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CONTENTS

Articles

Commentary

Note

Comment

Book Review

OUTLAW JUDICIARY: ON LIES, SECRETS, AND SILENCE: THE FLORIDA SUPREME COURT DEALS WITH DEATH ROW CLAIMS OF ACTUAL INNOCENCE

Michael Mello†

TABLE OF CONTENTS

† J.D., 1982, University of Virginia; B.A., 1979, Mary Washington College. Professor of Law, Vermont Law School. Professor Mello has, on and off, represented Joseph Spaziano for thirteen years. The author wishes to express special gratitude to two former Vermont Law School students, Elyse Ruzow and Tanja Shipman, for their genuine collaboration on the Petition for Writ of Certiorari found within. Were it not for the policy of the *New York City Law Review*, Tanja and Elyse would appear as co-authors of this article. Additionally, the author wishes to thank a group of current and former Vermont Law School students, who formed themselves into a pro bono "law firm" called BDNMCB ("The Best Defense No Money Can Buy"), and who generously worked, pro bono, on all aspects of the conceptualization and creation of the court documents found within: Deanna Peterson, Katherine Clarke, Daniel Factor, Christopher Gilmore, Douglas Gould, Catheryn Brigid Lynch, Thomas Malone, Sharon Pappas, Laurie Rosenweig, Elyse Ruzow, Tanja Shipman, Alexandra Varlay, Emilia Vargas-Ashby.

This article is dedicated to Mike Farrell, Beth Curnow, and Beth Grossbard.

I. INTRODUCTION

I think there is little meaningful difference between a good United States Supreme Court brief and a law review article. Both work products have a point of view. Each must deal with counter-evidence and counter-arguments in a fair and intellectually satisfying way. While their writing styles may differ, their substance and essence are closer than one might think — or so it seems to me.

Over the years, some of my law review articles originated as briefs or other litigation products and vice versa. In crafting law journal articles, I always try to write with an eye to the busy litigator (or judicial clerk) who might find my scholarship of some use. To put it crudely, I try to write "plagiarizable" scholarship.

In the past, I have not typically attempted to publish unmediated pleadings and correspondence in a law journal. I do so here for several reasons. First, Joseph Spaziano's case is unique to me for reasons I shall set out below. Second, when I wrote the Petition for Writ of Certiorari[1] reproduced here, I was self-consciously writing for an audience not limited to the nine United States Supreme Court Justices who would decide whether Mr. Spaziano lived or died. I knew as I was writing these pleadings that they were likely to be the last I would file in court on behalf of Mr. Spaziano or any condemned person. They were written for the Justices, of course, but they were also written for Joseph Spaziano and his family. In them, I try to set out where and why in this case the criminal justice system failed. Third, some of the materials reproduced here are unavailable in any other public forum, and they may be of importance to those who would not normally be privy to them (e.g., the Statement to Florida Governor Lawton Chiles[2] has not previously been made available to the general public; the Florida Supreme Court oral argument of September 7, 1995[3] was officially audiotaped by Florida State University, but was not officially transcribed; the United States Supreme Court refused to file the original certiorari petition[4] because it exceeded the Court's new

[1] *See infra* pp. 343-416 and notes 83-110.
[2] *See infra* pp. 284-89 and notes 46-48.
[3] *See infra* pp. 290-313 and notes 49, 50.
[4] *See infra* pp. 343-416 and notes 83-110.

page limit;[5] the Florida Supreme Court refused to file the recusal motion[6] because it previously ruled that I "effectively withdrew" as Mr. Spaziano's representative;[7] Judge Eaton's Order Mandating a New Trial[8] is unreported.[9])

For me, the most important reason for publishing unmediated pleadings is the uniqueness of Joseph Spaziano's case. These pleadings address significant aspects of the case — significant for us, at any rate. By the time you read these words, Joseph Spaziano may be dead. These pleadings are merely words, but words cannot convey the magnitude of this case.

It may be near impossible to fully appreciate the unbelievable events that have taken place throughout Mr. Spaziano's case. Be that as it may, I have nonetheless included in subsequent sections several documents that have come to be in the last year or so. I think it best to experience this nightmare as Mr. Spaziano has, through legal (and not so legal) memoranda. You see, some things are more easily quantified. One can write of a 1996 plane crash in the Florida Everglades that took 109 lives[10] or a 1992 hurricane that wiped out a trailer park in Homestead, Florida.[11] How does one quantify nearly twenty years on Florida's death row for crimes one did not commit? How does one quantify five death warrants? How does one quantify being strapped into an electric chair to pay for someone else's crime? The meaning of life is that it eventually ends.

In 1986, Neil Skene asked whether the Florida Supreme Court "knows what it's doing" when it reviews death cases.[12] Skene's devastating answer to his own question was "no."[13] According to my own personal experience with Florida's death court of last resort, much of Skene's critique rings as true today as when first published almost a decade ago.

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[5] The rules of the Supreme Court provide that every typed and double spaced Petition for a Writ of Certiorari shall not exceed sixty-five pages. SUP. CT. R. 33.3.a.

[6] *See infra* pp. 417-37 and notes 111-19.

[7] *See* Spaziano v. State, 660 So. 2d 1363 (Fla.) (per curiam), *modified*, (1995), *cert. denied*, 116 S. Ct. 722 (1996).

[8] *See infra* pp. 438-44 and notes 120-26.

[9] While Judge Eaton's Order is unreported, it was recently published. *See* Michael Mello, *Postscript-Death and His Lawyers*, 20 VT. L. REV. 945 (1996).

[10] Robert D. McFadden, *109 Feared Dead as Jet Crashes in Everglades*, N.Y. TIMES, May 12, 1996, at B1.

[11] Catherine S. Manegold, *Hurricane Rips Through Florida and Heads Into Gulf*, N.Y. TIMES, Aug. 25, 1992, at A1.

[12] Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What Its Doing?*, 15 STETSON L. REV. 263 (1986).

[13] *Id.* at 354.

Whereas Skene's field of inquiry was global, mine is far more modest. In this article, I address only one discrete, albeit important, aspect of the Florida Supreme Court's review of capital cases; how the court dealt with a death row claim of factual innocence in the case of Joseph Spaziano.[14]

In this day of federal judicial deregulation of death, the performance of state courts becomes the critical field of inquiry. A perverse aspect of how the State of Florida decides who dies is this; secrecy. It is ironic that the Sunshine State's highest court approaches death row claims of innocence in shadows. Mr. Spaziano's case is the most recent instance of the Florida Supreme Court's penchant for secrecy in deciding who dies. Secrecy, however, has long been a narrative theme in Florida's capital punishment system. In a line of cases including *Ford v. Wainwright*,[15] *Spaziano v. State*,[16] *Gardner v. Florida*,[17] and *Brown v. Wainwright*,[18]

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[14] Spaziano v. State, 545 So. 2d 843 (Fla. 1989); Spaziano v. State, 489 So. 2d 720 (Fla.), *cert. denied*, 479 U.S. 995 (1986); Spaziano v. State, 393 So. 2d 1119 (Fla. 1981), *petition for post-conviction relief remanded*, 660 So. 2d 1363 (Fla. 1995), *cert. denied*, 116 S. Ct. 722 (1996); Spaziano v. State, 393 So. 2d 1119 (Fla. 1981), *habeas corpus denied sub nom.*, Spaziano v. Dugger, 584 So. 2d 1 (Fla. 1991), *denial of post-conviction relief aff'd sub nom.*, Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 911 (1995); Spaziano v. State, 393 So. 2d 1119 (Fla. 1981), *appeal after remand*, 433 So. 2d 508 (Fla. 1983), *cert. granted*, 464 U.S. 1038, *aff'd*, 468 U.S. 447 (1984), *habeas corpus denied sub nom.*, Spaziano v. Dugger, 557 So. 2d 1372 (Fla. 1990), *post-conviction relief denied sub nom.*, 570 So. 2d 289 (Fla. 1990); Spaziano v. State, 393 So. 2d 1119 (Fla.), *cert. denied*, 454 U.S. 1037 (1981), *reh'g denied*, 454 U.S. 1165 (1982).

[15] 477 U.S. 399 (1986). After Florida sentenced the defendant to death, Ford v. State, 374 So. 2d 496 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980), the United States Supreme Court held that Florida procedure in capital cases was deficient, for Florida did not allow the defendant to rebut evidence of state-appointed psychiatrists and did not allow the defendant to offer evidence of his insanity.

[16] 468 U.S. 447 (1984). In sentencing Mr. Spaziano to death, Spaziano v. State, 433 So. 2d 508 (Fla. 1983), *cert. granted*, 464 U.S. 1038, *aff'd*, 468 U.S. 447 (1984), the Florida Supreme Court relied on confidential information regarding his prior felony convictions. The United States Supreme Court found it acted in error because Mr. Spaziano was left out of the process and was never given an opportunity to respond to the evidence.

[17] 430 U.S. 349 (1977). After Florida sentenced Gardner to death, Gardner v. State, 313 So. 2d 675 (Fla. 1975), *cert. granted*, 428 U.S. 908 (1976), *vacated*, 430 U.S. 349 (1977), the United States Supreme Court found his due process was violated when the Florida Supreme Court withheld confidential information during the resentencing hearing. The Court found the information would have persuaded the jury to sentence Gardner to life in prison rather than death.

[18] 392 So. 2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981). The appellant accused the Florida Supreme Court of withholding information that was not admitted at trial and never made its way into the trial record. This information included psychiatric evaluations, prior convictions, etc. The appellees were left not knowing what information was used in the review process when the court determined sentencing in this capital case.

the Florida Supreme Court shrouded the death decision in secrecy.

The Florida Supreme Court's penchant for secrecy raises an obvious question: What is the State of Florida trying to hide? In Joseph Spaziano's case, Florida was hiding evidence of innocence. The State's secrecy in *Spaziano* revealed evidence exculpatory in the extreme; a videotaped recantation by the State's central witness against Mr. Spaziano at his capital trial.[19]

I have written elsewhere about Joseph Spaziano's case.[20] I am convinced he is innocent.[21] However, his "innocence" was irrele-

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19 *See infra* note 21.

20 *See* Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald - and Not to any Defense Lawyer or Judge*, 20 VT. L. REV. 19 (1995) [hereinafter Mello, *Death and His Lawyers*]; Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513 (1988); Mello, *Postscript-Death and His Lawyers*, *supra*, note 9; Ruthann Robson and Michael Mello, *Ariadne's Provisions: A 'Clue of Thread' to the Intracacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 87 (1988); Michael Mello, The Hypnotized Witness and the Condemned Man (Oct. 1996) (on file with the *New York City Law Review*).

21 The facts of Joseph Spaziano's case have been detailed elsewhere. *See* Mello, *Death and His Lawyers*, *supra* note 20. However, since it is the facts of his case that prove his innocence, some backround is necessary.

> Mr. Spaziano was accused of murdering Laura Lynn Harberts, a vibrant young woman whose body was discovered in a garbage dump in Seminole County, Florida, on August 21, 1973. She was identified by dental records, and was last seen alive on August 5, 1973.
>
> Beverly Fink was Laura Harberts' roommate in Orlando. According to Ms. Fink, the last time she saw Ms. Harberts was on a Sunday afternoon, about August 5, 1973. The previous night, Ms. Fink and her boyfriend, Jack Mallen, were preparing to leave their apartment. At that time, Ms. Harberts was on the phone and, as Fink and Mallen were leaving, Ms. Harberts said, "Hold on a minute, Joe," and then waived goodbye. Ms. Fink stated she and Mallen returned to the apartment about 2:30 or 3:00 a.m. and Ms. Harberts was asleep on the couch.
>
> Later that same night, someone knocked at the door. Ms. Harberts asked Jack Mallen to go to the door but not to open it, and tell whoever it was to go away; it was too late at night, and she did not want to talk to him. Mr. Mallen complied with the request and the person went away. Ms. Fink further testified that she had spoken briefly with Mr. Spaziano once sometime in July 1973, when he came by the apartment on a weekend afternoon and asked to talk to Ms. Harberts. According to Ms. Fink's recollection, the man said he had met Ms. Harberts in Eola Park. After talking for a few minutes, the man left.
>
> On cross-examination, Ms. Fink testified that Ms. Harberts was not dating Mr. Spaziano, and there was another "Joe" who worked at the hospital with Ms. Fink and Ms. Harberts. Ms. Fink could not say which "Joe" Ms. Harberts was referring to on the phone the night before she was last seen.

William Coppick and Michael Ellis testified that approximately *two years* prior to Ms. Harberts' disappearance, Mr. Spaziano lived in a trailer in the same general area where Ms. Harberts' body was found. Mr. Coppick also testified that Mr. Spaziano told him about finding some bones, but Mr. Coppick did not say where or exactly when the alleged conversation took place. Mr. Ellis further stated that Mr. Spaziano took him to the general area where the body had been found. He concluded that Mr. Spaziano went to get some marijuana "stashed" there. Again, Mr. Ellis was unsure of the date when this took place.

The State's chief witness was an acquaintance of Mr. Spaziano named Anthony Dilisio [sic], who was sixteen years old at the time of the events in question. He testified that he accompanied Mr. Spaziano to a dump, for the ostensible reason, according to Dilisio [sic], that Mr. Spaziano could show him some women that he had raped and tortured. Dilisio [sic] testified that he saw two female bodies in the dump. He did not at the time report what he had seen to the police.

Dilisio [sic] testified he never believed Mr. Spaziano and that he thought Mr. Spaziano was bragging to impress him. Dilisio [sic] further indicated that he idolized Mr. Spaziano and that he wanted to ride motorcycles with him. Dilisio [sic] said he did not report what he had seen because he wanted to become a member of the Outlaw Motorcycle club.

Tony Dilisio [sic] *was* the State's case. The prosecutor told the trial court during a motion to preclude Dilisio's [sic] testimony that "if we can't get in the testimony of Tony Dilisio [sic], *we'd absolutely have no case here whatsoever - So either we're going to have to have it through Tony, or we're not going to have it at all.*" And as the State argued to the jury in closing argument, if they did not believe Mr. Dilisio [sic], they had to acquit Mr. Spaziano. The closing argument proved prophetic. After lengthy deliberation, the jury stated that it was having trouble reaching a verdict. The jury was told to continue deliberations and was told by the court that it was their *duty* to try to agree upon a verdict (a so-called "dynamite charge"). They tried again and reported they still did not believe they could reach a verdict. The court gave a more emphatic "dynamite charge," late in the evening, and a verdict of guilty was returned within minutes. The only evidence that could have possibly convicted Mr. Spaziano was Mr. Dilisio's [sic] testimony, and the reason for the juror uncertainty was accurately portrayed by the State: They "struggled so diligently with Mr. Dilisio's [sic] testimony."

In contrast to the difficulty the jury had in reaching its guilty verdict, it reached an almost immediate sentencing verdict of life imprisonment. This verdict suggests strongly that the jury was attempting to use the life verdict as its only available safeguard against the overall weakness of the evidence. If it had believed the State's evidence, the jury would have believed that Mr. Spaziano had committed a brutal crime. Yet the jury voted for life.

What was *not* revealed to the jury that convicted Mr. Spaziano, or to the judge that sentenced him to death, was that there was a strong likelihood that the singularly devastating Dilisio [sic] testimony was manufac-

tured. Mr. Dilisio [sic] did not "remember" his story until he was under police hypnosis . . . .

* * *

At trial, counsel for Mr. Spaziano attacked Dilisio's [sic] testimony by using traditional tools of cross-examination. He stressed that Mr. Dilisio [sic] was an admitted drug user before, during, and after the alleged dump incident. Dilisio [sic] admitted that while on LSD he sometimes hallucinated, especially when he combined marijuana and LSD. In closing argument, counsel urged the jury to feel sorry for Dilisio [sic] but not to believe him. He suggested that Dilisio [sic] might have honestly been confused, either by drugs or by the police. This strategy of discrediting Mr. Dilisio [sic], was central to any hopes of a defense victory in this case, but in pursuing it counsel failed to employ his most potent weapon. Counsel did not reveal the fact that Dilisio [sic] never "recalled" the alleged incident at the dump until after he went to a police hypnotist.

* * *

I have a juror affidavit that says that the jury recommended life imprisonment rather than death because *they* weren't so certain that he was guilty at all . . . . They knew he was an Outlaw (his club colleagues attended the trial, in full biker regalia), and they were squeamish about letting him loose. . . . So the jury found him guilty of first degree murder, but voted . . . against the imposition of death. There was a catch, however: [T]he trial judge didn't know the *reason* for the jury's life recommendation, and Florida law does not permit a judge to factor such lingering doubt into a capital sentencing decision. . . .

* * *

The post-trial investigation did more than reveal the hideous unreliability of Dilisio's [sic] hypnotically-warped testimony. As mentioned previously, the victim - Laura Harberts - had a roommate, Beverly Fink. At trial, Ms. Fink testified that Ms. Harberts had received a telephone call from "Joe" just before the time of her disappearance. The State implied and argued that the telephone call was from Joe Spaziano. Although Mr. Spaziano was able to *argue* that the call may have been from any other "Joe," including Joe Suarez, the exhibitionist whom Laura Harberts dated from time to time, the jury was clearly led to believe that the fact that the caller *may* have been Mr. Spaziano was an incriminating piece of circumstantial evidence. Yet, we now know from recently disclosed police files that the police had determined that the caller was indeed Joe Suarez *and* that the [S]tate failed to disclose this fact. In addition, Joe Suarez denied to the police that he had been with the decedent on August 5, 1973. Yet, in an undisclosed documented interview, the police were able to conclude that Suarez *was* with the decedent on the night of her disappearance.

During the investigation, the State believed that Laura Harberts' killer was Lynwood Tate, although none of the documents suggesting Mr. Tate's guilt were disclosed to the defense at trial. Mr. Tate was given several polygraph tests about his role in the killing, which he *failed*. He was a known rapist and all of the investigators involved concluded that Tate had committed the murder. Tate told the investigators "on several occasions" that "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

vant to those whose opinions mattered — the judges and governors who decided whether he lived or died.[22] He is a victim of lies, incompetent counsel, police collusion and a court's cowardly reluctance to admit error and reverse itself. Additionally, he is a victim of a "clemency" board that dispenses mercy based on polling data; that hears only from those who want executions carried out more swiftly than ever; that regards all claims of innocence as equally dubious; and that sees electrocution of human beings as the last proof that the Florida government can do something right. Mercy is not strained, it is vaporized. Justice lives elsewhere.

This is my last capital case. In the end, it was two small details that became the final straws for me. First was the United States Supreme Court's page limit.[23] It is a petty thing, and its pettiness is the point. The Justices' law clerks could not be bothered to read an extra forty-five, double-spaced pages about why Florida was on the verge of executing an innocent man. This obscene pettiness is ironic given the Court's alleged belief that "death is different."[24] Second, and one of the most bizarre twists of the Florida Supreme Court's vile performance in Mr. Spaziano's case, was its unilateral decision to fire me as his lawyer. This decision was applauded by

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> 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 at trial.
>
> The State also failed to disclose the contents of an interview with Mr. Dilisio [sic] 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 [sic] where the subject of the murders in the dump arose. The police notes indicate that all Mr. Spaziano had ever (allegedly) said to Dilisio [sic] was, "[M]an, that's my style." The report does not indicate that Mr. Spaziano admitted to the murder or that he gave any other information to Mr. Dilisio [sic], but he only supposedly claimed that it was his "style." Of course, six months later, in the first recorded statement of Dilisio [sic], the story had radically changed. By the time of the trial, Dilisio [sic] claimed even more extensive statements were made by Mr. Spaziano. Yet, defense counsel did not have available the contents of the first interview . . . .

Mello, *Death and His Lawyers*, *supra* note 20, at 28-33 (citing Michael Mello, Draft of Editorial: Save an Innocent Man, the Courts Refuse (June 4, 1995) (on file with author) (emphasis in original)).

22 Mello, *Death and His Lawyers*, *supra* note 20; Mello, The Hypnotized Witness and the Condemned Man, *supra* note 20.

23 SUP. CT. R. 33.3.a., *supra* note 5.

24 Gregg v. Georgia, 428 U.S. 153, 188 (1976).

the *Orlando Sentinel*,[25] the *St. Petersburg Times*,[26] and — most painfully to me — the *Miami Herald*.[27] The Florida Supreme Court's determination to fire me from this case was readily apparent. After the Florida Supreme Court modified its September 8, 1995 decision,[28] Mr. Spaziano filed numerous motions in the days that followed. On September 20, 1995, I received a letter from the Supreme Court of Florida, Office of the Clerk. It said in its entirety:

> Your letter to Joseph Spaziano, Motion to Hold Evidentiary Hearing in Abeyance Pending (1) Resolution of the Counsel Question and (2) the Filing and Disposition of a Timely Petition for Writ of Certiorari, and Motion to Treat Previously Filed Rehearing Motions as Petitions for Habeas Corpus, and for Extraordinary Relief have been received via our FAX on September 14, September 15 and September 18, respectively. These have not been docketed and will not be forwarded to the Court.
>
> The Court has authorized me to direct you not to FAX anymore pleadings or letters in re: the Spaziano case since you are no longer counsel in the case.
>
> Our FAX is to be used for death warrant cases and emergencies only.[29]

When Mr. Spaziano moved to recuse four justices of the Florida Supreme Court, that court issued the following Order:

> The Motion to Recuse Four Justices of the Florida Supreme Court, Appendix A, and the Supplement to Renewed Notice of Appearance, filed in the above cause by Michael A. Mello are hereby stricken as they were filed by an attorney not authorized by this Court to appear for appellant.[30]

The Florida Supreme Court's Orders reveal two things. First, they expose the length to which the court will go to deprive Mr. Spaziano of his constitutional right to effective assistance of coun-

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[25] *Justice for Spaziano*, ORLANDO SENTINEL, Aug. 25, 1995, at A12.

[26] Lucy Morgan, *Spaziano Report to Remain Secret*, ST. PETERSBURG TIMES, Aug. 26, 1995, at 4B.

[27] *Less 'Panic' for Spaziano*, MIAMI HERALD, Sept. 13, 1995, at 10A.

[28] Spaziano v. State, 660 So. 2d 1363 (Fla.) (per curiam), *modified*, (1995), *cert. denied*, 116 S. Ct. 722 (1996). *See infra* pp. 341-42 and notes 78-82.

[29] Letter from Sid J. White, Clerk, Supreme Court of Florida, to Michael Mello, Professor of Law, Vermont Law School (Sept. 20, 1995). The text of this letter appears in its original form. It has not been altered in any way (original on file with the *New York City Law Review*).

[30] Spaziano v. State, No. 67,929 (Fla. Jan. 5, 1996). The text of this Order appears in its original form. It has not been altered in any way (original on file with the *New York City Law Review*).

sel. As the Supreme Court of Florida knows — and as Mr. Spaziano reaffirmed in a Retainer Agreement, signed and notarized on December 21, 1995 and provided to the Florida Supreme Court — I am Mr. Spaziano's appellate attorney. The legality of the court's ruling is the precise question presented in Mr. Spaziano's United States Supreme Court Certiorari Petition. Second, the Florida Supreme Court's Orders confirm that it would not "authorize"[31] — to use the court's own term — me to represent Mr. Spaziano in the appeal that was certain to follow from the evidentiary hearing. But for the intervention of Holland and Knight,[32] Governor Chiles would likely have signed a new death warrant on January 10, 1996. Thus, Mr. Spaziano would have been unrepresented, and executed without any appeal at all.

The Florida Supreme Court's Orders crystallize the essence of this case. The Orders are a breathtakingly raw and naked exercise of brute judicial power, without even the pretense or the trappings of legality. The Florida Supreme Court's lawless dictates cite no authority, perhaps because there is none to cite. Federalism[33] is based on trust. In this case, the Florida Supreme Court has proven itself unworthy of such trust.

The Florida Supreme Court, that angel of oblivion, has a history of evading and defying the United States Supreme Court's constitutional commands.[34] However, never before has the Florida Supreme Court's arrogance of power been so obvious. The most recent Florida opinions in *Spaziano* demonstrate that the Florida Supreme Court has learned nothing from *Gideon v. Wainwright*[35]

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31 *Id.*

32 Holland and Knight is Florida's largest and richest law firm, with offices all over the State. It might be characterized as a white-shoe, establishment firm. To say that it is politically well-connected would be an understatement.

33 "The federal principle or system of political organization . . . . Of or pertaining to, or of the nature of, that form of government in which two or more states constitute a political unity while remaining more or less independent with regard to their internal affairs." THE OXFORD ENGLISH DICTIONARY 795 (2d ed. 1989).

34 *See* Hitchcock v. Dugger, 481 U.S. 393 (1987) (Court held jury instructions to consider only statutory mitigating factors in capital case was improper as any relevant mitigating evidence, including nonstatutory mitigating circumstances, should be considered); Gardner v. Florida, 430 U.S. 349 (1977) (Court held defendant's due process violated when confidential information that would have persuaded the jury to sentence defendant to life in prison rather than death was withheld during resentencing hearing); Argersinger v. Hamlin, 407 U.S. 25 (1972) (Court held imprisonment without benefit of counsel even for misdemeanors and petty offenses a violation of due process); Gideon v. Wainwright, 372 U.S. 334 (1963) (Court ruled that a right to counsel was necessary to protect indigents even during prosecution of lesser crimes).

35 372 U.S. 334 (1963).

and *Argersinger v. Hamlin*,[36] both Florida cases.

We learned in *Gideon* and *Argersinger*, and most recently in *Hitchcock v. Dugger*,[37] that the only apparent way for the United States Supreme Court to prevent the Florida Supreme Court from evading federal constitutional law is for the Court to grant plenary review and resoundingly reverse Florida cases in no uncertain terms. Sadly, the Florida Supreme Court's dictates in this case show that court cannot be trusted to enforce the federal Constitution. Certainly, Florida cannot be trusted to decide who dies in secret.

As I write these words, Joseph Spaziano has a stay of execution.[38] What the Florida Supreme Court will ultimately do with his

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[36] 407 U.S. 25 (1972).

[37] 481 U.S. 393 (1987).

[38] If you've skipped ahead to "The Happy Ending," *see infra* pp. 438-44 and notes 120-26, then this is no surprise. The stay is due to the enormous press coverage generated by his plight, and not due to anything done by any defense lawyer or judge. I am most grateful to the *Miami Herald*, although the newspaper is not shy about claiming full credit for saving Mr. Spaziano's life. Of course, the *Herald* did not adopt Mr. Spaziano out of altruism. The newspaper had its own institutional reasons. Neither the *Herald's* reasons, nor its self-promotion, diminish the public service it performed in the Spaziano case.

I will never find the words to express my profound gratitude to the *Herald* for saving Joe's life, even if only for a short time. I will not say that the amount of time does not matter, because it does; more time is always better than less. Still, what mattered most to me - and, I think, to Joe - was the fact that someone had *listened* to the record in his case, and that someone had written it down and published it. That, and the fact that the *Herald's* stay let him enjoy another Thanksgiving, Christmas and New Year. That is how Joe and I have marked the passage of time over the years, one holiday season at a time.

And yet . . . the *Herald's* success only underscored my failure as Joe's lawyer. I have poured my *soul* into Joe's case, for as long as I have been a lawyer, and I never succeeded in convincing a single judge to even *consider* the evidence of innocence. If I could not persuade any court anywhere not to kill my innocent client, then what was the point? Maybe the "system" is too obtuse to care, or maybe I am just not much of a lawyer. Either way, it seems time to quit. It's far past time, actually. The biggest mistake I made in Joe's case was going to the *Herald* in 1995, rather than in 1983. I played the polite professional far longer than the courts deserved. I trusted the judiciary not to kill an innocent man.

The media's coverage of *Spaziano*, with the exception of the *Orlando Sentinel*, comes far closer to the truth than anything yet written by a judge or a law clerk. *See, e.g.*, Liz Balmaseda, *Chiles' Logic, Like This Case, Is Full of Holes*, MIAMI HERALD, Aug. 3, 1995, at B1; William Booth, *Gov. Chiles Halts Execution After Witness Recants*, WASH. POST, June 17, 1995, at A5; Cartoon, MIAMI HERALD, Aug. 31, 1995, at 20A; *The Death Penalty: Change of Heart*, ECONOMIST, June 24, 1995, at 28; *Death by Secret Evidence*, MIAMI HERALD, Aug. 25, 1995, at 22A; *A Death Penalty Mistake*, ST. PETERSBURG TIMES, June 4, 1995, at 2D; *Death Unwarranted*, MIAMI HERALD, June 16, 1995, at 30A; Martin Dyckman, *Call Again for Clemency*, ST. PETERSBURG TIMES, June 13, 1995, at 11A; Martin Dyckman, *A Man May Die Under Cover of Secrecy*, ST. PETERSBURG TIMES, Aug. 27, 1995, at 3D; *The Executioner's Song*, THE NEW REPUBLIC, July 17 & 24, 1995, at 9; Tom Fiedler,

Taking the Politics Out of Capital Punishment, MIAMI HERALD, June 18, 1995, at 1C; Linda Gibson, *Court Gives 'Crazy Joe' 11th-Hour Reprieve*, NAT'L L.J, Sept. 25, 1995, at A10; Michael Griffin, *Spaziano Asks Chiles, Cabinet for Clemency Hearing*, ORLANDO SENTINEL, June 29, 1995, at A10; Michael Griffin & Jim Leusner, *Chiles to O.K. Spaziano's Death*, ORLANDO SENTINEL, Aug. 24, 1995, at A1; *Justice for Spaziano*, ORLANDO SENTINEL, Aug. 25, 1995, at A12; James J. Kilpatrick, *Florida May Execute Innocent Man*, MIAMI HERALD, June 8, 1995, at 21A; *Lawyer for Spaziano Asks for More Time*, TALLAHASSEE DEMOCRAT, Sept. 12, 1995, at 3B; *Less 'Panic' for Spaziano*, MIAMI HERALD, Sept. 13, 1995, at 10A; Jim Leusner & Michael Griffin, *Chiles Keeps FDLE Records of Spaziano Review*, ORLANDO SENTINEL, Aug. 26, 1995, at D3; Bryan K. Marquard, *Lawyer Stretches the Ethics Envelope*, VALLEY NEWS, Oct. 8, 1995, at 1; Bryan K. Marquard, *Opposition to Capital Punishment Goes Back to Teen Years*, VALLEY NEWS, Apr. 9, 1994, at 1; John D. McKinnon, *Spaziano Lawyer: Hearing a 'Sham,'* MIAMI HERALD, Sept. 10, 1995, at 6B; Kevin Metz, *Clemency Sought in Death Case*, TAMPA TRIBUNE, June 29, 1995; Kevin Metz, *Chiles Orders Execution of Killer*, TAMPA TRIBUNE, Aug. 25, 1995, at 1; Kevin Metz, *Spaziano Gets Stay of Execution*, TAMPA TRIBUNE, Sept. 13, 1995, at 4; Bill Moss, *Joe Spaziano Gets Fifth Death Warrant*, ST. PETERSBURG TIMES, Aug. 25, 1995; Tim Nickens & Lori Rozsa, *Gov. Chiles Steps in; Execution Called Off*, MIAMI HERALD, June 16, 1995, at 1A; Tim Nickens & Lori Rozsa, *Governor Considers Staying Execution*, MIAMI HERALD, June 15, 1995, at 5B; Tony Proscio, *Anatomy of a Lie*, MIAMI HERALD, Sept. 8, 1995, at 23A; Tony Proscio, *'Memory' of Murder, Mockery of Justice*, MIAMI HERALD, June 14, 1995, at 15A; Diane Rado, *Justices Grant Stay to Spaziano*, ST. PETERSBURG TIMES, Sept. 13, 1995, at 1B; Diane Rado, *Spaziano's Lawyer Says State Lied*, ST. PETERSBURG TIMES, Sept. 1, 1995, at 5B; Larry Rohter, *Though Witness Recants, Florida Man Faces Death*, N.Y. TIMES, Oct. 1, 1995, at A14; Lori Rozsa, *A Case Built on Hypnosis Crumbles*, MIAMI HERALD, June 16, 1995, at 1A; Lori Rozsa, *Case # 75-430*, MIAMI HERALD, Nov. 19, 1995, at 1A; Lori Rozsa, *Chiles Based His 'Crazy Joe' Decision on Flawed Report*, MIAMI HERALD, Sept. 16, 1995, at A1; Lori Rozsa, *Condemned Inmate Gets New Hearing*, MIAMI HERALD, Sept. 9, 1995, at 1A; Lori Rozsa, *Murder and Memory: Witness Recants, But the Chair Awaits*, MIAMI HERALD, Sept. 6, 1995, at 1A; Lori Rozsa, *'Crazy Joe' Is Granted a Reprieve*, MIAMI HERALD, Sept. 13, 1995, at 1A; Lori Rozsa, *'Crazy Joe' Trial Witness Told Pastor That He Lied*, MIAMI HERALD, Sept. 21, 1995, at 1A; Lori Rozsa, *Governor Asked to Free "Crazy Joe,"* MIAMI HERALD, June 30, 1995, at 5B; Lori Rozsa, *Psychic 'Sees' More in 'Crazy Joe' Case*, MIAMI HERALD, Oct. 15, 1995, at 1A; Lori Rozsa, *Witness: Don't Kill Convict*, MIAMI HERALD, June 11, 1995, at 1A; Lori Rozsa & Mark Silva, *Witness' Change of Heart Fails to Persuade Chiles To Spare 'Crazy Joe,'* Miami Herald, Aug. 25, 1995, at 1A; Bruce Shapiro, *Not for Burning*, THE NATION, July 17/24, 1995, at 79; Mark Silva, *'Crazy Joe's' Lawyers to Square Off Today*, MIAMI HERALD, Sept. 7, 1995, at 5B; Mark Silva, *Court Faces Quandary on Spaziano*, MIAMI HERALD, Sept. 8, 1995, at 5B; Mark Silva, *Spaziano May Lack Lawyer for Hearing*, MIAMI HERALD, Sept. 12, 1995, at 5B; Beth Taylor, *Essay-Writing Lawyer Rejoins Killer's Case*, ORLANDO SENTINEL, June 8, 1995, at B1; *Tick-Tick for 'Crazy Joe'*, MIAMI HERALD, Aug. 30, 1995, at 10A; *Time Is Running Out*, ST. PETERSBURG TIMES, June 15, 1995, at 14A; *Too Much Doubt in Spaziano Case*, TAMPA TRIBUNE, June 17, 1995, at 12; David Von Drehle, *A Hypnotized Witness*, WASH. POST, Sept. 15, 1995, at A25; *World News Tonight with Peter Jennings: Hypnotized Witness Recants Story* (ABC television broadcast, June 30, 1995) (transcript on file with the *New York City Law Review*).

The best accounts of the evidentiary hearing regarding Anthony DiLisio's recanted testimony are: Carl Hiaasen, *Fairly Convict Crazy Joe - or Let Him Live*, MIAMI HERALD, Jan. 11, 1996, at B1; John D. McKinnon, *One Judge Holds Key to Crazy Joe's Fate*, MIAMI HERALD, Jan. 16, 1996, at 1A; John D. McKinnon, *Tables Turned, State Grills Ex-Star Witness*, MIAMI HERALD, Jan. 11, 1996, at 5B; John D. McKinnon, *Witnesses: Truth was Told in '76*, MIAMI HERALD, Jan. 14, 1996, at 6B; *Retry 'Crazy Joe'*, MIAMI HERALD, Jan. 17, 1996, at 10A; Lori Rozsa & John D. McKinnon, *Ex-Girlfriend: 'Crazy Joe' Forced Me to Lie*, MIAMI HERALD, Jan. 12, 1996, at 5B.

case is impossible to know. He may have been executed by the time you read these words. He may have been released from prison. In a cockeyed way, it will not matter; either way, Joe is dead. He could be released from prison tomorrow, but he is an old man now who spent his life on death row for crimes he did not commit. He trusted the judges, in part because I told him he should. He trusted me. I failed. We failed. Joe could be freed tomorrow. He could make it to Vermont to teach me to ride a Harley. He could do many things. He'd still be a dead man walking.[39]

But right now, Joe has a stay, and I am guardedly nonpessimistic that his stay will hold. There is a moment toward the end of Camus' *The Plague*[40] when, against all expectations, signs emerge of a slight abatement of the horror.[41] The season slowly changes,

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By far the worst accounts of the hearing are the "coverage" provided by the *Orlando Sentinel*. Michael Griffin & Beth Taylor, *Brother Against Brother*, ORLANDO SENTINEL, Jan. 14, 1996, at A1; Michael Griffin & Beth Taylor, *DiLisio's Facts Wobble*, ORLANDO SENTINEL, Jan. 11, 1996, at A1; Michael Griffin & Jim Leusner, *Spaziano Brothers: Joe Said He Killed a Nurse*, ORLANDO SENTINEL, Jan. 9, 1996, at A1; Michael Griffin & Jim Leusner, *Spaziano's Former Girlfriend Contradicts DiLisio's Story*, ORLANDO SENTINEL, Jan. 12, 1996, at A1; Michael Griffin & Jim Leusner, *Spaziano's Life Hinges on Whether Judge Believes Witness's Latest [sic] Story*, ORLANDO SENTINEL, Jan. 7, 1996, at A1; Jim Leusner & Michael Griffin, *Former Outlaw: Spaziano Enjoyed Killing*, ORLANDO SENTINEL, Jan. 8, 1996, at C1; Jim Leusner & Beth Taylor, *Spaziano's Future is Now in Hands of Circuit Judge*, ORLANDO SENTINEL, Jan. 16, 1996, at A1; Jim Leusner & Michael Griffin, *Stepmother Disputes Dilisio's New Version*, ORLANDO SENTINEL, Jan. 13, 1996, at A1; Beth Taylor & Michael Griffin, *Dilisio: I Wronged Spaziano*, ORLANDO SENTINEL, Jan. 10, 1996, at A1.

The *Sentinel* has cheapened public discourse over Mr. Spaziano's guilt. It has cheapened journalism. Both deserve better. I was unable to comprehend Michael Griffin's difficulty in understanding a one-page motion I filed in the Florida Supreme Court in September 1995. The motion's caption, as well as its nonlegalistic and clear-as-a-bell contents, made clear that it was a request for judicial guidance about whether *I should move* to withdraw as Mr. Spaziano's appellate counsel. Mr. Griffin read the motion as a motion to withdraw, and mischaracterized the motion in his newspaper.

The homicide and the resulting trial occurred in the *Sentinel's* back yard in Seminole County. After the *Sentinel* slept on the case for almost two decades, the *Herald* secured the break that turned the case around and that resulted in two stays of execution and an evidentiary hearing - after working on the case for a mere three weeks. The *Herald's* investigations seem to cast doubt on the *Sentinel's* findings and reports.

From the beginning, it appears that the *Sentinel* received information from other sources which were not disclosed to Mr. Spaziano and his attorney. Thus, the *Sentinel* published "confidential" information immune from cross-examination or any other means of adversarial testing.

[39] The phrase, of course, comes from Sister Helen Prejean's haunting memoir. *See* HELEN PREJEAN, S.J., DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993).

[40] ALBERT CAMUS, THE PLAGUE (Stuart Gilbert, trans., Alfred A. Knopf 1968) (1948).

[41] *Id.* at 241.

but not everyone can adapt.[42] Camus writes the following:

> Some of them plague had imbued some of them with a skepticism so thorough that it was now a second nature; they had become allergic to hope in any form. Thus even when the plague had run its course, they went on living by its standards. They were, in short, behind the times.[43]

The only solace left for me now is knowing that, no matter what happens, the governor and the Florida Supreme Court can destroy Joseph Spaziano's body, but they cannot destroy his soul or his story. I will not allow them to write his history—our history.

This story begins on August 25, 1995. . . .

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[42] *Id.* at 243-44.

[43] *Id.* at 244.

II. Letter to Florida Governor Lawton Chiles, August 25, 1995[44]

I wrote this letter to the Governor of the State of Florida, Lawton Chiles, on the day after he signed Joseph Spaziano's fifth death warrant. At that time, Mr. Spaziano's execution was scheduled for September 21, 1995 at 7:00 a.m.

[sic]August 25, 1995

Governor Lawton Chiles
The Capitol
Tallahassee, Fl. 32399-0001

via fax (904) 488-9810

Dear Governor Chiles:

I learned from yesterday's *Orlando Sentinel* — rather than from any member of your staff — that you signed another death warrant on Joseph Spaziano. The *Sentinel* also reported a secret FDLE report that relied upon alleged statements made by unnamed and unidentifiable persons. Ron Sachs apparently leaked both the FDLE report and the fact that a warrant would come yesterday.

Your decision to inform the media that a person's death warrant would be signed — rather than to tell the man's attorney first — is beneath contempt. The only thing more revolting is that you base the warrant on secret information allegedly received from secret sources not subject to cross-examination to test the reliability of their witness.

In a letter you wrote on August 17th — the existence of which I learned on August 25th, the day after you signed the warrant and two days after you leaked the report to the *Orlando Sentinel* — you directed the FDLE that its investigative materials "may not be inspected or copied" — by Mr. Spaziano's counsel or by any media organization other than those reporters selected by yourself. In the end, have you no shame sir? Have you no shame at all? Your approach bears more resemblance to the Star Chamber than to a hall of justice. [sic]

[44] The text of this letter appears in its original form. It has not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*).

[sic] As I know you are aware, actions have consequences. Ideas have consequences. If my idea, explained to you in great and documented detail, is correct, and Mr. Spaziano is innocent, then his execution is simple murder.

"Murder" is the word Mr. Spaziano uses to describe what the state has been trying to do to him for the past two decades, and "murder" is the right word. It's a word he had used often in private conversations with me over the years, but when he used it in an *ABC Nightly News* interview, I cringed inwardly. "Jesus, Joe," I though; this kind of hyperbole doesn't help us." But, the more I thought about it, the righter my client sounded to me. Once against, the plain spoken common sense of my not-formally-educated client had trumped my law-trained lexicon; Mr. Spaziano's intuitive, earthy naming had cut through the tissue of complexified legalisms that have always tended to obscure the bone-level unfairness in this case. Mr. Spaziano is innocent. Killing an innocent person is simple murder. People who, aware of the facts, order the killing of innocent people are simply murderers. Their accomplices are treated as legally — and morally — equivalent to murderers; accomplices stand in the shoes (morally, if not legally) of their principals.

That murder will have many accomplices. Governor Lawton Chiles. Dexter Douglass, your general counsel, who sees his job as being the whitewashing of the state's frameup of my client. Attorney General Butterworth. Your unindicted co-conspirators at the *Orlando Sentinel* bulletin board.

None of the people named will actually throw the fatal switch. But under well-settled criminal law principles of accomplice liability, they acted in ways that reasonable people would expect to result in the killing of an innocent man. The killing of that innocent man was the natural and probable consequence of the *facts and circumstances as they knew them to be.* These people cannot plead ignorance of the facts. They *knew* the facts as set out in papers.

The people named would reply that they are not murderers, that they acted under the color of law — and, in a positivistic sense, they'd be right. But the whole point of the Nuremberg trials was that government bureaucrats who commit murder under color of

[sic]

[sic]law are still murderers — if they possess knowledge of the facts and circumstances that animate their actions and that imbue those acts — *actus reas*, we call them in the criminal law dodge — with mental awareness — *mens rea* that defines one's quantum of culpability for homicide. Under our criminal law, what distinguishes capital murder from manslaughter from blameless homicide is the mental state and informational awareness of the killer: murder is the purposeful homicide, or homicide with such a high degree of knowledge and certainty that the law will treat it as purposeful killing; homicide done with lower levels of mental awareness — negligence or recklessness, say — are considered manslaughter. Same homicidal act. What distinguishes murder from manslaughter from non-culpable homicide (killings committed in self-defense, for instance) is the mental state of the killer. What did he know, and when did he know it.

As I set out in Mr. Spaziano's clemency application, the named people who are accomplices to the murder of Joe Spaziano knew this. That makes them all accomplices to murder. Of course, they'll never be charged. They're judges and lawyers, who are just doing their jobs, just following orders. Who will judge the judges? Or the governor?

To paraphrase the *New Republic* writing of the genocide in Bosnia, evil is a mirror, and the evil of Joseph Spaziano's case is a mirror, too. Among the images in the Florida glass is an image of America, and it's not pretty. Your office seems to be taking a sabbatical from legal seriousness, blinding itself to the moral and practical imperatives of its own power to stop *this* killing, to prevent this particular murder from being committed in our name.

Well not exactly done in our name. You would be an accomplice to murder. Not so the American public, not even the Florida public. The Florida governor does not have the right to make the people of their state seem as indecent as you are. You have the power, but you do not have the right. The evidence is everywhere that more and more Floridians, even proponents of capital punishment — *especially* proponents of capital punishment, God bless'em — would like to know why Joseph Spaziano is being killed in *their* name. They await your answer. Mr. Spaziano and his family await your answer. Your whole world is watching — and waiting.

[sic]

[sic]Sincerely,

/s/
Michael Mello
Professor of Law
Counsel for Joseph Robert Spaziano[sic]

III. MEMORANDUM, AUGUST 27, 1995[45]

I sent this memorandum to a group I hold near and dear. They are colleagues and staunch supporters of Mr. Spaziano's plight. They include Pat Doherty, a Clearwater, Florida criminal defense attorney who was my co-counsel for a brief time; Mark Olive, my boss when I worked at Capital Collateral Representative (CCR), and the best capital post-conviction litigator in the country, as far as I'm concerned, for his nontraditional litigation tactics; Jenny Greenberg and Matthew Lawry, Co-Executive Directors at Volunteer Lawyers' Post-Conviction Defender Organization of Florida, Inc. (VLRC); Steve Gustadt, a pro bono investigator with VLRC before it lost funding on October 1, 1995 and was forced to close its doors; and George Kendall, Associate Counsel, National Association for the Advancement of Colored People, Legal Defense and Education Fund, Inc. in New York.

[sic]MEMORANDUM

DATE: August 27, 1995
TO: Pat, MO, Jenny, Matthew, Steve, and George
FROM: Mello
RE: Why I will *not* take Joe Spaziano's case back into federal court on a successive habeas, or into the state trial court on a fifth Rule 3.850 motion

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All of you are understandably skeptical about my decision not to take Joe's case into Federal court. I'll try here to sort out my thought processes.

There is an undeniable legal benefit in going into every possible court to seek a stay: The system of capital punishment is random, and we might get lucky and get a stay from the federal courts — if we don't ask, we don't get. There is also a psychological benefit: we feel better, because we've done all we can do as lawyers; our client feels better, knowing that we've knocked on every legal door, the judges feel better, because they can tell themselves "the defense system worked because they defense lawyers scurried like rats from court to court, raising every conceivable issue (we chide them for doing that, but we don't mean it);" ditto the public feels better. [sic]

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[45] The text of this memorandum appears in its original form. It has not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*).

[sic] So the benefits of the eleventh hour dash are clear and familiar to us; we've all been through the drill before. But every litigation decision we make — be it to go into court or not to — entails risks as well as benefits. The risks are as un-quantifiable as the benefits. The best I can do here is try to *identify* the risks as well as the benefits in choosing whether to take Joe's case into federal court under a fifth (count 'em) warrant.

First, the cost of foregoing the federal courts are minimal: to paraphrase Lincoln in 1862, for Joe Spaziano, there is no North — not on a successive habeas petition, at any rate. The "federal courts" here mean Kendall Sharp, Ed Carnes, and the Big Bill Rehnquist Court. Sharp has never granted CPC, much less a stay or an evidentiary hearing; in 13 years on the bench, Brother Sharp has not once found a single claim by a condemned prisoner to be non-frivolous — to say nothing of sufficiently potentially meritorious to justify a stay. Ed Carnes — the Alabama capital prosecutor cross-dressing as a federal appellate judge — requires no comment. Mr. Ed wrote the Eleventh Circuit's opinion on Joe's case, and he spent more energy bitching about the page limit for my brief than he devoted to the evidence of innocence I *raised* in the goddamn brief. So we clear the Eleventh Circuit on a successive habeas petition in a 20-year-old case on which the Court granted plenary review in 1984, with no stay and no CPC. The innocence-based cert. petition I filed in November did not get a single vote for cert. And that was on a first habeas — a habeas based on pretty compelling evidence of innocence, some of which wasn't procedurally defaulted.

Our evidence on innocence is pretty powerful, but we don't have a videotape showing that Joe was elsewhere at the precise time of the murder. The videotaped alabi isn't a hypo, of course; that's what Lloyd Schlup had in his successive habeas petition. And all Schlup got out of the Rebnquist/Scalia, Thomas ("bitch set me up") court was an evidentiary hearing — and that only by a razor this margin of 5-4, the same number of votes we'd need (5, not 4; remember *Streetman* and *Herrera*?) for a stay in Joe's case.

So the real legal test, as opposed to the black letter law, is: If you have a videotaped alabi, and you're in successor habeas status, then you might be able to scrape together five votes for a *chance* to

[sic]

[sic]prove your claim at an evidentiary hearing — a hearing which, in Joe's case, would occur before Judge Kendall Sharp. And a hearing before Sharp is the *most* we can expect to get out of the federal judiciary. We have little chance of getting even that, it seems to me. We don't have a videotaped alabi, or anything close. Like *Schlup*, we're a successor; unlike *Schlup*, Joe ran innocence as the centerpiece of his first habeas — and of the 13 federal judges who could have considered that evidence, none did — not a single one. In federal court, innocence is irrelevant. The Supreme Court says so, and the lower courts listen — as they're required to do.

So I think we give up little by foregoing the federal courts. Let's take their procedural default/retroactivity/abuse-of-the-writ rhetoric seriously. Fuck 'em.

On the other hand, the risks of going into federal court are great. We waste our scarce time and energy on essentially hopeless litigation before judges who don't think we belong there — and, if the Supreme Court's pronouncements in *Teague* and *Sykes* and *McCleskey* and *Coleman* and *Parks* are the law, then those judges are right. We *don't* belong in federal court. The Supreme Court has said so again and again. Maybe it's time to start *listening* to those robed assholes.

More significantly, it seems to me, by doing the 50-yard dash from court to court, we shift attention from Chiles and from the FSC. Most critically, we diffuse responsibility among Chiles, the FSC, and the federal courts. It's an intersticial, systemic manifestation of the Private Slovick syndrome and the *Caldwell* problem: If everyone shares some responsibility for the killing of this innocent man, then no one does.

I have long thought that the diffusion of responsibility was the fundamental systemic and institutional problem with this case. The jury wasn't sure Joe was guilty, but they knew he was an Outlaw, and it was Orange County in the mid-1970s. So they split the difference, and they found Joe guilty but recommended life. The trial judge didn't know about the jury's lingering doubt about guilt, so he overrode and imposed death. So the jury shifted responsibility to the judge, and vice versa. And the same thing happened at each other sequential step along the capital assembly line. [sic]

[sic]The FSC deferred to the jury and trial court, as principles of appellate practice dictate. And the federal courts deferred to the state judiciary, as principles of federalism command.

Finally, the judiciary (state and federal) deferred to the clemency authority of the governor — which, under *Herrera* and *Graham* they were supposed to do, no matter how idiotically unrealistic *Herrera* and *Graham* might seem to us. Finally, in 1995, the responsibility for executing this innocent man rested on the shoulders of one person: Lawton Chiles. The buck stopped there, and he knew it. That's why the *Herald's* coverage persuaded him to stay the warrant in June, I'm convinced.

And, I'm afraid, I erred in giving Chiles an out when I filed in the FSC. FDLE and the *Orlando Sentinel* gave him all the political cover he needed. We were back in the FSC, so it was the court's problem — not his. If we lost in the FSC, Chiles would expect us to dash into FDC, then the 11th Circuit and the Supreme Court. With thudding predictability, the stay would then be denied the night before the scheduled execution, and all of the attention — and any blame — would stick to the judges and not to Gov. Chiles. As we all know, that's the expected drill: the motherfuckers run us ragged from court to court, then they kill our clients and blame it on us for filing at the eleventh hour.

In my opinion, Joe has *some* (very little) chance of getting a stay from either of two places: the FSC and Chiles. If the FSC has any interest in doing right in this case, they have the opportunity to do so with the out-of-time rehearing motions pending before them. If the FSC has any inclination now — and they have never shown the slightest inclination in the eight other times Joe's case has come before them — in cutting through the procedural screens the court itself has erected to avoid even considering the evidence of innocence here, now they have a chance. I have no reason to think they will suddenly seize that opportunity. If they don't, I see no reason to give either the FSC or the trial court yet another chance to default and abuse us.

That leaves Chiles as our best shot at a stay. It is very depressing thought, and I want to be clear that I do not for a moment think that Chiles will grant a stay out of any impulses of justice or [sic]

[sic]fairness or decency. I keep hearing what a decent fellow Chiles is, but the May warrant, the stay (in the wake of public pressure), and the present warrant (now that the media attention has died down; remember Larry Joe Johnson?) leave me convinced that Chiles uses the killing machinery of the state according to the crass political calculus perfected by Bob Graham, the original wimp who transformed himself into a national political force, and who did so on the charred bodies of our clients.

That political calculus is, I believe, our only real chance for a stay. It's not much of a chance, but neither are the courts. It worked in June, to the amazement of us all (especially me). It may well not work again, as it wasn't supposed to work last time, either. What we must do is to maximize the pressures on Chiles.

The key to maximizing the pressures on Chiles is to eliminate any opportunity for him to pass the buck to the courts, to close off all possible escape routes. Thus, it seems to me, our chance with Chiles hinges on our ability to keep the responsibility for killing this innocent man squarely on Chiles and on Chiles alone. That's why I won't go to federal court. That's why, should we lose in the FSC, I won't file a new 3.850 in the trial court.

The magnitude of the pressure Chiles will face will depend, more than anything else, on our (and the media's) ability to discredit FDLE's secret, Star Chamber "process." That means getting access to FDLE's report and its underlying materials and exposing them as the product of a whitewash with a foreordained conclusion. Perhaps the combination of the report and the *Orlando Sentinel* will provide Chiles with enough political cover regardless of what we are able to ferret out. But I still think that Joe's best shot at a stay — and his only shot at any real, substantive relief — lies in my joint investigative venture with the *Herald*. The paper isn't beholden to me or to Joe of course; if they discover evidence Joe is guilty, they'd print it; they'd *have* to print it. Still, I plan to continue to treat the *Herald* as an investigative partner, giving them full and open access to my files and my thinking. By now, I trust Miller's, Holmes' and Rosza's ability to distinguish the real, reliable evidence from FDLE's smoke screens and McCarthy-esque guilt by association.

[sic]

[sic] It's terrifying to think that Joe's life is in the hands of a politician — a politician who has signed two warrants on him within three months, notwithstanding the evidence of innocence. But I believe our best shot is in keeping the responsibility on Chiles and on Chiles alone.

If Joe is killed, I want there to be no doubt that the final responsibility rests with one man, a man who must be thinking about his place in history. I want them to know that, no matter how much good he did the Senate and in the governor's mansion, it will all be eclipsed by this; it will all be outweighed by his killing this man. Tony Proscio was right that this really *is* a defining moment for America; it will, I can only hope, be the moment for Lawton Chiles to define how he is to be remembered. This will be the ultimate measure of the grain of his character and the content of his soul. This will be in his obituary, no matter how few column inches he rates when he dies.

Wayne Gretzky (cameo star of *Mighty Ducks, II*) asked the secret of his success in hockey, said, "I always skate to where the puck is going, not to where it's been." The continuity of our litigation strategy under warrant contrast sharply with the discontinuity of events — the "federal courts," especially *our* lower federal courts) have been packed with hacks by Reagan and Bush — suggests that perhaps we, by continuing to do the death warrant *Shinkansen* through the federal courts, are skating to where the judicial puck has been. Or maybe it's the *political* puck. Or maybe I'm just plain wrong about all of this, and maybe my wrongheadedness will cause the death of my one innocent client and close friend. Gene Miller accused me yesterday of "playing games" with Joe's life, and maybe he's right. On some level this *is* all a high-stakes game — so is Russian Roulette, and so are Pentagon war exercises in the Persian Gulf — but if it *is* all a game, then I think we need to consider changing the rules. My recent experiences with CCR convince me now — and better late than never, I guess — that Millard was right when he said at Airlie in 1986 that we risk becoming "the mask of the executioner." Better that Joe have no lawyer at all — and that the world clearly sees that he has no lawyer — than that Joe have the *illusion* of a lawyer, a hack PD office like CCR that plays by the rules laid down by the people whose job it is to kill their clients.

[sic]

[sic] One final word about taking responsibility. This call is mine (and Joe's). I've been privileged to have the input and advice of many, many people far smarter than I, and for that I am deeply grateful. But the final responsibility is mine alone. I hope I'm making the right decision on this; I hope even more that we won't need to find out, because the FSC will grant a stay to consider the rehearing motions now pending before it. Gulp.

God help Joe. God help us.[sic]

IV. Untendered Statement to Florida Governor Lawton Chiles and Attorney General Robert Butterworth[46]

Actor Mike Farrell co-wrote this Statement and gathered most

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[46] The text of this Statement and notes 47 and 48 appear in their original form. They have not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*). The signatories include: Sons of Italy Amici Lodge #2473, Palm Bay, FL., (All the members of this lodge are united and unanimous in requesting a new trial.); Sons of Italy Lodge #2648, Marion County, FL.; Senator George McGovern, Former Democratic Presidential candidate, 1972; Talbot D'Alemberte, President, Florida State University, Tallahassee, FL., Former Dean, Florida State University College of Law, Former President, American Bar Association; Stephen H. Sachs, Partner, Wilmer, Cutler & Pickering, Washington, D.C., Former Attorney General for the State of Maryland (1979-1987), (Argued and won the leading case establishing the constitutionality of Maryland's capital punishment statute.), Former U.S. Attorney, District of Maryland; Professor Michael Millemann, University of Maryland Law School, Baltimore, MD, Former Chief, Civil Division and Former Chief General Counsel, Maryland Attorney General's Office (1979-1981); James R. Acker, Associate Professor, State University of New York, School of Criminal Justice, Albany, NY; Anthony G. Amsterdam, Edward Weinfeld Professor of Law, New York University School of Law, New York, NY; Aris and Carolyn Anagnos, Los Angeles, CA; Congressman John Anderson, Washington, D.C.; Congressman Tom Andrews, Washington, D.C.; Dr. Maya Angelou, Winston-Salem, NC; Ira Arlook, Washington, D.C.; Edward Asner, Los Angeles, CA; Professor David Baldus, University of Iowa College of Law; Alec Baldwin, New York, NY; Professor Susan Bandes, DePaul Law School, Chicago, IL; Paul Basile, Editor, *Fra Noi*, Chicago, IL.; Meredith Baxter, Los Angeles, CA; Hugo Bedau, Austin Fletcher Professor of Philosophy, Tufts University, Medford, MA; Dr. Joan Willens Beerman, Los Angeles, CA; Rabbi Leonard Beerman, Los Angeles, CA; Marilyn and Alan Bergman, Los Angeles, CA; Rose Marie Boniello, State President, Order of the Sons of Italy, Grand Lodge of Florida, Ft. Lauderdale, FL; Scott H. Brassart, Editor, Northeastern University Press, Boston, MA; Jackson Browne, Los Angeles, CA; Brad Buckner, Los Angeles, CA; Richard Capozzola, Apopka, FL; Erwin Chemerinsky, Lex Legion Professor of Law, University of Southern California School of Law; Carol Chomsky, Associate Professor, University of Minnesota Law School; Diane V. Cirincione, Tiburon, CA; David Clennon, Los Angeles, CA; Professor Douglas Colbert, University of Maryland School of Law, Baltimore, MD; Kimberly Cook, Assistant Professor of Criminology, Mississippi State University; Professor Mary Coombs, University of Miami School of Law, Coral Gables, FL; Phyllis L. Crocker, Assistant Professor of Law, Cleveland Marshall College of Law, Cleveland, OH; Micki Dickoff, Pro Bono Productions, Los Angeles, CA; Professor J. Herbert DiFonzo, Hofstra University School of Law, Hempstead, NY; Dominic DiFrisco, President Emeritus, Civic Committee of Italian Americans; Professor Joshua Dressler, McGeorge School of Law, University of the Pacific; Richard Dreyfuss, Los Angeles, CA; N. Bruce Duthu, Associate Professor, Vermont Law School, South Royalton, VT; Professor Linda H. Edwards, Walter F. George School of Law, Mercer University, Macon, GA; Nancy Ehrenreich, University of Denver College of Law, Denver, CO; Diane G. Emery, Human Rights Activist; Shelley Fabares, Los Angeles, CA; Mike Farrell, Los Angeles, CA; Magda Finnegan, Lifelines Ireland, Dublin, Ireland; Professor David Firestone, Vermont Law School, South Royalton, VT; Robert Foxworth, Los Angeles, CA; Bonnie Franklin, Los Angeles, CA; Professor Eric M. Freedman, Hofstra University School of Law, Hempstead, NY; William A. Frohlich, Director, Northeastern University Press, Boston, MA; Michael Froomkin, Associate Professor of Law, University of Miami School of Law, Coral Gables, FL; Professor Linda Galler, Hofstra University School of Law, Hempstead, NY; Professor Leandra

of the supporting signatures. This document was prepared to be sent to Governor Chiles in the event that Mr. Spaziano exhausted all of his appeals. It's purpose is to beg the Governor for clemency. What a depressing thought.

[sic]STATEMENT TO GOVERNOR LAWTON CHILES AND ATTORNEY GENERAL ROBERT BUTTERWORTH IN SUPPORT OF A NEW TRIAL FOR JOSEPH ROBERT "CRAZY JOE" SPAZIANO

August 24, 1995, Governor Lawton Chiles signed a death war-

[sic]

Gassenheimer, Walter F. George School of Law, Mercer University, Macon, GA; Willaim S. Geimer, Professor of Law, Washington and Lee University, Lexington, VA; Sharon Gelman, Los Angeles, CA; Professor Dan Givelber, Northeastern University School of Law, Former Dean, Northeastern University School of Law; Danny Glover, Los Angeles, CA; Ann Goldstein, Visiting Professor of Law, University of Texas School of Law, Austin, TX; John D. Gregory, Hofstra University School of Law, Hempstead, NY; Alan Grier, Miami, FL; Bishop Thomas J. Gumbleton, Detroit, MI; Rabbi Steven Jacobs, Los Angeles, CA; Dr. Gerald G. Jampolsky, M.D., Tiburon, CA; Professor Peter L. Kahn, Catholic University School of Law, Washington, D.C.; Casey Kasem, Los Angeles, CA; Richard Kletter, Los Angeles, CA; Professor Stefan H. Krieger, Hofstra University School of Law, Hempstead, NY; Charles S. Lanier, State University of New York School of Criminal Justice; Piper Laurie, Los Angeles, CA; Jack Lemmon, Los Angeles, CA; John Lewis, Atlanta, GA; Holly Maguigan, Professor of Clinical Law, New York University Law School; Dr. Kathleen Maguire, State University of New York School of Criminal Justice; Ronald D. Maines, Maines & Harshman, Washington, D.C.; Rabbi Robert Marx, Glencoe, IL; Andrew A. Mcthenia, Professor of Law, Washington and Lee University, Lexington, VA; Professor Michael Mello, Vermont Law School, South Royalton, VT; Gregg Meyer, Staff Attorney, South Royalton Legal Clinic, South Royalton, VT; Chandler R. Muller, Winter Park, FL; Denise Nicholas, Los Angeles, CA; Michael O'Keefe, Los Angeles, CA; Edward James Olmos, Los Angeles, CA; Gregory Peck, Los Angeles, CA; Deanna L. Peterson, Wilder, VT; Elizabeth Peterson, Minneapolis, MN; Sarah Pillsbury, Los Angeles, CA; Sister Helen Prejean, Author; David Protess, Professor of Journalism, Chicago, IL; Bonnie Raitt, Los Angeles, CA; Jeffrey T. Renz, Assistant Professor, School of Law, University of Montana; Dr. Timonthy Reynolds, M.D., Los Angeles, CA; David W. Rintels, Los Angeles, CA; Dr. Victoria Riskin, Los Angeles, CA; Phil Alden Robinson, Los Angeles, CA; Marianne Rogers, Athens, GA; Grant Rosenberg, Los Angeles, CA; Eugenie Ross-Leming, Los Angeles, CA; Diane Rust-Tierny, American Civil Liberties Union, Washington, D.C.; Professor Jack L. Sammons, Walter F. George School of Law, Mercer University, Macon, GA; Ed Saxton, New York, NY; Bruce Shapiro, Associate Editor, *The Nation*; Jonathan Simon, Associate Professor of Law, University of Miami, Miami, FL; Robert Singer, Los Angeles, CA; Stacy Smith, University of Denver College of Law, Denver, CO; Scott E. Sundby, Professor of Law, Washington and Lee University, Lexington, VA; David Tarbert, Director, Criminal Justice Clinic, Assistant Professor of Law, Southern Methodist University School of Law, Dallas, TX; Frank Torrillo, President, Sons of Italy Lodge, Boyton Beach and Lakeworth, FL; Margaret Vandiver, Assistant Professor of Criminology, University of Memphis, Memphis, TN; David D. Walter, Walter F. George School of Law, Mercer University, Macon, GA; Professor Sidney D. Watson, Walter F. George School of Law, Mercer University, Ma-

[sic]rant ordering the execution of Joseph Robert Spaziano, a former Orlando biker, was scheduled to be executed for a crime he probably did not commit — the 1973 murder of Laura Harberts, a young woman found dead in a Seminole County garbage dump. The electrocution is scheduled to occur at 7:00 a.m. on September 21, 1995.

We are attorneys, professors, writers, artists and lay observers of the Florida legal system. Some of us support capital punishment as a legitimate social policy in the war on crime; others of us oppose it.

Although of diverse personal, professional and political backgrounds, we are united in our conviction that the execution of Joseph Robert Spaziano, in the absence of a new trial, would offend the evolving standards of decency that mark the progress of a maturing society.[47] Several reasons reinforce our conviction that Mr. Spaziano must receive a new murder trial; any one of these reasons demands a new trial — the combination makes a new trial a compelling moral necessity. Consider:

- There was absolutely no physical evidence linking Mr. Spaziano to Ms. Harbert's death. Mr. Spaziano's conviction was based solely on the testimony of a teenager who did not "remember" anything about Spaziano or the alleged crime until police removed him from a juvenile detention facility, dropped pending investigations on breaking and entering charges, and then "refreshed" his memory with grossly suggestive hypnosis sessions, conducted by a self-styled police "ethical hypnotist." This teenager, Anthony DiLisio, is now 37 years old. In 1995, DiLisio and his lawyer formally joined Mr. Spaziano in asking the governor for clemency and in asking the courts for a new trial on *both* the Harberts homicide conviction and on the previous, unrelated rape and mutilation of Vanessa Dale Croft, of which Mr. Spaziano was convicted in 1975 — again, based in large part on the purchased testimony of Anthony DiLisio. Today, DiLisio dis-

[sic]

con, GA; Dennis Weaver, Los Angeles, CA; Richard L. Wiener, Professor, Saint Louis University; Peter Yarrow, New York, NY; and Maryann Zavez, Professor, South Royalton Legal Clinic, South Royalton, VT (*Affiliation is for identification purposes only and does not imply any institutional endorsement*).

47 Obviously, not all of us have read the trial transcript. However, Mr. Spaziano's attorney has made the transcript and all other files available for our inspection.

[sic]avows his testimony in *both* cases, saying he had been "hrain-washed" by the police at the time.

- At his trial, the prosecution withheld evidence that police had better suspects in the murder.

- The prosecution offered only one piece of circumstantial evidence at trial; the prosecutor knew the evidence was false but withheld the truth from the defense, judge and jury.

- A post-conviction investigation showed that the jury had serious doubts that Mr. Spaziano was guilty, but because he was a member of the Outlaws motorcycle club — a frightening thought in the early 1970s — the jurors voted him guilty to keep him off the streets. In an effort to show mercy, they recommended a life prison sentence, but the judge overrode their recommendation and sentenced Joseph Spaziano to death in Florida's electric chair.

