

Before the

GOVERNOR AND THE BOARD OF EXECUTIVE CLEMENCY

**IN RE: FREEDOM AND RESTORATION OF FULL RIGHTS OF CITIZENSHIP
FOR JOSEPH ROBERT SPAZIANO**

**APPLICATION FOR EXECUTIVE CLEMENCY
AND IMMEDIATE RELEASE FROM CUSTODY**

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PRELIMINARY STATEMENT

This clemency application supersedes all clemency applications previously filed in Mr. Spaziano's case. All previously filed clemency applications have been denied by virtue of the signing of death warrants.

I. INTRODUCTION

A. 'MEMORY' OF MURDER, MOCKERY OF JUSTICE

by Tony Proscio, *Miami Herald*, June 14, 1995

This is one of those choices that tests a civilization's soul. Out of all the static about defining moments and public morality that crowds the narrow bandwidth of modern politics, here, finally, is a real defining moment for a real public. It will tell what morality, if any, guides Florida government. The issue is life or death, and the choice will be made in the next 12 days.

The question is whether the state of Florida will kill a man for committing a crime to which utterly no evidence links him.

That may sound impossibly easy, a case of the press manufacturing a simplistic, black-and-white choice out of a morass of complexities. But in fact the question is just that plain. Nearly a dozen skeptics, including reporters, editors, and lawyers, inside and outside *The Herald*, scrutinized this issue with exactly those doubts. But they, too, now find the evidence unconvincing. Governor Lawton Chiles has signed a death warrant for a man whom no court should have convicted, much less condemned to death.

The accused is Joseph Spaziano, nicknamed Crazy Joe, a troublemaker and all-around bad dude, locked up 20 years ago for the grotesque rape-torture-murder of Laura Lynn Harberts. Her badly decomposed body was found in a dump, along with the remains of another woman, still unidentified.

To clear up one issue right away: I struggle, like many Americans, with moral questions about the death penalty. But then I encounter crimes like the murder of Laura Lynn Harberts: a death committed for fun, perhaps slowly, by a person whose existence is a permanent threat to everyone. I can find no argument, even among the confused left-over devices of my once-bleeding heart, for sparing whoever committed this crime.

I understand that others disagree. I once did myself. And I'm even embarrassed by the strength of my feeling on this issue. But there it is: I say, when you catch him, fry him.

But first you have to be certain that you've caught him. You can be a mighty firm supporter of the death penalty and still be uneasy with many of the executions that occur in this country. The pending execution of Joseph Spaziano, scheduled for 7 a.m. on June 27, is guaranteed to be one of those.

As The Herald reported in detail on Sunday, Spaziano was convicted of murder in 1975 based on no physical evidence, no eyewitnesses, and no confession. By prosecutors' own admission, the state could produce just one witness who tied Spaziano to the crime. The 18-year-old witness told jurors that Spaziano had shown him the bodies of two victims, including the recently murdered Laura Lynn Harberts, and had boasted of other, similar murders.

No one, however, told the jurors one pertinent fact: This witness had never recalled any such thing until he was placed under hypnosis. The witness, Tony Dilisio, now 37, compares that experience to "brainwashing." He now says that he no longer has any idea what was true and what was cooked up under hypnotic guidance.

One thing is certain: Before the state's Dr. Mesmer act, Dilisio was a regular user of hallucinogens and more than acquainted with weird goings-on. Yet in lengthy interviews with police, he had given not one word of evidence tying Joe Spaziano to this murder.

Enter the shaman, Joe B. McCawley, a self-styled "ethical hypnotist" with a record of wringing testimony out of reluctant witnesses. By the time of Spaziano's trial, McCawley already had helped put two innocent men, Wilbert Lee and Freddie Pitts, on death row. (Governor Reubin Askew and the Florida Cabinet finally pardoned them after someone else confessed to the crime.) As he did for the prosecutors of Lee and Pitts, McCawley came up with a humdinger this time. But it wasn't easy.

The first time Dilisio went under, McCawley approached the job more or less obliquely. He calmed his witness and encouraged him with soothing (if slightly theatrical) language, to relax and to slow his mind. After some preliminary questions, the hypnotist began:

"I want you to go back perhaps to the time when there were two girls involved, their bodies were later found out in the Altamonte Springs, and I want you to go back and begin to remember about these girls. . . . What's the first thing you remember Joe talking to you about in relation to the girls?"

"He put some girls by a lake," said the zonked-out witness.

Q: Can you describe anything about the lake?

A: I never saw the lake; he just told me about it.

Q: He never showed you anything?

A: *No.*

Q: *Did he ever tell you the name of either girl?*

A: *No.*

Q: *Did he ever show you a body?*

A: *No.*

Obviously, this wasn't going well.

As the session dragged on, and under insistent prodding, Dilisio "recalled" Crazy Joe bragging about raping and mutilating women. The crimes that he described Spaziano bragging about had not been alleged, nor was there any evidence of them. But the thought of such boasting was repugnant all the same. Police smelled pay dirt.

Nevertheless, when it got to specifics, Dilisio had none. No known victims, no bodies, no evidence of any crime.

So the state tried a different tack. First, it seems, police took Dilisio to the spot where the bodies had been found, gave him a good look around, "refreshed" his knowledge of the scene. Then, in a follow-up session, the state-paid hypnotist went at Dilisio hammer and tongs:

"Now, you have some information about this particular incident There are certain things coming from your subconscious to your conscious level . . . and you're going to let these come out. . . . You have some knowledge there that you want to get out of your system apparently that we're going to give you a chance to get out and purge your system of it. . . . " and so on.

Between the visit to the dump site and the subsequent hypnotic encouragement, the groggy Dilisio finally got the message:

A: *I think I saw one.*

Q: *All right, tell me where you think you saw the one.*

A: *By a lake.*

Q: *How many bodies do you see?*

A: *Just one.*

Not good enough. There were two bodies. The state needed Tony to see two. Several more questions follow, all probing for some hint of another body. Then McCawley delivers the whopper:

Q: *Is there another body with this body that you're looking at? Think this out. It will be easier later, Tony; much easier.*

A: *Old. . . . Old woman.*

Oops. No good. The other victim wasn't discernably elderly; the *corpse* was old. That is, it had been disposed of long before. Dilisio evidently had gotten his suggestion mixed up.

McCawley isn't discouraged:

Q: *Huh?*

A: *Old.*

Q: *Gold what?*

A: *Old woman.*

Q: *Old woman?*

A: *Body . . . it was, it was, it was old. It's an old one.*

Bingo!

Now the case was rolling. The other body in the dump, too badly decomposed to identify, had been discussed in the media and doubtless by police. It was well enough known so that Dilisio was no doubt already aware of it. Even so, it took him several answers to "remember" what the police seemed to want.

In any case, here is how Dilisio describes the scene when Spaziano allegedly showed him the bodies of the two women:

Dilisio: *I didn't want to go.*

Q: *You didn't want to go?*

A: *I wanted to.*

Q: *You wanted to go, all right. Now, what's happening?*

A: *He didn't want to go.*

Q: *What does Joe want to do?*

A: *Stay there. Kill her. (Mind you: Up to now, the victim was supposedly already dead.)*

Q: *So what do you do?*

A: *Some acid.*

Q: *Uh huh.*

A: *Get drunk.*

Q: *Okay.*

A: *Smoke some marijuana.*

Q: *About when is this?*

A: *About one or two years ago.*

Today, 20 years later, Dilisio is a recovered man, a lay preacher and a responsible adult. He remembers nothing about any of this. At an impressionable moment of his adolescence, he supposedly was shown the mutilated corpses of two women and subjected to a bloodcurdling account of how they died. Yet to this day, he says, he remembers no such thing.

Could he, at the time, have been "recalling" a drug-induced hallucination? Maybe. Once the drugs were gone, perhaps so were the "memories."

But it's just as possible that he wasn't "recalling" anything at all, just responding — as many hypnotized patients do — in whatever way seemed to please the hypnotist. This helps explain Dilisio's confused, contradictory answers under hypnosis.

In any case, once he was out of the trance, Dilisio's "recollections" became cemented in his conscious mind. That is a common effect of

hypnosis. It's why people seek hypnotists to help them "resolve" to lose weight or stop smoking. The ideas that occur during the trance seem remarkably firm and vivid.

Nonetheless, nothing that happened to Tony Dilisio on the state's couch — and thus none of what he parroted later, under oath — is what rational people mean by "testimony." Some other descriptions come to mind: suggestion, prompting, manipulation. But Dilisio, who has grown into a man of straight talk, now prefers the blunt term "brainwashing." Seems as good a word as any.

On the strength of this hocus-pocus — and on the basis of no other evidence whatsoever — that state of Florida is about to electrocute a human being. You and I will provide the electricity and the authority by which it is administered. We will kill Joe Spaziano without any rational belief that he is guilty of murder.

Governor Chiles can prevent that by withdrawing the death warrant and seeking a vote of clemency from the Florida Cabinet. If he does not, the switch that kills Joe Spaziano on June 27 will at the same instant deprive us all of our innocence.

B. THE ROADMAP

The above column illustrates that a miscarriage of justice is about to occur. That miscarriage would be the execution of an innocent man, a man whose convictions and sentences are bottomed on the testimony of a sixteen year old young man who was vulnerable to chemical dependency and police manipulation and "brainwashing" by rogue officers; a witness who at the time hated Mr. Spaziano, and who was granted immunity before he "remembered" a bizarre and inconsistent tale about Mr. Spaziano allegedly taking him to a body and making inculpatory statements about Laura Harbert's death. The witness is Anthony Dilisio, and all agree that without his testimony there was no case against Mr. Spaziano. In an extraordinary act of Christian faith and courage, Mr. Dilisio, through his counsel, has joined in this petition for clemency for Mr. Spaziano.

We make this application for executive clemency, to you, Governor Lawton Chiles, and to the Board of Executive Clemency, because you are the only ones who can prevent his injustice from taking place. The courts cannot act, because they are bound by legalistic technicalities which preclude them from even *considering* the overwhelming evidence that Joseph Robert Spaziano has been convicted and sentenced to die for crimes he did not commit.

As the state argued to the homicide jury in closing, if they did not believe Mr. Dilisio, they had to acquit Mr. Spaziano. This closing argument proved to be prophetic. After considerable deliberation, the jury expressed that it was having trouble reaching a verdict. The jury was then told by the court that it was their duty to try to agree upon a verdict. They tried again and reported they did not believe they could reach a verdict. The court gave a dynamite charge, and late in the evening, 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." *See R2-272.*

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 damaging Dilisio testimony was manufactured by police manipulation that took two forms: the "recovery" of "repressed memories," and the further molding of those "memories" by the police's use of a charlatan "ethical hypnotist" who spoonfed Dilisio details of the crime scene known to the police and who tried to "brainwash" — Dilisio's word — him by means of a parody of a suggestive hypnosis session that would be darkly comical but for its outcome —

the testimony of Dilisio, which was really testimony concocted by the police, desperate to close a two-year homicide file and to nail the president of the Outlaws; by the time the police got done with Dilisio, he was ready to act as the denuded instrument of Mr. Spaziano's destruction, a "brainwashed" kid who was more like the Manchurian Candidate than the untainted witness upon whom the prosecutor depended to convict Joe Spaziano and to kill him. 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. Mr. Spaziano will produce the tapes and transcripts of the hypnosis sessions at an evidentiary hearing -- a hearing which he has never had. He also will present expert testimony to prove the inherent unreliability and unbelievability of the hypnotically refreshed testimony of Anthony Dilisio. Indeed, the Florida Supreme Court has held that hypnotically refreshed evidence is so unreliable as to be inadmissible in Florida, but this decision came too late for Mr. Spaziano. *Stokes v. State*, 548 So. 2d 188 (Fla. 1989); *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1987).

