DEATH AND HIS LAWYERS: WHY JOSEPH SPAZIANO OWES HIS LIFE TO THE *MIAMI HERALD*—AND NOT TO ANY DEFENSE LAWYER OR JUDGE

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Call it peace,
Call it treason,
Call it love,
Or call it reason,
I ain't marchin' anymore.[1]

So all of us have to do what we have to do. Some of us do things that others will not. In Chicago I remember Dave Dellinger saying, Some of you may break the law, some of you may write letters to the editor; in between there may be varieties of actions. Do what you can do, what your conscience, your will, your state of mind, can lead you to do. But do it.[2]

Send lawyers, guns, and money,
Dad, get me out of this.[3]

Were it up to the legal system, Joseph Spaziano would have been electrocuted by the state of Florida at 7:00 a.m. on June 27, 1995—for a crime he did not commit. This is why he is, for the moment, still alive.

I tell Joseph Spaziano's story for five reasons. First, his case is emblematic of much that is wrong with capital punishment as a system. Rogue cops, tunnel-visioned prosecutors, inept defense lawyers, and formulaic judges all contribute to the ultimate danger that the state will execute an innocent person.

Second, I have represented him, on and off, for twelve years. I believe he is innocent.

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1. PHIL OCHS, *I Ain't Marchin' Anymore*, *on* I AIN'T MARCHIN' ANYMORE (Appleseed Music, Inc. 1964).

2. Alexander Cockburn, *Beat the Devil*, THE NATION, Oct. 2, 1995, at 340, 341 (quoting William Kunstler's last speech).

3. WARREN ZEVON, *Send Lawyers, Guns and Money*, *on* EXCITABLE BOY (Elektra Records 1978).

Third, this story may provide guidance to defense attorneys who, having run out of all other alternatives, face the decision of whether to take their client's case to the media.

Fourth, until Mr. Spaziano's case deteriorated into a parody of justice, I believed that the Office of the Capital Collateral Representative (CCR), the agency created by the Florida Legislature to serve as counsel for the condemned, was beneficial for death row inmates. I am now convinced that having CCR as your lawyer is worse than having no lawyer at all.

Fifth, Mr. Spaziano's case and, more precisely, the ways in which that case was treated by the courts and CCR, were the final push that led to my personal decision no longer to participate directly in the American system of capital punishment. Over twelve years, a total of twenty-six judges read my legal arguments concerning Mr. Spaziano's innocence. With rare exceptions, those judges disregarded this case. But for the *Miami Herald* and the *ABC World News Tonight*, Mr. Spaziano would have been executed on schedule, at 7:00 a.m. on June 27, 1995. Mr. Spaziano is my last capital case.

Mr. Spaziano is, according to one student of the culture of Florida's condemned, "the most popular man on death row." It is not hard to see why. He has black hair, thin shoulders, and skin with the kind of sallowness brought on by years of life without sun. Mr. Spaziano is gregarious, except for his darting eyes. They show bottomless fear. He speaks with a New York accent that at times is indecipherable in its monotone. This is no eloquent Mumia Abu-Jamal, Caryl Chessman, or Jack Abbott offering quotable social criticism on the death penalty. Mr. Spaziano, with simple words that a child would use, is a terrified, cornered human being. He personifies fear, not evil. All that Mr. Spaziano says to me suggests that the man Florida would soon be killing is not the boy they caught in 1975.

You may fairly ask, if it is so certain that Mr. Spaziano is innocent or deserving of a new trial, why have the courts, after nineteen years of considering well-crafted appeals, not said so? The answer is not that the courts were not convinced one way or the other, but that they are bound by the procedural rules they created. It is a court rule that if the defense attorney did not make proper objections during the trial, then the error cannot be raised on appeal.[4] Also, federal courts must defer to state

4. Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CAL. L. REV. 87 (1988); Dugger v. Adams, 489 U.S. 401, 405 (1989).

procedural rules.[5] Because of this, no court has ever ruled on the merits of the evidence demonstrating Mr. Spaziano's innocence.

I wrote my first legal paper on Joseph Spaziano's behalf in 1983, twelve years ago. That document was a petition for plenary review (certiorari) in the United States Supreme Court, and it did not have my name on it because it was written and filed before I had passed the bar exam.

In the decade-plus since, I have filed on Mr. Spaziano's behalf post-conviction petitions, stay applications, and appellate briefs in state and federal courts. None of them made the slightest difference. The only thing I have ever written for Mr. Spaziano that mattered was an opinion editorial piece for the *Miami Herald*. My editorial was followed up by a series of brilliant investigative journalism articles by Lori Rosza, with Gene Miller and Warren Holmes, and by equally superb editorials and columns by James J. Kilpatrick, Tony Proscio, Tom Fiedler, Martin Dyckman, Tom Blackburn, the *Gainesville Sun*, *Tampa Tribune*, *St. Petersburg Times*, and the *Palm Beach Post*.[6] This investigation and reporting, and *not anything* done by lawyers or judges, caused Governor Chiles to stay Mr. Spaziano's death warrant. A follow-up piece by a team of *ABC World News Tonight* journalists, Nina Alvarez, Mark Potter, and Michelle Genessy, along with pieces in *The Nation*, *New Republic*, *Washington Post*, and *The Economist* caused the Governor to continue the stay.[7]

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5. Coleman v. Thompson, 501 U.S. 722, 729 (1991); Wainwright v. Sykes, 433 U.S. 72, 81, 87 (1977).

6. Lori Rosza, *Witness: Don't Kill Convict: My Testimony in '75 Unreliable, He Says*, MIAMI HERALD, June 11, 1995, at 1A; Lori Rosza, *A Witness Recants But Electric Chair Looms: Recalling a Story of Sex, Murder*, MIAMI HERALD, Sept. 6, 1995, at 1A; Lori Rosza, *"Crazy Joe" Trial Witness Told Pastor that He Lied*, MIAMI HERALD, Sept. 21, 1995, at 1A; James Kilpatrick, *Florida May Kill the Wrong Man*, CINCINNATI ENQUIRER, June 15, 1995, at A1; Tony Proscio, *"Memory" of Murder, Mockery of Justice*, MIAMI HERALD, June 14, 1995, at A15; Tony Proscio, *Anatomy of a Lie: The "Crazy Joe" Story*, MIAMI HERALD, Sept. 8, 1995, at 23A; Tom Fiedler, *Taking the Politics Out of Capital Punishment*, MIAMI HERALD, June 18, 1995, at C1; Martin Dyckman, *Call Again for Clemency*, ST. PETERSBURG TIMES, June 13, 1995, at 11A; Tom Blackburn, *The Hypnotist Got What He Wanted*, PALM BEACH POST, June 19, 1995, at 8A; *The Clemency Factor*, GAINESVILLE SUN, June 14, 1995, at 8A; *Too Much Doubt in Spaziano Case*, TAMPA TRIBUNE, June 17, 1995, at 19; *Time is Running Out*, ST. PETERSBURG TIMES, June 15, 1995, at 14A; *Chiles Spared Florida from Capital Crime*, PALM BEACH POST, June 16, 1995, at 16A; *Recover a Little Justice: Give Spaziano a New Trial*, PALM BEACH POST, Sept. 12, 1995, at 12A.