- Less than a decade after Mr. Spaziano's conviction, and shortly after his conviction became final on direct appeal, the Florida Supreme Court ruled that testimony gathered with the use of hypnosis cannot be used as evidence because it is unreliable and potentially harmful. The court relied on experts who said that subjects who undergo hypnosis become extremely vulnerable to suggestion and form hardened beliefs that what they "remembered" while in the trance, no matter how true or false, is absolutely accurate.

  The ruling, which came during convicted murderer Theodore "Ted" Bundy's appeals, was not retroactive. So even though the Florida Supreme Court indirectly discredited the *only* evidence used to convict Joseph Spaziano, he has been sitting on death row for 19 years.

There is a popular misconception that criminals often 'get off' on legal technicalities; Joseph Spaziano is about to be executed by one. Society, wrapped up in a frenzy of desire to exact revenge on murderers, doesn't seem to care. Despite massive evidence that he was wrongly convicted, numerous judges have disregarded his appeals as frivolous. Governor Lawton Chiles has refused to grant [sic]

[sic]Joseph Spaziano a clemency hearing. Attorney General Butterworth has argued — with great success — that courts ought to use procedural devices to avoid deciding the merits of Mr. Spaziano's claim of innocence. Mr. Spaziano's appeals — an exercise in futility — are all but exhausted. The only thing between Joseph Spaziano and the electric chair is the wait. And he's scared.

General Butterworth, your office has relentlessly opposed any new trial in this case, or even any temporary stay of Mr. Spaziano's execution. In refusing to join Mr. Spaziano's (and, today, Mr. DiLisio's) requests for a new trial, you are legally correct. Florida law does not require retrial in cases involving fresh evidence, such as Mr. Spaziano's. You are legally correct — but not morally right. You can, and should, go beyond the minimal requirements of the law to permit a new trial.

It ought to go without saying that a capital prosecutor's job is not to effect as many executions as he can — by any means necessary. Such an act would be morally reprehensible; prosecutors swear to uphold the United States Constitution, which directs them to seek the truth, not stack the deck.

The police officers and prosecutors in this case had a duty to accurately record the statements of the witnesses, to fairly investigate the case, and to disclose all exculpatory evidence. Moreover, they had a duty not to prosecute an innocent man. They failed in these duties.

Whether Joseph Spaziano ought to be executed — in the absence of a new trial — is one of those choices that tests a civilization's soul. Out of all the static about "defining moments" that crowds the narrow bandwidth of modern politics and law, here — finally — is a real defining moment for a real public and a real governor. What you do in this case will tell what morality, if any, guides Florida government. The issue is life and death, and the choice is yours.

Governor Chiles and General Butterworth, this is no longer a case about the death penalty. It should not be a case about politics. It is a case about public morality, our government's commitment to human life, and about simple decency. This case tests the [sic]

[sic]moral fiber and legal quality of civilization. The evidence is everywhere that more and more Floridians, even proponents of capital punishment — *especially* proponents of capital punishment — would like to know why Joseph Spaziano is being killed in *their* name. We await your answer.

Signed:[48][sic]

[48] Journalistic ethics preclude professional journalists from signing this sort of statement. However, nationally syndicated columnists James J. Kilpatrick and Colman McCarthy, National publications including: The *New Republic* and *The Nation*, and columns or editorials in every major Florida newspaper have publicly opposed the execution of Joseph Spaziano. These include *The Miami Herald, The Palm Beach Post, The St. Petersburg Times, The Tampa Tribune, The Lakeland Ledger*, and *The Gainesville Sun*, along with columnists Tom Fiedler, Carl Hiaason, Tony Proscio, Martin Dyckman and Tom Blackburn. The Spaziano story has been covered by *ABC Nightly News with Peter Jennings, The Washington Post, The Economist, The Nation, The New Republic, The Christian Science Monitor* and *Fra Noi* ("Chicagolands Italian American Voice"), as well as virtually every Florida newspaper.

V. Oral Argument, Florida Supreme Court, September 7, 1995[49]

I filed a Motion for Out of Time Rehearing on behalf of Mr. Spaziano on July 4, 1995. On Tuesday, September 5, 1995, at 4:00 p.m., the Florida Supreme Court notified me in Vermont that oral argument on this motion would be heard two days later on Thursday, September 7, 1995, at 2:00 p.m. I spent the next day, Wednesday, traveling from South Royalton to Tallahassee. On Thursday, I stood before the Florida Supreme Court in what would prove to be my last oral argument in a Florida death case.

The oral argument on Mr. Spaziano's stay application was straight out of *Through the Looking-Glass*.[50] Black was white, and white was black. Florida's judicial system was not what it was meant to be, it was a legal fiction. The atmosphere in the courtroom reflected the universe of capital punishment itself; chaotic, irrational, characterized by random acts of violence and mercy.

ORAL ARGUMENT

Ladies and gentlemen, the Florida Supreme Court. Please be seated.

Good afternoon. The only case on the docket is *Spaziano v. State.*

MELLO: Mr. Chief Justice. May it please the court. My name is Michael Mello from South Royalton, Vermont, and it is my honor, my great honor, to be representing Joseph Robert Spaziano in the proceedings before this court. There are a number of motions pending before the court and I'm not certain whether there are specific motions or specific aspects of specific motions that the court would like me to focus on but it seems to me that a large amount of paper pending before the court right now essentially boils down to four basic points. First and foremost, Joseph Robert Spaziano is innocent of the events for which he was sentenced to death nineteen and a half years ago and for which he is scheduled

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[49] The official record of Florida Supreme Court oral arguments is available only on audiotape from the Florida State University College of Law Library. This document is a transcription of the September 7, 1995 argument as audiotaped by the personnel at the Florida State University College of Law Library (original audiotape on file with the *New York City Law Review*).

[50] Lewis Carroll, The Works of Lewis Carroll 111-219 (Roger Lancelyn Green ed., 1965).

to be executed two weeks from today. That was my position before this court almost exactly ten years ago when I argued in favor of a stay of execution on Mr. Spaziano's first death warrant signed by then Governor Bob Graham. Mr. Spaziano is innocent, factually innocent, and I want to be very clear about that. All of the other factual issues in this case, all of the legal issues in this case, everything I have to say of importance about this case boils down, in my opinion, to that one basic fact. Second, if, I believe that if I had an opportunity to prove Mr. Spaziano's innocence before a jury, he would be acquitted. All I am asking for at bottom before this court right now is a stay of execution and the provision of resources to let me do my job as a capital defense lawyer. I want an opportunity to prove it to a jury. The State has been arguing on the basis of the record until fairly recently and within the past few weeks on the basis of supersecret information that supposedly reliable witnesses supposedly told FDLE that supposedly accurately reported it to the governor that they have yet more evidence of this crime and they have attempted to link Spaziano to other crimes. Well, if they've got the evidence, if it's so great, let them present it to a jury. If they want to convict him, if they want to kill him, let them do it the old fashioned way. What I'm asking for at bottom is a jury. Give me a jury. If they want to kill him [inaudible].

THE COURT: As I view this, the question here at this moment is Mr. Desilio's [sic] alleged recantations of his testimony which . . . . Your contention is that this was the sole evidence upon which his conviction was based. Would not the proper procedure be at this junction to remand this matter to the trial court to conduct a hearing to determine whether or not Mr. Desilio [sic] perjured himself and gave false testimony at the original trial and then if the trial judge so found, the trial judge would then proceed to grant you that new trial in front of a jury. Now how can we as a court bypass the judge's hearing on this particular matter and just say you can have the jury?

MELLO: A couple of points, if I may. First, if the court is willing to grant a stay and remand the case to the trial court with directions that I file a 3.850 motion in this case, I will do so. And I will do so as quickly as possible. The main problem before this court right now and when we go back to the trial court, if we go back to the trial court, is I don't have an investigator. I, at this point, and since this most recent death warrant was signed, VLRC, Volunteer Lawyers Resource Center, has ceased to exist, and I have been and Mr.

Spaziano has been totally reliant upon the good graces and extraordinarily extensive work conducted by the investigative reporters at the *Miami Herald.* They've done a wonderful job, and I am incredibly grateful to them and Joe Spaziano is incredibly grateful to them, but I would really like to be able to do my own investigation, not just of Tony DiLisio's recantation. That, I think - Tony DiLisio's recantation, it seems to me, is a fairly good metaphor of everything else that's wrong with this case. When I was arguing . . . .

THE COURT: Has he recanted under oath?

MELLO: Yes sir, he has. As I understand, that he was under oath when FDLE interrogated him last June. He was not placed under oath in the version of the video tape of that interrogation that I have, which is sort of the other huge lurking problem in this case. If FDLE had its way, if Governor Chiles had his way, I would not have that video tape. I would have had to have answered your question . . . .

THE COURT: You do not have, nor have you filed with this court, the matter that he has recanted his testimony under oath, do you? That is not before the court.

MELLO: Oh, I believe that is before the court. That's before the court in my motion to reopen the direct appeal to reconsider the sufficiency of the evidence point and it's before the court . . . .

THE COURT: [A]nd I'm saying that you don't have an affidavit from him signed by him.

MELLO: That's correct.

THE COURT: Under oath?

MELLO: That's correct.

THE COURT: Recanting his testimony?

MELLO: That's correct. I do not have that affidavit and I cannot get that affidavit because he lives in Pensacola, is represented by counsel; I live in Vermont and Tony DiLisio doesn't like to sign things. I have the next best thing, it seems to me. What I have is a

video tape or a portion of a video tape. I am now no longer certain that the version of the video tape that came into my possession, no thanks to the government, and that I provide to this court was in fact the full video tape. But according to the video tape that I have, Tony DiLisio is very, very clear and very, very emphatic that the critical, the weight-bearing beam of his testimony at trial was not true. He said that under oath. He said that to the police, which, it seems to me, is considerably more reliable than him saying it to me or signing . . . .

THE COURT: Did he also say that he would not sign anything to investigators that had come to him asking him to sign something?

MELLO: So far as I know, no investigator of mine has asked him to sign something. I understand . . . .

THE COURT: Who's the investigator called Hummel?

MELLO: That's a CCR investigator. And according to the video tape, Mike Hummel and another CCR investigator did attempt to get Mr. DiLisio to sign an affidavit. I've never seen a copy of that affidavit. I don't know what was in the affidavit. I don't know that affidavit exists.

THE COURT: Any statement by Mr. DiLisio has under oath said that he committed perjury at the original trial? Where did he do that under oath?

MELLO: I don't think I said that he said under oath that he committed perjury at the original trial. He doesn't use the word perjury. What he has done and what he did under oath - assuming that . . . .

THE COURT: When was it that he was placed under oath and gave contradictory testimony?

MELLO: I assume that he was placed under oath when FDLE interrogated him. That fact is not reflected on the version of the video tape - the bootlegged version of the video tape that I was able to get on my own, but I understand, although not from first hand knowledge, that when Florida law enforcement take formal video taped depositions of witnesses, and especially this witness, that they would have placed him under oath. His understanding was that he

was speaking under oath. And when I alluded to his attorney that I would very much like a signed statement from Tony DiLisio just to have something very clear nailed down without any of the questions that had been raised by - about the veracity of the video tape, whether he was under oath, he was not enthusiastic about that idea. And the reason she said her client wasn't enthusiastic about the idea was because he said, "I've already said that under oath. I said that to the police under oath. I said it in the FDLE video tape and I said it very clear, very emphatically in the FDLE video tape." Now when I had that conversion with Kelly McGray, with Tony DiLisio's lawyer, I hadn't - I didn't have a copy of the video tape. All I had was Dexter Douglas being quoted in the *Miami Herald* as saying, "There is no recantation on this video tape. Tony DiLisio just says he doesn't remember anything before his twenty-first birthday." And based on those representations, which I now know were willful misrepresentations of the truth, I tried to get Tony DiLisio to sign an affidavit. But once I got a hold of the video tape and learned that Tony DiLisio was telling the truth about the video tape - that Kelly McGray, his lawyer, was telling the truth about what was on the video tape, that the governor's office was not, I didn't pursue the affidavit rap.

THE COURT: Let me ask you two questions - if you had an investigator, do you think that DiLisio would talk to that investigator?

MELLO: Yes.

THE COURT: On what do you base that?

MELLO: Conversations that I have had with his attorney. Conversations - one conversation that I had directly with him at his attorneys' behest, a conversation that I was very squeamish about doing because I knew that he was represented by counsel, but he very much wants to tell the truth in this case.

THE COURT: Specifically, how are you being handicapped by not having an investigator at this point? I know, as a general thing, you would like for him to do, you know, do what investigators do, but can you be any more specific than that?

MELLO: I sure can. According to the *Miami Herald* yesterday, and the reason I keep referring to newspaper articles here is because that's my only source of information about the kind of investiga-

tion that I would like my investigator to be able to do. According to the *Miami Herald* yesterday, there is now some serious question about whether the State even identified the right remains. The State's theory at trial, and I tagged two or three dozen references in the trial transcript to this, the ultimate dump being a dumping ground for girls. This is where the Outlaws dumped girls, and the State at least raised the very strong inference at trial that the other identified body was female as was Laura Lynn Harberts's remains. Well, it now turns out that the State knows now or may well know now, and might well have known then, that the other body was not female, that the other body was male, which kind of blows their whole scenario as fanciful, as it always seemed to me it was, of this being an Outlaw dumping ground for girls. I would like to get a forensic anthropologist in to look at those bones. I've got someone at Emory University who would love to do it if I can pay his expenses, which I can't. That's one point. I mean that . . . .

THE COURT: I will pick up all your . . . .

THE COURT: Let me ask you a question. I don't want to cut you off, go ahead. . . .

MELLO: The investigation point is the critical one to me. And I would - I mean, I could go on for two or three hours about the investigation I want to do, and this is not fishing expedition stuff; this is very specific avenues of investigation that Steve Gustaff, my investigator at VLRC, was working on actively when he got his walking papers and VLRC shut down.

THE COURT: Okay, let me ask you. Why - kind of a follow-up to Justice Shaw's question - why didn't you file a 3850 back in January instead of filing with us a motion to reopen a rehearing that was closed ten years ago?

MELLO: A couple of reasons, one of which relates to Justice Shaw's question about resources. I didn't have the resources to put together . . . .

THE COURT: But of course you had the volunteer people then. . . .

MELLO: They were working on the case then along with all their other cases. No one expected a death warrant to be signed, at least

no one that I was talking to expected a death warrant to be signed when it was last May, and certainly no one expected a death warrant to be signed . . . .

THE COURT: How can you say that in the context of this particular case cause it's been here, I think, eight times, and there was a proceeding and an extensive opinion written by the Eleventh Circuit Court of Appeals and released last October. The United States Supreme Court denied cert. on that appeal in January. There was no other proceeding pending, and given those total circumstances, you had to accept that this was a primary case in which a death warrant would be signed.

MELLO: I made the mistake in January, and I have made the mistake as recently as a few weeks ago, of believing the information I was getting from the governor's office. That's why I - that was the source of the information. The information was wrong; it was a mistake for me to rely on it; if I would have - the main point here, it seems to me, is that if I messed up in not filing this as a 3850, in not filing it in January, please don't take that out on my client.

THE COURT: What was the second reason that you didn't file?

MELLO: The second reason, and this is the reason that I feel a little more comfortable about than the first reason - the second reason was precisely because this case had been before this court so many times in the past, and I didn't want to file a new lawsuit, because what I was really trying to get the court to do, substantively in the papers itself, in the pleadings themselves, was to get the court to take another look at the direct appeal judgment, the sufficiency of the evidence judgment, which was based on Tony DiLisio's supposed trip to the dump with Joe Spaziano. I mean, that's not me - that's the prosecutor, that's every prosecutor up until the most recent ones. And since that was the basis - I mean, since that's really what the pleading was about, I decided to call a . . . .

THE COURT: Let me ask you one other question. You make reference to conflict with CCR. What's this conflict?

MELLO: The conflict with CCR is as follows: In the FDLE video tape, Tony DiLisio accuses CCR's investigators, Mike Hummel and one of his colleagues, of essentially trying to strong-arm him into

signing an affidavit that he didn't want to sign. My understanding of the Florida ethics rules and of the Florida statutes on obstruction of justice and witness tampering is that those allegations, if true, and I underscore *if true*, would place CCR's interests in defending itself against those charges in a position directly conflicting with the position taken by the State's only real witness against their client at trial who has now recanted. CCR would be placed in the position of having to argue, and I think CCR would be in the position of having to argue when Tony DiLisio did the video tape with FDLE, he was telling the truth when he disavowed his testimony about the trip to the dump with Joe, but he really is not credible when he talked about CCR. And in fact, I understand that after - soon after FDLE's interrogation of DiLisio, FDLE went back and talked to CCR and asked them, you know, essentially, what's all this about? And it seems to me that the only ethical course of action that CCR could have done at that point, since CCR at that time still represented Joe Spaziano, was to show the FDLE the door and not to answer their questions.

THE COURT: Let me ask you this - on the matter of this particular case - DiLisio, by the recantation of testimony under oath, the testimony at trial was not the only testimony that he gave under oath. Am I correct?

MELLO: You are correct.

THE COURT: In other words, he gave testimony under oath in deposition and assuming he gave testimony under oath before a grand jury?

MELLO: Yes. Grand jury, I don't know about the deposition I have. Yes sir.

THE COURT: Now, the other during the course of the case, there were two witnesses that testified that Spaziano had a relationship with the victim. Am I correct? Both her roommate and the roommate's boyfriend . . . .

MELLO: Not that Spaziano had a relationship with the victim, but that Spaziano, I suppose it depends on how one defines relationship, but, supposedly, Spaziano had come to the apartment looking for her. I mean, that was . . . .

THE COURT: They both identified him at the trial, did they not?

MELLO: Well, true, but their identifications, and this did come out at trial, their identifications are pretty shaky. Their identifications were that they identified Joe Spaziano by looking at him through translucent doors, and I'm not sure how they . . . .

THE COURT: [W]hat you're challenging, that particular testimony at this stage, now, in addition, and this was at the time just before she disappeared. Correct?

MELLO: Correct.

THE COURT: And also at the time, at that particular time, another witness testified that Spaziano took him out to the dump together with another individual in his pickup truck.

MELLO: Took them out to the dump area to look for his stash - for his stash of marijuana.

THE COURT: Yeah, well, and Spaziano and the other individual said, "Stay there." But this was at a time, was it not, at the dump where the bodies would have been there.

MELLO: Maybe, maybe not. Those witnesses, if memory serves, and I can double check the record when I sit down, my memory of the record is that those witnesses were not real clear on the time frame. But even if those witnesses are right, all that proves is that Joe Spaziano came to - even if you believe them, and I suggest that neither of them are believable, but even if you do believe them, all they show is that Joe Spaziano had gone out to the dump area.

THE COURT: Well, basically, none of these witnesses had any relation - the witness that went out with Spaziano had no relationship with the roommate and her boyfriend?

MELLO: Right. Well, I think . . . .

THE COURT: Each of these witnesses had to be wrong.

MELLO: I think that they did have a relationship. I think all of the State's witnesses in this case had a relationship, and I think that relationship is Detective George Abdey who was desperate to nail

the Outlaws. And I think he is the one who is responsible for what happened to Tony DiLisio and, to the extent that there are questions about the credibility of other witnesses, and I believe that there are substantial questions, that's the common link. That's the common thread, it seems to me.

THE COURT: It just answered that one question.

THE COURT: The question before you sit down, as is obvious the proceedings before us have taken a rather free form. This is the way that you have approached this case with the court, and it is obviously causing us considerable difficulty with the pleadings that you filed, the various filings that you filed with the court. But a court concern that we have is whether or not this issue could have been or should have been properly raised in a post-conviction relief motion. Now, if it had been presented in that form, and now I'm talking about the recurring issue in all of your filings focusing on recanted testimony by the witness DiLisio. Now, if it had been filed in that form in a post-conviction motion, you would have had the burden of demonstrating, first of all, that it would have made a substantial difference in so far as the outcome of the case is concerned of trial. But also, you would have carried a burden of demonstrating some good reason why this couldn't have been presented before, why it wasn't discovered before or whatever. Now, and the State, you know, would have had an opportunity to respond to that. We've got a considerable problem with the free form here of the way that this is being presented. But can you demonstrate with what you have filed with the court so far, those ordinarily two essential ingredients that would entitle you to a hearing before a trial judge to resolve those two questions that I put. Have you made sufficient allegations or statements in the pleadings that you have filed that in any way might permit this court to treat that as the claim that you are seeking or at least one of the claims that you are seeking. One, that you have discovered new evidence that clearly would make a difference in the outcome, and two, that you couldn't reasonably have discovered that evidence before that time. Could you help us with that, and am I right, is that the reoccurring basis for your claim here and can and where in your pleadings, or how have you demonstrated that to the court at this time?

MELLO: I believe that we have demonstrated in the pleadings and in FDLE's own video tape that Mr. Spaziano is entitled to a new

trial. If not entitled to an order of immediate release by vehicle of reopening this court's direct appeal judgment on . . . .

THE COURT: What about those two ordinary hoops that you would have to jump through to entitle you to a hearing before a trial judge on this? First of all the substantial new evidence, and secondly, why that hasn't been presented to the court before?

MELLO: I can't imagine new evidence more substantial than a disavowal of the critical testimony by the witness that the trial prosecutor . . . .

THE COURT: That has not been filed - there are over 1,500 pages over there that have been filed in this proceeding.

MELLO: The transcripts not there?

THE COURT: Well, no, just motions and things that have been filed in this proceeding, but you have not filed in this proceeding a statement by DiLisio that his testimony was false.

MELLO: I believe . . . .

THE COURT: There is nothing - you do not have any statement, any affidavit or the transcript of his stating under oath his testimony was false. Isn't that correct?

MELLO: No sir, that's not correct. I do have a transcript of him stating under oath, and as I understand him to be stating under oath to the police . . . .

THE COURT: You have not filed in this record anything that says "I swear", an oath by DiLisio, correct?

MELLO: No, I don't have him saying under oath because I have, because FDLE, because the governor's office, because the attorney general has not given me their version of the video tape. Maybe it's on their version.

THE COURT: That doesn't mean that you can't go to him and get an affidavit from him, does it?

MELLO: I live in Vermont. He lives in Pensacola. He is difficult to deal with . . . .

THE COURT: The investigators that have talked to him since at lease June . . . .

MELLO: They are *Miami Herald* investigators who have talked to him. They are newspaper investigators . . . .

THE COURT: There are CCR investigators that talked to him.

MELLO: He wouldn't talk to CCR, and I am as curious as you are as to why that is. He gave an explanation in the video tape why he wouldn't talk to CCR, and if his explanation is right, it's a pretty good reason. I don't have an affidavit from him and if I have to have, in order to get a stay of execution, a signed affidavit from Tony DiLisio, I do not have that today.

THE COURT: Counsel, you are way over time, but that's because we asked you a lot of questions. I'm gonna give the state, if they need it, another five minutes in addition to their 20 minutes, and I'll give you a couple of minutes for rebuttal.

MELLO: Could I just address, literally in two seconds, your last point . . . .

THE COURT: The second prong, if you will.

MELLO: I have not set out in the papers why I was not able - why my investigators in the past were not able to turn Tony DiLisio around. I don't have a good explanation for that. My investigator tracked Tony DiLisio down to Vista, California, in 1985 before the first death warrant was signed, tried to get him to talk to him, and he wouldn't. CCR's investigator approached him twice earlier this year, tried to get him to talk to him, and he wouldn't. Laura Rose of the *Miami Herald* tracked him down in Pensacola. First he slammed the door in her face, second he slammed the door on her foot, third he let her in to his kitchen; they talked for three hours, and as they say, the rest is history. I don't know why my investigators weren't able to do that. I'm not gonna . . . my investigators aren't good enough investigators . . . .

THE COURT: Have you set out in any of the pleadings that you

have filed at this court what you just said, that is that your investigators or CCR's investigators have attempted to question DiLisio on this subject, but that prior to this interview by FDLE that he had refused to cooperate with the investigators? Is that in the pleadings?

MELLO: I am not sure whether it is in the pleadings in that form. I will write it up right now and file it. I mean, that's the case, and to the extent that I can make oral motions, please treat that as one. I mean, that's what happened, and I will write it up while the state is arguing.

ROPER: May it please the court, my name is Margene Roper; I am an assistant attorney general, and I represent the State of Florida in this proceeding. For the past 20 years, Joseph Robert Spaziano has had fly-specking review from all the courts. His case was heard by the highest court in this nation, the United States Supreme Court; he has been before the circuit court and before this court at least six times in post-conviction proceedings. Mr. Spaziano recognizes in the out-of-time motion that has been filed in this case that at this point in time he is simply out of claims, and that clemency is the proper proceeding. He indicates in his motion to this court—he addresses the court mistakenly as the Board, referring to the Board of Clemency, and he states in the introduction to his out-of-time motion that he recognizes that the claim he has may not be of the magnitude to require a court to give him relief, and he urges the Board to take action. I would submit that the Executive Branch is the proper form in such a case for Mr. Spaziano to have gained relief. As much as Mr. Spaziano may portray this as a gateway claim to some other claim, what he has is a claim under *Herrara v. Collins*, which is a free-standing claim of innocence. I would submit to the court that Mr. Spaziano has taken that claim to the proper forum and simply because he quarrels with the result, is not an issue that can revoke the jurisdiction of this court. I would submit to this court that, historically, clemency proceedings have been private and that is a sad fact—that it's ignored to the benefit of defendants. I would point out to the court that clemency was the proper proceeding. Mr. Spaziano is out of claims, but if he does have something he again wants to take before the courts, he's certainly in the wrong forum.

THE COURT: What do you say to this rebuttal? A person owns . . . facing days away from death, all of a sudden his counsel finding

out that he's without resources. He has no investigator. He doesn't have a system . . . volunteer lawyer organization that he thought he was going to have at this stage. You recognize it gets rather stressful at this point in the scenario. Everything is being filed, every avenue is being explored, and here is a person days from his execution date finding himself in this position. Why shouldn't he be given a continuance to see whether he can get an investigator for one thing and, is there some constitutional problem with that, or you find this . . . ?

ROPER: First of all, I think it would be a mischaractization to say that Mr. Mello and his representation of Mr. Spaziano was without resources. CCR has represented Mr. Spaziano for quite some time. At this point in time VLRC, it's my understanding, is not defunct. They will be in existence until September 30th. Tbe warrant runs out in this case September 26th. They are still making efforts to get funds, which may happen at this point in time, and there's no reason he can't use their investigators. CCR has a statutory mandate to handle these sort of cases. There's absolutely no reason why CCR can't assist Mr. Mello in his efforts. Mr. Mello, at this point in time, seems to be the only one who is accusing CCR's investigator of wrongdoing. It's my understanding . . . .

THE COURT: There's an allegation of conflict of interests even.

ROPER: From watching the tape, your honor, I recall Mr. DiLisio concluding at the end of the tape, after he had complained about the biker appearance of an investigator, I recall him concluding that since CCR had actually helped him, at the end of that tape I didn't see Mr. DiLisio filing any charges against CCR and I know of absolutely no impending charges against CCR. I think they are characterized as wrongdoings by Mr. Mello in an effort to get separate funding by this court when there are resources available to him.

THE COURT: Even tighter, with the state conceding he's entitled to counsel at this stage in the proceeding . . . .

ROPER: I think you have to look at several things, your honor. First of all, he is represented by counsel at this stage in the proceeding. Mr. Mello . . . .

THE COURT: Is he entitled to counsel at this stage?

ROPER: I would submit at this stage of the proceeding, when Mr. Spaziano's counsel is recognized, that he has no justiciable claim to bring before the courts and has sought clemency as a last resort, that further funding based on speculation would be inappropriate.

THE COURT: But he's not . . . .

THE COURT: Go ahead, I'm sorry.

THE COURT: He's claiming that he has an issue that if he can show to this court that that is a valid issue, that this court should then send this case back to the trial court to make a determination as to whether or not in fact the recantation of this particular witness is in fact valid and truthful and, if so, then that trial judge should grant a new trial before a new jury. Now, the fact of the matter is, if he raises that particular issue; how can you say that he doesn't have a viable issue before this particular court?

ROPER: Because, your honor, I know of no authority to recall a mandate in a case a decade old. He is simply in the wrong forum and he should be seeking funds and whatever other expenses he may need if he can not get them from VLRC and CCR, which is doubtful; from the appropriate forum, not this court.

THE COURT: What is the appropriate forum? He already says that he can't get it from CCR because of the conflict there, and he can't get it from this particular group which is going out of existence at the end of the month, and as I looked at the new pleading that I found here, I came out a few moments ago, and apparently they are telling him, you know, that they can't help him. So what is he to do at this particular juncture?

ROPER: I think CCR has a statutory mandate to help him and one would ask what sort of investigation he needs at this point in time. He certainly doesn't need an expert . . . .

THE COURT: He needs an investigation apparently and what he is telling us here today, and somebody going out there to talk to Mr. Desilio [sic] and see if Mr. Desilio [sic] will sign an affidavit. He apparently also needs investigators to check out what the governor's office has in a file which has apparently not been released publicly and nobody knows what's in that file other than the governor's office and perhaps the *Orlando Sentinel* - know what's in that

particular file. And what he's saying is, "I need the funds to go out there and to investigate this particular matter to check all of this out." Now what is this man to do? He said, "I don't have the money to do this."

ROPER: I would submit that, your honor, at this late date in the game, on the eve of execution, that investigation should have been complete at this time. DiLisio either is or is not Mr. Mello's witness. . . .

THE COURT: On that point that investigation should have been done at this particular point. The fact of the matter is that the investigation apparently has not been done. Apparently there is an allegation out there, and a very strong one, that the prime witness against the defendant in this particular case has now recanted his testimony and has said that "I did not tell the truth at the original trial." As a matter of fact, on the video tape that everyone is talking about which is part of his particular record, he does say that the first time I ever went to that dump where the bodies were found was when the police took me there. So we now have this particular information, and remember what the U.S. Supreme Court said, death is different, and it's up to us to decide in this particular court whether or not we say we're sorry Mr. Spaziano, you cannot get any relief from us despite the fact that there appears to be evidence out there that you may be entitled to a new trial, but we can't do any of that for you because counsel didn't file the proper 3.850 motion or counsel doesn't have money to investigate this matter any further and there are no other resources for him to go to. What do we do as a court? Do we sit back and say, okay, you know, counsel, you didn't do the job you should have done. You didn't file the right pleading. You don't have the money. You should have gotten the money way back when, so it's tough, Mr. Spaziano, we're gonna electrocute you because all these things should have been done before. Now is that the state's position?

ROPER: No, that is not the state's position.

THE COURT: What is the state's position?

ROPER: The state's position is that Mr. Spaziano's counsel is in the wrong forum. He should be making these requests in the right forum. It's debatable . . . .

THE COURT: Are you saying what forum is clemency? When the fact of the matter is the governor is already investigating this. The governor has a report that the governor refuses to release to anybody, and therefore the governor signs and makes a death warrant. What he's saying is, give me a little time, you know, I need, I've got the evidence here. I need people to go out and investigate this proof.

ROPER: I am saying that he is, number one, before the wrong court quarreling about the result of the proceeding he himself prompted.

THE COURT: Well, what court should he be in?

ROPER: He should be in the circuit court.

THE COURT: I'll grant you that he ought to file a 3.850 in the circuit court. But are we to tell the defendant in this case, Mr. Spaziano, you know, your attorney should have filed a 3.850, and even though we're aware of this information, that, if true, would entitle you to a new trial, we're just going to ignore all that and we're gonna let your execution proceed because your attorney didn't file the right motion?

ROPER: No, I wouldn't characterize the situation as that at all, your honor. I would say that Mr. Mello and Spaziano are seeking a stay of execution and are seeking funding from this court to further pursue litigation in another court that they should come before this court with something beyond mere speculation, something that would satisfy the *Jones* criteria, something more with a witness who has demonstrated . . . .

THE COURT: Does that mean speculation? Do you accept the fact that this is the state's position that this DiLisio, in fact, has said that his testimony that he gave at the time of trial was not true? Do you accept that fact?

ROPER: No, I do not accept that fact.

THE COURT: You don't accept that fact at all?

ROPER: Not from the video tape that Mr. . . . .

THE COURT: I didn't ask from the video tape. The state would accept that fact - whatever . . . .

ROPER: No.

THE COURT: You don't accept the fact that he has recanted his testimony?

ROPER: No, your honor, I don't. And the reason I would say to the court that that is not the case here as if you view the video tape, what Mr. DiLisio says is that he went to the dump with police. Well, that was known at the time of trial that he went to the dump with police. He was specifically asked under oath in a deposition that the police took him there. Well, of course we know he went in a police car and that's what we believe . . . .

THE COURT: He says on that video tape I watched yesterday, he says specifically that the first time he ever went to that dump was with the police.

ROPER: He says specifically, your honor, that he has no recall of going there with Mr. Spaziano. That does not mean that he never went there with Mr. Spaziano. He does not recant his deposition testimony where he answered the question of whether the police took him there with the response that I show them landmarks. There is no recantation of that whatsoever. What we have here is a witness who, when asked what the police said to him, said, I don't know what they said to me. He did not know what he said after he spoke to the police. He did not know what he said at trial. The investigators on the FDLE tape asked him, would you say that the police fed you details, and he said, well, I couldn't say that they fed me details, but what I said had to come from someplace. You basically have a man who, pursuant to Mr. Mello's proffered evidence, which would include newspaper clippings, had no memory of the time of the *Miami Herald* investigation, has, according to the *Miami Herald* articles and fighting battles with alcohol and has no memory of his life under the age of 21 at all other than getting married, you still have the same witness who has no memory. I would submit to the court that it takes more than speculation after 20 years of litigation and fly-specking review by court upon court to stay an execution and give funds for further investigation on the basis of such speculation.

THE COURT: Let me go back to the wrong forum position that you put forth. Is the state conceding that if - that there is anything that has been filed in this court, that it had been filed in the circuit court would be a basis upon which relief could be granted in the circuit court?

ROPER: No, your honor, the state is not conceding that at all and that would be an issue for the circuit court. I am saying if more funding is being requested then in the wrong forum in the first place, then something more has to be demonstrated than the fact that this man has no memory some 20 years later. As far as filing a 3.850, it isn't necessary for this court to remand because Mr. Spaziano and Mr. Mello don't need the permission of this court in the first place to file a 3.850, and the fact that they aren't filing a 3.850 is evidence that they have the kind of evidence that is not of a magnitude to prompt court action. It's the kind of evidence that is taking to clemency and, in this case, has been taken now unsuccessfully. Now nothing is preventing them from bringing such a claim to the circuit court, but since they have not done so at this point in time and considering the type of evidence proffered to this court, I would submit that a stay is wholly inappropriate and further funding at this point is wholly inappropriate, and that would be an issue for another court. It would be wholly inappropriate to fund on the basis that one of the bodies found at the dump is now discoyered to be a male corpse rather than a female. That's a totally collateral issue whether the Outlaws generically dumped all sorts of bodies there. The fact remains that at trial Laura Harberts was identified by dental records, and as Justice Overton pointed out, there is other evidence. Spaziano was identified as a travelling cook looking for the victim by her roommate and her roommate's boyfriend. He was identified as that person. He was also identified as similar to the man appearing in the translucent window that night. There are also many details linking Spaziano there. There's a testimony of Mike Coppick and Mike Ellis linking him specifically to the dump, and I don't think the court should also ignore the fact that a federal district court has found this hypnosis session not to be suggestive in the least. We have quite a bit of evidence here, and I would submit that on what counsel has shown today, this court should not grant a stay of execution and certainly shouldn't grant funding when VLRC is still in operation and CCR has a statutory mandate to assist in such situations. Does the court have any further questions?

THE COURT: All right. Mr. Mello, I said I'd give you two minutes?

MELLO: How long?

THE COURT: Two.

THE COURT: Mr. Mello, let me ask you a follow-up question. The precise motion upon which you are here today in asking this court to stay this execution is a motion for rehearing of the 1985 3.850 motion.

MELLO: Two motions form the underlying - the application for stay of execution is based on the motion to reopen the first 3.850 appeal, also . . . .

THE COURT: Was that the first - I want to know precisely what you're asking, what you're saying this court has a basis to reopen. Is it that first 850, is it the 1985 850, or what basis are you traveling on?

MELLO: The first one - 1985 was the first 850. It was filed in 1985 and under warrant and decided adversely to Mr. Spaziano by this court in 1986. Also, I am asking for a stay of execution on the basis of our motion to reopen the direct appeal judgment in this case, specifically the sufficiency of the evidence determination in the direct appeal determination in this case. If . . . .

THE COURT: So that would be the first direct appeal?

MELLO: Yes sir. Where the court said for the first time the evidence in this case at trial is legally sufficient because of the trip to the dump. Because of the trip to the dump with Mr. Spaziano and because Mr. Spaziano supposedly led Mr. DiLisio to the dump. Now, the second aspect of that, I respectfully suggest, was simply a misreading of the record. But the trip to the dump is - the trip to the dump with Mr. Spaziano was the heart of the state's case, and as we have been saying all along - this is not just me talking - that is the trial prosecutor who knew his case better than Ms. Roper ever will. "If we can't get in the testimony of Tony DiLisio, we absolutely have no case here whatsoever. So either we're going to have it through Tony or we're not going to have it at all." "He's the most important witness in this case, and I would submit to you that if you

don't believe Tony DiLisio, then find the defendant guilty in five minutes. Not guilty, excuse me. Finally, as to the trip to the dump, prosecutor on the Gardner remand, and that's what makes his testimony more than just idle gossip. The trip to the dump. According to the prosecutor, what makes Tony DiLisio's testimony more than idle gossip, in the words of the prosecutor, is the trip to the dump. Take out the trip to the dump and all you're left with is Tony DiLisio talking about idle Outlaw Bragadosio. Bragadosio that not even Tony DiLisio believed and that Judge McGregor at the original trial held inadmissible as a matter of law when Tony DiLisio's father tried to testify about it. Finally, one final quote: from the prosecutor on Gardner remand, "He took Mr. DiLisio to the Automount dump to view the bodies and confirm his alarming statements. At the dump site Mr. DiLisio saw the bodies of two women. Thank you.

THE COURT: Mr. Mello, the matter of your representation, and I think that, first of all, this has been a CCR case all the way along, hasn't it?

MELLO: This was not a CCR case. This has been a CCR case from January 17 until August. It was a CCR case when I was at CCR. . . .

THE COURT: Was it a CCR case when you were at CCR?

MELLO: In 1985 and 1986.

THE COURT: Isn't CCR counsel of record in the proceedings before the 11th Circuit Court of Appeals in which they rendered a decision in October?

MELLO: No.

THE COURT: That's what it shows.

MELLO: It's a little complicated. I was appointed sole counsel to represent Mr. Spaziano in the 11th Circuit. I wrote the brief. I was not able to do the oral argument for health reasons. I prevailed upon Gail Anderson at CCR to do the oral argument. She did the oral argument. By the time Judge Carnes's opinion on the 11th Circuit was issued . . . .

THE COURT: But this has been - this was a CCR case originally - I mean, right - you were counsel for CCR in this case . . . .

MELLO: In 1985 and 1986.

THE COURT: In this case in 1985 and 1986?

MELLO: Yes.

THE COURT: And it was CCR's investigator that was still trying to get DiLisio to change his testimony in the spring of this year?

MELLO: As recently as two weeks before the May war . . . .

THE COURT: So basically, your representation is as a volunteer in this particular cause?

MELLO: That's correct. Well, it is as a volunteer because, and I want to be very clear about this to the court, because Mr. Spaziano has no other attorney. CCR cannot represent him because they have a conflict of interest. In my judgment, and more importantly, in Mr. Spaziano's . . . .

THE COURT: There has been no determination by this or any otber court that there is a conflict of interest that requires an appointment of additional counsel in this case, is it?

MELLO: There has never been a determination because my understanding of the practice in that regard in the past is that those things happen pretty informally. CCR informs me that when a conflict arises CCR contacts VLRC and VLRC tries to find a volunteer attorney to come in and do the case. And that essentially is what happened here.

THE COURT: Conflict cases are those ordinarily that end up with the matter of other - where there is anotber defendant involving the same incident.

MELLO: That is absolutely correct, but my understanding of Florida's Ethics Code is that that is not the only way that a conflict of interest can come about. CCR has a directly adverse - an interest in this case directly adverse to the interest of the witness who is trying

his best to correct a mistake, a hideous mistake, that he made at this point.

THE COURT: How is CCR's position in conflict?

MELLO: CCR, in the course of defending itself, and as I understand, in the course of CCR's defending itself to FDLE when FDLE came in and interrogated CCR's investigators about what happened, CCR said what you would expect CCR to say. We didn't intimidate him. We didn't do what he describes. And so CCR is in the position of having to . . . .

THE COURT: That would be the basis of your representation . . . .

MELLO: Keeps the credibility . . . .

THE COURT: So CCR . . . .

MELLO: That is part of the basis of my representation.

THE COURT: What you said in the brief was that it was because Spaziano's family wanted you to represent him rather than CCR.

MELLO: That was the other part. That was - when I took the case back over in June, the conflict of interest existed, but I didn't know about it because up until, at that point, the state had been successful in keeping the video tape out of my hands. I didn't know about it then. I undertook the representation over again at the request of Mr. Spaziano, at the request of his mother and his daughter and his niece for personal reasons. And if my doing that is at all a basis for this court's denying a stay or in - if my trying to help out Joe Spaziano is gonna make it more likely that he be executed, I cannot tell you how sorry I am that I ever got back involved in this case.

THE COURT: Are you asserting that CCR said we have a conflict, we want you to represent him?

MELLO: No, CCR never said that. I have not had that conversation with CCR.

THE COURT: Thank you. Thank you very much.

MELLO: May I? . . .

THE COURT:[1] No sir. We really went over time. The governor's office - whether you've got a copy of this or not - the governor's office filed a request for leave to appear before the court on specific issues relating to congressional funding of the Volunteer Lawyers Resource Center of Florida. Mr. Slackman, do you intend to appear? Do you wish to appear?

SLACKMAN: [inaudible].

VI. *SPAZIANO V. STATE*, SEPTEMBER 8, 1995[51]

On September 8, 1995, the defendant, Joseph Robert Spaziano, whose sentence for first-degree murder had already been affirmed,[52] and whose death warrant was signed for the fifth time, had a final opportunity to have his appeal heard in the Florida Supreme Court. After Mr. Spaziano filed multiple motions to open by rehearing an appeal that was finalized more than thirteen years earlier and a post-conviction proceeding that was terminated more than nine years earlier on the basis of recanted testimony, the Florida Supreme Court granted his motion.[53]

These motions fell into five distinct categories: (1) Two motions for rehearing; (2) four motions to supplement the record; (3) two motions addressing actions by the office of the attorney general; (4) two motions relating to my representation of Mr. Spaziano; and (5) one catch-all motion concerning Mr. Spaziano's rights.

The motions for rehearing, those in the first category, were considered the principle motions by the court. They were: (1) An out-of-time motion for rehearing of a previous Florida Rule of Criminal Procedure 3.850 motion, which was denied by the Eleventh Circuit in 1985 and affirmed by the Florida Supreme Court in 1986; and (2) an out-of-time motion for rehearing of the direct appeal and judgment on the sufficiency of the evidence.[54] In order to insure that these first two motions had enough momentum, I filed four additional motions to supplement the record. These included: (1) A motion to supplement the record to include a videotape; (2) a motion to supplement the record to include recent media coverage of the case; (3) a motion to supplement the record with media coverage of the FDLE investigation; and (4) a motion to supplement the record with an unofficial transcript of the FDLE's interrogation of Anthony DiLisio.[55] I also filed an affidavit by DiLisio that stated:

> KNOW ALL MEN BY THESE PRESENTS, that I, Anthony Frank DiLisio, of . . . Pensacola, Florida 32534, do make, publish and declare freely, under penalty of perjury, this statement that I never under any circumstances went to the dump sight [sic]

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[51] Spaziano v. State, 660 So. 2d 1363 (Fla.) (per curiam), *modified*, (1995), *cert. denied*, 116 S. Ct. 722 (1996).

[52] Spaziano v. State, 393 So. 2d 1119 (Fla. 1981), *appeal after remand*, 433 So. 2d 508 (1983), *cert. granted*, 464 U.S. 1038, *aff'd*, 468 U.S. 447 (1984).

[53] *Spaziano*, 660 So. 2d at 1364.

[54] *Id.*

[55] *Id.*

> with Joseph Spaziano. I went there in the company of law enforcement investigators and only in the company of law enforcement investigators.[56]

This statement by DiLisio was, of course, significantly different than his statement made at trial where he testified that Mr. Spaziano had taken him by special route to the dump site and shown him the bodies of two females.[57]

I took the hit and conceded that the motions filed were not authorized in Florida's present legal system.

> As a motion [for] rehearing of an opinion by [the] court rendered in 1986, this motion [was] obviously untimely. Treated as a new claim for postconviction relief, this action [was] barred by the one year time limit on Rule 3.851 motions. There [were] claim and issue preclusion barriers, because all of the legal issues raised in this motion [had] been raised by Mr. Spaziano in the past; there [had] been no intervening change in the law; there [had] been new facts recently discovered, but they may not [have been] of the magnitude necessary , under [the] court's [precedents], to secure review. Finally, retroactivity principles bar[red the] court from treating several aspects raised by Mr. Spaziano as issues cognizable at [the] time.[58]

Slowly but surely, the court got around to discussing the methods for considering newly discovered evidence and recanted testimony. The test for newly discovered evidence had been recently broadened to allow evidence that would "probably" affect the verdict, rather than "conclusively" affect it. The standards for recanted testimony had been broadened as well.[59] Even so, the court held the motions were "clearly not authorized."[60] After all

> Spaziano ha[d] been before [the Florida Supreme Court] on seven prior occasions; he ha[d] been before the United States District Court and before the United States Court of Appeals, which wrote an extensive opinion examining the twenty-three issues raised before the United States District Court. The United States Supreme Court ha[d] considered his case on the merits and ha[d] denied petitions for writs of certiorari on three occasions.[61]

Nevertheless, as if the court were doing Mr. Spaziano a favor despite his inept counsel, it remanded the "successive Rules of

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56 *Id.*
57 *Id.*
58 *Id.* at 1365.
59 *Id.* (citations omitted).
60 *Id.*
61 *Id.*

Criminal Procedure 3.850-3.851 motion" to the Circuit Court of the Eighteenth Judicial Circuit for review stating, "consistent with our constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought, we have considered the contents of these motions . . . to determine whether they have any basis for relief under our jurisdiction."[62]

Some favor. The Florida Supreme Court scheduled the evidentiary hearing on the narrow issue of DiLisio's recanted testimony for no later than September 15, 1995, *one week later*! And in one more bout of insanity, the court refused to stay the execution.[63]

To finish him off, the court then predictably proceeded to deny Mr. Spaziano's remaining motions. The motion to supplement the record with news articles was "clearly unauthorized and improper."[64] The motions to disqualify the office of Attorney General Butterworth and to compel discovery from his office were denied.[65] The catch-all motion to compel release of the FDLE investigation report, to enter a stay of execution, or to alter the court's reading of the public records law was also denied.[66]

On the matter of my representation of Mr. Spaziano, the court held "CCR has the primary responsibility for . . . representation."[67] My motions were "not proper under the particular circumstances of this case."[68] The court found "that Mello may continue the representation with assistance from CCR and, if possible, with the assistance of any resources available from the Volunteer Lawyer's Resource Center."[69]

Thank goodness three Justices had their heads on straight that day. Justice Kogan, writing for himself and two of his colleagues, concurring in part and dissenting in part, stated:

> I agree with virtually all that is said in the majority opinion except that portion imposing an unrealistic time frame for resolving what we all have now agreed is a cognizable claim for postconviction relief. Such a restriction is without precedent in our case law and tends to create an atmosphere of panic for resolution of an issue that requires calm and deliberate resolu-

62 *Id.* at 1365-66.
63 *Id.* at 1366.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*

tion. Indeed, this is an issue demanding the most careful of attention because its end result could be the state-sponsored taking of a man's life when his guilt now has been called into question.[70]

Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without careful consideration of this newly discovered evidence under the only legal method available, Rule of Criminal Procedure 3.850 or 3.851.[71]

[W]e are talking about a man's life here. And in that sense, we are also talking about the moral underpinnings of the death penalty itself: an abiding faithfulness to *heightened* procedural safeguards, an absolute requirement of the certainty of guilt, and an overriding commitment to the proposition that society should never descend into lawlessness in an effort to eliminate the lawless. Ends do not justify means. Quite to the contrary, the means chosen almost always color and shape the ends achieved.[72]

All that can be said with finality about this case today is that it remains mired in serious doubt. Because of the irrevocable nature of the death penalty, I am utterly unwilling to dismiss those doubts without adequate inquiry into their source. The present record presents at least a prima facie showing that the State's chief witness has recanted, and I thus agree that the trial court must review the claim presented here pursuant to Rule 3.850 or 3.851.[73]

Because of the seriousness of the claim, I further believe this Court should enter an indefinite stay of execution to permit the parties to develop their cases without facing the pressures of an active death warrant, if the Governor does not stay or withdraw his warrant in light of our opinion today.[74]

Finally, as the majority indicates, the Office of Capital Collateral Representative continues to be statutorily responsible for this case.[75]

Hey, nobody's perfect.

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70 *Id.*
71 *Id.* (citations omitted).
72 *Id.* at 1367-68 (emphasis in original).
73 *Id.* at 1368.
74 *Id.*
75 *Id.*

VII. Tendered but Unfiled Motion for Rehearing and Reconsideration and Stay of Execution, September 8, 1995[76]

After completing the oral argument on Thursday afternoon, I

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[76] This document is a reproduction of a facsimile sent to the Florida Supreme Court. It appears in its original form. It has not been altered by anyone, in any way, as indicated by the use of [sic] (original on file with the *New York City Law Review*). A transcription of the facsimile appears below.

On Tuesday [9/5] at 4:30 pm, this court notified counsel in Vermont that it had scheduled oral argument for 2:00 p.m. on Thursday (9/7). (9/6) After spending all of Wednesday en route [from VT to Fla] the court granted counsel 30 minutes for oral argument. At 5:00 pm, a few hours before the court knew counsel was scheduled to [leave for] Vermont [on 7/8] to teach, the court issued an order — denying a stay, remanding the case for an evidentiary hearing, & "permitting" counsel to remain as pro bono counsel with the "assistance" of CCR, a law firm with a conflict of interest in this case. [*] The "hearing" would be in the home of the Orl. Sent.

The court should be aware that counsel shall not follow the court's unreasonable commands — not when those commands deny the reality of CCR's conflict & VLRC's sudden death. The state offends the federal constitution when it commands counsel to render the ineffective assistance of counsel. *US v. Cronic*, _____US_____ (1984).

If this court intends to kill this innocent man by depriving him of the effective assistance of counsel, then it will do so without my complicity. I will not participate in a sham evidentiary "hearing" under warrant when I lack the time & resources to do the job effectively. As the *amicus* brief sets out, VLRC is dead. As counsel has told the court, I lack the funds to do a meaningful evidentiary hearing under warrant — that is part of the reason I filed in this court. If the court wants to decide whether the CCR has a conflict & whether CCR can be forced upon Mr. Spaziano, this court, then the court should ask that the matter be fully briefed & argued — I should not be limited to a tiny fraction of a 30 minute argument. I teach legal ethics, & I have no doubt that CCR *does* have a conflict. More importantly, so does Mr. Spaziano.

The state that gave the world such famous right - to - counsel opinions as *Gideon v. Wainwright* & *Argersinger v. Hamlin* perhaps ought not to treat counsel claims with contempt that borders on the cavalcir. In any event, *Cronic* forbid court - imposed ineffective assistance of counsel.

CCR has none of the 25 bankers' boxes of files in this case. Nor will CCR ever have those files, as CCR will never have the cooperation or acquiescence of Mr. Spaziano.

If it wishes to base its ruling on reality, the court must know that counsel has rejected — & will continue to reject, until the last dog dies — the court's directive that he do the impossible. Nor will I accept as "co-counsel" a law firm with interests adverse to my client's — a law firm my client has rejected for very good reasons.

Specifically, the court should know that (1) I will participate in no evidentiary hearing under warrant; (2) Neither Mr. Spaziano nor I will accept CCR as co-counsel in this case, since CCR refused to serve as co-counsel when I asked them to do so in June; (3) counsel lacks the funds to return to Florida for purposes of any further court proceedings, as counsel's few remaining personal funds were spent to attend this court's 30 minute oral argument.

~~In short, counsel will~~ No valid procedural bar constitutes an adequate & independent ground precluding federal judicial review. First, Florida's default rules are discretionary & haphazardly applied. Second, the governor's abdication of his clemency function (see *Herald* interview with Chiles) trumps the state's interest in

took the opportunity on Friday, September 8, 1995 to drive out to the Florida State Prison, in Starke, to visit Mr. Spaziano. Have you ever been to Starke? It is a grim place. It has the feel of a medieval fortress. It was then that I received the Florida Supreme Court's response to my argument, its opinion synopsized above. I drove back from the prison that night in a rainstorm, disgusted. It was at that time that I felt the need to respond to the court's decision. The motion below was written on that road trip from Starke to Tallahassee, then faxed to the Florida Supreme Court, Office of the Clerk, from my hotel room at 11:10 p.m. that evening.

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procedural rectitude. We now know that the fundamental assumption of *Herera v. Collins* — that clemency in Texas functions as a failsafe safety valve against execution of a *truly* innocent person — does not apply in Florida under *this* governor. Chiles clearly thinks it's the *courts* job, not *his* job, to prevent state killing of innocents.

The Attorney General claimed, in Thursday's oral argument before this court, that Mr. Spaziano has "run out of legal claims." In its opinion, this court essentially agreed.

All I have is an innocent client. If I had the resources, I could prove it — without having to rely on the *Miami Herald* to do my investigation for me. I have a *videotaped police* interrogation of the state's only real witness at trial — & on that videotape that witness disavowed the testimony the trial prosecutor said was the indispensable element of his case.

If General Butterworth is correct that an innocent man in these circumstances has "run out of legal issues, " than there is something very wrong with the law.

Should this court choose to hold me in civil contempt, I will waive extradition; I learned a good bit about civil contempt from my representation of Dr. Elizabeth Morgan. Should this court disbar me, I will plead guilty. Do you really think you can do anything to me comparable to what you have done to my client? What you are *about* to do to him? ~~Is something very wrong with the law.~~

In short, undersigned counsel — an experienced Florida capital appellate littigator & an ethics teacher familiar with Florida's professional responsibility commands — will not accept this court's invitation to be ineffective. If you are going to kill an innocent man without a lawyer, you will do so in such a way that the whole world will see what you are doing. If you act as executioner of this innocent man, I will not be your mask.

[Signed] Michael Mello

Service by US mail to Robert Butterworth, ~~Fri~~ Sat Sept 8 9, 1995

[*CCR's conflict arises from three independently sufficient sources: (1) the DiLisio allegations against CCR, made in a videotaped interrogation by police, which are at present under investigation by the Leon County State Attorney's Office; (2) CCR's *present* overload of cases, of which CCR has ~~been~~ detailed in pleadings in others matters before this court; (3) CCR's failure to investigate prior to, & during, the *last* death warrant, matters that counsel could detail to the court if the court compels him to do so.]

[sic]

1

Spaziano
v
Florida

Faxed Fri 9/8 11:10 pm
(written on BSP trip from Fla to Talla)

FAXED

Motion por Rehearing
& Reconsideration & Stay
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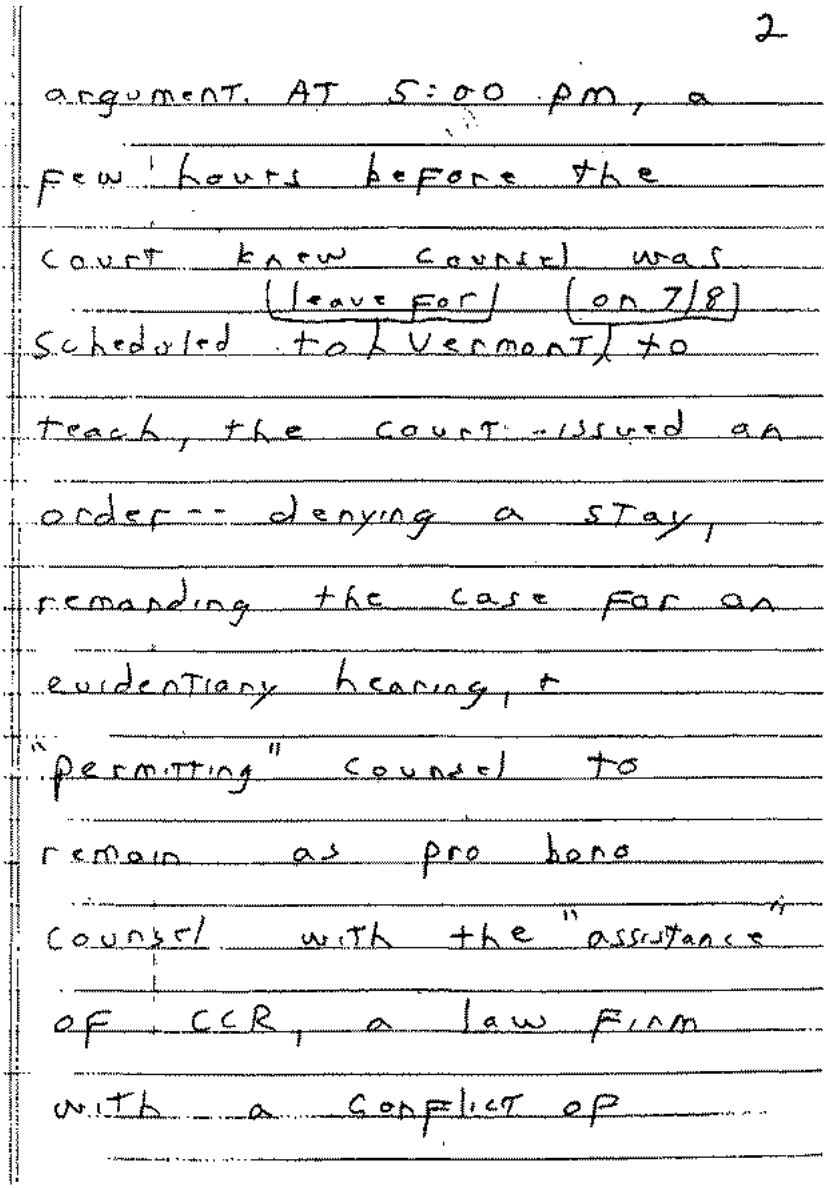

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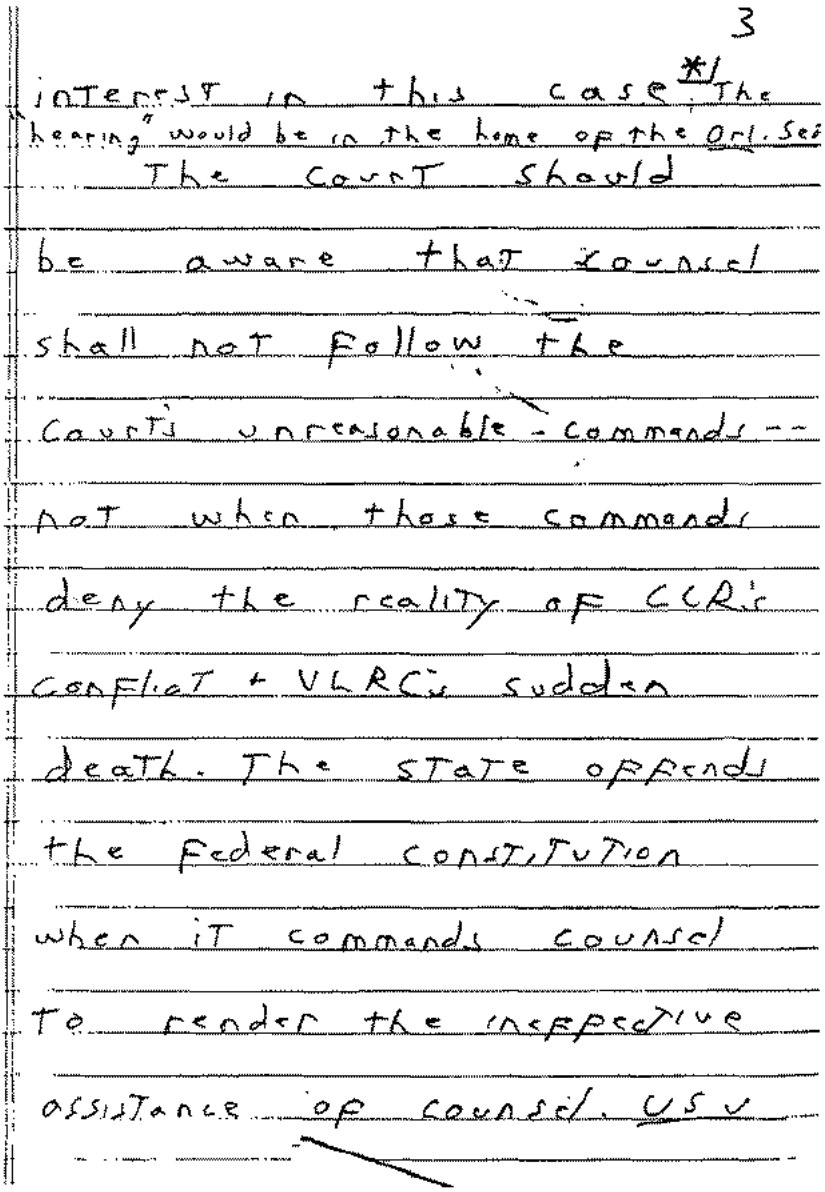

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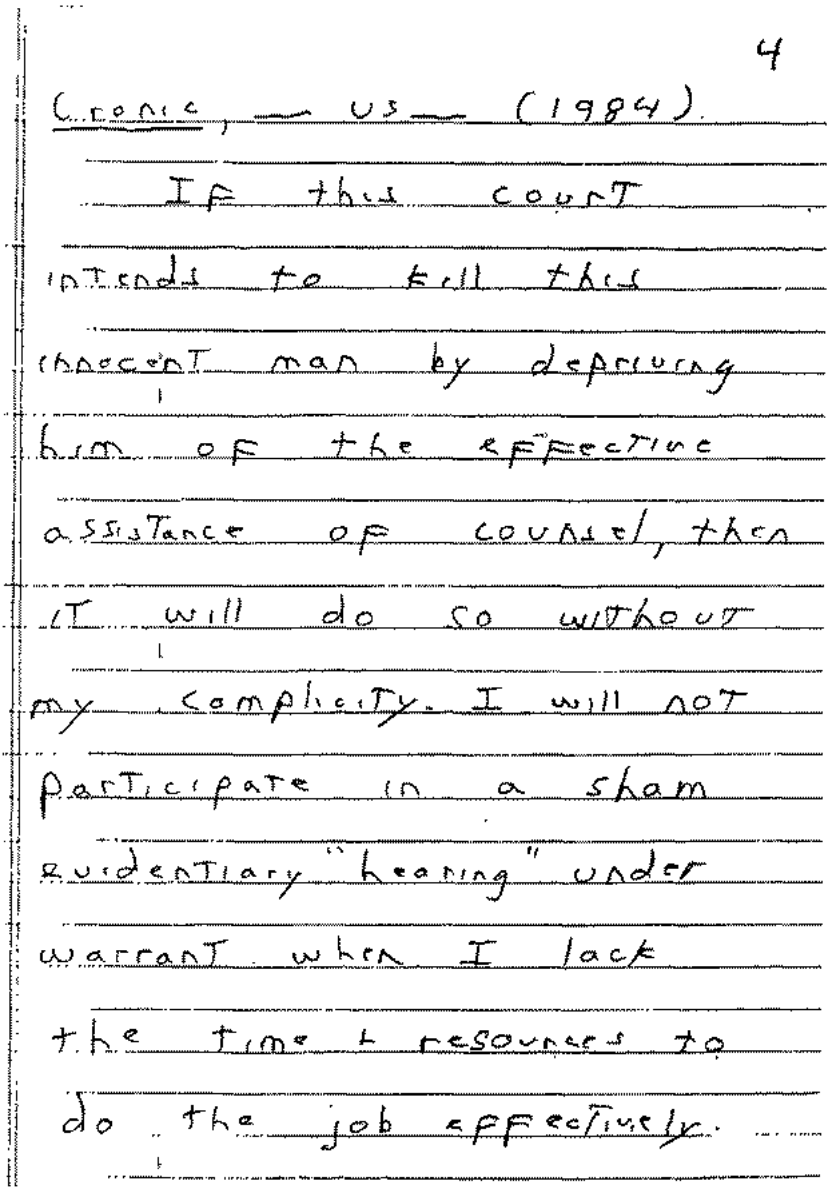

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Cronic, ___ US ___ (1984).

