Frederick also testified that Ms. Croft did not mention any tattoos (T 357).

Dr. Guillermo Ruiz, a medical examiner for Orange County, examined the victim on February 10, 1974 and found lacerations in the area of the eyes (T 370). He also tested for spermatozoa in the genital area, but the tests indicated that the victim had not had intercourse for three weeks (T 374-375). Dr. Ruiz stated that, in his opinion, Ms. Croft did not have intercourse with any person within a period of twenty-four hours prior to his examination (T 376-377).

Anthony Dilisio's testimony in the rape trial was critical, but -- unlike the murder trial -- in the rape case Mr. Dilisio's testimony was not the *only* real evidence the state had.

The problem, as we will now suggest, is that the other "evidence" that Mr. Spaziano committed the rape, is no more reliable than Mr. Dilisio's. We recognize that it is "politically incorrect" these days to argue that a rape might in fact have begun as consensual sex. *E.g.*, Susan Brownmiller, *Against Our Will*, ("*all men are rapists*"). But the facts are that (1) the rape victim failed a police polygraph; (2) her descriptions of her assailants described men with dramatically different physical characteristics than Mr. Spaziano's; and (3) the victim was able to "identify" Mr. Spaziano in a lineup only after a bit of subtle (and

not so subtle) helpful prompting from police who were relentlessly determined to nail the hated "Crazy Joe" Spaziano, Orlando President of the Outlaws.

B. The Rape Victim Flunked a Polygraph

For two decades, the state sandbagged Mr. Spaziano's attempts to ascertain whether the prosecution lawlessly withheld exculpatory evidence. In June 1995, the state informed Mr. Spaziano's attorneys — for the first time — that the victim in the rape case had taken a polygraph. And she had flunked it.

The polygraph results would not have been admissible at the guilt/innocence phase of Mr. Spaziano's bifurcated trial for the homicide of Laura Lynn Harberts. But it *would* have been relevant at sentencing, because the prior rape conviction was the trial judge's principal reason for overriding the sentencing jury's verdict of life imprisonment. And the polygraph is relevant to clemency.

The "confidential" stamped polygraph report said:

Orange County Sheriff's Department

Melvin G. Colman

March 8, 1974

**ORANGE COUNTY SHERIFF'S DEPARTMENT
POLYGRAPH ANALYSIS REPORT**

POLYGRAPH NO. 2420

BACKGROUND INFORMATION:

On March 8, 1974, VANESSA DALE CROFT, W/F, DOB: 9/9/57, was interviewed as the victim in an alleged forcible rape and aggravated assault.

PURPOSE:

The purpose of the examination was to determine the facts as related by DALE concerning her complaint as the victim in an alleged forcible rape and aggravated assault. The location of this incident is unknown, but occurred in a house suspected to be on South Orange Blossom Trail used by the Outlaw motorcycle club.

COMMENT:

DALE voluntarily agreed to the examination. Mrs. Norma Croft signed a juvenile release form as her parent authorizing the polygraph examination.

PRE-TEST INTERVIEW:

On February 9, 1974 at approximately 2200 hours DALE was walking on 30 Street, East toward South Orange Blossom Trail. A white male approximately twenty years of age, came out from behind 1313 38th Street. After several minutes of conversation DALE and this unknown subject got into a camper where they continued talking. Shortly afterwards they were joined by another white male, same age. DALE requested to be allowed to get out of the truck, but this was denied.

At this time the two men drove off with DALE forced into a position on the truck floor. She was allowed to change her position and sit between the two men. They arrived at a house, unknown location, and forced DALE to accompany them inside. The kitchen was said to have had a motorcycle in an advanced stage of being dismantled. A living room sparsely furnished and bedroom were the only rooms seen by the victim.

The two men she describes as only Ronnie and Dennis required her to go into the bedroom. At this point she was allegedly forced into performing sexual acts with both men. These were noted as normal intercourse and fellatio. DALE indicated that at no time did she assist in the performance of these actions.

The conclusion of this interlude DALE was forced into the living room where she was once again abused. This additional form of abuse was as the recipient of anal sodomy. No further sexual acts were forced upon DALE at this time.

The two men took DALE clad only in bra, panties, shirt and shoes and left in the truck. She was told that she was to be returned to the original location on 38th Street. This was believed not to be true due to the fact that one of her abductors had a knife and used this as an instrument of fear.

During this return ride she was once again on the floor of the truck cab. She was once again forced to perform fellatio upon one of the men while the truck was in motion. Throughout the return ride she was on the floor unable to recognize any landmarks.

On their arrival at a wooded area they removed her from the truck and told her to assume the position of a dog. She was threatened with a knife indicating they would insert this weapon into the anus. This dog-like position was for the purpose of anal sodomy, but she was choked into unconsciousness instead with her own belt.

During this unconscious state she received multiple stab wounds about the eyes and neck. Upon regaining consciousness she sought help from passing motorists.

DALE's description of the house where the incident occurred was similar to the clubhouse used by the Outlaw motorcycle club on south Orange Blossom Trail. Only the names Ronnie and Dennis were mentioned connected with the abductors. DALE repeatedly stated that these two men did not talk, with few exceptions, throughout the entire incident.

DALE admitted to having sexual relations with other males on a willing basis. It has been well over a year since her first sexual encounter. Prior to this incident it was indicated that her last affair was in January.

TEST

DALE was examined on the Stoalting Polygraph, Orange County Sheriff's Department, Room 104, Orange County Court House Annex, Orlando, Florida on March 8, 1974. Reported here are the relevant questions asked the examinee during the test to include her answers:

1. Did you willingly go with those two men:

Ans. NO

2. Did anyone use drugs, including marijuana that night?

Ans. NO

3. Have you been to that house before?

Ans. NO

4. Have you seen those men before?

Ans. NO

5. Did you willingly have sexual relations with those men?

Ans. NO

6. Do you know who those men are?

Ans. NO

RESULTS

A careful review of the charts produced as a result of this examination indicated deception.

It is my opinion that DALE left willingly with the two men to a house that she has visited previously. Sexual relations were indicated to be freely given and that she knows the men involved. This knowledge may be either by association or by actual name.

James E. Shannon
Polygraph Examiner

C. The Phantom Tattoos

The state trial court repeatedly and strongly instructed the jury to disregard the non-testimonial fact that Mr. Spaziano had extensive and conspicuous tattoos on his arms. Because the victim of the sexual assault had never identified her attackers as having tattoos, the court committed error of constitutional magnitude. In a case where guilt hinged on eyewitness identification by the victim, the court told the jury to disregard Mr. Spaziano's physical characteristics; it was the functional equivalent of instructing the jury not to consider Mr. Spaziano's height, hair color, clothing, physical build, or eye color. The state trial court ruled that *as a matter of law*, the jury in an eyewitness identification case would not consider

obvious physical characteristics of the person being identified unless that person forgoes his fifth amendment right and testifies.

Many of Mr. Spaziano's numerous tattoos had been in place since 1961, and that all had been in place for many years before the alleged assault. This was supported by both testimony and photographs.

Trial counsel explained in his affidavit that he sought to present no further evidence concerning the tattoos because

my understanding of the Court's statements and ruling was that in order for me to present and argue about Mr. Spaziano's tattoos, it would have been necessary to place Mr. Spaziano on the witness stand and subject him to cross examination. I believe I discussed this matter with Mr. Spaziano and we elected not to place him on the stand in exercise of his Fifth Amendment right to remain silent. I did not understand the judge's rulings to mean that we need only present evidence of when the tatoos were placed upon Mr. Spaziano because such evidence was undoubtedly available.

Thus, no other evidence concerning the tattoos -- such as the photographs or testimony that would have easily demonstrated their existence at the time of the assault -- was sought to be introduced.

During closing argument, the court prevented the defense from alluding to the tattoos:

MR. KIRKLAND: Finally, as to the testimony about he defendant's arms and the tattoos on the defendant's arms. Well, if a man has one; okay. But, when a man's arms are completely covered --

THE COURT: Mr. Kirkland, that is not in evidence, either.

MR. KIRKLAND: The jury saw it, your honor.

THE COURT: They saw it by pure chance. There is no testimony as to when those tattoos were placed on the defendant.