7. *ABC World News Tonight* (ABC television broadcast, June 30, 1995); Bruce Shapiro, *Not for Burning: Probability of Habeas Corpus Reform*, THE NATION, July 17, 1995, at 79; *Notebook*, NEW REPUBLIC, July 17 & 24, 1995, at 8, 9; William Booth, *Gov. Chiles Halts Execution After Witness Recants; Florida Case of "Crazy Joe" Spaziano, Which Hinged on Hypnosis, Spurs Death Penalty Debate*, WASHINGTON POST, June 17, 1995, at A5; Coleman McCarthy, *The Case of the Hypnotized Witness*, WASHINGTON POST, Aug. 5, 1995, at A19; David von Drehle, *A Hypnotized Wit-*

When the United States Supreme Court denied plenary review in Joseph Spaziano's case, in January 1995, I did something I have never done before, and will never do again, in a capital case: I attempted to take the case to the media.

Specifically, I took the case to Gene Miller. Twenty years ago, in 1975, Miller published a magnificent book, *Invitation to a Lynching*, that resulted in the pardon and release of two black men, Pitts and Lee, who had been railroaded onto death row for a crime they did not commit.[8] I had never met Miller before, but I was thoroughly intimidated by his reputation in Florida as a skeptic of death row claims of innocence. After his book was published in 1975, Miller was contacted by countless prisoners, all of whom attempted to enlist Miller's aid in their causes. Miller stated at the time, and in the two intervening decades, that he would never again become involved in a capital case. Miller's skepticism of prisoners' claims of innocence was, and is, legendary in and outside of Florida.

A friend of mine from our Florida deathwork days knew Mr. Miller's daughter. My friend persuaded the daughter to convince Mr. Miller to accept a short telephone call from me. During that ten minute telephone conversation, Mr. Miller was gracious but firm. He appreciated Mr. Spaziano's dilemma and, although my desperation appeared genuine, it was extremely unlikely that he or the *Miami Herald* would insert themselves into Mr. Spaziano's case. But, I think, mainly as a courtesy to his daughter, Mr. Miller agreed to read a book chapter I had written on Joseph Spaziano's case. I federal expressed the book chapter to Mr. Miller, and I fully expected never to hear from him again.

To my surprise and delight, Mr. Miller called me the following day. My memory is that the telephone conversation went something like this. Mr. Miller asked, "What aren't you telling me in your book chapter? You can't be telling me the whole story here, because no case, not even a Florida capital case tried twenty years ago, could possibly be as bad as you describe in your chapter." I replied that the book chapter I had written was as close as I was capable of coming to objective reporting. Because anyone reading my book would know my biases and predispositions, in the chapter addressing my belief in Joseph Spaziano's innocence, I bent over backwards to construe every piece of evidence and every single logical inference that could reasonably be drawn from that evidence in favor of the prosecution and against Mr. Spaziano's claim of innocence. After letting me speak my piece, Mr. Miller politely reiterated his belief

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ness, WASHINGTON POST, Sept. 15, 1995, at A19; *Change of Heart*, THE ECONOMIST, June 24, 1995, at 28.

8. GENE MILLER, INVITATION TO A LYNCHING (1975).

that there must be *something* I was leaving out of the chapter, such as the credible evidence that my client was guilty of murder. I repeated that there was nothing else. Mr. Miller repeated that there *must* be something else. We paused. I then suggested to Mr. Miller that there really was only one way that he could determine whether I had left anything out. I offered to send him the trial transcripts in Mr. Spaziano's murder case.

Mr. Miller was polite but firm in what he was willing to read, and, specifically, what he was *not* willing to read. "I want the trial transcripts, the police reports, the transcripts of the hypnosis sessions of the State's star witness, the audio tapes of those hypnosis sessions, *and nothing more*. I don't want briefs. I don't want legal memoranda. I don't want anything else written by any of Mr. Spaziano's defense lawyers—especially not anything written by you." Fair enough. More than fair. I promised to arrange to have the materials he wanted federal expressed that very day.

A few days later, Governor Lawton Chiles signed Mr. Spaziano's death warrant. The warrant was signed on May 24, 1995. The prison scheduled the execution for approximately four weeks hence, at 7:00 a.m., June 27, 1995. I fully expected, and Mr. Spaziano fully expected, that he would be killed on schedule.

But he was not, and it was not because of anything that I or any other lawyer did, or anything that any court did. Rather, it was solely because of the efforts of Gene Miller and his colleagues at the *Miami Herald*. I later learned that Mr. Miller had given the raw documents in the case to Warren Holmes, his investigator on the Pitts and Lee case. Mr. Holmes' skepticism of claims of innocence is, if such is possible, greater than that of Gene Miller. On the Friday of Memorial Day weekend, Mr. Miller dropped the trial transcripts, police reports, and other material on Mr. Holmes' desk and asked him, as a personal favor, to glance through them. As Warren Holmes told me later, he was not pleased. He hoped, and fully expected, to spend about half an hour reading through the trial transcript of the murder case and concluding, as he has concluded in virtually every other capital case he has investigated, that Mr. Spaziano is, in fact, as guilty as the prosecution argued he was at trial. But a half an hour became an hour, became two hours, became four hours, became eight hours, became ten hours. There just was not any evidence there. Warren Holmes knew that Mr. Spaziano had also been convicted of the rape and mutilation of Vanessa Dale Croft, and so he dug into the trial transcript of the rape case. And, *mirabile dictu*, Mr. Holmes concluded that Mr. Spaziano did not commit the rape, either.

I wish I had a tape recording of the first conversation I had with Warren Holmes in connection with Joseph Spaziano's case. It went something like this. Mr. Holmes asked me whether I was a defense law-

yer. I answered in the affirmative. There was a *long* pause. Mr. Holmes then asked me whether I happened to have any problems with the rape case. I told him that I did. He asked me whether I had mentioned those problems to Mr. Miller. I told him that I had not. Incredulous, he asked me why. And I confessed. I was afraid that if I had told Mr. Miller that I thought that the police had framed Joseph Spaziano for the rape, in addition to framing him for the homicide, that Mr. Miller would dismiss me as a flake. What else, I visualized Mr. Miller asking me at the time, did the state frame your client for? JFK? Jimmy Hoffa? Elvis?

I then had one of those telephone conversations with Warren Holmes that are of the sort that a defense lawyer has maybe once in her life, if she lives right and is very, very lucky. In essence, Mr. Holmes laid out for me in his own words why *he* thought that Mr. Spaziano was innocent both of the homicide and of the rape. He told me that he had reviewed between 1200 and 1400 trial transcripts in his time as a law enforcement officer and as a private investigator. Out of all of those transcripts, he had thought three men were innocent. Pitts. Lee. And Joseph Robert Spaziano.

I thought we were home free. Surely, now that the legendarily skeptical Gene Miller *and* the even more legendarily skeptical Warren Holmes were convinced there was significant doubt about Mr. Spaziano's guilt on the homicide, the *Miami Herald* would jump into the case. Eventually, the *Herald* did jump in, with both feet and with both guns blazing. But, even with the vociferous advocacy of Gene Miller and Warren Holmes, for a time—which to me seemed interminable—the powers-that-be at the *Herald* remained unconvinced. Mr. Miller and Mr. Holmes fought like wildcats to persuade the newspaper to assign a team of reporters to conduct a top down reinvestigation of the factual circumstances of Joseph Spaziano's conviction and condemnation, but there did not seem to be enough time. The killing was scheduled for only a month away. I had come to them too late. My errors in judgment and timing had contributed to the imminent execution of a man whom I believed was innocent.

