

Before the
BOARD OF EXECUTIVE CLEMENCY
IN RE: JOSEPH R. SPAZIANO

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EXECUTIVE CLEMENCY

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I. INTRODUCTION

In his initial Memorandum In Support of Executive Clemency, Mr. Spaziano asked that his clemency application be continued to allow further investigation of (1) the pre-trial hypnotism of Anthony Dilisio, the State's key witness at trial, and (2) Mr. Spaziano's mental condition and personal history. This supplemental memorandum, to be read in conjunction with the earlier memorandum, presents the results of such further investigation.

II. DOUBT ABOUT GUILT

As Mr. Spaziano discussed in detail in his initial memorandum to this Board, the State's case at trial rested almost entirely on the testimony of a 16-year-old drug addict, Anthony Dilisio. The boy had a motive to lie, insofar as he erroneously believed that Joe had raped his mother. He could not remember anything about the crucial trip to the dump until he had undergone hypnosis. As discussed below his testimony would today be per se excluded as wholly unreliable.

The jury which convicted Joe Spaziano was given only two choices: first-degree murder or acquittal. The jury struggled with this dilemma, and it convicted only after four and three-quarter hours of deliberation, multiple reinstructions, and an Allen "dynamite" charge.¹ Thus, even without knowing about the hypnotism, the jury was reluctant to convict Joe Spaziano of this

¹ The jury began its deliberations at 4:41 p.m. They first returned at 6:28 p.m. They retired again at 6:30 p.m., and returned at 8:27 p.m. After a supper break, they retired again at 9:50 p.m., and returned at 10:26, at which time they received the Allen charge. The jury retired for the last time at 10:29, requested five more minutes at 11:03, and returned with a verdict at 11:07 p.m. See Trial Transcript at 810-820.

savage murder. The fact that screams out to this Board, however, is that the jury did not know that Tony Dilisio's testimony had been induced by hypnosis. The jury also did not know that Joe Spaziano had been in a life-threatening automobile accident that had forever altered the direction of his life. The jury did know that Joe Spaziano was a member of the Outlaws,² and was charged with a brutal, grisly torture-murder. Yet knowing what they did, without any evidence of mental mitigating circumstances, the jurors quickly recommended life imprisonment.³

It is clearly reasonable to infer that the jurors' life recommendation in the face of this horrible crime reflected their lingering doubt about Joe Spaziano's guilt for first-degree murder.⁴ Recourse to the Florida courts on this issue is not available, because the Supreme Court of Florida has now unequivocally ruled that, as a matter of law, lingering doubt about guilt cannot be considered as a mitigating circumstance in

² The Outlaw "brothers" attended the trial en masse, according to Mr. Spaziano's trial attorney.

³ Trial counsel recalls that the jury quickly returned a verdict of life. Although the transcript of the original sentencing proceeding does not mark the times at which the jury began and concluded its deliberations, it is reasonable to infer from the transcript that the deliberations were brief. The proceedings began at 1:30 p.m. 1976, and concluded at 3:20 p.m. The transcript is 31 pages long, and does not mark the jury retiring until p.27. From the brevity of the entire proceeding, and the apparently great amount of time spent by counsel for both sides in argument prior to the point at which the jury retired, the inevitable conclusion is that the jury reached its decision extremely rapidly.

⁴ A more extensive discussion of the doubt about guilt issue is in Mr. Spaziano's original clemency memorandum at pp. 24-37.

setting penalty.⁵ This doubt becomes overriding when one considers facts not before the jury: the hypnotism of Anthony Dilisio and the personal history of Joe Spaziano.

A. Hypnosis Destroys the Trustworthiness of Trial Testimony: The Bundy Decision

Subsequent to Mr. Spaziano's clemency hearing on March 13, 1985, the Florida Supreme Court decided Bundy v. State, holding that hypnotically-refreshed testimony, such as Dilisio's, would be per se inadmissible.⁶ The Florida Supreme Court in Bundy surveyed the analyses of the hypnotism question made by courts of other jurisdictions and concluded:

We are swayed by the opinions of the courts of other jurisdictions that have held that the concerns surrounding the reliability of hypnosis warrant a holding that this mechanism, like polygraph and truth serum results, has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial. Nor can we agree that employing safeguards has been shown to insure that hypnotically recalled testimony is reliable at the present time.⁷

In reaching this conclusion, the Court recognized these problems:

(1) Hypnosis is not widely accepted by psychiatrists and psychologists as a reliable method of refreshing or enhancing a person's memory of past perceptions and experiences;⁸

⁵ Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985).

⁶ Bundy v. State, 471 So.2d 9 (Fla. 1985).

⁷ Id. at 18.

⁸ Id. at 14, citing Collins v. State, 52 Md.App. 186, 447 A.2d 1272 (1982).