MR. KIRKLAND: I could not erase it, okay. There is no evidence that there were any tattoos, in fact, there is negative evidence from the witnesses,

because Witness Pearch said she asked her about any other marks, or that sort of thing, and she got a negative response. And, whether the defendant in this case has any tatoos on his arms, I guess we're just going to have to leave to speculation.

THE COURT: That's quite correct.

(R 451-52).

The court began its jury charge with a special instruction to ignore the tattoos:

JURY CHARGE

THE COURT: Ladies and Gentlemen of the Jury, I didn't let Mr. Sharpe continue on his rebuttal on the matter of tattoos, because I don't think it's any more proper for him to argue that, than it is form Mr. Kirkland to argue it. And the reason for it is this: I imagine sometimes in the course of a trial the law may seem to be absurd and very nit-picking. But, this is the reason that you are not to consider tattoos. I'm going to make a special instruction on that. There is no evidence as to whether or not they existed or did not exist on the date of February 9, 1974. Mr. Sharpe cannot argue they did not exist, and Mr. Kirkland cannot argue that they did exist. They are not in evidence, and you are not to consider them. Whether they had been put on before that date, or could have been put on subsequent to that day, we do not know, and you cannot give it any value. You don't know that. That's why you're going to be instructed that you are only to consider the law and the evidence that has been admitted, and those matters, which as it says in the instruction, the evidence or lack of evidence, but no speculative evidence.

(T 461-462).

During the jury's deliberations, the jury asked the court for a read back on the testimony of Officer Hoover, which was done. Afterwards, in chambers, the Court expressed deep concern that jurors might be considering the tattoos. The following occurred:

THE COURT: In the course of the court reporter reading back the transcript of the testimony of Sergeant Hoover, the Court observed Juror Number Six, Bonnie Lynch, taking a definite reaction to a certain portion of the testimony. And that portion of the testimony that she reacted to in a positive fashion, as I can best describe it as literally coming out of her seat three or four inches and leaning over to her left, and as I recall, touching the arm of the juror next to her, or making a motion in that direction to the foreman of the jury, Mr.

King. And a nodding of her head and a kind of very positive think in the nature of, "See, I told you so," or something of that nature, was when in the testimony Sergeant Hoover referred to the tattoos on the arms of the defendant. The Jury has been instructed two times, and one time in a positive fashion not to consider tattoos. The Jury was instructed once during Mr. Kirkland's closing argument that tattoos were irrelevant, and not to be discussed. The Jury was instructed deliberately during Mr. Sharpe's closing argument that tattoos were irrelevant and the Jury was told back in the testimony that tattoos were irrelevant. In spite of all of this, the Court feels that this juror apparently is ignoring this Court's instruction. The reaction was so strong, that it left a definite impression that this Court has received. Now, I also understand Mr. Urbaniak observed something, and perhaps you can describe it in your own words that it was you observed without my asking you.

MR. URBANIAK: One woman on the back row turned when the tattoos were mentioned. I didn't really hear anything. It was sort of a gasp. You could see them talking, but it was right at the time the tattoos were mentioned.

THE COURT: Mr. Sharpe, did you see anything?

MR. SHARPE: No, sir, I didn't. Mr. VanValkenburg might have.

MR. URBANIAK: He did.

THE COURT: Well, Mr. VanValkenburg is one of the bailiffs.

MR. SHARPE: I WAS LISTENING, SO I DIDN'T SEE IT.

THE COURT: Mr. Kirkland, is there anything you want to say?

MR. KIRKLAND: During a portion of the reading of the testimony, there was a time and in all due credit to the court reporter, she read the testimony very fast and fluently and very correctly, but there was a rapport between juror number five and six at or about the time the testimony was given relative to the identifying marks that the victim was alleged to have made to the witness, Mr. Hoover. I would also comment that it is my position, and it has been throughout the entire trial, that because the State requires the defendant to come forward in their case and speak through identification, which would give a picture, that the defendant has a right to expose his tattoos on his arm during the presentation of that case. It was proper for the defendant to show his arms during course of the trial to show that he did have tattoos.

THE COURT: The reason the Court ruled in that fashion, is that the defendant's tattoos were not presented in the form of evidence. There was no opportunity for cross examination by the State as pointed out in the record. It is not known how long the tattoos were present on the defendant, and, therefore, he was being denied the opportunity to cross examine and denies the State to a fair trial, as well as the defense. Now, the Jury, therefore, was instructed to disregard it. The problem is, if the Jury is to come back with a verdict of not guilty, I think a grievous error would have existed --

MR. KIRKLAND: You could have declared a mistrial.

THE COURT: There is that possibility, too, but you have to make that motion. I don't think the Court can declare a mistrial without the defense requesting it. The Court just might find double jeopardy attached. The other alternative is to ask the Jury after they return a verdict, or before it's read, whether or not they considered the tattoos, which I think we might be waiting for eleven hours. Or, there is the possibility of going back into Court right now, summoning the jury and saying the Court has reason to believe and you should be reminded of --

THE BAILIFF: They have a verdict, Your Honor.

THE COURT: Well, hold on for a second. They should also consider this instruction one more time.

MR. KIRKLAND: They have arrived at a verdict.

THE COURT: I am not interested in which way the verdict is.

MR. KIRKLAND: Supposing one of them says, "Well, we saw the tattoos, just like his eyes, his haircut, his shoes and all of that stuff." Would you set aside the verdict of guilt if that's the way it was, and they considered the tattoos, or lack of it?

THE COURT: I don't want to know what the verdict is.

MR. KIRKLAND: You're going to have to know. They have got a verdict, Judge, and they are entitled to that verdict.

THE COURT: As long as I don't know what the verdict is, and as long as it is not published, it's still in the Juryroom. I am going to instruct them on that and ask them to then go into the Juryroom and bring in their verdict, or whatever.

MR. KIRKLAND: Are you going to interrogate each juror?

THE COURT: I will not interrogate, but simply remind them of the instruction.

MR. SHARPE: Does the Court intend to single out anybody about it and remind them of the instruction?

THE COURT: I don't want to embarrass any juror, but simply say that during the reading of the testimony the court got the district feeling it was necessary to reinstruct on this point.

MR. SHARPE: That's fair.

THE COURT: And ask them to go back and consider this.

MR. KIRKLAND: I strenuously object.

[Whereupon, Court, Counsel and court reporter left Chambers, after which, at 11:51 o'clock p.m., the Jury entered the Courtroom and the following proceedings were had before the Court and Jury.]

THE COURT: Ladies and Gentlemen of the Jury, I understand that through the bailiff, that you have indicated you have a verdict in the Juryroom, along with all other blank verdict forms, because I felt that it was necessary that one instruction be given to you prior to the Court having received your verdict.

During the reading of the testimony of Deputy Hoover, the Court arrived at the feeling that it was necessary to reinstruct on one matter in which you were instructed orally, but not in writing. You have all the instructions back in the Juryroom in writing, with one exception, and this last instruction arose out of the circumstances of the trial at the last minute, and therefore it was given to you orally. I feel it is imperative that you are reinstructed on this in writing, and it will be handed to you to go back to the Juryroom with you. You may consider further if you wish, or you may come back immediately with a verdict, which you say you have already arrived at, but that's up to you.

The reason I delayed doing this is I was deliberating the matter and thinking about it, and writing the instruction. The instruction is very simply this. The subject of whether or not the defendant had any tattoos on his arms at the time of the alleged offense, should be not discussed or considered or weighed in any way your deliberations on your verdict.

MR. KIRKLAND: We would object to that, unless he can differentiate between hallucinations and actual occurrences.

THE COURT: Sustained.

BY MR. SHARPE:

Q. To the best of your knowledge, in these conversations that you had with Mr. Spaziano, do you know whether or not they were an hallucination, or, in truth, the facts?

A. They were, in truth, the facts, sir.

Q. And these conversations, I believe you said, took place approximately around the time of your mother's birthday, March of last year?

A. Yes, sir.

MR. SHARPE: That's all I have, Your Honor.

REXCROSS EXAMINATION

BY MR. KIRKLAND

Q. Mr. Dilisio, how do you distinguish between hallucination and an event that has actually taken place? Don't you live the hallucination at the time --

THE COURT: You are asking two questions.