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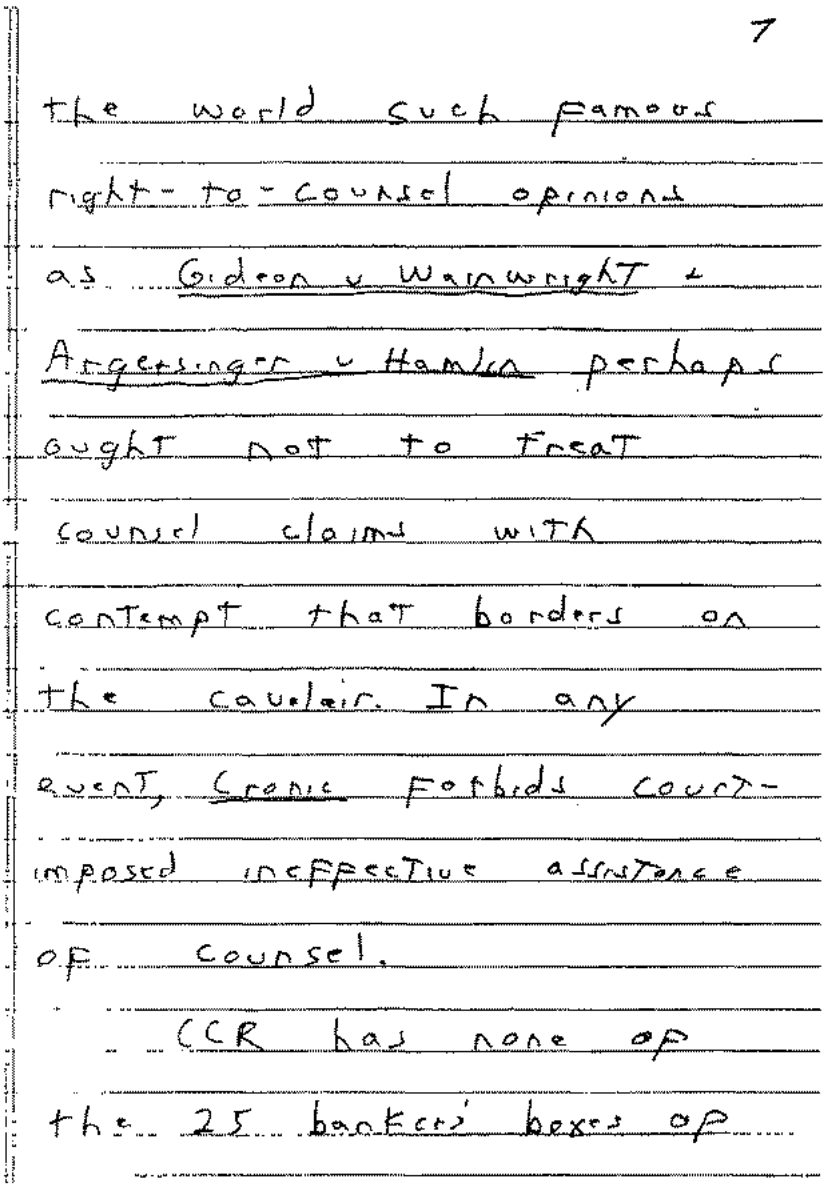
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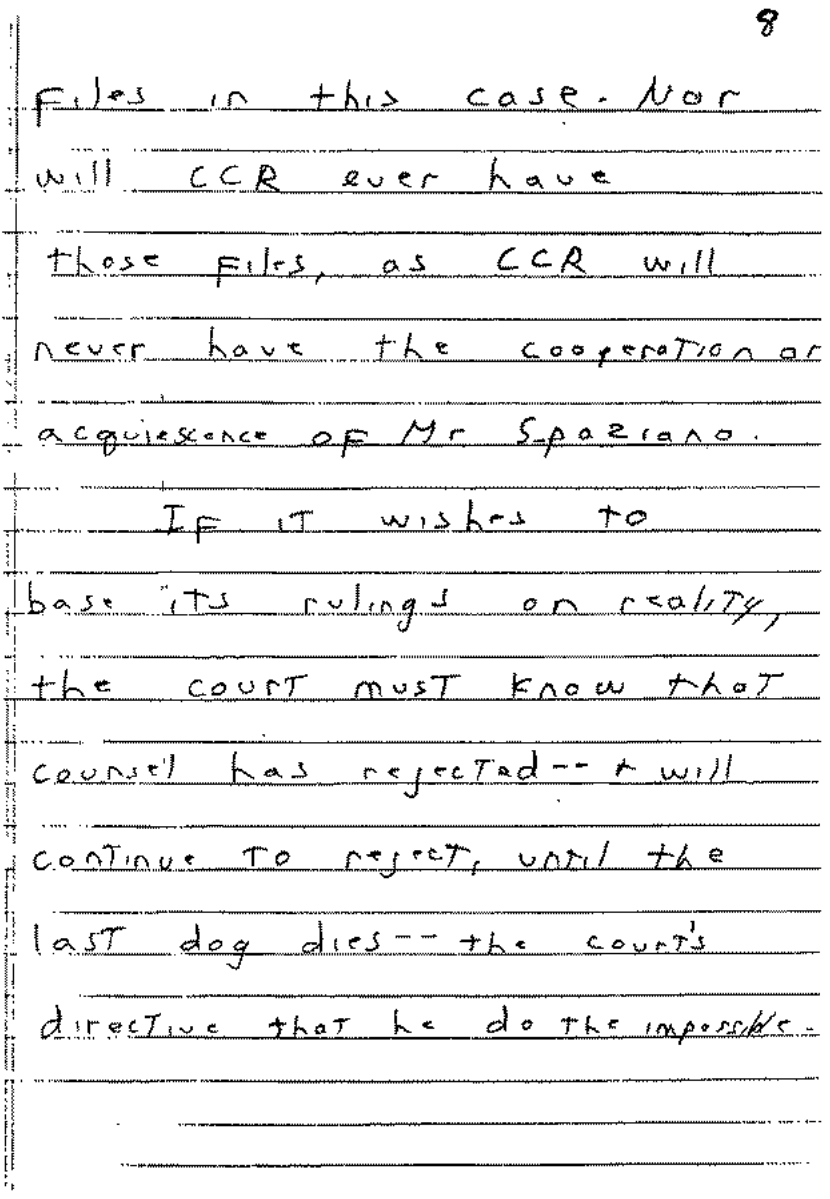
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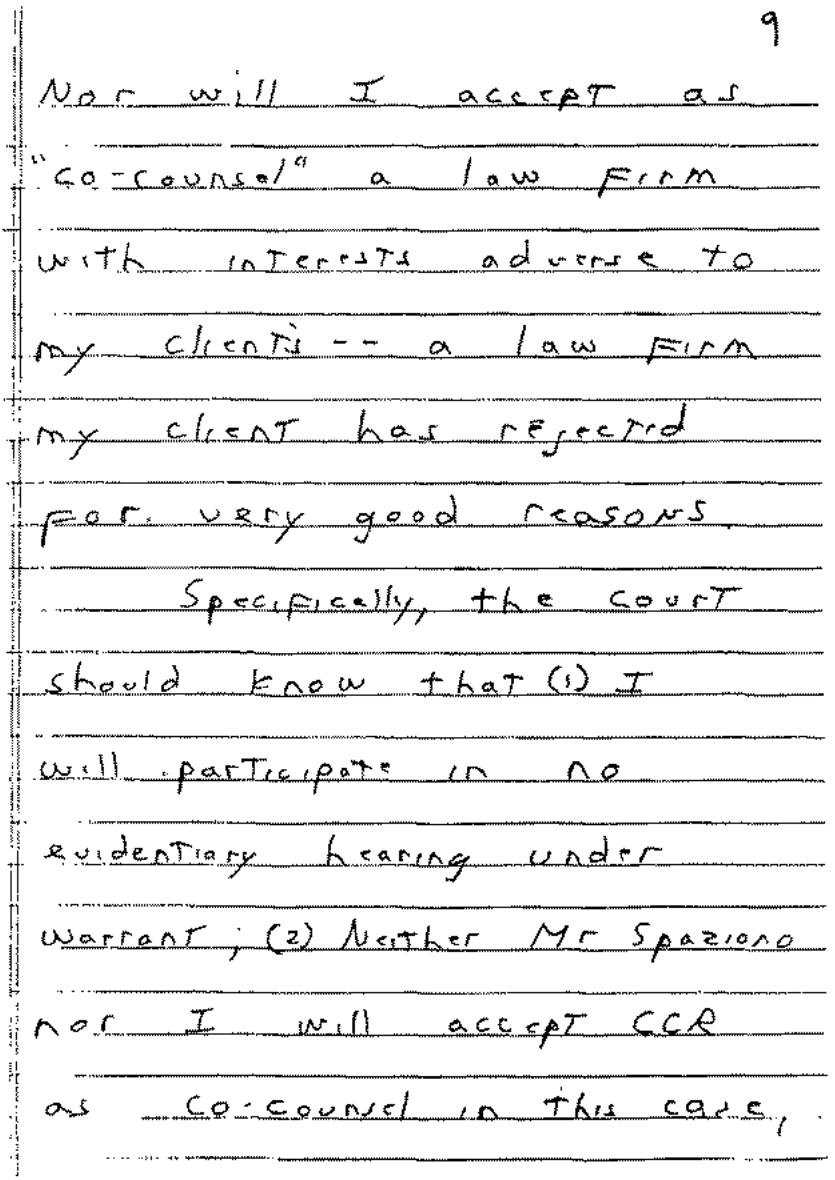

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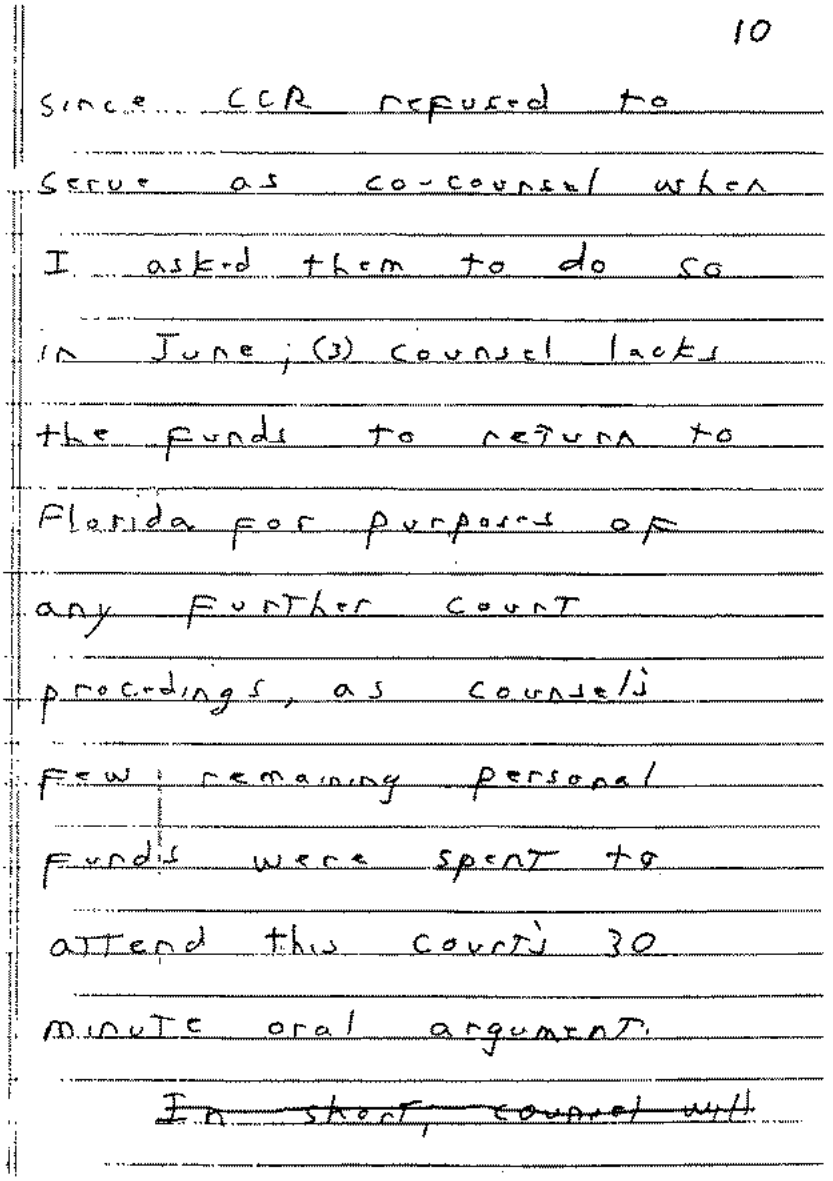
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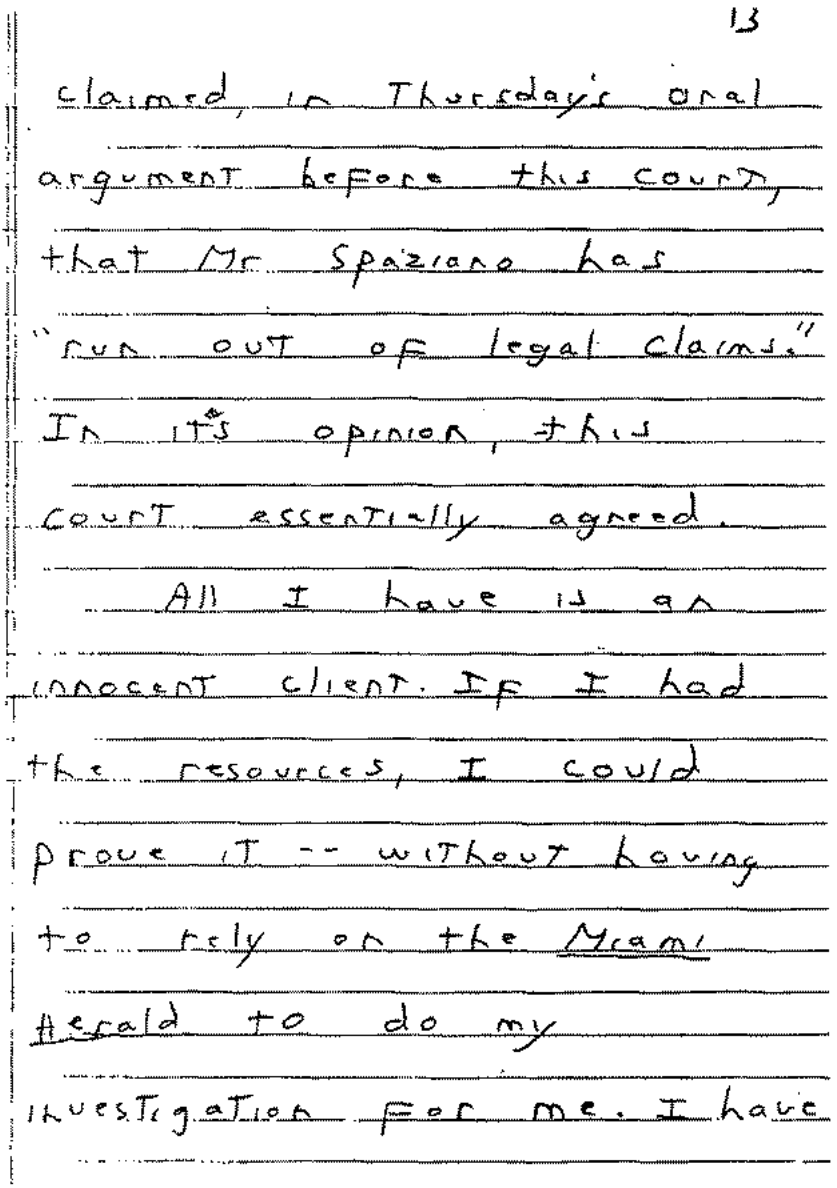
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[sic]

[sic]

16

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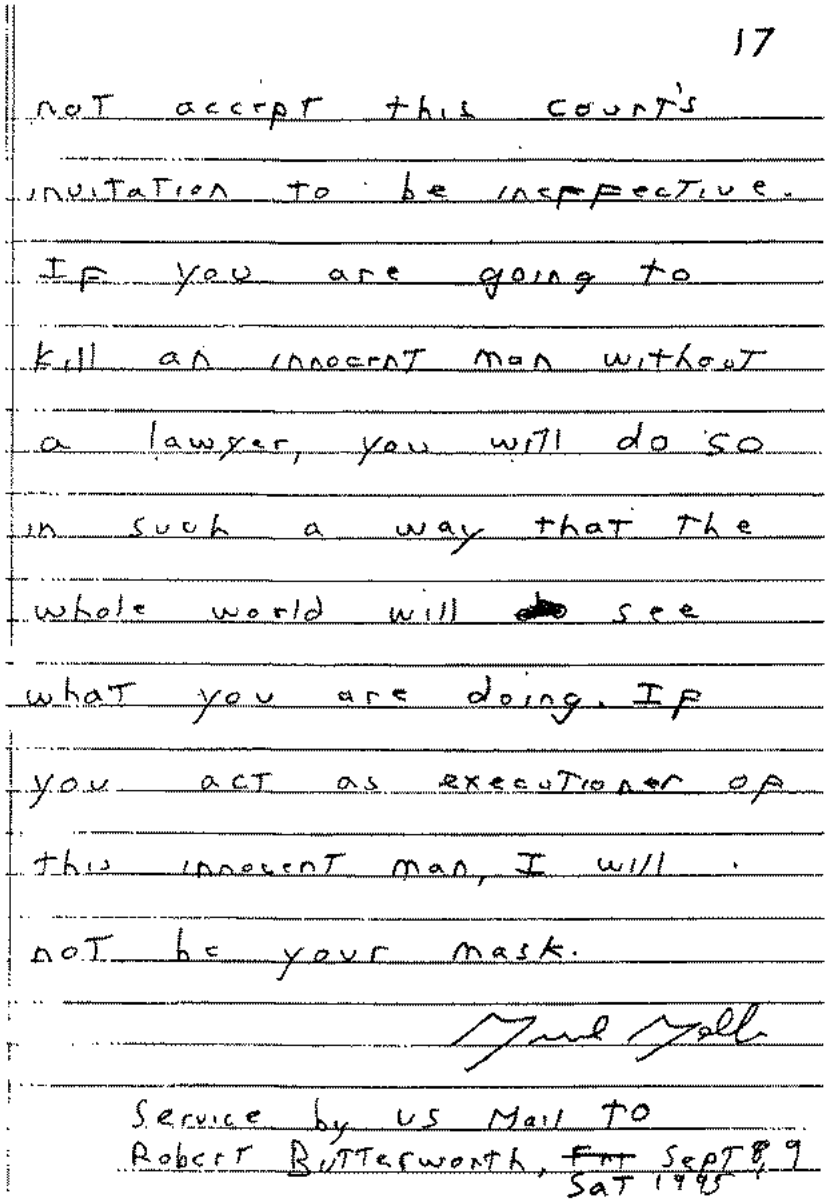
In short, undersigned counsel -- an experienced Florida capital appellate litigator + an ethics teacher Familer with Florida's professional responsibility commands -- will

[sic]

[sic]



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Service by US Mail TO
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Sat 1995

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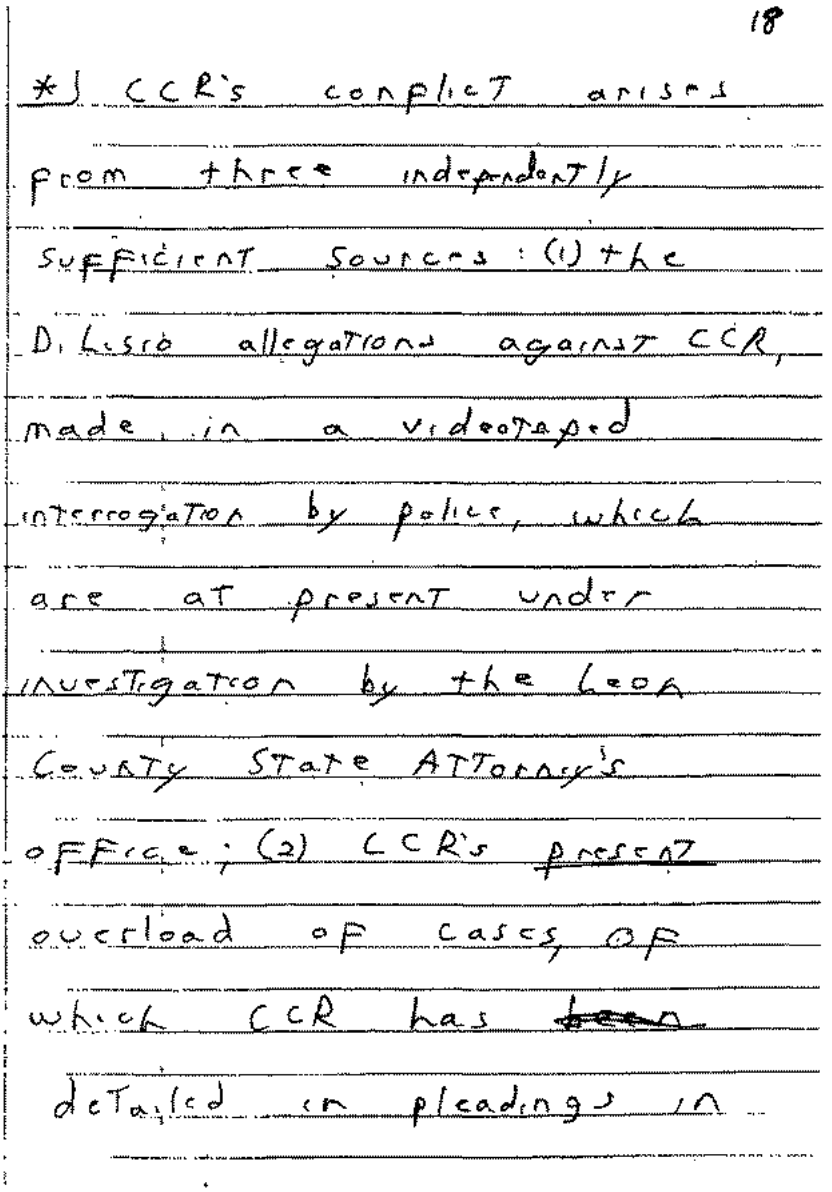

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[sic]

VIII. MEMORANDUM, SEPTEMBER 10, 1995[77]

[sic]MEMORANDUM

DATE: September 10, 1995
TO: Folks. . . .
FROM: Michael Mello
RE: Snatching Defeat From The Jaws Of Victory
(or How We Won In The Worst Possible Way)

Ugh. This is a hard memo to write, but I'm going to try to explain how we really *lost* in court on Friday.

First, the evidentiary hearing was ordered to address the question of Anthony DiLisio's recantation. That means the only question before the court will be this: Was Tony DiLisio lying when he testified at Joe's trial 20 years ago, as he now says he was, or is he lying *now* about lying 20 years ago? Tony will be called to the stand, and will testify quite powerfully that he was lying at Joe's trial and is telling the truth now.

Here comes the hard part. Dexter Douglass has already indicated to the media that the state intends to call some of its super-secret witnesses, and we can assume they will be used to try to discredit Tony's recantation. They will, in essence, testify that Tony was telling the truth at Joe's trial, and is lying now. We would then have an opportunity to cross-examine those witnesses and attempt to discredit their testimony — except that *we don't know who those witnesses are!*

Further, even *if* we were given the identities of those witnesses first thing Monday morning — an event which is *extremely* unlikely, given the pattern of state misconduct in this case —*96 hours* is not enough time for us to investigate those witnesses, their backgrounds, their relationship to Tony, and the validity of their testimony. In short, 96 hours is simply insufficient time to prepare *any* meaningful cross-examination of critical witnesses.

Our inability to prepare for this sham "hearing" will be [sic]

---

[77] This memorandum appears in its original form. It has not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*).

[sic]the surest thing to kill Joe. If we *try* — if we rush around blindly, trying to find out what we can, however we can, and wind up doing a lousy investigation of anonymous witnesses — we go into court ill-prepared, at best, and we will be unable to discredit the state's witnesses. And if we are unable to discredit those witnesses, the judge will make a factual determination that Tony is lying now, and was telling the truth 20 years ago at Joe's trial. That ruling will be presumptively correct — which means it is *completely* unreviewable by any other court, even the Supreme Court of the US. In short, if we rush this and blow it, Joe is dead. Since there is absolutely no way in which we can be prepared for a hearing in 96 hours, and given the grave consequences of a slip-shod attempt, we must prevent the hearing from happening on Friday. On this basis I have filed a motion to stay the execution and hold the evidentiary "hearing" in abeyance. We need more time.

In addition, I am an appellate attorney, not a trial lawyer. Since I learned of the court's opinion, I have been trying to find a trial attorney willing and competent to represent Joe at the "hearing" ordered by this court. As of this writing, *no* experienced, competent attorney is willing to do so under the unreasonable time constraints established by the court. I will keep looking for one.[sic]

IX. *SPAZIANO V. STATE*, MODIFIED OPINION, SEPTEMBER 12, 1995[78]

On September 12, four days after issuing its September 8 opinion directing the trial court to hold an evidentiary hearing by September 15, and CCR to retain primary responsibility for representation, the Florida Supreme Court modified its opinion to respond to several motions, most especially my Motion for Rehearing and Reconsideration and Stay of Execution. Justices Shaw and Armstead opined:

> In our September 8, 1995, opinion, we specifically stated that CCR has primary responsibility for Spaziano's postconviction relief proceedings. Furthermore, we declined to appoint Mello, nunc pro tunc, as Spaziano's counsel. In rendering that decision, this Court unanimously rejected Mello's assertions that a conflict existed in CCR's representation of Spaziano. Additionally, when we issued that opinion, we envisioned a spirit of cooperation between CCR and Mello that would guarantee the best representation for Spaziano. Unfortunately, the events of this past weekend make it clear that such cooperation does not exist. Indeed, Mello has not accepted our findings or conclusions.[79]
>
> The fair administration of justice in Florida cannot proceed with such flagrant disregard of this Court's procedures and directions. In view of Mello's actions, including his refusal to abide by this Court's directions, his statement that he is not competent to handle an evidentiary hearing at the trial level, and his express refusal to appear at the evidentiary hearing ordered by this Court, we find that he has effectively withdrawn from representing Spaziano.[80]
>
> Spaziano is an indigent inmate. Spaziano has previously requested that this Court address the issue of investigation costs and legal fees for his postconviction relief proceedings. We attempted to provide for both Spaziano's wishes and rights in our September 8, 1995, opinion. CCR and Mello were to work together to ensure adequate counsel and resources. That solution was intended to satisfy both Spaziano's wishes and his need for effective counsel. This past weekend's events have made it clear that a choice must now be made. Under the present circumstances, we direct that CCR shall act as Spaziano's counsel without Mello's assistance or interference.[81]

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[78] Spaziano v. State, 660 So. 2d 1363 (Fla.) (per curiam), *modified*, (1995), *cert. denied*, 116 S. Ct. 722 (1996).

[79] *Id.* at 1368-69.

[80] *Id.* at 1369.

[81] *Id.* at 1370.

> Spaziano is faced with a choice. He may be represented at the evidentiary hearing by CCR or by competent volunteer counsel who will comply with rules and directions of this Court at no expense to the State, or he may choose to have no counsel at the evidentiary hearing. It is his decision.[82]

Some choice.

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[82] *Id.*

X. TENDERED BUT UNFILED PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, OCTOBER 10, 1995[83]

I filed this petition along with a motion to exceed the Court's page limit for such filings[84] in the United States Supreme Court on October 10, 1995. In its original form, this document raised three questions presented and was one hundred and ten pages long, forty-five pages longer than the limit. Unfortunately, the Court could not be bothered to read these extra forty-five pages about Mr. Spaziano's innocence, and denied the motion. To remedy this distasteful situation, the document was split and two petitions were filed.

[sic]No._____

IN THE
SUPREME COURT OF THE UNTITTED STATES
OCTOBER TERM, 1995

JOSEPH R. SPAZIANO,
Petitioner,
v.
THE STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Mr. Spaziano prays that a writ of certiorari issue to review final judgement of the Supreme Court of Florida filed on September 8, 1995.

CITATIONS TO OPINIONS BELOW

The Florida Supreme Court rendered its judgement in this

[sic]

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[83] The relevant portions of the text of this Petition and notes 85-110 appear in their original form. They have not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*).

[84] SUP. CT. R. 33.3.a., *supra* note 5.

[sic]case on September 8, 1995. The court's opinion, not yet published, is attached, as Appendix A.

JURISDICTION

The judgement and opinion of the Supreme Court of Florida was filed on September 8, 1995. No rehearing was permitted by the court. The Court's opinion said: "NO MOTION FOR REHEARING WILL BE ALLOWED." *Spaziano v. State,* Appendix A, So. 2d ___, slip op. at 7 (Fla. Sup. Ct. Sept. 8, 1995) (capitalization in original). Mr. Spaziano's counsel did file a rehearing motion, which the Court appeared to consider, *See* Appendix C; because *pro bono* counsel was on the road (in Tallahassee, for the oral argument scheduled on short notice by the Florida Supreme Court), covering all his own out-of-pocket travel and litigation expenses and without secretarial or other support, he was forced to file the rehearing in handwritten form. This rehearing was withdrawn on September 10. *See* Appendix D. On September 12, 1995, the Florida Supreme Court issued a second judgment, modifying its September 8 opinion in ways not germane to the questions presented in this petition. *See* Appendix E. The court's mandate issued on September 12. *See* Appendix F.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254 (1993), Mr. Spaziano having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the eighth amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[sic]

[sic] This case also involves Section 1 of the fourteenth amendment to the United States Constitution, which provides in part;

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; mpr deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT REGARDING RELATED CASES PENDING BEFORE THE COURT

The class action *Asay v. Fla. Parole Comm., pet. for cert. filed,* No 95-5807, presents, in an abstract, class-based way, the public records issue presented in Joseph Robert Spaziano's certiorari petition. *Asay* was one of only two cases cited by the Florida Supreme Court in support of its rejection of Mr. Spaziano's secret records / *Brady* claim.

As the certiorari petition in *Asay* sets out, the secrecy claim is of some significant importance. However, Mr. Spaziano's case might provide a more appropriate vehicle through which the Court could decide this significant issue. *Asay* traces the abstract issue in a class action; Mr. Spaziano raises the issue in a concrete case, where the exculpatoriness of the secret evidence could not be clearer. Further, the *Asay* class action has procedural problems, *See* Appendix ____, not present in Mr. Spaziano's case-specific presentation of the question presented. Finally, unlike *Asay,* this Court is familiar with the record in Mr. Spaziano's case, having granted plenary review in the case once before. *Spaziano v. Florida,* _____ U.S. _____ (1984).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Undersigned counsel presented the first two constitutional questions raised in this petition to the Florida Supreme Court in the form of several motions and supplements. *See* Appendices G-UU. The Florida Supreme Court's September 8 opinion referred to a "catch-all" motion. *See* Appendix A. In any event, the court refused to file several motions filed by undersigned counsel. *See* Appendix TT. For this reason, counsel includes the relevant motions in the appendices to this petition.

At the outset of his principal pleading in the Florida Supreme Court, Mr. Spaziano's counsel wrote:

> Undersigned counsel candidly concedes that a plethora of procedural preclusions articulated by this court bar this instant [sic]

> [sic]action. As a motion to rehearing of an opinion by this court rendered in 1986, this motion is obviously untimely. Treated as a new claim for postconviction relief, this action is barred by the one year time limit on Rule 3.851 motions. There are claim and issue preclusion barriers, because all of the legal issues raised in this motion have been raised by Mr. Spaziano in the past; there has been no intervening change in law; there have been new facts recently discovered, but they may not be of the magnitude necessary, under this court's precedence, to secure review. Finally, retroactivity principles bar this court from treating several aspects raised by Mr. Spaziano as issues cognizable at this time.

Spaziano v. State, ____ So. 2d _____, Appendix A (Fla. Sup. Ct. Sept. 8, 1995).

The Florida Supreme Court decided the issues presented in this petition on their merits — and *solely* on their merits — thus forgiving any possible procedural bars. *Id.* This Court must do so as well: Even if a petitioner committed a procedural default that could have supplied an "adequate" and "independent" state ground for denying relief, the procedural default doctrine does not apply if "the last state court rendering a judgement in the case" reached the merits of the claim.[85] If the last state court in a given

[sic]

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[85] *Harris v. Reed*, 489 U.S. 255, 262 (1989). *See, e.g., Victor v. Nebraska*, 114 S. Ct. 1239, 1249 (1994) ("On state postconviction review, the Nebraska Supreme Court rejected Victor's contention that the instruction . . . violated the Due Process Clause. Because the last state court in which review could be had considered Victor's constitutional claim on the merits, it is properly presented for our review despite Victor's failure to object to the instruction at trial or raise the issue on direct appeal." (citing *Ylst v. Nunnemaker, infra*)); *Graham v. Collins*, 113 S. Ct. 893, 921 n.6 (1993) (Souter, J., dissenting) (although at trial, habeas corpus petitioner did not seek mitigating-circumstance instruction he now claims was required, issue is "properly before us" because, *inter alia*, "the Texas Court of Criminal Appeals appears to have addressed petitioner's challenge on the merits in a state postconviction proceeding"); *Ylst v. Nunnemaker*, 111 S. Ct. 2590, 2593 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal court review that might otherwise be available"); *California v. Freeman*, 488 U.S. 1311, 1314-15 (1989) (O'Connor, J., on application for stay) (direct review case) (if discussion of state claim is interwoven with discussion of federal claim, ruling on state claim may also be ruling on merits of federal claim); *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988); *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988); *Wainwright v. Greenfield*, 474 U.S. 284, 289 n.3 (1986); *Wainright v. Witt*, 469 U.S. 412, 413 n.11 (1985) ("Under circumstances where the state courts do not rely on independent state grounds . . . and instead reach the merits . . ., the federal question is properly before us."); *Connecticut v. Johnson*, 460 U.S. 73, 80 n.8 (1983) (plurality opinion) (direct review case); *Engle v. Isaac*, 456 U.S. 107, 135 n. 44 (1982); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980); *Ulster County Ct. v. Allen*, 442 U.S. 140, 152-54 (1979); *Franks v. Delaware*, 438 U.S. 154, 161-62 *(1978); Castaneda v. Partida*, 430 U.S. 482, 485 n.4 (1977); *Mullaney v.*

[sic]case did not see fit to rely on any procedural ground in rejecting a claim and instead decided the claim on its merits, the federal court may do likewise, for in such cases there is no federalism basis for deferring to any adequate and independent state procedural ground of decision,[86] and the state cannot claim that the defendant's default deprived the state courts of a fair opportunity to dispose of the claim.[87] As the Supreme Court has stated, "if the state court under state law chooses not to rely on a procedural bar [sic]

Wilbur, 421 U.S. 684, 704 n.* (1975) (Rhenquist, J., concurring); *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n.9 (1975); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (direct review case); *Warden v. Hayden*, 387 U.S. 294, 297 n.3 (1967); *Whitney v. California*, 274 U.S. 357, 360-62 (1927) (direct review case); *Jenkins v. Graley*, 8 F.3d 505, 507 (7th Cir. 1993); *Shaw v. Collins*, 5 F.3d 128, 131-32 (5th Cir. 1993); *Suniga v. Bunnell*, 998 F.2d 664, 667 (9th Cir. 1993); *Panther v. Hames*, 991 F.2d 576, 580 (9th Cir. 1993); *Thomas v. Harrelson*, 942 F.2d 1530, 1531-32 (11th Cir. 1991); *Brown v. Collins*, 937 F.2d 175, 179 (5th Cir. 1991); *Evans v. Dowd*, 932 F.2d 739, 741 (8th Cir.) *(per curiam), cert. denied*, 112 S. Ct. 385 (1991); *Thigpen v. Thigpen*, 926 F.2d 1003, 1011 n.18 (11th Cir. 1991); *Love v. Jones*, 923 F.2d 816, 818 n.1 (11th Cir. 1991); *Walton v. Caspari*, 916 F.2d 1352, 1356-57 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1387 (1991); *May v. Collins*, 904 F.2d 228, 232 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 770 (1991); *Russell v. Rolfs*, 893 F.2d 1033, 1035-36 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991); *Smith v. Freeman*, 892 F.2d 331, 337 (3d Cir. 1989) ("Under the principles of *Harris*, we are not bound to enforce a state procedural rule when the state itself has not done so, even if the procedural rule is theoretically applicable to our facts"); *Sawyer v. Butler*, 881 F.2d 1273, 1282-87 (5th Cir. 1989) *(en banc), aff'd sub nom, Sawyer v. Smith*, 497 U.S. 227 (1990); *Lewis v. Borg*, 879 F.2d 697, 698 (9th Cir. 1989) ("We have held that a federal habeas claim is not barred by the procedural default rule when the state court declines to apply the procedural bar and adjudicates the habeas claim on the merits"); *Williams v. Armontrout*, 877 F.2d 1376, 1384 n.3 (8th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); *Osborn v. Shillinger*, 861 F.2d 612, 617 (10th Cir, 1988); *Mann v. Dugger*, 844 F.2d 1446, 1448 n.4 (11th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989) (federal habeas corpus review not barred when state supreme court chooses not to enforce its own procedural default rule); *Doucette v. Vose*, 842 F.2d 538, 539-41 (1st Cir. 1988); *Cohen v. Tate*, 779 F.2d 1181, 1185 (6th Cir. 1985); *Velarde v. Shulsen*, 757 F.2d 1093, 1096 n.1 (10th Cir. 1985); *Briley v. Bass*, 750 F.2d 1238, 1242 n.6 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985); *Williams v. Parke*, 741 F.2d 847, 848 n.1 (6th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *Hux v. Murphy*, 733 F.2d 737, 739 (10th Cir. 1984), *cert. denied*, 471 U.S. 1103 (1985); *Jackson v. Amaral*, 729 F.2d 41, 44 (1st Cir. 1984); *Klein v. Harris*, 667 F.2d 274, 286-87 (2d Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982). The federal courts look to the opinion of "the last state court rendering a judgement in the case," *Victor v. Nebraska, supra*, 489 U.S. at 262, because "[s]tate procedural bars are not immortal . . .; they may expire because of later actions by state courts," *Yist v. Nunnenzaker, supra* at 2593.

86 *Ulster County Ct. v. Allen, supra*, 442 U.S. at 154.

87 *Cf. Coleman v. Thompson*, 111 S. Ct. ____ (19__) at 2555 ("in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoners' federal rights . . . [and] a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance").

[sic]. . ., then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim."[88]

The procedural barriers set out above preclude the filing of a successive habeas corpus petition in federal district court. The district court and the Eleventh Circuit ignored Mr. Spaziano's evidence of innocence in his *first* habeas petition. There is little reason to think those courts would treat a second habeas petition any differently.[89]

[sic]

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[88] *Harris v. Reed*, *supra*, 489 U.S. at 265 n. 12. *Accord Coleman v. Thompson*, *supra*, 111 S. Ct. at 2557; *Ylst v. Nunnemaker*, *supra*, 111 S. Ct. at 2593.

[89] The new death warrant signed by Governor Chiles, and based on the FDLE report, left undersigned counsel with the difficult question of whether to take Mr. Spaziano's case to federal district court. This was not an easy decision but, eventually, counsel decided not to pursue this unlikely channel of justice. Counsel made this decision for several reasons.

There are indeed undeniable legal benefits to going to every possible court to seek a stay. The system of capital punishment is random: we might get lucky and secure a stay from federal courts-if we do not ask, we will not get one. There is also the psychological benefit: we feel better because we have done all we can do as lawyers; our client feels better knowing that we have knocked on every legal door; the judges feel better because they can tell themselves the system worked because the defense lawyers scurried like rats from court to court raising every conceivable issue; and, for the same reasons, the public feels better.

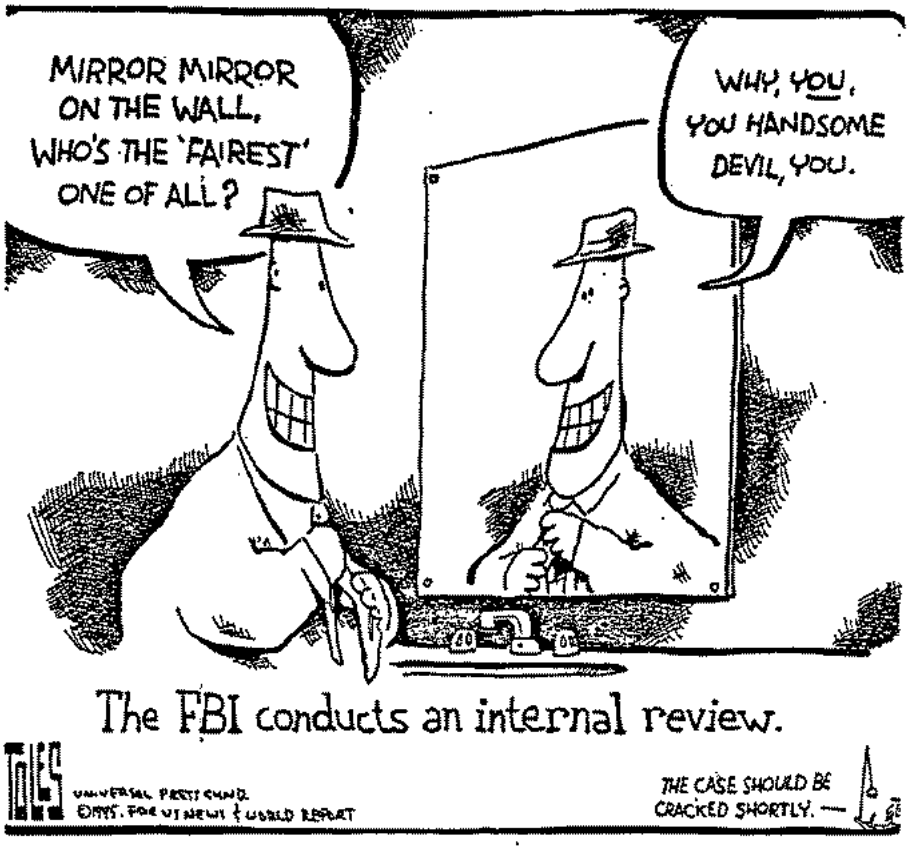
So, the benefits of the eleventh-hour dash are clear and familiar to us. We have all been through the drill before. Yet, the costs of foregoing the federal courts would be minimal. The "federal courts" in this case were Kendall Sharp, district judge, and Ed Carnes, Eleventh Circuit judge. In thirteen years on the bench, Judge Sharp has not once found a single claim by a condemned prisoner to be non-frivolous-to say nothing of being sufficiently meritorious to justify a stay. Judge Carnes provided even less hope; Carnes can most fairly be characterized as a capital prosecutor cross-dressing as a federal appellate judge. He wrote the Eleventh Circuit's opinion on Mr. Spaziano's case and spent more energy complaining about the page limit for counsel's brief than the evidence of innocence he raised in the brief. And this had been the first habeas-a habeas based on compelling evidence of innocence, some of which was not procedurally defaulted.

Our evidence on innocence was powerful, but we did not have a videtape showing that Mr. Spaziano was elsewhere at the precise time of the murder. A videotape was what Lloyd Schlup had in his successive habeas petition and all Schlup got out of the Court was an evidentiary hearing, and that only by a slim margin of 5-4, the same number we would need for a stay.

So, the real legal test, as opposed to the black letter law was: if you have a videotaped alibi, and you are in successor habeas status, then you might be able to scrape together five votes for a chance to prove your claim in an evidentiary hearing, a hearing which would be before Judge Sharp. Not having a videotape, or anything close, this was the absolute most we could hope for from the federal judiciary. We had already argued innocence as the basis for our first habeas and, of the thirteen federal judges who could have considered that evidence, not one agreed with us. In federal court, innocence seems irrelevant. So, in light of their procedural default rhetoric, we would give up little by foregoing the federal system.

On the other hand, the costs of entering the federal courts would have been

[sic]**STATEMENT OF THE CASE**



[sic]

great. We would waste scarce time and energy on an essentially hopeless litigation in front of judges who did not think we belonged there.

More importantly, it seemed to counsel, by doing the fifty-yard dash from court to court, we deflected attention away from Governor Chiles and the Florida Supreme Court. Most critically, we would diffuse responsibility and spread it among the Governor, the Florida Supreme Court, and the federal courts. If everyone shared responsibility for the killing of this innocent man, then no one would feel the responsibility.

Diffusion of responsibility is the fundamental systemic and institutional problem with Mr. Spaziano's case. The jury was not sure that Mr. Spaziano was guilty, but they knew he was an Outlaw biker so they split the difference and found him guilty but gave him life. The trial judge was unaware of the jury's doubt so he imposed death. The jury shifted responsibility to the judge and the judge shifted it to the jury. The same phenomena occurred at each step of the capital assembly line. The Florida Supreme Court deferred to the jury and trial court as principles of appellate practice dictate. And the federal courts deferred to the state judiciary as federalism demands.

Finally, the judiciary, both state and federal, deferred to the authority of the governor, as directed by *Herrera v. Collins*, 113 S.Ct. 853 (1993). In 1995, the responsibility for executing this innocent man rested on the shoulders of one person, Lawton Chiles. The buck stopped there, and he knew it. For this reason, the *Herald's* coverage persuaded him to stay the warrant in June.

[sic] Replace the word "FBI" with "Florida Department of Law Enforcement (FDLE);" a now-public FBI whitewash with a still-secret FDLE whitewash; rightist-militiamen with Outlaw bikers; and the above political cartoon captures the questions presented in this certiorari petition: law enforcement investigating law enforcement, to determine if law enforcement committed hideous errors with tragic consequences. In Ruby Ridge, the tragic consequences were the killing of a woman and her child. In Mr. Spaziano's case, the tragic consequence was the 19 year incarceration on death row of an innocent man. This case has not yet resulted in the killing of an innocent life. *Yet.* And the state relentlessly keeps trying.

The proceedings in the lower court involved a number of legal issues, but all the legal issues were grounded on the same factual premise that has been at the core of Mr. Spaziano's case for the past nineteen years: Mr. Spaziano is absolutely innocent of murder. He didn't do it, period. Not "he did it but he had a bad childhood;" not "he did it but he was crazy." Mr. Spaziano is innocent the old fashioned way: He didn't commit the crime.

All he has been asking for these past 19 years is an opportunity to prove his innocence to a jury allowed to hear *all* the evidence, on both sides. Give us a jury. If the state wants to kill him, let them do it the old fashioned way: Give us a jury.

[sic]

Counsel was afraid that he had already erred in giving Governor Chiles an out when he filed for relief in the Florida Supreme Court, and did not want to further dilute his responsibility by filing in federal court. The FDLE gave Chiles the political cover to issue another death warrant and, therefore, we were back in the Florida Supreme Court. So it was the Court's problem, not the Governor's. If we lost in the Florida Supreme Court, Chiles would expect us to dash into federal district court, then the Eleventh Circuit, and the Supreme Court. With frightening predictability, the stay would be denied the night before the scheduled execution, and all of the attention-and any blame-would rest on the judges and not Governor Chiles. As we all knew, that was the expected drill.

In my opinion, Mr. Spaziano had little chance of getting a stay from the Florida Supreme Court. If they were concerned with providing justice, they would have cut through the procedural screens that courts erect to avoid even considering the evidence of innocence and would have already mitigated the sentence. This left Governor Chiles as our best shot at a stay. And the key to Governor Chiles granting the stay was to eliminate any opportunity for him to pass the buck to the courts, to close off all possible escape routes. Thus, our chances for success hinged on keeping the responsibility for killing an innocent man squarely on Chiles and Chiles alone. This was why will not go to federal district court. Counsel hoped that by keeping the pressure on Governor Chiles, while allowing the media to continue championing Mr. Spaziano's innocence, we could succeed.

The magnitude of the pressure Governor Chiles faces depends not only on placing the full weight of Mr. Spaziano's death on him, but also on discrediting the FDLE report and exposing it as a whitewash with a foregone conclusion.

[sic] Joseph Robert Spaziano has spent the past 19 years on death row for crimes he did not commit. The evidence of his innocence has been accumulating over the past two decades, but court after court, blinded by procedural technicalities, refused to consider it. But for the investigative reporting of the *Miami Herald* over the past few months, Mr. Spaziano would have been killed at 7:00 a.m. on June 21, 1995, - *See generally,* Michael Mello, *Death and His Lawyers,* 20 Vt. L. Rev. _____ (forthcoming Oct. 1995). — *for crimes he did not commit.*

A. The Prosecutor's Case At Trial, According to the Trial Prosecutor: Anthony DiLisio

Mr. Spaziano was convicted and condemned to die for the 1973 murder of Laura Lynn Harberts.

Mr. Spaziano's murder conviction and death sentence were bottomed on the testimony of a sixteen-year-old drug abuser who hated Mr. Spaziano and who was granted immunity, and who was twice hypnotized by a police hypnotist, before he "remembered" a bizarre and inconsistent tale about Mr. Spaziano allegedly taking him to a body and making inculpatory statements about the victim's death. The witness is Anthony DiLisio, and all agree that without his testimony there was no case against Mr. Spaziano.

In a pre-trial motion before the judge, the trial prosecutor said that if they could not get the testimony of Anthony DiLisio admitted into evidence, they would bave no case: *"If we can't get in the testimony of Tony DiLisio, we'd absolutely have no case here whatsoever....*So either we're going to have it through Tony, or we're not going to have it at all." Tr. 14. The state's case at trial was "bottomed," in the words of the prosecutor, on the testimony of Anthony DiLisio.

In closing argument in the guilt/innocence phase, tbe prosecutor told the jury that Anthony DiLisio was *"the most important witness in this case,"* and told the jury *"if you don't believe DiLisio, then find the defendant not guilty in 5 minutes."* T. 775-76.

The key to the state's case, therefore, was Anthony DiLisio. Mr. DiLisio's testimony consisted of two components: (1) inculpatory statements allegedly made by Mr. Spaziano, and (2) a harrowing trip to a dump site that Mr. DiLisio testified he took with Mr. Spaziano so that Mr. Spaziano could, according to Mr. DiLisio, show Mr. DiLisio the bodies of women that Mr. Spaziano had bragged about having killed. The believability of Mr. DiLisio's testimony about the alleged inculpatory statements depended entirely

[sic]on the trip to the dump. Without the trip to the dump, not even Mr. DiLisio believed Mr. Spaziano's bravado statements. Without the trip to the dump, the statements are rendered meaningless.

The prosecutor's final argument urging the jury to recommend death consisted entirely of the trip to the dump. At the resentencing, the prosecutor said "this case is bottomed on the testimony of Anthony DiLisio." R.T. 245-46. The prosecutor later argued that the alleged trip to the dump with Mr. Spaziano is *"what makes DiLisio's testimony more than just idle gossip.* The defendant was actually bragging and showing him his handiwork....*[It's] not someone sitting in a bar somewhere,* the defendant is not telling this in a bar, he's not bragging." (R. 257).

And on direct appeal, countering Mr. Spaziano's claim that the evidence was legally insufficient: "the exact cause of death was presented through the testimony of Anthony DiLisio . . . . The Appellant bragged to Mr. DiLisio that he tortured and murdered some girls and took Mr. DiLisio to the Altamonte dump to view the bodies and *confirm his statements.*" Direct Appeal Brief of Appellee, at 10. The Florida Supreme Court agreed. *Spaziano v. State,* _____ So. 2d _____, _____ (Fla. 1981). Ralph DiLisio, Tony's father, also wanted to testify about generic statements made by Mr. Spaziano about alleged atrocities he allegedly committed against alleged (but unnamed) "girls" — in other words, DiLisio, the father, sought to testify about the same hearsay about which DiLisio the younger *was* permitted to testify. The father said he never believed Mr. Spaziano's Outlaw braggadocio — but neither did DiLisio the son.

Judge McGregor ruled the testimony of DiLisio senior inadmissible, and he ordered it stricken. T. 716. The testimony of DiLisio the son was held admissible.

Why was the hearsay testimony of the elder DiLisio held inadmissible, but the very similar hearsay testimony of DiLisio the son held admissible? The only plausible explanation is that the son's hearsay testimony, unlike the father's, was made to sound credible and reliable by virtue of the trip to the dump site.

[sic]

[sic]B. Mr. Spaziano's Sentencing Jury Recommended Life Imprisonment Because of Lingering Doubts About Mr. Spaziano's Guilt, Even Though the Jury Knew Mr. Spaziano was an Outlaw Charged with an Especially Brutal Murder, But the Jury Did Not Know that DiLisio Had Been Hypnotized, Much Less that He has Now Recanted.

When this Court last granted plenary review in Mr. Spaziano's case — following direct appeal to the Florida Supreme Court, with all parties limited to the four corners of the trial record — the record did not reflect the reasons for the jury's life recommendation. *Spaziano v. Florida,* 468 U.S. 447 (1984). Justice Stevens hypothesized that

> while the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body. It may well be that the jury was . . . sufficiently troubled by the possibility that an irrevocable mistake might be made, . . . that the jury concluded that a sentence of death could not be morally justified in this case.

Id. at n.34 (Stevens, J., dissenting).

We now know, however, that the jury harbored sincere doubt about guilt — which was in fact a large part of the reason for its life recommendation. We know that the jury had doubt about Mr. Spaziano's guilt because a juror has said so. During the course of postconviction investigation in this case, undersigned counsel filed Notice of Intent to Interview Jurors in this on November 6, 1985, and notified the state by proper service. Juror Lorenzano was then interviewed, and her affidavit was appended to the first state postconviction motion. In that affidavit she revealed:

> *During our jury deliberations at the sentence portion of the Spaziano trial, I voted for a life sentence rather than the death penalty.*
>
> *Nine or ten jurors felt as I did: that we did not want to see this man die.*
>
> *One of the major reasons for most of us favoring a life sentence was our doubts about whether Mr. Spaziano was guilty of the crime as charged. I distinctly remember this being expressed as a factor in many of the juror's minds.*
>
> *One of our major concerns was the testimony of the 16-year-old boy, Tony DiLisio, which we didn't entirely believe at the time of the trial.*
>
> [sic]

[sic] *Had we known his testimony was prompted by hypnosis, I believe it would have made a difference.*

C. DiLisio's Secret 1995 Recantation of the Weight-Bearing Beam of His Key Trial Testimony

In June, 1995, DiLisio — unbeknownst to Mr. Spaziano or his counsel — recanted his crucial testimony. The recantation was unbeknownst to Mr. Spaziano because it occurred in the course of a secret police investigation initiated, *sua sponte,* by Governor Lawton Chiles.

When Mr. Spaziano's counsel learned of media reports about DiLisio's secret recantation, he made repeated requests of the police and the governor for the videotape of DiLisio's interrogation. They refused. The governor's general counsel was quoted in the media as saying that DiLisio had not, in fact, recanted.

This was a lie. We know this because undersigned counsel obtained, through his own sources, a portion of the videotape. The recantation could not be clearer.

In 1995, in connection with Mr. Spaziano's out-of-time motion to rehear the court's opinion on the first Rule 3.850 motion, Mr. Spaziano filed with the court, under seal, the videotape of FDLE's 1995 interrogation of Mr. DiLisio. In that videotape, Mr. DiLisio disavows his crucial testimony: the trip to the dump. The videotape contained the following passages:

INTERVIEWER

Ok, going back to that same time *when you were with the police officers. Did at some point in time before hypnosis did you take them to a place where the body of this young lady that was killed...*

ANTHONY FRANK DILISIO

They took me there.

INTERVIEWER

They took you there?

ANTHONY FRANK DILISIO

They took me there, and a ... I remember that. I do remember that. I remember that...and the _____ God, like cut up pieces of a tree. It was kind of like dump but not a dump. Not a dump for trash, more like a dump for lawn stuff or you know what I mean.

INTERVIEWER

Was the body....still there?

[sic]

[sic]**ANTHONY FRANK DILISIO**

It was like an island. No.

INTERVIEWER

Alright...

ANTHONY FRANK DILISIO

The cops brought me there. The cops brought me there. I had never been there in my life until they brought me there. And they made it look like that a guy that they arrested, Crazy Joe, brought me there. They are the ones that showed me where the dump was, they were the ones that brought me to the dump. And I remember that I didn't do something right the first time that they brought me back to that office, and that doctors, and so they left, and they brought me back to the dump. And then brought me back to the office and I did really good.

INTERVIEWER

Do you recall what you told them after that experience?

ANTHONY FRANK DILISIO

No, I don't remember...that experience...no, it was almost like buddy, buddy, you know, they played me then.

INTERVIEWER

Uh, uh. . . did they, did you give them a description of the body or anything before hypnosis?

ANTHONY FRANK DILISIO

No, they told me what he did to the girl.

INTERVIEWER

Do you recall Spilanzo (sic) ever taking you to the dump?

ANTHONY FRANK DILISIO

No, never.

INTERVIEWER

If that in fact, did happen, do you think that you would recall that?

ANTHONY FRANK DILISIO

Most definitely.

INTERVIEWER

You never saw Sporanzo (sic) with her or heard Joe talk of Laura or whatever her name was?

ANTHONY FRANK DILISIO

No.

INTERVIEWER

What was your relationship with Sporanzo (sic)?

[sic]

[sic]**ANTHONY FRANK DILISIO**

His name is Spaziano.

INTERVIEWER

Spaziano...ok....

(emphasis added).

D. The Florida Supreme Court's September 8 Opinion: No Stay of Execution; Denial of Appointment of Counsel; No Defense Access to Secret Police Investigation File; Evidentiary Hearing in Seven Days, Under Active Death Warrant

The Florida Supreme Court held that Mr. Spaziano is not entitled under *Brady v. Maryland* to access to the FDLE videotape of DiLisio's recantation, or to any other aspect of the secret police investigation. *Spaziano,* Appendix A. The court also held that the Attorney General need not be recused from this litigation. *Id.*

In its Sept. 8 opinion, the Florida Supreme Court denied a stay of execution but remanded for an evidentiary hearing under warrant. The subject of the hearing was to have been DiLisio's recantation. Under the court's opinion, Mr. Spaziano's counsel would not have access to the secret report at the hearing.

The three dissenters wrote:

> I agree with virtually all that is said in the majority opinion except that portion imposing an unrealistic time frame for resolving what we all have now agreed is a cognizable claim for postconviction relief. Such a restriction is without precedent in our case law and tends to create an atmosphere of panic for resolution of an issue that requires calm and deliberate resolution.[90] Indeed, this is an issue demanding the most careful of attention because its end result could be the state-sponsored taking of a man's life when his guilt has now been called into question.
>
> As the United States Supreme Court itself has noted, "death is different." *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S. Ct. 2909, 2932, 49 L. ed. 2d 859 (1976). Unique in its finality, the death penalty therefore is circumscribed by extraordinary procedural safeguards designed to prevent an arbitrary or capricious application of this most irrevocable or punishments. I cannot see
>
> [sic]

[90] It is interesting that when the executive branch was presented with this problem, it put the entire case on hold while investigating the claim. We should do no less, and certainly should not force a quick decision that only enhances the further risk of error. (footnote in original)

[sic]how this core policy is being served by an unseemly rush to execute a man despite a sworn affidavit by the State's chief witness that Mr. Spaziano was convicted on falsified evidence.[91] This conclusion is all the more compelling here because the recantation is only the latest in a string of troubling doubts that have surrounded Mr. Spaziano's conviction from the outset, revealing it to be a text-book example of how capital trials and postconviction reviews should not be conducted.

Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, *Cochran v. State*, 547 So. 2d 928 (Fla. 1989), (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, *Bundy v. State*, 471 So. 2d 9, 18 (Fla. 1985), *cert. denied*, 479 U.S. 894, 107 S. Ct. 295, 93 L. Ed. 2d 269 (1986), (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without careful consideration of this newly discovered evidence under the only legal method available, Rule of Criminal Procedure 3.850 or 3.851.[92]

While each of these standing alone is cause for grave concern, the apparent recantation of the State's chief witness is the most disturbing. The role played by this witness was vividly explained by this Court's own words on direct appeal:

The principal witness for the state was Ralph DiLisio (sic), a sixteen-year-old acquaintance of the appellant. DiLisio testified that Spaziano often bragged about the girls he had mutilated and killed, and on the occasion DiLisio and another individual accompanied appellant to the Altamonte dump site where DiLisio saw two corpses, both covered with blood. DiLisio stated that Spaziano claimed responsibility for these killings [.]

With reference to the contention that the evidence is insufficient, the appellant asks us to reject in totality the testimony of DiLisio. DiLisio led authorities to the dump where the bodies were found two years after he observed the, with appellant. Both the jury and the trial judge had a superior advantage point to weigh the credibility of DiLisio's testimony. We find the evidence in this record was sufficient to sustain the jury's verdict. *Spaziano v. State*, 393 So. 2d 1119, 1120 & 1122 (Fla. 1981).

[sic]

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91 The affidavit, quoted in the majority opinion, is in irreconcilable conflict with DiLisio's testimony at trial, as quoted below from this Court's opinion on direct appeal. (footnote in original).

92 For reasons not adequately explained, counsel for Mr. Spaziano did not file under Rule of Criminal Procedure 3.850 or 3.851, but sought relief under a "motion" of his own invention. (footnote in original).

[sic]I think this excerpt more than amply refute any claim that Spaziano's conviction is adequately supported by evident apart from DiLisio's testimony. Were that the case, this Court in 1981 would hardly have pegged its *entire* analysis of the evidence's sufficiency on DiLisio's credibility. And today, when the credibility of that testimony has been called into question in the strongest possible manner — from DiLisio's own mouth — I think there is only one reasonable conclusion: This conviction bears a possible taint that must be investigated and explained before Spaziano can be electrocuted.

In oral argument, the State made much of the "speculative" nature of the allegations before us. While there certainly may be elements of speculation in what we are reviewing here, I am not at all satisfied the entire claim is groundless. DiLisio's affidavit alone tends to refute that contention. And in any event, it is the trial court's responsibility as fact-finder to weed out the speculative from the meritorious, not ours. Out sole duty at this point is to determine is a prima facie claim has been made, which is clearly has.

More to the point, we are talking about a man's life here. And in that sense, we are also talking about the moral underpinnings of the death penalty itself: an abiding faithfulness to the *heightened* procedural safeguards, an absolute requirement of the certainty of guilt, and an overriding commitment to the proposition that society should never descend into lawlessness in an effort to eliminate the lawless. Ends do not justify means. Quite to the contrary, the means chosen almost always color and shape the ends achieved. This is true even when we are talking about someone like Mr. Spaziano, whose life has hardly been a model. One question is at issue here, and one question alone: Was Mr. Spaziano *lawfully* convicted of the murder of Laura Harberts?

All that can be said with finality about this case today is that it remains mired in serious doubt. Because of the irrevocable nature of the death penalty, I am utterly unwilling to dismiss those doubts without adequate inquiry into their source. The present record presents at least a prima facie showing that the State's chief witness has recanted, and I thus agree that the trial court must review the claim presented here pursuant to Rule 3.850 or 3.851. Any other ruling would countenance an execution in the face of serious evidence that Mr. Spaziano was illegally convicted.

Because of the seriousness of the claim, I further believe this Court should enter an indefinite stay of execution to permit the parties to develop their cases without facing the pressures

[sic]

[sic]of an active death warrant, if the Governor does not stay or withdraw his warrant in light of our opinion today. Experience teaches that claims of this magnitude cannot be fully investigated nor a case prepared in one week. In any event, if the majority's time table proves inadequate, counsel clearly still has the ability to seek a stay from the trial court or this Court at a later time.

Finally, as the majority indicates, the Office of Capital Collateral Representative continues to be statutorily responsible for this case. Therefore it must at least provide volunteer counsel with the usual resources that would be available in a typical case handled by that agency.[93]

E. The Florida Supreme Court's September 12 Opinion, and the Court's "Firing" of Mr. Spaziano's *Pro Bono* Appellate Counsel and Appointment of a Hack Public Defender's Office With a Track Record of Botching the Factual Investigation into Mr. Spaziano's Innocence

Undersigned *pro bono* counsel refused to participate in an evidentiary hearing under those circumstances.[94] *See* Appendix C. So [sic]

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[93] I do not find persuasive counsel's claim that the Office of Capital Collateral Representative has a conflict. (footnote in original).

[94] Counsel circulated the following on September 10:

MEMORANDUM

DATE: September 10, 1995
TO: BDNMCB Group ("The Best Defense No Money Can Buy")
FROM: Michael Mello
RE: Snatching Defeat From the Jaws Of Victory
(or How We Won In The Worst Possible Way)

Ugh. This is a hard memo to write, but I'm going to try to explain how we really *lost* in court on Friday.

First, the evidentiary hearing was ordered to address the question of Anthony DiLisio's reaction. That means the only question before the court will be this: Was Tony DiLisio lying when he testified at Joe's trial 20 years ago, as he now says he was, or is he lying *now* about lying 20 years ago? Tony will be called to the stand, and will testify quite powerfully that he was lying at Joe's trial and is telling the truth now.

Here comes the hard part. Dexter Douglass has already indicated to the media that the state intends to call some of its super-secret witnesses, and we can assume they will be used to try to discredit Tony's recantation. They will, in essence, testify that Tony was telling the truth at Joe's trial, and is lying now. We would then have an opportunity to cross-examine those witnesses and attempt to discredit their testimony — except that *we don't know who those witnesses are!*

Further, even *if* we were given the identities of those witnesses first thing Monday morning — an event which is *extremely* unlikely, given the pattern of

[sic]did every one of the dozen law firms counsel asked to consider jumping into this case under death warrant - including Holland & Knight, the firm that agreed to do the hearing once the case was *no longer* under warrant.

Undersigned counsel argued in his original rehearing motion that the "hearing" ordered by the Florida Supreme Court was more than unfair; it was unlawful under the principles of *U.S. v. Cronic*. *Cronic* held that "[c]ircumstances . . . may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small, that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 446 U.S. 648, 659-60 (1984).[95]

[sic]

---

state misconduct in this case — *96 hours* is not enough time for us to investigate those witnesses, their backgrounds, their relationship to Tony, and the validity of their testimony. In short, 96 hours is simply insufficient time to prepare *any* meaningful cross-examination of critical witnesses.

Our inability to prepare for this sham "hearing" will be the surest thing to kill Joe. If we *try* — if we rush around blindly, trying to find out what we can, however ewe can, and wind up doing a lousy investigation of anonymous witnesses — we go into court ill-prepared, at best, and we will be unable to discredit the state's witnesses. And if we are unable to discredit those witnesses, the judge will make a factual determination that Tony is lying now, and was telling the truth 20 years ago at Joe's trial. That ruling will be presumptively correct — which means it is *completely* unreviewable by any other court, even the Supreme Court of the U.S. In short, if we rush this and blow it, Joe is dead. Since there is absolutely no way in which we can be prepared for a hearing in 96 hours, and given the grave consequences of a slip-shod attempt, we must prevent the hearing from happening on Friday. On this basis I have filed a motion to stay the execution and hold the evidentiary "hearing" in abeyance. We need more time.

In addition, I am an appellate attorney, not a trial lawyer. Since I learned of the court's opinion, I have been trying to find a trial attorney willing and competent to represent Joe at the "hearing" ordered by this court. As of this writing, *no* experienced, competent attorney is willing to do so under the unreasonable time constraints established by the court. I will keep looking for one.

95 The following cases either applied the rule from *Cronic* to presume prejudice or refused to presume prejudice when the state interfered with defendant's assistance of counsel. *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (Court held that under *Cronic*, lower court's exclusion of exculpatory evidence regarding the circumstances of defendant's confession "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'"); *United States v. Minsky*, *963* F.2d 870, 874 (6th Cir. 1992) (an ex parte bench conference was found to be a Sixth Amendment violation); *Jackson v. James*, 839 F.2d 1513 (11th Cir. 1988) (in a footnote, court stated that trial court's decision to permit appointment counsel to withdraw on morning of trial, resulting in defendant being unrepresented during critical stages of proceeding, made trial fundamentally unfair under *Cronic*);

[sic] On September 12, the Florida Supreme Court stayed the execution indefinitely, moved the evidentiary hearing back two and one half months, to November 15, "fired" undersigned counsel as Mr. Spaziano's pro bono appellate counsel, and forced upon

[sic]

Green v. Arn, 615 F. Supp. 1231, 1235 (N.D. Ohio 1985) (a Constitutional error was committed without having to establish prejudice when the judge was informed of petitioner's counsel's scheduling problem and chose to proceed with the prosecution of the action without counsel); *Walburg v. Israel*, 766 F.2d 1071, 1075-76 (7th Cir. 1985) (trial judge's hostility toward defendant's attorney justified presumption of prejudice under *Cronic); Perry v. Leeke*, 109 S. Ct. 594, 597 (1989) (Court affirmed appellate court's ruling that prejudice should not be presumed under *Cronic* when trial court directed defendant not to consult with anyone, including his lawyer, during fifteen-minute afternoon recess); *Blanco v. Singletary*, 943 F. 2d 1477, 1481 (11th Cir. 1991) (trial court's interference with defense attorney's calling of witnesses and overall conduct of defense did not justify presumption of prejudice under *Cronic* and not costly to litigate); *May v. Collins*, 948 F.2d 162, 167 (5th Cir. 1991) (while the structure of Texas sentencing statute may have caused the defense counsel's tactical decision not to present mitigating evidence, the court did not think this rose to the level of direct government interference with their ability to conduct the defense); *Stano v. Dugger*, 921 F.2d 1125, 1154 (11th Cir. 1991) (trial court's acceptance of defendant's guilty plea, even after the defense counsel informed him that he had not received full discovery from the State and could not advise defendant of wisdom of plea, did not reach *Cronic* exception to *Strickland* rule, *Strickland v. Washington*, 466 U.S. 668 (1984); defendant's attorney was an experienced public defender, and gave defendant appropriate advice regarding guilty pleas that defendant elected to enter); *Brown v. Rice*, 693 F. Supp. 381, 398 (W.D.N.C. 1988) (court held that State's interference with defense counsel's investigation of the case was not of sufficient magnitude to justify presumption of prejudice under *Cronic* when fruits of police investigation were made known to defendant through discovery); *Kelly v. United States*, 820 F.2d 1173, 1175-76 (11th Cir. 1987) (trial court's denial of defendant's continuance and attorney's entry into case one day before trial did not create sufficient reason to presume prejudice under *Cronic); Hammonds v. Newsome*, 816 F.2d 611, 613 (11th Cir. 1987) (trial court's refusal to appoint defendant's counsel during preliminary hearing did not justify presumption of prejudice because error was harmless; harmless error analysis, as applied to preliminary hearings, is still good law despite *Cronic* and *Strickland); Crutchfield v. Wainwright*, 803 F. 2d 1103, 108-09 (11th Cir. 1986) (trial court's denial of defendant's access to counsel during afternoon recess did not justify presumption of prejudice under *Cronic* when record did not show any objection to court's denial, or any evidence that defendant wanted to speak with his attorney during the recess); *Griffin v. Aiken*, 775 F.2d 1226, 1229-31 (4th Cir. 1985) (court refused to presume prejudice when trial court denied continuance and public defender had little time to prepare for trial); *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir. 1985) (citing *Cronic* for the proposition stated above and remanding to trail court for determination of whether federal agents insistence that defendant not advise his attorney of defendant's role in the FBI investigation interfered with defendant's sixth amendment rights); *Chadwick v. Green*, 740 F.2d 897 (11th Cir. 1984) (trial court's denial of continuance, resulting in attorney's inability to investigate and assert insanity defense, did not give rise to presumption of prejudice because "any failure to investigate and pursue all avenues of defense is best characterized as a failure by counsel in the performance of his investigatory duties, which is to be analyzed under *Strickland.*").