Gene Miller called me with a proposition. He and Mr. Holmes had convinced the *Herald* to publish, in their *Viewpoint* section, an opinion piece that I would write and that would appear under my byline. Mr. Miller then followed up on a point that I had made in my first telephone conversation with him. Had I really meant it when I told him that, of the seventy or so condemned prisoners I have been involved with over the past twelve years, Mr. Spaziano was my only innocent client? I told him yes. He told me that I needed to say that, explicitly and forcefully, in the first paragraph of the opinion piece that the *Herald* was willing to publish.

I told Mr. Miller that there were seventy reasons why I could not write such an opinion piece in the pages of Florida's flagship newspaper. The first sixty-nine reasons were my other sixty-nine clients. How would they feel, how would their families feel, to read in the pages of the *Miami Herald* that their former lawyer believed, at least implicitly, that they were in fact guilty all along? It was unethical, according to the rules and regulations governing the ethical behavior of lawyers admitted to practice before the courts of Florida. More importantly, it was wrong.

My seventieth reason for not wanting to write the opinion piece was personal and selfish. I was already in hot water with the Florida bar in connection with my aborted representation of Paul Hill on his direct appeal challenging his murder conviction and death sentence for the assassination of an abortion doctor and his armed escort. One of Mr. Hill's "pro-life" movement lawyers had filed a complaint against me with the Florida bar. The complaint was, in my opinion, patently frivolous. But it did not seem an opportune time for me to engage in an act of civil disobedience against the rules and regulations governing the behavior of Florida bar members.

Mr. Miller said he understood and appreciated my reticence. He would fully understand if I chose not to write the opinion piece. All he was doing was informing me of the factual reality. The *Miami Herald* would not insert itself into Mr. Spaziano's case and the paper would not assign a group of reporters to investigate the crimes unless I wrote, and they published, the opinion piece. I tried to bargain. Let me write it, but let it appear under someone else's byline—his, any name *other* than my own. No. It had to be written by me. It had to be written in the first person. It had to appear under my own name.

So, of course, I agreed to write it, and to write it in time for it to appear in the Sunday, June 4, 1995 edition of the *Miami Herald*. Over the next few days, I tried to write it as best I could and, with the critical assistance of Deanna Peterson and Bob Trebilcock, we got it in on time.

Mr. Miller not only reworked, edited, and polished the piece, but he decided that he could not, in good conscience, treat Mr. Spaziano's story as competitive. Consequently, and undoubtedly causing some controversy within the newspaper itself, Mr. Miller arranged for my *Viewpoint* piece to appear simultaneously, on June 4, in the *Miami Herald*, the *St. Petersburg Times*, and the *Orlando Sentinel*.[9] This is what I submitted to the *Herald*:

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9. Michael Mello, *Innocent Man Faces Execution*, MIAMI HERALD, June 4, 1995, at 6A; Michael Mello, *Does this Man Deserve to Die?*, ST. PETERSBURG TIMES, June 4, 1995, at 1D; Michael Mello, *Did Tainted Testimony Doom Man?*, ORLANDO SENTINEL, June 4, 1995, at G1.

This is a story about failure, the systemic failure of Florida's assembly line of death in general, and my own personal failure in particular.

Allow me cut to the chase: I want to tell you about a former client of mine, Joseph Robert Spaziano. For the past 19 years Mr. Spaziano has lived on Florida's death row. Joseph ("Crazy Joe," to quote from his murder indictment) Spaziano is scheduled to be executed in Florida's electric chair at 7:00 a.m. on June 27. That is in 19 days—less than three weeks hence.

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

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

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

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

I am telling you about Joseph Spaziano's case for two reasons. First, Mr. Spaziano is most likely going to be killed in Starke, on schedule, notwithstanding the powerful likelihood that he's an innocent man. He's going to be killed, not because his trial was fair or because his execution is lawful. That doesn't matter. What matters is that his case has already been "reviewed" by the courts. Because the courts have "reviewed" his case once, they are loathe to do so again—not-

withstanding inflated political rhetoric about "10 years of repetitive review." For this reason, and this reason alone, his death warrant will probably be carried out. His head and right ankle will be shaved; he will be measured for his funeral suit; he will say goodbye to his mother and niece and daughter and friends; he will be strapped into Florida's electric chair in full view of two dozen witnesses selected by the prison, most of whom will be strangers to him. He will be electrocuted by an executioner whose anonymity will be protected by the prison, and who will be paid $150 for his services rendered. Joe Spaziano will be electrocuted in our name. In your name. And in my name.

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

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

Then I told my client that the federal courts wouldn't permit an innocent man to be killed, but, again, I was wrong. Judge Carnes' opinion in Joe Spaziano's case spent more pages whining about the length of the brief I was not permitted to file than it spent addressing the points about innocence I wanted to *make* in the brief. In 1992, the United States Supreme Court held that innocence is not an issue cognizable in a habeas corpus proceeding; four Justices, in a subsequent case, did not even want to give Lloyd Schlup, who had a *videotape* showing him somewhere else at the time of the murder for which he was condemned to die, a hearing to *consider* the new video-

taped evidence. The Court, in effect, was saying: "Go to the governor and seek clemency if the criminal justice system has miscarried." So I did.

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

Mr. Spaziano is no Boy Scout. He's an unreconstructed biker (President, *in absentia*, of the Outlaws Motorcycle Brotherhood, Orlando Chapter), and a convicted rapist (that conviction is also highly questionable, but it's another story). He is also a self-taught artist, and he is my friend. His family is my family.

I am convinced that Mr. Spaziano is innocent, but I can't prove it with certainty. I have no compelling physical or testimonial evidence proving that Mr. Spaziano did not commit the crime for which he is condemned to die. What my investigators and I *have* done is more a matter of vaporizing the State's case of guilt than proving his innocence, which, I know, isn't the same thing.

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 waved 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 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, 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, that Mr. Spaziano could show him some women that he had raped and tortured. Dilisio 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 testified he never believed Mr. Spaziano and that he thought Mr. Spaziano was bragging to impress him. Dilisio further indicated that he idolized Mr. Spaziano and that he wanted to ride motorcycles with him. Dilisio said he did not report what he had seen because he wanted to become a member of the Outlaw Motorcycle Club.

Tony Dilisio *was* the State's case. The prosecutor told the trial court during a motion to preclude Dilisio's testimony that "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 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, they had to acquit Mr. Spaziano. This 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 testimony, and the reason for the juror uncertainty was accurately portrayed by the State: They "struggled so diligently with Mr. Dilisio's 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 testimony was manufactured. Mr. Dilisio did not "remember" his story until he was under police hypnosis, and the hypnosis sessions were conducted in such a suggestive and unprofessional manner that the resulting "recall" and testimony deserve no respect. Indeed, the Florida Supreme Court eventually held (several years after Mr. Spaziano's direct appeal) that hypnotically refreshed evidence is so unreliable as to be inadmissible by law in Florida. But the state courts said this decision came too late for Mr. Spaziano.