BY MR. KIRKLAND:

Q. Answer the last one.

A. Would you repeat it, please, and come down to my level, please. I'm not quite understanding what you are saying.

Q. At your level of a drug user, you know what hallucinations are, don't you, sir?

A. Yes, I know what you mean.

Q. How do you distinguish here today the difference between hallucinations that you were experiencing while you were tripping out on drugs and the facts?

A. I really don't understand your question.

Q. Well, you have had hallucinations, haven't you, sir?

A. Yes, sir.

Q. And you have these things and go on trips either by standing still or lying down.

A. I understand what you mean, sir.

Q. While you are on a trip.

A. Yes, sir.

Q. That is just street talk for going somewhere while you are lying still, right?

A. No, it's not going on a trip. You just see different things.

Q. And you hear different things.

A. Yes, sir.

Q. And when you are under the influence of drugs and you are hallucinating, does it seem to you to be real, that it's a fact that you are experiencing, as opposed to hallucinations? Isn't it a real experience when you hallucinate, Mr. Dilisio?

A. I'm not quite sure what you mean by experience.

Q. Well, you say you go places, yet you stay still. Isn't this a real experience to you?

A. No, sir.

Q. Huh?

A. No, sir.

Q. Doesn't it appear to be real to you?

A. No, sir.

Q. It does not?

A. I'm not real sure.

Q. Well, you are not having a true hallucination then, are you?

A. A hallucination isn't real, sir.

Q. No, sir. What I am saying is, under hypnotic or narcotic hallucinogenic effect of certain acid, chemicals and what have you, you have hallucinations, right?

A. Yes, sir.

Q. And fantasies, right?

A. Yes, sir.

Q. Things that appear that are not actual?

A. No sir.

Q. Events that take place that really don't, but you participate in them?

A. Right. It's more like cartoonland, sir.

Q. That's right. And you visit these places, don't you -- these cartoonlands, or Disney World, or whatever in your mind?

A. Yes, sir.

Q. And the experience, although not actual in fact, is real to you in your mind at the time.

A. Yes, sir, at the time.

Q. So you are actually unable to distinguish, are you not, Mr. Dilisio, between hallucinations and real facts, right?

A. Would you repeat that, please.

Q. At the time you were hallucinating, does it appear to be real -- a real experience that you really think that you are really experiencing?

A. At the time, sir, yes.

Q. And when you come out of the high, or you come down, or you come back from your trip, do you remember the things that occurred while you were gone in your mind? Do you have a total recall of what occurred while you were on this hallucination, or hallucinogenic trip?

A. No, sir.

Q. But you do have flashbacks, don't you?

A. I have never had a flashback, sir.

Q. You haven't had anything that has occurred to you that is now a deja vue, which is, you haven't had an experience where you feel something and you remember it here that occurred back a year and a half ago that you completely had forgotten?

A. Would you please rephrase that.

Q. All right. Now, the things that happen to you, as well as the things that happen to you while you are on trips --

A. Yes, sir.

Q. Do you talk to people -- imaginary people, while you are on trips?

A. No, sir.

Q. You don't?

A. I have never.

Q. Well, how do you know you don't -- You say you don't have recall when you come out of it.

A. Not that I can recall.

Q. You don't recall any?

A. No, sir.

Q. You are not suggesting that you have not had conversations with non-existent persons while you were on a trip?

A. True.

MR. KIRKLAND: I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. SHARPE:1

Q. Mr. Kirkland asked you about hallucinations being somewhat like a cartoon or a setting such as that. Did the conversation that you related as having had with the defendant, Joseph Spaziano, occur, to the best of your recollection, in a cartoon or fantasy setup?

A. No, it was real.

Q. Do you have an opinion, as a drug user, or as a former drug user, as to whether or not you can differentiate whether the conversation you had with Joseph Spaziano took place during a hallucination or whether it took place during a moment of your l--

MR. KIRKLAND: We would object to the form of the question, as an expert as opposed to a layman. I think the way it comes out it's almost calling for expert testimony.

THE COURT: Well, it is.

MR. KIRKLAND: I opened it up.

THE COURT: Objection will be sustained. The witness, obviously, is the best person around to answer that question. It has to be rephrased.

BY MR. SHARPE:

Q. You have heard Mr. Kirkland's questions about the use of drugs.

A. Yes, sir.

Q. And in fact you have had experiences in the past, is that right?

A. Yes, sir.

Q. Did any of your experiences in the past ever involve a conversation with a friend, or with a person that you know?

A. Would you repeat that.

Q. Did you, in any of your drug experiences -- did you ever have a conversation with a person that you knew?

A. Yes, sir.

Q. With whom?

A. While I was on drugs, is that what you are referring to?

Q. What I am saying is, while you were under the influence of drugs, and under some drug induced, did you ever have a conversation with a person that was a factual person, that you remember?

A. Not right offhand, sir.

Q. You are saying then that the conversation that you had with Joe Spaziano did not take place during one of these drug induced highs?

A. No sir.

MR. KIRKLAND: That's leading.

THE COURT: Sustained.

MR. SHARPE: That's all the questions I have.

RE CROSS EXAMINATION

BY MR. KIRKLAND:

Q. Mr. Dilisio, the article that you read concerning this event, did it talk about rape?

MR. SHARPE: That is not within the scope of redirect.

THE COURT: Sustained.

BY MR. KIRKLAND:

Q. Were you hallucinating during the time that this conversation took place about he newspaper articles?

A. No, sir.

Q. Did that have the details about he stabbing or eye-cutting or something?

A. I didn't read it, sir.

Q. Your father told you about it?

A. Yes, sir.

Q. Did that have details about slashing and cutting in the article?

A. I don't know.

Q. You read it, didn't you?

A. No, sir.

Q. Your father related to you that the article related about stabbing and slashing and raping?

A. I don't think it was his exact words.

Q. Something like that?

A. Yes, sir.

MR. KIRKLAND: I have no further questions.

MR. SHARPE: No further questions, Your Honor.

MR. KIRKLAND: He may be excused.

MR. SHARPE: He may be excused by the State.

THE COURT: Thank you. You are excused, sir.

(Whereupon, witness was excused.)

The State presented seven other witnesses at trial. Vanessa Dale Croft testified that she was the victim of a sexual battery and assault. She testified that on February 9, 1974, at ten o'clock in the evening, she was approached by a man who asked her if she would like to smoke marijuana with him (T 35-38). She replied in the affirmative, and they walked to his vehicle, a truck. Another male got in the truck beside her. She ascertained their names to be Dennis and Ronnie (T 41). Though she initially entered the truck voluntarily, she said that the two men forced her to remain. The men drove to a wooded area and entered a small house (T 46), where Ms. Croft says that both men attacked her. (T 47-55).

The three subsequently left the house and proceeded in the truck, where she said that Ronnie committed another sexual battery upon her. Dennis then choked her with a belt until she lost consciousness (T 55-57). When she awoke, she could not open her eyes because they were bloody (T 58-59). She was taken to a hospital where she underwent emergency eye surgery. The assault left her without peripheral vision of the left eye (T 60-61).

A lineup was conducted later, at which time Ms. Croft could not identify her assailants (T 64). She subsequently changed her mind and stated that she did recognize one man. She identified Mr. Spaziano as the man she know as Dennis (T 62-77).

On cross-examination, Ms. Croft indicated she had purposely lied in the first interview after the incident in part because she was confused and upset (T 87-89). She could not identify Mr. Spaziano at the lineup, as she was not sure of the identification. (T 111-112). But after discussing the lineup with an Officer Hardy, Ms. Croft did identify Mr. Spaziano. She indicated, in a previous deposition, that Officer Hardy told her the names of the individual in the lineup, specifically the name of Mr. Spaziano (T 114-115).

Ms. Croft also testified that the attacker she later identified as Mr. Spaziano, *i.e.*, "Dennis," was wearing "no shirt -- and a jean jacket, and it had no sleeves." (T 38).

Mrs. Ann Hawkins testified that on the night of February 19, 1974, a pickup truck pulled into the yard of her house and, while turning around, a door opened and shut (T 168). She subsequently found a young woman lying near her yard, partially dressed and bleeding about the face (T 164-165). On cross-examination, Mrs. Hawkins indicated she saw two males in the truck, wearing beards (T 1973).