[sic]Mr. Spaziano a hack public defender office with a track record of botching the factual investigation in this case.

The three dissenters wrote:

> I fully agree with the majority's conclusion that in light of attorney Mello's inability or refusal to comply with this Court's decision of September 8, 1995, the office of the Capital Collateral Representative shall represent Spaziano in all post-conviction matters relating to this case.
>
> I disagree with the November 15, 1995, deadline the majority places on the trial court for conducting an evidentiary hearing on Spaziano's claim of recantation. As pointed out by Justice Kogan in his opinion concurring in part, dissenting in part with this Court's decision of September 8, 1995, this is a highly unusual case:
>
> Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without a careful consideration of this newly discovered evidence under the only legal method available....
>
> *Spaziano v. State,* No. 67,929, slip op. at 9 (Fla. Sept. 8, 1995) (Kogan J., concurring in part, dissenting in part) (citations omitted). The problems presented in this case are further exacerbated by recent events as outlined in the majority opinion.
>
> In light of the unusual procedural history of this case, the critical nature of the evidentiary issue before the trial court, and recent events, I would leave the time frame for conducting an evidentiary hearing to the trial court's discretion. The trial court is far better suited than we are to determine the logistical requirements of such a hearing.
>
> I concur in the remainder of the majority opinion.

Undersigned counsel attempted to point out the factual and legal errors in its September 12 opinion (including the fact that the Florida Supreme Court lacked the legitimate power to "fire" the undersigned, since the undersigned's client was Joseph Robert Spaziano, not the Florida Supreme Court). Counsel provided the court with retainer letters from Mr. Spaziano, his mother, and his niece. The court refused even to *file* the pleadings submitted by the undersigned, explaining, in a letter dated Sept. 20, that only

[sic]

[sic]the public defender can file papers as Mr. Spaziano's counsel. *See* Appendix TT.

F. Alone in the Electric Chair: Florida's Crisis of Postconviction Counsel; and The CCR Public Defender's Office Devolution into a Lapdog for the Governor and the Mask of the Executioner

This Court recognized in *McFarland v. Scott*, 114 S. Ct. 2568 (1994), Texas' crisis in the provision of postconviction counsel for death row prisoners. Since *McFarland* was decided, the death penalty resource centers throughout the nation have been defunded.

The Florida Supreme Court seems to think that Florida has no counsel crisis because the legislature created the Office of the Capital Collateral Representative (CCR). *See generally*, Mello, *Facing Death Alone*, 37 AM. U. L. REV. 3 (1988) (tracing counsel crisis that led to creation of CCR). But, as Mr. Spaziano's case illustrates, Florida *does* have a counsel crisis, the Florida Supreme Court's denial notwithstanding. Florida's resource center died the day after Governor Chiles signed Mr. Spaziano's most recent death warrant.

Joseph Robert Spaziano is indigent. He was represented in the lower court by undersigned counsel, an experienced capital postconviction litigator who is intimately familiar with the gigantic record in this 19-year-old case. *See* Appendix BB.

Undersigned *pro bono* counsel is a full-time law teacher in Vermont. Until the day after Governor Lawton Chiles signed Mr. Spaziano's fifth death warrant — August 24, 1995 — counsel received the crucial secretarial, logistical, and investigative support from the Volunteer Lawyers' Resource Center of the state of Florida (VLRC). VLRC ceased to exist on August 25, 1995, as Mr. Spaziano — supplemented by an amicus brief — documented in the Florida Supreme Court.

The Florida Supreme Court denied the undersigned counsel's motion for appointment of counsel and provision of funds for investigation of the facts proving Mr. Spaziano's innocence. *See* Appendices AA-QQ. Then when *pro bono* counsel was unable physically to comply with the court's demands for a complex evidentiary hearing under death warrant, at which the state could rely on a secret police investigation — the court purported to "fire" the undersigned and to force upon Mr. Spaziano a public defender office that (1) had already botched this case almost beyond repair; [sic]

[sic] (2) had multiple conflicts of interest; (3) had as its director a political appointee of Governor Lawton Chiles — the man who has signed two death warrants against Mr. Spaziano over the past six months; (4) has a history of tepid and inept representation of Florida death row clients, leading many to think of the office as being a lapdog of law firm for the governor who periodically tries to kill its clients, a reality that most likely results when a capital litigant (the governor) gets to choose who his opponents' lawyer will be.

The undersigned has found a law firm, Holland & Knight, willing to serve as trial counsel at the evidentiary hearing; he will remain as lead appellate counsel in this court and in the Florida Supreme Court — without the assistance of the now-dead VLRC.

Chiles' stay of execution lasted two months. Based on the secret FDLE investigation, Chiles signed a fifth warrant. The execution was scheduled for September 21, 1995 at 7:00 a.m. On September 8, the Florida Supreme Court denied a stay and ordered an evidentiary hearing for seven days hence — under warrant. As set out in his rehearing motion *(see* Appendix B), Mello declined the court's invitation to attempt the impossible; he refused to participate in such a hearing. The reason Mello defied the Florida Supreme Court's order for a new hearing was his inability to prepare adequately in such a short time without support or resources.

As Mr. Spaziano would prove at an evidentiary hearing, there have been two institutions which provide legal services for capital cases in Florida. Volunteer Lawyers Resource Center (VLRC) was a federally funded resource center for *pro bono* lawyers in capital appellate and post-conviction work. Although an excellent program, funding for this organization ended on the day after Governor Chiles signed Mr. Spaziano's fifth death warrant. This was devastating to Mello's attempts to represent Mr. Spaziano effectively. The other legal service is the Office of the Capital Collateral Representative (CCR), Florida's public defense office for capital work. Mello worked for CCR from 1985 to 1987, but since that time it has deteriorated until it is now as useless as the defunct VLRC, although for a very different reason.

CCR still exists physically, but this is the kind of "help" *pro bono* lawyers can expect. Not only did CCR refuse to help me in any way with Mr. Spaziano's representation, but CCR mounted an aggressive campaign to take over the case — against the emphatic wishes of Mr. Spaziano, his mother, his daughter, his sister, his niece, and [sic]

[sic]his lawyer (me). This raises one question, and leads to a second, about CCR. First, if CCR is as overworked as it complains incessantly that it is, why would CCR force itself upon a condemned man who would rather have no lawyer than a CCR lawyer? Second, my experience in Mr. Spaziano's case has led me to suspect that CCR does not work as hard as they complain they do, so why do we not require CCR to document their work by producing its personnel time records, under oath?

The Florida Supreme Court's September 12 opinion correctly noted that Mr. Spaziano did not (and does not now) want CCR as his lawyer, but the court ignored the good reasons *why* Mr. Spaziano reasonably believes that having CCR as your lawyer is worse than having no lawyer at all. CCR's performance in Mr. Spaziano's case does not just suggest that the agency is overworked; it suggests the agency is inept. Two weeks in advance of Mr. Spaziano's scheduled execution — on a fourth death warrant — CCR had conducted no fact investigation of any use (notwithstanding a wealth of leads, provided mainly by the *Miami Herald's* own independent investigation, which was initiated over the strong misgivings of CCR and with no help whatsoever from CCR), CCR had drafted no pleadings, CCR had developed no strategy, and CCR's director, Michael Minerva, was telling reporters (and the governor) that all he wanted for his factually innocent client ("innocent" in that he did not commit the crime) was a reduction in sentence from death to life in prison.

As undersigned counsel told the Florida Supreme Court, he would rather go to jail for contempt than allow CCR to handle Mr. Spaziano's case. This is because CCR has become a pawn of the institutional powers in Florida attempting to kill Mr. Spaziano.

CCR says it zealously represents its clients, but its zealousness is a pose. CCR's director, Mike Minerva is not a fighter; he plays a fighter on television. To accomplish what CCR did when Mark Olive and Scharlatte Holdman were running the place requires courage and incredibly hard work.

The alternative to aggressive defense lawyering is an unbearable coziness with power. As Mr. Spaziano would prove at an evidentiary hearing, CCR has suffered the same homogenizing doom suffered years ago by the Legal Service Corporation. With one eye on the governor to whom they owe their jobs and with the other shut tightly, CCR lawyers have gone the way of deadening mediocrity. Everything that cannot be made palatable to the institutional [sic]

[sic]powers is killed outright. Spoiled and corrupted by the illusion that it has the "ear" of Governor Chiles, CCR seems to have no patience to hear my declaration that ninety-six hours is an absurdly paltry amount of time to prepare for a complex evidentiary hearing.

Mr. Spaziano would prove at an evidentiary hearing that the blame for CCR's devolution into a hack public defender office rests with its leadership, not with its front-line litigators. This leadership constrained the aggressive litigators, making CCR a pariah among the best capital defenders. Now CCR, although vastly overfunded and under-worked, feeds the deadly illusion that Florida does not have a counsel crisis because Florida has CCR. The fact is that Florida has a counsel crisis worse than Texas precisely *because* of CCR. In Texas, everyone can see death row has no lawyers. In Florida, it is worse than having no lawyers, CCR provides the comfortable illusion that death row *has* aggressive lawyers.

In its brief, CCR pointedly told the Florida Supreme Court that it was not "conspiring" with me to save Mr. Spaziano's life. That is true: CCR certainly wasn't working with undersigned counsel; they were doing all they could to give the Florida Supreme Court pretexts for throwing him off Mr. Spaziano's case. If Minerva was "conspiring" with anyone, he was conspiring with the governor who appointed him, the prosecutors he's in bed with, and the courts whose boots he licks. CCR sure wasn't working with undersigned.

Minerva's name sounded familiar to anyone familiar with the kind of lawyers the state of Florida wants as its opponents in capital cases. When Theodore Bundy as arrested in Florida, he wanted Millard Farmer as his lawyer. Farmer is the best capital trial lawyer in the United States, which is why the Florida courts found a legal technicality to throw him off Bundy's case. And whom did the state want to be Bundy's lawyer? The local public defender, who was . . . Mike Minerva. Most serious students of *Bundy* believe that the difference between Farmer and Minerva meant the difference between life and death for Bundy. Now, undersigned counsel is no Millard Farmer, and God knows, Mr. Spaziano is no Theodore Bundy. But Mike Minerva is still Mike Minerva, and anyone who'd entrust his life to Minerva is too dumb to live.

How different our wold would be had Chiles chosen Mark Olive, rather than Mike Minerva, to head CCR. Chiles would never choose Olive as his adversary, any more than Florida would have [sic]

[sic]chosen Farmer as its opponent in *Bundy*. All of them — those who will kill even an innocent man — would rather be going up against Mike Minerva. And with very good reason.

Florida thought it had solved its counsel crisis when it created CCR in 1985. Mr. Spaziano's case indicates otherwise.

One way or another, Florida will have to find a way to provide logistical support and expertise for *pro bono* lawyers willing to take these cases when the bar and the Supreme Court come asking for help. And they *will* come asking.

The capital defense bar is entering a crucial time, one that offers a chance to define our agenda for the coming crisis for capital representation. Mr. Spaziano's case suggests that the ideas, theories, and institutions of the past are no longer adequate to answer the challenges and questions before us. For decades, Florida defense lawyers have jumped in and represented condemned prisoners. Perhaps the time has come to stop pretending that capital punishment is a legal system at all. If the system is as worthless as we say, perhaps the best response is to refuse to play the game anymore. Perhaps the time has come to say, "On strike. Shut it down."

On September 12, 1995, Mr. Spaziano's 50th birthday, the Florida Supreme Court entered an order staying the execution indefinitely and removing Mello as Mr. Spaziano's lawyer.[96] The Court purported to fire Mello from the case and to force Mr. Spaziano to be "represented" by CCR. It did not work; the Florida Supreme Court lacks the power to fire Mello, because his client is Mr. Spaziano, not the Court. And Mr. Spaziano most emphatically does not want to be represented by CCR, as he and his family have made clear in writing.

This case involves the question what *kind* of lawyer an innocent man on death row is entitled. Michael Mello only asked the Florida Supreme Court to help defray his enormous out-ofpocket expenses or, in the alternative, to give him some time to find a law firm willing to provide essential resource support.

Lawyers are not fungible. Mr. Spaziano understands this, even [sic]

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[96] Rene Stutzman, *Spaziano's Lawyer Files New Requests*, ORLANDO SENTINEL, Sept. 11, 1995, at C1; Larry Kaplow, *Legal Gamble Wins Spaziano Stay*, PALM BEACH POST, Sept. 13, 1995, at 1A; Lori Rosza, *Crazy Joe is Granted a Reprieve*, MIAMI HERALD, Sept. 13, 1995, at 1A; Mark Silva, *Court Faces Quandry on Spaziano*, MIAMI HERALD, Sept. 8, 1995, at 1B; John MacKinnon, *Spaziano Lawyer: Hearing a "Sham,"* MIAMI HERALD, Sept. 8, 1995, at 1B.

[sic]if the Florida Supreme Court does not. As Mr. Spaziano would prove at an evidentiary hearing, for the past 12 years, Mr. Mello has come to know more than Mr. Spaziano's case. Mello came to know, and to believe in, Mr. Spaziano's innocence. Mr. Spaziano and his family trust Mello, and they do so for good reasons. The latest temporary stay of execution may not last-odds are it will not last for long. Another death warrant will be signed, and it will be carried out. But, in an odd way, that will not nullify the importance of the stay that resulted from the *Herald's* coverage, no matter how transitory or ephemeral that stay proves to have been.

There is something grotesque in the Florida court's removal of Mr. Spaziano's longtime and trusted lawyer a week before Mr. Spaziano has been scheduled to be killed by the state. It was Justice Lewis Powell, of all people, who recognized in *Skipper v. South Carolina,* that death row prisoners are not exactly like other inmates: Condemned people are not just litigating; they are also preparing for death — especially when they are on a fifth death warrant, as Mr. Spaziano was when the Florida Supreme Court "fired" Mello and forced CCR upon Mr. Spaziano.

Even when the stays are temporary and even when they do not result in eventual victory-a life sentence or a new trial-this sort of litigation can buy the inmate time, sometimes as little as five minutes and sometimes as much as years. This may not be what lawyers usually mean when we talk of "winning." But redefinition of the notion of winning is an important way of coping with a system that is often indifferent and increasingly bostile.

For the near-dead, a lifetime can be lived in five extra, snatched minutes; intimacy with death can carry with it a corresponding new intimacy with life; a *love* of life, and a lust to live. Paul Monette, writing of people with AIDS, got it exactly right: "I'm so rapacious of time . . . . I wander graveyards now like a math quiz figuring who we've beaten."[97] During that time, new evidence beneficial to the condemned person's case may be found by post-conviction counsel and presented in the post-conviction system. Also during that time, the condemned, like the rest of us, feels joy and sorrow, has hopes and dreams, grows and changes. In short, they live their lives. At some moments they are able to take Lambert Strether's advice in *The Ambassadors* to live all they can because it is

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[97] Paul Monette, *New Year's at Lawrence's Grave, in* WEST OF YESTERDAY, EAST OF SUMMER 37 (1994).

[sic]a mistake not to.[98]

Living one's life, even in the close confines of death row, is always much more than a legal matter. This is particularly so in the weeks and months prior to a scheduled execution. It is essential that the human, extralegal needs of the inmates are recognized and, when necessary, advocated.

Part of Mello's job as Mr. Spaziano's lawyer - a part CCR cannot replicate with a client whom despises the office - is to provide the nonlegal counseling and support help transform an inmate's appreciation of death from abstract principle to concrete reality, and so help the inmate-one keeps wanting to write "patient"- prepare to take care of the unfinished business of this lifetime. This also places the legal struggle in perspective. We fight not only scheduled death, but also despair. Mello's goals are to ensure that the person he represents knows all hope is not lost, the battle continues, *he will not be abandoned,* but also the outlook is grim and he should be preparing himself to die.

Experienced capital postconviction litigators know that there is a self-defensive instinct to distance one's self from a friend who is about to die. Yet such distancing is the one luxury we cannot permit ourselves to feel. At the very time when virtually everyone else is distancing himself from our dying(?) clients, we cannot do so, even for self-protective reasons, *especially* for self-protective reasons. They would be able to tell. That brand of disloyalty risks becoming a self-fulfilling prophecy.

As Mr. Spaziano would prove at an evidentiary hearing, it is not really—or maybe one means not *only* -dying at the hands of the state. It is living the best possible life knowing that the state is trying to kill you. When one is about to be killed by the state, hope is both a luxury and a necessity. Erica Goods made the point with regard to the survivors of the Oklahoma City bombing, but it holds true as well for my clients. Hope can be, like a drug, keeping the survivors going when the shock and waves of adrenaline are not enough, protecting them for a few more hours against the oncoming tidal wave of grief. They cling tightly to their illusions. As in war, hope is critical: without it you die. In court, we defense lawyers wear the poker face of the war room, slipping into the official language designed to keep the actuality of devastation at bay: the

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98 HENRY JAMES, THE AMBASSADORS (1970).

[sic]

[sic]moment when a waiting family was informed of a loved one's execution is "notification"; crisis counseling for our clients' families, and for ourselves, is called "debriefing." Yet the office was hit not by war but by something that had no ready blueprint for how to act or what to think. People did the best they could. We think we understand; they think they understand. For people involved in this sort of killing, even normal gestures of everyday life can move far beyond reach. As the hours wind down, and the execution draws closer, hope cannot last.

G. On Lies, Secrets adn Silence

The limited evidentiary hearing ordered by the Florida Supreme Court is still scheduled to occur on November 15. At that hearing, Mr. Spaziano will be represented by *pro bono* trial counsel. The Florida Supreme Court's ipse dixit notwithstanding, the undersigned remains as Mr. Spaziano's chief appellate counsel in this Court and in the Florida Supreme Court.

The Florida Supreme Curt's determination to force on Joseph Spaziano a hack public defender office that is a lapdog for the governor who is trying to kill Mr. Spaziano is not unrelated to the *Brady* question presented to this court. The court's actions deprived Mr. Spaziano's counsel of any ability to challenge effectively the secret case the state says it has built against Mr. Spaziano. For the second time in three months, Joseph was scheduled to die in Florida's electric chair. Governor Chiles signed a new death warrant on August 24, apparently based on alleged unidentified (and uncrossexaminable) sources whose alleged statements to FDLE were summarized in a secret FDLE report — secret to Mr. Spaziano's attorney, at any rate. In a secret letter Chiles wrote on August 17 — the existence of which counsel learned on August 25th, the day after Chiles signed the warrant and two days after he leaked the report to the *Orlando Sentinel* — Chiles directed FDLE that its investigative materials "may not be inspected or copied" by Mr. Spaziano's counsel or by any media organization other than those reporters selected by Chiles himself. *See* Appendix J.

Thus, the only aspect of the secret investigation Mr. Spaziano has been able to obtain on his own — no thanks to the government, which lied about the contents of the videotape, when the government believed that counsel would *never* see the videotape itself — has proven to be exculpatory in the extreme.

This petition asks the Court to grant Mr. Spaziano access to [sic]

[sic]the *rest* of the secret police report. If the only item we were able to bootleg was as exculpatory as the videotaped recantation, what *else* is there that the state is attempting to keep from Mr. Spaziano by labeling the police investigation into guilt/innocence a part of a "clemency" proceeding?

REASONS FOR GRANTING THE WRIT

I. GOVERNMENT IN THE DARKNESS, OR THE RUBY RIDGE FBI WHITEWASH AND THE STAR CHAMBER COME TO TALLAHASSEE: FDLE'S SUPER-SECRET "INVESTIGATION" OF UNIDENTIFIED WITNESSES OF UNKNOWN CREDIBILITY OR SOURCES OF INFORMATION: THAT *STILL* INADVERTENTLY UNEARTHED EVIDENCE THAT WAS EXCULPATORY IN THE EXTREME BUT WHICH WAS NEVER GIVEN TO MR. SPAZIANO'S COUNSEL BY THE STATE — NOT TO THIS DAY

A. On Lies, Secrets and Silence: The Sole Aspect Of FDLE's "Investigation" Mr. Spaziano Has Been Able To Obtain On His Own, No Thanks To The State, Has Been The FDLE Videotape Of DiLisio — And That Videotape Is Exculpatory In The Extreme: A State May Not Evade the Dictates of *Brady v. Maryland* by Labeling as "Clemency" a (1) Secret Police Investigation Based on Secret Witnesses into (2) Whether a Condemned Person — as Opposed to Another Person — Committed the Capital Murder Itself, and Whether the State's Obligations under *Brady v. Maryland* Continue Through the Post-conviction Proceedings in a Capital Case?

Mr. Spaziano presents this Court with a rare opportunity to address an issue of critical importance to not only an innocent man on death row, but to the very integrity of collateral review of every state imposed sentence of death. He presents that issue free from ancillary considerations which could cloud, confuse, or skew a clear resolution by this Court. Mr. Spaziano is not currently under warrant of death. The existence of the sought exculpatory material is howingly obvious. By its citation to *Asay*, the Supreme Court of Florida has stated unequivocally that the *Brady* issue and it alone is dispositive. This Court can, with a single succinct decision, both resolve the case and controversy before it and provide guidance to

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[sic]state courts which are increasingly becoming the primary arbiter of the scope of the Fourteenth Amendment due process clause.

Mr. Spaziano, twice scheduled to be destroyed within the past six months, has a right to know. *Brady v. Maryland*, 373 U.S. 83 (1963), requires the State to release any and all records in its possession which are exculpatory in nature. This obligation extends to all subdivisions of the State and does not end with affirmance on direct appeal. Where state law enforcement entities, such as the FDLE or the Florida Board of Executive Clemency, have discovered exculpatory material during the course of a post-conviction investigation of a capital case, that material is subject to disclosure so that the same may be considered by an independent judiciary in post-conviction proceedings. As the Florida Supreme Court noted recently in *Asay*, one of only two cases the Florida Supreme Court cited as authoritative in rejecting Mr. Spaziano's claim:

> The preliminary issue we must address is whether the Clemency Board's records are of a type that can trigger the requirements of *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1962), and its progeny. . . . This is apparently a case of first impression. Moreover, *the federal Brady issue, and it alone, is dispositive of this case.*
>
> We have read the cases cited by petitioners, including *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992), and *Miller v. Dugger*, 820 F.2d 1135 (11th Cir. 1987). Like *Ritchie*, all focus on state-sponsored investigations that have gathered evidence *within* the same basic time frame as the police investigation and trial, even if only disclosed much later. Florida clemency investigations, however, by their very nature gather materials well after the trial and appeals have ended, except for those materials actually contained in the trial court and appeals records reviewable by the Clemency Board. We find this to be a critical distinction between this case and those cited by petitioners and reason enough to deny this petition.
>
> Moreover, *Ritchie* itself suggested that records afforded a high degree of confidentiality may be immune from the *Brady* requirements. *Ritchie*, 480 U.S. at 57-58, 107 S.Ct. at 1001-02. Under Florida law, clemency records enjoy a similarly high level of confidentiality. *Lockett*. The state has a strong policy to maintain that confidentiality based on the unusually sensitive nature of some clemency evidence and the exclusive authority of clemency given to the executive by the Florida Constitution. Art. IV,

[sic]

> [sic]§ 8, Fla. Const. This, too, is reason enough to deny the petition.
>
> Furthermore, the decision in *Brady* has been in existence since 1963. In that time, no reported case apparently has ever suggested that clemency-related investigations occurring well after trial and appeals have ended may be the subject of a *Brady* claim. The lack of precedent even from lower courts is a strong indicator that *Brady* was never intended to apply in this context. Accordingly, we decline to extend the rule, and we hold that *Brady* has no application to clemency proceedings in Florida.

Secrecy is a petri dish for corruption and miscarriages of justice. Under such cover, a less trustworthy administration easily could sell pardons. It happened in Tennessee under Ray Blanton. Ruby Ridge has taught many of us that police agencies cannot be trusted to investigate themselves in secret. But Mr. Spaziano's case shows that this lesson of Ruby Ridge has been lost on Florida's FDLE, Governor, and Attorney General.

At present, there are almost 3,000 persons sentenced to death in 38 states, 389 in Florida alone. In each of these states, the governor, acting alone or in concert with a board of pardons or some other administrative body, has the power to commute these death sentences to lengthy prison terms. Governors (as opposed to pardon boards) have the final say in 24 of the 38 death penalty states; eleven states require the concurrence of another body with the governor; the remaining four death penalty states vest the entire power in a board of pardons. Note, *Reviewing Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 392 (1989).

Each of these death row prisoners has the privilege or the right to some form of clemency review by the chief executive or other official body. "The laws governing the exercise of clemency are diverse among the jurisdictions but they share these basic features: Clemency decisions are standardless in procedure, discretionary in exercise, and unreviewable in result. As a result, the clemency hearing in capital cases constitutes a terminal stage of lawlessness in criminal justice decisionmaking that is symmetrical with the lawlessness of the initial stage, controlled as it is by the prosecutor's comparably unregulated and discretionary decision making authority." Hugo Bedau, *The Decline of Executive Clemency in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOCIAL CHANGE, 255, 256-57 (1990-91).

Mr. Spaziano is *not* challenging the "lawlessness" of the clem-

[sic]

[sic]ency "procedure;" he is not asking the Court to impose due process procedures upon Florida's clemency system. What Mr. Spaziano *is* asking for is access to exculpatory material that comes into possession of the state as a result of operation of the clemency process. No matter how states choose to structure clemency procedures, exculpatory evidence that is generated by those procedures must be given to the condemned person - particularly here, where the state's highest court has mandated a *judicial* evidentiary hearing on the basis of information produced by the secret police "clemency" investigation into Mr. Spaziano's guilt or innocence.

1. *Brady* and Truth

The state has an affirmative obligation to deliver exculpatory evidence *whenever and wherever found.* "[A]fter a conviction the prosecutor . . . is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctedness of the conviction." *Imbler v. Pachtman,* 424 U.S. 409, 427 n. 25 (1976); *Walton v. Dugger,* 634 So. 2d 1059, 1062 (Fla. 1993) (addressing public records disclosure in post-conviction proceedings and "emphasiz[ing] that the State must still disclose any exculpatory document within its possession or to which it has access, even if such document is not subject to the public records law") (citing *Brady); See also Moore v. Kemp,* 809 F.2d 702, 730 (11th Cir. 1987) (defendant who was not given *Brady* material in postconviction proceedings did not get "full and fair" hearing in that proceeding); *Amadeo v. Zant,* 486 U.S. 214 (1988) (there is no procedural default when the state fails to disclose evidence supporting the post-conviction petitioner's claim; the evidence should be heard when it comes to light); *Thomas v. Goldsmith,* 979, F.2d 746, 749 (9th Cir. 1992) (rejecting the state's argument that the defendant/petitioner should have sought *Brady* material and have made a *Brady* claim earlier because the information sought was *"under control of the state"* and the defendant/petitioner could not "make the showing which would justify" relief without it —"We do not believe that [the *Brady* claim is defeated by this conundrum. Rather, we believe the *state is under an obligation to come forward with any exculpatory . . . Evidence."*) (emphasis supplied); *id.* at 750 (the constitutional "duty to turn over exculpatory evidence" applies in post-conviction proceedings.); *Walker v. Lockhart,* 763 F.2d 942 (8th Cir. 1985) (en banc) (relief granted under *Brady* twenty years after conviction where it took that long for evi-

[sic]

[sic]dence which the state had earlier failed to disclose to come to light) (emphasis supplied).

In the 30 years after *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), the Court identified an important class of due process rights now commonly referred to as the *Brady* doctrine. The state has an obligation to disclose any evidence which tends to negate a defendant's guilt. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Through this series of cases, the Court has uniformly condemned the prosecution's presentation of evidence that is false, that is known to create a false impression and the suppression of evidence that is favorable or exculpatory to the defense.

The *Mooney* Court recognized that due process is violated when "a state has contrived a conviction . . . through a deliberate deception of court and jury by the presentation of testimony known to be perjured." 294 U.S. at 112. Less than ten years later, the Court held that the same principle extended beyond the presentation of false evidence to include the prosecution's "suppression . . . of evidence favorable to" a defendant. *Pyle v. Kansas*, 317 U.S. 231, 216 (1942).

In *Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam), the prosecution suppressed information which would have "impeach[ed the state's witness'] credibility," and could have "corroborate[d] the petitioner's contention." 355 U.S. at 31. The Court held that the prosecution's presentation of evidence that creates a "false impression" and the suppression of evidence that 'corroborates" the defendant's theory of defense violates due process under the principles enunciated in *Mooney* and *Pyle*. *Id.*

In *Napue v. Illinois*, 360 U.S. 264 (1959), the court held that there is no difference between false evidence offered by the state and false evidence offered by the state and false evidence that goes "uncorrected when it appears," 360 U.S. at 268. The Court accordingly held that the rule of *Mooney*

> that a State may not knowingly use false evidence, including false testimony, . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id. at 269.

[sic]

[sic] In the landmark case of *Brady v. Maryland,* 373 U.S. 83 (1963), the Court framed the holdings of the above cases into a general principle. The Court again noted the prosecution's obligation to disclose any evidence in its possession that is favorable to the defense or that may "tend to exculpate [the defendant] or reduce the penalty." *Id.* at 88. *Brady* held

> that the suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87 (emphasis added).

The *Brady* rule is quintessential truth-seeking. An individual's right to a fair trail requires that the false or suppressed evidence be disclosed so that a defendant is assured "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing." *Crane v. Kentucky,* 476 U.S. 683, 690-91 (1986) quoting *United States v. Cronic,* 466 U.S. 648, 656 (1984). The truth-seeking policy underlying the *Brady* doctrine mandates that it encompass two situations: the prosecution's offering of evidence that it knew or should have known to be false and the prosecution's suppression of evidence favorable to the defense. Because each type of prosecutorial misconduct perverts and "corrupt[s] . . . the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 104 (1976), the Court has uniformly and adamantly denounced both.

When an individual raises a claim of prosecutorial misconduct under the rule of *Brady* forbidding suppression of evidence, the inquiry necessarily takes into consideration the reliability of the verdict and specifically asks whether confidence in the jury's verdict is undermined. In order to prove a due process violation, a petitioner must show that the prosecution failed to disclose material evidence that was favorable or exculpatory to the defense. The test for materiality was first announced in *United States v. Agurs, supra,* and was later refined in *United States v. Bagley,* 473 U.S. 667 (1985).

Bagley reformulated the criterion for materiality in light of *Strickland v. Washington,* 466 U.S. 668 (1984), an ineffective assistance of counsel case involving "undisclosed evidence" that highlighted the importance of the fact finders' ability to arrive at a just result based upon all probative evidence. The *Bagley* plurality held:

> The evidence is material only if there is a reasonable probability [sic]

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

Bagley, at 682. The inquiry seeks to determine "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Bagley,* at 682 n. 13, quoting *Strickland v. Washington,* 466 U.S. at 695.

> This test is not outcome-determinative. An individual need not show that the [error] more likely than not altered the outcome of the case. The result of the proceeding can be rendered unreliable, and hence the proceeding unfair, even if the [suppression of the evidence] cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 66 U.S. at 693-94; *accord Lockhart v. Fretwell,* 113 S. Ct. 838, 842 (1993) (the essence of the inquiry considers whether the error caused the verdict to be unreliable or the proceedings unfair rather than a "mere outcome determination").

Bagley requires the reviewing court to consider whether the prosecutor's suppression of evidence has "adverse[ly] affect[ed] the defendant's ability to subject the state's case to meaningful adversarial testing and to present evidence in his favor. 473 U.S. at 683. The reviewing court must "assess the possibility that [an adverse] effect might have occurred in light of the totality of circumstances" paying due respect to the "difficulty" of speculating how the trial would have evolved absent the suppression. *Id.*

2. The Irrelevancy of *How* The Government Acquires The Exculpatory Information Showing that the State is About to Execute the Wrong Man: Calling a Police Investigation "Clemency" Does Not Nullify *Brady*

a. *Brady* Matters; Labels Do Not

This *Brady* obligation does not magically disappear simply because the state labels the police investigation into guilt/innocence "clemency." The state's label "clemency" does not alter the character of what happened here: A governor, acting *sua sponte,* ordered the police to reinvestigate whether the police correctly identified the right person as Laura Harberts' killer 23 years ago.

As a threshold matter, it is hard to see why this police investigation had anything to do with "clemency." Governor Chiles stayed [sic]

[sic]Mr. Spaziano's execution on his own — no stay application or clemency petition were pending when Chiles acted. Mr. Spaziano certainly did not request an FDLE investigation, secret or otberwise; undersigned counsel protested the nature, character, and integrity of the investigation as early as June — two months before FDLE reported its secret results to Governor Chiles.

It is no answer to suggest that the FDLE "investigation" exists in a world separate from this litigation. Attorney General Butterworth acknowledged as much when he moved the Florida Supreme Court to hold this case in abeyance pending FDLE's investigation — a motion this court granted. Further, by leaking the FDLE report to specific journalists, the State of Florida — be it in the form of General Butterworth, Governor Ghiles, or FDLE has forged an intimate connection between the unchallengeable assertions supposedly made by their super-secret sources and Mr. Spaziano's attempts to prove his innocence in this litigation.

The DiLisio videotape is exculpatory in the extreme. The state continues to hide the videotape, along with the rest of its "investigative" materials. What *else* is exculpatory? Mr. Spaziano's attorney doesn't know. It's a secret.

Two months ago, the governor stayed Mr. Spaziano's execution after evidence of innocence arose. The Governor investigated with tons of resources, sealed the results, and re-scheduled the execution. Undersigned counsel for Joseph R. Spaziano, Michael Mello, is a distant lawyer who took the case only when a warrant did not exist, because no-one else had done anything, and because VLRC was available. Now, for Mr. Spaziano, there is no VLRC, no CCR, and a new death warrant that could be signed any day.

If Joe Spaziano had a fair trial, so did Randy Weaver, his wife and his child — and so did the Salem witches. It is useful to recall that a few years after the "witches" were executed, they were exonerated.

For 302 years, no other American bas been put to death on the unsupported testimony of an addicted teenager. The state's only witness now insists he lied under the influence of police pressure, hypnosis and possibly drugs at Spaziano's murder trial 21 years ago. Yet the governor has ordered Spaziano's electrocution to proceed Sept. 21. How can Lawton Chiles, a decent and considerate man, be so certain. Even the jurors weren't. They recommended life.

Because this killing will be done in our names, we had all bet-
[sic]

[sic]ter pray that Spaziano really is the man who raped and butchered Laura Lynn Harberts. But even if he is, there are serious implications that will far outlive him. It will be the first time in memory that someone went to his death on the strength of secret evidence. *Secret evidence!* Even the Salem witches were condemned entirely in public.

Well, not *totally* secret — notwithstanding the relentless attempts by the government to keep it so. The only piece of FDLE's "investigation" Mr. Spaziano's counsel has been able to obtain — *independently* of the governmental actors — is the videotape of FDLE's interrogation with Anthony DiLisio, which Mr. Spaziano has provided to this court. But before undersigned counsel was able to obtain a copy of the FDLE videotape, Dexter Douglass, Governor Chiles' general counsel, lied to reporters about what was in the tape. When Douglass was confident that Mr. Spaziano's attorney would never see the videotape, the governor's lawyer said, repeatedly, that DiLisio did not recant his critical trial testimony — that critical trial testimony was the trip to the dump *with Mr. Spaziano.*

So: the governor's office willfully misrepresented the truth about the one component of FDLE's investigation I have been able to obtain, notwithstanding the relentless stonewalling and disinformation campaign by Florida's governmental officials. The obvious question becomes: If Chiles' office lied about the videotape, why should we believe any of their other new "evidence" — especially when they insist on cloaking it in secrecy?

Counsel for Mr. Spaziano obtained the videotape from sources other than FDLE or the governor's office. Counsel filed this copy of the videotape under seal; when counsel learned that the government had leaked the videotape to the *Orlando Sentinel,* he withdrew the sealing request. *See* Appendices L-Q.

However, the videotape Mr. Spaziano's counsel provided to the court might well have been tampered with, and selectively edited, by the government before it was given to the private citizen who provided it to Mr. Spaziano's attorney. The videotape counsel filed in this court was 50 minutes long. But Dexter Douglass was quoted in the *Palm Beach Post as* saying the videotape lasted almost twice as long: *an hour and 45 minutes.*

This is no minor 18-1/2 minute gap. Douglass says the video is almost *twice* as long as the videotape possessed by Mr. Spaziano's attorney. Mr. Spaziano's counsel cannot explain the discrepancy, [sic]

[sic]because as stated, FDLE and Chiles still refuse to provide us with *their* version.

When governmental officials are this relentless in keeping something this secret, it is usually because they have something to hide. The government's disinformation about the videotape belies its claim that secrecy is needed because their new "witnesses" fear retribution from the big, bad bikers. There is a simple, more common sense explanation: The government doesn't want Mr. Spaziano's lawyers to know even the *identities* of their new, secret "witness" because those witnesses could easily be exposed as wrong or as liars.

The governor has a Florida Department of Law Enforcement report supposedly showing that the key witness, Tony DiLisio, was telling the truth then (and not now) when he testified that Spaziano took him to the dump and boastfully showed him the corpses of Harberts and another woman who was never identified. The FDLE's new "witnesses" have never been heard or cross-examined in any court, however. They never will be, if the governor has his way, because FDLE promised them confidentiality.

It is claimed they are afraid of Spaziano's former associates in the Outlaws motorcycle gang. This is a cowardly smokescreen: courts have ways of putting witnesses on the stand without jeopardizing them. For example, one of the governor's secret witnesses is said to be another former Outlaw already in the federal government's witness protection program as an FBI informant. He says — according to the governor's news release — that Spaziano had admitted to him before standing trial that he had killed the two women and had showed their bodies to a young man who he feared would betray him.

Very interesting. For all we know, it could have been this witness himself who killed the women. Is this justice? We don't know. It's a secret.

The governor's secret witnesses also supposedly include friends and family members who assert that the police and their hypnotist didn't manipulate DiLisio and that he had told the story he now denies before the hypnosis, before the trial, and for 20 years since. That may be true, although Douglass' misrepresentation about the contents of the videotape do not inspire confidence. But the governors' secret evidence also includes the FDLE's videotape of a June 14 interview with DiLisio in which he insists in forceful terms that what he says NOW is the truth. Such conflicts belong [sic]

[sic]in open court rather than a secret file — especially when a life is at stake. In the unofficial transcript of the taped interview, DiLisio says of the crucial visit to the dump that "The cops brought me there. I had never been there in my life until they brought me there."

Did Spaziano ever take him?

"No, never."

Had he ever told the police anything before being hypnotized?

"No, all the facts that I had I got from them to be able to read them back to them."

Throughout the transcript, the FDLE's crack agent repeatedly refers to Spaziano as "Foranzo," "Sporanzo," or Spilanzo," until DiLisio eventually corrects him. Could that be one of the reasons why the governor doesn't want the file made public? What else did the FDLE get wrong? What other exculpatory evidence are they hiding - besides the FDLE videotape, that is.

And what has happened to the nation's best open-government laws? Relying on a 1993 revision that caught the media lobby napping, Chiles invokes a total exemption for any record having to do with executive clemency. How convenient. Clemency happens to be one of the black holes of American jurisprudence. The Florida Supreme Court won't touch it. For all the courts care, the governor could go to Doak Campbell stadium at half-time and let the crowd decide Spaziano's fate with thumbs up or thumbs down, Roman style.

The governor's spokesman, Ron Sachs claims that it is not a secret report because the governor and his staff have reviewed it "thoroughly." Indeed.

Maybe DiLisio is lying now in his recantation, even though in doing so he has nothing to gain and everything to loose.

But God help us all, what if he is telling the truth?

b. FDLE: The Keystone Cops

As the DiLisio videotape demonstrates, the FDLE investigation did reveal *exculpatory* information. Such was inadvertent.

Again, Ruby Ridge is a fair metaphor for the quality and reliability of the FDLE "investigation." Whatever faith we initially possessed in the objectivity or integrity of the Florida Department of Law Enforcement investigation into what actually happened in this case in the mid-1970's had evaporated even before its secret find-

[sic]

[sic]ings were transmitted to Gov. Chiles and leaked by him to selected newspapers — to newspapers that could be counted upon to serve as journalistic bulletin boards for the governor, printing uncritically whatever his staff spoon fed them, and printing it on page one, complete with convenient bullet points. The "investigation" was a whitewash. *First,* FDLE's institutional and bureaucratic bias in favor of validating earlier state governmental actors — police and prosecutors — is too obvious to require much comment. In the "investigation," Florida governmental agents are investigating the alleged misconduct of other Florida governmental agents, and the outcome of such "investigation" may be expected to be thuddingly predictable. Such bias in favor of the police and prosecutors in 1975 and 1976 is the simplest explanation for the way in which FDLE has carried out its "investigation." *Second,* FDLE initially said that it was anxious to polygraph DiLisio, but when we insisted that such polygraph ought to be reliable and professionally done, the FDLE lost interest.

Third, the thrust of FDLE's investigation appears to be an attempt to smear and discredit Anthony DiLisio, by interviewing friends and his family members, apparently with an eye to discrediting Anthony DiLisio's memory of today, as opposed to attempting to ascertain why and under what circumstances Mr. DiLisio was manipulated by the police in the mid-1970's. *Fourth,* four months have now gone by since FDLE videotaped its interview with Mr. DiLisio, and the repeated requests by counsel for both Mr. Spaziano and Mr. DiLisio for a copy of the videotape have been met with a stone wall of silence. Rather, state officials have selectively leaked supposed information supposedly said by Mr. DiLisio on the supposed videotape. *Fifth,* Governor Chiles' chief legal advisor, Dexter Douglass, told the *Orlando Sentinel* that DiLisio hadn't recanted his testimony and that there is nothing to show that Mr. Spaziano was wrongly convicted. "The record to me is clear," Douglass told the newspaper. "This man tortured and killed this young woman. Nothing I have seen or heard from Mr. DiLisio or anyone else changes that." Douglass said that after Spaziano's execution was stayed, agents with the FDLE questioned DiLisio again. "All he has told FDLE is that he can no longer remember" his testimony, Douglass said. "That, to me, does nothing to discredit the testimony of 1976." These facts — and the logical inferences about the quality and the integrity of FDLE's "investigation," do not inspire confidence that the FDLE's agenda was anything more than a

[sic]

[sic]maneuver designed to provide political cover for the signing of another death warrant.

After two months of intensive investigation, conducted at an undisclosed expense to Florida taxpayers, FDLE made the extraordinary discovery that . . . Tony DiLisio is a liar and a manipulator and a general ratbag. None of this is news. The fact that Tony DiLisio was a ratbag was the central point that Mr. Spaziano's defense lawyer was attempting to make about the state's only real witness 20 years ago, *at the original trials*. So, 19 and 20 years after the trial, the state's law enforcement bureaucracy had *finally* learned that Mr. Spaziano was right about Tony DiLisio 20 years ago. Better late than never.

Of course, FDLE was conducting its investigation in 1995, and was limiting that investigation to the 37-year-old, *comparatively* mature, dried-out and sobered-up Tony DiLisio. So *imagine* what DiLisio was like 20 years ago, when he was a teenager, in trouble with the police for drugs and for criminal activity that included breakings and enterings, and the like. *That* Tony DiLisio — Tony DiLisio the younger - was the pathetic instrument that Florida police and prosecutors used to frame Joseph Robert Spaziano. If Tony DiLisio is the scumbag described by FDLE in 1995, just *imagine* what Tony DiLisio was like and what Tony DiLisio *was* 20 years ago, when the cops and the prosecutors used him to frame Joseph Spaziano for a rape and a murder he did not commit.

All 38 states which have authorized capital punishment have constitutional or statutory provisions for executive clemency. *Herrera v. Collins*, 113 S.Ct. 853 (1993). Like Florida, all have post-conviction mechanisms for either the presentation, or investigation, of evidence which would tend to show that the accused is innocent, has been unfairly tried and/or convicted, or is otherwise undeserving of the death penalty. Indeed, under Florida law, that post-conviction mechanism presents the *only* state court opportunity for capital defendants to present claims arising outside the record on appeal. *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990); *Cumper v. State*, 506 So. 2d 89 (Fla. App. 2 Dist. 1987); *Whitaker v. State*, 433 So. 2d 1352 (Fla. App. 3 Dist 1983). The decision of the Florida Supreme Court allows the State of Florida to conceal exculpatory evidence relevant to not only Mr. Spaziano's right to post-conviction review, but also to the integrity of his conviction and sentence. The decision leaves Florida's post-conviction proceedings neither full nor fair and deprives death-sentenced individuals of the due

[sic]

[sic]process afforded under the Fourteenth Amendment to the Constitution.

In other capital cases, General Butterworth has, with thudding predictability, contended: namely, that a defendant may not raise a challenge to a conviction based upon a state suppression of evidence if the state successfully suppresses it long enough. The subargument presented by the state is that it is the *defendant's* responsibility to look under the correct shell for evidence; not the *state's* trial and post-trial obligation to deliver *exculpatory* evidence whenever found.

This proposition is incorrect. It turns on itself — the fact that the state successfully hides evidence is the proof of, not a defense to, a *Brady* or a newly discovered evidence claim.

B. *Brady* and Its Progeny Are Applicable to the FDLE Police and the Florida Board of Executive Clemency

In *Brady*, the Court specifically held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 83 S.Ct. at 1196-1197. *Brady's* meaning on the surface is obvious — the prosecution has an obligation to disclose favorable evidence to the defendant if requested. The true significance of *Brady*, however, is found outside the literal statement of the prosecutor's obligation. As indicated by the Supreme Court, the requirement that the government disclose exculpatory evidence is grounded in notions of due process:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor *but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.* An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'

Brady, 83 S.Ct. at 1197 (emphasis added).

In *United States v. Bagley*, 473 U.S. 667 (1985), the Court emphasized that "[t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a [sic]

[sic]miscarriage of justice does not occur." *Bagley*, 105 S.Ct. at 3379-3380 (footnote omitted). If the proceeding is unfair, the accused has not received due process. The accused does not receive a fair judicial proceeding, nor due process, if material exculpatory evidence is withheld, regardless of where the evidence is located. *U.S. v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992) ("this court has declined to draw a distinction between different agencies under the same government"); *Martinez v. Wainwright*, 621 F.2d 184, 186-88 (5th Cir. 1980) (different "arms" of the government are not "severable entities").

Disclosure obligations thus should be held to extend beyond the actual prosecutor. In *Pennsylvania v. Ritchie*, 107 S.Ct. 989 (1987), this Court framed the issue as follows:

> The question presented in this case is whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

Id. at 993-994.

At issue is *Ritchie* were the files of the Children and Youth Services [hereinafter CYS], a protective service agency established to investigate cases of suspected child mistreatment and neglect. CYS, an agency created by the state, was an unrelated third party to the criminal action, as are the FDLE and the Board of Executive Clemency in the case at bar. CYS did not have any prosecutorial function. In fact, the Supreme Court specifically noted that "[t]here is no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents." *Ritchie*, 107 S.Ct. at 994 n.4.

In *Ritchie*, this Court was faced with CYS's failure to comply with the defendant's subpoena requesting exculpatory information contained in its files, because it claimed its records were privileged and confidential under a state statute. After recognizing that it traditionally evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment," *Ritchie*, 107 S.Ct. at 1001, it acknowledged that "[i]t is well-settled that the *government* has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt and punishment." *Id.* at 1001 (emphasis added). This Court went on to note that "[m]oreover, *the duty to disclose is ongoing; information that may be deemed immaterial* [sic]

[sic] *upon original examination may become important as the proceedings progress, and this court would be obligated to release information material to the fairness of the trial." Id.* at 1003 (emphasis added).

Under *Ritchie*, the *Brady* obligation is on the *government*, not just the prosecutor.

> At this stage, of course, *it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, be-* [sic] *cause neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file.* The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense.
>
> Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances.

Id. at 1001 (emphasis added).

The court concluded that "Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." *Id.* at 1002.

The Court's recent decision in *Kyles v. Whitley*, 115 S.Ct. ___, 57 Cr.L. 2003 (1995), affirms that the strictures of *Brady* apply to the *government*, not just the prosecuting attorney. *Kyles* states:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This is turn means that the individual prosecutor has a duty to learn of any favorable evidence *known to others acting on the government's behalf*, including the police.

Id. 57 Cr.L. at 2008. (Emphasis supplied).

None of the concerns expressed by the Florida Supreme Court justify a departure from this rule. As to the contention that clemency records are unusually sensitive: The Florida government's

[sic]

[sic]decision to withhold its materials from counsel — but not from its selected journalistic bulletin boards — evinces the governmnent's bad faith in this case. So does its selectivity:

AFFIDAVIT OF IAN HAIGLER

STATE OF FLORIDA
COUNTY OF LEON

I, Ian Haigler, having been duly sworn, hereby depose and say:

1. My name is Ian Haigler, and I have been employed by the Volunteer Lawyers' Resource Post-Conviction Defender Organization (previously known as the Volunteer Lawyers' Resource Center) for over six years. Among various other duties, part of my responsibilities have been the collection and maintenance of records relevant to cases on which the office has worked.
2. In the course of my employment I have very often requested and been given access to clemency records on capital cases. This has generally been accomplished by an informal telephone call to the Governor's Legal Office at The Capitol; I would tell a representative of that office which case I was interested in either reviewing or having photocopied. Usually, within one or two days, I would either review the file in a conference room to determine what items we wished to have copied or request that the entire file be copied (in cases where the file was very large, arrangements would be made for it to be copied by a private business).
3. Within the past few months, protocol for these requests changed slightly; I was asked to address a letter to the governor requesting access to the files. In two instances, I sent letters by facsimile transmission and was thereafter given access to the files. In the first instance, I requested that the entire file be copied and arrangements were made with a private firm; in the second, I was given the file to review in a conference room and thereafter made copies, personally, of those materials which I had been instructed to find.
4. I have never been denied access to original clemency records or have them photocopied; in fact, it has always proven a very casual process. Even in those two instances for which written requests were required, I was very soon thereafter given free access to what was originally represented to me as full and complete clemency files.

FURTHER AFFIANT SAYETH NAUGHT

/s/
IAN HAIGLER

[sic]

> [sic]SWORN TO and SUBSCRIBED before me by Ian Haigler, personally known to me, on this 30th day of August, 1995.
> /s/
> NOTARY PUBLIC
> STATE OF FLORIDA

Mr. Spaziano does not necessarily seek a wholesale disclosure of clemency records, rather *in camera* review by an independent judicial tribunal and, after such a review, disclosure of only exculpatory material. As to the fact that the Florida state constitution vests clemency power in the executive branch of state government, the state constitution cannot trump the federal constitution.

Furthermore, under Florida law, the Attorney General of the State of Florida, the same person prosecuting Mr. Spaziano during both direct appeal and post-conviction proceedings, is one of the members of the clemency board and has access to the very materials being denied petitioner. It is simply impossible to seriously contend that it does not violate the Constitution of the United States of America for the State of Florida to allow capital defendants to be marched through the post-conviction process while opposing counsel conceals exculpatory material under a claim of *state* executive privilege. Even if *Brady* applied only to information within the prosecutor's personal knowledge, it would apply to the FDLE and the Board of Executive Clemency.

C. *Brady* and Its Progeny Require the State to Disclose Exculpatory Material Discovered After Affirmance on Direct Appeal.

In *Asay*, the Florida Supreme Court rested its decision primarily upon a determination that *Brady* and its progeny do not require the state to disclose exculpatory information acquired by the state after a capital conviction and sentence has been affirmed on direct appeal.

People whom the government are trying to kill are entitled to due process beyond the parameters of their trial. The United States District Court for the Eastern District of Louisiana discussed this precept in *Monroe v. Butler*, 690 F.Supp. 521 (E.D.La. 1988):

> Although *Brady* dealt with trial conduct, its theoretical focus deals more broadly with the fairness of the proceeding in which the condemned conduct occurred. In *Brady*, that occurred at trial. The State has never disputed the fact that the nondisclosed evidence is favorable to Monroe. Nor does the State contend that the evidence is not exculpatory. And this Court found [sic]

> [sic]that the evidence was material; it had all the conceptual underpinnings of *Brady*-type facts.
>
> Nonetheless, the State argued that *Brady* did not apply because the nondisclosure did not occur until after the trial. It is instructive to note that nothing in *Brady* or its progeny limits its doctrine of fact-characterization to the pre-conviction context. *Brady* doctrinally stands for the notion that it is fundamentally unfair for the prosecution to withhold material, exculpatory evidence from the defendant and that the proceeding in which the unfairness occurred should be overturned so that the merit of the *Brady* facts can be considered. Clearly, such nondisclosure is as unfair where it prevents a defendant from taking full advantage of post-conviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial. The prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief. Any other conclusion would, in the words of the *Brady* Court, "cast [ ] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice...." 373 U.S. at 88, 83 S.Ct. at 1197.

Id. at 525 (footnote omitted).

As Justice Marshall observed in his denial of petition for writ of certiorari in *Monroe v. Blackburn*, 476 U.S. 1145 (1986), any other reading of the rule would be contrary to the basic tenets of *Brady*:

> In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 373 U.S., at 87, 83 S.Ct., at 1196-1197. In *United States v. Agurs*, *supra*, we recognized that
>
> "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done." *Id.*, 427 U.S., at 110-111, 96 S.Ct., at 2401 (footnote omitted).
>
> The message of *Brady* and its progeny is that a trial is not a mere "sporting event"; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory. See *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375,
>
> [sic]

[sic]3380, 87 L.Ed.2d 481 (1985). (*Brady* rule to "ensure that a miscarriage of justice does not occur").

> The quest for truth may not terminate with a defendant's conviction. In Louisiana, a convicted defendant must receive a new trial whenever "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgement of guilty." La.Code Crim. Proc.Ann., Art. 851(3) (West 1984).

When the sovereign has decided that justice will best be served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose otherwise. And until factfinding proceedings, or the possibility of them, is terminated, the State remains bound by the rules of simple fairness that *Brady* held to be of constitutional dimension. It would hardly make sense to hold the State to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the State to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings.

In this case there can be no doubt that petitioner's due process rights were violated by the State's failure to disclose to him the information that Detective Gallardo related to the New Orleans police. That the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference. This police files that so readily provided the State with the incriminating material to convict a defendant cannot be turned into a deadletter repository where evidence of innocence is concerned. See *Moore v. Illinios*, 408 U.S. 786, 810, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972) (MARSHALL, J., concurring in part and dissenting in part); *Smith v. Florida*, 410 F.2d 1349, 1351 (CA5 1959). If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

The State of Florida's obligation to place *all* favorable evidence in the crucible of an adversarial testing does not disappear when an individual's conviction and sentence of death have [sic]

[sic]been affirmed on direct appeal. Tbe post-conviction process affords Mr. Spaziano his only opportunity to have extra-record claims considered by the Florida state courts. That opportunity is neither full nor fair if the state can conceal favorable evidence from an independent judiciary. Insofar as the state has maintained that its state post-conviction remedies are entitled to deference, it cannot be heard to say that it can skew those remedies by concealing relevant exculpatory evidence.

D. The *Ipse Dixit* of Labeling this Police Investigation into Guilt Innocence as "Clemency," and *Herrera v. Collins*' Magnification of the Importance that Clemency Procedures Be Reliable and Fair.

1. The Right Not to be Killed by the State for a Crime You Did Not Commit: Merely a "Liberty" Interest or a Fundamental Right to "Life" Itself

The role of clemency as an integral part of our justice system was reaffirmed by the Court in *Herrera v. Collins*, 113 S. Ct. 853 (1993). In *Herrera*, the Court considered whether the Due Process Clause of the Fourteenth Amendment entitled the petitioner to a new trial or to a vacation of his death sentence in light of newly discovered evidence supporting his claim that he was innocent. By a six to three vote, the Court held that the Constitution did not require that Herrera's execution be stayed pending an evidentiary hearing on his innocence. The Justices in the majority wrote four separate opinions, three of which focused primarily on what the Justices considered to be the overwhelming evidence of Herrera's guilt.[99] However, Chief Justice Rhenquist in his opinion for the Court suggested that Herrera was not entitled to a new trial on due process grounds because of the availability of clemency "[c]lemency 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. *Id.* at 866 (footnotes omitted). Thus, executive clemency, which is available in all thirty-six states which authorize capital punishment, is the "'fail safe' in our criminal justice system." *Id.* at 867-68 (quoting [sic]

[99] Chief Justice Rhenquist delivered the opinion of the court, with Justice O'Connor concurring and filing an opinion in which Justice Kennedy joined, Justice Scalia concurring and filing an opinion in which Justice Thomas joined, Justice White concurring in the judgement, and Justice Blackmun dissenting and filing an opinion in which Justices Stevens and Souter joined in part. *Id.*

[sic]KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989)). Justice Scalia similarly observed that although the Constitution would allow the execution of an innocent person who had received all the process that our society has traditionally deemed adequate, convincing evidence of innocence would undoubtedly result in an executive pardon being granted. *Id.* at 875.

The Court's reasoning in *Herrera* suggests that the due process protections of Brady apply to capital clemency decisions. Chief Justice Rhenquist's reliance on clemency as the historical "fail safe" in our justice system is justified only if *meaningful* review of capital clemency requests is mandated by the Constitution. The petitioner in *Herrera* had not yet availed himself of a Texas procedure for seeking clemency because of innocence. *Id.* at 868-69. But what if the State of Texas failed to provide a fair procedure for considering capital clemency applications and simply decided whether to grant such requests by lottery? Or if it conducted a secret police investigation, generated evidence that the state was trying to kill the wrong person, would *Brady* require Texas to disclose such exculpatory evidence to the defense?

Given that clemency is an essential part of our system of justice, the assumption that it could be wielded in a blatantly arbitrary or discriminatory manner is simply anachronistic. An analogy can be drawn to executive discretion in deciding whether to prosecute a particular case. Although the executive has broad, some might say "unfettered" discretion to determine whether to enforce the laws in a specific case, it cannot exercise this discretion in a selective manner that violates the Equal Protection Clause of the Fourteenth Amendment. *Wayte v. United States*, 470 U.S. 598, 607-09 & n.9 (1985) (holding that, although the executive has broad discretion as to whom to prosecute, a decision to prosecute selectively may violate "ordinary equal protection standards"); *United States v. Batchelder*, 442 U.S. 114, 125 & n.9 (1979) (holding that selectivity in the enforcement of federal criminal laws is subject to equal protection constraints). In like fashion, the broad executive discretion that exists at the other end of the punishment continuum to decide after conviction whether to commute a sentence does not mean that the clemency authority can be exercised in an arbitrary or discriminatory fashion. *But cf. Solem v. Helm*, 463 U.S. 277, 301 (1983) (asserting that an executive "may commute a sentence at any time for any reason without reference to any standards"). The

[sic]

[sic]Supreme Court implicitly recognized as much when it noted that the president may freely exercise the clemency power in a manner "which does not otherwise offend the Constitution." *Schick v. Reed*, 419 U.S. 256, 266 (1974); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 617-18 (1991) (arguing that equal protection constraints apply to use of the clemency power); Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 181-82 (1964) (suggesting that racial discrimination in granting clemency may give rise to an action for violation of constitutional rights).

In view of existing constitutional precedent and the important role clemency plays in our system of justice, it appears that die process protections do apply to clemency procedures, at least in capital cases. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989) is illustrative of the analysis currently employed by the Supreme Court in procedural due process cases. The Court in *Thompson* utilized a two-step test, asking first whether there exists "a liberty or property interest which has been interfered with by the State," and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* at 460 (citations omitted).

Applying this test to the process employed when determining whether to commute a death sentence, the question arises, is the applicant asserting a "liberty" interest, or an interest in *life* itself? As the above quotation from *Thompson* illustrates, the Court has omitted mention of the protection of life from most discussions of procedural due process. Moreover, virtually all lower courts that have considered due process challenges to capital clemency procedures have analyzed the interest being asserted as one in "liberty." *Spinkellink v. Wainwright*, 578 F. 2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 967 (1979); *Bundy v. Dugger*, 850 F. 2d 1402 (11th Cir. 1988), and Otey v. State, 485 N.W. 2d 153 (Neb. 1992). Generally, these courts rely on *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981) which characterized the respondents' alleged interest in commutation of their life sentences as "liberty interests."[100] In *Dumschat*, the Court held that the respondents' interests in liberty

[sic]

[100] Based on the facts in *Dumschat*, in which respondents were seeking relief from their confinement,rather than preservation of their life or protection of their property, the Court undoubtedly was correct in identifying the asserted interest as one in "liberty."

[sic]via commutation could only be revived by state rules or statutes creating a "right' to clemency[101] because no state statute created such a right, the respondents lacked requisite liberty interest and due process protections were therefore not triggered.

By contrast, it is difficult to say that one who seeks commutation of a sentence of death lacks the requisite protectable interest. An unfavorable decision by the clemency authority will deprive him of life, an interest he presently has (unless we are prepared to make the harrowing admission that for purposes of the Due Process Clause he is already dead).[102] Justice Stevens' natural law argument in *Dumschat*, that a liberty interest continues while one is in the legal custody of the state, has greater force with respect to a "life" interest, since life quite obviously had its "roots" in a source deeper than state law or rules. *Dumschat*, 452 U.S. at 468-69 (Stevens, J., dissenting). Recognition that the asserted interest in life also vitiates what Justice Stevens has characterized as the unsatisfactory distinction, employed for purposes of determining when due process is triggered, between losing what one has and not getting what one wants. *Id.* at 470 (Stevens, J., dissenting). Under this approach, originally put forward in *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 9-10 (1979), when one is denied what one has (i.e. when punishment is imposed), due process applies, but when one is denied what one wants, (i.e. when commutation is denied), due process is not triggered. A capital clemency applicant clearly still has life, the loss of which will directly and inevitably follow a denial of clemency. Consequently, the clemency process in a capital case would implicate an interest specifically protected by the Fourteenth Amendment, and any procedure employed in deciding whether to grant clemency would have to comport with due process.

[sic]

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101 *Dumschat*, 452 U.S. at 464-65. Presumably this is because, as later cases have indicated, prisoners'liberty diminishes following incarceration. *Hewitt v. Helms*, 459 U.S.460,467 (1983).Later cases suggest that liberty interests may also be created independently of state law by the Due Process Clause itself. E.g.,*Kentucky Department of Corrections v.Thompson*,490 U.S.454,460 (1989).

102 Along this line,one might argue that once an individual has been convicted ad sentenced to death in accord with constitutional procedures, his life is effectively forfeited. Thus,in order to be protected by the due process, his "life interest (as distinct from mere life) must be resurrected through some reasonable expectation based on state rules or statutes or the Fourteenth Amendment.Such an argument, as my colleague William Bluth has dryly remarked, would seem to be the ultimate legal fiction.

[sic]2. The Inapplicability of *Dumschat*

However, even if the Court was to determine that capital clemency decisions implicate "liberty" interests, we believe that the procedural due process requirements of *Brady* are nevertheless applicable. As we discuss below, *Dumschat v. Connecticut Board* is not [sic] dispositive of the issue of whether a capital clemency applicant has a right to fair procedure. As the Eighth Circuit pointed out in *Otey v. Hopkins*, 972 F. 2d 210, 212 (8th Cir. 1992) the respondents in Dumschat were alleging that, because of the frequency with which clemency was granted in Connecticut, the Board of Pardons had to explain its reasons for denying commutation in a particular case. The majority in *Dumschat* responded to this argument by noting that, although commutations in the past may have been readily forthcoming, the absolute discretion of the Board to grant or withhold clemency undercut the prisoners' assertion that they had a right to clemency which triggered due process. 452 U.S. at 465-67. By contrast, the argument for procedural due process advanced in this article is not based on any expectation by the applicant of actually receiving clemency. The relevant expectation which triggers the Due Process Clause is the his capital clemency request *will be given meaningful consideration* by the ultimate decisionmaker.[103] Such an expectation may be rooted either in the Due Process Clause itself or in specific state procedures used in evaluating requests for clemency in-capital cases.

Although the Court has never held that a capital clemency applicant has a liberty interest in his request being given meaningful consideration, the Court should recognize such an interest under the Due Process Clause or the Eighth Amendment. The Due Process Clause seems to be the most logical source of such a right. However, in its recent death penalty jurisprudence, the Court has used the Eighth Amendment's proscription of "cruel and unusual punishment" to impose procedural requirements on the use of capital punishment. *E.g., Ford v. Wainwright*, 477 U.S. 399, 405 (1986). Thus, any challenge to capital clemency procedures should also take into account the protections of the Eighth Amendment. Because clemency is an integral part of our federal constitutional scheme and all state systems of justice, it ought to function in a [sic]

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103 In *Otey v. State*, 485 N.W. 153, 166 (Neb. 1992), the Nebraska Supreme Court held that the relevant expectation is merely to "seek a commutation." However, such a right to "seek" clemency would be empty if it did not presuppose that an application for capital clemency will receive meaningful consideration.

[sic]meaningful way. If a criminal punishment system which includes the death penalty, but not executive clemency, is indeed "totally alien" to American notions of justice, *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (Stewart, Powell, and Stevens, JJ.).then it would seem that the dispensing of clemency must be more than a sham or perfunctory exercise. The Court has held that a condemned prisoner has no due process right to an adversarial hearing when the governor has the sole responsibility for determining the sanity of a person as a prerequisite to execution. *Solesbee v. Balkcom*, 339 U.S. 9 (1950). However, *Solesbee* would not be controlling in the context of an executive clemency decision in a capital case today. The Supreme Court effectively overruled *Solesbee* in *Ford v. Wainwright*, 477 U.S. 339 (1986), in which it held that the Eighth Amendment prevents states from executing insane prisoners; thus, the state must employ substantial procedural protections, including an adversarial hearing, when making a sanity determination. 477 U.S. at 416-18. Justice Frankfurter's careful, well-reasoned dissent in *Solesbee*, which relied heavily on historical analysis and the practices used by most states, clearly has more vitality than Justice Black's terse majority opinion. This is particularly true in death penalty cases where there is a heightened need to be sensitive to the values underlying the Due Process Clause and where clemency is historically the vehicle for preventing miscarriages of justice. *Herrera v. Collins*, 113 S. Ct. 853, 866 (1993). Justice Harlan remarked in *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) that capital cases stand on entirely different footing that other offenses, and thus the law is especially concerned with procedural fairness in these cases. Just as the process afforded to one faced with a fine or prison offense may not satisfy the requirements of the Constitution in a capital case, so to due process interests may be implicated in a capital clemency case that are not extant in other clemency requests. Such a distinction is neither "novel, nor is it negligible, being literally that between life and death." *Id.*

Recognition of the unique nature of the death penalty underlay the Arizona Supreme Court's decision in *McGee v. Arizona State Board of Pardons and Paroles*, 376 P. 2d 779, 781 (Ariz. 1962) (en banc) which held that a prisoner applying for commutation of a death sentence is entitled to die process in the form of notice, an opportunity to be heard, and a meaningful hearing. The court noted that if the State is to justify taking a human life, an act that has long been considered immoral, "it must not be done with less

[sic]

[sic]formality that the spirit and traditions of the law contemplate." *Id.* Evidently, the *McGee* court believed that imposing formal procedural protections benefits not only the individual, but society as well, for these protections give the condemned "his full measure in the struggle against the pubic's will." *Id.* Therefore, the court ordered that the Board of Pardons and Parole grant McGee a hearing at which he would be allowed to present evidence that had bearing upon his application for commutation.

Although the opinion in *McGee* does not offer a wealth of reasons supporting its holding, the court appears to have been concerned with the intrinsic value of due process in "generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jericho*, Inc., 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Refugee *Comm v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)). As Justice Blackmun has noted, imposing procedural protections may enhance our sense of a decision's legitimacy. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 801 (1980) (Blackmun, J., concurring in judgement). And society, no less than the prisoner condemned to death, has an interest in enduring that capital clemency applicants are "personally *talked* to about the decision rather than simply being *dealt with*. TRIBE, *supra* note 10. § 10-7, at 667 (emphasis in original).