At trial, counsel for Mr. Spaziano attacked Dilisio's testimony by using the traditional tools of cross-examination. He stressed that Dilisio was an admitted drug user before, during, and after the alleged dump incident. Dilisio 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 but not to believe him. He suggested that Dilisio might have honestly been confused, either by drugs or by the police. This strategy of discrediting Mr. Dilisio 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 never "recalled" the alleged incident at the dump until after he went to a police hypnotist.

Courts now recognize that testimony extracted by hypnosis is untrustworthy and should be treated with skepticism. The testimony of any witness is subject to the inaccuracies of observation, and hypnosis exacerbates this unreliability. There is a public misconception that hypnosis acts as a form of truth serum, preventing a witness who has been hypnotized from lying. To the contrary, "the commentators and experts are united in the view that hypnotized subjects can and occasionally do prevaricate." Hypnotized subjects engage in "confabulation," the invention of details to supply unremembered events in order to make the account complete, logical, and acceptable to the hypnotist. This tendency to fill in the gaps of memory is extremely difficult to detect, because "[a] witness who is uncertain of his recollections before being hypnotized and who has confabulated during hypnosis will become convinced that the post-hypnotic recollections are absolutely accurate . . . . Such a belief can be unshakable, last a lifetime, and be immune to all cross-examination."

In 1985, Florida joined the growing roster of jurisdictions which hold that hypnotically-produced testimony is *per se* inadmissible. But that court decision came too late for Mr. Spaziano; the Florida Supreme Court refused to apply its 1985 hypnotism decision to Mr. Spaziano's case. Thus, Mr. Spaziano will be electrocuted on June 27 due to a legal technicality.

Had Spaziano's trial lawyer investigated available sources, he would have found an abundance of medical scientific evidence proving the inherent unreliability of hypnotically-generated testimony. By reading Gene Miller's magnificent 1975 book *Invitation to A Lynching*, counsel would have learned that Joe McCawley, the hypnotist who hypnotized Dilisio was a laughable mountebank, and that McCawley's hypnotic skills had previously sent two innocent men to Florida's death row, in the infamous case of Freddie Pitts and Wilbert Lee. By 1976, when Mr. Spaziano went to trial, scientists had advanced several arguments for excluding hypnotically-warped testimony, including (1) hypnosis was not widely accepted as a reliable method of "refreshing" memory; (2) subjects respond according to what they perceive as the response likely to please the hypnotist; (3) subjects "confabulate," or fill gaps in their memories; (4) the recall induced by hypnosis may be totally incorrect; (5) the subject can willfully lie; (6) cross-examination of a hypnotized witness is virtually ineffective; and (7) no set of procedural

safeguards is effective in eliminating these problems. Mr. Spaziano's trial counsel could and should have made the same arguments at trial.

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, but their only choices at the guilt/innocence stage were acquittal or conviction of first degree murder. They knew he was an Outlaw (his club colleagues attended the trial, in full biker regalia), and they were squeamish about letting him loose. The trial took place in the mid-1970s when bikers were considered by many "normal" people to be domestic terrorists, and they didn't want him running loose on the streets of Orlando. So the jury found him guilty of first degree murder, but voted (9-3 or 10-2, according to the juror's affidavit) against the imposition of death. There was a catch, however: the 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. A defendant "cannot be a little bit guilty," in the memorable words of former Florida Supreme Court Chief Justice Joseph Boyd.

Former Spaziano juror Lena Lorenzana was in her eighties when I met with her on the porch of her home in Orlando. Ms. Lorenzana signed an affidavit for me, discussing the jury's recommendation of life imprisonment instead of the death penalty. It said:

> One of the major reasons for [nine or ten] 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 jurors' 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. *Had we known his testimony was prompted by hypnosis, I believe it would have made a difference.*

The post-trial investigation did more than reveal the hideous unreliability of Dilisio's 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 state 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 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 conducted in October 1974 (about six months before the first disclosed interview). Although only police notes confirm this interview (as opposed to a transcript or tape), it appears that this was the first police interview with Dilisio where the subject of the murders in the dump arose. The police notes indicate that all Mr. Spaziano had ever (allegedly) said to Dilisio was "man, that's my style." The report does not indicate that Spaziano admitted to the murder or that he gave any other information to Mr. Dilisio, but he only supposedly claimed that it was his "style." Of course six months later, in the first recorded statement of Dilisio, the story had radically changed. By the time of the trial Dilisio claimed even more extensive statements were made by Mr. Spaziano. Yet, defense counsel did not have available the contents of the first interview which would have constituted strong impeachment of Dilisio's trial testimony.

By now you are probably wondering: So what's Spaziano's alibi? Where was he, if he wasn't killing Laura Lynn Harberts? It's a fair question, and Mr. Spaziano wishes, more than you'll ever know, that he knew the answer—and so do I. But the truth is that he *doesn't* know where he was on the day Laura Harberts was murdered. Recall that police suspicion did not focus on Mr. Spaziano until two years after

Ms. Harberts was killed. Now, quick: Can you say where you were, and with whom, two years ago today—on June 4, 1993? I don't know either, but I keep a journal, so I could find out. Joe Spaziano didn't keep a journal in 1972, so he didn't remember where he was or what he was doing when he was questioned by the police two years later.

Mr. Spaziano is not a good personal historian. Part of the reason for this is that at the time of Ms. Harberts' disappearance in 1972, Mr. Spaziano was living the nomadic and chaotic life of an Outlaw. But there is another reason Mr. Spaziano is not a good historian, and it's a subject about which Mr. Spaziano is, to this day, embarrassed. He would rather be executed for a crime he didn't commit than let me tell the world why his nickname was "Crazy Joe" long *before* he joined the Outlaws. You see, Mr. Spaziano *is* crazy. That's the truth. It's a truth that shames and humiliates himself in his own eyes.

Mr. Spaziano's medical history shows that on May 29, 1966, he suffered a severe head injury as a result of being run over by an automobile. He was admitted to Rochester, New York, General Hospital on May 29, 1966, with a "fracture of the skull in the right parietal area, contusion of the brain with accompanying coma, contusion of the urinary bladder, a fracture of the right ulna, a right peripheral facial paralysis, a 4 inch laceration of the scalp, and a 1 inch laceration of the right wrist." Mr. Spaziano was in a coma for several weeks and was discharged on June 20, 1966. Upon discharge, however, Mr. Spaziano "was still somewhat confused and only semi-oriented. In general he appeared rather indifferent to his mental difficulties." The significance of this injury in relation to the recent evaluations of Mr. Spaziano by medical experts cannot be overstated. "Closed head injuries," such as Mr. Spaziano suffered, "are the most common cause of organic personality syndromes in peacetime." Temporal lobe seizures, classically manifested as dream-like states which Mr. Spaziano experienced after his head injury, augment the development of an organic personality syndrome.

Most importantly, recent medical literature demonstrates that the symptomatology of the kind of head trauma suffered by Mr. Spaziano includes deficits in short and long term memory. That's why, when he was arrested in 1975, he had no alibi for his whereabouts two years previously, when Laura Harberts disappeared.