Officer James M. Hoover of the Mineola Police Department was called to investigate. He was the first law enforcement officer to meet with Ms. Croft, who stated she had just been raped by two white males (T 178). Ms. Croft described the men to him (T 186-187):

Q: What was the description?

A: Okay. There were two suspects. Suspect number one used the name Ronnie. It was a white male approximately twenty-four years of age, address unknown, height was five foot seven approximately one hundred sixty pounds. He had straight, black hair, with a moustache. His eyes, unknown. Birthdate, unknown.

Q: What about suspect number two?

A: Suspect number two was using the name Dennis. He was a white male, approximately twenty-four, address unknown, height five foot five, weighed a hundred thirty pounds, long, dark beard, eyes unknown, birthdate unknown. He had a Levi jacket and a sleeveless Levi jacket with a T-shirt.

(T 186-187). On cross examination, the following exchange occurred:

Q: You say that she said that he was sleeveless?

A: Yes, sir.

Q: Dennis?

A: Dennis was sleeveless, with a Levi jacket.

Q: Did you ask her, or do your notes reflect -- strike that. Did you ask her for any other identifying marks, such as tattoos, moles, scars, or other things like that?

A: We would have asked her for that. I don't recall.

Q: Do your notes reflect that she indicated that Dennis had tattoos over the entire surface of his left and right arms?

A: No, I have no indication of tattoos in my notes.

(T 322-323).

The prosecutor pursued the tattoo question on cross examination:

Q: Now, with reference to the mentioning of tattoos, do you recall her saying specifically there was no tattoos?

A: Our questioning at that point would have been, and I am not saying it was -

Q: You are not saying it was, but --

A: It would have been, as we follow a procedure for investigation, it would have been questions regarding any other identifying marks.

Q: Do you recall her answer?

A: I have no indication in my notes. Therefore, it would seem to me from that, that there was no further details as to any identifying marks on the subject.

Q: You say you have no further indication in your notes, so you are not certain, then, whether or not she made an answer and said, "I don't recall," or whether anything was said or any remarks made at all?

A: The only thing I can say for sure is that if she had made this statement, I would have noted it.

Q: If she had said something about tattoos, it would have been in there?

A: Or scars, or any other identifying information.

Q: But, if she had said, "I don't know, don't remember," you wouldn't have put it down?

Mr. VanValkenburg, if you will attach this to the other instructions, the Jury is instructed to return to the Juryroom to deliberate further, or indicate that you are prepared to give the Court your verdict, at which time I will receive it.

(Whereupon at 11:52 o'clock p.m., the Jury retired to deliberate.)

...

(Whereupon, at 11:55 o'clock p.m., the Jury returned to the Courtroom and the following proceedings were had before the Court and Jury.)

(T 495-504).

The jury then returned its verdict of guilty.

Because the trial court would have allowed Mr. Spaziano to present the clearly relevant evidence of his tattoos only at the price of foregoing his fifth amendment right not to testify, Mr. Spaziano must receive a new trial.

At Mr. Spaziano's trial, his attorney was not permitted to refer either in cross-examining witnesses or in argument to Mr. Spaziano's features -- *i.e.*, his tattoos, without first placing Mr. Spaziano on the stand. Moreover, the jury was expressly precluded from considering this crucial matter. Because Mr. Spaziano's entire defense rested on his contention that he was not the assailant, this limitation on Mr. Spaziano struck at the heart of his defense.

In an affidavit, trial counsel explained:

At the time of trial, my understanding of the Court's statements and ruling was that in order for me to present and argue about Mr. Spaziano's tattoos, it would have been necessary to place Mr. Spaziano on the witness stand and subject him to cross examination. I believe I discussed this matter with Mr. Spaziano and we elected not to place him on the stand in exercise of his Fifth Amendment right to remain silent. I did not understand the judge's rulings to mean that we need only present evidence of when the tattoos were placed upon Mr. Spaziano because such evidence was undoubtedly available.

The defense attorney's affidavit is supported by his statements at trial. At trial, he explained:

it is my position, and it has been throughout the entire trial, that because the State requires the defendant to come forward in their case and speak through identification, which would give a picture, that the defendant has a right to expose his tattoos on his arm during the presentation of that case.

(T-499).⁵³ In other words, the defense attorney took the position that it was sufficient that the jury could observe Mr. Spaziano, as a jury observes any of defendant's features, to compare them to the testimony, and that no "evidence" had to be presented. He obviously took this position because he believed that the only alternative was for Mr. Spaziano to forego his right to remain silent, which he did not wish to do.

The most telling factor to explain what occurred at trial is that it could have been easily demonstrated that Mr. Spaziano had the tattoos for years. The affidavit of Mr. Spaziano's mother shows that not only did Mr. Spaziano have these tattoos long before the offense, but with very little effort, the timing of the tattoos could have been established. Indeed, the timing could have been *conclusively* established by virtue of photographs that can be dated. Thus, there could have been no tactical reason for failing to establish the timing of

⁵³At another point, Mr. Spaziano's attorney explained that the jurors must be able to consider that which they can readily observe:

Supposing one of [the jurors] says, "Well, we saw the tattoos, just like his eyes, his haircut, his shoes and all of that stuff." Would you set aside the verdict of guilt if that's the way it was, and they considered the tattoos, or lack of it?

THE COURT: I don't want to know what the verdict is.

MR. KIRKLAND: You're going to have to know. They have got a verdict, Judge, and they are entitled to that verdict.

(R-500-01).

the tattoos if that is all that was needed. Rather, the timing was not established because of the trial judge's ruling and defense counsel's understanding of that ruling that Mr. Spaziano would have been required to testify in order to introduce "evidence" of the tattoos beyond that which defense counsel believed the jury could consider because it was before the jury.

IV. THE BUCK STOPS HERE

"Defend yourself," the judges said.

"No," the accused said.

"Why? But you must."

"Not yet. I want you to take full responsibility."

Albert Camus *Notebooks*, November 1943

A. The Courts' Obsession with Procedural Technicalities Over Evidence of Innocence: Because Innocence is Irrelevant to the Judiciary, It Must Be Relevant Here

In rubber stamping the conviction and death sentence in this case — by means of procedural artifices and technicalities of the most arid and mechanistic court — the courts have valued finality over justice, expediency over human life. Repeatedly denying Joseph Spaziano his basic constitutional rights is unacceptable. Executing him is inexcusable.

Who has the ultimate responsibility, in this case, of the execution of an innocent man? No one does, and that's exactly the problem. The jury found him guilty of murder, even though they had reasonable doubts; they recommended life, rather than death, because of those doubts. The trial judge was precluded by Florida law from taking account of those doubts, and so he overrode the jury's life verdict and imposed the death sentence. The jury

pitched to the judge, who ducked. The jury deferred its responsibility to the judge, who deferred it right back to the jury.

The Florida Supreme Court deferred to the trial judge, who had deferred to the jury, who had deferred to the judge. And then the federal courts deferred to the state courts, as they are required to do under Supreme Court precedent. That left the ultimate responsibility with Governor Chiles. But then Chiles pitched it back to the courts, saying, through his clemency aide Mark Schlackman, that it was the *court's* responsibility to guarantee that an innocent man isn't put to death. Thus does close the deadly circle of deflection of responsibility. So *many* people have blood on their hands that it sticks to the skin of no one. It's always someone *else's* responsibility to ensure that an innocent man is not destroyed by the Sunshine State.

The federal government and every state in the nation have given chief executives the power to grant pardons, clemency and reprieve. With the decision in *Herrera v. Collins*, the United States Supreme Court has transformed a Governor's clemency power from an elective act of mercy into a vital safeguard of justice. In denying relief for a prisoner who had new evidence to support his innocence, Justice Rehnquist wrote:

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.

In England, the clemency power was vested in the Crown and can be traced back to the 700's. . . .

* * * *

Executive clemency has provided the 'fail safe' in our criminal justice system It is an unalterable fact that our justice system, like the human beings who administer it, is fallible.