(2) Hypnosis subjects are often so susceptible to even unintended suggestion and so receptive to the hypnotist's verbal and nonverbal communications that they respond in accordance with what they perceive to be the desired response in order to please the hypnotist;⁹ (3) The willingness of subjects to "confabulate," or fill in the gaps in their memories is a serious and undetectable problem;¹⁰ (4) The recall induced by hypnosis may be totally incorrect;¹¹ (5) The subject can willfully lie under hypnosis;¹² (6) The subsequent opportunity for cross-examination at trial of a previously hypnotized witness is virtually meaningless as a tool to expose falsity¹³; and (7) No set of procedural safeguards is effective in eliminating these problems.¹⁴

⁹ Id., citing State ex. rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982).

¹⁰ Id.

¹¹ Id. at 15, citing State v. Grier, 129 Ariz. 297, 630 P.2d 575 (App. 1981).

¹² Id., citing State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

¹³ Id., citing State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981).

¹⁴ Id. at 17, citing People v. Shirley, 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

B. The Reports of Doctors Diamond and Buckhout

Undersigned counsel has retained the services of two nationally known experts on hypnosis, Doctors Bernard Diamond and Robert Buckhout, to conduct detailed analyses of Dilisio's hypnosis sessions in this case. Dr. Diamond is Professor Emeritus of Law at the University of California at Berkley, and Professor of Psychiatry at the University of California Medical School at San Francisco. He has long been recognized as one of the world's most authoritative sources on hypnosis. He has been cited as an authority in many of the ground-breaking hypnosis cases.¹⁵ He has published more than fifty articles and book chapters on forensic psychiatry and related issues. His report, resume, and bibliography are in Appendix A. Dr. Buckhout is Professor of Psychiatry at the City University of New York. He had published over fifty scientific articles and two books in the field of human perception and memory. He has testified in over 80 jury trials and more than 120 evidentiary hearings, having been found on each occasion to be a qualified expert on perception, memory, and eyewitness identification. His report and resume are in Appendix A of this supplemental memorandum.

¹⁵ People v. Shirley, 31 Cal.3d 18, 641 P.2d 775, 181 Cal.Rptr. 243 (1982) (included in the Appendix to Mr. Spaziano's first Memorandum In Support of Executive Clemency); State ex rel. Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981); and many others.

Doctors Diamond and Buckhout identified exactly the same problems with Dilisio's hypnosis as the Florida Supreme Court identified in its decision to per se exclude hypnotically refreshed testimony. In discussing a pre-hypnosis interview of Dilisio, which had been conducted by a police officer, Dr. Buckhout reports that:

I received a tape recording of an interview with Mr. Dilisio by the police a few days before the hypnosis session. This tape gives some insight into the state of knowledge of the instant case by the witness. However, it is also a remarkable example of pre-conditioning the witness to a future hypnotic session by implying that his memory would be better and that he need not fear being named as an accomplice. The interview begins with some vagueness of memory and frequent denials that certain conversations between the witness and the defendant had ever taken place. It is clear from the tape that the police had other conversations with Mr. Dilisio prior to this interview. It is also clear that many of the details under discussion had been part of the prior news media coverage. After a very brief period of time, the officer sought the witness's agreement to be hypnotized and only then reads him his rights. The witness's statement: "You'll find out when I am under hypnosis," is remarkable in that he is in the process of negotiating the conditions under which he will give evidence. The officer conducting the interview then meets every vague answer by giving more information, asking leading questions, providing details about another suspect, showing the witness a map of where the body was found, etc.

Later, the police interrogator remembers to administer an oath and seeks a name of a man accompanying the defendant after telling the witness about the existence of another man. The entire interview is characterized by excessive use of leading questions. The witness keeps promising that he will be able to give more details and then separates this information from the newspaper coverage. Meanwhile, the witness appears to use the language in his answers which had been previously fed to him in

the form of leading questions. In my opinion, the substance of what the witness provided in the later hypnosis session had already been discussed in this earlier police interview.

Buckhout Report at 8-9 (See Appendix A).

In discussing the actual hypnosis sessions themselves, Dr.

Buckhout reports that:

In the instant case, the transcripts and the recently found tapes of the hypnosis of the key witness appear to be incomplete; indicating that critically important conversations before and after the sessions (which could have influenced the witness) remain as a source of doubt. A competent expert witness could well have pointed out the importance of these missing elements to a jury. For example, it is clear from the record that the hypnotist had obtained a great deal of advance information about the facts of the case and some speculations about the character of the defendant:

Q. Joe had a habit apparently of keeping certain items from a girls body. What would he keep?

A. Some of her clothes.

Q. What part did he keep? The outer clothing? Underclothing? Or was it jewelry? What was it?

(Transcript p.1,5/15/75)[See Appendix B]

This exchange, typical of many, indicates that the hypnotist knew a great deal about the investigation of the case by the police, and, that it contributed to his excessive tendency to lead the witness. This question (as well as others), was specifically anticipated by questions used by the police officer in the interview cited above. Mention of a "left breast" by the witness clearly stems from the leading questions indulged in by the police interviewer on May 13, 1975. By interjecting names and ages of victims, conclusions about the alleged behavior of the defendant, and assumptions about event sequences, the hypnotist signals a clear line of expected answers and scenarios without waiting for the witness

to freely volunteer information. This pattern violates the standards for conducting any type of hypnotic interview and resembles more the interrogation of a witness by an investigator who thinks he knows more about the crime than the witness.