Mr. Dilisio's crucial testimony was that Mr. Spaziano took him to a dump where a dead human body was located, indicated to Mr. Dilisio that he, Spaziano, had killed the person, and described how he did so. Mr. Dilisio also testified about his recollection of the condition of the body. Further, Mr. Dilisio testified at trial that photographs of the location where Laura Harberts' body was found looked like the area where he had allegedly gone with Mr. Spaziano.

It was a powerful yarn, and it was the alleged trip to where the body was located which convicted Mr. Spaziano and which resulted in the judge's disregard of the jury

recommendation of life. The problem is that *it wasn't true*. On this point Mr. Dilisio is clear and emphatic. There was a trip to a dump, but it was with the *police* — not with Joe Spaziano.

In June 1995, Anthony Dilisio, the State's *only* meaningful witness against Joseph Spaziano at the original trial, agreed to join in this petition for clemency. At the time of the trial, Dilisio was a confused kid who was manipulated by the police. He has matured into a responsible adult, now working to the best of his ability to save the life of the man the police used him to frame two decades ago.

Mr. Spaziano and Mr. Dilisio stand united in their belief that *no* person — not even an Outlaw — ought to be killed on the basis of the testimony of the 1975 and 1976 Anthony Dilisio. Mr. Dilisio has said some inconsistent things in his unaccustomed and newfound celebrity of late, but his bedrock conviction has never wavered: No person should be executed because of his youthful testimony two decades ago.

Clemency therefore is not dependent on believing what Dilisio now says. If one *does* believe Dilisio the man — as opposed to Dilisio the scared, vulnerable and manipulated kid — then the state clearly has no case against Mr. Spaziano. But even if one *doesn't* believe the Dilisio of today, it is further evidence of the unreliability of *all* of his testimony that was the product of police manipulation — by means of the garbage science of repressed "memory," grotesquely suggestive hypnotism sessions with a mountebank police "ethical hypnotist" who has a track record of railroading at least two other men — Pitts and Lee — onto death row. Mr. Dilisio in 1995 said it best: "I'm appalled that a man could be executed on the basis of my testimony when I was a terrified kid."

The state of Florida cannot elide the simple fact that it has tried to execute a man — four times in 20 years, so far — based on testimony that was either (1) perjured, or (2) the product of the pseudoscience of "repressed memory" and the warping effects of hideously suggestive hypnosis sessions with a police hypnotist whom — at the time of Mr. Spaziano's trials — had already been exposed as a charlatan with a track record of sending innocent men to Florida's death row. Either way, the execution of Joseph Spaziano on the basis of such useless and unreliable testimony would offend the evolving standards of decency that mark the progress of a maturing society.

II. THE HOMICIDE

Starke, Florida — "Crazy Joe" Spaziano — biker, dooper, and the most popular guy on death row — is scheduled to be executed in 16 days. But now the witness whose testimony convicted him can't remember a thing.

He [Anthony Dilisio] can't remember Crazy Joe's taking him out to a back woods dump 22 years ago to see the corpses of two women.

He can't remember the hypnosis that helped him recall the incident in lurid detail for its investigators and the jury.

He can't even remember the trial or his gruesome testimony.

"How do I know what I said back then was reliable? Especially if it came out under hypnosis," Tony Dilisio said "Surely they're not going to let Spaziano go to the chair, to have his blood shed, based on what a confused and scared kid said," Dilisio told the

Herald, referring to himself in the third person.

. . . When told the details of the case and confronted with his testimony, Dilisio was appalled that police had hypnotized him. "You can't do that to a kid and get away with it. If I was falsely used by the state to bring this to court, to put this gentleman behind bars, if he's innocent, then I'm furious about that." Governor Chiles, he said, should halt the execution. "I want this to be out in the open. The state is responsible."

Lori Rozsa, *Witness: Don't Kill Convict*,
Miami Herald, June 11, 1995, front page

Claude van Hook helped prosecute the case. He remembers Dilisio's testimony well. "He was proof that it was a homicide. We couldn't prove the cause of death because she was so badly decomposed. His saying that he saw her and that she looked like she had been sliced with a knife . . . he was our pathologist. What he saw made it a homicide. He had the ring of truth to him . . . the jury believed him.

Miami Herald, June 11, 1995

- A. JOSEPH SPAZIANO'S CAPITAL SENTENCING JURY RECOMMENDED LIFE IMPRISONMENT BECAUSE OF LINGERING DOUBTS ABOUT MR. SPAZIANO'S GUILT AT TRIAL, AND WHAT LITTLE EVIDENCE THE STATE *DID* PRODUCE AT TRIAL HAS EVAPORATED IN THE YEARS SINCE

Joseph Spaziano did not commit the crime for which he is condemned to die. As we now know, the jury harbored sincere doubt about guilt -- which was in fact a large part of the reason for its life recommendation. We know that the jury had doubt about Mr. Spaziano's guilt because a juror has said so. Juror Lorenzani was then interviewed, and her affidavit revealed:

During our jury deliberations at the sentence portion of the Spaziano trial, I voted for a life sentence rather than the death penalty.

Nine or ten jurors felt as I did: that we did not want to see this man die.

One of the major reasons for most of us favoring a life sentence was our doubts about whether Mr. Spaziano was guilty of the crime as charged. I distinctly remember this being expressed as a factor in many of the juror's minds.

One of our major concerns was the testimony of the 16-year-old boy, Tony Dilisio, which we didn't entirely believe at the time of the trial. Had we known his testimony was prompted by hypnosis, I believe it would have made a difference.

PC-R1-App. E-2-3.

The irrevocability of death makes it a profoundly different punishment from any other penalty permissible under our Constitution. Death is different because it is final. A sentence of imprisonment can be modified through a variety of corrective mechanisms, but such remedies are not available to an executed defendant. This mortal finality makes death qualitatively different from a sentence of confinement, however long.

Because death is irrevocable, court decisions over the past decade have attempted to structure the capital selection process in a manner calculated to reduce the risk of erroneous decision. But, although the capital convicting and sentencing process has become

increasingly careful to avoid executing those who are innocent or who deserve some sentence less than death, the fact remains that the system is not foolproof.

The system did not work in Mr. Spaziano's case. The Seminole County jury in Mr. Spaziano's case concluded that he should not be put to death. It did so despite the fact that the crime charged by the state was a slow torture -- murder of unimaginable cruelty. It did so despite the fact that it knew that Mr. Spaziano was a member of the Outlaws Motorcycle Club and thus presumably that he had committed acts of violence in the past. Yet the jury voted for life. Why?

The answer, Mr. Spaziano submits, is that the jury override in his case was the result of pincer-like constraints on the jury's ability to exercise its decision making power in a reasonable manner. On one hand, the jury was deprived of the ability accurately to gauge the weight of the evidence against Mr. Spaziano because of the failure to charge lesser included offenses at the guilt-innocence phase of the trial. On the other hand, the jury's apparent attempt to proportion its verdict to Mr. Spaziano's culpability at the sentencing phase was overridden by the judge.

Mr. Spaziano has argued in the courts that doubt about guilt is a matter calling for a life sentence in his case. But the law of Florida is clear that such doubt is *not* a matter for the courts to consider in deciding penalty. *E.g., Buford v. State*, 403 So. 2d 943, 953 (Fla. 1981). This position defies common sense and reality, but it is the law in the Florida courts. For this reason, it falls to this Board as the entity of Florida government able to consider the essential facts of this case: that the state's case of guilt was weak, and that such weakness formed a *reasonable* basis for the jury's life recommendation.

A few brief observations about the timing of this clemency application are in order. First, Mr. Spaziano's case has languished for two decades in the courts. The courts have deployed an army of procedural technicalities to avoid confronting the core legal — and moral — issue in this case: that Mr. Spaziano did not murder Laura Lynn Harberts, nor did he rape and slash Vanessa Dale Croft. Enough is enough. He seeks clemency now in order to avoid a last minute, eleventh hour clemency process; the issues he raises are grave, and the Board should have sufficient time to consider them carefully. Second, Mr. Spaziano has before unsuccessfully petitioned for clemency. However, the postconviction investigation undertaken by counsel has revealed a wealth of previously unknown information about this case. Investigations — our own; the *Miami Herald's*; FDLE's — are ongoing, and, as new information reaches us, we will provide it to this Board.

Whatever faith we possessed initially in the objectivity or integrity of the Florida Department of Law Enforcement investigation into what actually happened in this case in the mid-1970s has evaporated. The "investigation" is beginning to smell more like a whitewash. *First*, FDLE's institutional and bureaucratic bias in favor of validating the earlier state governmental actors — police and prosecutors — is too obvious to require much comment. In this "investigation," Florida governmental agents are investigating the alleged misconduct of other Florida governmental agents, and the outcome of such an "investigation" may be expected to be thuddingly predictable. Such bias in favor of the police and prosecutors in 1975 and 1976 is the simplest explanation for the way in which FDLE has carried out its "investigation." *Second*, FDLE initially said that it was anxious to polygraph Dilisio; but when we insisted that such a polygraph ought to be reliable and professionally done, the

FDLE lost interest. *Third*, the thrust of FDLE's investigation to date appears to be an attempt to smear and discredit Anthony Dilisio, by interviewing his friends and his family members, apparently with an eye to discrediting Anthony Dilisio's memory of today, as opposed to attempting to ascertain why and under what circumstances Mr. Dilisio was manipulated by the police in the mid-1970s. *Fourth*, two weeks have now gone by since FDLE videotaped its interview with Mr. Dilisio, and the repeated requests by counsel for both Mr. Spaziano and Mr. Dilisio for a copy of the videotape have been met with a stone wall of silence. Rather, state officials have selectively leaked supposed information supposedly said by Mr. Dilisio on the supposed videotape. *Fifth*, Governor Chiles' chief legal adviser, Dexter Douglass, told the *Orlando Sentinel* that Dilisio hasn't recanted his testimony and that there is nothing to show that Spaziano was wrongly convicted. "The record to me is clear," Douglass told the newspaper. "This man tortured and killed this young woman. Nothing I have seen or heard from Mr. Dilisio or anyone else changes that."¹ Douglass said that after Spaziano's execution was stayed, agents with the FDLE questioned Dilisio again. "All he has told FDLE is that he can no longer remember" his testimony, Douglass said. "That, to me, does nothing to discredit the testimony of 1976."