As Alexander Hamilton noted, "The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. . . ." The Federalist No. 4, pp. 447-49 (Clinton Rossiter ed. 1961). Recently, the Missouri Supreme Court also noted that it is the proper role of the Governor to act when the courts decline to correct an unjust conviction or sentence.

The Governor and Executive Cabinet are not restricted in their clemency powers. Clemency may be granted or denied for reason, or for no reason. The Executive can freely review the facts of the case. He must answer only to his own conscience in making the final life and death decision that is before him now.

Professor Michael Radelet's most recent scholarly work documents all clemencies given in the United States in death sentences rendered since *Furman v. Georgia*, 498 U.S. 238 in 1972. Professor Radelet's research is described in an affidavit I asked him to prepare in support of Mr. Spaziano's clemency application. As outlined in Professor Radelet's affidavit, there have been six cases in which executive clemency has been granted in Florida capital cases since 1972:

1. Alford, Learie Leo. June 26, 1979.
2. Gibson, Richard Henry. May 6, 1980.
3. Hallman, Clifford. June 26, 1979.
4. Hoy, Darrell Edwin. January 9, 1980.
5. Rutledge, Jesse Raymond. April 19, 1983.
6. Salvatore, Michael. May 19, 1981.

No specific reasons are announced when death sentences are commuted. However, Professor Radelet reports that his "investigation of the cases and the issues raised in clemency proceedings indicate that lingering doubt about the defendant's guilt is *the number one explanation* for clemencies in post-*Furman* capital cases in Florida."

The cases bear out Professor Radelet's conclusion. Alford was convicted on circumstantial evidence of the January 1973 rape and murder of a thirteen-year old. In 1977, an eyewitness recanted the testimony he had given at trial and told the authorities that the true killer was much larger than Alford. Deborah L. Ibert, *Two Get Decision on Mercy*, Tallahassee Democrat, June 20, 1979, at 1A. This claim had been made in private to several friends shortly after Alford's trial, but the witness was reluctant to come forward because of a fear of being charged with perjury. At the clemency hearing before Florida's cabinet, the main argument made by Alford's attorney in favor of clemency was "Learie Alford did not commit the murder he was convicted of." Transcript of argument for executive clemency, April 20, 1979.

In 1974, Rutledge was convicted of breaking into a home and stabbing a woman and her three children. The woman and one child died. Rutledge consistently maintained his innocence and the evidence strongly implicated another man (who nonetheless was never indicted for it).

Salvatore and two companions were convicted of the 1975 murder of a Miami businessman. At the clemency hearing, Salvatore's attorney argued that Salvatore had nothing to do with the crime; that and the disparities in sentences between Salvatore and two others involved are the likely explanations for the commutation.

In addition to these three cases, clemency was awarded in Hallman's case because of evidence that Hallman's crime was more consistent with an aggravated assault than a first degree murder. Hallman was convicted in 1973 of slitting the throat of a barmaid with a piece of broken glass. No arteries were cut, but the victim died of suffocation four days later. Hallman's attorneys argued that Hallman did not possess enough premeditation to render him guilty of first-degree murder. Furthermore, they alleged that had the victim received proper treatment at Tampa General Hospital, her death would have been prevented. Indeed, the victim's family successfully sued the hospital for \$42,500 for malpractice.

Thus, in "at least three, and arguably four, of the six post-*Furman* clemencies in Florida capital cases, lingering doubts about the defendant's guilt is the primary explanation for the commutation."

Those who have the power to stop what they perceive to be unjust executions often fail to do so, because they believe some other savior will act in their stead. This mortal game of blind-man's-bluff may be conceptualized in terms of the "private Slovik" syndrome. The "Slovik Syndrome" is named after Private Eddie Slovik, who in 1945 became the only American soldier to be executed for desertion since the Civil War. In his compelling rendition of the case, William Bradford Huie shows that the only reason the execution was affirmed at various levels is that all sequential decision-makers believed that the execution would never occur. Because of the declining interest in the federal courts to intervene in capital cases and the dramatic slowing of the pace of executive clemencies since 1972, Governor Chiles and his cabinet were not only an appropriate body to grant relief. They were by far the best.

The Slovik phenomenon refers to the mindset that in a multi-layered system of sequential decisionmakers, someone else, somewhere else, sometime else down the line of the process will make a "saving" decision. In Slovik's case, however, that somewhere/someone never made such a decision, and Slovik was executed. According to William Bradford Huie's classic book *THE EXECUTION OF PRIVATE SLOVIK*: "I think every member of the court thought that Slovik deserved to be shot; and we were convinced that, for the good of the division, he *ought* to be shot. But in honesty--and so that people who didn't have to go to war can understand this thing--this must be said: I don't think a single member of that court actually believed that Slovik would ever be shot. I know I didn't believe it. . . . I had no reason to believe it. . . . I knew what the practice had been. I thought that the sentence would be cut down, probably not by General Cota, but certainly by Theater Command. I don't say this is what I thought *should* happen; I say it is what I felt *would* happen. And I thought that not long after the war ended--two or three years maybe--Slovik would be a free man."

Radelet and Bedau wrote that Joseph Spaziano's jury "recommended that he be sentenced to life, not death. Given the brutality of the crime described by the prosecutor, this jury recommendation clearly indicates that several jurors had lingering doubts about Spaziano's guilt." Jury votes of life imprisonment that reflect lingering doubt about guilt are also seen in the above case of Ernest Miller, and at least three other recent (but little-known) Florida death penalty cases:

Anthony Silah Brown (black). 1983. Brown was convicted of first-degree murder and sentenced to death, despite a jury recommendation of life imprisonment. The only evidence against Brown came from the testimony of a co-defendant, who was sentenced to life for his role in the crime. On appeal, the conviction was reversed and

a new trial ordered because Brown had not been notified before the State took a crucial deposition in the case and had thereby been deprived of his right to confront and cross-examine an adverse witness. At retrial in 1986, the co-defendant admitted that his incrimination of Brown at the first trial had been perjured, and Brown was acquitted.

Anibal Jaramillo (Hispanic). 1981. Jaramillo was convicted on two counts of first-degree murder and sentenced to death, even though the trial jury had unanimously recommended a sentence of life imprisonment. At trial, one prosecution witness admitted under cross-examination that he had seen another "anxious-looking" man, a roommate of the victims, less than one mile from the scene shortly after the time of the crime; another prosecution witness admitted that shortly thereafter she and her husband drove this same frightened man back to the house where the killing occurred. The failure of this man to mention having seen any signs of a fight or the dead victims suggests he may have been implicated in the crime (although he was never indicted). On appeal, Jaramillo's convictions were reversed, and he was released on the ground that the circumstantial evidence against him was "not legally sufficient to establish a prima facie case"

Juan F. Ramos (Hispanic). 1983. Ramos was convicted of first-degree murder and sentenced to death, although the jury had recommended a sentence of life imprisonment. The victim, who lived near where Ramos worked, had been raped and died of multiple stab wounds. Ramos was convicted largely because the police had no other suspect, a neighbor contradicted Ramos's alibi, and his clothing was picked out in a lineup by dog scent discrimination. No physical evidence linked Ramos to the victim or to the scene of the crime. In 1987, the Florida Supreme Court vacated the conviction and ordered a new trial because of evidence improperly used against the defendant. At retrial in 1987, Ramos was acquitted.

One point made by Professors Radelet and Bedau bears repeating and repeating again: the actual number of innocent people condemned to die is almost certainly *higher* than the 400 cases identified in their studies. First, the collaborators greatly limited what they defined to be "miscarriages of justice" by their methodological choices. The collaborators note that they included "far" fewer cases than all that were investigated. In addition, they did not include cases where the evidence of innocence was "slight" or the research done was "unproductive." Finally, the collaborators state that, in many cases, they were unable to perform sufficient investigation in order to make a determination.

Yet the results of the Radelet/Bedau studies support the proposition that the reasonable doubt standard is not infallible as a safeguard against erroneous conviction. Innocent individuals have been convicted; some have been executed, in spite of this standard. Although 400 cases within eighty-five years may be an acceptable amount to some, others find this figure disturbing, especially since it most likely understates the number of erroneous convictions.