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

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

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

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

I have had fairly extensive contact with Mr. Spaziano throughout the course of working on his case. I corresponded with him and visited him on death row. In numerous conversations with me, Mr. Spaziano has always forcefully maintained his innocence of the murder of Laura Harberts. He has never suggested that he was involved in any way in that crime, not even to the point of asking or answering "hypothetical" questions that might assume his guilt. On the contrary, Mr. Spaziano has insisted that he was in no way involved in the crime. In fact, Mr. Spaziano's firm assertions of his innocence have, on occasion, been a source of some tension in our relationship. From the time that I first became involved with his case (in the fall of 1983), up until now, the case has not been in a posture that permitted us to introduce evidence of Mr. Spaziano's innocence. By the time the case reached our hands, the legal issues had "narrowed" to the constitutional challenges to his conviction and sentence. Accordingly, I had to tell Mr. Spaziano—more than once—that, at least for the time being, our hands were tied; we were limited to those constitutional issues in our appeals.

While expressing frustration at the slow pace of his appeals, and anger that the courts have failed so utterly to uncover the truth about the crime, Mr. Spaziano has continued steadfastly to maintain his

innocence, and has never wavered in his belief that if the truth about the crime were brought to light, he would be exonerated and released.

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

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

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

I've done the best I'm capable of doing, but it hasn't been enough. Mr. Spaziano will be destroyed at 7:00 a.m. on June 27, and there's not a thing I can do to stop it.[10]

Mr. Miller also contacted people he knew at the *New York Times*, the *Washington Post*, *Newsweek*, and James Jackson Kilpatrick, the conservative columnist from my own native state of Virginia. Mr. Kilpatrick wrote a column that I reproduce here in full.

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10. Michael Mello, Draft of Editorial: Save an Innocent Man, the Courts Refuse (June 4, 1995) (on file with author).

On June 27, Florida intends to execute Crazy Joe Spaziano for a murder that he probably did not commit.

The facts and the chronology are not much in dispute. On or about Aug. 6, 1973, someone brutally murdered Laura Lynn Harberts of Orlando. On Aug. 21 a passer-by found her decomposed body in a trash dump in Seminole County. She probably had been stabbed to death.

Beverly Fink, Laura's roommate, told police that on Sunday afternoon, the 5th, as she was leaving the apartment they shared, Laura was on the telephone. "Hold on a minute, Joe," she said to her caller. Was she talking to Joe Spaziano? Beverly said that the two were acquainted but barely so; they were not dating.

Almost two years passed. It was not until the summer of 1975 that police arrested Spaziano and charged him with the crime. Most of the police investigation in this period focused on another man entirely. But Spaziano had a bad reputation. He had a prior conviction for rape, and he was president of the Outlaws Motorcycle Brotherhood in the Orlando area. There was the suggestive "Hold on a minute, Joe." Laura and Spaziano had at least met. In July of '73 he had come by the apartment. Spaziano became the best suspect that the police could find.

Spaziano went to trial in July 1975. He asserted his absolute innocence. The key witness against him was one Tony Dilisio, 18, who testified to this effect: that he had once idolized Spaziano as an Outlaw biker; that he hoped to become a member of the Brotherhood himself; that at some point—he could not remember when—Spaziano took him to the Seminole dump and boasted that he had dumped the bodies of two women there. "Man, that's my style."

This was substantially all the evidence the prosecution had to offer. As the prosecutor himself acknowledged, without Dilisio's testimony, they had no case. The jurors doubted that guilt had been proved. Judge Robert McGregor twice had to order them back to their room to reach a verdict.

The jurors never got the whole story. Two aspects of the trial are especially disturbing. First, the state knew that on the Sunday afternoon in question, Laura had in fact been talking to Joe Suarez, a co-worker at the hospital where Laura and Beverly worked. This was never disclosed to the jury.

Second, for some inexplicable reason, Spaziano's trial counsel never brought out that Dilisio's testimony had been induced under hypnosis. During his first interrogation by police, Dilisio never mentioned the visit to the dump and the vainglorious boast. It was only under hypnosis, coupled with highly suggestive questions, that he much later "remembered" the incident and enlarged upon the incriminating conversation.

(In 1985, Florida's Supreme Court held that hypnotically induced evidence is unreliable and inadmissible, but the ruling was not made retroactive.)

In any event, Spaziano did not testify, and the jury found him guilty. One juror recalls that the vote was either 10-2 or 9-3 to recommend life imprisonment, but Judge McGregor overruled the jury and sentenced Spaziano to death. The court took note of Spaziano's prior conviction for rape; the crime had been especially "heinous, atrocious and cruel"; no mitigating evidence had been offered. "Crazy Joe," as the indictment identified him, was a leader of the Outlaw bikers. His brothers, in full biker regalia, had attended the trial.

The long process of appeals and petitions for habeas corpus began. In 1984 the U.S. Supreme Court affirmed the conviction, 6-3, with Justices Stevens, Brennan and Marshall dissenting. They reasoned that it is cruel and unusual punishment for a judge to overrule a jury and impose a death sentence on his own.

Since then the case has been up and down, and in and out. Spaziano, now 51, has been on Death Row for 20 years. Professor Michael Mello of the Vermont Law School, an authority on the law of capital punishment, came late into the case as Spaziano's appellate counsel. He is convinced "down to the very marrow of my bones" that his client is innocent. Other investigators have expressed serious doubts of the defendant's guilt.

Now it is up to Florida's Gov. Lawton Chiles. Given the totality of the circumstances—the withheld evidence, the testimony induced by hypnosis, the jury's recommendation of life—it is hard to imagine a better case for clemency.

Despite all my waning confidence in capital punishment, I believe that there are especially atrocious cases, in which guilt has been proved far beyond a reasonable doubt, when the death sentence may be justified.

> Crazy Joe's case is different. It resounds with doubt. I cannot argue Spaziano's innocence as Mello can—I have not read the trial record—but I am satisfied that in this case the state played dirty pool with the life of a not very likable man.[11]

Most importantly, Mr. Miller and Warren Holmes persuaded the *Herald* to assign a crack team of investigators, led by Lori Rosza, to reinvestigate the case. Ms. Rosza pulled off a number of miracles over the ensuing couple of weeks, but I must mention one. The State's case against Joseph Spaziano rested on the testimony of one Anthony Dilisio. In 1985, my investigator had tracked Dilisio down to a small town in California. Dilisio refused to talk to my investigator about the case. In March 1995, Florida's Office of the Capital Collateral Representative's (CCR) investigator tracked Dilisio down to Pensacola, Florida. CCR's investigator not only struck out with Mr. Dilisio, but his heavy-handed approach made it extremely unlikely that Dilisio would talk to *anyone* about Mr. Spaziano's case. So, when I gave Lori Rosza Mr. Dilisio's address in Pensacola, I fully expected that she would strike out as well. The first time she approached Dilisio, he slammed the door in her face. The second time she approached him, he slammed the door on her foot. The third time she approached him, he let her into his kitchen, and spoke with her for several hours about Joseph Spaziano and himself.