The incomplete trance induction sequence, recorded in the undated interview transcript on the first page, is a classic example of feeding a wholly nonscientific rationale for hypnosis to a witness, along with some dubious analogies between "hidden memories" and physical distress caused by "boils." The entire statement sets the witness up as a person who is hiding guilty knowledge and promises relief for divulging it. Such strong arm tactics would be rejected in a courtroom as bullying; in a hypnosis session it sounds a green light to a witness to pour out anything that comes to mind whether accurate or not. The implied promise to an adolescent witness that he will feel better, mixes therapy with the investigative process and is a promise which cannot be fulfilled by the hypnotist who is merely an arm of the investigation. Seldom have I seen or heard such unprofessional behavior by a hypnotist on record (assuming of course that this person has had professional training).

It is my opinion that the leading and suggestive manner of questioning Mr. Dilisio by the hypnotist raises the possibility that the so-called memories generated by this process could have been a mixture of real facts, fantasies, confabulations and outright fabrications owing to the numerous violations of standard professional practice evidenced in the transcript. The process was such that one cannot tell the difference between fact and fantasy since no effort was made to even determine whether the witness was hypnotized nor was the questioning conducted in an objective manner. Such a process as shown here also tends to encourage an exaggerated sense of confidence in a witness which makes cross-examination virtually useless.

Buckhout Report at 9-11 (See Appendix A).

Dr. Diamond first reviewed the hypnotist's qualifications:

In my opinion, none of the qualifications as stated in the resume established Mr. McCawley as an expert in psychology or hypnosis. His junior college graduation is hardly an appropriate educational background, and none of the hypnosis training centers or institutes which he mentions by name are considered adequate to provide proper training in the psychology of hypnosis.

Further, the various professional organizations to which he belongs do not, in any degree, establish his competency or expertise in the psychology of hypnosis. The "Association to Advance Ethical Hypnosis" and the other organizations which he claims to have trained and certified him, or of which he is a director or officer, have no standing within the scientific community of academic or clinical researchers and practitioners who use hypnosis.

Letter of Dr. Bernard Diamond to Michael Mello, 8/5/85 (See Appendix A).

Next, Dr. Diamond performed an extensive analysis of the tapes and transcripts of the hypnosis sessions. He found that these sessions were beset by exactly the problems which led the Bundy Court to exclude hypnotically refreshed testimony per se from future cases.

First, he found that Dilisio's recollections may well have been fantasies and hallucinations:

An habitual abuser of such drugs would be expected to have greater difficulty than the average individual in distinguishing truth from fantasy. If some of the events claimed to be recalled occurred while the subject was under the influence of such drugs, it is almost certain that memory distortions will occur. [I interpret the subject's statements on p.2 of

the second transcript to mean that he was under the influence of LSD ("acid"), alcohol, and marijuana during some of the time of these alleged events.]

Diamond Report at 2 (See Appendix A).

Second, he found the hypnotist provided Dilisio with an unacceptable degree of suggestion:

This first transcript begins sometime after hypnotic induction is entirely, or nearly, complete. The hypnotist gives the specific suggestion:

... the deeper you go the more you remember. Details begin to surface now gradually surfacing from your subconscious to the conscious level.

Leading questions are frequently asked:

Q. He never showed you anything?

A. No.

Q. No clothing, no jewelry, no nothing at all?

A. I think a purple pair of pants.

Q. You mean under pants or a --

A. Underpants. Bikini.

Q. A purple pair?

A. Uh huh.

. . .

Q. Okay. Do you remember anything about an older woman about mid-fifties?

Q. Her name is Kennedy.

. . .

Q. Do you remember anything about a girl named Depree? In Orange County?

. . .

Q. Did he tell you about anybody else that he tortured or raped or killed?

. . .

Q. Did he ever use a figure? How many he killed, Tony?

Diamond Report at 2-3 (See Appendix A).

Direct suggestions are given to the subject that he can remember certain events.

Q. What is Joe doing?

A. Talking about it.

Q. What is he saying? You can hear him. You can hear his voice. What is he saying?

. . .

Q. Can you see any other bodies?

A. Yeh.

Q. How many others do you see?

A. No.

Q. Uh?

A. I don't want to see it.

Q. You don't want to see it?

A. No.

Q. Alright. Is there any other body, with this body that you're looking at? Think this out. It will be easier later Tony, much easier.

. . .