In ignoring lingering doubt about guilt as a reasonable basis for the jury's life recommendation, Mr. Spaziano's trial judge acted faithfully to state law. Florida law is blunt: "A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy."

Thus, Florida is a hard line state against any consideration of lingering doubt at either the trial or appellate levels. The Florida courts doctrinal trope that "you can't be a little bit guilty" denies reality, however. According to a study conducted by William Geimer and Jonathan Amsterdam, however, sixty-nine percent of Florida jurors interviewed confirmed that residual doubt was the reason they had voted for a life sentence rather than death. In fact, the study stated that "[t]he existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied."

In one case discussed in the published study, one juror interviewed was quoted as saying that some of the evidence presented at trial raised doubts in his mind as to whether someone else had committed the homicide. That juror stated: "We found him guilty, there

wasn't anybody else to put it on . . . but we didn't want to execute him because some evidence might come out in the future about the other guy." This statement is hauntingly similar to the affidavit of juror Lorenzano in this case.

William Geimer, senior author of the Florida study cited above, prepared an affidavit, at my request, in support of Mr. Spaziano's clemency application:

I have been a member of the legal profession for 24 years. I practiced law in North Carolina for ten years, with particular emphasis on criminal law. I am currently Professor of Law at Washington and Lee University in Lexington, Virginia. This affidavit is submitted at the request of counsel for Joseph Spaziano.

In 1987, with assistance from the Frances Lewis Law Center at Washington and Lee, my colleague Jonathan Amsterdam and I conducted structured interviews with Florida jurors who had sat on death penalty cases. The study included, among others, interviews with jurors who had voted for life in prison in cases where the jury's recommendation was overridden and defendant was sentenced to death. Our findings were published in an article entitled "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty cases", 15 Am J. Crim. Law 1 (1988).

As explained in the article, we found that a factor we denominated *LINGERING DOUBT* was the most often recurring explanation by jurors who voted to recommend life in prison instead of death. In spite of the name we gave to the factor, we explained further that the interviews often revealed more than simply a residual doubt sufficient for the juror not to wish to foreclose further investigation by voting for execution. Rather, we found that it also included many instances of full-blown REASONABLE doubt, either that the accused was guilty of any crime, or that he was guilty of first degree murder. One reason many jurors did not translate their reasonable doubts into votes for acquittal or guilt of a lesser included offense is that, in many cases, guilt and penalty were discussed at the same time during guilt phase deliberations. Although contrary to law, of course, it would often happen that jurors with doubts about guilt would be persuaded to vote for guilt anyway by assurances from fellow jurors that the penalty vote would be life in prison.

At the request of counsel for Mr. Spaziano, I recently reviewed the data collected in the Florida study and was struck by one matter that was not included in the article. *It was the number of prosecutors, defense attorneys, and judges who participated in these cases who also recognized the powerful*

influence of lingering doubt. These trial actors are respected members of the legal profession in Florida. One defense attorney and one prosecutor who expressed this view are now judges. One prosecutor is now a United States Magistrate. Even two of the trial judges who overrode life recommendations mentioned lingering doubt prominently when asked to explain the jury's action.

I would like to add another admittedly anecdotal bit of empirical observation. I teach first year law students. Very few of them have any reservations about the imposition of the death penalty in an appropriate case. Yet, even before they learn of the importance the law purportedly attaches to juries as barometers of "evolving standards of decency," they are appalled by the operation of Florida's override law. Some are Florida residents who are hearing of the law for the first time. Over the years, I think it is correct to report that all would recommend serious consideration be given the clemency application of anyone sentenced to death contrary to the recommendation of a jury. I would also.

The first "dimension" reflects the sentencer's lingering doubt as to both the identity of the killer and the deliberateness of the killing. The author of the Georgia study determined that a lower degree of certainty meant a greater likelihood that the defendant was sentenced to life. Therefore, even in those cases where the requisite "beyond a reasonable doubt" standard was satisfied for conviction, any remaining doubt on the part of the sentencer appeared to affect the sentence.

Given the ostrich-like quality of Florida's positive law on lingering doubt about guilt, juries' consideration of such doubt constitutes a form of "jury nullification." Jeffrey Abramson's book *We, The Jury* devotes a fascinating chapter to a history of jury nullification, in which jurors ignore a judge's legal instructions and simply dispense rough justice on their own. Jury nullification has an ambiguous history. In the trials of William Penn, in seventeenth century England, and John Peter Zenger, in eighteenth century America, jurors braved considerable personal risk to apparently reject the judges' instructions

and uphold the defendants exercise of their consciences. But in more recent times, jurors, especially in the south, regularly defied the law and the evidence to acquit whites for violence against African Americans. Abraham observes, "As long as we have juries, we will have nullification and verdicts according to conscience. Some of these verdicts will outrage us, others will inspire us. But always nullification will give us the full drama of democracy, as citizen-jurors assume on our behalf the task of deliberating about law in relation to justice." Anthony Lake has written that the "drama of democracy" is ultimately what animates and preserves the jury system. The system's flaws are our flaws. Juries are little more than electorates writ small. If juries sometimes act willfully, emotionally, or unwisely, it is only because the population at large does so, too. Far more often, juries deal fairly and justly with the difficult assignments they are handed. And their verdicts, flawed though they sometimes are, still command enormous popular respect, as well they should. In a society that seeks its legitimacy in the consent of the governed, it seems right to let the verdict of the jury be the last word. So where does that leave Joseph Spaziano?

Much of the information on innocence contained in this petition is not news to Governor Chiles or to the courts. As described above, past governors have acted as though it is the *courts'* job — not *their* job — to determine whether the man upon whom Chiles signed the death warrant might be innocent. We have been trying for 11 years to get the courts and the governors to pay attention to it, with no apparent success. The federal courts of appeals was much more interested in limiting the number of pages we would be permitted in which to brief the judges about Mr. Spaziano's innocence.

These things do not inspire confidence that the judiciary — federal or state — will accept the responsibility of killing this innocent man. To date, no actor in Florida's assembly line of sequential decisionmakers will own up to their *own* responsibility for the killing of this innocent man. So far, Mr. Spaziano's case has fallen between the stools and he will be killed for a crime he did not commit.

One might think that state and federal appellate judges reviewing death cases seek to ensure that the condemned person is, in fact, guilty. One would be wrong. Unless the evidence suggesting innocence *also* happens to prove that particular constitutional rules of procedure has been violated, the evidence of innocence is irrelevant. "Innocence" is not, in and of itself, a valid constitutional ground upon which one may attack the legality of a conviction or death sentence. As the journalist Dave Barry might say, we are not making this up.

Even before enactment of the antiterrorism bill now pending in Congress, the federal courts could be counted upon to correct injustices in Mr. Spaziano's case. The United States Supreme Court appears determined to "deregulate death," as one commentator aptly phrased it — generally to leave it to the states to administer their capital punishment systems as they see fit. The United States Supreme Court's 1993 decision in *Herrera v. Collins*, makes clear that so long as there are state processes in place, federal habeas corpus courts may not intervene — not even in cases presenting troubling claims of innocence. This federal abdication gives state courts a special, and essentially unreviewable, duty to ensure that innocent people are not put to death. The message is clear: Mr. Spaziano's life rests in the hands of Lawton Chiles and his cabinet.

One can analogize this diffusion of responsibility with the famous Milgram Experiment. Like the Milgram subjects, the typical death penalty juror is placed "in a novel and disorienting situation that pose(s) for him a distressing moral dilemma." And, like the Milgram experiments, the juror in a death penalty case may seek "a professional, symbolic interpretation of the situation to reorient himself"--in short the "mystifying language of legal formality" may lead the juror to conclude that the sentencing decision falls outside the scope of the juror's personal moral responsibility, and may therefore cost the juror's "moral sense" to be distorted. The experiments involved volunteers who are asked to serve as "teachers" in a study of learning. The "teachers" were told to ask questions of a "subject" and to administer a painful electric shock to the "subject" if the "subject" gave the wrong answer. The stated purpose of the study was to see how negative reinforcement affected learning. In reality, however, Milgram wanted to study the capability of the "teachers" to administer pain--the shocks were not real, and the "subjects" were trained actors who only pretended to suffer real pain from the shocks. Milgram found that the "teachers" showed a troubling capability to administer various levels of pain that "in their perception" ranged from relatively mild to very severe, even potentially fatal. According to Milgram, this capability to engage in conduct that, under normal circumstances, would seem sadistic and cruel was triggered by an application of personal moral responsibility--whenever they balked, the "teachers" were told that "the experiment must go on," and the responsibilities to the outcome regressed with the scientists and not with the "teachers".