The ensuing news stories written by Ms. Rosza and her colleagues at the *Miami Herald*, combined with columns and editorials in other newspapers in and outside of Florida, caused Florida Governor Chiles to stay the execution of Mr. Spaziano—an execution Mr. Chiles had ordered by signing the death warrant in the first place.[12]

I want to be very, very clear on this point. The stay did *not* result from anything I did. It did not result from anything that any other lawyer did. It did not result from anything that any court or any judge anywhere did. As surely as I live and breathe, but for the intervention of Gene Miller, Warren Holmes, and Lori Rosza, Joseph Robert Spaziano would have been executed, as scheduled, at 7:00 a.m. on June 27, 1995.

After the stay came down, other media picked up the story. Jeffrey Rosen wrote an editorial in the *New Republic*.[13] Bruce Shapiro wrote a

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11. James Kilpatrick, *Facts Undermine Case against Crazy Joe*, TAMPA TRIBUNE, June 9, 1995, (Nation/World) at 15.

12. Tim Mickins & Lori Rosza, *Chiles Considers Staying Execution of Joe Spaziano*, MIAMI HERALD, June 15, 1995, at 1B; Tim Mickins & Lori Rosza, *Governor Chiles Steps In; Execution Called Off*, MIAMI HERALD, June 16, 1995, at 1A.

13. *Notebook*, *supra* note 7.

beautiful piece in *The Nation* magazine.[14] In the *National Law Journal*, Linda Gibson traced the *Herald*'s role in Mr. Spaziano's case.[15] The *Washington Post*, the *Christian Science Monitor*, and *The Economist* all wrote substantial news stories about the case.[16] And *ABC World News Tonight* conducted its own, extremely thorough, factual reinvestigation in the case.[17] Producers Nina Alvarez and Beth Grossbard, along with reporters Mark Potter and Michelle Genessy, generated a meaty and accurate account of the case.

The *Miami Herald* was responsible for obtaining the stay of execution. And *ABC News* was responsible for holding the stay of execution for as long as it held. During my twelve years as a capital post-conviction litigator, I swore that I would never try any of my cases in the media. Now, I swear that I will never again try one in court.

When I first decided to take Mr. Spaziano's case to the *Miami Herald*, one of my friends and colleagues in deathwork asked me whether I had lost my mind. I had not lost my mind; I had found my courage. And I had found my voice.

Twelve years of deathwork has left me extremely distrustful of reporters and, in a few instances, that intuitive distrust was confirmed by my experiences in Joseph Spaziano's case. A few, but only a few, reporters who called me *were* only interested in a quickie story. But those were not the reporters with whom I chose to deal.

The reporters with whom I chose to deal all met two simple criteria. First, they did their *own* homework, their *own* prosaic, gumshoe reporting. Second, *if* their own independent reporting confirmed my contentions that Mr. Spaziano was, in fact, innocent and that he had been framed by the State, then those reporters would not be intimidated by the Governor, or the Florida Department of Law Enforcement, or the courts, or the prosecutor. They would *report* what they found in their *own* investigation of the case. These reporters knew they were getting into a marathon, not a sprint. They were in it for the long haul. They were looking for the long view, the wide-angle lens shot.

The State, under the auspices of the Florida Department of Law Enforcement (FDLE) also did an investigation that was limited to one, narrow focus: the credibility of Anthony DiLisio, the State's only witness

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14. Shapiro, *supra* note 7.

15. Linda Gibson, *Happy Birthday, Mr. Spaziano: Court Gives "Crazy Joe" 11th-Hour Reprieve*, NAT'L L. J., Sept. 25, 1995, at A10.

16. Booth, *supra* note 7; Scott Pendleton, *When Innocence Gets Short Shrift*, CHRISTIAN SCI. MONITOR, June 26, 1995, at 1; *Change of Heart*, *supra* note 7.

17. *ABC World News Tonight*, *supra* note 7.

of substance against Mr. Spaziano at the murder trial and the rape trial. The FDLE spent two months investigating, at an undisclosed expense to Florida taxpayers, to generate a report.

However, there was a catch. The FDLE report was ordered sealed,[18] an order upheld by the Florida Supreme Court.[19] Once again, Lori Rosza's investigative reporting exposed the FDLE report as a fraud.[20] But the secret police report was enough for Chiles, he signed a new death warrant on August 24, 1995.[21]

The new death warrant signed by Governor Chiles, and based on the FDLE report, left me with the difficult question of whether to take Mr. Spaziano's case to federal court. This was not an easy decision but, eventually, I decided not to pursue this unlikely channel of justice. I 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, Ed Carnes, Eleventh Circuit judge, and the Rehnquist Court. 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

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18. Letter from Lawton Chiles, Governor of Florida, to James Moore, Commissioner, FDLE 1 (Aug. 17, 1995).

19. Spaziano v. State, No. 67929, 1995 Fla. LEXIS 1428, at *8 (Fla. Sept. 8, 1995) (per curiam). The matter of the sealed report was challenged in Joseph Spaziano's Request to Enforce Rights. Brief for Joseph Spaziano, Spaziano v. State, No. 67929, 1995 Fla. LEXIS 1428 (Fla. Sept. 8, 1995)(No. 67929).

20. Lori Rosza, *Chiles Got a Flawed Report on "Crazy Joe,"* MIAMI HERALD, Sept. 17, 1995, at 1A.

21. Mike Griffin, *Chiles to OK Spaziano's Death*, ORLANDO SENTINEL, Aug. 24, 1995, at A1. An editorial in the *Orlando Sentinel* supported Chiles' decision. *Justice for Spaziano*, ORLANDO SENTINEL, Aug. 25, 1995, at 12A.

the Eleventh Circuit's opinion on Mr. Spaziano's case and spent more energy complaining about the page limit for my brief than the evidence of innocence I raised in the brief. Finally, the innocence-based certiorari petition I filed in November of 1994 with the U.S. Supreme Court did not get a single positive vote. 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 videotape 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 Rehnquist 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 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 me, 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.

I have long thought 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*.[22] 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.

I was afraid that I had already erred in giving Governor Chiles an out when I 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 I did not go to federal court. I hoped that by keeping the pressure on Governor Chiles, while allowing the media to continue championing Mr. Spaziano's innocence, we could succeed.

As a result of this decision, Gene Miller accused me of playing games with Mr. Spaziano's life, and maybe he was right. On some level this is all a high-stakes game—so are Pentagon war exercises in the Persian Gulf—but if it is all a game I think we need to consider changing the rules. This call was mine and Mr. Spaziano's. I had the input and advice of many people far smarter than I, and for that I was grateful. But the final responsibility was mine alone. I hoped I was making the right decision on this. I hoped even more that I would not need to find out

22. Herrera v. Collins, 113 S. Ct. 853 (1993).

because the Florida Supreme Court would grant a stay to consider the rehearing motions that were pending before it.

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.

However, the criminal justice system, and particularly prosecutors and police, *never* admit they are wrong. They did not with Pitts and Lee. They did not with Miller and Jent, and they did not with Joseph Green Brown. In every case, even Mr. Richardson's sorry conviction, some prosecutor or police officer was quoted as saying, "He got away with murder."