Q. What does he do with them? [clothing]

A. I don't know. I never ask him.

Q. He never did tell you what he did with them?

A. Yeh, I can't remember.

Q. Did he tell you?

A. Yeh.

Q. Told you what he did with them?

A. Yeh.

Q. Well, then, you know what he did. You know where he put it. Where did he put it, Tony?

Diamond Report at 5 (See Appendix A).

Third, he found that Dilisio probably was confabulating:

I believe the circumstances of these hypnotic interviews with this adolescent boy and the assertions and leading questions of the hypnotist, as illustrated above, indicate a high probability that many, if not all, of the boy's recollections during, and subsequent to the hypnotic sessions, could be confabulated.

Diamond Report at 6 (See Appendix A).

Fourth, he found that the hypnotism would have rendered Dilisio immune to subsequent cross-examination at Mr. Spaziano's trial:

Hypnotic interrogations, such as these interviews, may falsely induce the strong belief by a witness that memories of specific events exist when, in fact, no such memories do exist. When such suggestions are given to a hypnotic subject, along with pseudo-scientific explanations insisting that memories are permanently recorded in the subconscious mind, it is almost certain that a susceptible person will generate memories in compliance with the demands of the hypnotist.

Such generated memories may be entirely false, yet the subject will usually have a totally

unwarranted belief and confidence in the validity of such hypnotically induced memories. The sense of confidence may be so strong that it defeats all cross-examination.

Diamond report at 6 (See Appendix A).

Fifth, he found that minimum procedural safeguards were not met:

Accordingly, the record of these hypnotic sessions must be considered grossly inadequate, and does not meet even the barest minimum standards acceptable to the legal or scientific community. [See State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) and "Council [on Scientific Affairs] Report: Scientific Status of Refreshing Recollection by the Use of Hypnosis," [Journal of the American Medical Association, vol.253, pp.1918-23, April 5, 1985.]

Diamond Report at 3 (See Appendix A).

He therefore concluded:

Accordingly, it is my opinion that Anthony Dilisio, to a high degree of probability, had his memory permanently distorted by these hypnotic interrogations, and that it is probable that considerable portions of what he claimed to have remembered might well be fantasy.

Diamond Report at 6 (See Appendix A).

If Mr. Spaziano's trial were held today, the Bundy decision would mandate the per se exclusion of Dilisio's hypnotically-induced testimony. However, the Bundy Court explicitly made its ruling prospective only. It did so to avoid a "flood" of cases challenging hypnotism, most of which would have been frivolous. But the non-retroactivity of the Bundy rule, while a good idea from the standpoint of judicial economy, is disastrous to the few cases, such as Joe Spaziano's, where hypnotism wrought a substantial injustice. Despite the fact that experts have

concluded that the testimony which convicted Mr. Spaziano was thoroughly and unacceptably tainted, Mr. Spaziano seems to have no recourse in the Florida's courts.

This situation presents a classic case for clemency. It is similar to the case of Clifford Hallman. Hallman was tried, convicted, and sentenced to death for the murder of Eleanor Groves. The Florida Supreme Court affirmed.¹⁶ Approximately two years later, Hallman filed a three-part motion to mitigate sentence with the sentencing circuit judge. The motion alleged that in 1975 the administrator of Groves' estate had filed suit against Tampa General Hospital contending that Mrs. Groves had died as a result of the negligence of the hospital rather than from the injuries inflicted by Hallman; that Hallman's acts were therefore not the cause of Groves' death; and that if in a new trial a jury found that the hospital's negligence was an intervening cause of death, that jury could not find Hallman guilty of homicide. The trial court denied all relief, and the Florida Supreme Court affirmed.¹⁷

Hallman received executive clemency from this Board. There, as here, subsequent developments cast a conviction and sentence of death in doubt. The same principles of justice and equity which supported Hallman's clemency call for clemency for Joe

¹⁶ Hallman v. State, 305 So.2d 180 (Fla. 1974).

¹⁷ Hallman v. State, 371 So.2d 482 (Fla. 1979).

Spaziano. As Governor Graham himself has recently been quoted as saying:

The purpose of clemency is to allow consideration of special circumstances that might not be available to a court applying strict laws and strict precedents.

Cabinet to Hear 'Mercy Killing' Arguments, The (Palm Beach) Post, August 8, 1985 at B9.

III. WHO IS JOSEPH SPAZIANO?

To appreciate who Joe is now, it is necessary to understand where he has been, and what he has been through.

A. The Car Accident

Normal life for Joe 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 severe head injuries: 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. (See Appendix C). 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 his 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 20-year old young man, whose primary assets until the accident had been his good looks and friendly, easy-going personality, was 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, difficult to live with. Once confident of his good looks, his self-concept 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 became calling him "Crazy Joe."

His family's own words, as provided in affidavits which are in Appendix D, speak most poignantly about the changes which overcame Joe. Joe's mother, Rose Spaziano says:

When Joe had the 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 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 though[t] 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 any more. His friends started calling him "Crazy Joe" because he would act so "spacey."