When responsibility for a death sentence is divided, there exists the danger that no one bears the ultimate responsibility for this awesome life-or-death decision. The judge might

defer to the jury and the jury defer to the judge; the state courts to the federal courts; the judiciary to the executive — and *vice versa*, with the result that the capital defendant falls between the stools.

This principle may also contain a larger message about the death penalty itself at this moment in American history. David Bruck perceptively and eloquently argued:

Frank Zimring and Gordon Hawkins conclude that the derailment of abolition in the United States after *Furman* was a product of the peculiarly American system of divided government, which by diffusing responsibility for such profound moral decisions permitted the country's political leadership to avoid the courageous actions of their Western European and Canadian counterparts. Zimring and Hawkins point out the remarkable fact that in no country did public opinion favor abolition before the fact. Everywhere but here, elected leadership actually took the lead, abolishing capital punishment while the public opinion polls still favored it. Only in the United States could the political branches pander to retentionist public sentiment in the knowledge that the courts would step in and sort out who, if anyone, would actually get killed.

When *Gregg v. Georgia* ratified the derailment of abolition in the United States in 1976, the handful of lawyers engaged in the struggle against the death penalty expected that executions would begin relatively soon, and in large numbers. But fourteen years later, the average annual rate of executions still stands at only ten, and the backlog of prisoners on death row has exploded to four times the total who waited at the time of *Furman*.

Why has it taken so long?

Obviously, the pace of executions will quicken, as the Rehnquist Court steadily removes legal obstacles, and slashes away at the federal habeas system. But I don't think that executions will even remotely approach the 250 or 300 death sentences imposed each year around the country. Americans' enthusiasm for executions is inversely proportionate to the responsibility they bear for carrying them out. Wherever responsibility comes to rest, there you will find a bottleneck. Lift the responsibility from the federal courts, and the cases will pile up in the state courts. If the state courts start letting more cases through, you'll begin to see increased jury reluctance to impose death sentence-- as appears to have happened in Louisiana, where new death sentences have dwindled to almost zero in the years after the execution binge of the mid-1980s

This reluctance to assume personal responsibility for large numbers of executions should not be surprising. It tells us that the United States has not veered so far after all from the abolitionist path of the other democratic countries of the West. The practice of killing unarmed prisoners has run its course here too. It's just that we lack the political means to say so.

B. A PERSONAL FOOTNOTE FROM MICHAEL MELLO

The state is not God. It has no right to take away that which it cannot give back, if it should so desire.

Anton Chekov

This case is a story about failure, the systemic failure of Florida's assembly line of death in general, and my own personal failure as a lawyer in particular. Mr. Spaziano is alive today — for the moment — not due to the efforts of any lawyers or any courts. Mr. Spaziano owes his life to the hard work, honesty and courage of several reporters, editors, investigators and researchers: Lori Rosza, Gene Miller, Warren Holmes, Tony Proscio, Richard Ofshe, Martin Dyckman, Tom Blackburn, Manning Pynn, Mark Potter, Michelle, Jeff Rosen, Bruce Shapiro, James Jackson Kilpatrick, Peter Katel, Mike Griffin, Beth Taylor, Brad Barnes, Micki Dickoff, Mike Farrell, Beth Grossbard, Nina Alvarez, Peter and Pam Freyd, among others. *They* prevented the legal system from committing a miscarriage of justice — they forced the system to work in spite of itself.

Mr. Spaziano is, I believe in the very marrow of my bones, innocent. By "innocent" I mean exactly that: The state got the wrong man. I'm not referring to "legal technicalities" — I'm not saying he did it, but he was crazy; I'm not saying he did it but he had a bad upbringing.

I'm saying he's innocent the old fashioned way, as my mother would put it. Joe Spaziano didn't do the crime, period. This fact makes him unique among my death row clients. When I was a Florida appellate public defender in the mid 1980's, my caseload was 35 capital cases, more or less; in all, over the past 11 years, I have been closely involved in approximately 70 death row cases.

Now, let me introduce myself. This is the first time I have written on behalf of a former client in an attempt to focus public attention on a very real person with an impending execution date. I don't try my cases in the media, and I am writing this with full knowledge of the potential consequences to my license to practice law in Florida. I wrote as a private citizen and not as Joseph Spaziano's attorney, which at the time I no longer was.

One way or the other, this is my last capital case. I will see this one through to the end, but when it *does* end — either by Mr. Spaziano's clemency or, more likely, by his execution — I'm done with capital litigation. My conscience will not permit me to continue to participate in a criminal "justice" system so howlingly lawless, and so hideously corrupt — intellectually, morally, and legally — that it can't even ensure that you're killing the person who actually *did* the crime. And when defense lawyers — pro bono defense lawyers, at that — try to show that you really *are* killing the wrong person, we are met by an obstacle course of procedural hurdles designed to permit the courts to avoid even *considering* the evidence of innocence: statutes of limitations; time limits; doctrines of retroactivity and procedural default; presumptively correct "fact" findings and the like. This is a crap game with dice so loaded that it's not worth the effort to play.

Even if Mr. Spaziano is released from prison today, the state of Florida has robbed him of his life. Twenty years on death row; four death warrants; four trips to the deathwatch cells, a short walk from the electric chair that is the state's intended destination for the man from whom the state has already taken so much. The *least* you can do is not kill him. The least.

There's a lovely couple of lines in Harper Lee's *To Kill a Mockingbird*. Atticus Finch tells his daughter: "Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one's mine, I guess." This one's mine, I guess.

I agreed to re-enter Joseph Spaziano's case for two reasons. First, Mr. Spaziano is most likely going to be killed in Starke, if the governor signs a new death warrant, notwithstanding the powerful likelihood that he's an innocent man. He's going to be killed, not because his trial was fair or because his execution is lawful. That doesn't matter. What matters is that his case has already been "reviewed" by the courts. Because the courts have "reviewed" his case once, they are loathe to do so again — notwithstanding inflated political rhetoric about "10 years of repetitive review." For this reason, and this reason alone, his next death warrant will probably be carried out. His head and right ankle will be shaved; he will be measured for his funeral suit; he will say goodbye to his mother and niece and daughter and friends; he will be strapped into Florida's electric chair in full view of two dozen witnesses selected by the prison, most of whom will be strangers to him. He will be electrocuted by an executioner whose anonymity will be protected by the prison, and who

will be paid \$150 for his services rendered. Joe Spaziano will be electrocuted in our name. In your name. And in my name.

The second reason I am again Joseph Spaziano's lawyer is because his story is emblematic of much that is wrong with the jury override, in part because his jury recommended *against* death due to their nagging doubts that he was guilty *at all*. The judge disregarded the jury's recommendation and imposed death, yet now we *know* that the jury's doubts were well founded. Post-trial discovery of the facts surrounding the hypnotism of the state's key witness destroys any confidence in the conviction of Mr. Spaziano. Conservative (and pro-capital punishment) columnist James Kilpatrick began a recent column: "On June 17, Florida intends to execute Crazy Joe Spaziano for a murder he probably did not commit." *Res ipsa loquitur*.

For the past 11 years, I've been a dutiful and polite little lawyer who played by the rules and trusted the legal system to correct the monstrous injustice in this case. I told my client that the state courts would not permit an innocent man to be destroyed, but I was wrong. They will, and they are: They've used legal technicalities to ignore the critical aspects of this case. The hypnotically-manufactured evidence against Mr. Spaziano would be *per se* inadmissible today — but the decision saying so came too late to benefit Joe Spaziano; what ought to be an unceasing search for truth has devolved into a morbid game of "Gotcha."