Just as importantly, procedural protections serve society's interest in assuring that accurate decisions are made in cases involving deprivations of important rights. *Id.* at 666-67. Generally, in capital proceedings the Court has required that procedures aspire to a higher standard of reliability because death if "the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Thus, due process should require meaningful consideration of capital clemency requests because such decisions are the last chance for the State to identify instances of wrongful conviction or other circumstances that would merit remission of this absolute punishment.

Florida has promulgated rules governing the procedure for considering death penalty commutation requests. 1992 Florida Rules of Executive Clemency applicable to commutation of death sentences. These rules, although less comprehensive than the ones previously in force, still provide for a thorough investigative report by the Parole Commission, a hearing before the Clemency Board with requisite notice to the condemned inmate's attorney, and an opportunity for the applicant to present evidence at the hearing.

[sic]

[sic] *Id.* However, the rules also specify that they are not to be construed as limiting in any way the powers of the Parole Board and they suggest that the investigation and hearing provisions are triggered only at the Governor's discretion. *Id.* at Rule 15 ("The investigation shall begin immediately after the Commission receives a written request from the Governor."). Suppose that the Governor, for whatever reason — personal animus, political expediency, or perhaps administrative oversight — did not request that an investigation and hearing be conducted by the Clemency Board in a capital clemency case. In such an event, would the Constitution allow the application to be summarily denied? We do not believe that it would. Since the state has raised an expectation that requests for commutation of the death sentence will be meaningfully considered, the Due Process Clause imposes a requirement that procedures to ensure meaningful consideration be employed.

In *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458 (1981) the United States Supreme Court considered whether due process protections of the Fourteenth Amendment apply to non-capital clemency decisions. The Court in *Dumschat* reversed a decision of the Second Circuit Court of Appeals (*Dumschat v. Board of Pardons,* 618 F. 2d 216, 218-22 (2d Cir. 1980) (per curiam) (holding that because inmates had demonstrated a legitimate expectation of commutation, procedural due process protections attached)) and held that prisoners sentenced to life in Connecticut prisons did not possess a protectable liberty interest in having their sentences commuted and, hence, were not entitled to procedural due process from the Connecticut Board of Pardons.

The respondents had argues successfully in the courts below that life prisoners possessed a due process right to written statements from the Connecticut Board of Pardons explaining why they had been denied commutation of their sentences. *See id.* at 217-22. The Second Circuit upheld the trial court's ruling that the Board of Pardons had created a legitimate expectation of clemency and release by virtue of the regularity with which the Board granted clemency to "lifers." The appellate court relied on findings that more than seventy-five percent of Connecticut's prisoners serving life sentences had their eligibility for parole accelerated by the Board through a grant of clemency and that ninety percent of those inmates were then granted parole within their first year of eligibility. *Id.* at 219-20. According to the appeals court, this "almost invariable practice" (*Id.* at 220 (quoting *Dumschat v. Board of*

[sic]

[sic]*Pardons*, 593 F. 2d 165, 166 (2d Cir. 1979)) and the "overwhelming likelihood" that life inmates would be pardoned and released before completing their a life terms gave them a liberty interest in clemency proceedings. *Id.* The Second Circuit remanded to the district court to determine how many years prisoners with life [sic]sentences must serve before the probability of clemency became so significant as to give rise to a protectable liberty interest. *Id.* at 221.

This Court, by a vote of seven to two, overturned the decision of the Second Circuit. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981). Although the Court recognized that a state-created right can, in some circumstances, implicate procedural due process protections, the historically high probability of being granted clemency under the generous practices of the State of Connecticut did not give rise to such a right. Id. at 46365. According to Chief Justice Burger, the respondents and the courts below had misconceived the nature of the clemency decisionmaking process:

> In terms of the Due Process Clause, a Connecticut felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope.

Id. at 465 (footnote omitted).

The mere frequency with which commutations were granted did not create a constitutionally protected liberty interest; instead, in the majority's view, such a claim must be based in "statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.* Justices White and Brennan concurred separately in the judgement, but both emphasized that protectable liberty interests may be found in sources other than state statutes or rules. *See id.* at 467. (Brennan, J., concurring) (sources of liberty interests include "statute, regulation, administrative practice, contractual arrangement or other mutual understanding...particularized standards or criteria [which] guide the State's decisionmakers"); *id.* at 468 (White, J., concurring) (not "all liberty interests entitled to constitutional protection must be found in state law"). Since the clemency statute did not provide any standards or criteria and effectively conferred unfettered discretion on the Board of Pardons to grant or deny clemency,[104] the Court held [sic]

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[104] The Connecticut statute in question provided:

[sic]that the Connecticut law created no constitutionally cognizable entitlement.

Justice Stevens, in a dissenting opinion joined by Justice Marshall, disagreed with the majority's contention that liberty interests are created solely by state law. For the dissenting Justices, it was 'self evident' that individual liberty has far deeper roots." 452 U.S. at 469 n.1 (Stevens, J., dissenting) (arguing that all persons are endowed with unalienable liberty rights independent of state laws). Because of its natural law origins, liberty to some extent survives after conviction regardless of whether state law so provides. Thus, the dissenters reasoned, the decision of the Board of Pardons to grant or deny clemency implicates a prisoner's liberty, and the State violates the Due Process Clause when it acts arbitrarily in making this decision. *Id.* at 470-71 (Stevens, J., dissenting). Justices Stevens and Marsball believed that prisoners applying for clemency, unlike ordinary litigants, have few procedural protections against arbitrary action, and at a minimum, are entitled to a brief statement of reasons from the Board of Pardons when clemency is denied.

The *Dumschat* decision is relevant to, but not dispositive of, the issue of whether the *Brady* continues through in capital clemency cases. First, the case suggests that Fourteenth Amendment procedural protections may apply to the clemency decisionmaking process where the discretion of the decisionmaker, unlike Connecticut, is "fettered" as a matter of state law. The Court found it relevant that the Connecticut clemency statute "imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board." *Id.* at 466. By implication, a clemency scheme which included some or all of these strictures would create a constitutional entitlement worthy of due process protections.

Second, the clemency applicants in *Dumschat* were arguing that they actually had an expectation of receiving clemency, and [sic]

(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations fom the penalty of death shall be vested in the board of pardons.

(b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

CONN. GEN. STAT. § 18-26 (1981).

[sic]thus, the Board of Pardons had to explain its reasons for denying it. Consequently, *Dumschat* does not answer the question of whether a capital clemency applicant has an expectation of receiving *meaningful consideration* of his clemency request, regardless of whatever substantive decision is ultimately made.

Perhaps most significantly, the reasoning of the Court in *Dumschat* is applicable only to those cases in which a *liberty* interest is at stake. Since *Dumschat*, the Court has not followed Chief Justice Burger's notion that protectable interests are created solely by state law, having held in later cases that liberty interests may also arise from the Due Process Clause itself. *E.g., Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (liberty interests may arise from two sources: the laws of the states and the Due Process Clause itself). Chief Justice Burger in his opinion for the majority simply did not respond to Justice Stevens' assertion that individuals possess a residuum of constitutionally protected liberty even while in the custody of the State. 452 U.S. at 469 (Stevens, J., dissenting). Moreover, the majority's contention that the basis for a protectable liberty interest must be found in either state rules or statutes defining the obligations of the clemency authority fails to take into account several cases in which the Court has found a liberty interest in other sources. *See Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977) (child's interest in physical integrity is a liberty interest because it has historically been protected); *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13 (1980) (interest in reputation in conjunction with dismissal from employment constitutes a liberty interest); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). However, in the case of a clemency request by a prisoner sentenced to death, is it not an interest in *life* that is being asserted, rather than an interest in liberty? *But cf. Bundy v. Dugger*, 850 F. 2d 1402, 1423-24 (11th Cir. 1988) (characterizing the interest being asserted as "liberty"); *Spinkellink v. Wainwright*, 578 F. 2d 582, 617-19 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (rejecting applicability of due process protections to capital clemency request relying on "liberty interest" cases); *Otey v. State*, 485 N.W. 2d 153, 166 (Neb. 1992) (finding that clemency procedures did not implicate a "liberty interest"). A life interest would seem to be extant so long as the person draws breath, regardless of state rules or regulations which might be significant in

[sic]

[sic]determining whether an interest in liberty continues. In his short concurring opinion in *Dumschat,* Justice Brennan stated that the clemency decisionmaker "can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Dumschat,* 452 U.S. at 467 (Brennan, J., concurring). Thus, he believed that no liberty interest in a pardon existed and due process would not be implicated.

However, it seems unlikely that Justice Brennan would have extended such reasoning to clemency decisions in capital cases. For example, could a decision to deny capital clemency be made in an entirely arbitrary manner? Notwithstanding the vast discretion typically vested in clemency decisionmakers, surely a governor or pardon board could not decide to spare the life of every person whose name begins with the first ten letters in the alphabet. While this might arguably provide a basis for an equal protection challenge, such a practice would most clearly run afoul of the Due Process Clause of the Fourteenth Amendment.

E. The Florida Supreme Court's Penchant for Secrecy in Deciding Who Dies, and for Lying About What Happens in Its Secret Proceedings.

Federalism and comity are based on trust. Past experience teaches that Florida government cannot be trusted to decide who dies — at least not when those death decisions are made following secret police investigation of police investigation into whether the police and prosecutor sent an innocent man to death row and has kept him there for 19 years (and counting) and five death warrants (and counting).

The principal legal authority for Mr. Spaziano's claim that he ought not be killed on the basis of super-secret "information," presented and represented by the government as being inculpatory provided to law enforcement by unidentified people, who allegedly provided such information under unknown circumstances—unknown to Mr. Spaziano and his counsel, that is—are *Gardner v. Florida* and *Ford v. Wainwright,* which extended *Gardner's* principles to Florida's executive clemency/death warrant "process." Perhaps it is no coincidence or accident that *Gardner* and *Ford* both arose out of Florida.

This court has had occasion to invalidate Florida's repeated attempts to base death decisions on secret evidence. *Gardner v. Florida,* 430 U.S. 349 (1977), is the most obvious example, but Alvin

[sic]

[sic]Ford's case is both more recent and more germane. *Ford v. Wainwright*, 477 U.S. 399 (1986), presented a powerful record that a condemned inmate had become insane following his conviction. The Governor of Florida proposed to execute him anyway, rejecting his lawyers' evidence of his insanity after executive proceedings that had none of the attributes of a fair hearing. The constitutional claim might have been cast in either of two ways: (1) as an argument that due process requires fair procedures for determining the sanity of a condemned inmate who asserts that s/he is mentally incompetent to be executed (even if the right not to be executed while mentally incompetent is purely a matter of state law); and (2) as an argument that there is a substantive Eighth and Fourteenth Amendment right not to be executed while insane; that a deferral habeas corpus court is obliged by *Townsend v. Sain*, 372 U.S. 293 (1963), and 28 U.S.C. § 2254(d) to make an independent determination of sanity for this purpose unless the State employs full and fair procedures to determine the facts bearing upon a death-row inmate's mental competency; and that the Florida Governor's procedures in Ford were neither full nor fair. However, the decision whether to make both forms of argument was quite complicated. Among other concerns. there was a risk that the first argument, while easier to win because of its limited implications for other cases, would commend itself to the courts as a compromise but leave Ford exposed to execution after a second Governor's hearing, employing improved procedures, produced the same predictable determination by partisan state officials that Ford was mentally sound as a bell. Ford's lawyers did eventually choose to make both arguments but refined them by emphasizing that a competency hearing conducted by partisan executive officials could meet neither habeas due process requirements nor the *Townsend*-§ 2254 standards requiring federal habeas courts to defer to state factfindings made pursuant to "full and fair" hearing procedures. In this form, the second constitutional argument was probably narrower in its implications than the first, and it prevailed in the Supreme Court.

Commentators have, in recent years, acknowledged that the Florida Supreme Court's treatment of *Gardner v. Florida* has been less than forthright. David von Drehle; Neil Skene. The court's fullest elaboration of *Gardner* concerned the infamous "*Brown* issues."

The so-called *"Brown" (Brown v. Wainwright*, 392 So. 2d 1327

[sic]

[sic] (Fla.), *cert. denied*, 454 U.S. 1000 (1981)) claim was the following: a constitutional challenge to the Florida Supreme Court's secret, *ex parte* solicitation of psychological screening reports on Florida death row prisoners. The reports, prepared by the Florida prison system as part of its routine procedures for handling new prisoners, wound up in the Florida Supreme Court files of at least 25 capital inmates between 1976 and 1978. Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263, 286 (1986); *see also Brown v. Wainwright*, 454 U.S. 1000, 1000-03 (1981) (Marshall, J., dissenting from denial of certiorari). The problem apparently began as early as 1975. *See Ford*, 696 F.2d at 874 (Johnson, J., concurring in part and dissenting in part). The information had not been disclosed to defense counsel who were appealing the inmates' convictions and sentences to the Florida Supreme Court.

Soon after the court's secret practice came to light—fortuitously during an oral argument before the Florida Supreme Court—all 123 inmates then on Florida's death row, at various stages of their appeals and postconviction proceedings, filed a class action petition for habeas corpus in the Florida Supreme Court. *Brown v. Wainwright*, 392 So. 2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981). Prisoners able to prove that information in their cases had in fact been secretly solicited relied upon *Gardner v. Florida*, 430 U.S. 349 (1977) which recognized a defendant's right to see and challenge information used against him in capital sentencing proceedings. Inmates who could not demonstrate that secret information had actually been obtained by the Florida Supreme Court in their cases argued that the use of the screening report in some cases tainted the overall fairness of capital sentencing and required the invalidation of all death sentences in Florida. *Brown*, 392 So. 2d at 1328-30. Since Joseph Green Brown was first on the alphabetical list of class members, the case became styled *Brown v. Wainwright*, and the claim became known as the "*Brown* issue."[105] (Ironically, Joseph Green Brown was most likely innocent of the

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105 392 So. 2d 1327 (Fla.), *cert. denied*, 454 U.S. 1000 (1981). Richard Blumenthal, *If An Innocent Person Can Be Executed, the Death Penalty is Unworkable*, Hartford [Conn.] Courant, May 17, 1987, at D1; Styron, *Death Row*, N.Y. Times, May 10, 1987, at A25, col. 1; Siegal, *Sentencing the Wrong Man to Die*, L.A. Times, May 10, 1987, at A1, col. 1; Fink, *Given New Life After Death Row, Man Fights Capital Punishment*, Hartford [Conn.] Courant, Mar. 19, 1987, at A1; Krasnow, *Ex-Inmate Wants Story To Be Told*, Florida Times-Union/Jacksonville Journal, Mar. 14, 1987, at A1; Port, *Freed Prisoner Talks of Brush With Death*, St. Petersburg [Fla.] Times, Mar. 14, 1987, at A1.

[sic]offense for which he was sentenced to death; in 1986, the Eleventh Circuit mandated retrial due to prosecutorial misconduct, the state elected not to retry Green, and he was released from prison in 1987).

As to the class action "*Brown* issue" the Supreme Court of Florida denied the habeas petition on the merits, as a matter of law.[106] The court stated that "the doctrines of constitutional law here argued are singularly unpersuasive." *Id.* at 1331. Moreover, the court held that "[e]ven if petitioners' most serious charges were accepted as true," that would not change the court's decision: "[A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or as to the validity of any individual death sentence." Drawing a distinction between sentence "review" and sentence "imposition, the court concluded that" [s]ince we do not 'impose' sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information. . . . [N]on-record information we may have seen, even though never presented to or considered by the [trial] judge, the jury, or counsel, plays no role in capital sentence 'review'." *Id.* at 1332-33. Accordingly, "[a]s we view the case . . . appellate review can never be compromised . . . by the receipt of any quantity of non-record information." *Id.* at 1333 n. 16. All relief was denied to each petitioner.

Because Florida Governor Robert Graham signed his death warrant, Alvin Ford became the first member of the 123-prisoner Brown class to reach the Eleventh Circuit. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982), *vacated by operation of law for rehearing en banc*, 696 F. 2d 804 (11th Cir. 1983) (en banc). A panel of the Eleventh Circuit had temporarily stayed Ford's then-imminent execution to allow for review, but subsequently denied substantive relief. *See Ford v. Strickland*, 676 F. 2d 434 (11th Cir. 1982). By a narrow 6-5 vote, with Judge Vance casting the decisive sixth vote, [sic]

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106 *Brown*, 392 So. 2d at 1333. The court criticized the procedure of joining multiple habeas corpus petitioners in a single petition, and said that "[i]n the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily." *Id.* at 1330. However, in the present case "[t]o avoid absurd technicalities," the court "decline[d] to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, [the] disposition of Brown's petition effectively dispose[d] of all claims for relief of those petitioners who have joined with Brown." *Id.* The court's final order was that "[t]he petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied." *Id.* at 1333.

[sic]the en banc Eleventh Circuit found Florida's procedure constitutionally tolerable. *Ford*, 676 F.2d at 808-11. It based that determination on *Alice Through the Looking Glass* reasoning that the Florida Supreme Court deliberately and regularly *obtained ex parte* information of an important nature, but then failed to "use" it. Judge Vance at oral argument had been "obviously unsatisfied by these verbal distinctions. 'I'm trying desperately to understand you,' he intejected [into the prosecutor Charles Corces' argument]. 'I just want one plausible explanation." DAVID VON DRFHLE, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF THE CONDEMNED 176 (Advance Readers' Edition Random House 1995). Von Drehle wrote that "under attack, Corces fell back on his gut-level argument—the dignity of the state supreme court. 'We are not dealing with a lawsuit with private citizens. We are talking about judges. Judges who have almost absolute immunity,' he said. Corces appealed to the court's sense of itself, of the station and integrity of their office as judges. An institution as lofty as the Florida Supreme Court must be given the benefit of the doubt, he insisted. 'When they say they did not consider it, we have to accept it.'"

The Eleventh Circuit majority view was expressed in two opinions. The plurality opinion assumed that resort by an appellate court to secret materials in reviewing capital sentences would violate *Gardner v. Florida*. *Id.* at 809-10. However, the plurality read the *Brown* opinion as a statement that the Florida Supreme Court did not "use" the materials it had solicited. *Id.* at 811. Judge Tjoflat concurred specially. He determined that the Florida court had read the materials but that it had not relied on them. *Id.* at 832-33 (Tjoflat, J., concurring in part and dissenting in part.) The concurring opinion then noted that the outcome might have been different had Mr. Ford separately alleged that "as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety." *Id.* at 833.

The logic of the plurality would be laughable were it not so important to the lives of six score human beings. Twenty-three members of the *Brown* class have since been executed DEATH ROW, U.S.A. (listing all post-*Furman* executions); *Brown v. Wainwright*, 392 So. 2d 1327 (Fla.) (style of case listing class members), *cert. denied*, 454 U.S. 1000 (1981): Nollie Lee Martin, Carl Shriner, Daniel Thomas, Aubry Adams, David Funchess, James Raulerson, Raymond Clark, Marvin Francois, James Adams, Anthony Antone,

[sic]

[sic]Bernard Bollander, Theodore Bundy, Arthur Goode, Timothy Palmes, Roy Stewart, Robert Sullivan, Buford White, Jesse Tafero, Willie Darden, Ronald Straight, Johnny Witt, Ernest Dobbert, and David Washington. All were members of the *Brown* class. At least 17 others remain under sentence of death: Douglas Meeks, Robert Heiney, Marvin Johnson, Bobbie Lusk, Jimmie Lee Smith, Gregory Mills, Raleigh Porter, McArther Breedlove, Levis Aldridge, Paul Scott (scheduled to be executed on November 12, 1994), Terry Sims, William White, Gary Alvord, Stephen Booker, Carl Jackson, Frank Smith, and Walter Steinhorst.[107]

The *Ford* plurality's major premise was that the Florida Supreme Court did not "use" the *ex parte* materials that it had solicited. Yet, as Justice Marshall wondered in dissent from the denial of certiorari in *Brown*, "if the [Florida Supreme] [C]ourt does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information?" Brown *v. Wainwtright*, 454 U.S. 1000, 1002 (1981) (Marshall, J., dissenting from denial of certiorari). Further, the Florida Supreme Court in *Brown* did not quite say otherwise. Eleventh Circuit Chief Judge Godbold noted (charitably) "the intractable ambiguity" of the Florida court's *Brown* opinion. *Ford*, 676 F.2d at 821 (Godbold, C.J., dissenting in part and specially concurring in part). He observed that a majority of Eleventh Circuit judges inferred that the Florida Supreme Court had not used the secret material; another circuit judge said the Florida court "actually did consider" the material; and still another judge said the *Brown* opinion raised a "presumption" that the material had been used.

The secret practice itself betrays the hollowness of the plurality's semantic distinction between "use," on the one hand, and "solicit," "receive," "see," "read," "review," and "consider," on the other. Word games aside, the 6 to 5 majority's conclusion in *Ford* that the Florida Supreme Court did not "use" the materials was belied by actual experience. The oral argument before the Florida Supreme Court that inadvertently revealed the practice to the outside world made the point. Paul Magill had been sentenced to death. At oral argument on direct appeal before the Florida Supreme Court, Magill's attorney urged that a life sentence should have been imposed. She relied, in part, upon psychiatric informa-

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[107] Telephone conversation with Dr. Michael Radelet, Professor of Criminology, University of Florida, May 29, 1991. Some of these inmates (Jimmie Lee Smith, Stephen Booker and Frank Smith, for example) are pending resentencing.

[sic]tion presented to the trial court. Counsel was then questioned by Florida Supreme Court justice about an inconsistent, extra-record psychological evaluation[108] that the Florida Supreme Court had secretly obtained from the prison. See *Skene, supra,* at 286 (citing Scott *Justices Saw Confidential Psychological Profiles of Death Row Inmmates,* St. Petersburg [Fla.] Times, Aug. 19, 1980, at 1B). David von Drehle provides the history behind-the-scenes in AMONG THE LOWEST OF THE DEAD: THE CULTURE OF THE CONDEMNED (Random House Advance Reader's Ed. Feb. 1995). That is "use." Res ipsa loquitur.

F. Anatomy Of A Whitewash: The Flipside of *Brady,* and the State's Super-Secret "Process" and the Super-Secret Witnesses That "Process" Produced: "J.J. Hall," For Example? Mr. Spaziano's Attorney Doesn't Know: *It's A Secret*

Governor Chiles signed the active death warrant on Joseph R. Spaziano based on alleged information allegedly provided to FDLE agents by unidentified — but really *really* trustworthy and reliable our government-officials demand us to take on faith — people who live their lives in the federal witness protection program. For all we know, J.J. Hall — or a dirtball like him — was FDLE's and Governor Chiles' super-secret "information" that formed the basis of the active death warrant. Mr. Spaziano does not know, of course, who these secret witnesses are against him. But we do know the kind of secret witnesses that state and federal law enforcement have used in the past, particularly one J.J. Hall. As set out in Appendix __, the J.J. Hall example does not inspire confidence.

G. Without Access to Crucial Public Records, Mr. Spaziano Cannot Effectively Respond to the Government's Stealth Assault Against Him in the Media.

The Florida Supreme Court requires that a prisoner whose case has become final receive criminal investigative police records as provided in Chapter 119. *See Anderson v. State,* 627 So. 2d 1170 [sic]

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108 The exchange between the justice and Magill's lawyer was preserved on the audio tape of the oral argument. Florida Supreme Court oral argument tapes are available to the public and may be obtained from the court clerk's office in Tallahassee, Florida.

The published opinion resulting from the oral argument is reported as *Magill v. State,* 386 So. 2d 1188 (Fla. 1980), *cert. denied,* 450 U.S. 927 (1981). The *Magill* opinion sheds no light up on the *Brown* issue.

[sic] (Fla. 1993); *Muhleman v. Dugger*, 623 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990); *Provensano v. Dugger*, 561 So. 2d 541 (Fla. 1990). *See also Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992). An evidentiary hearing may be required on the public records issues. *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993). The Court will extend the time period for filing Rule 3.850 motions where public records have not been properly disclosed. *Jennings v. State*, 583 So. 2d 316 (Fla. 1991); *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991); *Provenzano, supra.*

Crucial public records have not been released to petitioner. Once such information is released counsel will respond to General Butterworth's factual contentions. *Cf. Brown (Larry) v. State*, 596 So. 2d 1026 (Fla. 1992); *Woods v. State*, 531 So. 2d 79 (Fla. 1988). *See also* Rule 3.851 (b)(3) ("[T]his time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules.")

The State of Florida is required to provide counsel to death row inmates to prepare and file post-conviction actions. Death-sentenced inmates are entitled to the effective assistance of such counsel. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988).

As set out in documents filed previously with this court, the Capital Collateral Representative — the state agency charged with the representation of death-sentenced inmates — does not represent Mr. Spaziano.

Undersigned counsel has accomplished very little of that to which Mr. Spaziano is entitled. This incomplete motion is filed because it is required to be filed before Mr. Spaziano is scheduled to be killed. Petitioner believes that this motion contains grounds upon which relief must be granted. However, this motion does not contain all the grounds upon which relief must be granted, and the claims as presented herein will have to be amended, due to Petitioner not yet having received the assistance required by Florida law.

The Florida Supreme Court and the Florida rules recognize that circumstances arise under which it is impossible for a meaningful Rule 3.850 motion to be filed within the time limitations provided in Rule 3.850. When problems with the representation of a death-sentenced inmate arise which make it impossible or impractical for that inmate to be meaningful represented, the Court will extend the time for the filing of a Rule 3.850 motion. *See Wickham v. Singletary*, No. 73,508 (Order entered May 20, 1994); *Routly*

[sic] *v. Wainwright,* No. 69,089 (Order entered December 30, 1986); *Wright v. State,* No. 64,391 (Order entered January 21, 1988); *Atkins v. State,* No. 65,974 (Order entered January 19, *1989); Dufor v. State,* No. 65,694 (Order entered February 1, 1989).[109]

II. THE FLORIDA ATTORNEY GENERAL MUST RECUSE ITSELF FROM THIS *LEGAL* CASE BECAUSE OF A CONFLICT OF INTEREST ARISING FROM ITS MANDATED ROLE AS A MEMBER OF FLORIDA'S CLEMENCY BODY?

Florida Attorney General Butterworth's last motion for extension of time in the Florida Supreme Court evinced his pre-judgment of Mr. Spaziano's pending application for executive clemency. Clemency in Florida requires a recommendation by the governor and four votes from the executive cabinet. The attorney general is one of seven members of the cabinet, any one of which can call for a clemency hearing.

General Butterworth's long-standing position before the state and federal courts — that procedural technicalities preclude judicial consideration of Mr. Spaziano's evidence of innocence — compromises any pretense of neutrality when he acts in his capacity as a member of the executive cabinet. This Court lacks the constitutional power to remove General Butterworth from his position as judge of Mr. Spaziano's clemency.

But the Court does have the constitutional power to remove General Butterworth from his role as zealous advocate for Mr. Spaziano's execution without need for a new trial. This Court has the constitutional *duty* to ensure that law firms practicing before this court are not burdened by conflicting interests. In the interest of ensuring General Butterworth's actual *and apparent* neutrality in his role as cabinet member, Mr. Spaziano moves for this court to remove General Butterworth, and the law firm over which he presides, from Mr. Spaziano's case, and to permit the state courts to appoint a special prosecutor not burdened by General Butterworth's conflicting institutional functions.

[sic]

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109 Under Rule 3.851, a death-sentenced inmate is entitled to have counsel assigned to his or her case and "addressing the petitioner's postconviction issues within thirty days after the judgement and sentence becomes final." An extension of time is expressly provided for "if the petitioner's counsel makes a showing of good cause for counsel's inability to file" the postconviction pleadings in a timely manner. *Id.,* at subsection 3. Furthermore, Rule 3.851 expressly provides for amendment and supplementation of pending Rule 3.850 motions.

[sic] Governor Chiles' denial of Joseph Spaziano's most recent clemency application does not moot the conflict of interest problem set out by Mr. Spaziano's previously-filed recusal motion. Another clemency application might be filed at any time.

Further, General Butterworth, through his Assistant Attorney General, Margene Roper, responded to Mr. Spaziano's recusal motion by making factual representations about the lines of communication within the Attorney General's office.

Putting such facts into dispute, is, of course, the tactical prerogative of General Butterworth. However, now that General Butterworth has chosen to pierce the veil of confidentiality of the law firm — by raising factual issues concerning what of the firm's lawyers knew what, when they knew it, and what they did with that knowledge — Mr. Spaziano is entitled to full discovery on the factual issues that General Butterworth has raised. Ms. Roper's willful misrepresentation of the truth concerning her idiotic "service of process" claim — contained in her latest motion to delay judicial consideration of this case, rebutted in Mr. Spaziano's reply to Ms. Roper's response, and not disputed in any way in Ms. Roper's subsequent filings — do not inspire confidence in her latest factual representations.

Further, the Florida Attorney General's office has a history of lying to courts about even the public records in this case (as opposed to the super-secret information about which Florida's governmental officials ask us to take at their word). Mark Menser, Ms. Roper's predecessor counsel in this case, was compelled to own up to factual misrepresentations of the truth he made during oral argument in *Spaziano v. Florida* in the United States Supreme Court, in 1984.

April 20, 1984

Alexander L. Stevas, Clerk
United States Supreme Court
First and Maryland Avenue, N.E.
Washington, D.C. 20543

Re: *Spaziano v. State of Florida*
Case No. 83-5596

Dear Mr. Stevas:

During oral argument in the above-referenced case, I inadvertently stated that Spaziano had been convicted of certain crimes [sic]

[sic]for which he was still a suspect. His correct record is contained in the pre-sentence investigation filed in the joint appendix.

Please convey my apologies to the Court for this error.

Sincerely,

/s/

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

April 20, 1984

Mr. Alexander Stevas
United States Supreme Court
First and Maryland Avenue, N.E.
Washington, D.C.

Re: *Spaziano v., Florida,*
Case Number: 83-5596

Dear Mr. Stevas:

This second letter is being submitted because of information obtained upon full review of the record.

As noted in my first letter, I represented during oral argument that Mr. Spaziano was involved in some homicides and bombings, without mentioning he was still under investigation (or, as suspect). Since then, I have reviewed his presentence investigation more thoroughly and have detected a second error.

The young lady Mr. Spaziano attacked in Orlando was stabbed around the eyes as characterized in oral argument. However, I did not recall the fact that her eyesight was restored (or saved).

[sic]While these facts do not relate directly to the legal questions before the court, I wish to correct any error or misimpression caused by my mistakes. I am deeply embarrassed by the errors and assure you that they were the product of a bad memory (and stage fright) and not any desire or intention to mislead the court.

I would like to file a corrective pleading, if you think it necessary to make certain the record is clear.

Again, I deeply regret the error and wish my apologies to be [sic]

> [sic]conveyed to the court. Hopefully this will correct any misimpressions.
>
> Thank you,
>
> /s/
>
> Mark Menser
> Assistant Attorney General

III. THIS COURT'S NEW PAGE LIMIT OUGHT NOT APPLY TO DEATH ROW PRISONERS SEEKING PLENARY REVIEW BY THIS COURT: LIMITING MR. SPAZIANO'S CERTIORARI PETITION TO FORTY PAGES WOULD VIOLATE MR. SPAZIANO'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, AND REQUIRE COUNSEL TO VIOLATE NATIONAL STANDARDS FOR COMPETENT PERFORMANCE OF *PRO BONO* CAPITAL APPELLATF COUNSEL.

This Court has repeated the conventional wisdom that appellate counsel should narrow the range of issues to be considered by an appellate court, *Jones v. Barnes*, 463 U.S. 745, 751-53 (1983), but has never addressed counsel's responsibilities to narrow issues in the death penalty context. Counsel maintains that he would violate national standards for competent performance of capital appellate counsel to do less than raise all issues he wished to raise and to raise them fully for reversal. Both the American Bar Association and the National Legal Aid and Defender Association agree that capital appellate counsel

> should seek, when perfecting the appeal, to present all arguable meritorious issues, including challenges to any overly restrictive appellate rules.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.2.D (1989); National Legal Aid and Defender Association, *Standards for the Appointment and Performace of Counsel in Death Penalty Cases*, Standard 11.9.2(d) (1989). The reason for this strategy stems from the dual role of counsel in death cases: On the one hand, counsel must persuade the appellate court that prejudicial error occurred, but at the same time counsel must preserve all arguable issues for review.

Defense counsel cannot anticipate with any certainty future capital punishment law: It is still of recent origin, bewilderingly complex, and subject to frequent change. Faced with strict default [sic]

[sic]rules and confusing constitutional commands, counsel can only conclude that his client will more likely face execution if issues are "narrowed." The ABA and NLADA explain:

> Traditional theories or appellate practice notwithstanding, appellate counsel in a capital case should *not* raise only the best of several potential issues. [Footnote omitted.] Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if a case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.

Guidelines, supra *at Guideline 12.9.2.D Conunentary;* Standards, supra at Guideline 12.9.2(d) Commentary.

Taking from capital defense counsel the power of deciding how many issues to raise counsel and in what form violated Mr. Spaziano's right to effective assistance of appellate counsel. Even when the federal court acts to protect a strong state interest, orders impingimg on the professional judgment of counsel must give way to ensure the right to counsel. *Geders v. United States*, 425 U.S. 80, 87 (1976) (important judicial interest in no coaching of defendant before testimony does not overcome interest of defendant in his right to confer with counsel).

Likewise, when counsel believes briefing many issues is in his client's best interest, the right to counsel outweighs the interest of the appellate courts in having short briefs or petitions. Interfering in this professional judgment would require — and in this case *did* require counsel to forgo substantial factual and legal arguments. professional judgment, partly based upon the ABA and NLADA' standards of competent performance, distinguishes this case from *Jones v. Barnes*. In *Jones*, this Court held that defense counsel need not raise eery colorable claim requested by a client. However, the Court's holding in *Jones* — while partly based on the benefits of [sic]narrowing issues — raised heavily on counsel's professional judgment, which in this case is that all colorable issues must be raised. Mr. Spaziano suggests that it would conflict with the holding in *Jones* to say that it is the business of the courts, not counsel, to decide how many issues should be raised.

Although courts may have an interest in controlling the size of a party's brief, they cannot legitimately require counsel to fully brief complex constitutional and factual issues on pain of default — and then limit the brief's size. This Court's guidance is needed on this unresolved issue, one which is likely to recur in light [sic]

[sic]of the evolving ABA and NLADA standards for capital appellate counsel.

Rules which interfere with functions properly exercised by counsel violates the sixth amendment. *Strickland v. Washington,* 466 U.S. 668 (1984). When counsel finds numerous errors in a death penalty case, a court order to reduce a brief as drastically as in this case guarantees that counsel will forgo substantial factual and legal arguments. The ABA has adopted the standard that counsel should seek to present all arguable issues in a capital appeal. [sic]Moreover, this Court has recognized that a capital appeal must be thorough to ensure meaningful access to postconviction relief.

The order at issue here required counsel to ignore his proper function to persuasively brief the issues presented. If he keeps all his issues but reduces arguments thereon, so much substance will be cut as to render the result unreliable. If he drops or lists issues, or files a supplemental brief, his claims will likely be defaulted.

The length of the brief counsel wished to file in this case was due to counsel's choice to raise certain significant issues and, equally important, to raise such issues adequately. Such a decision follows national standards for competent performance by appellate counsel. Compliance with the court's page limit would require counsel to consider the workload interests of the court over the client's interests, interfered with the proper fimction of counsel in deciding which issues to brief. Counsel professionally and competently chose to raise Mr. Spaziano's issues in reasonable space, considering the enormous complexity of the case. No suggestion has been made that counsel has raised any frivolous issues. The Court should issue its writ of certiorari to prevent he usurpation of counsel's authority.

The issues presented here by Mr. Spaziano are important and appear to be of first impression.

CONCLUSION

Joseph Robert Spaziano is innocent. The state possesses evidence showing his innocence. The principles of *Brady* require the state to reveal that evidence to Mr. Spaziano; *Brady* must require hte state to disclose all evidence suggesting it is attempting to kill an innocent man.

The fact that the state has chosen to label the state-ordered police investigation into whether Mr. Spaziano is innocent as part

[sic]

[sic]of a "clemency" proceeding does not nullify the state's duty of disclosure under *Brady*.

The one bootleg piece of the secret police investigation Mr. Spaziano's counsel has been able to obtain on his own — the FDLE videotape— is exculpatory in the extreme. When Governor Chiles thought Mr. Spaziano would never see the videotape, he lied about the contents of the videotape, claiming DiLisio did not recant on the videotape. Now the state asks us to accept, on its word of honor, that nothing *else* exculpatory came into possession in the [sic]course of its *sua sponte* police investigation into Mr. Spaziano's guilt or innocence.

Brady requires the state to reveal what *other* exculpatory evidence it acquired in its secret police investigation. The writ should issue.

Respectfully submitted,

MICHAEL A. MELLO[110]
Vermont Law School
South Royalton, VT 05068
(802) 295-5724
Pro Bono Appellate Counsel for
Joseph R. Spaziano[sic]

[110] Joseph Spaziano, his family and his counsel wish to express our gratitude to a group of current and former Vermont Law School students, who generously worked, *pro bono*, on all aspects of the conceptualization and creation of this petition and who fomred themselves into a *pro bono* "law firm" called BDNMCB ("The Best Defense No Money Can Buy"): Deanna Peterson, Katherine Clarke, Daniel Factor, Christopher Gilmore, Douglas Gould, Cahteryn Brigid Lynch, Thomas Malone, Sharon Pappas, Laurie Rosenweig, Elyse Ruzow, Tanja Shipman, Alexandra Varlay, Emilia Vargas-Ashby.

XI. Unfiled Motion to Recuse Four Justices of the Florida Supreme Court, December 22, 1995[111]

I attempted to file this motion in the Florida Supreme Court on December 22, 1995. As you now know,[112] the clerk refused to file this motion because the court ruled on September 12, 1995 that I had "effectively withdrawn" as Mr. Spaziano's representative.

[sic]**IN THE SUPREME COURT OF FLORIDA**

JOSEPH R. SPAZIANO,
Petitioner-Appellant,
v. Case No. 67,929
THE STATE OF FLORIDA,
Respondent-Appellee.

MOTION TO RECUSE FOUR JUSTICES OF THE FLORIDA SUPREME COURT

I. INTRODUCTION AND STATEMENT OF THE CASE

A fair hearing before an impartial tribunal is a basic requirement of due process. *Marshall v. Jerrico*, 446 U.S. 238 (1980); *In re Murchison*, 349 U.S. 333 (1955); *Porter v. Singletary*, 49 F.3d 1483, 1487-88 (11th Cir. 1955). "Every litigant [ ] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 2d 332, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988) teaches that even the *appearance* of prejudgment is sufficient to warrant reversal. In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. The impartiality of the judiciary is particularly important in "this first-degree murder case in which [Mr. Spaziano's] life is at stake." *Livingston v. State*, 441 So. 2d 1083, 1087 (1983).

In *Livingston* and *Suarez*, this court concluded that the failure of the judge to disqualify himself was error due to apparent prejudgment and bias against counsel, and predetermination of the facts at issue. Consequently, the supreme court reversed and the matter was remanded for proceeding before a different judge. In

[sic]

[111] The relevant portions of the text of this Motion and notes 113-19 appear in their original form. They have not been altered in any way, as indicated by the use of [sic] (copy on file with the *New York City Law Review*).

[112] *See supra* pp. 261, 314-17, 341-42 and notes 6-7, 51-75, 78-82.

[sic] *Suarez*, the issue arose before a post-conviction hearing in a capital case, and concerned a judge's comments to the media about a pending death warrant. There the trial court erred in failing to grant a motion to disqualify after expressing an opinion as to the issues before the court prior to receiving testimony.

As this court reiterated only three months ago, a judge must recuse him or herself if a "party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." *Cave v. State*, 660 So. 2d. 705, 707 (Fla. 1995) (quoting Fla. R. Crim. Proc. 2.160). The court in *Cave* also set out the procedure judges must follow when faced with motions to recuse. Rule 2.160 of the Rules of Judicial Administration became effective January 1, 1993. It replaced the differing rules governing disqualification of judges that had been contained in the Civil, Criminal, and Juvenile Rules of Court. *The Florida Bar Re: Amend. To Fla. Rules*, 509 So. 2d 465 (Fla. 1995). Under new Rule 2.160, a party is entitled to the disqualification of one, *i.e.*, an initial, judge purely on procedural grounds; recusal motions after the initial one are judge on substance, not procedure.[115] Mr. Spaziano successfully moved to recuse trial judge Robert McGregor. This is his first motion to recuse an appellate judge.

Undersigned counsel respectfully moves for the recusal of the four justices of this court who formed the majority in the court's September 8 opinion in this case, demanding that Mr. Spaziano's pro bono appellate attorney violate his ethical duties to Mr. Spaziano as a precondition of the court's "permission" for the undersigned to continue as Mr. Spaziano's appellate attorney. *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995). This court's September 8 and September 12 opinions evince these justices' animus towards Mr. Spaziano and his counsel. Reasonable people reading this court's opinions in this case, combined with this court's refusal even to *file* pleadings submitted by Mr. Spaziano's appellate counsel, could fairly question these justices' neutrality in this case.

[sic]

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[115] The judge against whom an initial motion to disqualify . . . is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.

> [A] successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

Rule 2.160(f) and (g).

[sic] A complicated counsel crisis developed in this court during the last death warrant. Undersigned counsel's reasons for refusing to participate in the Florida Supreme Court's sham "hearing" under warrant are set out in three documents appended to this motion: (1) the rehearing motion filed in this court on September 8 and misrepresented in this court's September 12 opinion; (2) a memorandum dated September 10; and (3) a law review article. *See* Appendices A, I and J.

As set out in Mr. Spaziano's previous filing, Joseph Spaziano has spent the past 19 years on death row for crimes he did not commit. But for the investigative reporting of the *Miami Herald* over the past few month, Mr. Spaziano would have been killed at 7:00 a.m. On June 21, 1995. *See generally* Michael Mello, *Death and His Lawyers*, 20 VT. L. REV. 19 (1995), Mello, *The Hypnotized Witness and the Condemned Man*, ____ FLA. ST. U. L. REV. ____ (1996); Mello, *Outlaw Attorney*, ____ STETSON L. REV. ____ (1996); Mello, *On Lies, Secrets and Silence: The Florida Supreme Court Deals With Death Row Claims of Factual Innocence*, ____ STETSON L. REV. ____(1996).

Mr. Spaziano's conviction was based on the testimony of Anthony DiLisio. Mr. Spaziano's previous filings, in June 1995, DiLisio — unbeknownst to Mr. Spaziano or his counsel — recanted his crucial testimony. The recantation was not known to Mr. Spaziano because it occurred in the course of a secret police investigation initiated, *sua sponte*, by Governor Lawton Chiles.

A. This Court's September 8 Judgement: No Stay of Execution; Denial of Appointment of Counsel; No Defense Access to Secret Police Investigation File; Evidentiary Hearing in Seven Days.

In its September 8 opinion, this court denied a stay of execution but remanded for an evidentiary hearing under warrant. *Spaziano, supra* at 1366. The subject of the hearing was to have been Anthony DiLisio's recantation. Under this court's opinion, and over the express objections of Mr. Spaziano's counsel, Mr. Spaziano's counsel would not have access to the secret FDLE report, including the videotape of DiLisio's recantation, at the hearing. *Id.*

Additionally, this court demanded that Mr. Spaziano's *pro bono* counsel investigate the case for less than a week before participating at the evidentiary hearing ordered by the court. In contrast, FDLE, with combined human, fiscal and information resources, [sic]

[sic]took 2 1/2 months to conduct its investigation, and the *Miami Herald's* investigation has lasted six months — and counting.

Until the day before Governor Chiles signed Mr. Spaziano's fifth death warrant, "volunteers" who represent indigents in state and federal post-conviction proceeding had been supported by the VLRC. The VLRC is the agency that had been funded by Congress at the request of the Committee on Defender Services to assist pro bono lawyers in investigating and preparing their cases. The VLRC has since been dismantled, as even this court can no longer deny. *Spaziano, supra* at 1366 n.6.

B. This Court's September 12 Judgement: The Court's "Firing" Mr. Spaziano's *Pro Bono* Appellate Counsel; and Appointment of a Hack Public Defender's Office With a Track Record of Botching the Factual Investigation into Mr. Spaziano's Innocence.

For reasons set out in the appendices, undersigned *pro bono* counsel refused to participate in an evidentiary hearing under the circumstances set out above. So did every one of the dozen law firms counsel asked to consider jumping into this case under death warrant — including Holland & Knight, the firm that subsequently agreed to do the hearing once the case was *no longer* under warrant.

On September 12, this court stayed the executing indefinitely, moved the evidentiary hearing back two and one half months, to November 15, "fired" undersigned counsel as Mr. Spaziano's pro bono appellate counsel, forced upon Mr. Spaziano a hack public defender office with a track record of botching the factual investigation in this case and a possible conflict of interest. *Spaziano v. State, supra* at 1368-71.

Undersigned counsel attempted to point out the factual and legal errors in the Florida Court's September 12 opinion (including the fact that the Florida Supreme Court lacked the legitimate power to "fire" the undersigned, since the undersigned's client was Joseph Robert Spaziano, not this court). Counsel provided the court with retainer letters from Mr. Spaziano, his mother, and his niece. The court refused even to *file* the pleadings submitted by the undersigned, explaining, in a letter dated Sept. 20, that only the public defender can file papers as Mr. Spaziano's counsel. *See* Appendix C.

[sic]

[sic]C. CCR's Conflicts of Interest, Alleged Misconduct and Purported "Overload"

As set out in Mr. Spaziano's September 8 rehearing and his other filing, CCR's conflicts of interest had three independent sources: (1) CCR's misconduct, as alleged by Anthony DiLisio; (2) CCR's general misbandling of Mr. Spaziano's case; and (3) CCR's self-proclaimed case "overload." *See In re: Order of Prosecution*, 561 So. 2d 1130, 1135 (Fla. 1990).

1. What CCR Has Become

CCR's investigators are alleged to have engaged in unethical, and quite possibly illegal, conduct in attempting to coerce Anthony DiLisio, the state's key witness against Mr. Spaziano at trial, into recanting his trial testimony. Mr. DiLisio described CCR's misconduct in a videotaped interrogation he did with FDLE.

CCR's strongarm tactics did not succeed, but failure to coerce is no defense to a charge of witness tampering or obstruction of justice. Mr. DiLisio *did* eventually recant, and the FDLE investigated the truthfulness of his recantation.

As part of its investigation, FDLE interrogated CCR personnel. CCR unilaterally waived their client's (Mr. Spaziano's) privilege of confidentiality and spoke with the members of the FDLE. CCR impeached DiLisio's credibility as to his allegations concerning CCR's misconduct. As a result, FDLE later submitted a report to Governor Chiles, concluding that DiLisio's recantation was untruthful.

When confronted by Mr. Spaziano's counsel with DiLisio's allegations against CCR, CCR denied them and misrepresented what DiLisio had told the FDLE. When confronted with the videotape itself, CCR changed its tactics and minimized its conflicts of interests. It did so in pleadings filed in the Florida Supreme Court. Based on CCR's misrepresentations, the court found that CCR had no conflict of interest and acceded to CCR's request that it take over Mr. Spaziano's case from the undersigned. Undersigned counsel filed two discovery requests with CCR seeking information regarding their conflicts of interest in this and other capital cases. To date, CCR has ignored those reports.

CCR was Mr. Spaziano's sole counsel from January to June 1995. CCR also did an oral argument on Mr. Spaziano's behalf in the federal court of appeals, do primarily to the fact that the undersigned was too ill to do it. CCR also represented Mr. Spaziano nine and ten years ago, when the undersigned was a Senior Assis-

[sic]

[sic]tant on CCR's staff. Then in May 1995 Governor Chile's signed Mr. Spaziano's fourth death warrant.

Two weeks in advance of Mr. Spaziano's scheduled execution — on a fourth death warrant — CCR had conducted no fact investigation of any use. This occurred despite the wealth of leads, provided mainly by the *Miami Herald's* , independent investigation. The *Herald's* investigation was initiated over the strong misgivings of CCR and with no help whatsoever from them. CCR had drafted no pleading; CCR had developed no strategy; CCR's director, Michael Minera, was telling reporters (and the governor) that all he wanted for his factually innocent client ("innocent" in that he didn't do the crime, period), was a reduction in sentence from death to life in prison.

Undersigned counsel sent a detailed letter to CCR, which they never responded to. When the undersigned received CCR's files in this case, he learned why: CCR had done none of the basic investigative tasks set out in the letter, much less initiated CCR's *own* follow-up of the multitude of promising leads indicated by the *Miami Herald's* extensive investigative reporting into Mr. Spaziano's claim of absolute innocence.

2. CCR's "Overload"

The ineptitude of CCR's investigation and handling of this case was obvious even to CCR's condemned client. Mr. Spaziano and his family asked the undersigned to undertake Mr. Spaziano's *pro bono* representation. Undersigned counsel agreed.

But CCR later attempted to supplant the undersigned as Mr. Spaziano's lawyer. In aid of its hostile takeover CCR misrepresented facts to the Florida Supreme Court. The court relied upon those misrepresentations when it purported to remove the undersigned from Mr. Spaziano's case and assign the case to CCR.

CCR's relentless campaign to take over Mr. Spaziano's case was in direct opposition to the clearly stated written wishes of Mr. Spaziano and his family. Mr. Spaziano's refusal to have CCR as his lawyer was entirely reasonable and based on his recent experience with CCR's botched and inept factual investigation into Mr. Spaziano's innocence.

CCR's campaign to take over Mr. Spaziano's case is puzzling in one respect. At the very time CCR was attempting to force itself upon Mr. Spaziano, the agency was telling this court, in pleadings, that the office was so overloaded that it could not undertake any [sic]

[sic]new cases. *See infra* note 2. This court recently rejected CCR's complaints about overwork, perhaps because those complaints were belied by CCR's relentlessness to add Mr. Spaziano's case to its already "overloaded" docket.

It is unsurprising that General Butterworth would prefer to have CCR as his "adversary" of choice. The Governor appointed the current director of CCR, and Chiles appointed him because he could be trusted to be good lapdog. He has not disappointed his patron. CCR has already botched this case, perhaps beyond repair. Neither General Butterworth nor Governor Chiles nor the Florida Supreme Court has the legitimate power to force a hack public defender office upon an innocent man who is litigating for his life and who is not so crazy as to permit CCR to represent him.

II. THE LAW

A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. If the motion is legally sufficient, "the judge shall proceed no further." *Lake v. Edwards*, 501 So. 2d 759, 760 (Fla. 5th DCA 1987) (quoting Fla. R. Civ. P. 1. 432(d)). Florida Rule of Criminal Procedure 3.230(d) contains virtually identical language to Fla. R. Civ. P. 1.432(d). *See also* Fla.R.Jud.Admin. 2.160.

The Florida Supreme Court has repeatedly held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." *Suarez v. State*, 527 So. 2d 191 (Fla. 1988) (emphasis added); *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983); *Brady v. Rudd*, 366 So. 2d 440 (Fla. 1978). Rather, to establish a basis for relief, a movant:

> need only show "a well grounded fear that he will not receive a fair trial at the hand of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis of such feeling." *State ex rel. Brown v. Dewell*, 131 Fla. 566, 579 So. 2d 694, 697-98 (1938). *See also Hayslip v. Douglas*, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those mater from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston, 441 So. 2d st 2086. Rule 2.160 of the Florida Rules of Judicial Administration specifically provides:

[sic]

> [sic] (f) Determination—Individual Motion . The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action . . . .

Fla R. Jud. Admin. 2.160(f)

The United States Supreme Court has recognized the basis constitutional precept of a neutral, detached judiciary.

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceeding safeguards the two central concerns of procedural due process, the prevention of unjustified or mistake deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267, 98 S. Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 22, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Matthews v. Eldridge*, 424 U.S. 319, 344, 96 S. Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 649. 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Due process guarantees the right to a neutral and detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite*, 376

[sic]

> [sic]U.S. 575, 588, 84 S.Ct. 841, 11 L.Ed. 2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. *In re Murchison*, 349 U.S. 133, 136, 76 S.Ct. 523, 624, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

The purpose of the rules of disqualification emanates from the directive of the judicial canons that a judge must avoid even the appearance of impropriety. Canon 3(C) of Florida's Code of Judicial conduct states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter or controversy, or a lawyer with whom he previously practiced law served during such association as lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it . . . .

Fla. Code of Judicial conduct, Canon 3(C).(1)(a) and (b). The commentary to this provision specifically provides, moreover:

> A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

The purpose of the disqualification rules direct a judge must "avoid even the appearance of impropriety."

> It is established law of this States that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. *Crosby v. State*, 97 So. 2d 181 (Fla. 1957); *State ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613 [sic]

> [sic] (1939), *Dickenson v. Parks*, 104 Fla. 577, 140 So. 459 (1932); *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 131 So. 3331 (1930).
>
> . . .
>
> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. *Dickenson v.Parks*, 104 Fla. 577, 140 So. 459 (1932); *Sate ex. rel. Aquiar v. Chappell*, 344 So. 2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977). In capital cases, judicial scrutiny must be more stringent than in non-capital cases. The impartiality of the judiciary is particularly important in "this first-degree murder case in which [Mr. Spaziano's] life is at stake. *Livingston v. State*, 441 So. 2d at 1087.

III. WHAT HAPPENED TO JERRY WHITE *WOULD HAVE* HAPPENED TO JOSEPH SPAZIANO—HAD UNDERSIGNED COUNSEL FOLLOWED THIS COURT'S DICTATES

Two series of events confirm counsel's decision to defy this court's "hearing" under the September warrant. The first is the killing of Jerry White. The second are subsequent events in Mr. Spaziano's case.

CCR's special blend of cowardice and ineptitude came very close to killing Joe Spaziano. It *did* kill a man named Jerry White in December 1995. The parallels between *White* and *Spaziano* are frightening, and Mr. White's fate shows what would have happened to Mr. Spaziano had undersigned counsel followed the Florida Supreme Court's dictates and handed the case to CCR under death warrant.

Like Mr. Spaziano, Mr. White had, prior to the warrant, been represented by volunteer, pro bono counsel. As in *Spaziano*, in *White* CCR told this court that it could not competently represent Mr. White due to CCR's caseload;[114] this court has recognized that [sic]

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114 Motion for Relief by CCR, In Re: Rule of Criminal Procedure 3.851, No. 82, 322 (Filed in Fla Sup. Ct. June 23, 1995); Supplemental to Motion for Relief, *supra*, at 2 ("Even before the closing of the Resource Center was announced, CCR had notified this court of its inability, due to underfundings to carry out the statutory mandate of representing all its present and potential clients within the time limits established by Rule 3.851"); CCR's Motion for Clarification and clarication, *supra* at 3 ("We respectfully reassert that we are not adequately funded due to the confluence of the one-year filing time with unprecedented rate of direct appeal affirmance"; Pleading Regarding

[sic] "when excessive caseload forces the public defender to choose between the rights of various indigent criminals defendants he represents, a conflict of interest is inevitably created," *In re: Order on Prosecution*, 561 So. 2d at 1135. As in *Spaziano*, in *White* this court (with two dissenting justices) disbelieved CCR's overload representations and ordered CCR to represent Mr. White anyway, under warrant. As in *Spaziano*, CCR then folded its counsel arguments and undertook the representation—under circumstance which CCR itself had just told this court it could not render effective assistance of counsel. *See supra* note 2.

There the comparison between *White* and *Spaziano* ends. In *Spaziano*, undersigned counsel refused to permit CCR to take over as counsel . No one was there to prevent CCR from taking over *White*. So it did—while confessing its own conflicts, *see supra* note 2. CCR dashed from court to court, pretending that it could and was representing Mr. White effectively.[115] Mr. White was executed on December 4. (The electric chair malfunctioned during Mr. White's electrocution; he screamed, and his scream was heard by the execution witnesses. Another CCR client, Philip Atkins, was

[sic]

Status of Counsel, In re: Jerry White, No. 86, 706 (filed Oct. 19, 1995), at 1-2 (" . . . Jerry White is currently unrepresented and is therefore without counsel to assist him during his pending death warrant. [CCR] further notifies the Court that [CCR] . . . is presently unable to fulfill its statutory mandate obligation to provide "the effective assistance of counsel to Mr. White during this critical warrant period . . ."); *id.* at 8 ("These warrant have come at a time of great vulnerability and crisis for those attempting to provide counsel to approximately 200 death - sentenced . . . "); *id.* at 10 (" . . . CCR is so swamped it has not assigned counsel to twenty-five clients when such assignment is required . . . Thus [sic] inadequacy of resources for post-conviction counsel has been brought to this Court's attention in the recent past. The deteriorating situation as described . . ."); *id.* at 12 ("The stream of new clients likely to be coming to CCR in the ensuring months as volunteer lawyers drop off portends a constant tension between clients already assigned to CCR and ones which come here from other counsel in various stages of litigation, including those like Jerry White with an active warrant but no lawyer"); *id.* at 14 ("Jerry white has a death warrant and no attorney. CCR cannot give him adequate representation in the time remaining before the execution. Attempting to do so forsakes the interests of some other client or clients. This predicament is a direct result of an unusually large number of affirmed death sentences coupled with the legislature's failure to increase CCR budget at all"); *id.* at 16 ("CCR cannot render effective representation to Mr. White"); *id.* at 27 (same); Summary of Initial Brief, White v., State, No. 86, 900 (filed Dec. 1, 1995), at 72 ("It has become apparent during these past several weeks that Mr. White has not been receiving the effective assistance of counsel"); *id.* at 77 ("Mr. White is not receiving the effective assistance of counsel")

[115] For example of an argument that underfunding might generate system-wide ineffective assistance of counsel, see Samuel Stretton, *Defense of the Indigent Criminal Defendant: When Does the System Become Unethical?*, THE CHAMPION, Sept. .Oct. 1991, at 26.

[sic]executed 22 hours later.)[116] Whether effective counsel could have prevented Mr. White's execution we will never know. Jerry White's killing makes it a moot point anyway.[117]

In *White*, CCR had told this court it could not render the effective assistance of counsel. *See supra* note 2. Yet, CCR represented Mr. White anyway, after this court ordered it to do so. This means that CCR either (1) lied to this court about its inability to represent Mr. White effectively, or (2) CCR wasn't able to, and didn't represent Mr. White effectively. There are no other possibilities. Jerry White's execution is a pretty good metaphor for how CCR works today.

IV. WHAT *DID* HAPPEN IN THIS CASE: REASONABLE GROUNDS FOR FEARING BIAS

What happened in *White* was precisely what undersigned counsel was afraid would happen in *Spaziano*. That is why counsel defied this court's demand that he hand Mr. Spaziano's case over to CCR. Counsel is convinced that, had he done so, Joseph Spaziano would have been killed at 7:00 a.m. on September 17, 1995.

Events in Mr. Spaziano's own case have proven the correctness of undersigned counsel's argument to this court that a complicated evidentiary hearing on six days notice was no hearing at all. This court gave undersigned pro bono counsel 96 working hours to investigate and prepare for the hearing under warrant. By contrast, in its September 12 opinion, the court gave CCR—a law firm with 22 attorneys and a multi-million dollar budget—*two months* to prepare for the hearing. And, when Florida's largest law firm, Hol-

[sic]

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[116] The execution of Mr. White and Mr. Atkins reduced CCR's caseload by two, but it is indecent to contemplate the possibility that CCR would, in light of its overload representations to this court, now accept two new clients to "replace" Mr. White and Mr. Atkins. To offer CCR's slots left by its two most recently executed clients—to offer such spots to Mr. Spaziano or anyone else—would compound CCR's existing and self-confessed conflicts of interest, see *supra* note. 2, with a conflict that would be macabre.

[117] CCR's ineptitude in *White* carried through to the very end of CCR's representation of Phillip Atkins. CCR's director, Michael Minerva, and asked Richard Jorandby, the Public Defender in West Palm Beach, to witness Mr. Atkin's execution. Jorandby drove from West Palm to Starke for that sad reason. He arrived in Starke the night before the execution occurred. But, on the morning of the killing, when Jorandby arrived at the prison to witness the electrocution of Jerry White, the prison personnel told Jorandby that he was not on the witness list. Bureaucratic foul up, but not the prison's. CCR had forgotten to put Jorandby or the witness list. He was escorted off prison grounds by five prison guards.

[sic]land & Knight, took the evidentiary hearing portion of this case over from CCR, the firm asked this court for *two additional months*. *See* Appendix K. The court gave it to the law firm. *See* Appendix L. Finally, *the Miami Herald*, Florida's largest newspaper, has, to date been intensively investigating Mr. Spaziano's case for *eight months*. That investigation has disclosed new facts about the crimes for which the state set up Mr. Spaziano, as evidenced in the news stories appended to this motion. *See* Appendices M, N.

So. This court gave me 96 hours—knowing that VLRC was recently dead, that I was representing Mr. Spaziano pro bono, and that I was on the brink of personal financial bankruptcy. The court gave Florida's largest law firm four months. Florida's largest newspaper has taken eight months.

Thus, implicitly and grudgingly, this court has agreed with me that 96 hours was not enough time for any lawyer—not even Florida's largest law firm—to investigate and prepare for this complex evidentiary hearing on whether Florida was about to execute an innocent man.

A. "Effective Withdrawal": A Doctrinal Fiction Manufactured in This Case

This court indicated that undersigned pro bono counsel for Joseph Spaziano has "effectively withdrawn" and that CCR would now represent Mr. Spaziano in the capital appeals process. *Spaziano v. State, supra*. This order is contrary to both the wishes of the affected client, Mr. Spaziano, and his attorney, Michael Mello. An attorney cannot "effectively withdraw" as representative of a client. Any withdrawal from representation must be affirmative and, under certain circumstances, with the permission of the court. This court "effectively fired" Mr. Spaziano's attorney. The court erred because it does not have the power to "fire" an attorney, the client, who hired the attorney, is the sole party who may terminate the relationship in such a matter.

Rule Regulating the Florida Bar 4-1.16(b) provides the formal procedures for withdrawal which require a lawyer to take several affirmative steps to terminate the attorney-relationship. The *Florida Bar v. King*, 1995 Fla. LEXIS 1471, *6 (1995) (noting that an attorney "could not simply stop representing his clients without following the procedures for withdrawal"). [These rules do not indicate that an attorney's actions can imply that he has withdrawn as the representative of his client's interests. The spirit of the rules [sic]

[sic]"presumes that an attorney will follow the representation to completion unless withdrawal is necessitated by one of the conditions [stated in the rule]." *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994). Complying with these conditions for withdrawal is so important that the Florida Supreme Court has held that an attorney forfeits his rights to compensation if he withdraws from representation without having one of the conditions under the rule occur. *Kay v. Home Depot, Inc.*, 623 So. 2d 764 (Fla. 5th DCA 1993). The Florida Supreme Court seems to generally place a high value on the procedure involved in withdrawal from representation. However, the same value was not placed on the procedure in Mr. Spaziano's case.

There are formal procedures for withdrawing from representation and even disputes that arise between the client and attorney require compliance with these procedures. "Once an attorney has appeared in pending litigation to represent a party, that attorney cannot withdraw from the case pursuant to discharge by the client without leave of the court granted by order after due notice to both the attorney and client." *Brown v. Vermont Mut. Ins. Co.*, 614 So. 2d 574, 579-580 (Fla. 1st DCA 1993). By requiring close compliance with the procedures for withdrawal in one case, how can the Florida Supreme Court turn around and imply the same withdrawal in another case? There are no cases which indicate that the Florida Supreme Court has the unfettered discretion to hire or fire the counsel representing parties before the court. There are checks on the system and the Florida Rule requires compliance with formal procedures in order to ensure that the client's interests are preserved. Mr. Spaziano's adamantly wishes that Mr. Mello remain his attorney and these rules were made to protect his interest in this area.

In this case, undersigned pro bono counsel had has not initiated any procedures to withdraw as counsel for Mr. Spaziano. In fact, he has worked diligently to represent Mr. Spaziano's interests for over twelve years. The undersigned has not withdrawn as representative of Mr. Spaziano's interest and he has not implied this withdrawal through his actions. To understate, this court erred in that it may not imply that counsel has "effectively withdrawn" until that counsel affirmatively states his intention to withdraw.

Florida's statutes and its common law guarantee a right to post-conviction counsel to death row prisoners. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Mr. Spaziano was effectively "without

[sic]

[sic]counsel who can effectively and reasonably assist him in post conviction proceedings." *Scott v. Dugger*, 634 So. 2d 1062 (Fla. 1993). Previously, the Florida Supreme Court has not permitted an execution to be carried out under such circumstances. *Scott*, 634 So. 2d at 1064-65; *Mendyk v. Dugger*, 592 So. 2d 1076 (Fla. 1992) (Court will not allow "indigent inmates to be executed without legal representation"); *Rivera v. Dugger*, 629 So. 2d 105 (Fla. 1993) (same). In other cases, the Florida Supreme Court has recognized that this statutory right to counsel carries with it the right to the *effective* assistance of counsel. In this case, however, Florida's highest court told Mr. Spaziano that, because Florida is not *required* to provide him with post-conviction counsel, he had better be satisfied with whatever hack lawyers the state, in its generosity, chooses to give him.

This bait-and-switch scam. It is more than grotesquely unfair to an innocent indigent man trying to prove his innocence from an isolated prison cell on Florida's death row. It is unconstitutional as well. The United States Constitution and the Florida Constitution are violated when a state guaranteed post-conviction attorney is forced and required to provide ineffective assistance of counsel to a death row petitioner at an post-conviction evidentiary hearing to determine the petitioner's factual innocence

The reason it is unconstitutional may be illustrated by *Tippins v. Walker*, 889 F.Supp. 91 (S.D.N.Y. 1995). In *Tippins*, defense counsel, Louis Tirelli, slept through substantial portions of the trial. Judge Kennan held this to be a *per se* violation of the habeas petitioner's Sixth Amendment right to counsel, reasoning that an "actual or *constructive* denial of the assistance of counsel constitutes a *per se* violation of the sixth amendment." *Id.* at 93 (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Jaour v. United States*, 724 F.2d 831, 833-34 (9th Cir. 1984)).

Under the logic of this court's opinion in Mr. Spaziano's case, the sleeping lawyer in *Tippins* could move to Florida, take over Mr. Spaziano's case, botch it as pitifully as he botched *Tippins*, and this court would find no problem. Since Mr. Spaziano is entitled to no lawyer at all, he had better just be satisfied with his sleeping lawyer. Having a sleeping lawyer is better than having no lawyer at all.

Or is it? Actually, having a sleeping lawyer is *worse* than having no lawyer. A sleeping lawyer provides the *illusion* of having a lawyer. CCR is not exactly like having a sleeping lawyer, but it's the

[sic]

[sic]next best thing — as Mr. Spaziano alleged and offered to prove at an evidentiary hearing.

Undersigned counsel argued in his original rehearing motion in this court that the "hearing" ordered by the Florida Supreme Court was more than unfair; it was unlawful under the principles of *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). In *Cronic*, the Court held that "[c]ircumstances . . . may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small, that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* Without VLRC and without the FDLE file, no lawyer, even a fully competent one, can adequately represent Mr. Spaziano at the evidentiary hearing. This court has ordered an evidentiary hearing to test the validity of the key witness's recantation, but has at the same time ruled that Mr. Spaziano has no right to evidence of Mr. DiLisio's recantation in the state's possession.

In *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986), the United States Supreme Court held that exclusion of exculpatory evidence regarding the circumstances of defendant's confession "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659-60 (1984)). Mr. Spaziano counsel's cannot subject the state's case to "meaningful adversarial testing" at the evidentiary hearing because this court has denied counsel access to the exculpatory evidence in the hands of the State. This court's order for the hearing, and its simultaneous denial of Mr. Spaziano's right to review the evidence to be tested at the hearing, violates Mr. Spaziano's constitutional rights as set forth *Cronic* and *Crane* .