See Appendix D.

Barbara Spaziano Walker, Joe's sister, says:

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.

Joe had been engaged to a girl before the accident. He had given her a diamond ring, but she wouldn't visit him the whole time he was in the hospital and she broke the engagement after he came home. I was in the room when she came to tell him that. Joe was very depressed after she left and wanted to go for a ride. He wanted to go to a church. He could hardly walk at all. Bobby went with us and Joe cried and cried with Bobby and me.

After the accident, Joe couldn't recognize his good friends or even his aunts and uncles and cousins. 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.

See Appendix D.

Robert (Bobby) Spaziano says:

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 "spacey" 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.

See Appendix D.

The injuries, however, were not only cosmetic. The severe damage to his skull and brain left him with severe memory deficits, impaired judgment, and a tendency to "acting out"

behavior, particularly under stress. All of the psychological and psychiatric evaluations completed from the time of the accident to this date (collected in Appendix C) have noted these problems.

In a neurosurgical consultation conducted on July 7, 1966, soon after the accident, Dr. Leonard Zinker found:

CHIEF COMPLAINTS: Dream-like states.

PRESENT ILLNESS: This 20-yr old, white, right-handed male, while out walking at about 2:30 a.m. May 29, 1966, was hit by a car and brought to RGH ED in coma. He was found to have lacerations about the scalp, a fractured skull and right arm. He was cared for by Dr. Schmugler and Wiley. Pt began to speak several days after the accident. Dr. Wiley carried out a spinal tap on June 3, 1966 and found yellow fluid. The skull x-ray demonstrated a fracture running through the right parietal temporal bone and pt had a complete right facial paralysis. He was discharged from the hospital on June 20, 1966. Starting about Sat. 7/2/66 pt 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. He was examined at the RGH ED Tues. night 7/5/66 by the surgical resident at my request and started on phenobarbital, 30 mg. 3 times a day.

P.H. Born in Rochester Sept. 12, 1945. Parents are in good health. Has 6 brothers and 1 sister. Education: 7th grade. Serious illnesses: arthritic disturbance at the ages of 1½ and 12, diagnosed as rheumatoid arthritis by Dr. Bradford. Other accidents and injuries: nil. Tobacco: less than a pack of cigarettes a day. Alcohol: little. Job: mason.

PHYSICAL EXAMINATION: Height 5'6; weight 131 lbs; pulse 100 per min. Pt was accompanied by his mother and upon going into the doctor's office sat in the doctor's chair. He was then told where to sit by his mother. He appeared

to be about 18 years of age, and had an extremely noticeable complete paralysis of the right half of his face. His speech was fairly clear, despite the facial paralysis. He was very unsure of himself and constantly looked to his mother to help him answer simple questions. He did recall being at a bar shortly before his injury and claimed he had no recall of ever having been in the hospital or having left the hospital. Apparent recall started about 1 wk ago. He had some tattoos over both forearms (1 on the right forearm self-made). He had some dry blood in both external auditory meati, more so on the right, and the right drum was opaque and the left drum less opaque.

Cranial nerve study found a complete right facial paralysis with inability to close the right eyelids. Weber test lateralized to the right. Bone conduction was better than air conduction on the right and hearing on the right was greatly decreased. Reflex study found 3+ knee responses with a 2+ left and a 3+ right ankle response but no clonus. There was no Hoffman or Babinski response. Coordination testing well performed. Sensorium: pt was not sure of the date and had a somewhat foggy facial expression. Simple arithmetic with help was accurate.

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.

RECOMMENDATIONS: Pt scheduled for an EEG on Thurs. July 14, 1966, after which he will be re-examined. He is to continue on his phenobarbitol. A brain scan was obtained on 6/22/66, suggestive of some disturbance in the right parietal area. This may be repeated.
LZ/rsm (cc: Dr. Wiley)

Memorandum from Dr. Leonard Zinker, MD, to Samuel Shoolman, Esq.,
July 7, 1966 at 1-2. (Appendix C).

Two weeks after this evaluation, Mr. Spaziano was examined by Dr. Wiley:

I saw Mr. Spaziano in the office July 20. This is the first I have seen him since he was discharged from the hospital one month ago.

For the first week or two after discharge from the hospital he apparently began to have rather frequent dreamlike states. He saw Dr. Zinker on July 7, and again on July 11. Dr. Zinker had him obtain an electroencephalogram by Dr. Salmone, which was reported as being normal.

At the present time the boy himself has no complaints. His mother said that his behavior is better, but she does not feel his memory is entirely normal.

On examination he was alert. His speech was normal except for slight slurring because of his right facial paralysis. Memory for recent events was only fair. For instance, he was able to name the President of the United States, but not the Governor of New York. He did fairly well in naming five different kinds of fruit, but very poorly in naming vegetables, and there was some question as to whether or not he knows what a vegetable is. His arithmetic ability in subtracting serial 7's was fairly good, but he performed very slowly on this test. The optic fundi were within normal limits. There was still a complete right facial paralysis. Hearing was slightly diminished in the right ear and Weber's test was lateralized to the right. Facial and corneal sensation was normal. There was no other motor weakness. There was no sensory loss anywhere, and no cerebellar signs. The deep tendon reflexes were equal and active and there were no pathological reflexes.