Then I told my client that the federal courts wouldn't permit an innocent man to be killed, but, again, I was wrong. Judge Carnes' opinion in Joe Spaziano's case spent more pages whining about the length of the brief I was not permitted to file than it spent

addressing the points about innocence I wanted to *make* in the brief. In 1992, the United States Supreme Court held that innocence is not an issue cognizable in a habeas corpus proceeding; four justices, in a subsequent case, did not even want to give Lloyd Schlup, who had a *videotape* showing him somewhere else at the time of the murder for which he was condemned to die — a hearing to *consider* the new videotaped evidence. The Court, in effect, was saying: "Go to the governor and seek clemency if the criminal justice system has miscarried." So I did.

Finally, I told my client that executive clemency was as a failsafe designed to prevent execution of an innocent man, but I shouldn't have bothered, because, for all practical purposes, "clemency" in Florida does not exist. As Martin Dyckman has written, while Florida governors in the past weren't afraid to grant life sentences in cases involving credible claims of innocence, there have been no clemencies for Florida's death row since the third year of Bob Graham's first term — 14 years ago. One final time I was wrong: Governor Lawton Chiles said that it's the court's job — not *his* job — to see to it that the right person is being executed. So the courts deny responsibility and say it's up to the governor; the governor denies responsibility and says it's up to the courts. The outcome of this deadly game of blind man's bluff is that Joe Spaziano will be executed for a crime he did not commit, and nobody is willing to take responsibility for this abominable perversion of justice.

This case haunts me like no other, and it should haunt you, too. If you're like most folks I know, I am the kind of capital criminal defense lawyer you probably love to hate. Between 1983 and 1986, I was a capital appellate public defender, initially in West Palm

Beach and later in Tallahassee, at the Office of the Capital Collateral Representative (CCR). Over the past couple of years, I've free-lanced with CCR, representing a handful of condemned clients. I first represented Mr. Spaziano in 1983-87. When I left Florida in January 1987, I turned Mr. Spaziano's case over to a Tallahassee attorney, but promised to re-enter the case if it reached the federal court of appeals.

I tried to persuade the state trial judge, the justices of the Florida Supreme Court, a federal district judge, three judges on the Eleventh Circuit Court of Appeals, and the Justices of the Supreme Court of the United States. I have failed utterly to convince a court to look at any of this. They let me file briefs and listen politely to my oral arguments. But I can't get them to *hear* me. No one has listened.

I like to think that I represent *all* my clients, guilty or not, as zealously as humanly possible within the bounds of the law. I didn't think it would make a difference to me that one particular client is innocent. But it does; losing feels worse, and it's harder to convince myself that I ought to participate in a system so crassly and hideously and grotesquely unfair that it can't even ensure that the person being executed is actually guilty of the crime. That matters. It matters to me.

I have had fairly extensive contact with Mr. Spaziano and with his family throughout the course of working on his case. I corresponded with Mr. Spaziano and visited him on death row. In numerous conversations with me, Mr. Spaziano has always forcefully maintained his innocence of the murder of Laura Harberts. He has never suggested that he was involved in any way in that crime, not even to the point of asking or answering "hypothetical" questions that might assume his guilt. On the contrary, Mr. Spaziano has

insisted that he was in no way involved in the crime. In fact, Mr. Spaziano's firm assertions of his innocence have, on occasion, been a source of some tension in our relationship. From the time that I first became involved with his case (in the fall of 1983), up until now, the case has not been in a posture that permitted us to introduce evidence of Mr. Spaziano's innocence. By the time the case reached our hands, the legal issues had "narrowed" to the constitutional challenges to his conviction and sentence. Accordingly, I had to tell Mr. Spaziano -- more than once -- that, at least for the time being, our hands were tied; we were limited to those constitutional issues in our appeals.

While expressing frustration at the slow pace of his appeals, and anger that the courts have failed so utterly to uncover the truth about the crime, Mr. Spaziano has continued steadfastly to maintain his innocence, and has never wavered in his belief that if the truth about the crime were brought to light, he would be exonerated and released.

As discussed above, even a jury that was not told about Dilisio's hypnotism had serious doubts about Joe Spaziano's guilt. That jury recommended life imprisonment as a hedge against the very real possibility that an innocent man had been convicted; the judge disregarded the jury's recommendation and imposed death. Yet now we *know* that the jury's doubts were well founded. Our post-trial discovery of the facts surrounding the hypnotism of the state's key witness destroys any reasonable confidence in the conviction of Joe Spaziano.

Joe Spaziano has steadfastly maintained his innocence. From his personal history, particularly the car accident and its aftermath, it is easy to understand why no alibi has ever been established. Joe Spaziano's memory and incoherence explain why he is a terrible personal historian. The most recent psychological and neuropsychological evaluations completed note that his "blanking out" during conversations is probably the result of petit

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mal seizures, one of the lingering results of the severe head injuries suffered in the car accident.

I *have* won some cases, but those aren't the ones that haunt my dreams. The cases I revisit nightly are the near misses, the cases I lost by a one vote margin. I can't shake the feeling that if only I had been smarter, or a better lawyer, or if I could make language sing the way David von Drehle does, then maybe that would have meant life rather than death for a human being I had come to know better than a spouse knows her husband. Our roles — lawyer and damned — could, and often did, require us to become that intimate. As I mentioned above, I often became close with my clients. But Joe Spaziano's case is different, because he's innocent and because I've failed so completely to convince any Florida governor or any court anywhere of that fact.

I've done the best I'm capable of doing, but it hasn't been enough. Mr. Spaziano will be destroyed on his next death warrant, and there's not a thing I can do to stop it.

You should know that we will not initiate further litigation in this case; the courts have had 20 years to get it right, and they have failed. What this means, as a practical matter, is that should you lift your stay and reschedule the execution — and if you enter no stay between now and then — Mr. Spaziano will be electrocuted on schedule. Unless the courts act *sua sponte* to stay the execution, or unless you do, the execution will be carried out.

In other words, you ought not to count on the judiciary to correct the monstrous injustice in your again scheduling Mr. Spaziano to die. I have been litigating Mr. Spaziano's innocence claims in the courts for eleven years, and they have said, in effect, take your case to the governor. So we have. If you lift your stay, Mr. Spaziano's destruction will be *your*

responsibility and yours alone. For the first time in the two decade sorry history of this case, responsibility rests with one man and one man alone. Sequential courts have evaded their own responsibility for the killing of this innocent man. They've passed the buck to you, but clemency *is* your job. The buck stops here.

Finally, you should know my ultimate goals in this case. They are (1) invalidation of both convictions — the rape as well as the homicide; (2) an apology by the State of Florida for the two decades it has stolen from my client — including four death warrants; and (3) reparations. I am, at the moment, negotiable on (3), if you are negotiable on (1) and (2). Should you succeed in rushing to execute my innocent client, I will pursue an action for wrongful death. My understanding is that sovereign immunity does not insulate governmental officials from causes of action grounded in intentional homicide committed by state actors who are in full possession of the facts of their intentional conduct.

One must wonder why three serial governors have signed four death warrants, in light of the vulnerability of the case against my client. I don't know why Governor Chiles and his predecessors keep trying to kill my client. But it isn't because they were not told — and told again — why killing this man would be a grotesque injustice. The *Miami Herald*, *St. Petersburg Times*, and others have done your homework for Chiles' staff, and they ought to be grateful to them — rather than impugning their motives.

You and I both know that Governors Graham and Martinez signed warrants in order to manipulate defense lawyers into rushing into court with pleadings that were often inadequate. But let me suggest a more honorable and honest precedent: Governor LeRoy Collins. Governor Collins once told me why he had a policy of meeting — face to face — with every person upon whom the governor signed a death warrant. He told me that he did

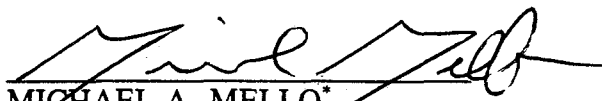
so because he wanted to look into the eyes of each man for whose killing he was responsible. *He* was responsible, and he had the courage to say so.

I wonder whether, when the Florida legislature enacted its capital statute in 1972, and when the United States Supreme Court upheld its constitutionality in 1976, they thought that the life of an innocent man would depend on the conscience of one career politician. But that's exactly where we are. Should Chiles have the bad judgment to think that this is some kind of bluff on my part, his staff should ask around. I don't bluff.

Respectfully submitted,

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