These facts — and the logical inferences about the quality and the integrity of FDLE's "investigation," do not inspire confidence that the FDLE'S agenda is anything more than a maneuver designed to provide political cover for the signing of another death warrant.

B. The Evidence At Trial

¹Associated Press, *Outlaw Case Testimony Not Flawed, Lawyer Says*, PALM BEACH POST, Sunday, June 18, 1995, at 7B.

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

No trail of blood led from a white Ford Bronco to Mr. Spaziano's front door; no physical evidence whatsoever linked Mr. Spaziano to the victim — no DNA, no fingerprints, no blood type matching, no ballistics. 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 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 Brotherhood.

Tony Dilisio was the state's case. The *prosecutor* said so, and he was right. 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.²

²The only recorded pre-hypnosis interrogations of Dilisio — 5/13/75 — is worthy of a footnote. It consisted of grossly misleading questions — the first link between "Joseph R. Spaziano" and "the dump" was made by the police, not by Dilisio — and it consisted solely of hearsay evidence by an admittedly unreliable witness who didn't even believe the "evidence" himself. Even as a confused and troubled kid, Dilisio knew to take the statements for what they were: "bragg[ing]" was his word for it. So did the police: they wanted to hypnotize Dilisio in order to get some *real* evidence against Mr. Spaziano. The police did not

think that statements were significant enough to disclose to defense; the prosecutor didn't think the statements were significant enough to use at trial. Mr. Dilisio's post-hypnosis statements did not derive any credibility from this previous "testimony;" to the contrary, the obvious manipulations, misconduct and over-reaching taints these as well.

Further, Dilisio's motivation to falsely accuse Mr. Spaziano also existed at the time of his first interview: he thought — wrongly — that Joe had raped his stepmother (who had been having intercourse with Tony since he was 14, and who ultimately ran away with Tony's brother). Dilisio: ". . . ah, he had an incident with my stepmother after our Christmas vacation around New Years about *raping my stepmother* told me that Joe tried to rape her. She didn't tell me that he raped her, you know, she didn't tell me that. She must have been ashamed of it. She told me he put a knife to her. *That's what really got me mad.*" (emphasis added). And:

Q. Uh huh. Was this ah we'll go on this other and ask him a little later. Was this just before this incident with your sep-mother?

A. It was in October. It was around Christmas. It was just before Christmas and, ho, after Christmas and ah he had an incident with my step-mother after Christmas vacation around New Years about raping her my step-mother told me that Joe tried to rape her. She didn't tell me that he raped her, you know, she didn't tell me that. She must have been ashamed of it. She told me he pub a knife to her. That's what really got me mad.

Q. Okay, about ah when he mentioned this to you about these girls, did he mention any number of girls. Whether it was two girls or three or more?

A. I don't specifically remember. He just bragged about like what I said, cutting their chests, you know, cutting their heels. I remember him saying stabbing them, ah, their eyes. Ah, he did say ah about cutting their chests ah.

Q. Their breasts?

A. Their breasts ah -

Q. Did he mention any particular breasts? Left or right breast or -

A. I can't remember. I can't remember which one he, I really can't. I know, he was telling about one specific girl one time, I can't remember when cause it's been a long time.

Q. Did he mention her name?

A. He might have but it's been a long time, I can't remember.

Q. Did he mention what she looked like?

A. No. No. He might have but I can't remember if he did.

Q. Did he ever mention the name of Laura or Laurie or Laura Harberts?

A. No, not that I can recall.

Q. Okay, did he mention anything to you ah do you remember when we found these two bodies? There was some publicity on it in the newspaper.

A. Yes. And that's the cutting, he cut the breasts off.

Q. Okay, did he say, did he -

A. No, wait, I think this was before he stabbed the girls I ah a lot of it is coming back. This was around Christmas time I'm pretty sure. He still had his truck too and his bike, a 1200 bike and he stole that.

Q. Just take your time and try to remember. Did he mention anything to you about these girls in the dump? These two girls bodies that were found?

A. No, but I think he mentioned to me about two girls that were in an orange grove not a dump. And orange grove. Or one girls. He did talk about cutting the chick or two. I can't remember when it was in an orange grove. That's getting me mixed up with the dump. Getting those two mixed up.

Q. Okay, this was near an orange grove where what we are talking about. Did he say where in an orange grove?

A. Ah, I think around I-4. I don't know. I can't remember.

Q. Okay, Tony would you be willing to be put under hypnosis to remember these things?

A. Will it help? Would it help?

Q. It sure would.

A. I wouldn't be ask anything but about Joe?

Q. That's it.

A. And everything would be the truth then. You'd ask me the same questions you've asked me -

Q. Okay, let me ask you this now. I'm not trying to implicate you. Now, did you have anything to do with these murders?

A. No.

Q. Okay fine.

A. I never did that's why I'm saying, I go under hypnosis and you find out what I used to know then? I don't know now.

Q. Okay fine.

A. If I knew about them does that mean that I had something to do with them?

Q. No. No. You're a young fellow and ah I haven't even advised you of your rights and anything you tell me that you are implicated in can't be used against you. Do you understand that?

A. (No verbal reply).

Q. Okay. You've known me to be fair to you before. Right?

A. Uh huh.

Q. Ah, I didn't ask you about anything else. About any B&E's you've committed. I know you've committed some so that's past. That's under the bridge. That's all, that's gone.

A. That's why I'm trying to work with myself at the Volusia House you know down at the Volusia House. I was put there on a drunk charge.

Q. Right.

A. Dealing marijuana. I wasn't busted on sale just possession. I could have beat that charge, possession, Cause it wasn't in my possession and I signed a statement saying it was mine. I decided to do something with myself.

Q. Okay, but he did tell you it was an orange grove or near and orange grove?

A. I remember him saying and orange and all that. You all will find out when I'm under hypnosis but I can't remember right now.

Q. Okay. Did you ask him something in particular about these girls? Did you say why did you kill these girls or anything like that?

A. I ask him ah why he did it ah the manner he did it. He said it was his style, that's the way he did it. I mean if you wanted to kill someone why would he have to go out and cut their breasts off and poke their eyes out and stab them and really make a disgusted mess of their face and stuff like that. And he's says that's my style.

Q. Okay. now -

A. Black people too he did it with.

Q. Okay, now there must have been a reason for you to ask him why he did it.

A. I had no -

Q. Okay, we'll case the conversation about this murder right now unless you can remember anything specific. Now, go ahead.

A. An orange grove. It wasn't a dump. It was in, I'm pretty sure he did say he put the bodies in an orange grove not a dump.

Q. Well, this would have been, this is real close to an orange grove. Here's the woods here. There's an orange grove here and just a little way in is the, you know, where the bodies.

A. If this isn't the orange grove, ya'll be able to find out for sure what he told me if I am under hypnosis.

Q. He was also associated with that fellow in Titusville, you know, his orange grove.

A. Uh huh. Tall Paul.

Q. No, there Was a Giles. Did he mention a fellow by the name of Giles?

A. Ray Giles.

Q. I think that's what it was.

A. It just popped into my head. I remember him telling me about him.

Q. Uh huh. He also picked up girls hitchhiking and killed them.

A. It might have been.

Q. He's got six to his credit so far and there's supposed to be six more somewhere that they haven't found.

Q. They say they're all supposed to be in an orange grove.

Q. Yeh. How about ah Tony, okay, let's go down now with the sixteen year old girl who's eyes were slashed.

A. Uh huh.

Q. And left for dead. Now when I talked to you before you said that Joe told you that he did that and there was somebody else with him.

A. I think there were two people.

Q. Okay, first of all, you know, I failed to put you under oath. I forgot.

A. Uh huh.

Q. Would you raise your right hand please? Do you solemnly swear that the information given here is true and correct to the best of your knowledge and ability so help you God

A. I do.

Q. Okay.

A. Now, I'm nervous. I don't know.

Q. Just relax. This question I ask you is about the sixteen year old girl found with her eyes slashed and her throat cut and she was left for dead in Orange

County. The last time I talked to you you told me something about that. Do you remember what it was?

A. Told you something about right after that I didn't see Joe for a long time and I haven't seen him since at all after he did that. He didn't specifically say he did it. He didn't come out and tell me he did it he just ah he told me about it before I ever heard about it in the newspaper, before I heard about it anywhere.

Q. Did he say who was with him?

A. I'm trying to think. No, he just said some bikers, their Out, under Outlaws. Right, one was an Outlaw. Then, he said one he might I think he said one of them might have been a Pagan. I can't remember.

Q. Okay.

A. You know I'd like to, you know, this is sudden when you came and got me in class.

Q. I know.

A. I would like to think about what happened. It's been a lot of time you know over a half a year.

Q. Okay, we'll cease questioning at this time.

Q. Okay, Tony, I'm going to start questioning again. I want you to remember that you are under oath is that correct?

A. Correct.

Q. Okay, I want to go over again what we did at first when we weren't under oath about what Joe told you about the girls about picking up the girls.

A. Picking up hitchhikers you mean?

Q. Uh huh. And what he did to them.

A. Brought them to the clubhouse and um pull a train or in other words, all

the club house do what they wanted to do with them.

Q. And then what would he do with them?

A. Bring them out and get rid of them and kill them or mostly that's what he'd say. Let's go out and kill them.

Q. Did he say how?

A. Stab them with his knife or else strangle them or something just bring them out and kill them, you know, he never said stab them with his knife (illegible) he'd bring them out and kill them, you know, make them look disgusted, cut their breasts and stuff like this.

Q. Okay, did he say where he picked these girls up?

A. Around the park, I mean, around the lake is what he said. He said the lake. He never said Lake Osceola or Lake -

Q. Lake Eola.

A. Lake Eola. He never said the name of the lake. He just said the lake and I know where he was talking about. He always told me about the fun that's out there in the park. Around Lake Eola.

Q. Do you remember the last time you saw Crazy Joe?

A. A little bit after Christmas. No, a little bit after New Years. No, I saw him once at a shopping center in a Mustang. Green Mustang.

Q. Did -

A. Colonial Mall.

Q. Did you see him after your step-mother was raped?

A. Yes, I saw him after that.

Q. Okay, ah, could this have been February or right around there about. Did you hang around with him much after that?

A. I didn't see him was in -

Q. What I'm getting at Tony, is ah about the time this sixteen year old got her eyes slashed and her throat slashed and was left for dead.

A. No, I didn't, I saw him before I ever head about it. I heard from him before I heard about it anywhere, newspaper or any place.

Q. And you'd be willing to testify to that in court?

A. Yeh, I head it from him. Ya'll can find out what he said. I can't remember what he said. I just remember hearing about him and then I remember hearing it when I was at work through the shop, people at the shop, talking about it.

Q. But you heard about it from him before -

A. Before it ever happened from the paper, before it was ever in the paper or on the news, TV or wherever it was. I heard it from Joe.