He is now definitely better than he was when I last saw him a month ago. The only thing which is not improved is the right facial paralysis, and the prognosis regarding this is still indeterminate. His memory is still apparently not normal, but it is rather difficult to evaluate this, since his school history indicates his intelligence may be somewhat below normal anyway. He said that he was

dismissed from Jefferson High School and then attended Madison High School, but left school while in the eighth grade at the age of sixteen.

I am to see him again in two months. If there is no evidence of returning function of the facial nerve in four months, I may possibly advise a hypoglossal-facial anastomosis.

Letter from J. LaRue Wiley, MD, to Herbert Schugler, MD, July 22, 1966 at 1-2. (Appendix C).

On December 30, 1967, a year and a half after the automobile accident, Mr. Spaziano voluntarily admitted himself to the Rochester State Hospital, a psychiatric facility, because of his behavior changes. 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. On admission, patient is very dull, hardly gives any information. While questioned he kept biting his nails and occasionally would move his head in yes or no fashion to the questions posed. He was sent to Ward 5M-008 with the following medications prescribed: Thorazine, 50 mg. q.i.d., and Tofranil, 25 mg. t.i.d.

Voluntary Commitment at 1. (Appendix C).

A mental examination dated January 5, 1968, noted an "inability to smell or taste, impaired vision -- symptoms which patient attributes to the car accident." His stream of mental

activity was described as "incoherent," "flighty" and "blocked" and his emotional mood and affect were "depressed" and "flattened." The evaluation mentioned that the accident had caused "personality changes." See Appendix C.

In May, 1976, Dr. Dionisio Britton conducted a psychiatric evaluation for the Florida Department of Corrections. Dr. Britton noted that Mr. Spaziano had suffered a "head trauma" and was "pronounced dead and after he became conscious he had amnesia and up to now his memory is poor for recalling past events." He found that "insight and judgment are poor due to head trauma, poor value system, and inadequate ego and super ego development." Thus, Dr. Britton diagnosed Mr. Spaziano as both "(1) anti-social personality (2) organic brain syndrome is due to trauma." See Appendix C. Remarkably, Dr. Britton apparently did not attempt to determine if the antisocial behavior was caused by the organic impairment.

On July 27, 1976, following Mr. Spaziano's conviction of first-degree murder and sentence of death, Dr. Paul Decker of the Florida State Prison wrote a one-page Psychological Screening Report. Dr. Decker noted a "good possibility of organic brain dysfunction due to trauma ... Subject was hospitalized after being hit by a car which resulted in the brain damage ... The brain damage is rather extensive, with complete post-traumatic amnesia symptoms." (Appendix C).

In early 1985, Joe Spaziano was examined by mental health professionals, who, for the first time to our knowledge, tested him extensively to determine whether his head injuries and

behavior were linked and whether Joe Spaziano was competent to make certain decisions at the time of his trial. Dr. James Valley conducted an extensive neuropsychological evaluation. See Appendix C. The results of Dr. Valley's evaluations were considered and incorporated into a final report prepared by his colleague, Dr. Harry Krop, who also considered Joe Spaziano's past medical and legal records, reports from his family and interviews with Joe Spaziano.

Dr. Krop concluded that:

The current evaluation reveals a man who presents as highly suspicious, anxious and emotionally labile. These emotional manifestations are secondary to an 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.

Although Mr. Spaziano was adjusting marginally prior to his head trauma, following the accident, he began to exhibit marked emotional, cognitive and personality changes. He became increasingly frustrated, showed marked feelings of inadequacy and manifested an extremely poor self-concept. As a result, Mr. Spaziano became an easy target for the more aggressive members of a motorcycle gang. As Mr. Spaziano became increasingly incorporated (and reinforced) into the Outlaw "family," it was increasingly difficult to withdraw.

Mr. Spaziano has almost no insight into his mental condition and has difficulty perceiving himself in a realistic manner. Although he is willing to recognize his memory deficits, he has considerable difficulty acknowledging his "craziness," and, instead, rationalizing his peculiarities as attention getting behavior patterns. Thus, Mr. Spaziano attempts to deny that he has serious psychiatric problems and,

in fact, would attempt to minimize his pathology even if it might be in the best interests (i.e., legally) to do otherwise. Although one can only speculate, it is likely that Mr. Spaziano was not competent to assist his attorneys during the penalty phase of his trial, in which he was convicted of First Degree Murder. Based on the current evaluation, which indicates severely impaired judgment under stressful conditions, there is a high probability that following his conviction, his judgment was so impaired that he was not competent to make rational and sound decisions on his own behalf.