B. The Puzzling Analogy of Paul Hill

The court's treatment of Paul Hill's request for counsel of his choice provides an interesting contrast to its treatment of the same issue in Mr. Spaziano's case. *See* Appendix O. Unlike Mr. Spaziano, Mr. Hill wants to die. This court granted Mr. Hill's request that he be represented by a prolife movement lawyer, even though that lawyer is not a Florida bar member and even though he has no capital appellate experience whatsoever. *See* Appendix O.

The attorney in *Hill* and *Spaziano* both made clear to this court that they were willing to work pro bono, so this court's unwilling-[sic]

[sic]ness to spend tax dollars to provide competent counsel for death row prisoners does not distinguish the two cases. Undersigned counsel did ask this court for reasonable accommodations in light of his public service representation of Mr. Spaziano, and he made such requests because, in the past, this court has recognized that it is unseemly for this court to bend over backwards to make such pro bono work as difficult as possible for Florida bar members who are attempting to discharge their ethical duty to donate their time and out-of-pocket expenses to represent poor people free of charge-as this court did in granting Holland and Knight to reasonable extensions of time for the evidentiary hearing.

There are differences between *Hill* and *Spaziano*. First, Mr. Hill does not dispute the factual basis of his homicide conviction, and he wants a lawyer to aid him in his goal of becoming a martyr to his cause. Mr. Spaziano is factually innocent and wants undersigned counsel in aid of proving his innocence. Second, Mr. Hill's lawyer is not a Florida bar member, and he lacks any capital appellate experience. Undersigned is an experienced Florida capital appellate litigator. Third, the appellate public defender who otherwise would have represented Mr. Hill — William McClain — has a long track record of competence and expertise in capital appeals. This court's September 12 opinion forced Mr. Spaziano to be represented by CCR. Fourth, in *Hill* this court did not place impossible-to-meet conditions on Mr. Hill's pro bono counsel as a condition of its "permission" that Mr. Hill receive the lawyer he wanted. As set out in this motion and in Mr. Spaziano's previous filing, this court did precisely that here.

As the court seem to recognize in *Hill*, lawyers are not fungible. Mr. Spaziano understands this, even if the Florida Supreme Court does not. As Mr. Spaziano would prove at an evidentiary hearing, for the past 12 years, Mr. Mello has come to know more than Mr. Spaziano's case. Mello came to know, and to believe in, Mr. Spaziano's innocence. Mr. Spaziano and his family trust Mello, and they do so for good reasons. The latest temporary stay of execution may not last — odds are it will not last for long. Another death warrant will be signed, and it will be carried out. But, in an odd way, that will not nullify the importance of the stay that resulted from the *Herald's* coverage, no matter how transitory or ephemeral that stay proves to have been.

There is something grotesque in this court's (1) manufacturing a doctrine of "effective withdrawal"; (2) misreading the record

[sic]

[sic]to find that counsel had "effectively withdrawn": and (3) refusing to give counsel any opportunity to respond to the court's doctrinal innovation-all to justify removal of Mr. Spaziano's longtime and trusted lawyer a week before Mr. Spaziano has been scheduled to be killed by the state. It was Justice Lewis Powell, of all people, who recognized in *Skipper v. South Carolina,* that death row prisoners are not exactly like other inmates: Condemned people are not just litigating; they are also preparing for death — especially when they are on a fifth death warrant, as Mr. Spaziano was when the Florida Supreme Court "fired" Mr. Mello and forced CCR upon Mr. Spaziano.

Even when the stays are temporary and even when they do not result in eventual victory - a life sentence or new trial - this sort of litigation can buy the inmate time, sometimes as little as five minutes and sometimes as much as years. This may not be what lawyers usually mean when we talk of "winning." But redefinition of the notion of winning is an important way of coping with a system that it often indifferent and increasingly hostile.

For the near-dead, a lifetime can be lived in five extra, snatched minutes; intimacy with death can carry with it a corresponding new intimacy with life; a *love* of life, and a lust to live. Paul Monette, writing of people with AIDS, got it exactly right: "I'm so rapacious of time . . . I wander graveyards now like a math quiz figuring who we've beaten."[118] During that time, new evidence beneficial to the condemned person's case may be found by post-conviction counsel and presented in the post-conviction system. Also during that time, the condemned, like the rest of us, feels joy and sorrow, has hopes and dreams, grows and changes. In short, they live their lives. At some moments they are able to take Lambert Strether's advice in *The Ambassadors* to live all they can because it is a mistake not to.[119]

Living one's life, even in the close confines of death row, is always much more than a legal matter. This is particularly so in the weeks and months prior to a scheduled execution. It is essential that the human, extralegal needs of the inmates are recognized and, when necessary, advocated.

Part of the undersigned's job as Mr. Spaziano's lawyer — a part CCR cannot replicate with a client whom despises the office — [sic]

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[118] PAUL MONETTE, *New Year's at Lawrence's Grave,* in WEST OF YESTERDAY, EAST OF SUMMER 37 (1994).

[119] HENRY JAMES, THE AMBASSADORS (1970).

[sic]is to provide the nonlegal counseling and support help transform an inmate's appreciation of death from abstract principle to concrete reality, and so help the inmate — one keeps wanting to write "patient" — prepare to take care of the unfinished business of this lifetime. This also places the legal struggle in perspective. We fight not only scheduled death, but also despair. Our goals are to ensure that the person he represents knows all hope is not lost, the battle continues, *he will not be abandoned*, but also the outlook is grim and he should be preparing himself to die.

Experienced capital postconvicition litigators know that there is a self-defensive instinct to distance one's self from a friend who is about to die. Yet such distancing is the one luxury we cannot permit ourselves to feel. At the very time when virtually everyone else is distancing himself from our dying(?) clients, we cannot do so, even for self-protective reasons, *especially* for self-protective reasons. They would be able to tell. That brand of disloyalty risks becoming a self-fulfilling prophecy.

As Mr. Spaziano would prove at an evidentiary hearing, it is not really — or maybe one means not *only* — dying at the hands of the state. It is living the best possible life knowing that the state is trying to kill you. When one is about to be killed by the state, hope is both a luxury and a necessity. Erica Goods made the point with regard to the survivors of the Oklahoma City bombing, but it holds true as well for my clients. Hope can be like a drug, keeping the survivors going when the shock and waves of adrenaline are not enough, protecting them for a few more hours against the oncoming tidal wave of grief. They cling tightly to their illusions. As in war, hope is critical: without it you die. In court, we defense lawyers wear the poker face of the war room, slipping into the official language designed to keep the actuality of devastation at bay: the moment when a waiting family was informed of a loved one's execution is "notification"; crisis counseling for our clients' families, and for ourselves, is called "debriefing." Yet the office was hit not by war but by something that had no ready blueprint for how to act or what to think. People did the best they could. We think we understand; they think they understand. For people involved in this sort of killing, even normal gestures of everyday life can move far beyond reach. As the hours wind down, and the execution draws closer, hope cannot last.

V. CONCLUSION

For the moment, Mr. Spaziano is alive; he will likely be dead [sic]

[sic]soon — a victim of lies, incompetent counsel, police collusion and a court system's cowardly reluctance to admit error and reverse itself; a victim of a "clemency" board that dispenses mercy based on polling data and that hears only from those who want executions carried our more swiftly than ever, who regard all claims of innocence as equally dubious, who see electrocution of human beings as the last proof that Florida government can do something right, after all. The quality of mercy is not strained; it is vaporized. The quality of justice lives elsewhere.

Joseph Spaziano is not on death row because he is a murderer or because he is a rapist. He is on death row because he is an Outlaw — president, *in absentia*, of the Outlaws Motorcycle Brotherhood, Orlando Chapter.

It is ironic and churlish — although unsurprising — that this court refuses to permit to be filed the results of the *Miami Herald's* investigation into the facts of this case. Such self-imposed ignorance is the obtuse equivalent of this court's willingness to allow an innocent man to be killed based on a secret governmental investigation. Neither Mr. Spaziano nor the undersigned will ever find the words to express our profound gratitude to the *Herald* for saving Joe's life, even if only for a short time. We won't say that the amount of time doesn't matter, because it does; more time is always better than less. Still, what mattered most was the fact that someone had *listened* to the record in his case, and that someone had written in down and published it. That, and the fact that the *Herald's* stay let him see another Thanksgiving, Christmas and New Year. That's how we have marked the passage of time over the years: one holiday season at a time.

And yet . . . the *Herald's* success only underscored my failure as Joe's lawyer. I've pour my *soul* into Joe's case, for as long as I've been a lawyer, and I never succeeded in convincing a single judge to even *consider* the evidence of innocence. If I couldn't even persuade any court anywhere not to kill my innocent client, then what was the point? Maybe the "system" is too obtuse to care, or maybe I'm not just much of a lawyer. Either way, it seems time to quit.

It's far past time, actually. The biggest mistake I made in Joe Spaziano's case was not going to the *Herald* in 1995; it was in not going to the *Herald* in 1983; it was in playing the polite professional for longer than the courts deserved; it was *trusting* the judiciary not to kill an innocent man.

Either way, Mr. Spaziano is dead. He could be released from [sic]

[sic]prison tomorrow, but he's an old man now who spent his life on death row for crimes he did not commit. He trusted the judges, in part because I told him he should. He trusted me. I failed. We failed.

But right now, Mr. Spaziano has a stay. There is a moment toward the end of Camus' *The Plague* when, against all expectation, signs emerge of a slight abatement of the horror. The seasons slowly changes; but not everyone can adapt. Camus writes: "Plague had imbued some of them with skepticism so thorough that it was now a second nature, they had become so allergic to hope in any form. Thus even when the plague had run its course, they went on living by its standards. They were, in short, behind the time."

For the moment, as I write these words, Joseph Spaziano has a stay. He'll probably be executed on the next warrant. Or maybe he'll be released from prison. In a cockeyed way, it won't matter. Joe could be freed tomorrow; he could make it to Vermont by December 30 to be the best man at my wedding; he could teach me to ride a Harley; he could watch the house while I am on our honeymoon. He could do all those things. He'd still be a dead man walking.

At the minimum, Mr. Spaziano's innocence claim ought to be decided by fair and impartial judges — not by judges who are obviously sick of Mr. Spaziano, sick of his innocence claim, and sick of undersigned counsel's attempts to represent his innocent client zealously, within the bounds of the law and the ethnics of his profession. Mr. Spaziano moves for recusal of the September 8 majority.

CERTIFICATE OF GOOD FAITH

The undersigned counsel certifies that he is appellate counsel of record in this cause and that this motion to disqualify judge and supporting points of authority is made in good faith for the purposes described in Florida Rules of Judicial Administration.

Respectfully submitted,

/s/ Michael Mello
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For Joseph R. Spaziano[sic]

XII. The Happy Ending: The Order Mandating a New Trial[120]

The United States Supreme Court denied certiorari.[121] In the meantime, it became apparent to me that I could no longer act as Mr. Spaziano's attorney before the Florida Supreme Court. I did not have the personal resources. Additionally, VLRC lost its funding on October 1, 1995 and had already indicated to me that it could no longer assist in Mr. Spaziano's defense.[122] I persuaded Holland and Knight to get involved before the hearing. Finally, the unreasonableness of its Order became apparent to the court when even Holland and Knight could not be ready to adequately defend Mr. Spaziano according to the court's timetable. By separate Order dated October 12, 1995,[123] the Florida Supreme Court moved the evidentiary hearing originally scheduled for no later than September 15, 1995, then moved to no later than November 15, 1995, to no later than January 15, 1996.

On January 22, 1996, following a week-long evidentiary hearing, Seminole County Circuit Judge O.H. Eaton, Jr. issued the following opinion:

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

CASE NO. 75-430-CFA

STATE OF FLORIDA,
Plaintiff,
vs.
JOSEPH R. SPAZIANO,
Defendant.

[sic]

120 Florida v. Spaziano, No. 75-430-CFA, slip. op. (Fla. Cir. Ct. Jan. 22, 1996). This Order has been previously published. *See* Mello, *Postscript-Death and His Lawyers*, *supra* note 20. This Order and notes 124 and 125 appear in their original form. They have not been altered in any way, as indicated by the use of [sic] (original on file with the *New York City Law Review*).

121 Spaziano v. Florida, 116 S. Ct. 722 (1996).

122 Letter from Matthew Lawry, Co-Director, Volunteer Lawyers' Post-Conviction Defender Organization of Florida, Inc., to Michael Mello, Pro Bono Appellate Counsel (Aug. 25, 1995) (on file with the *New York City Law Review*).

123 Spaziano v. State, No. 67,929 (Fla. Oct. 12, 1995) (order to extend evidentiary hearing).

[sic] *ORDER VACATING JUDGMENT AND SENTENCE AND SETTING TRIAL DATE*

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

The Issue

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

The Law of Newly Discovered Evidence and Recanted Testimony

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

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

Jones v. State, 591 So.2d 911 (Fla. 1992); *Henderson v. State*, 135 So. 625 (Fla. 1938); *Smith v. State*, 156 So. 91 (Fla. 1934); *Beasley v. State*, 315 So.2d 540 (Fla. 2d DCA 1975); *Weeks v. State*, 253 So.2d 459 (Fla. 3d DCA 1971).

In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the issue. *Armstrong v. State*, 642 So.2d 730 (Fla. 1994); *Bell v. State*, 90 So.2d 704 (Fla. 1956). Moreover, recanting

[sic]

[sic]testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury. *Id.* at 705; *Henderson v. State, supra.*

Findings of Fact

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

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

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

DiLisio testified that he and his five siblings lived in a dysfunctional family ruled by his father, Ralph DiLisio, who physically abused them.[124] DiLisio tried to please his father but he never succeeded. His father owned a boat dealership known as

[sic]

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

[sic]Maitland Marine and DiLisio frequented the business as a young teenager.

Ralph DiLisio started an affair with a younger woman employee named Keppy who seduced DiLisio when he was fifteen and with whom he had frequent sexual intercourse for about two and one half years. His father and Keppy ultimately married. DiLisio had sex with her for the last time on their wedding day. It was during this time that DiLisio started using drugs including marijuana, hash and alcohol.[125]

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

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

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

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

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

[sic]

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

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

The State called several witnesses in order to attack DiLisio's testimony and destroy his credibility. Many of these witnesses had major credibility problems themselves. One of the witnesses, a murderer in the Federal witness protection program, testified that he and the defendant were in prison together after the defendant was sentenced to life for rape but before the trial in this case. The witness heard the defendant express concern over a young boy whom he had taken to see some dead bodies. The reliability of that statement is questionable. If the statement was made, it is likely that the defendant was discussing the testimony he had learned DiLisio was going to give at trial. That is the only way to reconcile the testimony with DiLisio's version of the events without rejecting it as being untruthful.

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

Conclusions of Law

In the United States of America every person, no matter how unsavory, is entitled to due process of law and a fair trial. The defendant received neither. The validity of the verdict in this case [sic]

[sic]rests upon the testimony of an admitted perjurer who had every reason to fabricate a story which he hoped would be believed. The courts of this county should not tolerate the deprivation of life or liberty under such circumstances. A fair trial requires a determination of the truth by an informed jury. The verdict of an uninformed jury results in an unfair trial. An unfair trial is an unlawful trial because it produces an illegal result.

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

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

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

IT IS ADJUDGED:

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

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

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

/s/
O. H. EATON, JR.
Circuit Judge [sic]

Following the issuance of Judge Eaton's Order, the State of Florida appealed. The arguments were fully briefed and submitted to the Florida Supreme Court, and the court heard oral argument in early December 1996. As of this writing a decision is pending.

It will be said of Mr. Spaziano's new [trial] order: The sys-

tem worked. "In fact, it was the lawyers and reporters who worked. The legal system did its powerful best to kill." In the same week that Joe Spaziano won a new trial, Delaware hanged a man and Utah executed another man by firing squad.[126]

126 Mello, *Postscript-Death and His Lawyers*, *supra* note 9, at 950 (citations omitted).

A CRITIQUE OF THE SECOND CIRCUIT'S ANALYSIS OF NEW YORK AND NEW JERSEY JOINT VENTURE LAW IN *ARDITI v. DUBITZKY* AND *SAGAMORE CORP. v. DIAMOND WEST ENERGY CORP.*

Robert Steinbuch†

When one party is encumbered with a liability, it will often look for another party to assume some of the costs. One method of forcing costs to be shared by another is to have a joint venturer contribute. Not surprisingly, when a liability arises, the liable party will be liberal in its interpretation of who among its relationships is a joint venturer, while a potential contributor will be conservative in its interpretation. Thus, it is important to identify analytical tools to determine if a joint venture exists. The first section of this article discusses the core legal elements of a joint venture and presents basic techniques for determining its existence. The second section discusses the majority view regarding the relationship between joint ventures and the corporations created to effect their purposes; the New York and New Jersey exception (the "Exception") to that view; and the Second Circuit's interpretation of the Exception. Under the Exception, which can potentially determine cost allocation, a valid joint venture and attendant liabilities cease to exist once the joint venture incorporates. The Second Circuit's interpretation has essentially permitted the rule to consume the Exception.

I. JOINT VENTURES

A. *Definition*

Although descriptions of joint ventures have varied and courts have been reluctant to formulate a precise definition of the term, some common elements in courts' treatment of joint ventures exist.[1] "A 'joint [ ]venture,' as a legal concept, is of comparative[ly]

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[1] *See generally* 2 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 318 (3d ed. 1959 & Supp. 1995); Porter v. Cooke, 127 F.2d 853 (5th

recent origin and is founded entirely on contract, either express or implied."[2] In addition to a contract asserting the creation of a joint venture, courts often require that certain elements be present in the relationship to find that a joint venture exists.[3]

> Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
> (b) A joint property interest in the subject matter of the venture;
> (c) A right of mutual control or management of the enterprise;
> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
> (e) A right to participate in the profits; [and]
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.[4]

Accordingly, if disputes arise as to the existence of a joint venture contract, courts may look to see if any of the additional requisites of a joint venture are present. As a logical matter, the presence of these typical elements will not satisfy the first requirement of the test (i.e., a contract). As a practical matter, however,

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Cir.), *cert. denied*, 317 U.S. 670, *reh'g denied*, 317 U.S. 710 (1942); United States v. Standard Oil Co., 155 F. Supp. 121 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959); Harris v. Morse, 54 F.2d 109 (S.D.N.Y. 1931).

[2] WILLISTON & JAEGER, *supra* note 1, § 318, at 553 (quoting Rockett v. Ford, 326 P.2d 787 (Okla. 1940)). *See Porter*, 127 F.2d at 858; United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1469 (D. Del. 1990) ("one appellate court has stated a prerequisite to finding a joint venture is a 'willingness to be joint venturers, share control, and [a] division of profits and losses'" (citing Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 158 (7th Cir. 1988))); Hellenic Lines Ltd. v. Commodities Bagging & Shipping Process Supply Co., 611 F. Supp. 665, 679 (D.N.J. 1988); *Standard Oil*, 155 F. Supp. at 148; Universal Sales Corp. v. California Press Mfg. Co., 128 P.2d 665, 673 (Cal. 1942) ("Whether the parties to a particular contract have thereby created, as between themselves, the strict relation of joint adventurers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts.").

[3] WILLISTON & JAEGER, *supra* note 1, § 318A, at 556.

[4] WILLISTON & JAEGER, *supra* note 1, § 318A, at 563-65 (citations omitted). *See Hellenic Lines*, 611 F. Supp. at 679; *see also Consolidated Rail*, 729 F. Supp. at 1469; Shell Oil Co. v. Prestidge, 249 F.2d 413, 415-16 (9th Cir. 1957); George D. Horning v. McAleenan, 149 F.2d 561, 566 (4th Cir.), *cert. denied*, 326 U.S. 761 (1945); Consolidated Fisheries Co. v. Consolidated Solubles Co., 112 A.2d 30, 35, *reh'g denied*, 113 A.2d 576 (Del. 1955); Albert Packing Corp. v. Fickling Properties, 200 So. 907, 908 (Fla. 1941).

their presence allows courts to infer the existence of the joint venture contract. This "leap of faith" or "argument from existence" analysis, however, does not state that the essential elements prove the agreement, but simply implies that since the elements are there, the agreement must exist despite the fact that there is no independent evidence to support it. This distinction is of little comfort to practitioners who are less concerned about a court's reasoning than about its conclusion.

B. Ancillary Tools

The statute of frauds and tax laws could aid in determining whether or not a joint venture was formed. Simply looking for the actual written joint venture contract or examining parties' tax returns could provide the added evidence necessary to determine if a joint venture exists.

It is a fundamental principle of contract law that when both sides reach an agreement as to the terms of a deal, they are bound regardless of whether the agreement is oral or written.[5] However, due to the many difficulties of enforcing oral agreements, most jurisdictions in the United States have enacted a statute of frauds, which requires that certain types of agreements be in writing in order to be enforceable.[6] These include, *inter alia*, contracts for

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[5] RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.").

[6] *See, e.g.*, ALA. CODE §§ 7-2-201, 8-9-1 (1993); ARIZ. REV. STAT. ANN. § 44-101 (West 1994); CAL. CIV. CODE § 1624 (West 1985 & Supp. 1996); COLO. REV. STAT. ANN. §§ 38-10-101,-106 (West 1990); CONN. GEN. STAT. ANN. § 52-550 (West 1991 & Supp. 1996); DEL. CODE ANN. tit. 6, §§ 1-206, 2-201, 8-319 (1993); D.C. CODE ANN. § 28-3501 (1991); FLA. STAT. ANN. § 689.01 (West 1994), § 725.01 (West 1988); GA. CODE ANN. § 13-5-30 (1982 & Supp. 1995); 740 ILL. COMP. STAT. 80/1, 80/2 (West 1993); IOWA CODE ANN. § 622.32 (West 1950); KAN. STAT. ANN. § 33-101 (1986); KY. REV. STAT. ANN. § 355.2-201 (Michie 1987); ME. REV. STAT. ANN. tit. 11, §§ 1-206, 2-201, 8-319 (West 1995), tit. 33, § 51 (West 1988); MASS. GEN. LAWS ANN. ch. 106, §§ 1-206, 2-201, 8-319 (West 1990), ch. 259, § 1, ch. 260, § 13 (West 1992); MINN. STAT. ANN. §§ 513.01, 513.03 (West 1990); MISS. CODE ANN. § 15-3-1 (1995); MO. ANN. STAT. § 432.010 (West 1992); NEB. REV. STAT. ANN. §§ 36-103, 36-107, 36-202 (Michie 1993); NEV. REV. STAT. ANN. §§ 111.205, 111.210, 111.220, 111.235 (Michie 1993); N.H. REV. STAT. ANN. §§ 382-A:1-206, 382-A:2-201, 382-A:8-319 (1994); N.J. REV. STAT. §§ 12A:1-206, 12A:2-201, 12A:8-319 (1962), § 25:1-1 (1940 & Supp. 1996); N.M. STAT. ANN. § 46-2-13 (Michie 1989); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996); N.Y. U.C.C. LAW §§ 1-206, 2-201 (McKinney 1993 & Supp. 1996), § 8-319 (McKinney 1990); N.C. GEN. STAT. §§ 22-1, 22-4 (1986); N.D. CENT. CODE § 9-06-04 (Supp. 1995), § 47-10-01 (1978); OHIO REV. CODE ANN. §§ 1301.12, 1302.04, 1335.01, 1335.04-.05 (Banks-Baldwin 1993); OKLA. STAT. ANN. tit. 15, §§ 136, 324-325, tit. 16, § 4 (West 1991); 33 PA. CONS. STAT. ANN. § 1 (West 1967); R.I. GEN. LAWS §§ 6A-1-206, 6A-2-201, 6A-8-319 (1992); S.C. CODE ANN. §§ 32-3-10, 32-3-20 (Law Co-op. 1991); S.D. CODIFIED LAWS § 43-32-5 (Allen Smith 1983), § 53-8-2 (Michie 1990); TENN. CODE ANN. § 29-2-

the sale of land, agreements that will not be fully performed within one year, promises to answer for the debt of another, agreements modifying written contracts, contracts for the sale of goods in excess of $500, contracts for the sale of personal property in excess of $5,000, and contracts for the sale of securities.[7]

If a contract falls within a jurisdiction's statute of frauds, it will usually only be enforceable if the agreement is in writing and the writing specifies the parties and subject matter of the contract.[8] Accordingly, if the alleged joint venture falls within the scope of the statute of frauds, the absence of a written agreement could be evidence that a joint venture does not exist. However, this analysis is of limited usefulness because of the lack of clarity as to the applicability of the statute of frauds to joint venture agreements.[9] Moreover, the statute of frauds can also be satisfied by partial performance.[10] Thus, if a court finds evidence that the parties were acting as if they were bound by an agreement that would normally require a writing under the statute of frauds, the court may choose to enforce the agreement even absent a writing. For example, if an oral contract for the sale of goods worth $10,000 requires ten installment payments, two or three payments could constitute

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101 (Supp. 1995); TEX. BUS. & COM. CODE ANN. § 26-01 (West 1987); UTAH CODE ANN. §§ 25-5-1, 25-5-9 (1995); VT. STAT. ANN. tit. 9A, §§ 1-206, 2-201, 8-319 (1994), tit. 12, § 181 (1973 & Supp. 1995), §§ 182-183 (1973); VA. CODE ANN. §§ 11-1, -2 (Michie 1993), §§ 55-2, -3 (Michie 1986); WASH. REV. CODE ANN. § 5.52.010 (West 1995), § 19.36.010 (West 1989), § 62A.1-206 (West Supp. 1996), § 62A.2-201 (West 1995), § 62A.8-113 (West Supp. 1996), § 64.04.010 (West 1994); W. VA. CODE § 36-1-1 (1985), § 48-3-9 (1995), § 55-1-1 (1994); WIS. STAT. ANN. § 240.10 (West Supp. 1995), § 241.02 (West 1987), § 241.025 (West Supp. 1995), § 241.09 (West 1987), §§ 401.206, 402.201, 408.319 (West 1995), § 704.03 (West 1981); WYO. STAT. ANN. § 34.1-3-119 (Michie 1996).

7 N.J. REV. STAT. § 25:1-5 (1940 & Supp. 1996); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996). *See, e.g.*, Inter-City Tire & Auto Center, Inc. v. Uniroyal, Inc., 701 F. Supp. 1120, 1125 (D.N.J. 1988), *aff'd*, 888 F.2d 1380 (3d Cir. 1989), *aff'd sub nom.* Uniroyal, Inc. v. Erbesh, 888 F.2d 1382 (3d Cir. 1989); Kahn v. Massler, 140 F. Supp. 629, 643 (D.N.J. 1956), *aff'd*, 241 F.2d 47 (3d Cir. 1957).

8 *See, e.g.*, N.J. REV. STAT. § 25:1-5 (1940 & Supp. 1996); N.Y. GEN. OBLIG. LAW § 5-701 (Consol. Supp. 1996).

9 *Compare* Sugar Creek Stores, Inc. v. Pitts, 604 N.Y.S.2d 407, 408 (N.Y. App. Div. 1993) ("While an oral agreement may be sufficient to create a joint venture relationship, the Statute of Frauds applies to joint ventures, which, as here, have a stated term of more than one year." (citations omitted)) *with* Blank v. Nadler, 533 N.Y.S.2d 891, 892 (N.Y. App. Div. 1988) ("It is well[-]settled that an oral agreement may be sufficient to create a joint-venture relationship and that the Statute of Frauds is generally inapplicable thereto." (citations omitted)).

10 *See* Banker's Trust Co. v. Steenburn, 409 N.Y.S.2d 51, 61-62 (N.Y. Sup. Ct. 1978), *aff'd*, 418 N.Y.S.2d 723 (N.Y. App. Div. 1979).

partial performance, and the court may enforce the contract.[11]

Additionally, joint ventures sound in partnership law and, thus, similar rules apply to both relationships when determining respective parties' obligations.[12] Federal tax law deems a joint venture equivalent to a partnership and requires joint ventures to pay taxes as if they were partnerships.[13] Thus, an examination of the parties' filings should provide evidence as to whether the participants intended to be joint venturers.

II. JOINT VENTURES AS CORPORATIONS

Whether the persons deciding to create an organization to effectuate a joint enterprise (the "organizing parties") properly follow the procedures of incorporation, and do in fact form a corporation, will not in itself determine the permanence of the joint venture.[14] The permanence will depend initially on whether the jurisdiction allows joint ventures to take the form of a corporation. If it does not, then the joint venture gives way to the corporate form and no confidential fiduciary duty exists among the shareholders.[15] Consequently, liability among the organizing parties is limited, and equitable claims, such as those for an accounting, cannot be brought by one of the former joint venturers (presently shareholders) against any of the others. If, however, the jurisdiction allows a joint venture to take the form of a corporation,

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[11] *See* Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 828 (2d Cir. 1984), *aff'd*, 930 F.2d 909 (2d Cir.), *cert. denied*, 502 U.S. 853, *reh'g denied*, 502 U.S. 1000 (1991).

[12] WILLISTON & JAEGER, *supra* note 1, §§ 318, 318B, at 550-52, 585-616; Walter v. Holiday Inns, Inc., 784 F. Supp. 1159, 1167 n.10 (D.N.J. 1992), *aff'd*, 985 F.2d 1232 (3d Cir. 1993); Roberts v. Craig, 268 P.2d 500, 504 (Cal. Dist. Ct. App. 1954); Lesser v. Smith, 160 A. 302, 304 (Conn. 1932); Ross v. Willett, 27 N.Y.S. 785, 786 (N.Y. Sup. Ct. 1894).

[13] WILLISTON & JAEGER, *supra* note 1, § 318B, at 585. *See* Stuart v. Willis, 244 F.2d 925, 928 (9th Cir. 1957) ("A joint venture as defined by the Internal Revenue Code is a partnership '* * * [sic] through or by means of which any business, financial operation, or venture is carried, and which is not, within the meaning of this title, a trust or estate or corporation.'" (citation omitted)); Boone v. United States, 374 F. Supp. 115, 120 (D.N.D. 1973).

[14] The organizing parties can be real persons or legal persons, i.e., corporations. Corporations are generally empowered to form partnerships or joint ventures with other corporations. *See, e.g.*, N.J. STAT. ANN. § 14A:3-1(m) (West 1969); N.Y. BUS. CORP. LAW § 202(a)(15) (McKinney 1986). Of course, the fact that corporations can become members of partnerships does not make the aggregation of the partners itself a corporation. The issue here is whether an arrangement between two or more persons or corporations, or any combination thereof, can itself take the form of a corporation, yet remain a joint venture with all of the attendant responsibilities and liabilities.

[15] *See, e.g.*, Weisman v. Awnair Corp. of America, 144 N.E.2d 415, 418 (N.Y. 1957).

then the court must determine whether the organizing parties intended the joint venture to continue even after the enterprise in question was incorporated.[16] In this regard, the interposition of a corporation will not negate the existence of a joint venture, "[b]ut it is an important consideration in that direction and will be conclusive in the absence of compelling factors to the contrary."[17] If the jurisdiction allows joint ventures to take the form of a corporation, and both the joint venture and the corporation are valid, then the parties to the joint venture shall be liable to each other as joint venturers, while the incorporated venture shall have limited liability as to third parties.[18] Indeed, the majority view is that, while a partnership may not take the form of a corporation, a joint venture may. In these jurisdictions, individuals or corporations can form a corporation as a joint venture, resulting in limited liability as to third parties but not as between themselves.[19] Thus, whether the jurisdiction allows joint ventures to take the corporate form is critical. It will determine the type of liability that the relevant parties face.

A. The New York and New Jersey Exception

A minority of jurisdictions refuse to recognize as valid a joint venture in the form of a corporation.[20] In *Weisman v. Awnair Corp. of America*,[21] the New York Court of Appeals held that "the rule is well[-]settled that a joint venture may not be carried on by individuals through a corporate form."[22] In its decision, the *Weisman* court relied on the New Jersey state case of *Jackson v. Hooper*.[23] In *Jackson*, the court held that it would violate public policy to allow a corporation to maintain the corporate veil against the public, but not allow its shareholders the same protection for disputes among

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16 United States v. Standard Oil Co., 155 F. Supp. 121, 150 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959).

17 *Id.*

18 WILLISTON & JAEGER, *supra* note 1, § 318C, at 619.

19 WILLISTON & JAEGER, *supra* note 1, § 318C, at 619. *See* Enos v. Picacho Gold Mining Co., 133 P.2d 663, 667 (Cal. Dist. Ct. App. 1943); Hathaway v. Porter Royalty Pool, Inc., 295 N.W. 571, 577-78, *amended by* 299 N.W. 451 (Mich. 1941).

20 WILLISTON & JAEGER, *supra* note 1, § 318C, at 619.

21 144 N.E.2d 415 (N.Y. 1957).

22 *Id.* at 418. *See* Yonofsky v. Wernick, 362 F. Supp. 1005, 1022 (S.D.N.Y. 1973) ("When joint adventurers carry on their business through a corporate entity[,] they cease being joint adventurers and assume the rights, duties and obligations of stockholders." (citing *Weisman*, 144 N.E.2d at 449)); Noto v. Cia Secula di Armanento, 310 F. Supp. 639, 646 (S.D.N.Y. 1970); Bevilacque v. Ford Motor Co., 509 N.Y.S.2d 595, 599 (N.Y. App. Div. 1986).

23 75 A. 568 (N.J. 1910).

themselves.[24] Thus, these courts hold that once a joint venture incorporates, the joint venture ceases to exist and the parties become only shareholders. They are no longer fiduciaries to each other and no longer personally liable. A result is that the very powerful equitable relief available to partners and joint venturers, receipt of an accounting, is not available to the organizing parties.

B. The Second Circuit's View

The Second Circuit's interpretation of the Exception severely limits the force of *Weisman*. In *Arditi v. Dubitzky*,[25] the Second Circuit stated that the laws of New York and New Jersey are for all practical purposes identical with regard to joint ventures.[26] The court, restricting *Weisman* and *Jackson*, held that joint venture obligations can exist among members of a corporation if it is the intention of the parties that the corporation simply be a means of carrying out the joint venture.[27] Since *Arditi* is the Second Circuit's interpretation, it is persuasive but not binding on either of these state courts. More importantly, the *Arditi* court relied on cases not strongly supportive of its viewpoint. In fact, the *Arditi* court cited the New York and New Jersey state court cases of *Macklem v. Marine Park Homes, Inc.*,[28] *M.P.E. Holding Corp. v. Freeman's Dairy, Inc.*,[29] *Loverdos v. Vomvouras*,[30] and *Fortugno v. Hudson Manure Co.*[31] to support its proposition that the *Weisman/Jackson* line has been restricted.

Macklem was decided at the trial level in 1955 before the *Weisman* opinion was issued, and affirmed in 1960 after *Weisman* was decided. To support its proposition that *Macklem* is distinguished from *Weisman*, the *Arditi* court cited the unattributed quote that the corporation was "merely * * [sic] an adjunct of a joint venture."[32] This quote, however, does not appear in the *Macklem* opinion. The trial court in *Macklem* concluded that the parties did not intend to carry on the venture as stockholders in a corporation.[33]

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[24] *Id.* at 571. *See* WILLISTON & JAEGER, *supra* note 1, § 318C, at 619-20; Ault & Wiborg of Canada v. Carson Carbon Co., 160 So. 298, 300 (La. 1935).

[25] 354 F.2d 483 (2d Cir. 1965).

[26] *Id.* at 485.

[27] *Id.* at 487.

[28] 191 N.Y.S.2d 374 (N.Y. Sup. Ct. 1955), *aff'd mem.*, 191 N.Y.S.2d 545 (N.Y. App. Div. 1959), *appeal dismissed*, 165 N.E.2d 201 (N.Y.), *aff'd*, 170 N.E.2d 455 (N.Y. 1960).

[29] 232 N.Y.S.2d 689 (N.Y. Sup. Ct. 1962).

[30] 200 N.Y.S.2d 921 (N.Y. Sup. Ct. 1960).

[31] 144 A.2d 207 (N.J. Super. Ct. App. Div. 1958).

[32] Arditi v. Dubitzky, 354 F.2d 483, 486 (2d Cir. 1965).

[33] *Macklem*, 191 N.Y.S.2d at 376.

Further, the court held that "[i]t is very likely, under the facts as developed at the trial, that were this an action brought by a creditor of [the parties to the joint venture] the 'corporate veil' would be 'pierced.'"[34] It also held that "[t]he incorporators were 'dummies' and apparently no corporate meetings were held and no stock issued,"[35] and that the party seeking a distribution of stock was prohibited by state law from receiving stock for his services.[36] Although *Macklem* may provide support for the *Arditi* opinion, the irregularities with the corporation in question seem to have been critical to the court's analysis. As a result, the applicability of *Macklem* to cases involving valid corporations is dubious.

M.P.E. Holding Corp. and *Loverdos* clearly support *Weisman*, despite the *Arditi* court's reliance on them. Conversely, *Fortugno* provides some support, albeit limited, for *Arditi*. The *Fortugno* court, using equity, despite the "lack of precedent," held that the "partnership's stock ownership was not for the purpose of participating in corporate affairs in the normal manner, but was resorted to in order to simply make each corporation an instrumentality or department of the integrated family enterprise."[37] The *Arditi* court claimed to be following precedent when it cited *Fortugno*.[38] Ironically, the *Fortugno* court disavowed the existence of any precedent on the issue.[39]

The Second Circuit further demonstrated how overreliance on, and the misapplication of, precedent can be detrimental in *Sagamore Corp. v. Diamond West Energy Corp.*[40] Therein, the court again relied on unsupportive case law. The court indicated that almost as soon as the ink was dry on the *Weisman* opinion, the New York courts began to retreat from the rule laid out therein.[41] The parties in *Sagamore* validly formed a joint venture and then formed a corporation to effect the venture.[42] The court held that the rule in New York under such circumstances is that when parties to a joint venture merge the entire joint venture agreement into the corporation, the enterprise is governed by corporation law.[43] How-

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34 *Id.*
35 *Id.*
36 *Id.*
37 Fortugno v. Hudson Manure Co., 144 A.2d 207, 217 (N.J. Super. Ct. App. Div. 1958).
38 Arditi v. Dubitzky, 354 F.2d 483, 485 (2d Cir. 1965).
39 *Fortugno*, 144 A.2d at 217.
40 806 F.2d 373 (2d Cir. 1986).
41 *Id.* at 378.
42 *Id.* at 374, 376.
43 *Id.* at 378.

ever, when parties to a joint venture form a corporation to carry out one or more of the joint venture's objectives and intend the joint venture to exist along with the corporation, the rights and duties under the joint venture agreement still exist.[44] Like *Arditi*, the *Sagamore* rule is bifurcated. It allows joint venture obligations to exist after incorporation in some situations, but not others. However, the *Sagamore* rule appears more constrained than the one set out in *Arditi*. The *Sagamore* court seems only to allow the intervention of a corporation into a joint venture if the corporation has a limited focus.

As in *Arditi*, the case law cited by the *Sagamore* court does not strongly support its holding. The *Sagamore* court relied on *Arditi*[45] and *Macklem*,[46] on four cases that held that a joint venture no longer exists when it is merged into the ensuing corporation,[47] and on two cases that the court contended demonstrate that a joint venture and corporation can exist simultaneously.[48]

The reliance by the *Sagamore* court on the above four cases as support for the claim that there is a bifurcated standard under New York law was misplaced. Two of these cases rest squarely on *Weisman*, which mandates the Exception and, therefore, does not allow for the bifurcated rule.[49] Under *Weisman*, joint venture obligations simply do not exist after incorporation.[50] Of course, *Weisman* supports the half of the bifurcated rule preventing joint venture liability after incorporation, but *Weisman* swallows and prevents the exemption *Sagamore* tries to develop. It is one thing for the *Sagamore* court to simply state that *Weisman* goes too far, and then restrict the *Weisman* holding. It is wholly different to claim that *Weisman's* progeny have limited *Weisman*, when they clearly have not. *Miglietta v. Kennecott Copper Corp.*[51] and *Farber v. Romano*,[52] also cited in the *Sagamore* opinion, rest their decisions upon *Manacher v.*

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44 *Id.*

45 *Sagamore*, 806 F.2d at 378.

46 *Id.*

47 *Id.* (citing Beck v. General Tire & Rubber Co., 469 N.Y.S.2d 785 (N.Y. App. Div. 1983), *appeal dismissed*, 469 N.E.2d 102 (N.Y. 1984); Judelson v. Weintraub, 390 N.Y.S.2d 455 (N.Y. App. Div. 1977); Miglietta v. Kennecott Copper Corp., 266 N.Y.S.2d 936 (N.Y. App. Div. 1966); Farber v. Romano, 232 N.Y.S.2d 285 (N.Y. Sup. Ct. 1962)).

48 *Id.* at 378-79 (citing Triggs v. Triggs, 385 N.E.2d 1254 (N.Y. 1978); Shapolsky v. Shapolsky, 279 N.Y.S.2d 747 (N.Y. Sup. Ct. 1966), *aff'd*, 282 N.Y.S.2d 163 (N.Y. App. Div. 1967)).

49 *See Beck*, 469 N.Y.S.2d at 786; *Judelson*, 390 N.Y.S.2d at 456.

50 *See Beck*, 469 N.Y.S.2d at 786; *Judelson*, 390 N.Y.S.2d at 456.

51 266 N.Y.S.2d 936 (N.Y. App. Div. 1966).

52 232 N.Y.S.2d 285 (N.Y. Sup. Ct. 1962).

Central Coal Co.[53] *Manacher*, relying on *Jackson*, concluded that a joint venture agreement can run

> [A]long side of the path of the corporation[, but] [w]hen the two merge . . . and relief is sought upon the ground that the corporation has become a mere agency or instrumentality for the performance of an independent agreement of joint adventurers or partners[,] the aggrieved party is relegated to his rights as a stockholder and may not sue in his individual capacity.[54]

The *Manacher* court aptly summed up its decision as follows: "Individuals may enter into partnership agreements or joint ventures independent of the corporate form but they may not organize a corporation for the purpose of carrying on a joint venture."[55] Thus, *Manacher* only appears to have provided for a qualification to the Exception in limited situations where a joint venture has organized a corporation to effect one part of a multifaceted joint venture.

Finally, the *Sagamore* court relied on *Arditi*, *Triggs v. Triggs*,[56] *Shapolsky v. Shapolsky*[57] and *Fromkin v. Merrall Realty, Inc.*,[58] to support the proposition that parties to a joint venture, in forming a corporation to carry out one or more of its objectives, may reserve certain rights *inter sese* under their agreement.[59]

As with previously discussed cases, *Fromkin* rests upon and supports *Weisman*.[60] *Triggs* does not involve a joint venture, but simply deals with an agreement between corporate shareholders regarding a stock purchase option.[61] *Shapolsky* involves a unique factual situation that seems to have dictated the outcome. In that case, plaintiff and his brother, the defendant, agreed to purchase real estate for speculation and to take title to such in the name of several corporations.[62] Plaintiff contended that his brother never gave him stock certificates in the aforementioned corporations.[63] The court merely held that this was not a derivative action, and

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53 131 N.Y.S.2d 671 (N.Y. App. Div. 1954), *aff'd*, 125 N.E.2d 431 (N.Y. 1955).

54 *Id.* at 676.

55 *Id.* at 677.

56 385 N.E.2d 1254 (N.Y. 1978).

57 279 N.Y.S.2d 747 (N.Y. Sup. Ct. 1966), *aff'd*, 282 N.Y.S.2d 163 (N.Y. App. Div. 1967).

58 225 N.Y.S.2d 632 (N.Y. App. Div.), *appeal denied*, 183 N.E.2d 770 (N.Y. 1962).

59 Sagamore Corp. v. Diamond West Energy Corp., 806 F.2d 373, 378-79 (2d Cir. 1986).

60 *Fromkin*, 225 N.Y.S.2d at 635.

61 *Triggs*, 385 N.E.2d at 1254.

62 *Shapolsky*, 279 N.Y.S.2d at 749.

63 *Id.* at 749-50.

plaintiff could maintain an action against his brother for the stock certificates, as plaintiff's right to recovery had its origin independent of and extrinsic to the corporate entity.[64]

Finally, in a recent federal district court case in New York, *Zahr v. Wingate*,[65] the court explicitly followed *Weisman* and its progeny. *Zahr*, however, did not specifically address *Arditi* and *Sagamore*. Therefore, we cannot be sure whether the court, in properly following New York precedent, recognized its departure from the Second Circuit's view of the law.

III. Conclusion

The Second Circuit should follow *Zahr* and its proper adherence to New York law. *Weisman* created the Exception whereby joint ventures could not incorporate, but the Second Circuit weakened the Exception to the point of virtual elimination. Like any United States Court of Appeals reviewing a district court's interpretation of state law, the Second Circuit is in a delicate position thrust upon it by the principles of federalism embodied in the Constitution. Such a court must take pains to interpret the state law as the state court would. If the court is unsure of the state law or the state has not addressed a particular issue, the court can certify a question for state court review. Rewriting the state law, however, is inappropriate. This, though, is exactly what the Second Circuit has done. The Second Circuit should revisit the issue and revitalize *Weisman*.

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[64] *Id.* at 751.

[65] 827 F. Supp. 1061, 1068-69 (S.D.N.Y. 1993) ("It is axiomatic that individuals may not, as a matter of law, operate a business entity as a partnership for the purposes of defining their rights vis-a-vis each other while concurrently holding the entity out to the general public as a corporation." (citing Weisman v. Awnair Corp. of America, 144 N.E.2d 415, 418 (N.Y. 1957) and Jackson v. Hooper, 75 A. 568, 571 (N.J. 1910))).

THE INDEPENDENCE OF THE JUDICIARY?

Edward I. Koch†

I. INTRODUCTION

New York State and New York City, like most states and cities, elect many of their judges.[1] These elections can produce good judges, bad judges, and mediocre judges. Many efforts have been made to change the City of New York's current system and establish one of merit-based judicial selection.[2] The State of New York, however, has successfully moved to a merit-based system for some positions. For example, New York State Court of Appeals judges are appointed by the governor.[3] The governor must choose from a short list of well-qualified candidates who are nominated by the Court of Appeals Nominating Commission.[4] That commission is bipartisan in nature, and the governor may appoint only four of its twelve members.[5] Efforts at constitutional change to unify all New York courts by appointing judges, instead of electing them, have not been successful.

I believe that the caliber of judges is not necessarily determined by the process used in their ascension to the bench. However, I believe that a merit-based judicial selection system is better overall. It is far less political and more openly public. Moreover, there is strong evidence that this appointment system enables more women and minorities to reach the bench than in the elective

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1 *See, e.g.*, N.Y. CONST. art. VI, §§ 6(c), 10(a), 13(a), 15(a), 16(h), 17(d).

2 Generally, merit selection is a strategy to select judges "on the basis of ability, character, training, and experience . . . ." HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 299 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993) (internal citation omitted). Merit selection, or the Missouri Plan, "requires the creation of a non-partisan nominating board consisting of the chief justice of the state supreme court, who acts as chairperson, three lawyers elected by the state bar association, and three laymen . . . ." *Id.* (internal citations omitted).

3 *See* N.Y. CONST. art. VI, § 2(b)-(e); *see also* U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1993, at 88-89 (1995). The governor's appointments are confirmed by the New York State Senate. *See* N.Y. CONST. art. VI, § 2(e); *see also* ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 258 (3d ed. 1996).

4 *See* N.Y. CONST. art. VI, § 2(c); *see also* U.S. DEP'T OF JUSTICE, *supra* note 3, at 80-83; HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT, *supra* note 2, at 299.

5 *See* N.Y. CONST. art. VI, § 2(d)(1); *see also* HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT, *supra* note 2, at 299.

system.[6]

In New York State, each party's judicial convention determines candidates for the state supreme court judicial elections. Consequently, many of those nominated by the conventions will have political obligations to the party leaders instrumental in getting them the party designation. On the other hand, senators in some states designate the federal district court nominees using a merit-based judicial selection process. Many conversant with both the federal and state judiciary would say that the appointment system used in the federal selection system leads to fewer political obligations and, overall, attracts more distinguished jurists.

II. Merit-Based Judicial Selection in the City of New York

When I became Mayor of the City of New York in 1978, I, like every mayor before me, had absolute power to appoint anyone I decided worthy to the criminal and family courts.[7] The only limitations were constitutional requirements that the appointee must have been a lawyer for at least ten years and a resident of the City of New York.[8]

Mayor Wagner,[9] followed by Mayors Lindsay[10] and Beame,[11] created a screening, non-merit judicial selection system. While still not a merit-based selection system, it was better than that of their predecessors because qualifying committees were asked to appraise the proposed candidates' professional qualifications. Nevertheless, it also happens that each of the three mayors, on at least one occasion during their time in office, rejected the negative rating given to a particular candidate by the qualifying committee and appointed him or her anyway.[12] As mayor-elect, I denounced this ac-

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[6] *See, e.g.*, The Fund for Modern Courts, Inc., The Success of Women and Minorities in Achieving Judicial Office: The Selection Process 32-33 (1985).

[7] *See* N.Y. Const. art. VI, §§ 13(a), 15(a).

[8] *See id.* §§ 13(a), 15(a), 20(a).

[9] Robert F. Wagner served as Mayor of the City of New York from 1954 to 1965. *See* City of New York, The 1994-95 Green Book: Official Directory of the City of New York 4 (1994) [hereinafter The Green Book].

[10] John V. Lindsay served as Mayor of the City of New York from 1966 to 1973. *See id.*

[11] Abraham D. Beame served as Mayor of the City of New York from 1974 to 1977. *See id.*

[12] For example, in Mayor Beame's case, after losing the primary in 1977 and before leaving office, he appointed ten people to fill judicial vacancies. The two committees authorized to review the candidates' qualifications were the Mayor's Committee on the Judiciary (to which he appointed all the members) and a committee of The Association of the Bar of the City of New York. The latter found the ten selections

tion and announced my intention to not reappoint these candidates when their terms ended. That self-imposed prohibition ended with my creation of a merit-based judicial selection system for the City of New York.

After I was inaugurated, I asked members of my administration to propose a totally merit-based selection system for the appointment of judges. I adopted and created by Executive Order the system that they proposed.[13] In this system, the mayor appointed the Chair of the Mayor's Committee on the Judiciary ("Mayor's Committee") and twelve of its members.[14] The two presiding justices of the First and Second Departments of the Appellate Division of the State Supreme Court each appointed another six members, and the deans of various law schools in the city appointed the other two members on a rotating basis.[15] Thus, the Mayor's Committee had twenty-seven members[16] and fewer than half were appointed by the mayor.

I also made a commitment concerning all reappointments. If both committees, the Mayor's Committee and The Association of the Bar of the City of New York ("City Bar Association"),[17] recommended that any sitting judge be reappointed at the end of his or her term, I would reappoint that person without exception. Similarly, if either of those two committees recommended that a sitting judge not be reappointed, I would, without exception, follow its advice.

The most important aspect of the new merit-based judicial selection system was that I, as Mayor, voluntarily waived my rights to submit names for consideration to the Mayor's Committee. I requested that the Mayor's Committee submit three names to me for each vacancy.[18] I retained overall responsibility and accountability by personally interviewing the three candidates, from which I selected one. If I found none of the three submissions to be satisfactory, I would ask the Mayor's Committee for three more names. This did not apply to sitting judges where both committees recommended reappointment. If either committee recommended de-

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unqualified to sit as criminal or family court judges, but Mayor Beame appointed them anyway.

[13] Exec. Order No. 10 (Apr. 11, 1978).

[14] *Id.* The Mayor's Committee on the Judiciary nominates candidates for criminal, civil, and family courts. *See* U.S. DEP'T OF JUSTICE, *supra* note 3, at 82-83.

[15] Exec. Order No. 10, § 5 (Apr. 11, 1978).

[16] *Id.*

[17] An unofficial arrangement, started by mayors before me, allows the City Bar Association to evaluate judicial candidates.

[18] *See* Exec. Order No. 10, § 2(d) (Apr. 11, 1978).

nial of the reappointment, the vacancy would be filled in the above way.[19] I also directed that anyone who wanted to be a judge could apply directly to the Mayor's Committee and ask for a hearing on his or her request for appointment.[20] In addition, the Mayor's Committee was authorized to seek candidates.[21]

I believe my appointments to the family and criminal courts enormously raised the caliber of the judiciary in those courts. This quality was affirmed by Governors Carey[22] and Cuomo[23] when they selected many of my appointees to serve as New York State Court of Claims judges. A further indication of the quality of my appointments was the selection of many of these individuals by the judicial convention to become candidates for the New York State Supreme Court. The convention is a highly political candidate selection process. This merit-based judicial selection system was continued by Mayor Dinkins[24] without change, and by Mayor Giuliani[25] for a brief period.

I served as the Mayor of New York City for twelve years, from 1978 to 1989. Since the terms of both criminal and family court judges are ten years, all ten of Mayor Beame's original non-qualified candidates came up for reappointment during my third term.[26] When that happened, despite my original intention not to reappoint them, I abided by the decisions of the two committees to reappoint without exception. Those committees recommended that about one-half of the original ten be reappointed and that the others not be reappointed. I adhered to their decisions.

Indeed, there were other occasions when both committees recommended that individuals not be reappointed. Often judges were highly regarded by other members of the judiciary, who asked me to override the committees' recommendations. I never did. If the mayor had knowledge concerning a candidate or someone seeking reappointment, it would have been perfectly proper for him or her to bring the information to the attention of his or her

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19 *Id.* § 2(c).

20 *Id.* § 2(b).

21 *Id.* § 2(a).

22 Hugh L. Carey served as Governor of the State of New York from 1975 to 1982. *See* THE GREEN BOOK, *supra* note 9, at 367.

23 Mario M. Cuomo served as Governor of the State of New York from 1983 to 1994. *See* THE GREEN BOOK, *supra* note 9, at 367.

24 David N. Dinkins served as Mayor of the City of New York from 1990 to 1993. *See* THE GREEN BOOK, *supra* note 9, at 4.

25 Rudolph W. Giuliani took office as Mayor of the City of New York in 1994. *See* THE GREEN BOOK, *supra* note 9, at 4.

26 *See supra* note 12 and accompanying text.

committees. However, under my "procedure" once the committees made a recommendation on reappointment, the mayor would accept and implement it.

I should point out that it is often a painful decision not to reappoint judges, particularly when, as is often the case, they and their friends importune you to change your mind. However, if a mayor wishes to claim the judicial system is non-political and totally meritorious, such decisions are a necessary part of the process.

My original Executive Order on reappointments directed the Mayor's Committee to "[e]valuate the qualifications of each incumbent judge for reappointment to judicial office and report the committee's recommendation to the Mayor, provided that if the committee shall recommend against reappointment it shall nominate three candidates for appointment to the resulting vacancy as provided above."[27] However, Mayor Giuliani issued a revised provision on reappointments.[28] Through this revision, the Mayor gave himself the authority to deny reappointment to a sitting judge, even if the Mayor's Committee had recommended reappointment, and to direct the Mayor's Committee to propose three new candidates.

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[27] Exec. Order No. 10, § 2(e) (Apr. 11, 1978).

[28] Exec. Order No. 10 (July 20, 1994). This section of the Executive Order now reads in its entirety:

> Section 2. Functions. The Committee shall:
>
> (a) Recruit and receive from any source the names of candidates appearing to have the highest qualifications for judicial office;
>
> (b) Evaluate and conduct all necessary inquiry *to determine* those persons whose character, ability, training, experience, temperament and commitment to equal justice under law fully qualify them for judicial office;
>
> (c) Consider all relevant information to determine which of the fully qualified candidates are best qualified for judicial office, *and refer to the Department of Investigation for screening all persons the Committee proposes to nominate for appointment;*
>
> (d) Nominate *and present to the Mayor* three candidates for appointment to each vacant judicial office, except that if there are numerous vacancies the Committee, *in its discretion,* may present less than three nominations (unless the Mayor requests three nominations) for each vacancy, and *provide* such information as may be necessary to inform the Mayor of the qualifications of each nominee; and
>
> (e) Evaluate the qualifications of each incumbent judge for reappointment to judicial office and *present* the Committee's recommendation to the Mayor, provided that *either at the request of the Mayor, or* if the Committee shall recommend against reappointment *of an incumbent, the Committee* shall nominate *and present to the Mayor* three candidates for appointment to the resulting vacancy *other than the incumbent.*

Id. (emphasis added to amended text).

III. The Independence of Judges Schwartzwald, Kay, and Freedman?

Early in Mayor Giuliani's administration, I received a call from his counsel, Dennison Young, who told me that the Mayor was considering reducing the Mayor's Committee from the existing twenty-seven members to nineteen. He wanted to know my opinion. I told him that I thought it was a bad idea; the system was not broken and there was no need to fix it. He raised no other change with me.

Subsequently, Mayor Giuliani announced that he was not reappointing Judges Eugene Schwartzwald and Jerome Kay, two of the original ten criminal court judges appointed by Mayor Beame, and whom I reappointed, and who had been recommended for reappointment by the two committees for the second time. I immediately criticized Mayor Giuliani for rejecting the recommendations of the committees.[29]

Mayor Giuliani denounced those of us who criticized his actions, including Judith Kaye, Chief Judge of the New York State Court of Appeals.[30] Judge Kaye met with Mayor Giuliani when the Mayor announced he was rejecting the committees' recommendations, and asked him to reappoint both judges to full ten-year terms. When she publicly criticized Mayor Giuliani's decision, he, in turn, "criticized her for criticizing him, saying she had overstepped her bounds."[31] Furthermore, the *New York Law Journal* reported that "[o]ne court administrator, angered by the way the reappointments had been handled, said, '[n]o one in the mayor's office' can point to 'any complaints about (the judges') work performance.' The administrator added that failure to reappoint the two 'destroys the whole idea of a non-political merit appointment process.'"[32]

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[29] David Firestone, *Koch and Dinkins Denounce Mayor in a Feud Over Judges*, N.Y. Times, Dec. 23, 1995, at 29 ("[F]ormer Mayor Edward I. Koch called the decision 'scandalous' and 'calamitous,' and said he could never endorse a candidate for mayor who had injected politics into the courtroom.").

[30] David Firestone, *Giuliani and Ex-Mayors Intensify Battle over Judicial Demotions*, N.Y. Times, Dec. 28, 1995, at A1.

[31] *Id.*

[32] Daniel Wise & Matthew Goldstein, *Mayor's Action on Judges Stirs Dissent*, N.Y.L.J., Dec. 26, 1995, at 1 [hereinafter Wise & Goldstein, *Mayor's Action*]. Moreover, as the *New York Law Journal* further pointed out, Mayor Giuliani "may not have followed his own procedure for naming judges to replace [Schwartzwald and Kay]." Matthew Goldstein & Daniel Wise, *Process Used by Giuliani for Judges Is Questioned*, N.Y.L.J., Jan. 5, 1996, at 1.

Seven months after taking office, the Mayor issued an executive or-

In support of his decision, Mayor Giuliani announced that his standards were higher than those of the committees.[33] He further stated he would exercise those standards in overruling the committees in these two cases and where appropriate in the future because he wanted judges of the very highest quality.[34] At a press conference, Mayor Giuliani attacked former Mayor Dinkins and me and accused both of our administrations of making political appointments to the bench.[35] Later in the press conference, he stated that "[former Mayor] Dinkins and [former Mayor] Koch reappointed 'a significant number of Democratic machine politicians despite their hypocritical allegiance to some pristine process.'"[36] Mayor Giuliani then added that his process was a way to protect himself politically.[37] Moreover, he stated that former Mayor Dinkins and I used our process in an "under the table"[38] manner, then added "I know that went on . . . ."[39] Mayor Giuliani then held up a copy of *City for Sale*,[40] a book written by two reporters who were hostile to me during my administration. Mayor Giuliani twice repeated a partial line from the book about "[t]he Koch collapse on judicial selection."[41] *The New York Times* columnist Joyce Purnick later pointed out that Mayor Giuliani failed to note "that the reference was to a different

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der that altered the process for reappointing incumbent judges and gave himself somewhat greater latitude than his two predecessors.

The provision in the July 20, 1994, order gave the Mayor authority to ask his Advisory Committee on the Judiciary to provide him with the names of three qualified candidates to succeed an incumbent judge in the event he decided not to reappoint a sitting judge, even if the committee had recommended reappointment of the sitting judge. According to City Hall officials, no additional names were requested to replace the two demoted judges, Eugene Schwartzwald and Jerome M. Kay.

The Mayor's counsel, Dennison Young, Jr., said the new language was added "to try to enhance the quality of the judiciary." But Mr. Young vigorously disputed that the change obligated the Mayor to request three new names and asserted that the Mayor already had an adequate number of candidates before him when he made his choice.

Id.

[33] Don Van Natta, Jr., *Giuliani's Choice for Judge: A Question of Experience*, N.Y. TIMES, Dec. 30, 1995, at 29.

[34] Firestone, *supra* note 29, at 29 ("Mr. Giuliani . . . said that if anything he planned to remove more sitting judges from the bench when their terms ended . . . .").

[35] Firestone, *supra* note 29, at 29.

[36] Joyce Purnick, *Heeding Only His Own Gavel, A Mayor Pays*, N.Y. TIMES, Dec. 28, 1995, at B1.

[37] Firestone, *supra* note 29, at 29.

[38] Firestone, *supra* note 29, at 29.

[39] Firestone, *supra* note 29, at 29.

[40] JACK NEWFIELD & WAYNE BARRETT, CITY FOR SALE (1988).

[41] *Id.* at 172.

process and court—a 1979 nomination for the [New York] State Supreme Court, an elective position unrelated to the Koch judicial screening committee, and his own judicial appointments."[42]

An inference could be drawn from Mayor Giuliani's statements that, as a U.S. Attorney,[43] he had access to confidential information. There was a false implication that I lied when I said I never recommended anyone to the Mayor's Committee. If in fact I did what Mayor Giuliani implied, then it would mean that twenty-seven members of the Mayor's Committee, most of them outstanding lawyers with great reputations, were part of a conspiracy. This would include David Trager, the Chairman of the Mayor's Committee during my last eight years in office. Mr. Trager also served as the Dean of Brooklyn Law School, was a former U.S. Attorney, and now sits as a federal judge. Moreover, the conspiracy would also include all the members of the judicial committee of the City Bar Association. Furthermore, how could I send anyone to the Mayor's Committee for evaluation without actually intending an evaluation to occur? Had there been a conspiracy, would not a number of the several dozen lawyers involved have broken ranks and confirmed the Mayor's false, cowardly, and unprofessional statements?

Suffice it to say that the two persons appointed by Mayor Giuliani do not appear to bear out his stated reason for the appointments, that they were far superior to those whom they were replacing. It now seems, according to *The New York Times*, that the Mayor's first replacement, Charles A. Posner, had "very little courtroom experience, having tried just seven cases in his six years as a top aide" to Brooklyn District Attorney Joe Hynes.[44] Mayor Giuliani's other replacement, Robert Torres, according to *The New York Times*, "flunked out of Brooklyn Law School twice and never earned a law degree but became a lawyer by studying on his own and passing the bar exam."[45] *The New York Times* further stated that Judge Torres had unsuccessfully applied for a seat on the bench before three other committees:[46] Governor Cuomo's, Mayor Dinkins', and mine. With all due deference to Judge Torres, Mayor Giuliani's comparing him, as he did, to Abraham Lincoln is

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42 Purnick, *supra* note 36, at B1.

43 Rudolph W. Giuliani served as the U.S. Attorney for the Southern District of New York from 1983 to 1989. *See* CHRIS MCNICKLE, TO BE MAYOR OF NEW YORK: ETHNIC POLITICS IN THE CITY 296-99 (1993).

44 Don Van Natta, Jr., *Giuliani Judicial Selection Passed the Bar Exam Despite Lacking a Law Degree*, N.Y. TIMES, Jan. 2, 1996, at B3.

45 *Id.*

46 *Id.*

a bit of a stretch.[47] It is amusing that Mayor Giuliani would refer to the suggestion that a prospective judge should have graduated from law school as "elitist criteria."[48]

Following Mayor Giuliani's announcement of his replacements, I immediately wrote to every member of his Mayor's Committee and urged them to resign if the Mayor did not recant this change in the merit-based judicial selection system. Of the twenty-seven members, only Paul Curran, Chairman of the Mayor's Committee, replied. He, in high dudgeon and defending the Mayor's position, criticized me in a letter, saying "it is unassailable that the Mayor's decisions as to Judges Kay and Schwartzwald were not based upon partisan political considerations. I regret I cannot say the same for your letter to me."[49] President Kennedy said "loyalty sometimes demands too much."[50]

I must confess, I thought there would be a rallying of support for my position. When that did not occur and lawyers stood mute, I felt quite alone. It was not until *The New York Times* spoke out in a brilliant editorial[51] that I felt there was still a chance to convince the public that what Mayor Giuliani had done was absolutely wrong, and perhaps even see the Mayor correct the error. When Mayor Giuliani overruled the two independent judicial panels' recommendations that both Judges Schwartzwald and Kay be reappointed, *The New York Times* wrote that "[t]he argument shifted from a debate about the quality of judges to the fitness of Mr. Giuliani as judicial arbiter."[52] *The New York Times* editorial went on:

> Mayor Edward Koch voluntarily relinquished enormous patronage power when he created an independent panel to review judicial candidates . . . . It was one of Mr. Koch's great achievements, and Mayor Giuliani's refusal to acknowledge that during this spitting match is a stark example of his worst failure as a leader — the compulsion to demonize everyone who disagrees with him.[53]

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47 *See id.*; *see also* David Seifman, *Hizzoner Plays the Shrink*, N.Y. POST, Jan. 3, 1996, at 3.

48 Van Natta, Jr., *supra* note 44, at B3.

49 Letter from Paul J. Curran, Chairman, Mayor's Advisory Committee on the Judiciary, to Hon. Edward I. Koch, Partner, Robinson Silverman Pearce Aronsohn & Berman LLP (Dec. 26, 1995) (copy on file with the *New York City Law Review*).

50 This quote has been attributed to President Kennedy. *See* Albert R. Hunt, *People & Politics: Clinton's Final Campaign Hurrah, and Two Who Deserve to Lose*, WALL ST. J., Oct. 31, 1996, at A23 ("John F. Kennedy: 'Party loyalty sometimes demands too much.'").

51 *The Mayor Ruins His Own Case*, N.Y. TIMES, Dec. 29, 1995, at A34.

52 *Id.*

53 *Id.*

Putting to rest the issue of my alleged political appointments, *The New York Times*' editorial stated that "Mr. Giuliani and his aides suggested, *with no evidence whatsoever*, that Mayors Koch and Dinkins had practiced behind-the-scenes politics to influence the process and reward loyal Democrats with judgeships."[54]

When *The New York Times*' editorial was followed by an equally scathing editorial in *Crain's New York Business*,[55] I thought there was indeed hope that Mayor Giuliani would be held responsible for destroying the merit-based judicial selection system, by replacing it with a political system that allows him to determine with absolute unchecked authority who should be reappointed. *Crain's New York Business* stated, "Mr. Giuliani's virulent reaction [to his critics] is part of a pattern of disparagement that he heaps upon his critics and opponents. Adversaries must not merely be overcome, they must be pulverized."[56]

In 1995, Mayor Giuliani denied Judge Eugene Schwartzwald reappointment to the criminal court and instead appointed him to a one year interim civil court judgeship.[57] At the swearing-in ceremony, Judge Schwartzwald refused to shake the Mayor's hand.[58] In December 1996, the Mayor's Committee apparently found Judge Schwartzwald's refusal to shake the Mayor's hand indicative of a lack of judicial temperament. News reports conveyed that the Mayor's Committee recommended against Mayor Giuliani providing Judge Schwartzwald with another interim civil court appointment because of that incident.[59] I concurred with the Mayor's Committee's decision, publicly saying that Judge Schwartzwald's refusal to shake the Mayor's hand "showed a lack of judicial temperament."[60] I drew a distinction between Mayor Giuliani making the decision not to reappoint Judge Schwartzwald, for his own political reasons, and the Mayor accepting the decision of the Mayor's Committee.

Under the New York State Constitution, any judicial appointee

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54 *Id.* (emphasis added).