Q. Now, you're talking about his pickup truck. This blue pick-up truck. Did he ah pick up these girls in his pick-up truck did he say?

A. Yeh, that's all he drove when he picked the girls up, that's all he ever drove. He never picked girls up on his bike.

Q. Did he ever drive a little red car, two doors?

A. Was it a Volkswagen?

Q. I don't know.

A. Two door. There was doors see in it. No, that was a blue car. A red car? Not that I can remember.

Q. Did he say actually where he killed these girls at?

A. No, he just said he brought them out to the orange groves. He didn't say where he killed them. After he got from the club house, he brought out and killed them after he got done with them at the Club House.

Q. Did he say if anybody else was with him when he killed these girls?

A. No, he didn't.

Q. Did he make any indication that someone was with him?

A. He just said ah The Outlaws, bikers, there was some kind of indication that they were with him then it looks like after asking if they were with him when he killed them and him not tell me that. He just said he brought them out and killed them. I imagine someone was with him. He brought them from the club house. He did tell me that.

Q. Did he say what he did with their clothes and their identification?

A. He did say he did something with it. I can't remember because it was some specific thing. I can't remember right now. The clothes when you said that just hit me in the head. I can't remember what he did with them specifically. He did something especially with their clothes. He'd always having something left after he killed them to brag about. But he did something with the clothes, I can't remember right now what it was.

Q. Alright, did ah did he at any time mention how many girls he had killed?

A. Quite a few. He was bragging about how many he had. The number. Seven. I don't know if he said seven, maybe he did. I'm getting confused and trying to think. It was so long ago.

Q. Alright, did he mention as to this mutilation?

A. You mean how he slaughtered them and how he really did it?

Q. Right.

A. Yeh, he said that. He'd stab their eyes out and stab their breasts and cut their breasts off, you know, do a job on them and smash their face up and tore them up and just throw them in the grove and leave them.

Q. Did he say how he smashed their face? Did he use an instrument or -

A. I can't remember. I can't remember about that. I do remember he said he knew their face was really messed up. I can't remember when.

Q. Is there anything that you can think of on your own that might help us in this investigation that he might have said or told you?

A. That he's killed a lot of girls. You know, but I don't -

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

Q. Did he say why?

A. Just to do it. Go out and do it. Bring them to the club house. Something about the club, you know, it makes you within the club you, you know, the same reason you go out and steal a bike when you're in a club. Bring them to the club. They turn from a probate to an Outlaw to steal a bike so many bikes. Bring some many chicks that do kill some many chicks I guess.

Q. Was he a probate at the time or was he a -

A. No, he was an Outlaw at the time but he was a probate before that. You know, it's I went to court to testify, I guess to try to get off, I'd do it, I'd do it but it would be hard right in front of Joe's face.

Q. Nobody ever said it would be easy son. But you've come a long way to straighten yourself up. I'm tickle to see you.

A. N, I'd like to help you but I don't know what you're looking for.

Q. You've helped us.

A. I, I can just tell you what I know. It's going to help isn't it. Ah, here's something else that would help you though. Maybe I could get together and you know it's hard to remember that long ago and maybe hypnotism really do me good.

Q. Okay, we'll get it set up for you. Okay.

A. Okay.

Q. This questioning is ceased at 12:35, 5/13/75.

"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 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.

We 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 79 years old when undersigned counsel met with her on the porch of her home in Orlando. Ms. Lorenzano signed an affidavit, 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 juror's minds. One of our major concerns was the testimony of the 16-year-old boy, Tony Dilisio, which we didn't entirely believe at the

time of the trial. *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.

The sentencing judge in fact did not consider the jury's probable doubt. But this Board is not bound by the anomalous legal doctrine that doubt about guilt is irrelevant to the death decision. This Board should consider, as the jury in this case considered but as the state judiciary stubbornly *refused* to consider, the fact that the evidence in this case simply is not strong enough to support the most irrevocable of decisions. In the following section,

Mr. Spaziano will demonstrate that such consideration has solid roots in Florida's tradition of executive clemency.

C. GUILT OR INNOCENCE: THE STATE DID NOT PROVE ITS CASE

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

The jury which convicted Joseph Spaziano was given only two choices: first-degree murder or acquittal. The jury struggled with this dilemma, and it convicted only after four and three-quarter hours of deliberation, multiple reinstructions, and an *Allen* "dynamite" charge.³ Thus, even without knowing about the hypnotism, the jury was reluctant to convict Joseph Spaziano of this savage murder. The fact that screams out to this Board, however, is that the jury did not know that Tony Dilisio's testimony had been induced by hypnosis. The jury also did not know that Joseph Spaziano had been in a life-threatening automobile accident that had forever altered the direction of his life. The jury *did* know that Mr. Spaziano was a member of the Outlaws Motorcycle Club,⁴ and was charged with a brutal,

³The jury began its deliberations at 4:41 p.m. They first returned at 6:28 p.m. They retired again at 6:30 p.m., and returned at 8:27 p.m. After a supper break, they retired again at 9:50 p.m., and returned at 10:26, at which time they received the *Allen* charge. The jury retired for the last time at 10:29, requested five more minutes at 11:03, and returned with a verdict at 11:07 p.m. See Trial Transcript at 810-820.

⁴The Outlaw brothers attended the trial en masse, according to Mr. Spaziano's trial attorney.

grisly torture-murder. Yet knowing what they did, and without any evidence of mental mitigating circumstances, the jurors quickly recommended life imprisonment.⁵ Why?

The jurors' life recommendation in the face of this horrible crime reflected their lingering doubt about Mr. Spaziano's guilt for first-degree murder. Recourse to the Florida courts on this issue is not available, because the Supreme Court of Florida has unequivocally ruled that, as a matter of law, lingering doubt about guilt cannot be considered as a mitigating circumstance in setting penalty. *Buford*, 403 So. 2d; *King*, 514 So. 2d. This doubt becomes overriding when one considers the facts *not* before the jury: manipulation by the police of young Anthony Dilisio and the personal history of Joseph Spaziano.

1. Information Disclosed Subsequent to Trial Further Undermines the State's Case of Guilt
 - a. The Pseudoscience of "Repressed" Memory " Released" Through Police Hypnosis: "Nonsense on Stilts"

The theory of "repressed memory" is breathtakingly simple — and breathtakingly idiotic: The best evidence that you suffered extreme trauma long, long ago is that you have no memory of being traumatized long, long ago. This is a circular tautology worthy of Orwell. And the criminal justice system's acceptance of such nonsense in this *capital* case could have been scripted by Kafka on a bad day.

⁵Trial counsel recalls that the jury quickly returned a verdict of life. Although the transcript of the original sentencing proceeding does not mark the times at which the jury began and concluded its deliberations, it is reasonable to infer from the transcript that the deliberations were brief. The proceedings began at 1:30 p.m. 1976, and concluded at 3:20 p.m. The transcript is 31 pages long, and does not mark the jury retiring until p. 27. From the brevity of the entire proceeding, and the apparently great amount of time spent by counsel for both sides in argument prior to the point at which the jury retired, the inevitable conclusion is that the jury reached its decision extremely rapidly.

Two weeks into the most recent death warrant, I realized that this was a repressed memory case. Undersigned counsel tracked down Dr. Richard Ofshe, a professor at Berkeley and the national expert on the subject, at his vacation in the Bahamas. Ofshe put his vacation on hold for 27 straight hours, and wrote a report on Mr. Spaziano's case.

The bases for his opinions were: the review of transcripts of two of Mr. Dilisio's hypnosis sessions with Joe McCawley; the written reports of Dr. Bernard Diamond and Dr. Robert Buckhout, *Miami Herald* articles published by Lori Rosza on June 11, 1995, and Tony Procio on June 14, 1995; and our conversations on June 14 and 15, 1995. It was his understanding that the facts in this case were as follows: Initially Anthony Dilisio steadfastly maintained to the investigating officers that he had no memories of the events to which he eventually testified; his alleged memories were recovered in response to interrogation, and specifically in reaction to hypnosis. These so called memories formed the entirety of the critical aspects of his subsequent testimony in court — the trip to the dump and the hearsay statements he attributed to Mr. Spaziano. In response to interrogation and hypnosis Mr. Dilisio initially agreed that he had been taken by Mr. Spaziano to a certain location and shown a body. He was taken to that location by the police and informed that there were actually two bodies. Mr. Dilisio was then hypnotized a second time and in immediate response to the second hypnosis session agreed that he had been shown two bodies by Mr. Spaziano.

Given the fact pattern of this case, Ofshe wrote, "it should be distinguished — at least in terms of the degree of unreliability of Mr. Dilisio's hypnotically 'refreshed' testimony — from the usual case involving hypnotically refreshed testimony. In comparison, the Dilisio

testimony is doubly unreliable. This is so because Mr. Dilisio was entirely ignorant of the events prior to hypnosis, and therefore was unlike the typical witness, who is generally aware of most of the facts of the crucial event (for example, an assault, robbery or an accident) but through hypnosis adds particular details to what was already reliably known. Mr. Dilisio was ignorant of the totality of the event prior to hypnosis. This fact is critical to understanding why Mr. Dilisio's trial testimony is so exceptionally unreliable.

"Given these facts, in order for Mr. Dilisio's testimony to be credible, two things are necessary: *First*, Mr. Dilisio would have had to have 'repressed' the entirety of this experience (*i.e.*, his awareness of the event would have to have been removed from consciousness through the action of a mental mechanism called repression). Repression would have rendered Mr. Dilisio utterly ignorant of any involvement in what he subsequently 'recovered' during his sessions with the police. *Second*, hypnosis would have had to have been used to pierce the amnesiac barrier allegedly created by the repression mechanism. The information to which Mr. Dilisio testified was produced entirely through the action of hypnosis supposedly breaking through the mechanism of repression.

"This case, therefore, raises fundamentally the issue of whether or not repression exists as a mental mechanism and/or whether information allegedly repressed and recovered should be admitted as a basis for testimony (whether 'recovered' through hypnosis or any other technique). Repression, if it exists, is a dramatically different mental mechanism than those which underlie well recognized acts of remembering past events, even those not recalled for years. This is not merely a hypnosis case; it is first a *repressed memory* case.

Although hypnosis and repressed memory share some features of unreliability, "each raises its own constellation of problems. It is therefore useful to analyze Mr. Dilisio's 'recollections' in two stages. The first, threshold, level of inquiry is the repressed memory dimension of Mr. Dilisio's 'recall;' given that all of Mr. Dilisio's important 'recollections' — the trip to the dump and the hearsay statements he attributed to Mr. Spaziano — were 'repressed memories,' do those "memories" have any scientifically established reliability as descriptions of historical facts; in other words, does the 'recovery' of 'repressed memories' make one a better historian about, for instance, who said what when, what happened, and the like. The second level of inquiry concerns suggestibility, and thus the reliability, of the hypnosis sessions that created Mr. Dilisio's recovery of his alleged repressed 'memories.'"