* * *

Recent neuropsychological testing conducted in November, 1984, indicated a number of strong indications of unquestionably impaired brain functioning. Although his overall intellectual functioning is low average, his verbal skills are within the mentally deficient range (VIQ on WAIS-R- 69). The evaluation revealed impaired verbal memory and other left hemispheric deficits.¹⁸ Frontal lobe functioning was also impaired bilaterally. The overall testing suggested diffuse moderate to severe impairment of left hemispheric functioning which is probably related to congenital deficits and deficits acquired from the auto accident. Mr. Spaziano's current medical status is unremarkable, although his behavior during the evaluation process was suggestive of petit mal seizure activity.

* * *

According to the reports I reviewed, Mr. Spaziano apparently went through some drastic personality changes following his accident. His friends referred to him as "crazy Joe," a name which Mr. Spaziano takes pride in, in that he gained a lot of attention by making people

¹⁸ The left hemisphere controls "verbal" behavior in a number of respects. The left side deals with logical decision making, the ability to use ideas as a guide for behavior, dealing with concepts and premises to logical thought. Essentially, the left hemisphere is the seat of reason, logic and rationality.

laugh. A number of incidents were described in which Mr. Spaziano apparently placed himself in dangerous situations (e.g., in the path of a car), while apparently "staring off into space." Following the accident, Mr. Spaziano recalls feeling lonely and rejected and apparently was accepted as part of the Outlaw "family." As he had always shown an interest in motorcycles, the Outlaws served as a stabilizing force in Mr. Spaziano's life at that time. He felt accepted by a group of individuals who patterned and shaped his behavior. Although Mr. Spaziano recalls a desire to leave the group at times, his non-assertiveness and past history of being abused when he attempted to leave another gang resulted in his remaining with the Outlaws. Mr. Spaziano's inordinate need for approval (generally satisfied by the Outlaws) also made it difficult for him to terminate his involvement with the group.

See Appendix C.

Dr. Krop's report was based, in part, upon the neuropsychological evaluation conducted by his colleague, Dr. James Vallely. Dr. Vallely, a neuropsychologist, gave Mr. Spaziano a detailed clinical interview and Mental Status Examination as well as the following psychometric tests:

- (1) Wechsler Adult Intelligence Scale-Revised (WAIS-R)
- (2) Wechsler Memory Scale-Form I
- (3) Rey Auditory Verbal Learning Test
- (4) Milner Facial Recognition Test
- (5) Benton Visual Retention Test (memory form)
- (6) Benton Facial Recognition Test
- (7) Poppelreuter Test
- (8) Hooper Visual Organization Test
- (9) Rey-Osterrieth Complex Design (copy)

- (10) Bender Gestalt Test (immediate recall, copy, and 10' recall)
- (11) Grip Strength
- (12) Tapping Test
- (13) Tests of Sensory Acuity
- (14) Alternate Motor Tests
- (15) Luria Figures
- (16) Trail Making A & B
- (17) Wisconsin Card Sort
- (18) Proverb Test
- (19) Halstead-Reitan Aphasia Screening Test
- (20) Tests of Simulation of Cognitive Deficits.¹⁹

See Appendix C. Dr. Vallely concluded:

Joseph Spaziano presents with 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 predates that time period. The results also

¹⁹ Together, these tests comprise a battery of neuropsychological assessment which probes every measurable aspect of brain function, including memory function (immediate, short, and long term recall), the ability to change behavior appropriately in response to changes in environment, and logical thought (including temporal sequencing, associative logic, and the ability to maintain the appropriate focus from one point in a logical sequence to the next).

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 petit mal seizures as the client appears to "blankout" or lose his focus of consciousness periodically.

Mr. Spaziano has moderately poor judgment in general, but when he experiences even mild stress, his cognitive and emotional control deteriorates to almost primitive levels. Clearly, this deterioration would be dramatic and extreme given serious stress. He became verbally aggressive and paranoid during even simple tasks that he perceived as stressful and it is my professional opinion that he would probably lose control of his thoughts, emotions and behavior if faced with even moderate threat, stress, or emotional stimulation.

While he exhibits personality disorder with paranoid, antisocial and borderline features, the problems in controlling behavior suggested in such disorders are directly related to the types of brain damage exhibited by the client. Such brain damage is often associated with loss of social judgment, diminished impulsive control, poor insight, emotional lability, paranoia and acting out behavior. 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 C.

Most recently, Dr. Sotomayer of the Florida State Prison conducted a psychiatric evaluation of Mr. Spaziano in March of 1985. Dr. Sotomayer's report does not state upon what information it was based other than an interview with the subject. Dr. Sotomayer wrote that "Spaziano stated that he was the victim of a

hit and run accident in 1966 and was lucky to be alive.... Brain damage in this case resulting to violence can be clinically correlated through neurology consult with inmate refused."²⁰ See Appendix C.