The fact that the prosecutor, police, and FDLE are reluctant to admit Mr. Spaziano's innocence is no surprise to anyone who has watched this system over time. However, they did the next best thing. Some nameless, faceless person accused Mr. Spaziano in the *Orlando Sentinel* of complicity in other crimes.[23] Implicit in that accusation is the acknowledgment that Mr. Spaziano is innocent of the crime for which he is on death row. It would be a waste of time and energy to talk about other crimes if this prosecution could be defended. It is only because this prosecution is so repugnant to fair-minded people that anyone would bring up some other uncharged offense. The importance of these remarks in the *Orlando Sentinel* is not that they are true or even plausible. Their importance lies in the fact that they would not have been made at all, except that the maker knew how truly indefensible *this* prosecution was.

But admit Mr. Spaziano is innocent? Never. Consider the words of Richard Blumenthal, *pro bono* lawyer for Joseph Green Brown (and now Attorney General for Connecticut).

> Pondering whether the system worked for Brown, I think back to all the critical decisions that, made differently, might have led to a less successful outcome: which arguments to pursue with which courts, how to answer questions so as to be most persuasive, when to approach the prosecutors and with what arguments, how to assemble the pieces of the puzzle so as to maximize the possibility that Brown might not be executed. Success was always only a possibility, not a probability, let alone a certainty.

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23. Michael Griffin & Jim Leusner, *Chiles to OK Spaziano's Death*, ORLANDO SENTINEL, Aug. 24, 1995, at A1.

> In our attack on the prosecution, we failed in three courts before we finally prevailed in the United States Court of Appeals for the 11th Circuit. Only one more avenue of appeal would have remained if we had failed there—the U.S. Supreme Court—where success would have been problematic at best.
>
> In short, the inevitability of Brown's vindication was not so self-evident as it may seem in hindsight. There were many moments when I sought to steel myself for the electrocution of a human being who I knew to be innocent.
>
> Brown's story had a happy ending. But are there other innocent prisoners on death row whose lives will not be sparred? Have there been others truly not guilty of the crimes charged against them who already have met death?
>
> * * *
>
> Consider simply and solely the issue of fallibility. We have the fairest and most accurate criminal justice system in the world, probably the best ever in human history. Still, the system makes mistakes. Maybe the mistakes are rare, but it is not error-proof.
>
> The system's fallibility is nobody's fault. We are the system and we are only human. Human beings are fallible. The finality of death as a penalty denies us the opportunity to correct our mistakes.[24]

Surely governors, such as Lawton Chiles, must understand that prosecutors and judges and juries can make mistakes, they are fallible human beings. Governors must know that most capital defendants do not get treated like O.J. Simpson; in my experience, they are, fairly often, represented by court-appointed hacks. This is not just my judgment; read the reported cases on ineffective assistance of counsel claims, or read about them in the *Harvard Law Review* and the *Yale Law Journal*.[25] If a governor is chauvinistic enough to think that innocent people are convicted and condemned only in the bad old South of my birth, then they should study the history of executions in New York. Until modern times, the Empire State had the singular honor of having executed more innocent

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24. Richard Blumenthal, *If an Innocent Person Can Be Executed, the Death Penalty is Unworkable*, HARTFORD COURANT, May 17, 1987, at D1.

25. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994).

people than any other state, bar none: more than Texas or Georgia or Alabama or Mississippi or Louisiana or Florida or Virginia or North or South Carolina.[26] And if they think that state killings of innocent people is merely puffery from bleeding heart liberals like myself, they should study the staff report issued a few years ago by the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, entitled *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*.[27] Or they could read Gene Miller's 1975 book *Invitation to a Lynching* or ponder Warden Lewis Lawes' book *Twenty Thousand Years at Sing Sing*.[28]

Chiles, and other governors, would give government the power to decide who dies—the same government that cannot competently, in many parts of the country, deliver the mail (and our names are on the envelopes and everything) or come up with a fair system of taxation. Yet, Chiles would entrust that same government to reliably assess the gradations of horror committed by some of its citizens, and to decide which relatively few of those bad actors deserve to die. Chiles' faith in judges and juries is misplaced. It is bad enough that the criminal justice system can put people away for life without possibility of parole, but at least those convicts who are convicted in error might still be alive when (and if) those mistakes are discovered. It seems strange to have to say this, but death is different in its finality. The legal system buries *those* mistakes.

Since the stay came down in Joseph Spaziano's case, a few people have asked me for thoughts on "working" the media. My only thought is that you *cannot* work the media, at least not in a capital post-conviction case. What you *can* do is provide specific reporters with information—so long as the information is true, accurate, and complete. Here are my observations on taking a case to the media.

Number 1: Choose your reporters carefully and according to two criteria. Do they do *their own* homework, and do they have an open mind? Ironically, media that is willing to take your word, uncritically, for what the raw, primary documents in the case say, is not media with whom you want to be dealing. If the reporters do not ask *you* the hard questions, they will not ask the prosecutors the hard questions either, and the prosecutors always have the better sound bites; they also have the grisly

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26. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 282-386 (1992).

27. SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE JUDICIARY COMMITTEE, 103D CONG., 2D SESS., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS (Comm. Print 1994).

28. MILLER, *supra* note 8. LEWIS E. LAWES, TWENTY THOUSAND YEARS IN SING SING (1932).

crime scene photos. So, the more skeptical the reporter, the better. If she supports capital punishment as a public policy, all the better.

Number 2: Your client had better *really* be innocent, and you had better be able to prove it. You should know that if you run a fraudulent innocence claim in the media, and you are found out, and you *will* be found out, trust me, then the media will slaughter both your client and you, as they *should*. Also, you will make it significantly harder for others to convince the media that *their clients* are innocent, even if they are. You must be prepared to live with the fact that your fraudulent innocence claim will likely contribute to the killing of innocent people in the future, by poisoning the media atmosphere within which such claims must be raised.

Number 3: Tell the truth, omitting and embroidering nothing, including, *especially*, the evidence that hurts your client. If you have chosen the right reporters, you will not be able to fool them. So do not even try.

Number 4: Legal technicalities do not matter here, regardless of whether they work to your client's benefit or to the prosecution's. The qualified good news is that in this venue, unlike in court, you *will* be able to tell the whole story. The legal technicalities that preclude courts from hearing newly discovered evidence bearing on actual innocence do not apply in this forum. By the same token, the exclusionary rule does not apply, either; the state is as free as you are to tell *its* whole story. And, while at trial your client need not testify in his own defense, here you had better have a provable alibi, or a damn good reason for not having one. The trial is over; your client lost; *you* now have the burden of upsetting a presumptively valid murder conviction and death sentence.

Number 5: Open *all* your files to your reporters, and keep them open. Resist the temptation to purge. If you are working with the right reporters, they will find you out, and nail you and your client.

Number 6: Be willing to say, in writing and on the record, that of your X number of death row clients (you *must* give a number, and it had better be fairly high), *this* is the one, and the only one, whom you believe in your bone marrow to be entirely innocent. Be ready to live with the consequences from your former clients and their families, who will feel, quite justifiably, that you have sold them down the river in favor of your one current client. Be prepared to be grieved against before the bar and sued for malpractice.

Number 7: Be ready to give up any future representation of death row clients. You only possess a finite amount of credibility capital and, by the time this case is over, you will be deficit spending at an order of magnitude that only the Pentagon might understand. This only works

once, and all of your future clients will, and rightly so, demand that you do for them what you did for this one client.