55 Alair Townsend, Editorial, *By Demonizing Dissenters, Rudy Risks Retribution, Throttles Debate*, CRAIN'S N.Y. BUS., Jan. 8-14, 1996, at 9.

56 *Id.*

57 Susan Rubinowitz & Devlin Barrett, *Axed Judge: Rudy Didn't Give Me Fair Shake*, N.Y. POST, Dec. 28, 1996, at 3.

58 David Firestone, *At Swearing-In Ceremony, A Judge Snubs the Mayor*, N.Y. TIMES, Dec. 29, 1995, at B3.

59 *See* Rubinowitz & Barrett, *supra* note 57, at 3; *see also* Joel Siegel, *Veteran Judge Dismissed by Mayor's Panel*, DAILY NEWS (New York), Dec. 11, 1996, at 22.

60 Rubinowitz & Barrett, *supra* note 57, at 3.

must be "well[-]qualified."[61] One must assume that both judicial committees are aware of that requirement. In fact, I know that the City Bar Association is aware of it because its former president, Barbara Paul Robinson, brought it to my attention. Ms. Robinson told me that if the Mayor wanted to raise the standards for any judicial appointment, there would be no question that the City Bar Association would oblige him.

Ms. Robinson also showed me an unpublished op-ed article submitted to *The New York Times* wherein she wrote:

> While the standards should be sufficiently high to approve only well[-]qualified incumbents, once met, incumbent judges should be re-appointed. Otherwise, there is a real danger that, at the very least, there will be an appearance of politics intruding into the decisions of the courts. . . . A judge who had been approved by both judiciary committees should not have to worry whether a particular mayor will find them appropriate for re-appointment.[62]

Additionally, Ms. Robinson responded to written questions I had concerning the Mayor's changes in the judicial selection process and the City Bar Association's role in that process. The following are excerpts from her reply:

> First, I can confirm that the [City Bar Association] was not consulted about any changes made to the relevant executive order. While we did respond to certain changes in the language regarding diversity, we did not comment on any other changes. . . .
>
> As you know, our Judiciary Committee evaluates all candidates for judicial office in our city . . . . As I told you, our Judiciary Committee applies the same standards to all candidates it reviews and I provided you a copy of the relevant language. . . .
>
> The Mayor had not asked our Committee on the Judiciary to review or upgrade its standards. However, the Mayor's recent decision not to re-appoint two incumbent judges who had been approved by both his and our Judiciary Committees and the ensuing controversy presented us with an opportunity to meet with the Mayor and his advisors to discuss our concerns. We suggested that we work cooperatively together to review the standards being applied by both Committees to be sure that only

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[61] N.Y. CONST. art. VI, § 2(c). While the New York State Constitution specifies only that appointees to the New York State Court of Appeals be "well[-]qualified," *id.*, the City Bar Association applies this standard to all appointees.

[62] Barbara Paul Robinson on merit selection and the New York City judicial selection process 2 (Jan. 28, 1996) (unpublished op-ed article, on file with the *New York City Law Review*).

> those candidates found "well-qualified" were approved, the standard required by the State Constitution. We agree with you that the re-appointment of incumbent judges raises special concerns about judicial independence . . . .
>
> Whenever an appointing authority appoints someone who has been disapproved by [ ]our Judiciary Committee, we do speak out publicly and expect to continue to do so. We also publicize our approvals and disapprovals of all candidates we review who participate in judicial [ ]elections. Finally, you asked whether we would support a change in the law to require the Mayor to submit all nominees to the City Council for it to [ ]"advise and consent[."] We have never considered such a proposal so we have no position at the present time. Naturally, we would expect to review the specifics of any such proposal before we could do so. Thanks to the process you established, candidates for mayoral appointment who have been disapproved by our Judiciary Committee have not been appointed to the bench.
>
> Thank you again for everything you have done and continue to do to protect the integrity and independence of the [ ]judiciary.[63]

In my opinion, if Mayor Giuliani wants to raise judicial standards, all he has to do is direct the committees to raise theirs. By substituting his judgment for theirs, as Gary Brown, Executive Director of The Fund for Modern Courts, Inc. said, "[it] may very well have a chilling effect on judges . . . ."[64]

It is interesting, and disappointing, that so many lawyers have chosen to remain silent, undoubtedly fearful of Mayor Giuliani's vindictiveness. One well-known lawyer recently told me that he was glad I stood up to the Mayor and spoke out. I replied, "[i]t would be even better if you did." Another equally prominent lawyer told me that he would have spoken out, but due to his position with an organization receiving funds from the city, he did not because he was afraid the Mayor would cut off the funding.

Most lawyers are familiar with the 1866 saying of a New York State Surrogate, to wit, "[n]o man's life, liberty, or property are safe while the legislature is in session."[65] I think this sentiment is probably still true. I believe that it could also apply to the same extent to mayors and chief executives alike. It is also still true that

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[63] Letter from Barbara Paul Robinson, then President, Association of the Bar of the City of New York, to Hon. Edward I. Koch, Partner, Robinson Silverman Pearce Aronsohn & Berman LLP (Feb. 9, 1996) (copy on file with the *New York City Law Review*).

[64] *See* Wise & Goldstein, *Mayor's Action*, *supra* note 32, at 1.

[65] Estate of A.B., 1 Tuck. 247, 249 (N.Y. Sur. Ct. 1866).

our recourse is through the courts. Only if we are certain that the courts are not politically dominated and only if we are certain that nominations to those courts are outside the political process can we, while the legislature is in session, sleep without fear. Regrettably, that is not the case in New York. It was true in the City of New York in the appointment of criminal and family court judges under the merit-based selection system I created, but it is no longer true under the procedures used by Mayor Rudolph Giuliani. Recently, the public danger created by Mayor Giuliani's rescission of automatic reappointment for sitting judges was vividly illustrated. In *McCain v. Giuliani*,[66] The Legal Aid Society's Homeless Family Rights Project (the "Project") won its case at trial by establishing that the city had violated both law and court orders in processing homeless families seeking housing. The Project was required to go to the appellate division after the city filed a notice of appeal. If this case simply involved an appeal by the city, as is its right, no one could fault the Giuliani Administration. However, the Mayor went far beyond the filing of the notice of appeal, and undertook to personally attack Judge Helen Freedman with his demeaning language, a deplorable and dangerous action.[67]

During the Dinkins and Giuliani Administrations, Judge Freedman imposed fines totalling $5 million against the city for disobeying her orders in this ongoing matter.[68] The City of New York faces another $1 million in penalties, currently stayed on appeal.[69] Understandably angered, the Mayor viciously and personally attacked Judge Freedman, saying, "[s]he [is not] ruling on the law, [she is] ruling on her own personal ideology."[70] However, if that were true, she would be reversed on appeal. Mayor Giuliani, according to the *New York Post*, said that Judge Freedman has been issuing "irrational orders" to mayors for thirteen years and that "[it is] about time she step aside. Any judge that holds a case for a decade or more should get off the case because what happens is they become the purveyors of policy rather than deciders of cases that come before them."[71]

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66 N.Y.L.J., May 16, 1996, at 28 (N.Y. Sup. Ct. May 14, 1996), *aff'd*, N.Y.L.J., Feb. 14, 1997, at 29 (N.Y. App. Div. Feb. 11, 1997).

67 Mike Pearl & David Seifman, *'Workfare' Judge Ought to Quit: Rudy*, N.Y. POST, Aug. 21, 1996, at 5.

68 *See* Matthew Goldstein, *City Held in Contempt Again for Keeping Homeless in Office*, N.Y.L.J., May 15, 1996, at 1.

69 *Id.*

70 Pearl & Seifman, *supra* note 67, at 5.

71 Pearl & Seifman, *supra* note 67, at 5.

Mayor Giuliani also asserted that Steven Banks, The Legal Aid Society's coordinating attorney in *McCain*, "[b]y and large controls her ideology because she constantly rules his way."[72] Was the Mayor suggesting collusion between Mr. Banks and Judge Freedman with impeachment and disbarment proceedings in the offing?

In this particular instance, Mayor Giuliani is facing a New York State Supreme Court justice who, because she is elected, does not have to rely upon a chief executive's generosity of spirit to be reappointed at the end of her term, and cannot be terrorized. However, there are many who do rely upon this generosity, particularly criminal and family court judges, who are often appointed to preside as acting supreme court justices. Surely, some judges would be fearful of Mayor Giuliani and his implied and expressed threats that they will not be reappointed unless they meet his standards regardless of the evaluations given by the Mayor's Committee and the City Bar Association. What would such a message convey to Judge Freedman if she were an appointed judge, that is, a criminal or family court judge presiding as an "acting" New York State Supreme Court judge?

On February 11, 1997, the appellate division affirmed Judge Freedman's ruling holding the Mayor and the city in contempt.[73] Imagine what the consequences would be for Judge Freedman if she needed Mayor Giuliani's consent for her reappointment.

The Mayor's vicious personal attacks on the judiciary go far beyond responsible criticism, which is always legitimate. He is seeking to place judges in a state of fear, making a government of men, not of laws. This brings to mind a quote from Shakespeare's Julius Caesar: "Upon what meat doth this our Caesar feed, that he is grown so great?"[74] The City of New York is the number one litigant in the civil and criminal courts of this city. Do we want our judges to succumb to the extralegal pressures of the Mayor?

IV. The Independence of Judges Baer, Friedman, and Chin?

In several cases, Governor Pataki[75] and President Clinton[76]

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[72] Pearl & Seifman, *supra* note 67, at 5.

[73] McCain v. Giuliani, N.Y.L.J., Feb. 14, 1997, at 29 (N.Y. App. Div. Feb. 11, 1997).

[74] William Shakespeare, The Tragedy of Julius Caesar act 1, sc. 2, ln. 149-50 (Sylvan Barnet ed., Signet Classic 1987).

[75] George E. Pataki took office as Governor of the State of New York in 1995. *See* The Green Book, *supra* note 9, at 367.

[76] William J. Clinton took office as President of the United States in 1993. *See* The Green Book, *supra* note 9, at 459.

joined the Mayor in criticizing judges and threatening the independence of the judiciary. One such case involving U.S. District Court Judge Harold Baer, Jr., who serves in the Southern District of New York, received nationwide attention.[77] In *United States v. Bayless*,[78] Judge Baer invalidated a police investigative stop[79] where police recovered thirty-four kilograms of cocaine and two kilograms of heroin.[80] In *Bayless*, a plainclothes police officer testified that at approximately 5:00 a.m., he and his partner observed Carol Bayless drive her rented 1995 Caprice, fitted with Michigan license plates, "slowly along 176th Street. Before reaching the intersection of 176th Street and St. Nicholas Avenue [Bayless] pulled over to the north side of the street and double parked the car."[81] He further testified that

> once the car stopped, four men emerged from between parked cars on the south side of the street. The males crossed the street walking single file, [Bayless] leaned over to the passenger side of the car and pushed the button for the trunk release. The first male then lifted the trunk open, the second and third males each placed a large black duffel bag into the trunk and the fourth male closed the trunk.[82]

Police did not observe any conversation between any of the four men.[83] Bayless drove away and the police followed.[84] At a stoplight, two of the four males, who were standing nearby, recognized the police officers.[85] At that time, all four males "moved in different directions at a rapid gait."[86] After the stoplight turned green, the officers continued to follow Bayless.[87] The officer testified that in order to prevent Bayless from entering a major highway and before they could "run a [computer] check,"[88] they pulled Bayless over.[89] He testified that they pulled Bayless over because they observed that

> the car had an out-of-town license plate; the actions of the four

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77 Al Guart, *Judge Throws Out $4M Drug Bust Seizure on Technicality*, N.Y. Post, Jan. 25, 1996, at 4.

78 913 F. Supp. 232, *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

79 *Id.* at 239.

80 *Id.* at 234.

81 *Id.* at 235.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* (quoting police officer's testimony).

87 *Id.*

88 *Id.*

89 *Id.* at 235-36.

> males, particularly the way they crossed the street in single file and did not speak with the driver of the car; the fact that the males ran once they noticed the officers; and the duffel bags the males placed in the trunk of the car.[90]

After police stopped Bayless, they looked in the trunk of her car,[91] wherein they found thirty-four kilograms of cocaine and two kilograms of heroin.[92] Bayless was arrested at the scene.[93]

After her arrest, Bayless made a videotaped statement.[94] Bayless' "version of the events surrounding her arrest differ[ed] significantly from that recounted by [the police]."[95] In her videotaped confession, Bayless admitted driving from Detroit to New York with $1 million in the trunk in order to pick up drugs.[96] Bayless further admitted she made the same trip to buy drugs more than twenty times since 1991.[97] For this trip, Bayless expected to be paid $20,000 by her son.[98] Judge Baer found that Bayless' "candor and the nature of her statements [gave] her statement great credibility."[99] Judge Baer opined, "I place considerable weight on the defendant's statements because of how they incriminate her, her son and others and because at the time the statements were made, defendants, unlike the [o]fficer, had no reason to color the facts."[100]

Following the suppression hearing, at which Bayless did not testify,[101] Judge Baer chose not to believe the police officer's sworn testimony that the men loading duffel bags into Bayless' trunk ran when they spotted the police officers.[102] Rather, Judge Baer suppressed the seized narcotics and Bayless' videotaped confession.[103] In granting Bayless' motion to suppress, Judge Baer stated:

> Even before this prosecution and the public hearing and final report of the Mollen Commission, residents in [Washington

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90 *Id.* at 236.
91 *Id.*
92 *Id.* at 234.
93 *Id.* at 236.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at 237.
98 *Id.*
99 *Id.* at 236.
100 *Id.* at 239.
101 During the suppression hearing, "defense counsel notified the court that [Bayless] was ill with a stomach ailment and needed to be removed from the courtroom. [Bayless] waived her right to be present at the remainder of the proceedings." *Id.* at 236 n.8.
102 *Id.* at 239 ("[t]he testimony offered by [the police officer] . . . is at best suspect.").
103 *Id.* at 243.

> Heights] tended to regard police officers as corrupt, abusive and violent. . . . *[H]ad the men not run when the cops began to stare at them, it would have been unusual.*[104]

He further added, "[w]hat I find shattering is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person."[105]

For most of the country, Judge Baer's decision flew in the face of common sense. In order to sustain a police officer's investigative stop and search of Bayless' car trunk, Judge Baer had to find that the officers had a "'reasonable suspicion' supported by articulable facts that criminal activity 'may be afoot.'"[106] Judge Baer's decision is laden with evidence that demonstrates an appalling anti-law enforcement bias. For example, he tortured the facts and circumstances in order to conclude that the police lacked the requisite "reasonable suspicion" to support their stop; his out-of-hand rejection of the police officer's testimony based upon the statement of a defendant never subjected to cross-examination; and his statement that the men were correct to run when they saw the police. In a final stroke, Judge Baer branded the U.S. Attorney's efforts to have him reconsider the suppression motion "a juvenile project."[107]

President Clinton's spokesman, Michael D. McCurry, called Judge Baer's decision "wrongheaded"[108] and said that "the White House was waiting to see what happened in the hearing being conducted by Judge Baer [and urged by President Clinton]"[109] and left open the possibility that Mr. Clinton might ask the judge to step down."[110] Mayor Giuliani called the ruling "mind-boggling in its effect"[111] and further stated that he "read the decision twice. . . . There [was] no basis for it."[112] Governor Pataki joined the criticism, saying through his spokesman, "[t]his sadly is too often what happens when liberal elites in powerful positions treat the

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104 *Id.* at 242 (emphasis added).

105 *Id.* at 240.

106 *Id.* (citing United States v. Sokolow, 490 U.S. 1 (1989); Terry v. Ohio, 392 U.S. 1 (1968)).

107 Don Van Natta, Jr., *Judge to Hear Bid to Reverse a Drug Ruling*, N.Y. TIMES, Feb. 3, 1996, at 25.

108 Alison Mitchell, *Clinton Defends His Criticism of a New York Judge's Ruling*, N.Y. TIMES, Apr. 3, 1996, at A12.

109 Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1.

110 Mitchell, *supra* note 108, at A12.

111 Clifford Krauss, *Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case*, N.Y. TIMES, Jan. 27, 1996, at 25.

112 *Id.*

criminals as victims and victims as criminals."[113]

Under obvious intense public pressure, Judge Baer heard reargument of the original suppression motion and overruled his first decision.[114] Perhaps he acted out of fear of inevitable condemnation by editorials, as well as concern that President Clinton would call for his resignation. Judge Baer would have been better off—and more intellectually honest and better preserving of his good reputation—had he urged the U.S. Attorney to appeal his first decision to the Second Circuit Court of Appeals, or, in the alternative, recuse himself from the argument on rehearing, allowing another judge to decide the issue.[115]

In another widely reported state criminal court case, Criminal Court Justice David Friedman ruled evidence collected in a Brooklyn rape case inadmissible because police conducted their search after nine p.m.[116] Under New York law, "[a] search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 [a.m.] and 9:00 [p.m.], unless the warrant expressly authorizes execution thereof at any time of the day or night."[117] In fact, Justice Friedman later discovered the search was executed at approximately six p.m.[118] The Brooklyn District Attorney's Office was delinquent in not refuting the defense counsel's allegation that the search warrant was executed after nine p.m. Subsequent to his original decision, and after pointing out the defense counsel's error, Justice Friedman reversed his decision and

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113 Greg B. Smith & Frank Lombardi, *Rudy, Gov Hit Judge for Axing Drug Case*, Jan. 26, 1996, DAILY NEWS (New York), at 4.

114 United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y. 1996). At the initial hearing, the government put forth the testimony of only one of the officers involved in Bayless' arrest. *Id.* at 214. Judge Baer noted that upon rehearing, the government brought forth the "other officer who observed the events at issue here, [and] also the report he prepared hours after the arrest . . . ." *Id.* at 215. After the rehearing, Judge Baer found that the second officer "corroborated several significant portions of [his partner's] story and presented a more credible chronology of the events of April 21st." *Id.* Judge Baer added that "as a consequence of the defendant's testimony and that of the [second officer], her story is now less convincing." *Id.* at 216.

115 Before Bayless' case went to trial, she made motion under 28 U.S.C. § 455(a) to have Judge Baer recuse himself. *See* United States v. Bayless, 926 F. Supp. 405 (S.D.N.Y. 1996). Judge Baer denied Bayless' motion. *Id.* at 406. However, Judge Baer removed himself from the case to avoid "unnecessary and otherwise avoidable problems and attendant delays," *id.*, and ordered a new judge for trial. *Id.*

116 *See* People v. Gardner, N.Y.L.J., Feb. 1, 1996, at 32 (N.Y. Sup. Ct. Jan. 25, 1996); *see also* Anthony M. DeStafano & Paul Moses, *Ruling Raises a Searching Question*, NEWSDAY (New York), Feb. 2, 1996, at A4.

117 N.Y. CRIM. PROC. LAW § 690.30(2) (McKinney 1995).

118 DeStafano & Moses, *supra* note 116, at A4.

ruled that the seized evidence could be admitted.[119] Justice Fried-

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[119] On February 6, 1996, Justice Friedman, ruling from the bench, modified his January 25th order, and denied suppression of evidence recovered by police in the execution of their warrant. No formal opinion was written. What appears below is a transcript of the statement read on the record in open court.

> In a decision and order dated January 25, 1996, this court granted defendant's motion to suppress certain evidence. In so doing the court stated that it was constrained to suppress certain evidence. When the court used the word constrained it was indicating disfavor with the result but recognizing its obligation under oath of office to follow the law of this state and the [C]onstitution[s] of the United States and New York State. It did so because the District Attorney conceded that the search warrant was executed at night.
>
> At the outset I want to applaud the candidness at oral argument of the District Attorney in agreeing that the law as the court saw it in the decision of January 25, 1996 was correct.
>
> The Criminal Procedure Law provides that a warrant may only be executed at night (that is between the hours of 9 [p.m.] and 6 [a.m.]) if certain conditions are met. These are: (1) the application for the warrant must set forth reasons showing that there is a need to search at night, and (2) the warrant must specifically authorize a nighttime search.
>
> In this case, the warrant did not permit a nighttime search; the application for the warrant did not provide any reason for needing to search at night; and the police officer did not request a nighttime search. This court was therefore left with a choice [—] the choice of following and obeying the law passed by the legislature of this state or trashing the law. I chose to follow and obey the law. Neither this court nor any other person is above the law.
>
> In any event, the People have now moved to reargue and renew the motion leading to the January 25, 1996 decision. It has become apparent from the information the District Attorney has belatedly supplied that the search did indeed take place during the hours that the Criminal Procedure Law regards as day. Moreover, the court has heard testimony by Police Officer Forbes verifying the People's Claim. I find the testimony credible. Defendant has offered nothing other than speculation to contradict the sworn testimony. While no satisfactory explanation has been offered by the District Attorney for the failure to present this information at the outset, the interests of justice and the protection of society mandate that the court reexamine its original decision.
>
> It has become evident that the court's prior order was based upon misinformation. In this regard, defense counsel sought suppression of evidence alleging that the search impermissibly took place during a prohibited time. He in fact had no basis for such a claim.
>
> Thus the claim made in defendant's original motion is without merit. Accordingly, I grant the District Attorney's motion to the extent of granting renewal. Upon renewal and the hearing conducted this day, this court's order dated January 25, 1996 is hereby modified so as to deny suppression of the evidence in issue.

Justice David Friedman modifying, without written opinion, People v. Gardner, N.Y.L.J., Feb. 1, 1996, at 32 (N.Y. Sup. Ct. Jan. 25, 1996) 1-3 (Feb. 6, 1996) (emphasis in original) (copy on file with the *New York City Law Review*); *see also* Joseph P. Fried, *Evidence is Reinstated in a Brooklyn Rape Case*, N.Y. TIMES, Feb. 7, 1996, at B2.

man deserved applause for both decisions. He did what the law required in the first proceeding based on the evidence before him.[120] Then he did what the new evidence warranted; he reversed his first ruling based on the evidence before him.[121]

Despite the fact that Justice Friedman did the right thing—indeed, exactly what the law required in both decisions—he was criticized by public officials. Governor Pataki called Justice Friedman's first decision "just the latest demonstration that New York's courts have gone too far in protecting criminal[s'] rights."[122] Mayor Giuliani said "[t]his is a good illustration of how far people will go to show the police are wrong. . . . Maybe the police are right."[123] The Mayor and the Governor should have apologized to Justice Friedman after his second decision and congratulated him on his actions. However, they chose not to. New York State Court of Appeals Judge Vito Titone, outraged by the unfair attacks on Justice Friedman, said, "[i]t was the last straw. . . . I know him. I worked [with him] in the [a]ppellate [d]ivision. He [is] a fine lawyer and a fine judge. To go after him on half the facts is so wrong."[124] *The New York Times* columnist Clyde Haberman commented on what seemed to be "open season on judges,"[125] saying "Justice Friedman . . . has fallen victim to what may charitably be called a political and journalistic mugging."[126]

When he seeks reappointment, does Justice Friedman have to be concerned that he embarrassed Mayor Giuliani? I believe so. What if Justice Friedman had not detected the Assistant District Attorney's error with respect to the timing of the search? Would the Mayor, incensed at the original decision granting the suppression motion, reappoint him? I do not believe so.

Governor Pataki introduced legislation,[127] because of his distress with Justice Friedman's decision, that "would loosen search-and-seizure rules for the police and prosecutors in New York by

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120 N.Y. CRIM. PROC. LAW § 710.60(2)(a) (McKinney 1995).

121 *Id.* § 710.60(3)(a)-(b).

122 Randy Kennedy, *Ruling in Favor of a Suspect Puts State Judge Under Fire*, N.Y. TIMES, Feb. 2, 1996, at B3.

123 *Id.*

124 Lynette Holloway, *Appeals Judge Says Colleagues Are Not Being Soft on Criminals*, N.Y. TIMES, Feb. 4, 1996, at 38.

125 Clyde Haberman, *Under Fire, Judge Decides to Fire Back*, N.Y. TIMES, Feb. 27, 1996, at B1.

126 *Id.*

127 S. 6041, 219th Gen. Assembly, 2d Reg. Sess. (N.Y. 1996). Governor Pataki's Police and Public Protection Act of 1996 (the "PPPA") failed to pass the New York State Assembly.

basing rules of evidence on [f]ederal [l]aws rather than more stringent state standards."[128] In responding to Judge Titone's remarks attesting to Justice Friedman's character and ability, the Governor's spokesman said, "[t]he Governor believes Judge Titone is entitled to his opinion, but the [New York State] Legislature must pass the Police and Public Protection Act in order to restore a sensible balance between victims' rights and criminals' rights. . . . As it stands now, criminals' rights too often come before victims' rights."[129] This would have been the appropriate time to acknowledge that Justice Friedman correctly applied the existing law. The Governor chose not to do so.

It is not just public officials who are guilty of exerting pressure against judges. Recently, U.S. District Court Judge Denny Chin ruled that New York State's Sex Offender Registration Act,[130] known as Megan's Law, which mandates that the addresses of released sex offenders be made public,[131] cannot be applied retroac-

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[128] *See* Holloway, *supra* note 124, at 38. For example, the PPPA proposed to amend the New York State Criminal Procedure Law to provide that:

> when engaged in criminal law enforcement duties a police officer may approach a person in a public place located within the geographical area of such officer's employment when he has an objective, credible reason not necessarily indicative of criminality, and to the full extent permissible under the Constitution of this State and the United States of America may ask such questions and take such other actions as the officer deems appropriate.

S. 6041, 219th Gen. Assembly, 2d Reg. Sess. (N.Y. 1996).

[129] *See* Holloway, *supra* note 124, at 38.

[130] N.Y. CORRECT. LAW §§ 168-168-v (McKinney Supp. 1996).

[131] New York State's Sex Offender Registration Act provides that the names, addresses and other significant information of any person convicted of any "sex offense" or any "sexually violent offense" be made public under the following circumstances:

> (a) If the risk of repeat offense is low, a level one designation shall be given to such sex offender. In such case the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified pursuant to this article.
>
> (b) If the risk of repeat offense is moderate, a level two designation shall be given to such sex offender. In such case the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified and may disseminate relevant information which may include approximate address based on sex offender's zip code, a photograph of the offender, background information including the offender's crime of conviction, modus of operation, type of victim targeted and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion.
>
> (c) If the risk of repeat offense is high and there exists a threat to the

tively.[132] The *Daily News*, in an outrageous attack, disagreed. Of course, disagreement would be in order, but the language employed certainly was not. Leading off with the headline, "Perverts' Pal,"[133] the *Daily News* wrote:

> Because of him, the state cannot notify New Yorkers when most sex offenders and pedophiles are living in their midst.
>
> His junk justice ruling makes permanent his earlier decision to prevent the police from alerting the public about the release of any sex fiend who was convicted before New York's Megan's Law took effect Jan[uary] 21.[134]

V. CONCLUSION

The importance of maintaining an independent judiciary requires an assurance to the judiciary that they will be appointed without regard to political affiliations and obligations. Furthermore, assurances must be made that reappointments will come to those found deserving by the two committees assigned the responsibility of making such decisions.

I have praised Mayor Giuliani on many issues. I have disagreed with him on many as well. I have never sought to court him or seek his favor. I offered my advice to be helpful when asked for my opinion. However, the Mayor's[135] interference is so outrageous

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> public safety, such sex offender shall be deemed a "sexually violent predator" and a level three designation shall be given to such sex offender. In such case, the law enforcement agency having jurisdiction and the law enforcement agency having had jurisdiction at the time of his conviction shall be notified and may disseminate relevant information which may include the sex offender's exact address, a photograph of the offender, background information including the offender's crime of conviction, modus of operation, type of victim targeted, and the description of special conditions imposed on the offender to any entity with vulnerable populations related to the nature of the offense committed by such sex offender. Any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion. In addition, in such case, the information described herein shall also be provided in the subdirectory established in this article and notwithstanding any other provision of law, such information shall, upon request, be made available to the public.

Id. § 168-l(6)(a)-(c).

132 Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996).

133 *Perverts' Pal*, DAILY NEWS (New York), Sept. 26, 1996, at 44.

134 *Id.*

135 The Mayor does not stand alone. As this article has demonstrated, other politicians and chief executives also threaten the independence of the judiciary.

it must be condemned and is, regrettably, reflective of his character. As Heraclitus said 2,500 years ago, "[a] man's character is his fate."[136]

[136] JOHN BARTLETT, FAMILIAR QUOTATIONS 62 (1992).

THE *CONTRACT WITH AMERICA*: THE CRYSTALLIZATION OF THE GOP'S RACIAL AGENDA

Edward J. Rymsza†

I. INTRODUCTION

"Election Day, November 8, 1994, was a turning point."[1] Indeed it was. When the votes were counted throughout the country, the Republican Party (or "GOP")[2] found itself in control of the U.S. House of Representatives (the "House"), a Democrat stronghold for the past forty years, and the U.S. Senate. Much of the Republicans' success was primarily due to their new manifesto, the *Contract with America* (the *"Contract"*).

Over 300 Republican candidates[3] for the House signed the *Contract* (the "Signatories"). It contained a written "promise" to the American people outlining the agenda for the 104th Congress.[4] The Signatories pledged to introduce ten specific pieces of legislation in the first 100 days of the new congressional session[5] and, ultimately, attempt to ratify them.

The Signatories, claiming to be the party of the middle class, boasted that the programs outlined in the *Contract* would benefit all Americans.[6] However, the *Contract with America* is more accurately a "contract on minorities,"[7] who almost certainly did not

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1 CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 3 (Ed Gillespie & Bob Schellhas eds., 1994) [hereinafter CONTRACT WITH AMERICA] (emphasis added).

2 The Grand Old Party.

3 CONTRACT WITH AMERICA, *supra* note 1, at 169.

4 CONTRACT WITH AMERICA, *supra* note 1, at 6-11.

5 CONTRACT WITH AMERICA, *supra* note 1, at 15.

6 CONTRACT WITH AMERICA, *supra* note 1, at 12. For instance, the authors state that the September 27, 1994 unveiling of the *Contract* on the steps of the Capitol was "an opportunity to reclaim our mantle as the party of the middle class . . . ." CONTRACT WITH AMERICA, *supra* note 1, at 12.

7 Kwame Nantambu, *GOP Freezes Out Afro-Americans*, PLAIN DEALER (Cleveland), May 2, 1995, at 9B. As used in this Note, the term "minority" means "[a] racial, religious, political, national, or other group regarded as different from the larger group of which it is part." THE AMERICAN HERITAGE DICTIONARY 800 (2d ed. 1982). This Note focuses on the two largest minority groups in America, African Americans and those of Hispanic origin. Persons of Hispanic origin may be of any race. The total population in the United States in 1994 was approximately 260 million. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Na-

elect the Signatories.[8] The *Contract's* programs, if passed by Congress, would have devastating consequences on minorities. Sadly, it is but the latest chapter of a Republican racial agenda.

This Note primarily focuses on two reform proposals: the Personal Responsibility Act ("PRA"),[9] and the Taking Back Our Streets Act ("TBOSA").[10] This Note, in lesser detail, also discusses the Fiscal Responsibility Act ("FRA"),[11] and the Common Sense Legal Reforms Act ("CSLRA").[12] Through empirical evidence,[13] this Note demonstrates that the *Contract*, either on its face or in its effect, furthers a racial agenda. In particular, Part II illustrates the need for critical review of the *Contract* in light of the Signatories' past public statements and legislative records on civil rights issues. Part III demonstrates how the *Contract's* reform proposals for welfare, criminal justice, and tort litigation, and a balanced budget amendment will disproportionately impact minorities. The central tenet of this Note is that in an ideal society, the percentage of minorities on welfare and under the auspices of the criminal justice system should reflect a cross-section of the population as a whole. Unfor-

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tional Data Book 14 (1995). The white population was estimated at approximately 216.5 million, the African American population was estimated at approximately 32.6 million, and the population of those of Hispanic origin was estimated at approximately 26 million. *Id.*

8 Minorities in America have long been Democratic supporters. For instance, in 1994, more than 80% of African Americans identified their political affiliation as Democrat, while only approximately 10% identified themselves as Republican. *See* BUREAU OF THE CENSUS, *supra* note 7, at 268.

9 CONTRACT WITH AMERICA, *supra* note 1, at 65-77. The PRA was proposed to overhaul the welfare system and called for block grants to the states in order to administer various social programs. CONTRACT WITH AMERICA, *supra* note 1, at 67.

10 CONTRACT WITH AMERICA, *supra* note 1, at 37-64. The TBOSA was an anti-crime package that called for expansion of the death penalty, revision of the habeas corpus process, expansion of the "good faith" exception to the exclusionary rule to include warrantless searches and seizures, and increased spending for law enforcement and prison construction. CONTRACT WITH AMERICA, *supra* note 1, at 38.

11 CONTRACT WITH AMERICA, *supra* note 1, at 23-36. The FRA called for, among other things, a balanced budget amendment to the Constitution. CONTRACT WITH AMERICA, *supra* note 1, at 24.

12 CONTRACT WITH AMERICA, *supra* note 1, at 143-55. The CSLRA proposed limits on punitive damage awards and proposed that the "loser-pays" the winner's legal costs. CONTRACT WITH AMERICA, *supra* note 1, at 144-45.

13 While this Note relies primarily on U.S. Census Bureau data, the author recognizes that some observers have questioned the accuracy of the statistics with respect to the Census Bureau's figures on minorities. However, these statistics are the most widely cited source for population statistics. *See, e.g.*, George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1458 (1993); Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 234-35 (1994).

tunately, as this Note will demonstrate, this is not the case in America.

II. CRITICAL REVIEW OF THE GOP AGENDA

The Signatories designed their reforms for the benefit of the "American people."[14] However, their America is limited and exclusive. The Signatories authored the reforms to placate a specific audience, wealthy and middle-class white Americans. The idea that the Signatories are concerned with the needs of all Americans is, at best, questionable. Recent history has taught the American people otherwise.

A cursory review of the history of House Republican voting records and their attitudes on civil rights issues reveals their lack of concern about the entire populace.[15] From the earliest days of the civil rights movement in the 1960s, an overwhelming majority of Republican Congressmen have tried to derail civil rights efforts.[16] Notably, then House member from Texas, George Bush, opposed the 1964 Civil Rights Act because, as he stated, it "'was passed to protect [only] 14% of the people. I'm also worried about the other 86%.'"[17]

More recent House Republicans, and eventual Signatories, shared the same principles as their predecessors and consistently voted against significant civil rights legislation or initiatives. For instance, in 1988, Congress passed a valuable piece of civil rights legislation, the Fair Housing Amendments Act ("FHAA"),[18] en-

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[14] Throughout the *Contract* the Signatories mention the "American people" or "Americans," suggesting that they understand the desires of the entire American population. *See, e.g.*, CONTRACT WITH AMERICA, *supra* note 1, at 5, 23, 195.

[15] *See, e.g.*, *infra* pp. 483-86 and notes 17-41. The GOP was a strong advocate for the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments during the Reconstruction period following the Civil War. *See, e.g.*, Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 878 (1986); X. Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2156 (1996). The *Contract* correctly notes that the Republican party was the party of Abraham Lincoln. CONTRACT WITH AMERICA, *supra* note 1, at 7. Since that time, however, the Republican party has undergone a radical transformation. Indeed, in debating the passage of the Civil Rights Act of 1990, Senator Howard Metzenbaum (D-Ohio) questioned whether the Republican party was in fact the party of Lincoln or had become the party of David Duke. *See* 136 CONG. REC. S15,336 (daily ed. Oct. 16, 1990) (statement of Sen. Metzenbaum).

[16] *See* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1018-20 (1992).

[17] Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 974 (1992) (quoting Ruth Marcus, *What Does Bush Really Believe?: Civil Rights Issue Illustrates Shifts*, WASH. POST, Aug. 18, 1992, at A1).

[18] H.R. 1158, 100th Cong. (1988).

acted to amend Title VIII of the Civil Rights Act of 1968.[19] Specifically, the FHAA sought to revise procedures designed to prohibit discrimination in the rental, sale, and financing of housing and provide funding for housing assistance.[20] Rep. Dick Armey (R-Tex.), current House majority leader and co-author of the *Contract*, voted against the FHAA.[21] In 1990, the House passed the Civil Rights Act of 1990[22] to amend the Civil Rights Act of 1964.[23] The 1990 legislation restored and strengthened civil rights laws that banned discrimination in the work place.[24] Unsurprisingly, Rep. Armey also voted against the Civil Rights Act of 1990.[25] Apparently, Rep. Armey's biases are not limited to his voting on legislation in the House chamber. During a radio interview, Rep. Armey referred to Rep. Barney Frank (D-Mass.), an openly gay member of Congress, as "Barney Fag."[26]

The Voting Rights Extension Act of 1992 ("VREA"),[27] introduced to clarify certain aspects of the Voting Rights Act of 1965,[28] is another significant piece of civil rights legislation.[29] Once again, notable House Republicans, who eventually oversaw the working groups[30] responsible for drafting the ten *Contract* bills, voted against it.[31] Such individuals included Rep. Bill McCollum (R-

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19 42 U.S.C. §§ 3601-3619, 3631 (1968).

20 *See* H.R. 1158, 100th Cong. (1988).

21 Rep. Armey was among only twenty-three Republicans who voted against it. 134 CONG. REC. H16,511 (1988).

22 H.R. 4000, 101st Cong. (1990).

23 42 U.S.C. §§ 1981-1997j, 2000a-2000h-6 (1964).

24 H.R. 4000, 101st Cong. (1990).

25 *Id.* In Rep. Armey's objection to the bill he stated he opposed the bill "not because I oppose civil rights, but to the contrary, because I am a strong supporter of the rights of all Americans, black and white, male and female; and I have never believed that any one group should receive preferential treatment at the expense of others." 136 CONG. REC. H6802 (1990).

26 *Hill Briefs*, CONG. DAILY (National Journal Inc., Wash. D.C.), Jan. 27, 1995, at 3. The incident arose when Rep. Armey was conducting an interview with radio reporters. When Rep. Armey was asked a question regarding his recent book deal he said "'I like peace and quiet, and I [do not] need to listen to Barney Fag . . . [sic] Barney Frank haranguing in my ear because I made a few bucks off a book I worked on.'" Rep. Armey later apologized to Rep. Frank on the House floor. *Id.*

27 H.R. 5236, 102d Cong. (1992).

28 42 U.S.C. §§ 1971-1973p, 1973aa-1973gg-10, 1974-1974e (1965).

29 *See* H.R. REP. NO. 102-656, at 2 (1992). The bill was introduced to reverse two Supreme Court decisions which limited the use of the Voting Rights Act of 1965 as Congress intended. *Id.* *See* Presley v. Etowah County Comm'n, 502 U.S. 491 (1992); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991).

30 The *Contract* cites the Republican members of Congress who headed the working groups which were responsible for drafting the proposed legislation. CONTRACT WITH AMERICA, *supra* note 1, at vii.

31 H.R. REP. NO. 102-656, at 19 (1992).

Fla.),[32] Rep. Jim Ramstad (R-Minn.),[33] and Rep. Henry Hyde (R-Ill.).[34]

The *Contract's* chief architect, Speaker of the House Newt Gingrich (R-Ga.), has been openly and relentlessly hostile to civil rights programs, including affirmative action programs.[35] Seemingly at every opportunity, Speaker Gingrich spread his anti-affirmative action message. In October 1995, Speaker Gingrich sent a letter to targeted voters in California, 3,000 miles outside his congressional district, urging them to support the California Civil Rights Initiative ("CCRI"), which would end all affirmative action by the California state government.[36] In June 1995, before a forum of African American journalists, Speaker Gingrich criticized civil rights lawsuits and protests as "obsolete after the Civil Rights Act of 1964 banned discrimination."[37] According to Speaker Gingrich, "poor people need to 'learn new habits' and . . . women and minorities who rely on affirmative action should . . . take advantage of 'enormous avenues for opportunity' that ignore factors of race and sex."[38] Speaker Gingrich also added that affirmative action programs were primarily rooted in lawsuits.[39] He declared: "'[w]hen you create that kind of backward-looking, grievance-looking system, you teach people exactly the wrong habits. They end up spending their lives waiting for the lawsuit, instead of spending their lives seeking opportunity.'"[40] He further stated that the "civil rights movement had gone off-track because it was dominated by those 'who thought there was some way to get fairness of outcome as opposed to equality of opportunity.'"[41]

The House Republicans', and ultimate Signatories', voting

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[32] CONTRACT WITH AMERICA, *supra* note 1, at vii. Rep. McCollum headed the group responsible for the TBOSA.

[33] CONTRACT WITH AMERICA, *supra* note 1, at vii. Rep. Ramstad headed the group responsible for the CSLRA.

[34] CONTRACT WITH AMERICA, *supra* note 1, at vii. Rep. Hyde headed the group responsible for the FRA.

[35] *See, e.g., infra* notes 36-41.

[36] *From the Leadership*, CONG. DAILY (National Journal Inc., Wash. D.C.) Oct. 30, 1995, at 5. Speaker Gingrich went on to state that he believed that the CCRI was "'a model which should be looked at by every state, and by the federal government.'" *Id.* The initiative, Proposition 209, was passed by California voters on November 5, 1996. Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

[37] *See Hill Briefs*, CONG. DAILY (National Journal Inc., Wash. D.C.), June 19, 1995, at 4.

[38] *Id.* at 5.

[39] *Id.*

[40] *Id.*

[41] *Id.*

records and hostile sentiments demonstrate a hidden, and at times blatant, racist agenda. Thus, when analyzing the various proposed legislation in the *Contract*, one must be cognizant of the need to do so with a critical perspective.

III. THE *CONTRACT'S* RELEVANT BILLS AND THEIR NEGATIVE IMPACT ON MINORITIES

The PRA[42] and the TBOSA[43] will most profoundly impact minorities. Therefore, an in-depth evaluation is necessary.

A. *The Personal Responsibility Act and Welfare Reform*

In 1964, President Lyndon Johnson launched the "War on Poverty."[44] The War on Poverty was a bold agenda designed to provide poor Americans with government aid in the form of medical benefits, cash payments, food stamps, housing, and other benefits.[45] Through the years, as the struggle to combat poverty increased, so did criticism of the government's efforts.[46] "Welfare programs were denounced as stingy, unfair, demeaning to recipients, contributing to the breakup of families, and . . . narrow in their coverage . . . ."[47] Some critics called welfare programs "a dismal failure, bankrupt, a mess in need of total reform."[48] Critics of welfare have tried to dismantle it for nearly three decades. Today, they echo the same old sentiments throughout the country. These criticisms are now in a written and signed Republican *Contract*.

The Signatories labeled President Johnson's War on Poverty and his vision of a Great Society a failure.[49] They blame much of society's ills, including illegitimacy, crime, and illiteracy, on welfare programs.[50] The proposals endorsed by the Signatories are only

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[42] *See supra* note 9.

[43] *See supra* note 10.

[44] WILLIAM A. DEGREGORIO, THE COMPLETE BOOK OF U.S. PRESIDENTS 574 (3d ed. 1991). President Johnson unveiled his vision of a "Great Society" in a speech at the University of Michigan in May 1964. The Great Society was designed to end poverty and racial injustice. It included the War on Poverty, civil rights legislation, Medicare, Medicaid, and environmental protection. *Id.*

[45] MARTIN ANDERSON, WELFARE 15 (1981).

[46] *Id.* at 16-17.

[47] *Id.* at 17.

[48] *Id.*

[49] CONTRACT WITH AMERICA, *supra* note 1, at 67.

[50] CONTRACT WITH AMERICA, *supra* note 1, at 65. For example,

> after an all-white jury acquitted four white police officers in the brutal beating of black motorist Rodney King, the streets of Los Angeles erupted in flames as enraged ghetto residents took to the streets . . . .

more recent versions of the welfare reform movement. The current stream of reform proposals by the Signatories, however, are the harshest to date. Based on United States Bureau of the Census statistics, the reforms will disproportionately impact America's minority population.[51]

> Six days later, when the flames had been reduced to smoldering rubble, President George Bush declared that what had triggered the riot was not frustration at an unjust system, not the despair of grinding poverty and blocked opportunity, but rather the failure of the liberal social programs of the 1960's.

JILL QUADAGNO, THE COLOR OF WELFARE 3 (1994).

[51] Minorities comprise a disproportionate percentage of America's poor. Although the number of whites (26.2 million) living below the poverty level in 1993 was greater than African Americans (10.8 million) and those of Hispanic origin (8.1 million), the percentage of the African American and those of Hispanic origin populations living below the poverty level greatly exceeds the percentage of the white population living below the poverty level. In 1993 for individuals, 12.2% of the white population lived below the poverty level, 33.1% of the African American population lived below the poverty level, and 30.6% of those of Hispanic origin lived below the poverty level. BUREAU OF THE CENSUS, *supra* note 7, at 481. For families in 1993, 9.4% of the white population, 31.3% of the African American population, and 27.3% of the population of those of Hispanic origin lived below the poverty level. BUREAU OF THE CENSUS, *supra* note 7, at 484.

"The poverty index is based solely on money income and does not reflect the fact that many low-income persons receive non[-]cash benefits such as food stamps, Medicaid, and public housing." BUREAU OF THE CENSUS, *supra* note 7, at 450. By way of example, in 1993, the poverty borderline for an individual was a yearly income of $7,363. For a family of four it was $14,763. BUREAU OF THE CENSUS, *supra* note 7, at 481.

The total number of whites receiving government assistance greatly surpasses the number of African Americans and those of Hispanic origin. In 1991, 19.1 million whites, 10.3 million African Americans, and 5.7 million people of Hispanic origin received government assistance. BUREAU OF THE CENSUS, *supra* note 7, at 378. However, the percentage of the population of African Americans and those of Hispanic origin receiving government assistance is disproportionately large compared to the percentage of the white population. *See* BUREAU OF THE CENSUS, *supra* note 7, at 14 (citing overall population statistics). For instance, in 1991, 9.1% of the white population, 33.4% of the African American population, and 26.3% of the population of persons of Hispanic origin were participants in the major government assistance programs. BUREAU OF THE CENSUS, *supra* note 7, at 378.

The major assistance programs were Aid to Families with Dependent Children ("AFDC"), General Assistance, Supplemental Security Income ("SSI"), food stamps, Medicaid, and housing assistance. BUREAU OF THE CENSUS, *supra* note 7, at 378.

Others have also demonstrated that minorities "experience poverty in much greater numbers than corresponds with their percentage of the population." *See, e.g.*, Marcus, *supra* note 13, at 235.

> People of color are disproportionately poor in the United States. African-Americans comprised only about 12% of the entire U.S. population in 1991, but they comprised 30.4% of the families living below the poverty line. While Hispanics composed approximately 9% of the U.S. population, they accounted for 26.5% of the families living below the poverty line . . . . These statistics are in stark contrast with the fact that

> A comparison between whites and other racial groups in this country demonstrates a "severe and amazingly persistent pattern of income inequality." Over the past two decades, the median household income of blacks has remained at about 59% of the income earned by whites which is a difference of over twelve thousand. Hispanics' median household income is 72% of that earned by whites totalling a difference of over eight thousand dollars. During the past two decades, both of these gaps have grown. African-Americans face an especially disproportionate level of poverty in this country. While approximately 20% of all American children grow up in poverty, nearly half of black children grow up in poverty in the United States. The problem of huge numbers of African-Americans living in poverty does not seem to be improving. As William Julius Wilson explained, "[t]hroughout much of the 20th century, blacks were able to experience social mobility through good-paying, blue collar jobs. Now, as industry has moved to suburban and exurban areas, the traditional avenue out of poverty has been closed off." Racial minorities often find themselves in cycles of poverty that are difficult to escape.[52]

The PRA's purported aim is to "reduce government dependency, attack illegitimacy, require welfare recipients to work, and cut welfare spending."[53] According to the *Contract*, these objectives will be achieved in a number of ways.

First, AFDC payments would be restructured. Under the PRA, mothers under the age of eighteen who bear children out of wedlock would be denied AFDC benefits for their children.[54] The states, at their discretion, would be able to deny AFDC and housing benefits to mothers who are ages eighteen through twenty.[55] States would be given the option of eliminating AFDC benefits after the recipients have received welfare for two years.[56] Under the PRA, states would be required to "drop families"[57] who have received AFDC benefits for five years.[58]

> whites comprise about 80% of the U.S. population, but account for only 8.8% of the families living below the poverty line.

Marcus, *supra* note 13, at 234-35 (citations omitted).

52 Marcus, *supra* note 13, at 235 (citing George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1424-25 (1993); Cornel West, *The '80s. Market Culture Run Amok*, NEWSWEEK, Jan. 3, 1994, at 49; William Julius Wilson, *Hope for Our Cities*, PEOPLE, Jan. 17, 1994, at 81).

53 CONTRACT WITH AMERICA, *supra* note 1, at 66.

54 CONTRACT WITH AMERICA, *supra* note 1, at 70.

55 CONTRACT WITH AMERICA, *supra* note 1, at 66.

56 CONTRACT WITH AMERICA, *supra* note 1, at 66.

57 CONTRACT WITH AMERICA, *supra* note 1, at 66.

58 CONTRACT WITH AMERICA, *supra* note 1, at 66.

Second, states would be given extensive powers to develop and administer work programs tied to the receipt of welfare payments.[59] Under the PRA, the states would be granted the authority to develop their own work programs and determine who may participate in them.[60] Under this plan, states would be required to transfer welfare recipients who received benefits for two years into work programs.[61] The work programs would require welfare recipients to work an average of thirty-five hours a week.[62] Welfare participants would be permitted to participate in work programs for no more than two years.[63] The states would further be required to terminate AFDC payments to families who received welfare benefits for five years, whether or not the AFDC recipient has participated in the work program.[64]

Finally, governmental spending on major welfare programs such as AFDC and public housing programs would be cut drastically.[65] They would be consolidated with other programs, including food stamp and school lunch programs, and become a block grant to the states.[66] In addition, many non-citizens would also be denied any welfare payments.[67]

To say that Johnson's War on Poverty[68] was an "unqualified failure"[69] is simply untrue. The primary goal of welfare, to help those who are unable to help themselves financially, is still intact and has been achieved in part. Of course, there are flaws in the present welfare system, and some degree of reform is necessary.[70] Yet the Signatories' proposal in the *Contract* is extreme and highly suspect.

Despite the fact that Bureau of the Census statistics were readily available to the Signatories, they nevertheless chose to ignore them. These chilling figures demonstrate that minority women

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59 CONTRACT WITH AMERICA, *supra* note 1, at 66, 71-72.

60 CONTRACT WITH AMERICA, *supra* note 1, at 72.

61 CONTRACT WITH AMERICA, *supra* note 1, at 71.

62 CONTRACT WITH AMERICA, *supra* note 1, at 71-72.

63 CONTRACT WITH AMERICA, *supra* note 1, at 71.

64 CONTRACT WITH AMERICA, *supra* note 1, at 71-72.

65 CONTRACT WITH AMERICA, *supra* note 1, at 67, 72-73.

66 CONTRACT WITH AMERICA, *supra* note 1, at 67.

67 CONTRACT WITH AMERICA, *supra* note 1, at 73. The exceptions noted by the Signatories are refugees over seventy-five years of age, those lawfully admitted to the United States, or those who have resided in the United States for at least five years.

68 *See supra* notes 44-45 and accompanying text.

69 CONTRACT WITH AMERICA, *supra* note 1, at 67.

70 President Johnson's War on Poverty has been characterized as "a well-intended but poorly executed effort to treat [the racial inequality] malady." QUADAGNO, *supra* note 50, at 4.

and children will suffer most by the Republican welfare reform.[71] The statistics, while unpleasant, cannot be ignored. In 1993, 45.9% of all African American children and 39.9% of all children of Hispanic origin lived below the poverty level, while 17.0% of all white children lived below the poverty level.[72] In 1993, 31.3% of all African American families and 27.3% of all families of Hispanic origin lived below the poverty level, while only 9.4% of all white families lived below the poverty level.[73] Finally, in 1994, 60% of all the African American family households, and 31% of all Hispanic origin family households, were headed by single females, while 21% of white family households were headed by single females.[74] Moreover, in 1991, 33.4% of the African American population, and 26.3% of the population of those of Hispanic origin were participants in the major assistance programs in the United States, while only 9.1% of the entire white population were participants.[75] As the above statistics demonstrate, it is clear that the *Contract's* welfare proposals will have a disproportionately devastating effect upon minorities in America.

The *Contract's* racial agenda is also furthered by its justifications of the need for reforms. In its discourse, the *Contract* offers numerous blanket characterizations of welfare recipients to convince its constituency that the suggested reforms are necessary.[76] In doing so, the *Contract* reinforces many of the stereotypes concerning the poor in America.[77]

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71 BUREAU OF THE CENSUS, *supra* note 7, at 378.

72 BUREAU OF THE CENSUS, *supra* note 7, at 480.

73 BUREAU OF THE CENSUS, *supra* note 7, at 484.

74 BUREAU OF THE CENSUS, *supra* note 7, at 61.

75 BUREAU OF THE CENSUS, *supra* note 7, at 378. The major assistance programs covered were AFDC, General Assistance, SSI, food stamps, Medicaid and housing assistance. BUREAU OF THE CENSUS, *supra* note 7, at 378. Others have noted similar statistics.

> Statistics on poverty rates [demonstrate] that black families have maintained a poverty rate that is roughly three and-a-half times (twenty percentage points higher than) the poverty rates of white families. By comparison, the Hispanic rate is roughly three times higher (sixteen percentage points more) than that of whites.

Galster, *supra* note 13, at 1425 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 751, STATISTICAL ABSTRACT OF THE UNITED STATES, 1991, at 465); *see* Lisa A. Crooms, *Don't Believe the Hype: Black Women, Patriarchy, and the New Welfarism*, 38 How. L.J. 611, 615 (1995).

76 *See generally* CONTRACT WITH AMERICA, *supra* note 1, at 65-77.

77 *See, e.g.*, Crooms, *supra* note 75, at 622; Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 535 (1996); Lucy A. Williams, *Race, Rat Bites and Unfit*

For example, the *Contract* proposes that its welfare reform program is designed to fight, among other things, illegitimacy, crime, and illiteracy.[78] With that insight, the Signatories boast that the Republican party grasps something that Democrats do not—"incentives affect behavior."[79]

> Currently, the federal government provides young girls the following deal: Have an illegitimate baby and taxpayers will guarantee you cash, food stamps, and medical care, plus a host of other benefits. As long as you stay single and [do not] work, [we will] continue giving you benefits worth a minimum of $12,000 per year ($3,000 more than a full-time job paying a minimum wage). [It is] time to change the incentives and make responsible parenthood the norm and not the exception.[80]

According to the Signatories, teenage girls are getting pregnant so that they may receive welfare benefits.[81] Thus, logically, Republicans believe that the current American welfare system has become a "cash cow" to the poor mother. The Signatories apparently feel that denying benefits to mothers on welfare will teach them "responsibility."[82] Additionally, Speaker Gingrich has stereotyped a typical welfare recipient as a "thirteen year old drug addict [who is] pregnant" and whose baby faces the option of ending up in a "dumpster" or a "boarding school."[83] Moreover, in its attack on single parents,[84] the *Contract* states that "two out of every three *African-American* children are born out of wedlock."[85]

The Signatories argue that guaranteed income to the poor under the current welfare system in America creates a lifestyle of dependency, and encourages recipients not to work.[86] This concern is not novel. For hundreds of years, there has been the concern that giving money to the poor might encourage recipients to stop working.[87] For example, in the fourteenth century, England's

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Mothers: How Media Discourse Informs Welfare Legislation Debate, 22 FORDHAM URB. L.J. 1159, 1163 (1995).

78 CONTRACT WITH AMERICA, *supra* note 1, at 65.

79 CONTRACT WITH AMERICA, *supra* note 1, at 75.

80 CONTRACT WITH AMERICA, *supra* note 1, at 75.

81 Carla M. da Luz & Pamela C. Weckerly, *Will the New Republican Majority in Congress Wage Old Battles Against Women?*, 5 UCLA WOMEN'S L.J. 501, 528 (1995).

82 *Id.* at 529.

83 *Meet the Press: Incoming House Speaker Newt Gingrich, On Proposed Legislation Geared Toward Governmental Reform, Foreign Policy and His Novel* (NBC television broadcast, Dec. 4, 1994).

84 CONTRACT WITH AMERICA, *supra* note 1, at 70.

85 CONTRACT WITH AMERICA, *supra* note 1, at 70 (emphasis added).

86 *See* CONTRACT WITH AMERICA, *supra* note 1, at 65.

87 *See* ANDERSON, *supra* note 45, at 89.

first poverty laws forbade private citizens to give donations to the able-bodied poor.[88] These laws were supported by the belief that such donations did not encourage recipients to find work.[89] Unfortunately, the Signatories made the same assumption as this early English legislation that the poor receiving aid are lazy and do not want to work. Psychologist Erich Fromm stated that

> [m]an, by nature is not lazy, but on the contrary, suffers from the results of inactivity. People might prefer not to work for one or two months, but the vast majority would beg to work . . . . Misuse of the guarantee would disappear after a short time, just as people would not overeat on sweets after a couple of weeks, assuming they would not have to pay for them.[90]

Requiring able bodies to support themselves is legitimate. However, the *Contract* continues to stereotype and stigmatize welfare recipients as lazy, preferring to cash-in on welfare payments rather than work.

The PRA fails to accurately address the causes of the welfare problem in America. Furthermore, the Signatories are using welfare recipients as scapegoats. They attempt to scare their constituency by misinforming them that those on welfare are the source of the problem rather than what they really are—victims.

Unfortunately, in some instances, the ugly Republican message has been successful. On the House floor in March 1995, Rep. Cynthia McKinney (D-Ga.) read a hate letter that she received in which the writer compared African American women on welfare to "monkeys."[91] As Rep. McKinney so articulately concluded, "the

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88 *See* ANDERSON, *supra* note 45, at 89.

89 *See* ANDERSON, *supra* note 45, at 89.

90 Erich Fromm, *The Psychological Aspects of the Guaranteed Income, in* THE GUARANTEED INCOME: NEXT STEP IN ECONOMIC EVOLUTION? 177-79 (Robert Theobald ed., 1965).

91 141 CONG. REC. H3741 (daily ed. Mar. 24, 1995) (statement of Rep. McKinney). The letter stated:

> After watching your Negro boss do her jungle act about bringing back the brown shirts, I think we need some color shirts to control these Negro females who pop out . . . Negro children like monkeys in the jungle. No, I think the monkeys are more civilized. We real Americans [do not] intend to support . . . Negro children who live like rats in a hole and [do not] have a chance to become human. The welfare system is the cause. Even whites are becoming trash just like Negroes who pop out all these . . . Negro children. [Do you not] understand that we Americans are trying to civilize you? Why do you fight so hard? The jungle is in Africa, though you have turned D.C. into an American jungle. Grow up and become an American.

Id.

spirit of GOP welfare reform lives in these words."[92]

Amid much controversy and after two prior presidential vetoes, President Clinton accepted and signed into law a welfare bill "largely written on Repuhlican terms."[93] Much of the bill was conceived from the Republican's PRA found in the *Contract.* In particular, AFDC benefits will end and be replaced with block grants from the federal government to the states;[94] states will be permitted to end payments to unwed teenage mothers;[95] benefits will be limited to five years, but states may impose a shorter limit;[96] and the bill prohibits immigrants, including legal immigrants, from receiving various welfare programs, such as food stamps and Medicaid.[97]

B. The Taking Back Our Streets Act and Criminal Justice Reform

The Signatories, through the *Contract,* attempt to save the "American Dream."[98] They proposed a tough anti-crime package. Their proposal stated:

> The American Dream cannot survive without safety and security for individual Americans—for all of you. When our children are afraid to go to school, when husbands and wives are afraid to walk to the grocery store, and when society as a whole is being threatened, government must meet its responsibility to protect our streets, our schools, and our neighborhoods.[99]

According to the *Contract,* the TBOSA symbolizes the

> Republican approach to fighting crime: making punishments severe enough to deter criminals from committing crimes, making sure that the criminal justice system is fair and impartial for all, and making sure that local law enforcement officials (who are on the streets every day) and not Washington bureaucrats direct the distribution of federal law enforcement funds.[100]

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92 *Id.* at H3742.

93 John F. Harris & John E. Yang, *Clinton to Sign Bill Overhauling Welfare,* WASH. POST, Aug. 1, 1996, at A1. "Clinton said the measure has 'serious flaws' . . . but he pledged to sign it anyway because it is the 'best chance we will have in a long, long time' to fulfill his 1992 campaign promise of 'ending welfare as we know it:'" *Id.* Acknowledging that there would be protest, "Clinton said that he would work to correct the bill's deficiencies with later legislation." *Id.*

94 Barbara Vobejda, *House Passes Major Overhaul of Nation's Welfare Programs,* WASH. POST, July 19, 1996, at A1.

95 *Id.*

96 *Id.*

97 *Id.*

98 CONTRACT WITH AMERICA, *supra* note 1, at 37.

99 CONTRACT WITH AMERICA, *supra* note 1, at 37.

100 CONTRACT WITH AMERICA, *supra* note 1, at 38.

The TBOSA's provisions are wide-ranging. First, it proposes to reform the habeas corpus process.[101] Specifically, it would place time limitations on filing federal and state habeas corpus appeals, and would limit prisoners to one appeal.[102] Second, jury instructions for death penalty cases would be reformed.[103] Under the TBOSA, juries would be instructed to recommend a death sentence if aggravating factors underlying the crime outweigh mitigating factors.[104] Juries would also be required to refrain from considering any "influence of sympathy, sentiment, passion, prejudice or other arbitrary factors."[105] Third, federal courts would be directed to dismiss any "frivolous" lawsuits by prisoners.[106] Fourth, the "good faith" exception to the exclusionary rule[107] would be expanded to include the introduction of evidence where the police acted in "good faith" in a warrantless search and seizure incident.[108] Fifth, mandatory minimum sentencing would be required for "state or federal drug or violent crimes that involve the possession of a gun."[109] Sixth, criminals would be required to pay restitution to their victims as a result of their criminal activity.[110] Seventh, block grants would be allocated to local law enforcement bodies specifically for "law enforcement" and not for crime prevention programs.[111] Eighth, any illegal alien convicted of an aggravated felony would be deported.[112] Finally, money would be allocated to the states for building and expanding prisons.[113]

With the help of enormous media exposure, many Americans believe that the crime rate in this country has escalated to unprece-

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101 CONTRACT WITH AMERICA, *supra* note 1, at 43-44. The primary function of a writ of habeas corpus "is to release from unlawful imprisonment." *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990). The writ permits a prisoner to challenge a conviction on constitutional grounds. *Id.*

102 CONTRACT WITH AMERICA, *supra* note 1, at 43-44.

103 CONTRACT WITH AMERICA, *supra* note 1, at 45-46.

104 CONTRACT WITH AMERICA, *supra* note 1, at 45.

105 CONTRACT WITH AMERICA, *supra* note 1, at 38.

106 CONTRACT WITH AMERICA, *supra* note 1, at 53.

107 The exclusionary rule "commands that where evidence seized has been obtained in violation of the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant." BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

108 CONTRACT WITH AMERICA, *supra* note 1, at 52-53.

109 CONTRACT WITH AMERICA, *supra* note 1, at 47.

110 CONTRACT WITH AMERICA, *supra* note 1, at 47-49.

111 CONTRACT WITH AMERICA, *supra* note 1, at 49-50. The TBOSA would also "repeal sections of the recently enacted crime control act that provide specific funds for drug courts, recreational programs, community justice programs, and other social prevention spending." CONTRACT WITH AMERICA, *supra* note 1, at 50.

112 CONTRACT WITH AMERICA, *supra* note 1, at 54.

113 CONTRACT WITH AMERICA, *supra* note 1, at 51-52.

dented proportions.[114] Daily television viewers are treated to a large dose of violent crime through the nightly news programs, "cop shows," and tabloid news.[115] As a result, crime has become an important political platform for the GOP, which uses it to instill more fear and garner more votes from their constituency.[116]

Few can deny that the crime problem in America is profound. However, the media has misled American viewers.[117] In the United States, violent crimes reported to the police actually dropped by 3% from 1991 to 1992, and 2% from 1992 to 1993.[118] Moreover, as *The New York Times* reported, a recent FBI survey from 1995 data concluded that the overall violent crime rate in America is at its lowest since 1989, and the country's murder rate is at the lowest in ten years.[119]

Beyond mischaracterizing the crime problem in America, the TBOSA's flaws go much deeper. In its purported intent to save the "American Dream," the *Contract* shatters it for many. In a criminal justice system that may be fairly characterized as racist,[120] the proposals in the *Contract* would tighten the system's racist grip.[121]

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114 *See* David Zucchino, *Today's Violent Crime Is Old Story with a Twist*, PHILA. INQ., Oct. 30, 1994, at A1.

115 *Id.*

116 *See* BUREAU OF THE CENSUS, *supra* note 7, at 268. In 1994, according to the Bureau of the Census, approximately 45% of whites identified their political affiliation as Republican, compared to less than 10% of African Americans. BUREAU OF THE CENSUS, *supra* note 7, at 268.

117 *See* Zucchino, *supra* note 114, at A1.

118 BUREAU OF THE CENSUS, *supra* note 7, at 199. Violent crime includes murder, rape, robbery, and aggravated assault. BUREAU OF THE CENSUS, *supra* note 7, at 199.

119 *Violent Crime Declines 8 Percent in Big Cities*, N.Y. TIMES, Oct. 13, 1996, at 25. The FBI survey was "compiled from crimes reported to more than 16,000 law-enforcement agencies covering 95 percent of the nation's population." *Id. See also* Clifford Krauss, *New York Crime Rate Plummets to Levels Not Seen in 30 Years*, N.Y. TIMES, Dec. 20, 1996, at A1.

120 It is noted that reliance solely on statistical data does not necessarily prove that the criminal justice system is racist. However, the statistics that follow, which demonstrate "the magnitude of the disparities [between African Americans and whites in the criminal justice system] ought to give us pause." David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2557 (1995).

121 It has been recognized that

> there are a greater percentage of black males incarcerated in the United States than in South Africa. There are 14,625,000 black men in the United States, of which 454,724 are incarcerated. South Africa has 15,050,642 black men and only 109,739 of them are incarcerated. "Nearly one in every four black men in the United States between 20-29 years of age is under the control of the criminal justice system—whether in prison or jail, on probation, or parol." This over-representation of minority groups is not only a black-white issue—it affects all racial minorities in the United States.

> [W]e really should not be surprised to find some form of racial bigotry present in the criminal justice system. It is surely evident in the society at large, and the criminal justice system is not isolated from the larger society. Indeed, the evidence is persuasive that the system is heavily influenced by the surrounding culture.[122]

The force of this proposition is reflected in various ways. In 1992, African Americans made up approximately 12% of the total population, while whites made up approximately 83% of the population.[123] In 1992, 8.3% of the estimated 21.4 million African American adults[124] were either in jail or prison, on probation or parole.[125] In contrast, 1.7% of the estimated 160 million white adults were either in jail or prison, on probation or parole.[126] Moreover, in 1992, approximately 3,930 African Americans eighteen years of age and older out of every 100,000 Americans were arrested, while approximately 793 white people eighteen years of age and older out of every 100,000 Americans were arrested.[127] Indeed, others have noted similar findings.

> A number of national studies have yielded startling statistics regarding the high proportion of minorities involved in the criminal justice system. In a 1990 study, the Sentencing Project reported that, nationally, the total number of black males aged [twenty] to [twenty-nine] who were under some control by the criminal justice system was greater than the total number of similarly-aged black males enrolled in college. Of all black males in this age range, 23% were either in prison or jail, or on probation or parole. The study stated that 6.2% of whites and 10.4% of Hispanics in the same age range were similarly involved in the criminal justice system. A 1993 Sociological Quarterly paper by

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Marcus, *supra* note 13, at 237 (citations omitted).