Thus, this case involves (1) repressed memory, (2) that was then subjected to the warping effects of incompetently-conducted sessions of hypnosis. Drs. Diamond and Buckhout previously addressed only the second level of inquiry: hypnosis.

It should come as "no surprise that Drs. Diamond and Buckhout did not identify the repressed memory dimension of this case in 1985. Scrutiny and criticism of the repressed memory theory simply had not commenced in earnest in 1985. We now discuss the first level of inquiry: Mr. Dilisio's allegedly repressed memories.

"We understand that Mr. Dilisio testified to 'facts' which he only 'remembered' after being 'hypnotized.' In order for hypnosis to assist memory, a person must have some, but not complete, memory of the questioned event. Even then the process of hypnosis itself 'warps' the resurrections of memory and renders it unreliable, in ways that were previously reported by Drs. Diamond and Buckhout in this case.

"Mr. Dilisio had *no* memory of the event to which he testified, after hypnosis. As noted, in order for hypnosis to have had even an unreliable chance of resurrecting Mr. Dilisio's memory, he would have had to have had some memory. Recent scientific research and court opinion indicates that under such circumstances one can assign no value whatsoever to Mr. Dilisio's testimony.

"In short, if partial memory "enhanced" by hypnosis is unreliable, "no" memory, "enhanced" by hypnosis, is nonsense upon stilts. The question of total repression of memory is one which only over the last five to seven years has been considered with any degree of seriousness by the scientific community. Prior to approximately a decade ago, the notion of repression was presumed, based solely on pre-scientific tradition, within the clinical psychological/psychiatric community. It had, however, received only limited attention from scientific psychology and psychiatry. In the last five years this situation has dramatically changed, and the scientific community as well as the general medical community have come to recognize and reject the possibility of repressed memories of the sort necessary for Mr. Dilisio's testimony to be credible. Dr. Buckhout and Dr. Diamond did not have this information available to them in 1985.

"A series of important, if not seminal publications on this subject, in leading scientific journals or in books that have received serious international attention, have all recently concluded that memory repression is utterly unsubstantiated. For example, David Holmes' article, *The Evidence for Repression: An Examination of 60 Years of Research* (in *Repression and Dissociation*, J. Singer, Ed., Univ. of Chicago Press, 1990) reviews 60 years of scientific research and concludes there is no scientific evidence demonstrating the mechanism

of repression. Holmes documents that repressed memory is scientifically unproved and, in fact, dangerous. See also Elizabeth Loftus, *The Reality of Repressed Memories*, *American Psychologist* (1993); Richard Ofshe, *Inadvertent Hypnosis During Interrogation: Misidentified Multiple Personality Disorder and Satanic Cult Hypothesis*, *International Journal of Clinical and Experimental Hypnosis* (1992); Richard Ofshe, *MAKING MONSTERS* (Scribners, 1994); Elizabeth Loftus, *THE MYTH OF REPRESSED MEMORY* (St. Martins, 1994); Richard Ofshe and Margaret Singer, *Recovered Memory Therapy and Robust Repression, Influence and Pseudomemories*, *International Journal of Clinical and Experimental Hypnosis* (Oct. 1994); Harrison Pope and James Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?*, *Psychological Medicine* (1995). These sources share two characteristics: They all — using different methodologies and approaches — debunk repressed memory as quack science. They are all very recent.

"The emerging scientific consensus on the rejection of repressed memory theory was recently articulated in a resolution on recovered memory therapy by the American Medical Association. Issued in late 1994, it states that recovered memories are too unreliable to be taken seriously without independent corroboration. This statement parallels the AMA's statement on hypnosis.

"Most of the strands of thought traced in the above sources came together in the May, 1995 joint decision in *State of New Hampshire v. Joel Hungerford*, 94-S-045 through 94-S0047, and *State of New Hampshire v. John Morahan*, 93-S-1734 through 93-S-1936. *Hungerford* was a case of first impression, and the court held that, under the *Frye* test, evidence based upon 'repressed memory' is so unreliable that it must be excluded *as a matter*

of law. The *Hungerford* opinion obviously has no precedential force outside of New Hampshire, but we append the court's opinion for the persuasive quality of the court's treatment of the science on repressed memory. Specifically, the court said:

It is absolutely clear that a ranging or robust debate exists in the field of psychology as to whether such a phenomenon as repressed memory as defined in these cases exists. There is no reluctance to accept the existence of some limited partial amnesia as generally associated with trauma. However it is the concept of the total loss of memory of the traumatic event for a period of years or massive repression which is highly disputed. It is clear from the testimony of the expert witnesses, the literature, and the published opinions of the professional societies, that there is not a general acceptance of the phenomenon of repressed memory in the field of psychology today. It is in fact clear that there is not only a lack of consensus, but a violent disagreement. It is clear that the state has failed to meet its burden of proof in this regard." (pp. 22-23).

Dr. James Hudson of Harvard Medical School testified in *Hungerford*, as did Dr. Elizabeth Loftus of the University of Washington, and Dr. Paul McHugh of Johns Hopkins Medical School, that repressed memory simply has not been demonstrated to exist.

"*Hungerford* was a tragic case, and its lessons ought to give pause to anyone who would send a person to prison — or, as in this case, execute them — based on the pseudo science of 'repressed memory.'

"It is our opinion, based upon a reasonable degree of scientific certainty, that Mr. Dilisio's testimony was utterly worthless, at best, and more likely dangerously mistaken. He did not 'repress' any memory, and hypnosis 'refreshed' nothing."

Professor Ofshe's report was filed on behalf of himself and three other leading scholars in the field:

Richard Ofshe, Ph.D.
Professor of Sociology
University of California, Berkeley, CA

Elizabeth Loftus, Ph.D.
Professor of Psychology, Adjunct Professor of Law
University of Washington, Seattle, WA

Harrison Pope Jr. M.D.
Associate Professor of Psychiatry
Harvard Medical School, Cambridge, MA

Paul McHugh, M.D.
Phipps Professor of Psychiatry
Chair, Department of Psychiatry
Johns Hopkins University, Baltimore, MD

b. Recovered Memories Are of Unproven Reliability

Empirical data does not exist to support the assumed prevalence of repression as a common response to trauma, the mechanism by which repression is posited to operate, or even to verify the concept of repression itself. Furthermore, studies have shown that no intrinsic test exists which can determine the reliability of "recovered repressed memories" and have suggested that no such test may ever be found. However, what has been demonstrated is that false memories can easily be implanted and are often accompanied by misleading affect and confidence.

Despite claims of the widespread occurrence of repression of childhood trauma, comprehensive reviews of the literature used to support the theory of repression reveal that, as yet, there is no controlled, experimental evidence to support the authenticity of such memories or to confirm their very existence.

As clinical psychologist, Michael D. Yapko, explains, "The truth is, we don't know very much about the repression of memories of trauma. We don't know how common repression really is or how authentic seemingly distant memories are that suddenly and

dramatically surface in response to the stimulus of a lecture, self-help book, or a therapy session."⁶

Although researchers and clinicians have sought to prove an individual can selectively forget trauma, such as sexual abuse, spanning several developmental phases, from infancy into adolescence, where the overall autobiographical memory system was otherwise intact, evidence of such selective forgetting and sudden emerging of corroborated events does not yet exist.⁷

In light of these findings and in response to growing concerns of the mental health community, several professional organizations,⁸ including the American Medical Association and the American Psychological Association, have recently issued statements cautioning against assuming that "recovered repressed memories" are inherently accurate and reliable.

In June, 1994, the American Medical Association issued a statement⁹ that reads:

The AMA considers recovered memories of child sexual abuse to be of uncertain authenticity, which should be subject to external verification. The

⁶YAPKO, M.D., SUGGESTIONS OF ABUSE: TRUE AND FALSE MEMORIES OF CHILDHOOD SEXUAL TRAUMA, (1994) p. 89.

⁷M.L. Rogers, Factors to Consider in Assessing Complaints by Adult Litigants of Childhood Sexual Abuse, BEHAVIORAL SCIENCE AND THE LAW.

⁸See, e.g., The Australian Psychological Society Limited, Board of Directors issued "Guidelines Relating to the Reporting of Recovered Memories" on October 1, 1994. The American Society of Clinical Hypnosis (ASCH) is completing a study on hypnosis and repressed memory. The British Psychological Society, the United Kingdom Council for Psychotherapy, and the British Association of Counselors have working parties reviewing the research on repressed memories in order to formulate guidelines for treating child sexual abuse issues.

⁹American Medical Association: Report of the Council on Scientific Affairs, C.S.A. Report 5-A-94.

use of recovered memories is fraught with problems of potential misapplication.

Similarly, in December, 1993, the Board of Trustees of the American Psychiatric Association approved a statement¹⁰ in response to "passionate debates" which they feared may have "obscured the recognition of a body of scientific evidence" in the treatment of child sexual abuse by noting:

The retrieval and recounting of a memory can modify the form of the memory, which may influence the content and conviction about the veracity of the memory in the future. Scientific knowledge is not yet precise enough to predict how a certain experience or factor will influence a memory in a given person.

A special panel of the American Psychological Association issued an interim report in November, 1994¹¹ which summarized the consensus of current research literature:

There are gaps in our knowledge about the processes that lead to accurate or inaccurate recollection of childhood sexual abuse The mechanism(s) by which such delayed recall occur(s) is/are not currently well understood.

There is no reliable internal test to determine the accuracy of a "recovered" repressed memory. External verification is required.

There is no reliable method of determining the accuracy of "recovered repressed" memory by examining its content or characteristics. As Dr. Yapko points out, greater levels of certainty, emotionalism or detail about a memory did not necessarily indicate a greater

¹⁰American Psychiatric Association, Board of Trustees (1993) "Statement on Memories of Sexual Abuse," which was approved by the Board of Trustees of the American Psychiatric Association on December 12, 1993.

¹¹American Psychological Association, Counsel of Representatives, Working Group on Investigation of Memories of Child Abuse (November 11, 1994), Interim Report. The full report of the working group is expected at the APA Council of Representatives in February, 1995.

likelihood of its accuracy. This is reported to be the consensus of many of this country's experts on memory, suggestibility and the treatment of abuse survivors.¹²

As the American Medical Association specifically stated it is not yet known how to distinguish true memories from imagined events. Likewise, the American Psychiatric Association cautions, "It is not yet known how to distinguish with complete accuracy, memories based on true events from those derived from other sources."

Methods seeking to determine a "recovered repressed memory's accuracy by examining its content and affect have been shown to be unreliable. Adults can have vivid memories, of which they are extremely confident—that are nevertheless quite wrong. Once false memories have been established, they are not easily changed by contrary evidence.¹³ A person's level of confidence and conviction in a memory are not proof of its veracity.¹⁴ Neither the clarity and volume of detail of a memory nor its relative vagueness are considered sufficient to judge its truthfulness¹⁵ nor is the inclusion of false or inconsistent statements considered conclusive proof of its falsity. Such inconsistencies may, however,

¹²Yapko pp. 160, 168.