Thus, based on all available reports, there can be no fair question that the head injuries remain a major causal factor of Joe Spaziano's thoughts and actions today.

B. Family Background

Joseph Spaziano was the second of eight children born to Constanzio and Rose Spaziano. From all reports of family and neighbors, Mr. Spaziano worked hard, sometimes holding two or three jobs at a time, to provide materially for his family.

²⁰ Though the psychological report notes that the neurological examination was "refused" by Mr. Spaziano, in fact both the psychological and neurological evaluations had been directed to be cancelled by the Legal Office of the Governor (Arthur R. Weidinger, Jr., Assistant General Counsel). This direction apparently was not communicated from the parole commission to the prison. In the meantime, as Mr. Spaziano's counsel, we had informed him that the evaluations had been cancelled; so when Mr. Spaziano was confronted with persons seeking to perform those evaluations, the result was the confusion reflected by the report. Upon hearing of the attempted evaluation of Mr. Spaziano, we confirmed with Mr. Weidinger that he had indeed directed the interviews to be cancelled.

As shown by this supplemental memorandum, Mr. Spaziano has received the most reliable and comprehensive neurological testing available to medical science -- neuropsychological testing -- though he does desire and unsuccessful attempts have been made for a CAT scan and an EEG. Those tests are, unfortunately, unavailable to Mr. Spaziano at the prison.

Unfortunately, however, he had little or no patience or understanding for the needs of his young children who were terrorized by his verbal and physical abuse. Mr. Spaziano is now harmless because of his advanced age and ill health. The truth is, however, that the scars from his previous behavior toward his family run deep.

Even by the evaluation of persons outside the home who saw Mr. Spaziano with his children, he is described as stern, rough, and a strong disciplinarian. Neighbors saw him chase down and hit the boys with 2 x 4s or any other material available.

Life behind the closed doors of the home was traumatic for all of the children. Barbara reports that her father's screaming tirades began from the moment he opened the door upon his return from work. Rather than run to greet their father, the children would hide. Barbara, the only girl of the family, recalls sitting with her hands over her ears and humming during meals to drown out her father's belligerent tirades. She recalls when one of the boys reached for a second piece of chicken, only to have his small hand cruelly stabbed with a dinner fork by their father. Mr. Spaziano was a belligerent and violent alcoholic who reigned over the family through verbal and physical violence. All of the children were terrified of him. See Appendix D.

The violence did not stop with Joe's accident. Even as he was attempting to learn again how to walk, Joe's father would assault him. It was to escape this tyranny that all of the

children left home as young teenagers. As soon as he was able to leave the house after this accident, Joe escaped, turning to the family of the motorcycle gang who accepted his physical and psychological disfigurement. With Joe's impaired judgment, limited coping skills and need for support, his seeking the fellowship of the motorcycle brotherhood is completely understandable. He saw nowhere else to turn.

C. The Motorcycle Brotherhood

After the car accident, Joe Spaziano needed constant physical, emotional and psychological support. His need for approval and acceptance became almost an obsession. His father's verbal and physical abuse made life at home impossible. When members of a local motorcycle club offered support, Joe accepted.

For Joe Spaziano, the members of the motorcycle club served as a surrogate family. He has always regarded these members as "brothers." Within this family, his psychological and physical disfigurement were regarded as normal. With his rather low intelligence, now complicated by the after effects of the accident, Joe Spaziano was easy prey.

At one point, Joe attempted to extricate himself from the motorcycle gang. For this traitorous act, he was severely punished -- tortured, beaten and left for dead. A friend took him home. His sister, Barbara, and her husband came to help him. Barbara recalls that:

I saw Joe the night he tried to leave the motorcycle club and they beat him up. It was really terrible. Joe's wife called my husband

and me and we went to their house. Joe was almost lifeless. They had beaten his legs and his arms and all over his body. They had used a branding iron or something hot to burn off a tattoo on his arm. He had cigarette burns everywhere, even on his private areas. His whole body was bloody. Joe's wife called her parents in Florida and they left very quickly, leaving everything, including their clothes and furniture and home behind. My husband helped carry Joe from the house to get them out of there as quickly as possible.

See Appendix D.

IV. CONCLUSION

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 recent 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 historian. The most recent psychological and neuropsychological evaluations completed note that his "blinking out" during conversations is probably the result of petit mal seizures, one of the lingering results of the severe head injuries suffered in the car accident.

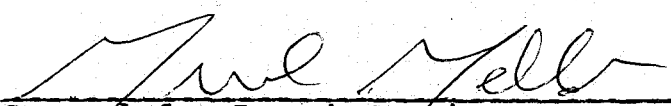
Joe Spaziano appeals for commutation of sentence through executive clemency. He has adjusted to life in prison. He does not receive disciplinary reports, and he spends his time improving his considerable talents as an artist. Under these circumstances, there would be no purpose served in taking his life. And extinguishing his life will not extinguish the very real doubt about his guilt.

Respectfully submitted,

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