122 GREGORY D. RUSSELL, THE DEATH PENALTY AND RACIAL BIAS: OVERTURNING SUPREME COURT ASSUMPTIONS 1 (1994). The author devotes an entire chapter in which he discusses how racism produces different outcomes throughout the criminal justice system. The author discusses research compiled on, among other things, bias in crime detection, bias in police behavior and arrest, bias in the grand jury, prosecutor and courtroom, and bias in judicial sentencing. *Id.* at 49-71.

123 BUREAU OF THE CENSUS, *supra* note 7, at 14. In 1992, the white population was approximately 213 million, the African American population was 31.6 million, and the population of those of Hispanic origin was 24.2 million. BUREAU OF THE CENSUS, *supra* note 7, at 14.

124 The adult population consists of those over eighteen years of age. *See infra* note 125.

125 TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1992, at 5 (1995).

126 *Id.*

127 U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 378 (1994).

> J. Kramer and D. Steffensmeir reported that blacks represented 13% of the U.S. population and 50% of those persons in prisons. In the proceedings of the "Studying Race and Gender Bias in the Criminal Justice System" workshop at the 1993 BJS/JRSA National Conference on Enhancing Capacities and Confronting Controversies in Criminal Justice, it was noted that while blacks account for approximately 12% of the U.S. population they represented 64% of the robbery arrests, 55% of homicide arrests, and 32% of the burglary arrests.[128]

The Signatories of the *Contract* apparently ignored these disturbing statistics. Thus, according to these statistics, a large and discriminating disparity exists between a minority's contact and a white person's contact with the criminal justice system.[129] Therefore, the reforms proposed by the Signatories will disproportionately touch the lives of minorities in America.[130]

The habeas corpus reform proposed by the *Contract* is deceptive and should be more appropriately referred to as habeas corpus "repeal."[131] The reform will affect state and federal habeas corpus process in both capital and noncapital cases.[132] The time limitations and "one appeal rule"[133] will have a tremendous negative ef-

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128 Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 766 (1996). *See also* Robert Carter, *Racism and the Criminal Justice System: The Struggle Continues*, 10 NAT'L BAR ASS'N MAG. 34, 36-38 (March/April, 1996).

129 *See supra* notes 120-128 and accompanying text.

130 It is a sad reality in America that individuals in some racial groups are more likely than others to go to prison than college. *See, e.g.*, MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-1993, 18 (1994); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 145 n.8 (1996); Cole, *supra* note 120, at 2557; Georgia Supreme Court Commission, *supra* note 128, at 766; Nantambu, *supra* note 7, at 9B.

For instance, in 1992, the total number of African American males who were incarcerated in state or federal prisons (399,755), SNELL, *supra* note 125, at 70, closely approached the number of African American males who were enrolled in college (527,000). BUREAU OF THE CENSUS, *supra* note 7, at 180. By contrast, the number of white males in college (5,210,000), BUREAU OF THE CENSUS, *supra* note 7, at 180, greatly exceeded the total number of white males incarcerated in state or federal prisons (386,103), SNELL, *supra* note 125, at 70. Indeed, the number of African American males incarcerated actually outnumber those in college when combining the state or federal prison population with the jail population. In a 1994 study by the Sentencing Project, it was determined that in the United States in 1992, the number of African American males who were incarcerated in prisons or jails was 583,000, while the number of African American males who were enrolled in institutions of higher education was 537,000. MAUER, *supra* note 130, at 18.

131 Symposium, *Are Executions in New York Inevitable?*, 22 FORDHAM URB. L.J. 557, 599 (1995) (quoting NAACP attorney George H. Kendall).

132 CONTRACT WITH AMERICA, *supra* note 1, at 43.

133 CONTRACT WITH AMERICA, *supra* note 1, at 44.

fect on prisoners seeking legitimate constitutional challenges to their sentences. As NAACP attorney George Kendall stated, the proposed habeas corpus reform will "handcuff and blindfold the federal judiciary, preventing it from granting any remedy whatsoever even when it is faced with egregious, shocking, harmful violations of the Bill of Rights in capital cases."[134]

The death penalty has remained a topic of bitter debate throughout the years in America. In the Signatories' effort to expand capital punishment, the *Contract* proposes two new mandates on jury instructions in criminal cases. First, juries would be instructed to recommend the death penalty if aggravating factors outweigh mitigating factors.[135] Second, "juries must also be instructed to avoid any 'influence of sympathy, sentiment, passion, prejudice or other arbitrary factors' in their decisions."[136]

In one of his final opinions before his retirement from the United States Supreme Court, Justice Blackmun passionately articulated his antipathy towards the death penalty in *Callins v. Collins*.[137] He wrote:

> From this day forward, I no longer shall tinker with the machinery of death. For more than [twenty] years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor . . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[138]

Justice Blackmun stated that the death penalty, as the ultimate form of punishment, has always been and remains to be fraught with "arbitrariness, discrimination, caprice and mistake."[139] He also acknowledged that the arbitrariness of the sentencer's discretion to afford mercy is heightened by the problem of race.[140] Race, as Blackmun declared, "continues to play a major role in determining who shall live and who shall die."[141]

Justice Blackmun's observations are borne out by the statistics. In the United States from 1930 to 1993, more African Americans (2,154) were executed than whites (1,864).[142] Moreover, there is

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134 Symposium, *supra* note 131, at 599.
135 CONTRACT WITH AMERICA, *supra* note 1, at 45.
136 CONTRACT WITH AMERICA, *supra* note 1, at 45.
137 510 U.S. 1141 (1994) (Blackmun, J., dissenting).
138 *Id.* at 1145.
139 *Id.* at 1144.
140 *Id.* at 1153.
141 *Id.*
142 BUREAU OF THE CENSUS, *supra* note 7, at 220.

evidence that the death penalty is grossly and disproportionately applied where the victims are white and the defendants are black.[143] In Georgia, for instance, "blacks who kill whites are sentenced to death at nearly *[twenty-two] times* the rate of blacks who kill blacks, and more than *[seven] times* the rate of whites who kill blacks."[144]

Rather than realize the inherent flaws with the death penalty, the Signatories simply ignored them. The evidence of discrimination in death penalty sentencing was overwhelming, yet the Signatories still encouraged capital punishment. This reform is another way to insure a guilty verdict in capital cases and broaden the use of the death penalty by the Signatories who encouraged capital punishment. Similarly, the abolishment of the so-called "arbitrary factors" in jury instructions—sympathy, sentiment, passion or prejudice—would either expressly or implicitly abolish considerations of race, poverty or mental deficiency. The Signatories attempted to foreclose the jury's consideration of valid, meaningful factors which play a prominent role in shaping the life, and now death, of a human being.

The *Contract's* death penalty reforms are the most disturbing of the TBOSA proposals. A serious reform measure would be to dismantle capital punishment in America altogether because of its inherent prejudice, arbitrariness and error. Yet, the Signatories ignored the death penalty's grim truth. Their proposals would force a jury to refrain from applying their own knowledge, insight, and reservations about capital punishment.

The Signatories also proposed a reform which mandated federal courts to dismiss any "frivolous or malicious" lawsuits filed by prisoners.[145] Unquestionably, this would have an enormous effect on all prisoners, who would find it much more difficult to challenge their treatment behind bars. Naturally, there have been suits which many people may consider frivolous (e.g. male prisoner suing for his right of access and to wear bras and lipstick;[146] inmates

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[143] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 149-50 (1990).

[144] McCleskey v. Kemp, 481 U.S. 279, 327 (1987) (emphasis in original). In *McCleskey*, the petitioner was an African American man convicted of murder and sentenced to death. *Id.* He sought habeas corpus relief in federal court and offered a statistical study as evidence that a disparity in the imposition of the death penalty in Georgia based on the victim's race and the defendant's race existed. *See* BALDUS, *supra* note 143.

[145] CONTRACT WITH AMERICA, *supra* note 1, at 53.

[146] Jones v. Warden, 918 F. Supp. 1142 (N.D. Ill. 1995).

complaining about white only underwear rule;[147] inmates not provided with towel racks for wet towels[148]). Although memorable, the actual number of these types of suits are few, and in most (if not all) instances, they are dismissed.[149]

Although the *Contract* states that it is not seeking to diminish inmates' rights,[150] the *Contract's* reforms are based on such lawsuits.[151] In reality, the vast majority of prisoners' lawsuits are meritorious. They involve topics of serious concern to any human being, such as inadequate medical treatment,[152] overcrowding, and unsafe and unsanitary living conditions.[153]

Consider, for instance, the following federal cases from Alabama. In *Newman v. Alabama,* a quadriplegic inmate spent months in the prison hospital suffering from bedsores.[154] The sores eventually developed into open wounds because of a lack of medical care.[155] As a result, the sores became infested with maggots.[156] In *Pugh v. Locke,* many deficiencies in the living conditions of most of the inmates were apparent. For example, the living quarters of the inmates were inadequately heated; diseases and body lice were widespread due to their filthy old cotton mattresses; the prison failed to furnish toothbrushes, toothpaste, or shampoo; the inmates had no eating and drinking utensils and had to use tin cans; and food was stored in filthy units which were infested with insects.[157]

Newman and *Pugh* are far more representative of the legitimate interests that comprise a typical inmate's lawsuit. They address serious legal issues involving violations of prisoners' rights under the Eighth and Fourteenth Amendments. Unlike the examples cited

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147 Burnette v. Phelps, 621 F. Supp. 1157 (M.D. La. 1985).

148 *Id.*

149 *See id; see also Jones,* 918 F. Supp. at 1145.

150 CONTRACT WITH AMERICA, *supra* note 1, at 61.

151 CONTRACT WITH AMERICA, *supra* note 1, at 61. The *Contract* states that "[p]risoners have asserted that a lack of Frisbees, art supplies, and chunky peanut butter (as opposed to creamy peanut butter) constitutes cruel and unusual punishment." CONTRACT WITH AMERICA, *supra* note 1, at 61.

152 Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part,* 503 F.2d 1320 (5th Cir. 1974), *reh'g denied,* 506 F.2d 1056 (5th Cir.), *cert. denied,* 421 U.S. 948 (1975).

153 Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and remanded,* Newman v. Alabama, 559 F.2d 283 (*Pugh* was consolidated with *Newman*), *reh'd denied,* Pugh v. Locke, 564 F.2d 98 (5th Cir. 1977), *cert. granted in part, judgment rev'd in part sub nom.,* Alabama v. Pugh, 438 U.S. 781, *cert. denied,* 438 U.S. 915 (1978).

154 *Newman,* 349 F. Supp. at 285.

155 *Id.*

156 *Id.*

157 *Pugh,* 406 F. Supp. at 322-23.

by the *Contract*, these cases more often than not shock the conscience.

By proposing this reform, the GOP is again focused upon a prison population that contains a disproportionate number of minorities.[158] Such reforms serve only to intensify their plight. This is simply another attempt to remove constitutional rights from prisoners, who are the "'least-represented group in society.'"[159] For each meritless lawsuit that this proposal prevents, there are potentially dozens of legitimate actions that will also be foreclosed. The Signatories exploit the most outrageous examples to create legislation. They take the position that "'[i]t is easy to try to convince the American public that every lawsuit filed by an inmate is frivolous'"[160] simply because they are prisoners.

The *Contract* also seeks an expansion of the "good faith" exception to the exclusionary rule.[161] This proposal would extend the Supreme Court's decision in *United States v. Leon*.[162] The *Contract* proposes to extend the "good faith" exception to the exclusionary rule to apply to searches conducted without a warrant.[163] The Signatories argue that this is necessary to remedy the suppression of reliable evidence under the current rule, which seemingly permits guilty defendants to either "go free or receive reduced sentences as a result of a favorable plea bargain."[164]

This proposal does more harm than good. Opponents of the expansion of the "good faith" exception note that "[t]he notion that the rule needs to be relaxed because 'hordes of criminals are being released [on] legal technicalities' is a myth."[165] Further-

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158 *See supra* notes 120-128 and accompanying text.

159 Jeff Barker, *Congress Moves Closer to Limiting Inmate Lawsuits*, ARIZ. REP., Nov. 13, 1995, at B1 (quoting Kathi Westcott, coordinator of a Washington, D.C. based prisoners rights coalition).

160 *Id.* (quoting Donna Leone Hamm, founder of Middle Ground, an Arizona prisoner's rights group).

161 CONTRACT WITH AMERICA, *supra* note 1, at 52-53.

162 468 U.S. 897 (1984). *Leon* held that the exclusionary rule does not apply when the police act in "good faith" on a defective search warrant. *Id.* The "good faith" exception to the exclusionary rule "provides that evidence is not to be suppressed under such rule where that evidence was discovered by officers acting in good faith and in reasonable, though mistaken, belief that they were authorized to take those actions." BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

163 CONTRACT WITH AMERICA, *supra* note 1, at 52-53.

164 *Leon*, 468 U.S. at 907.

165 Kenneth Jost, *Exclusionary Rule Reforms Advance: Opponents Claim Proposals Unconstitutional, Encourage Police Misconduct*, 81 A.B.A. J. 18 (1995) (quoting Thomas Davies, Professor of Law at the University of Tennessee). Davies stated that the exclusionary rule has been narrowed by a number of rulings by both the Rehnquist and the Burger Supreme Courts. *Id.*

more, this expansion would not only undermine the principles of the Fourth Amendment, but also would promote police misconduct. The police undoubtedly will have little or no trouble persuading a court that they meet the minimal "reasonable basis" requirement for believing the search was valid.

In yet another chapter on the federal government's "war on drugs," the TBOSA proposes mandatory minimum sentences of ten years for federal or state drug or violent crimes that involve the possession of a gun.[166] However, since stringent sentencing guidelines restrict judges' discretion at sentencing, in many instances the punishment does not fit the crime.[167] Mandatory sentences have come under increased attack by members of the judiciary.[168] Supreme Court Justice Anthony Kennedy stated that "mandatory minimums are an imprudent, unwise, and often unjust mechanism for sentencing."[169] The *Contract* ignores the concerns of the judiciary. Thus, even when a person does not actually use the gun to commit the drug crime, he will automatically receive a ten year sentence, regardless of whether it was found on the defendant's person. In other words, even if a nexus does not exist between the gun seized and the illegal drug activity, the defendant will nevertheless receive the full mandatory prison sentence of ten years.

The other proposals offered in the TBOSA provide additional harsh methods to fight crime.[170] Nevertheless, because of the racism inherent in the American criminal justice system, all of these proposals will affect a disproportionate number of minorities.[171]

Since the commencement of the 104th Congress, some provisions of the TBOSA were enacted as part of the anti-terrorism legislation that was signed into law in late April 1996.[172] The most

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166 CONTRACT WITH AMERICA, *supra* note 1, at 46-47.

167 *See, e.g.*, 140 CONG. REC. S10,281 (daily ed. Aug. 2, 1994) (statement of Sen. Paul Simon). Sen. Simon quoted a number of people in opposition to mandatory minimum sentences, including Justice Anthony Kennedy. *Id.*

168 *Id.*; *see also* Edward A. Adams, *Federal Judge Scores Mandatory Sentences for Dealing in Drugs*, N.Y.L.J., Aug. 26, 1993, at 1.

169 140 CONG. REC., *supra* note 167, at S10,281. Justice Kennedy made these and other comments during a House Appropriations subcommittee hearing on the Supreme Court budget. 140 CONG. REC, *supra* note 167, at 510, 281.

170 CONTRACT WITH AMERICA, *supra* note 1, at 47-52. The other proposals include victim restitution, block grants to the states specifically for law enforcement as opposed to crime prevention programs, and the allocation of money to the states for building more prisons. CONTRACT WITH AMERICA, *supra* note 1, at 47-52.

171 *See supra* notes 120-128 and accompanying text.

172 Joan Biskupic & Helen Dewar, *Senate Would Limit Appeals on Death Row; Anti-Terrorism Bill Wins in 91-8 Vote*, WASH. POST, Apr. 18, 1996, at A1. Although the legislation focused primarily on anti-terrorism measures, the bill, in addition to the habeas corpus proposal, also provided more money for state law enforcement and the depor-

noteworthy aspect of that bill, which primarily was enacted as a tool to fight domestic and international terrorism, contained the GOP's habeas corpus "reform" to restrict the number of appeals by all prisoners, including death-row inmates.[173] In most circumstances, inmates would be restricted to one federal appeal, and federal judges would have to defer to state court rulings to determine if an inmate's constitutional rights were violated.[174]

C. *Other Proposed Reforms*

Two other proposed reforms in the *Contract* merit some discussion because of their potentially devastating effects on the poor. They are the Fiscal Responsibility Act ("FRA")[175] and the Common Sense Legal Reforms Act ("CSLRA").[176] Although these reforms will devastate the poor in general, they will disproportionately impact minorities.[177]

First, the FRA proposes a balanced budget amendment to the Constitution.[178] Under this plan, the Signatories proposed to balance the budget by the year 2002.[179] Although requiring the federal government to balance the budget may be fiscally sound, the burdens associated with doing so will fall squarely upon the poor's shoulders. The heart of the GOP's plan for balancing the budget includes huge cuts in federal aid to the states.[180] The Center on Budget and Policy Priorities (the "Center") projected that such cuts, which would include a $100 billion annual loss in federal aid to state and local governments, would have a destructive effect on the states.[181] The Center predicted "that by the year 2000, two years short of a [GOP proposed] balanced budget, the loss of federal aid would exceed all state spending in all [fifty] states on programs for the poor."[182]

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tation of non-citizens who commit crimes. *See* Mary Jacoby, *Vetoes Blocked the GOP's 'Contract,'* CHI. TRIB., Apr. 28, 1996, at 3.

173 Jacoby, *supra* note 172, at 3.

174 Helen Dewar, *Hill Negotiators Agree on Anti-Terrorism Bill*, WASH. POST, Apr. 16, 1996, at A7.

175 CONTRACT WITH AMERICA, *supra* note 1, at 24.

176 CONTRACT WITH AMERICA, *supra* note 1, at 144.

177 *See supra* notes 51-52 and accompanying text.

178 CONTRACT WITH AMERICA, *supra* note 1, at 24.

179 CONTRACT WITH AMERICA, *supra* note 1, at 32.

180 William M. Welch, *Liberal Group: Balanced Budget Will Cost States*, USA TODAY, Jan. 31, 1995, at 5A.

181 *Id.* The author provides telling statistics. The loss in aid to the states "would amount to $342 per person nationally, and run as high as $591 per person in Alaska; $577 per person in Mississippi; and $566 per person in New York." *Id.*

182 *Id.*

The Signatories of the FRA clearly are not concerned with balancing the budget. If so, they would begin their cuts with oversized spending programs such as the defense budget.[183] At the moment, "the defense budget is three times as large as the total of all federal cash, food, housing, jobs, and education benefits for the poor."[184] In fact, the Signatories actually proposed strengthening the national defense, including increased spending for the Pentagon.[185] Thus, the intent of the Signatories is not to balance the budget, but rather to sabotage the poor. Fortunately, such efforts have failed thus far. The balanced budget amendment did not become law. President Clinton vetoed it, "declaring its spending cuts too harsh."[186]

Second, the *Contract*, aiming to discourage frivolous tort litigation, proposes the CSLRA.[187] The most radical provision of the CSLRA imposes a "loser pays" approach.[188] This approach would require the loser in various types of federal cases to pay the legal fees of the winner, including attorneys' fees.[189] However, the "loser pays" provision of the CSLRA is not simply a device aimed at stopping "frivolous lawsuits"[190] as represented, but rather "a device designed by selfish corporations to discourage lawsuits—both legitimate and frivolous—which threaten their profits."[191]

Because it will discourage legitimate lawsuits by individuals against huge corporations, the "loser-pays" provision "is a losing approach for most Americans,"[192] especially the poor. For example, a poor person who sustains serious injuries as a result of a defective product and is out of work must now make a choice. Should he pursue his legitimate claim against the product's manufacturer or risk losing his home, savings, and other assets if he loses his suit?[193] Under the GOP's "reform," he would have to pay not only the costs of the corporate manufacturer, but also the potentially tens of thousands of dollars in legal fees of the law firm that

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183 *See* Ken Schechtman, *Contract Is Out of Balance*, ST. LOUIS POST DISPATCH, Apr. 27, 1995, at 7B. The author states that the defense budget is $260 billion. *Id.*

184 *Id.*

185 CONTRACT WITH AMERICA, *supra* note 1, at 92-93 (The National Security Restoration Act).

186 Jacoby, *supra* note 172, at 3.

187 CONTRACT WITH AMERICA, *supra* note 1, at 144.

188 CONTRACT WITH AMERICA, *supra* note 1, at 145.

189 CONTRACT WITH AMERICA, *supra* note 1, at 145.

190 CONTRACT WITH AMERICA, *supra* note 1, at 18.

191 Alan Dershowitz, *'Loser Pays' Tort Reform Aptly Named*, BUFFALO NEWS, Mar. 15, 1995, at B3.

192 *Id.*

193 *See id.*

represented the manufacturer.[194]

Access to justice should not be restricted only to those who can pay for it.[195] However, this "reform" does in fact impose such a system. As a result, it threatens the very heart of the American consumer's legal rights and protections. The "loser pays" rule would all but remove the means of all Americans, except the powerful and wealthy, to assert their rights in a court of law. Like the balanced budget amendment, product liability reform to limit punitive damages on personal injury cases and the "loser-pays" provision failed to become law during the 104th Congress.[196]

IV. CONCLUSION

November 8, 1994 was indeed a turning point for America. Quite simply, it began a disturbing new era in American government. The *Contract with America* has many themes. It is a manifesto empowering white and wealthy America. It is about suspicion and distaste for those groups that are outside of the Republican mainstream — minorities and the poor. It is about Republicans stoking the fear of middle-class white voters. However viewed, the *Contract with America* is a document replete with racism. The Republican initiatives outlined in the *Contract*, either facially or subtly or in their purpose or effect, will disproportionately devastate minorities in America.

The 1996 elections provided the Republicans with an opportunity to push through the remaining proposals on their agenda in the 105th Congress. Indeed, many Republican candidates attempted to capitalize upon the success of the programs proposed in the *Contract*, and their hidden racial undertones, in their 1996 campaigns. In their platforms, we heard echoes of the *Contract* in their promises to balance the budget, fight crime, and strengthen family values. The GOP's racial agenda is not new. However, in light of the Republican majority's success in legislating portions of their manifesto, and as a result of the November 5, 1996 elections, a need for skepticism exists now more than ever.

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194 *See id.*

195 *See* Ervin A. Gonzalez, *Big Business Is Selling Bill of Goods*, SUN SENTINEL (Ft. Lauderdale), May 6, 1995, at 15A.

196 Securities litigation reform, which was part of the GOP tort reform, has become law. Jacoby, *supra* note 172, at 3.

CANVASSING "POINT OUTS" AND POLICE SUGGESTION: A COMMENT ON *PEOPLE v. DIXON*

Geoffrey T. Raicht†

I. INTRODUCTION

Wade hearings seek to "test identification testimony for taint arising from official suggestion during 'police-arranged confrontations between a defendant and an eyewitness.'"[1] In *United States v. Wade*,[2] the United States Supreme Court noted that one major fac-

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[1] People v. Dixon, 647 N.E.2d 1321, 1323 (N.Y. 1995) (quoting People v. Gissendanner, 399 N.E.2d 924, 930 (N.Y. 1979)). *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 659 (8th ed. 1994) (*Wade* hearings seek "to protect the reliability of the identification process and to make available testimony about the conditions under which such process is carried out . . . ."); *see also* Leonard B. Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984); Joseph D. Grano, Kirby, Biggers, *and* Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Yale Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978); Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U. PA. L. REV. 1079 (1973); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992); Charles A. Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097 (1974); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984); *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 521 (1988); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441 (1978); Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741 (1993).

[2] 388 U.S. 218 (1967) (applying Sixth Amendment right to counsel to pretrial lineups). Moreover, the Supreme Court held that the right to counsel applied because

> of "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup." The Court was concerned about the potential suggestiveness of improper lineup or showup procedures. To protect the defendant from prejudice, the *Wade* Court recognized that a

tor which contributes to "the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[3] The Court further noted that "[s]uggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and, thus, his susceptibility to suggestion the greatest."[4] When police officers conduct identification procedures, the possibility of suggestion is no less serious.[5] Often, shortly after a crime has occurred, police will conduct a "show-up" where they present the suspect to a witness for identification.[6] In some instances, a victim or witness will only be in the presence of police, canvassing the area near the scene of the crime, when they point out a perpetrator.[7] Does this situation command a *Wade* hearing?[8] In February 1995, New York State's highest court ruled that where the police canvass an area of a crime scene with a victim or witness in their car and a perpetrator is "pointed out," the iden-

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> postindictment lineup is a "critical stage" of the criminal proceedings, at which the defendant has a right to counsel. The Court reasoned that the presence of counsel at such a "critical stage" can prevent prejudicial identification procedures and can enable counsel to reconstruct and challenge those procedures at trial.

Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987, 76 GEO. L.J. 521, 651 (1988) (internal citations omitted).

[3] *Wade*, 388 U.S. at 228.

[4] *Id.* at 229.

[5] Stovall v. Denno, 388 U.S. 293 (1967) (the Court extended due process right to exclude identification testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification).

[6] *See, e.g.*, People v. Clark, 649 N.E.2d 1203 (N.Y. 1995).

[7] *See generally* People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995).

[8] Canvassing of a crime scene in a police van with a witness is akin to "alley confrontations" or "prompt confrontations with the victim or an eyewitness at the scene of the crime." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 669 (8th ed. 1994). This type of identification has been exempted from the right to counsel requirement under the Sixth Amendment. *Id.* (citing Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969)). However, in pre-arrest and pre-indictment cases

> [t]he Due Process Clause of the Fifth and Fourteenth Amendments forbids a line up that is unnecessarily suggestive and conducive to irreparable mistaken identification. When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.

Kirby v. Illinois, 406 U.S. 682, 691 (1972) (internal citation omitted).

tification procedure must be subject to a *Wade* hearing.[9] The decision enhances due process and may burden criminal court calendars. However, the New York State Court of Appeals was correct by affording defendants this extra layer of protection.

While this opinion may be viewed as a branding of police procedures as inherently suggestive,[10] such a stark view is unnecessary. While the New York State Court of Appeals' grant of due process protection was correct, one need not believe that police practices are inherently malicious and in need of constant oversight. That is not to say that police do not, at times, disregard certain individual constitutional protections. However, even the most honest and well-intentioned police officer may unknowingly taint an identification.

II. THE ROBBERY OF HAROLD KNOWINGS AND THE ARREST OF ROBERT DIXON

A group of men robbed Harold Knowings as he exited a grocery store in Brooklyn.[11] Shortly thereafter, transit police officers drove Harold Knowings in a marked van around the streets near where the robbery occurred.[12] During the "canvass," Knowings "pointed to" Robert Dixon on the street and identified him as one of the men who robbed him earlier.[13] Based on Knowings' identification, police immediately arrested Dixon and charged him with robbery in the second degree,[14] grand larceny in the fourth degree,[15] and assault in the second[16] and third degrees.[17]

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9 *Dixon*, 647 N.E.2d at 1324.

10 *Id.* at 1326 (Bellacosa, J., dissenting).

11 *Id.* at 1324.

12 *Id.*

13 *Id.*

14 Under New York Penal Law section 160.10, a person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or
2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
   a. Causes physical injury to any person who is not a participant in the crime; or
   b. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.

Robbery in the second degree is a class C felony.

N.Y. PENAL LAW § 160.10 (McKinney 1988 & Supp. 1996).

15 Under New York Penal Law section 155.30, a person is guilty of grand larceny in the fourth degree when he steals property and when:

1. The value of the property exceeds one thousand dollars; or

The prosecution notified Dixon that Knowings made a "'cor-

2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or
3. The property consists of secret scientific material; or
4. The property consists of a credit card or debit card; or
5. The property, regardless of its nature and value, is taken from the person of another; or
6. The property, regardless of its nature and value, is obtained by extortion; or
7. The property consists of one or more firearms, rifles, or guns, as such terms are defined in section 265.00 of this chapter; or
8. The value of the property exceeds one hundred dollars and the property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, other than a motorcycle, as defined in section one hundred twenty-three of such law; or
9. The property consists of a scroll, religious vestment, vessel or other item of property having a value of at least one hundred dollars kept for or used in connection with religious worship in any building or structure used as a place of religious worship by a religious corporation, as incorporated under the religious corporations law or the education law.
10. The property consists of an access device which the person intends to use unlawfully to obtain telephone service.

Grand larceny in the fourth degree is a class E felony.

N.Y. PENAL LAW § 155.30 (McKinney 1988 & Supp. 1996).

[16] Under New York Penal Law section 120.05, a person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
3. With intent to prevent a peace officer, police officer, a fireman, including a fireman acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such fireman, or an emergency medical service paramedic or emergency medical service technician, from performing a lawful duty, he causes physical injury to such peace officer, police officer, fireman, paramedic or technician; or
4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or
6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or
7. Having been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with

poreal non-lineup identification' in the presence of the police."[18] Dixon then requested a *Wade* hearing[19] "to challenge 'the propriety of the identification procedures used.'"[20] He argued that the police identification procedure was "unfair, creating a substantial likelihood of misidentification."[21] The People argued that Dixon was "pointed out" to the police *sua sponte* by Knowings "during a canvass of the area surrounding the scene of the crime."[22] Therefore, the People argued that Dixon's identification was not police-arranged and, thus, he was not entitled to a *Wade* hearing.[23] The court agreed and denied Dixon's motion.[24]

At trial, Knowings testified to his out-of-court identification of Dixon and further identified him in court as one of the men who robbed him.[25] In his defense, Dixon took the stand and claimed that while he was near the scene of the crime, Knowings had mistakenly identified him as one of the perpetrators.[26] The jury convicted Dixon of robbery in the second degree.[27] The appellate division affirmed both Dixon's conviction and the court's denial of a *Wade* hearing.[28]

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intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

8. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly causes serious physical injury to such person.

Assault in the second degree is a class D felony.

N.Y. PENAL LAW § 120.05 (McKinney 1987 & Supp. 1996).

17 Under New York Penal Law section 120.00, a person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

N.Y. PENAL LAW § 120.00 (McKinney 1987 & Supp. 1996).

18 *Dixon*, 647 N.E.2d at 1322.

19 Dixon sought omnibus relief, which included his application for a "*Wade* hearing to challenge 'the propriety of the identification procedures used' to identify him as one of the perpetrators." *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at 1323; *see also* People v. Dixon, 609 N.Y.S.2d 807, 808 (N.Y. App. Div. 1994).

III. The Potential for Police Suggestion Was Too Great Not to Afford Dixon a *Wade* Hearing

In a five to two decision,[29] the New York State Court of Appeals held that the "canvassing" of the streets near the crime scene, with Knowings in the police van, was "police-arranged" and the identification susceptible to police suggestion. Therefore, according to the majority, Robert Dixon was entitled to a *Wade* hearing.[30]

The court began with an analysis of New York Criminal Procedure Law section 710.60,[31] "which governs suppression motions

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[29] *Dixon*, 647 N.E.2d at 1328.

[30] *Id.* at 1324.

[31] New York Criminal Procedure Law section 710.60, which governs motions to suppress evidence, provides:

> 1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds for the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.
>
> 2. The court must summarily grant the motion if:
>
> a. The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or
>
> b. The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.
>
> 3. The court may summarily deny the motion if:
>
> a. The motion papers do not allege a ground constituting legal basis for the motion; or
>
> b. The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three or six of section 710.20.
>
> 4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact.
>
> 5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the

and their disposition."[32] The court noted that the standard under this section requires the trial court to "conduct a hearing and make findings of fact in determining the motion."[33] It also noted that the suppression motion may be "summarily denied 'if no legal basis for suppression is presented or if the factual predicate for the motion is insufficient as a matter of law.'"[34] The court found that blame could not rest with Dixon for not alleging facts "describing the nature and circumstances of the 'point-out' in the police car."[35] The court further noted that the 1986 amendments to New York State Criminal Procedure Law section 710.60(3)(b) no longer burden a defendant with having to allege facts to support a motion to suppress an out-of-court identification.[36] Indeed, the court found that nowhere is such a rule more valuable than here, where no one but the witness and police are privy to the exact circumstances of the identification.[37]

The court then turned to the issue of Dixon's entitlement to a *Wade* hearing.[38] The court based its decision on the principle that "the purpose of the *Wade* hearing is to test identification testimony for taint arising from official suggestion during 'police-arranged confrontations between a defendant and an eyewitness.'"[39]

Central to the court's decision, it announced adherence to "precedent" and utilization of a nonrestrictive definition of "'police-arranged' procedures."[40] The court, therefore, did not believe that it was announcing a new rule, but a natural outgrowth of precedent. The court rejected the People's argument that "the fact that [Knowings] 'spontaneously' pointed out [Dixon] removed the identification procedure—here, the canvassing—from the category of police-sponsored viewings that warrant a *Wade* hearing."[41] A wit-

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presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its finding of fact, its conclusions of law and the reasons for its determination.

N.Y. CRIM. PROC. LAW § 710.60 (McKinney 1995) (internal footnote omitted).

[32] *Dixon*, 647 N.E.2d at 1323.

[33] *Id.*

[34] *Id.* (citing People v. Rodriguez, 593 N.E.2d 268, 273 (N.Y. 1992)).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (quoting People v. Gissendanner, 399 N.E.2d 924, 930 (N.Y. 1979)).

[40] *Id.* (citing *id.* at 1327 (Bellacosa, J., dissenting)).

[41] *Id.*

ness identification may be "spontaneous,"[42] yet may nonetheless be prompted by a police-arranged procedure.[43] The court narrowly defined an identification as truly spontaneous where "a complainant flags down a police officer and then points to the attackers on the street less than two blocks away."[44] The court found it unmistakable that the canvassing of the crime area in a marked police car was done "at the 'deliberate direction of the State.'"[45]

Moreover, the instant identification did not fall into the two recognized exceptions to the *Wade* requirement.[46] The court recognized that an exception to the *Wade* requirement may be made when either (1) the prior identification is merely "confirmatory,"[47] or (2) the identifying witness and suspect are known to each other.[48] In either circumstance, the possibility of misidentification is extremely low.[49] Implicitly, there is no room for police suggestion in either exception.

The court further reasoned that "[w]ithout the benefit of a *Wade* hearing, the courts below could not conclude as a matter of law that [Knowings'] identification of [Dixon] from the police van was spontaneous and not subject to any degree of police suggestion."[50] The court noted that the mere claim that Knowings "pointed out" Dixon supports the possibility that the identification was indeed preceded by police prompting.[51] The court found the circumstances of the canvassing to be no different than a traditional lineup.[52] Accordingly, "a *Wade* hearing was required to enable the parties to explore the true nature of the facts surrounding the particular identification—circumstances not ascertainable in the absence of a hearing."[53]

IV. The Majority's Rule Creates a Per Se Entitlement

In his dissent, Judge Bellacosa, joined by Judge Levine, would

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[42] The court exemplified "spontaneous" as when a victim "points out" a defendant by reflex while viewing a police supplied video tape. While the "point out" may be "spontaneous," it would be difficult to deny that the viewing was police-arranged. *See id.* at 1324 (citing People v. Edmonson, 554 N.E.2d 1254 (N.Y. 1990)).

[43] *Id.* at 1323-24.

[44] *Id.* at 1324 (citing People v. Rios, 548 N.Y.S.2d 348, 349 (N.Y. App. Div. 1989)).

[45] *Id.* (citing People v. Berkowitz, 406 N.E.2d 783 (N.Y. 1980)).

[46] *Id.*

[47] *Id.* (citing People v. Wharton, 549 N.E.2d 462 (N.Y. 1989)).

[48] *Id.* (citing People v. Gissendanner, 399 N.E.2d 924 (N.Y. 1979)).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1325.

have affirmed the denial of the suppression hearing, because the defendant failed to show any "'legal basis [or cognizable theory] for suppression . . .' and no sufficient 'factual predicate for the motion' to suppress, as a matter of law, [was] advanced."[54] The dissenting judges were most concerned with the majority's creation of a "virtual per se pretrial hearing entitlement, contrary to [New York Criminal Procedure Law section 710.60]'s express limitations and prescriptions."[55] The dissenting judges warned that "[e]very noncustodial street canvass by police with crime victims will hereafter be preemptively treated as 'police-arranged' and the identification as suggestive by its nature."[56] Moreover, the dissenting judges cautioned that the "[u]nnecessary, layered hearings, not constitutionally or statutorily required in fairness, merely provide for indirect discovery, complexity and tactical delay and unjust results."[57] They further argued that the identification of Dixon was not police-arranged. Dixon's identification, the dissenting judges wrote, "drives the phrase 'police-arranged' inexorably and inappropriately beyond its categorical, functional and particularized purpose."[58] "The law enforcement authorities did not initiate or exert this effort with prior knowledge about this or any targeted perpetrator. They were simply responding immediately to a civilian crime victim's complaint."[59] This, the dissenting judges asserted, "is not a situation instinct with suggestibility . . . ."[60]

V. *WADE* HEARINGS AFFORD DEFENDANTS NECESSARY PROTECTIONS AGAINST TAINT OF IDENTIFICATION

The New York State Court of Appeals correctly found that the lower courts erred by failing to conduct a suppression hearing. Whenever there is the possibility of undue suggestion, either by law enforcement or prosecutors, suppression hearings should be granted. While the court's decision may add another layer upon an already burdened criminal justice system, the court simultaneously prevented a potential miscarriage of justice where misidentification was possible.

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54 *Id.* (citing N.Y. CRIM. PROC. LAW § 710.60 (McKinney 1995); People v. Mendoza, 624 N.E.2d 1017 (N.Y. 1993); People v. Rodriguez, 593 N.E.2d 268 (N.Y. 1992)).

55 *Id.*; *see* Timothy B. Lennon, *Joseph W. Bellacosa: Cardozo's Knight-Errant?*, 59 ALB. L. REV. 1827 (1996) (discussing *Dixon* to illustrate Judge Bellacosa's conservativism).

56 *Dixon*, 647 N.E.2d at 1325.

57 *Id.*

58 *Id.* at 1327.

59 *Id.* at 1326.

60 *Id.*

VI. The Role of Police Suggestion in Canvassing "Point Outs"

Dixon represents a classic contrast in philosophical beliefs. The debate may seem to turn on the question of whether police manipulate and influence witnesses at every opportunity. The five member majority found, in effect, that they do.[61] However, such polarized views are not necessary to resolve this issue. Even an honest and well-intentioned police officer may create undue suggestion or taint in identification.

In *Dixon*, the majority believed that no amount of time was too short for a witness to be alone with the police before undue suggestion may occur. The majority did not in its recitation of the facts make any reference to how long the canvassing lasted.[62] Thus, whether the victim or witness is alone with police canvassing the area for two hours or two minutes, the potential for police suggestion exists and such an identification *must* be subject to a *Wade* hearing. The court stated that the only true spontaneous "point out" would be where a complainant flagged down a police officer and pointed to the perpetrators on the street only a couple of blocks away.[63] Accordingly, in New York State, *Wade* hearings are likely to be granted in all similar situations.[64]

While the record is devoid of any direct accusations of police misconduct,[65] nothing suggests that it is a routine police procedure to coach or coax witnesses into making identifications. It would be counter-productive for police officers to routinely encourage false identifications since most would be unlikely to result in convictions at trial.[66] However, it appears accepted by the *Dixon* majority and by the United States Supreme Court[67] that such practices do rou-

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61 *Id.* at 1324.

62 *Id.* at 1322.

63 *Id.* at 1324.

64 *Id.* at 1325 (Bellacosa, J., dissenting).

65 *See generally id.*

66 A trial may reveal alibi defenses and general inconsistencies that would be unlikely to result in convictions.

67 In United States v. Wade, 388 U.S. 218 (1967), the Court gave a long explanation of the possibility of police suggestion in identification procedures.

> But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than

tinely exist. The pervasiveness of this practice is, however, unquantifiable.

The effect of *Dixon* is an extra layer of protection against possible misidentification. Indeed, it is an important layer. In fact, contrary to the general tone of this decision, one need not find themselves on one side of the crime control-due process fence to recognize it as such. Suggestiveness, resulting in taint of witness identification, need not take the form of malicious police practice. Even the police officer who in no way means to engage in a suggestive practice may taint an identification.

A hypothetical examination of the conduct of two different fictional police officers demonstrates this very point. Police Officer Alpha ("Alpha") is a defendant's worst nightmare and the very type of police officer from whom the majority seeks to protect would-be defendants. Alpha is the classic dishonest police officer who does not exercise care in safeguarding a defendant's due process rights. He wants to make arrests and does not care how he gets them. For Alpha, it is irrelevant whether the arrestee is culpable for the crime. In Alpha's mind, the arrestee is probably guilty of something.

Alpha responds to a mugging call outside a grocery store. When he arrives in his police van, the victim is outside the store. Alpha places the victim in the van and they proceed to drive around the neighborhood canvassing the area attempting to spot one of the perpetrators. Alpha could say a variety of things to incite the victim into making an identification (e.g., "he looks guilty of something" or "doesn't he fit your description"). Indeed, Alpha may not even direct his comments toward a particular individual. Rather, he may say things to encourage the witness to pick anyone, such as "guys that rob are scum and should be locked away." The victim then wants to make an identification merely to vindicate himself or perhaps believing he is doing the right thing. It is this type of police officer that strikes fear in the *Dixon* majority and in those in the wrong place at the wrong time.

Police Officer Omega ("Omega") is the antithesis of Alpha. He is not interested in making arrests at any cost. In fact, Omega is

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any other single factor—perhaps it is responsible for more such errors than all other factors combined." Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Id. at 228-29 (internal citations omitted).

generally good-willed, honest and concerned with the health and safety of those victimized by crime. When Omega responds to the mugging call, he finds the victim in front of the market and inquires if any medical assistance is needed. After seeing that the victim does not require medical assistance, the victim and Omega get into the police van and canvass the neighborhood looking for one of the perpetrators. Omega does not try to incite the victim, but generally tries to be helpful. Based on a description supplied to him by the victim, he may suggest persons on the street. While he is trying to be helpful, he has tainted the identification.

Omega may not say anything about the crime and still taint the identification. Suppose the victim gives Omega a description of the perpetrators. Omega and the victim then canvass the neighborhood. Omega and the victim could discuss anything. By chance, Omega stops the conversation because he thinks he sees someone resembling the description. The victim's attention is drawn there and the resulting identification would then be considered tainted. The only way to avoid any type of taint is for the police officers not to engage in any conversation either amongst other officers or with the victims. Unfortunately, it is impossible to safeguard against such happenings.

The dissenting judges were incorrect when they challenged the majority's characterization of the canvassing as "conducted for the purpose of obtaining an identification."[68] They argued that "[n]o one could have known that one of the perpetrators was still at or near the crime scene when the normal investigative canvass was undertaken."[69] The dissenting judges missed the point. First, what other reason would the police officer and the victim get into the van were it not to attempt to secure an identification? Second, the mere fact that the police did not "arrange" potential suspects does not remove this identification from the category of police-arranged. The dissenting judges focused on presentation of the perpetrators, akin to a lineup or a photo array. Its view appeared to be that it is not police-arranged if the police did not physically assemble the suspects. The majority saw potential for taint on the other side of the two-way glass. While it is true that the police did not arrange for Robert Dixon to be on the street at that time, the police may have said or portrayed something in a certain light to taint. It is this that cannot be checked without a *Wade* hearing. The dissenting judges further argued that:

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68 *Dixon*, 647 N.E.2d at 1326 (citing *id.* at 1322).

69 *Id.*

> [T]he law enforcement action here was limited to responding promptly and appropriately to a crime victim's exigent report of a crime committed proximately in time and place. The action is different in kind from the identification techniques, practices and categories that have previously been curtailed or condemned or made subject to per se suppression.[70]

However, surely the same arguments were made when protections were afforded for lineups,[71] true show-ups,[72] and photo identifications.[73]

As of this writing, the New York State Court of Appeals has twice relied upon its holding in *Dixon*.[74] In *People v. Brown*,[75] the court remanded[76] the proceeding so that a *Wade* hearing could be conducted.[77] In *Brown*, the perpetrator robbed the victim of jewelry "allegedly" at gunpoint.[78] The victim and his sister informed police officers, stationed nearby, of the robbery.[79] In a marked police car, the victim, his sister and police officers "canvassed" the adjacent block for the perpetrator.[80] The victim "'pointed out' the person he thought was the robber, and upon the approach by the police in the marked car, the suspected robber ran off."[81] Chased by police, the suspected robber ran into an apartment building.[82] Police apprehended the suspect in the building stairwell.[83] Police presented the suspected robber to the victim in the ground floor stairwell handcuffed and surrounded by police officers.[84] The victim then identified the suspect as the person who robbed him.[85] No jewelry or guns were recovered from the suspect.[86] The court ordered a *Wade* hearing to ensure that the identification was free

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70 *See id.* at 1327.

71 *See* United States v. Wade, 388 U.S. 218 (1967); *see also* People v. Chipp, 552 N.E.2d 608 (N.Y. 1990).

72 *See* People v. Riley, 517 N.E.2d 520 (N.Y. 1987).

73 *See* People v. Rodriguez, 593 N.E.2d 268 (N.Y. 1992).

74 *See* People v. Brown, 655 N.E.2d 162 (N.Y. 1995); *see also* People v. Clark, 649 N.E.2d 1203 (N.Y. 1995).

75 655 N.E.2d 162 (N.Y. 1995).

76 *Id.* at 163.

77 *Id.* at 162.

78 *Id.* at 163.

79 *Id.*

80 *Id.*

81 *Id.* (emphasis added).

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

from police suggestion.[87] The court stated that "[a]lthough the victim initiated the police chase once he pointed out his alleged assailant, the resultant showup does not fit into the category of confirmatory identifications that are recognized as exceptions to the general requirement of a *Wade* hearing."[88]

In *People v. Clark*,[89] "[o]ne of two robbery victims observed the perpetrator in a neighborhood market, asked the manager for his address, and then contacted the police with this information."[90] Police escorted the victims to that address and identified their assailant as he opened the door to his apartment.[91] The court unanimously found that the procedure was not suggestive and the identification spontaneous.[92]

However, in *Clark*, the court affirmed *People v. Williams*.[93] The court, confronted with a similar situation, found the identification to be mere "happenstance"[94] and upheld the denial of a *Wade* hearing. In that case, the perpetrator raped and sodomized a woman in the lobby of her building.[95] Two weeks later, a man contacted the woman claiming to have her passport and identification cards, which were stolen from her apartment twelve days after her rape.[96] The man approached the woman's neighbor in an attempt to locate her.[97] The neighbor described the man to the victim.[98] Based on that description, the woman believed him to be her attacker.[99] After conferring with the police, the woman agreed to meet the man outside of a subway station in order to return her property.[100] The police, in an unmarked police car, escorted the woman to the subway station.[101] "After canvassing the area several times, the detectives spotted an individual, who matched the complainant's prior descriptions, standing by himself atop the stairs leading down

87 *Id.*

88 *Id.* (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995); People v. Wharton, 549 N.E.2d 462 (N.Y. 1989); People v. Gissendanner, 399 N.E.2d 924 (N.Y. 1979)).

89 649 N.E.2d 1203 (N.Y. 1995).

90 *Id.* at 1204.

91 *Id.*

92 *Id.* (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995)).

93 609 N.Y.S.2d 596 (N.Y. App. Div. 1994), *aff'd*, People v. Clark, 649 N.E.2d 1203 (N.Y. 1995) (*Williams* was consolidated with *Clark*).

94 *Clark*, 649 N.E.2d at 1204.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

to the subway."[102] The police instructed the woman to remain in the car and followed the suspect into the subway station.[103] After a scuffle, police arrested the suspect, searched his person, and recovered the woman's passport and identification cards.[104] An unrelated commotion in the subway station forced the police to remove the suspect to street level.[105] "The [woman] observed the detectives emerge from the station with the defendant, and immediately recognized and identified him to the detectives as her attacker."[106] The woman positively identified the suspect as her attacker by his distinguished crooked teeth, which she had previously and repeatedly attributed to her attacker.[107]

While on their face these facts appear closely analogous to *Dixon*,[108] in this case the court of appeals upheld the denial of the protection of a *Wade* hearing. The court stated that "[g]iven the erratic circumstances of the detectives' encounter with the defendant, the resulting 'showup' identification procedure was unavoidable, the product of a fast-paced, uncontrollable situation."[109]

The necessity for the protection of due process is well stated by Professor Lawrence M. Friedman of Stanford University School of Law:

> In criminal trials, some one man or woman stands in the dock, facing the raw and awesome power of the state. A democratic system acknowledges this fact, and is committed to some kind of balance. 'Due process' is a basic concept of American law. It has many meanings. One of them, however, relates strongly to criminal justice. The scales must not tilt too much toward government. Arrests must be fair; trials must be fair; punishments must be fair. These are ideals (reality is another matter). The opposite of a democratic society is a police state. This is a state where the other side, the police side, the government side, always has the upper hand.[110]

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102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *See* People v. Dixon, 647 N.E.2d 1321, 1322-23 (N.Y. 1995). In *Dixon* and *Williams*, the police canvassed the area near the crime scene. The fact that the canvass took place shortly after the crime in *Dixon* and several weeks after the crime in *Williams* did not factor into the court's analysis. Accordingly, for comparison purposes, these cases remain factually analogous.
109 *See Clark*, 649 N.E.2d at 1204 (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995)).
110 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 55 (1993).

Professor Friedman's observation is correct. The State possesses "raw and awesome power."[111] Identifications made solely in the presence of police officers, where there exists opportunity for intended or unintended taint or suggestion, is too much power to remain unchecked. To protect due process, it is necessary to add another layer of protection. Certainly, a major drawback is that courts will be forced to conduct additional hearings. The result is that potential misidentifications will be thwarted. When balanced, barring extraordinary circumstances, due process must always outweigh burdens on the judiciary. The dissent in *Dixon* argued that allowing this extra layer of protection would result in delay and unjust results.[112]

VII. Conclusion

The New York State Court of Appeals has protected those identifications made in the presence of police that are not truly spontaneous. The majority and dissent based their decision on whether there existed the opportunity for police suggestion. The correctness of the opinion can be reached whether or not one believes that police officers manipulate witnesses with malicious intent.

In a scathing critique of the criminal justice system, the exclusionary rule, and the Fourth Amendment, New York State Supreme Court Justice Harold J. Rothwax noted:

> [T]he law is so muddy that the police can't find out what they are allowed to do even if they wanted to. If a street cop took a sabbatical and holed himself up in a library for six months doing nothing but studying the law on search and seizure, he wouldn't know any more than he did before he started. The law is totally confusing, yet we expect cops to always know at every moment what the proper action is. It's no wonder that police officers are somewhat edgy . . . .[113]

While Justice Rothwax's comments are directed toward a different amendment to the Constitution than those governing *Wade* hearings, his observations of the complexity of the law and its impact on police officers is no less true. Most likely, *Dixon* will have little effect on police practices. However, *Wade* hearings will likely be conducted more often than before. Simultaneously, misiden-

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111 *Id.*

112 *Dixon*, 647 N.E.2d at 1325 (Bellacosa, J., dissenting).

113 Judge Harold J. Rothwax, Guilty: The Collapse of the Criminal Justice System 41 (1996).

tifications will likely decrease. As a result, due process will be protected and identifications that survive *Wade* hearings will be reliable.

A REVIEW OF HAIG'S *COMMERCIAL LITIGATION IN NEW YORK STATE COURTS*

Walter M. Schackman†

COMMERCIAL LITIGATION IN NEW YORK STATE COURTS. Edited by Robert L. Haig, Esq.†† St. Paul: West Publishing Co. 1995. Vol. 2 pp. CXXIII, 961; Vol. 3 pp. LXXXIII, 1018; Vol. 4 pp. LXXXIII, 1335.

In September 1992, the Review Committee for the Individual Assignment System (the "Committee"),[1] appointed by then Chief Judge Sol Wachtler, recommended the establishment of specialized parts within the supreme court to handle complex commercial litigation. In particular, the Committee suggested that such parts be established in New York County, where commercial litigation appeared to be most voluminous and complex. The specialized parts were to be responsible for all aspects of commercial litigation, from the initial filing of a Request for Judicial Intervention to the ultimate disposition of a claim.

These specialized parts were designed to create a cadre of experienced judges who would use active management techniques to resolve commercial disputes swiftly, fairly, and in expert fashion. The Committee was of the opinion that the complex nature of commercial litigation required vigilant judicial supervision. If commercial litigation cases were left amidst the general case inventory, they would be deprived of necessary attention and burden the entire system. Over the decades, the workload of judges in New York expanded, inhibiting their ability to manage difficult and complex legal commercial issues with the speed, thoroughness, and depth they so merit. In turn, commercial litigators voted with their feet

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[1] The Committee was established to review the effectiveness of the newly instituted Individual Assignment System, where one judge guides a case from its inception to its disposition. The Committee was appointed by former Chief Judge Sol Wachtler.

and took their cases to federal court. Accordingly, New York ceased to be the paramount center for commercial litigation in the United States. The Committee sought to reinvigorate New York's ability to dispense efficient, considered, influential, and wise justice in such cases.

The commercial parts of the Supreme Court, New York County, established on January 1, 1993, have been a huge success. In February 1995, at the urging of the Commercial and Federal Litigation Section of the New York State Bar Association, Chief Judge Judith S. Kaye established a Commercial Courts Task Force. The Task Force recommended the creation of a Commercial Division to provide a structured setting for that which the parts were already doing. On November 6, 1995, Chief Judge Kaye, with the support of New York County Administrative Judge Stanley S. Ostrau, established Commercial Divisions in New York County and Rochester.

The creation of the Commercial Divisions has spirited this new treatise *Commercial Litigation in New York State Courts*.[2] Robert L. Haig, Esq., the Editor-in-Chief, brought together an impressive group of judges and practitioners to compile the chapters. As a former practicing attorney, I see in the authors such dedication to scholarship and principles of justice.[3] Sixty-three principal authors

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[2] 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (Robert L. Haig ed., 1995); 3 *id.*; 4 *id.* This work consists of volumes two through four of *West's New York Practice Series*, together with a computer disk which contains all the forms and jury charges sampled in the volumes. It is a joint venture of West Publishing and the New York County Lawyer's Association.

[3] The authors include: Stewart D. Aaron, Robert M. Abrahams, John L. Amabile, Arthur H. Aufses, III, Celia Goldwag Barenholtz, Garrard R. Beeney, Mark A. Belnick, Charles G. Berry, Richard L. Bond, David M. Brodsky, John F. Cannon, P. Kevin Castel, Ellen M. Coin, J. Peter Coll, Jr., The Honorable Barry A. Cozier, Donald Francis Donovan, Richard E. Donovan, Robert S. Duboff, Peter G. Eikenberry, Blair C. Fensterstock, William R. Golden, Jr., David M. Gouldin, The Honorable Steward F. Hancock, Jr., David L. Hoffberg, Laura B. Hoguet, Stephen M. Hudspeth, Gary S. Jacobson, J. Christopher Jensen, Jay B. Kasner, Stephen L. Kass, The Honorable Judith S. Kaye, Stephen Rackow Kaye, Louis B. Kimmelman, The Honorable Theodore R. Kupferman, Deborah E. Lans, Bernice K. Leber, Mark D. Lebow, Burton N. Lipshie, Mitchell A. Lowenthal, Alan Mansfield, Peter J. Mastaglio, Sayward Mazur, John P. McCahey, Thomas McGanney, Joseph T. McLaughlin, Edwin B. Mishkin, James C. Moore, The Honorable Francis T. Murphy, Richard E. Nolan, John M. Nonna, The Honorable Geoffrey J. O'Connell, James M. Ringer, Gary L. Rubin, Edward L. Sadowsky, Jay G. Safer, Frederick P. Schaffer, The Honorable George Bundy Smith, Robert S. Smith, James L. Stengel, Harry P. Trueheart, III, Kevin J. Walsh, and Stephen A. Weiner.

The co-authors include: Liza R. Berliner, Jennifer Bernheim, Frederick A. Brodie, Lynn E. Busath, Irene Chang, Flor M. Colón, Jodi A. Danzig, Thomas F. Fleming, Richard A. De Palma, Laurie Strauch Dix, Leonard Allen Feiwus, Janet A. Gordon,

contributed to this work, and Mr. Haig notes that many others offered to help as well.[4] I am pleased to commend Mr. Haig and his authors for their outstanding public service in bringing this work to life.

This treatise provides a comprehensive and in-depth examination of procedural and substantive commercial law in New York. All the principle topics of substantive commercial law are discussed in detail. It contains thorough discussions of the rules of procedure, including some of the more treacherous ones, such as the procedure for commencing third-party actions.[5] The helpful (but not overwhelming) footnotes, library references, and case citations will aid a lawyer needing to explore a point in greater detail. The table of contents and index are clear, comprehensive, and easy to use. I think it fair to say that even Judge Cardozo would have found this treatise quite helpful if the text had been around in his day!

What is most unique about this work is that it is more than a form book, practice manual, or substantive treatise. It is a road map for practice and strategy, from the decision to litigate to collection of judgment. There are able and thoughtful examinations of important questions of practice, tactics, strategy, and ethics, together with most useful forms. The work even includes sample jury charges, a welcome addition for busy trial lawyers.

Volume two, consisting of twenty-nine chapters, examines a range of issues including jurisdiction,[6] venue,[7] the drafting of a complaint,[8] filing procedures for commencing a third party action,[9] disclosure,[10] and motion practice.[11] There are also strategy discussions on settlement,[12] such as how to position a case so that it can be settled for the right amount at the right time,[13] and jury

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Michael C. Griffen, Elisa F. Hyman, Christopher P. Johnson, Jonathan Z. King, Richard A. Lingg, Robert Malaby, Jean M. McCarroll, Robert P. McGreevy, James F. Parver, Dorothea W. Regal, Harold E. Schimkat, Amelia T.R. Starr, Beverly G. Steinberg, Gloria M. Trattles, Carol E. Warren, Kevin C. Walker, Michael R. Wright, and Andrew M. Zeitlin.

4 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at XI.

5 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 206-12.

6 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 9-49.

7 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 50-74.

8 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 96-137.

9 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 206-12.

10 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 587-622.

11 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 775-812.

12 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 891-922.

13 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 892-93.

selection.[14] Chapter one sets the stage, discussing the historical perspective of commercial law from the eighteenth century to the twentieth century.[15] Particularly enlightening is the fact that certain basic features of New York litigation in 1795 remain the same today, such as dissatisfaction with fees, arbitration, the special verdict, and the struck jury.[16] This chapter provides an in-depth analysis of the relationship between commercialization and litigation, encouraging legal practitioners to commit "to provid[ing] an attractive venue in the State courts for the expeditious and skillful resolution of commercial disputes."[17] Since New York "considers itself a world business capital [, it] must offer a court system commensurate with that role. The two, after all, are inextricably linked."[18]

The remaining chapters in this volume provide a wealth of detailed information. For example, chapter three discusses the law of venue in New York as it pertains to the parties involved and the type of relief sought.[19] It provides a basic understanding of the contractual venue provisions,[20] defines the standards for changing venue,[21] and discusses procedures for changing venue and waiver.[22] Within the text there is a discussion of the pragmatic considerations for determining proper venue.[23] For example, more than one venue may be proper, even seemingly mandatory venue provisions may be overcome, and the parties may agree on a forum.[24] Forms for requesting a venue change[25] and a practice checklist[26] are provided to guide practitioners through the change of venue process.

Chapter ten discusses the substantive law governing enforcement of agreements to arbitrate under federal and New York law,[27] and the enforcement of forum selection clauses.[28] Further, chapter eleven provides the procedures for raising or objecting to a

14 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 923-55.
15 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 1-8.
16 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 3.
17 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 8.
18 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 8.
19 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 53-61.
20 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 51-53.
21 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 61-65.
22 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 65-69.
23 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 69-71.
24 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 70.
25 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 72-74.
26 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 71-72.
27 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 309-26.
28 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 333-42.

choice of law clause and waiving its enforcement.[29]

The depth of this treatise is illustrated in chapter fourteen. It examines the standard for determining whether a preliminary injunction is justified,[30] and outlines the procedure for obtaining a preliminary injunction.[31] It ascertains how the court assesses the amount of damages a defendant sustains by reason of a preliminary injunction[32] and then expressly states the type of relief the court may grant.[33] The chapter also examines the law that governs the practice and procedure of provisional remedies such as a temporary restraining order,[34] attachment,[35] temporary receivership,[36] notice of pendency,[37] and seizure of chattel.[38]

The multitude of forms supplied within the treatise is illustrated in chapter fifteen. The chapter examines the capacity of parties to sue and be sued, whether they be partnerships or associations,[39] or unauthorized foreign corporations.[40] The forms include a Motion for Substitution,[41] Interpleader Complaint,[42] Affirmation in Opposition to Motion to Intervene,[43] a Motion and Order for Poor Person Relief,[44] and an Order Approving Settlement of an Infant's Action.[45] Although these forms are available elsewhere, their compilation in one place will prove to be handy for the practitioner.

According to chapter eighteen, disclosure is "one of the most important components of commercial litigation . . . . Disclosure encompasses not only information about the client and its claim that you and your adversary will obtain from each other, but also information that may have to be obtained from third parties."[46] The chapter further discusses the importance of developing a dis-

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29 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 359-60.
30 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 417-24.
31 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 425-28.
32 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 420-25.
33 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 428-31.
34 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 431-35.
35 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 435-50.
36 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 451-55.
37 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 455-60.
38 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 460-66.
39 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 500.
40 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 500-02.
41 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 508-10.
42 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 511-12.
43 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 512-15.
44 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 515-17.
45 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 518.
46 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 588.

covery plan for commercial cases,[47] and the methods of obtaining disclosure.[48]

Volume three details the nuts and bolts of litigation. The mechanics of trial practice (witness examination,[49] final argument,[50] and jury charges[51]) and post-trial procedures (motions,[52] appellate practice,[53] and enforcement of judgments[54]) are given great attention. The anchor of this volume is its introductory chapter on trials. This chapter begins with a discussion of theories and observations which can help the practicing commercial attorney understand the processes and complexities associated with commercial litigation.[55] Although there are similarities between commercial trials and trials of other types, there are some notable differences. For instance, the subject matter of the commercial case is often technical in nature, there may be differences in background and experience between judge or jury and the witnesses, and commercial cases are characterized by a predominance of documents as sources of evidence, the use of depositions, and extensive witness preparation.[56] Trial structures and strategies are discussed in an easy to understand and apply style.[57]

Even more helpful for the litigator are subsequent chapters which discuss the aspects of trial. An overview is provided for every conceivable step: Preliminary conferences,[58] presentation of the case in chief,[59] cross-examination,[60] expert witnesses,[61] and final arguments,[62] just to name a few. Each chapter contains concrete examples which illustrate the particular topic.[63] For example, the chapter on expert witnesses contains an excerpt of expert testimony, including a direct examination and *voir dire* of an expert

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47 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 592-97.
48 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 611-13.
49 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 103-293.
50 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 429-59.
51 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 460-97.
52 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 611-24.
53 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 793-960.
54 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 961-82.
55 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 4-14.
56 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 4.
57 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 35-48.
58 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 53-68.
59 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 102-79.
60 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 180-215.
61 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 216-93.
62 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 429-59.
63 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 89-101, 149-79, 211-15, 269-93, 457-59.

witness.[64] These examples provide an excellent frame of reference for attorneys.

Also included in this volume is a discussion of evidence and related issues of admissibility in the commercial context.[65] Hearsay[66] and the Parol Evidence Rule[67] are both discussed in the same easy to understand language that characterizes this entire treatise.

The remainder of the chapters in this volume address the issues of compensatory and punitive damages,[68] enforcement of judgments,[69] and appellate practice in the Appellate Divisions[70] and the Court of Appeals.[71] Finally, in keeping with the great depth this treatise offers, such topics as alternative dispute resolution[72] and ethical issues which may arise in commercial cases,[73] including potential conflicts of interest[74] and confidentiality,[75] are included. This volume is a compendium of sound advice, as well as a practical guide.

Although volume four is of a more technical nature, the clarity is not lost. This volume details issues involved in handling specific types of commercial cases, and provides strategies for pursuing and defending against these claims. For example, there are chapters covering insurance,[76] banking litigation,[77] and collections.[78] New York agency law and its impact in commercial litigation cases are discussed.[79] The succeeding chapter provides an analysis of warranty claims[80] and defenses.[81] An emphasis is placed on express[82] and implied[83] warranties under Article 2 of the New York Uniform

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64 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 269-73.
65 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 366-428.
66 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 371-85.
67 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 385-412.
68 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 498-566.
69 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 961-982.
70 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 791-900.
71 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 901-60.
72 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 567-91.
73 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 983-1018.
74 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 984-98.
75 3 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 998-1003.
76 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 83-149.
77 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 150-202.
78 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 240-62.
79 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 309-54.
80 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 367-377.
81 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 377-88.
82 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 361-63.
83 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 363-66.

Commercial Code. The latter chapters of this volume are dedicated to antitrust litigation,[84] torts of competition,[85] construction litigation,[86] and environmental litigation.[87] Most chapters provide an analysis of preliminary strategic considerations[88] and checklists of essential allegations[89] and potential defenses.[90]

The volume closes with a helpful overview of jurisdiction and procedural matters in the Surrogate's Court.[91] The final chapter proposes a model for corporate litigation management which should prove helpful to all commercial litigators.[92] It includes recommendations as to how corporate litigation can be managed cost-effectively, such as returning telephone calls promptly, providing in-house training for attorneys on litigation and negotiation, and periodically reviewing litigation referred to outside counsel to determine if similar matters may be handled in-house in the future.[93] The quick reference tables and indexes provide easy cross reference within all volumes of the treatise.[94]

With so many contributors, the result could have been confusing, but Mr. Haig and his colleagues at West Publishing managed a seamless and well-organized presentation. However, due to the multiplicity of authors, readers who spend time immersed in these volumes may miss a single, consistent, unique, and stylistic authorial voice such as that found in Professor Siegel's *New York Practice*[95] or Wigmore's *Evidence in Trials at Common Law*.[96] Moreover, greater depth in each topic's substantive law is needed. The for-

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84 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 570-626.

85 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 627-83.

86 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 728-99.

87 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 800-95.

88 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 3-15, 85-92, 204-09, 241-44, 265-68, 310-12, 357-58, 404-05, 457-60, 512-15, 571-75, 628-30, 686-88, 730-35, 802.

89 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 33, 129-32, 166-68, 191-92, 297-98, 346, 393-94, 415-16, 500-03, 560-63, 619-20, 669-80, 718, 775.

90 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 33-34, 134, 300, 347, 396-97, 416-17, 565-66, 669-80, 718, 775-76, 924-25.

91 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 896-925.

92 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 955-59.

93 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 954.

94 4 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS, *supra* note 2, at 960-1335.

95 DAVID D. SIEGEL, NEW YORK PRACTICE (2d ed. 1991).

96 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Peter Tillers rev. vol. 1983 & Supp. 1996); 1A *id.* (1983 & Supp. 1996); 2 *id.* (James H. Chadbourn rev. vol. 1979 & Supp. 1996); 3 *id.* (1970 & Supp. 1996); 3A *id.* (1970 & Supp. 1996); 4 *id.* (1972 & Supp. 1996); 5 *id.* (1974 & Supp. 1996); 6 *id.* (1976 & Supp. 1996); 7 *id.* (1978 & Supp. 1996); 8 *id.* (John T. McNaughton rev. vol. 1961 & Supp. 1996); 9 *id.*

mer is not a fundamental problem. Indeed, many a single author fails to accomplish this level of consistency. The latter is due to a limit on space; it is hardly a condemnation to wish for more volume. There will, one hopes, be room to grow in the future.

Haig's *Commercial Litigation in New York State Courts* will promptly become indispensable for all commercial litigators within the Empire State. Those unfamiliar with the New York court system will also find these volumes priceless. Additionally, this treatise will be of great assistance to the Commercial Division and to all New York courts faced with issues in commercial law. It is my hope that this excellent treatise, along with the formation of the Commercial Division, will restore New York as the center of commercial law in the United States.

(James H. Chadbourn rev. vol. 1981 & Supp. 1996); 10 *id.* (3d ed. 1940); 11 *id.* (1985 & Supp. 1996).