¹³Neisser, U. and N. Hersch, *Phantom Flashbulbs: False Recollections of Hearing the News about Challenger*, " in WINOGRAD, E. AND NEISSER, U. (EDS) AFFECT AND ACCURACY IN RECALL: STUDIES OF FLASHBULB MEMORIES, pp. 9-31.

¹⁴Ernsdorff, G.M. and Loftus, E.F. (1993), referring to decades of research on memory state, "A confident witness is not necessarily an accurate one." Loftus, E. and Ketcham, K., WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS AND THE EXPERT WHO PUTS MEMORY ON TRIAL, p. 208, note that, "When false memories are created by misinformation, the holders of these memories can describe these false creations in great detail and with great conviction."

¹⁵Yapko (1994), p. 80.

raise the problem of distinguishing which parts are true and which parts are false.¹⁶ This problem is particularly acute when the complainant has not critically examined the source of his testimony.¹⁷

No set of behavior or psychological symptoms has been reliably shown as probative of the accuracy of the "recovered memories" of trauma.¹⁸ This view has also been supported by an American Psychological Association Working Group which reported "there is no single set of symptoms which automatically means that a person was a victim of childhood sexual abuse."¹⁹

Symptoms such as depression, anxiety, sexual dysfunction, eating disorders, or low self esteem are not specific in etiology to previous trauma. They may be caused by a history of trauma or they may stem from other sources. Empirical findings, therefore, do not support a strong causal link from known trauma to any specific set of symptoms.²⁰

¹⁶Ernsdorff and Loftus (1993).

¹⁷False memories may develop if a patient comes to believe that dreams or feelings ought to be accepted as historically accurate. Bass, E. and Davis, L. (1988) *THE COURAGE TO HEAL: WOMEN HEALING FROM SEXUAL ABUSE*, Harper and Row, New York, simply say, "If you think you were abused and your life shows the symptoms, then you were."

¹⁸Lindsay and Read (1994).

¹⁹American Psychological Association (1994).

²⁰*THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*, published by the American Psychiatric Association to aid professionals in identifying mental disorders, almost completely omits any discussion of underlying causes of syndromes. Dr. Robert L. Spitzer, task force chairman for the DSM is quoted as saying, "The emphasis is on description of the problem, not the why and how, because in most cases we don't really know." in Slovenko, R. (1984) "Syndrome evidence in establishing a stressor," *JOURNAL OF PSYCHIATRY AND LAW*, p. 447.

Dr. Ofshe, in his review of the use and misuse of popular and clinical "symptom lists" explains:

Even though some of the disorders listed can result from abuse, it does not mean that someone with these symptoms can be expected to have experienced abuse. Depression, self-destructive behavior, anxiety, feelings of isolation and stigma, and poor self-esteem do not result only from child abuse but from a large number of experiences, chemical imbalances, genetic factors, behaviors, or combinations of these factors The notion that psychiatrists, because of their advanced training, can relate symptoms to a particular event is not accepted within the ranks of scientific psychology or scientific psychiatry.²¹

Many researchers such as Dr. Terence Campbell have shown that "there is little relationship between the confidence psychologists and psychiatrists express in their judgments and how accurate those judgments really are."²² A 1992 Task Force Report of the American Psychiatric Association concluded:

There have been recent instances in which psychiatrists have testified that the presence of symptoms related to post-traumatic stress disorder is powerful evidence that certain abusive events such as rape or child molestation have taken place. Here, a diagnosis based on a DSM-III-R category is used to conclude that criminally actionable conduct has occurred. *In the absence of a scientific foundation for attributing a person's behavior or mental condition to a single past event, such testimony should be viewed as a misuse of psychiatric expertise* (emphasis added).²³

²¹OF SHE, R. AND E. WATTER, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA, (1994) pp. 75-76, 270.

²²Campbell, T.W. *Repressed Memories and Statute of Limitations: Examining the Data and Weighing the Consequences*, AMERICAN JOURNAL OF FORENSIC PSYCHOLOGY. See also, R.M. Dawes, House of Cards: Psychology and Psychotherapy Built on Myth (1993) "The biases of child sexual abuse experts: Believing is seeing," BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW, VOL. 21, No. 3.

²³Halleck, S. et al., (1992) "The use of psychiatric diagnoses in the legal process: Task Force Report of the American Psychiatric Association," BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW, 20:4:481-499 at 495.

Logical errors are made when *sufficient* conditions are assumed to be *necessary*. This would happen if a therapist inferred a history of childhood sexual abuse from one or more current behaviors which are not specifically known to be the exclusive result of such history. Thus, while arguments about the quality and nature of behavioral and psychological symptoms are often advanced in expert testimony to endorse the accuracy of "recovered memory," they are known to be unreliable to do just that. Prudent researchers and clinicians urge that in the absence of any reliable method of internal analysis of the memories, external corroboration be required to determine a memory's accuracy.

Is it prudent to authorize an execution based on testimony whose reliability has been questioned by careful and empirical study? Is it sound — morally or legally — to kill a man on the strength of testimony which cannot be verified by any independent or objective evidence?

c. Does Trauma Repression Exist?²⁴ Scientific Support For This Popular Theory Has Not Been Found

Valid science or garbage science, good or bad, the notion of repression is today part of our culture. Many writers, both popular and professional, assume it is a common response to trauma²⁵ and that when recovered, a repressed memory is certainly an accurate

²⁴The factors which distinguish "repression" from the normal idea of "motivated forgetting" are summarized by Holmes: Repression is posited to be an involuntary defense which happens in such a way that what is repressed remains fundamentally intact. The view found in both popular writing and from some mental health professionals apparently makes no distinction between repression and forgetting, considering all absence of memory to be psychologically motivated or repressed. See, e.g., R. FREDERICKSON, *REPPRESSED MEMORIES: A JOURNEY OF RECOVERY FROM SEXUAL ABUSE* (1992).

²⁵It is common to read claims such as "most incest survivors have limited recall about their abuse" or "half of all incest survivors did not remember that the abuse occurred."

representation of historical events. This assumption is often found in memory recovery therapy. When communicated to patients, it can be the source of false memories.²⁶

Richard Ofshe has described the theory as "either the most fascinating psychological discovery of the 20th century or the centerpiece of the most embarrassing mistake modern psychiatry and psychology have ever made."²⁷ As the scientific evidence shows, despite these assertions, empirical studies have not, as yet, been able to confirm the popular assumptions about the repression mechanism. The whole theory itself is on sufficiently shaky ground so as to make it improper to serve as a basis for any legal action.

Dr. David Holmes, Professor of Psychology at the University of Kansas carefully examined studies offered as verification of the existence of repression in 1974 and again in 1990 when he wrote that he found no reason to revise his earlier findings. He concluded that "[d]espite over sixty years of research involving numerous approaches by many thoughtful and clever investigators, at the present time there is no controlled laboratory evidence [which] supports the concept of repression."²⁸

Blume, E. SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTER-EFFECTS IN WOMEN, (1990) p. 81.

²⁶See, e.g., Kihlstrom, J.F. (1993), "the Recovery of Memory in the Laboratory and Clinic," paper presented at the joint Rocky Mountain Psychological conference, Phoenix, Arizona, April 1993.

²⁷Cited by Loftus, E.F. and L.A. Rosenwald (1993), *Buried memories; Shattered lives*, ABA JOURNAL, November, 1993, p. 71.

²⁸Holmes (1990), p. 98.

In addition to anecdotal case reports,²⁹ support for the theory of "repression" is most frequently drawn from three research studies (Herman and Schatzow, Briere and Conte, and Williams).³⁰ Drs. Harrison Pope and James Hudson recently conducted an extensive and thorough review of these three studies and found that the available clinical evidence was insufficient to conclude that individuals can repress memories of childhood sexual abuse. For an in-depth look at their analysis, please refer to *Can Memories of Childhood Sexual Abuse be Repressed?*, PSYCHOLOGICAL MEDICINE.

Researchers seeking evidence for repression have also looked to reports of the psychological response to individuals who had lived through severe trauma. Studies of holocaust survivors or of persons who had witnessed a parent injured or killed and the like have found that, rather than repress memory of the event, they had trouble pushing it out of mind. Although the trauma is agreed to be severe, it has not led to reports of dissociation in the clinical or empirical literature.³¹

²⁹Holmes (1990), pp. 96-87. Holmes concludes that the evidence of repression most frequently offered by clinicians, "consists of impressionistic case studies, and in view of the data concerning the reliability and validity of clinical judgments, those observations cannot be counted as anything more than unconfirmed clinical speculations -- certainly not as 'evidence' for repression."

³⁰Herman, J.L. and Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, PSYCHOANALYTIC PSYCHOLOGY, 4:1-14; Briere, J. and J. Conte *Self-reported Amnesia for Abuse in Adults Molested as Children*, JOURNAL OF TRAUMATIC STRESS, 6:21-31; and Williams, *Recall of Childhood Trauma: a Prospective Study of Women's Memories of Child Sexual Abuse*, JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY.

³¹See, e.g. Tillman, J.G., et al, for a summary of psychological studies of survivors of Nazi concentration camps; Loftus, E.F. (1992). Pope, H., (1994), Interview with *Currents in Affective Illness*, XIII:7, p. 7 noted that, "Everyone who was in the Coconut Grove fire will remember the events of November 28, 1942 for as long as they live. There is no one who

There is, however, substantial, convincing and undisputed evidence of the ability to "implant" false memories.³² Memories of truly traumatic events are easily altered³³ and false recollections, though felt to be actual memories of real events, can easily be induced by suggestion.³⁴ As Dr. Pope states:

Overall, there may be a mixture of cases of genuine abuse that was perceived as sufficiently [horrible] to have been forgotten by the processes of ordinary forgetfulness, genuine abuse that was never forgotten but was reported by the individual to have been forgotten, and false memories of abuse that never occurred but apropos of which the individual has developed what he or she believes to be memories. *I believe that all three phenomenon occur although in what prevalence no one is certain. But at this stage, there is no scientific evidence demonstrating that people who genuinely experience severe and protracted abuse can entirely forget it for a period of time and only years later remember it.* (emphasis added)

"woke up" 20 years later and said, "Good God, I was in the Coconut Grove fire and forgot it." Similarly, in a study of 16 children who witnessed a parent murdered, all 16 remembered the murder vividly. In studies of children kidnapped on a school bus, children involved in a sniper attack, and survivors of marine disasters, concentration camps, and war atrocities, all of the individuals remembered the events, often in painful detail."

³²See, e.g., Loftus (1992); Campbell (in press).

³³See, e.g., Pynoos, R.S. and K. Nader, *Children's Memory and Proximity to Violence*, JOURNAL OF AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 28:236-241 (1989); Narsch, N. and Neisser, U., *Substantial and Irreversible Errors in Flashbulb Memories of the Challenger Explosion*, poster presented at the annual meeting of the Psychonomic Society, Atlanta, November, 1989.