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. I refused to participate in such a hearing. The reason I defied the Florida Supreme Court's order for a new hearing was my inability to prepare adequately in such a short time without support or resources.

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 my 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. I worked for CCR from 1983 to 1986, 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 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?

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 I told the Florida Supreme Court, I 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. 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.

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 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.

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 over-funded 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.

Mark Olive, my mentor on all capital matters, once told me how executions are stopped. Good law helps; good facts help; factual innocence helps, but not nearly as much as it should. What stops executions is *will*, a simple bedrock determination that this execution shall not happen.

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

First, the legislature should abolish CCR. Not only is CCR's effectiveness an illusion, it is also an expensive way to provide lawyers. Second, the legislature and bar should undertake a joint venture to resurrect VLRC to provide logistical support for *pro bono* lawyers. It

could be done at a fraction of CCR's current budget. It would be better for death row, and it would be better public policy. Death row inmates would be represented by real lawyers, rather than CCR bureaucrats. And those real lawyers would experience, firsthand, the reality of Florida's capital punishment as a functioning (or dysfunctional) legal system.

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.

But they best not come to me, not that I expect they will. After working for two thousand *pro bono* hours, and going into personal debt that maxed out all my credit cards, the Florida Supreme Court's response was to "fire" me from the case. However, the Court's determination to make it impossible for me to continue as Mr. Spaziano's lawyer, did me a great personal service. The Court's shameful treatment of Mr. Spaziano's attempts to prove his innocence were a *mitzfa* for me, because it cemented a decision I have been moving towards for years: to conscientiously abstain from participation in a legal "system" so grotesquely skewed, unfair, and morally corrupt that it will not even consider, *really* consider as opposed to pretending to consider, evidence of innocence.

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. The time has come for us 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 birthday, the Florida Supreme Court entered an order staying the execution indefinitely and removing me as Mr. Spaziano's lawyer.[29] The Court purported to fire me 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 me, because my client is Mr. Spaziano, not the Court. And Mr. Spaziano

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29. 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 MacKinnan, *Spaziano Lawyer: Hearing a "Sham,"* MIAMI HERALD, Sept. 8, 1995, at 1B.

most emphatically does not want to be represented by CCR, as he and his family have made clear in writing.

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.

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 hostile.

To win time is to win. 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."[30] 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.[31]

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. Often the attorneys (who are trained to "think like lawyers," to think linearly, and to treat people as lawyers do) challenging the inmate's underlying conviction and sentence are not the best ones to fulfill these needs. Florida death row inmates are fortunate to have a few people of seemingly inexhaustible generosity of spirit and compassion, such as Susan Cary, Michael and Lisa Radelet, and Margaret Vandiver, who assist them and their families in recognizing, processing, and coping with the psychological and spiritual process of preparing for possible death. These

30. PAUL MONETTE, *New Year's at Lawrence's Grave*, *in* WEST OF YESTERDAY, EAST OF SUMMER 37 (1994).

31. HENRY JAMES, THE AMBASSADORS (1970).

generous folks have a rare talent for slicing through the macho posturing of death row, posturing that can be painful to watch.

This nonlegal counseling and support helps transform an inmate's appreciation of death from abstract principle to concrete reality, and so helps the inmate—I keep 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. My goals are to ensure that the person I represent 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.

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.

It is not really—or maybe I mean 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.

POSTSCRIPT: A MODEST PROPOSAL FOR A TRUTH SUPER-JURY, A FACTUAL COURT OF LAST RESORT

As the O.J. Simpson spectacle has made painfully clear for all to see, the criminal justice system has little to do with seeking the truth. Lawyers and judges are in pursuit of legal truth, truth by legal means. Lawyers and judges focus on legalisms, often on legalisms of a procedural and technical sort.

Such legal and procedural technicalities often inure to the benefit of criminal defendants. But procedural rules are a sword that cuts both ways. As often as not, the law's preoccupation with procedural matters works *against* criminal defendants—to preclude appellate courts from even *considering* newly discovered evidence that the state got the wrong person, that a death row prisoner is, in fact, totally innocent of the crime.

One such death row prisoner is, of course, Joseph Spaziano. Court after court—twenty-six judges over nineteen years—has refused to even *consider* Joseph Spaziano's evidence of innocence. Why? Because of the law's procedural technicalities: the evidence was found too late; the evidence was presented to the wrong court at the wrong time; some of the new evidence (a police videotape) was not given under oath (even though it is a crime to give a false statement to the police). And so on.

It is more than passing strange that appellate courts *will* decide whether the police erred in not giving a capital defendant his *Miranda* warnings, but not whether the state is about to execute the wrong guy. This is a twisted and inverted situation that only a lawyer could love.

As the Spaziano case illustrates, lawyers and judges cannot be trusted to guarantee that the state is not killing the wrong man. They *can* be trusted to determine whether the defendant's constitutional rights were violated. Legal truth and absolute truth are different questions. The difference is large.

I propose the creation of a truth super-jury to investigate and decide death row prisoners' claims of factual innocence. Note that I do not say a truth *court*. Judges and lawyers would be excluded from the body I propose. The last thing we need is yet another court peopled and run by linear thinkers who obsess with procedure over substance and who "think like lawyers." Further, the law and its technicalities often become a crutch for indecisive people. So I propose a truth jury, not a truth court.

The truth jury would have a roving mandate to evaluate and investigate claims of factual innocence, and the jury would possess the expertise to make its judgments reliable and worthy of trust and respect. The jury would consist of experienced forensic investigators, experts (on ballistics, fingerprinting, DNA, and the like), forensic criminologists, polygraphers, and so on. The jury would not be hand-cuffed by the legalistic technicalities that preclude courts from considering newly-discovered evidence of innocence. Since the prisoner would have the

option of going to the truth jury (or not), the jury would compel the prisoner to answer its questions (about alibi, for instance), and the jury could rightly demand that defense counsel open up her files to the jury.

The truth jury would exist to answer one question and one question alone: "Did he commit the crime?" Not: "Did he do it, but was he crazy?"; not "Did he do it, but did he have a bad childhood?"; not "Did he do it, but does he deserve to die for it?" Much like the Home Secretary in Britain, the American truth jury would only ask whether the condemned prisoner is factually innocent.

This job could be done with fewer resources than you might think. Most claims of factual innocence are bogus—Mumia Abu-Jamal's comes immediately to mind—and the truth jury would be able to peremptorily dismiss most of them early on. Guilty people would not avail themselves of the truth super-jury, because the jury's adverse verdict would be a confirmation of guilt.

Even proponents of capital punishment—indeed, *especially* proponents — should support the creation of a truth jury to explore claims of factual innocence. Nothing will undermine public support for capital punishment faster than the execution of a person who later turns out to have been innocent; that's what led to abolition in England in the 1950s. Supporters of capital punishment should *demand* that a check be devised to prevent the unthinkable: executing the innocent. The courts cannot be counted on, as the Spaziano case vividly and tragically illustrates.

We need a truth super-jury for the Joe Spazianos on our death rows. More importantly, we need a truth super-jury for ourselves, to ensure that an innocent person is not put to death in our names.