³⁴Ceci, S.J. *Cognitive and Social Factors in Children's Testimony*, in B. SALES AND G. VANDENOS PSYCHOLOGY AND LAW master lectures, Washington, DC (1993); Haugaard, J.J., et al *Children's Definition of the Truth and Their Competency as Witnesses in Legal Proceedings*, LAW AND HUMAN BEHAVIOR, 15:253-272 (1991); Loftus, E.F. and J. Coan, *The Construction of Childhood Memories*, in D.P. PETERS, THE CHILD WITNESS IN CONTEXT: COGNITIVE, SOCIAL AND LEGAL PERSPECTIVES, Dordrecht, The Netherlands; Spanos, N.P., et al. (1991), *Secondary Identity Enactments During Hypnotic Past-life Regression: a Sociocognitive Perspective*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 61:308-320; Cannon, L. (1991), PRESIDENT REAGAN: THE ROLE OF A LIFETIME, New York, Academic Press, p. 60.

One of the striking findings in psychological research over the last fifty years is that even intelligent and sophisticated people can be highly suggestible . . . people can be extraordinarily vulnerable to suggestion under the pressure of peers or authority . . . all of which occur in individual psychotherapy and may have profound influences, or at least influences that are greater than most of us would like to believe³⁵

d. Possible Sources of False Memories

All therapists make use of their client's memory. They seek to organize, interpret and summarize this information thematically. If a therapist is unaware of, or chooses to act in spite of, biased expectations and assumptions, that result may be a profound distortion of the memories of their clients. This effect has been widely discussed by memory researchers, social scientists, and clinicians.³⁶ The American Medical Association summarizes by saying:

Questions have been raised about the veracity of such reported memories, one's ability to recall such memories, the techniques used to recover these memories, and the role of the therapist in developing the memories It is established, for example, that a trusted person such as a therapist can influence an individual's reports . . . [and citing Loftus,] there have been reports of therapists advising patients that their symptoms are indicative -- not merely suggestive -- of having been abused, even when the patient denies having been abused Other research has shown that repeated questioning may lead individuals to report events that in fact never occurred.

Repressed memory therapies commonly employ various memory-enhancement techniques such as hypnosis, the drug sodium amytal and dream analysis. Many researchers as well as the American Medical Association³⁷ have shown that one memory recovery

³⁵Pope (1994), p. 7-9.

³⁶See, e.g., Campbell, T.W. *Therapeutic Relationships and Iatrogenic Outcomes: the Blame-and-change Maneuver in Psychotherapy*, PSYCHOTHERAPY, 19:474-480; Ofshe, R. and E. Watters (1994); Yapko, M.D. (1994).

³⁷American Medical Association (1985) Council Report, *Scientific Status of Repressing Recollection by the Use of Hypnosis*, JAMA, April 5, 1985, Vol. 253; American Medical Association, Council on Scientific Affairs, *Mental Health Consequences of Interpersonal and*

technique, hypnosis, though touted by some as effective in recovery of memories of traumatic events, is known to increase suggestibility and confabulation, "memory hardening," source amnesia and loss of critical judgment. A recent study of the use of sodium amytal concluded that "the amytal interview cannot be considered to guarantee access to anything remotely resembling truth."³⁸ While "rigorous scientific assessment of other methods of memory enhancement are not available,"³⁹ many researchers and clinicians believe memory recovery techniques can be so suggestive as to distort a patient's memories. It is possible to create false memories and even more source amnesia which renders a patient unaware of the suggestion which resulted in the distortion.⁴⁰

One of the most popular writings on the subject of "repressed memory" of childhood sexual abuse is *The Courage to Heal* (Bass & Davis, 1988), often referred to as the "bible" of the incest book industry. It advertises itself as a guide for women survivors of child sexual abuse and advises its readers, "[I]f you think you were abused and your life shows the symptoms, then you were."⁴¹ Lindsay and Read, two Canadian cognitive psychologists specializing in research on human memory, offer an in-depth analysis of their research on the issue of "repressed memories" and conclude that the approaches to psychotherapies advocated

Family Violence: Implications for Practitioners, CSA Report B (A-93).

³⁸Piper, A. 'Truth Serum' and 'Recovered Memories' of Sexual Abuse: a Review of the Evidence, *JOURNAL OF PSYCHIATRY AND LAW*, Winter 1993, p. 465.

³⁹American Medical Association (1985).

⁴⁰See, e.g., Campbell (in press).

⁴¹Bass and Davis (1988), p. 22.

by certain self-help books and by some clinical practitioners may inadvertently lead some adult clients to create illusory memories of childhood sexual abuse.

Executing an innocent man on the basis of testimony of unknown and possibly unknowable reliability should only be made after careful scrutiny of the validity of the "repressed memory" theory. Such examination of this volatile issue is more suited to the legislature. Allowing claims unsupported by objective, verifiable and corroborative evidence in cases of such serious consequence vitiates common sense and the legal principle requiring evidence to be reliable and trustworthy.

As Dr. Loftus notes in an article analyzing the theory of repression in psychology:

Nonetheless, when we move from the privacy of the therapy session, in which the client's reality may be the only reality that is important, into the courtroom, in which there can be but a single reality, then we as citizens in a democratic society are entitled to more solid evidence.

. . . Uncritical acceptance of uncorroborated trauma memories by therapists, social agencies and law enforcement personnel has been used to promote public accusations by alleged abuse survivors. If the memories are fabricated, this will of course lead to irreparable damage to the reputations of potentially innocent people⁴²

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

Here was a detailed, explicit confession, complete with dialogue, of a scene that had never happened. So far, the experiment had taught Ofshe just how much pressure it took to make Ingram comply with his demands, and the answer was remarkably little. The next task was to determine whether Ingram would admit that the confession was false. But he was unshakable about this. "It's just as real to me as anything else," he maintained.

⁴²Loftus (1992).

Ofshe now had serious doubts about whether Ingram was guilty of anything, except of being a highly suggestible individual with a tendency to float in and out of trance states, and of having a patent and rather dangerous eagerness to please authority. He suspected Ericka of being a habitual liar. Throughout the investigation, Julie's accusations had followed Erika's lead. Ofshe doubted whether the sisters had ever intended their charges to be drawn into the legal arena. Once the charges had been filed, Ofshe believed, the sisters pasted over the inconsistencies in their original accusations with ever more fanciful claims. The whole misadventure, it seemed to Ofshe, was a kind of mass folly -- something that would be suitable mainly for folklorists if it were not that innocent people's lives were being crushed. When Ofshe left Olympia, he was convinced that he was seeing a new Salem in the making. The witch trials, he believed, were about to begin.

Wright, *Remembering Satan*, New Yorker,
May 24, 1993, at 68-69

a. Joe McCawley, "Ethical Hypnotist"

If Lewis Carroll were alive and writing today, he might well have Alice meet Joe McCawley.

Dear Mr. Mello:

This letter is pursuant to my phone conversation with you on June 14, 1995, regarding my past experience with Joseph McCawley.

I was involved in the Pitts/Lee case as a consultant for Irwin Block, Esquire. At that time I was made privy to the transcript made by Mr. McCawley when he allegedly hypnotized an eye witness which incriminated Pitts and Lee.

Based on my experience, and review of that tape, it was quite clear that Mr. McCawley did not test for hypnosis, asked leading questions, and produced undue influence on a witness which produced false information and resulted in a false conviction. Mr. McCawley is a lay hypnotist without credentials and, in my opinion, did not understand the true nature of hypnosis and the potential undue influence that can be imposed upon a subject.

Assuming that he utilized the same type of procedure with the witness in the above case, there would be a strong likelihood that testimony after hypnosis would be totally unreliable on its own unless it fits the rest of the facts of the

case. If there are no other facts in the case, hypnosis cannot stand on its own other than to explain behavior.

It should be noted that people in hypnosis can be subjected to undue influence and cueing. Leading questions can produce false information. Furthermore, people who are even in the deepest states of hypnosis can lie, confabulate or fantasize. This can even occur with people not in hypnosis if they are strongly influenced by the examiner.

I hope this information will be of assistance.

Very truly yours,

Charles B. Mutter, M.D., P.A.

But the best account of McCawley's antics in the Pitts and Lee case comes from Gene Miller's magnificent 1975 book *Invitation to a Lynching*. (Parenthetically, Miller's book would have been easily available to Mr. Spaziano's trial lawyer months before trial.) Miller described Pitts and Lee's attorneys — Block and Hubbart — reaction to McCawley's hypnotism of the state's star witness, Willie Mae Lee, in this way:

Dumbfounded, Block and Hubbart stared unbelieving at the judge. What was he saying? He wanted a psychiatrist to put Willie Mae Lee under hypnosis? In the courtroom?

J. Frank Adams, who had said practically nothing in the course of the day, jumped to his feet. "Please the court, we have a hypnotist who is scheduled to be here in the morning."

"Oh, you do have?" said Judge Holley, as if surprised.

"For that very purpose," said Georgieff.

"Who is this individual, Mr. Adams?" Judge Holley asked.

Speedy DeWitt answered for him. "Your honor, his name is Joe McCawley, who practices in Orange County. He's a licensed ethical hypnotist. He'll be here in the morning."

Befuddled and perplexed, Block and Hubbart wondered what the hell was going on. Here Judge Holley calmly tells everyone he wants a psychiatrist present for a hypnotic seance in the courtroom. And the state already has a hypnotist arriving in the morning? Was that supposed to be coincidence? The AP and UPI trial reporters were furiously taking notes.

"I don't want to interfere with the petitioners' presentation of their case," said Judge Holley. "But at the same time I want this witness and I want it handled in this manner."

Holmes, for one, smelled a rat. "For Christ's sakes, Irwin," he asked Block in the corridor, "is this legal? Can a judge do this?"

"This judge will do anything he wants to do," Block replied. He was smiling his calamity smile.

Just whose idea was this latest judicial innovation? Four years later, by deposition, Speedy DeWitt swore it had been Judge Fitzpatrick's. DeWitt and J. Frank Adams had gone to see Judge Fitzpatrick in his chambers after their New York-Backster polygraph trip.

Until that moment, hypnosis "hadn't entered my mind," DeWitt testified. "He [Judge Fitzpatrick] related that he had done some reading and heard some things on hypnosis, and he asked me if I would do it."

Speedy DeWitt wasn't the sort of investigator who needed to be told twice. At that time, in early March 1968, Judge Fitzpatrick had before him the defense motions for a new trial. Speedy DeWitt telephoned Joe B. McCawley in Orlando on April 19. McCawley took notes: "Negro female witness ran on lie detector, not too dependable. May have been drunk. Judge wants her hypnotized."

Judge Fitzpatrick disqualified himself on April 23. That was the same day, it developed, that Willie Mae Lee underwent a hypnotic seance in secret in Orlando. Matter of fact, it was her second secret seance. The first one was the day before, April 22. Years later, Judge Fitzpatrick would say he couldn't remember if he had suggested the idea.

On the day Judge Holley unveiled his plan for hypnosis, Block and Hubbart stalled for time. Hubbart's eyes raced down the state's witness list. There he was: Joe McCawley. Hubbart's friend, Virgil Mayo, the Panhandle public defender, had told him he thought McCawley was a Panama City policeman.

In a whispered conference, Block learned of the two previous seances. "I now understand that the hypnotist they're bringing has already seen her and spoken to her and I don't think your honor realizes that," Block ventured.

Assistant attorney general Marky spoke up quickly. "He was a witness on our list, your honor. They could have inquired as to what his scope of inquiry would be."

Well, that's not the objection," said Block. "I think your honor intended that independent persons be involved."

That wasn't so, it seemed. "I don't think it makes any difference," said Judge Holley. "Particularly if the court is represented by a psychiatrist."

The judge then lectured the spectators ambiguously. "If any matter comes to my attention where any of you are doing anything that you shouldn't be to affect the procedure of this court, I am going to do everything I can do to see that you're prosecuted to the fullest extent of the law," he said. "Now, I don't want anybody interfering with these lawyers. Is that clear?"

He had in mind an incident that had occurred the evening before. Defense attorney Maurice Rosen had found five two-inch roofing nails propped against the front tires of Block's rental car in the courthouse parking lot.

"Hey, Phil, spikes!" Block deadpanned. "You're the only man here without children. You're expendable. Look under the hood for dynamite."

Hubbart laughed, but it wasn't funny. He looked under the hood. There was no dynamite.

Neither would there be any relief for the defense on hypnotism. Judge Charles R. Holley was hellbent on a public demonstration. On three occasions, Hubbart arose and objected. The state, in effect, had already "brainwashed" Willie Mae Lee by its two previous hypnotic sessions, and "tampered with her mind" and "implanted in her mind the story it wants her to say," Hubbart said. The hypnotic sessions, he charged, were a violation of due process of law under the Fourteenth Amendment. "It is denial of a fair trial to these two petitioners. We can't adequately cross-examine this witness. As a result the petitioners are denied their right to confrontation of the witnesses against them, guaranteed by the Sixth and Fourteenth Amendments. In addition, I think it's a violation of the petitioners' right to effective assistance of counsel."

"Thank you, counsel," said Judge Holley. "I'll take your objection under advisement." The judge had already announced that he had "a lot of faith in hypnosis and regression." He had instructed the state to bring a psychiatrist to the courtroom along with Joe B. McCawley.

"May I correct one thing for the record," Georgieff interjected. "Mr McCawley was not employed by the state. There was no fee paid and none accepted of any kind whatsoever. This was a gratuity on his part," he said in reference to the two previous hypnotic practice sessions.

Joe McCawley would change his mind about gratuitous service. He would bill the state \$465 for his courtroom services. The court would order him paid.

On behalf of Freddie Pitts and Wilbert Lee, attorney Block summoned a psychiatrist for the defense with Judge Holley's consent. Late the night before the courtroom seance, Michael M. Gilbert, a Miamian with both an M.D. and a Ph.D., was allowed to examine Willie Mae Lee at the jail, again with Holley's consent.

The next morning, September 26, 1968, Georgieff arose in a packed courtroom and attacked Dr. Michael Gilbert. Someone had told Georgieff that Dr. Gilbert had "suggested things" to Willie Mae Lee, telling her she was "going against her race."

Block was outraged. Why had this accusation been made in open court? "This is totally improper," he sputtered. "Dr. Michael Gilbert is one of the foremost prominent psychiatrists in the state of Florida and so recognized, and he would never do anything of that nature." Judge Holley informed Block that he was the one who had instructed Georgieff to make the allegation in open court as a "matter of record."

The allegation promptly collapsed. A jailer, Gordon Martin, apparently had eavesdropped on the examination. But he wasn't available to testify. He had left for the day for Wewahitachka. Wayne White's secretary, Norma Humphrey, took the stand and said Willie Mae Lee had told her that Dr. Gilbert said, "If you do not stand behind your own color, who in the world do you think will?"

Dr. Gilbert denied the statement and any improprieties. He had inquired into Willie Mae Lee's emotional state, and the obvious conflicts of her role in the black community, he testified. "I was trying to get her upset, see what her emotional reaction was to this particular problem. Any reasonable person would certainly have some conflicts or some qualms about

being in a situation like that." It was his opinion that she was competent and legally sane. There the matter dropped.

Irwin Block was allowed to cross-examine Willie Mae Lee prior to the seance. Judge Fitzpatrick, who had arrived to watch the hypnosis, took a seat in the jury box. After a few moments of Block's cross-examination, he left the courtroom.

Although Block's cross-examination that day was overwhelmed by the sensationalism of the hypnosis to follow, Willie Mae Lee fared poorly. She professed a very bad memory indeed. This time she had forgotten that the police kept her in jail for three weeks. She couldn't remember that she had supposedly seen Freddie Pitts with a gun and the car jack. She forgot Pitts supposedly pistolwhipped a victim and blood ran down the man's shirt. She forgot she had testified that she saw Pitts in the office at the Mo-Jo. She forgot she supposedly saw him carry out a sack of money. She couldn't remember falling asleep on the trip to Tyndall Air Force Base. She couldn't remember the time sequence when "Mr. Red" pushed the stalled car.

On thirty-three occasions she replied, "I don't remember." Thirty-six times she said, "I don't know." On fourteen occasions she failed to answer at all. She couldn't remember that by deposition she had admitted she "told a heap of lies." On seven occasions Block forced her to admit she had previously lied under oath.

For the state, Georgieff questioned her no more than two minutes. Who had come out to her house? he asked.

"Well, Mr. Gene Miller, if he don't come, he send somebody," she said. "He told me if I wanted to come to Miami he would put my little girl in a private school and see to me getting a good job." The brevity of Georgieff's cross-examination hardly mattered. It was time for the hypnosis. As show biz justice, it would excel.

Joe B. McCawley, tall, dapper, his hair well oiled, proudly jotted a note to himself: "making history." He was indeed. His seance would qualify as one of the most eccentric exhibitions to occur in a courtroom in the history of law in America. Until that moment in 1968, according to later research, there had been only one previous instance of hypnotism in an American courtroom in a legal proceeding.⁴³

⁴³That had occurred on June 8, 1962, in Columbus, Ohio, in the trial of Arthur C. Nebb, an outraged husband. He shot to death a man he claimed made love to his wife. He shot

Joe McCawley, garbed in a dark blue suit and polka-dot necktie, took the witness stand. Georgieff mistakenly kept calling him "Doctor." McCawley corrected him. McCawley identified himself as an "ethical hypnotist," the nation's "first," he said. He had been licensed, he said, which was true. He had paid thirty-five dollars for occupational licenses. No examination had been required.

McCawley informed the court that "at the present time approximately 350" physicians and dentists referred patients to him in the Orlando area. On cross-examination, Block did not question the figure. He knew practically nothing of McCawley's background, and like most astute lawyers, he chose not to ask questions where he did not know the answers. A later count of the number of physicians and dentists listed in the yellow pages of the Orlando telephone book would show 441. If McCawley was correct, it meant that nearly three out of four doctors in the entire metropolitan area used his services. The Drs. Louis C. Murray and W. H. Brownwell, respective presidents of the county's medical and dental societies, would both declare McCawley's estimate much too high.

McCawley also testified that he "routinely" practiced in Orlando hospitals. Garth Walker, director of Orlando's largest hospital, Orange Memorial, would say he had no knowledge of McCawley's practice there.

That morning in the courtroom the ethical McCawley testified: "I have been trained by the American Institute of Hypnosis." Among the sites for courses in hypnosis, he said, was Las Vegas. A convention of the American Institute of Hypnosis in Las Vegas not long after the Port St. Joe hearing featured, among other things, lectures on "Sexual Stimulation in the Treatment of Impotence by Watching Copulation" and "Sexual Stimulation of Animals as a Means of Sexual Arousal." The hypnotists also watched films on nude therapy.

McCawley would later describe his practice as "self-improvement -- just like Dale Carnegie." He was forty, and he practiced what he preached.

her, too. Nebb had submitted to hypnosis on the witness stand. But, unlike the Port S. Joe seance, both the defense and the prosecution had agreed to the procedure. And unlike the Port St. Joe seance, a psychiatrist conducted the hypnosis. Joe McCawley's academic qualifications, it turned out, consisted of graduation from a junior college in Orlando. And unlike the Port S. Joe seance, both sides had cross-examined the witness. Judge Holley specifically prohibited this. (Even if he had not, though, the defense lawyers would not have participated.) In the Ohio case a jury had been excused. Eventually the defendant had been convicted of manslaughter. The case had not been appealed.

Each morning he would routinely hypnotize himself. He helped salesmen sell better, he proclaimed, and he helped people overcome the fear of dentist drills. He also helped people stop smoking, stop eating too much, stop bed-wetting and stop thumb sucking. Before he became a hypnotist, he made a living for eleven years as a radio station engineer for WHOO in Orlando.

"Could you tell us whether hypnotism has been recognized by any of the medial professions?" Georgieff asked.

"Yes, sir," said McCawley. "In 1958 the American Medical Association made a public statement formally recognizing the value of hypnosis when used for therapeutic purposes by trained individuals."

Block asked McCawley a pointed question. "You said that you couldn't get anybody to lie under hypnosis with their will?"

"A person's hypnotic behavior is really determined by his non-hypnotic behavior," McCawley replied. "If he would normally lie out of hypnosis, he can also lie in hypnosis."

"That's all," said Block, and soon Judge Holley announced, "I'm ready to proceed here, gentlemen" Hubbart objected, futilely, one last time.

He sat down in disgust. Warren Holmes seethed. Block settled back to await calamity. Judge Holley was expectant. Freddie Pitts and Wilbert Lee didn't know what to expect. Joe B. McCawley knew what to expect. He had done it twice before.

In a hushed instant of improbable tragic-comedy, Willie Mae Lee again took the witness stand. Joe McCawley would make her "relive" the murders of Jesse Burkett and Grover Floyd, Jr.

"Mr Bailiff," said Judge Holley, "Anybody tries to create any interruption, I want them placed under arrest. This applies to counsel, anyone else."

"Did anybody discuss with you your being hypnotized here in the courtroom?" Judge Holley asked Willie Mae Lee. She shook her head no. This, obviously, was the wrong answer.

So a moment later Judge Holley, undeterred, said, "I have here a slip from the sheriff -- that is, from the bailiff -- and it says here to the effect, Willie Mae, that you want to be assured that only either Mr. McCawley or I ask you questions under hypnosis." This time she nodded her head yes. By

then Judge Fitzpatrick had returned to the courtroom and resumed his seat in the jury box. Other distinguished guests from the Panhandle of Florida kept him company.

"All right," said Judge Holley. "Everybody be quiet now." Joe McCawley instructed Willie Mae Lee to stare at a brass-plated eagle atop the American flag. "Just relax," he began. "Now you're drifting right on down, further and further, deeper and deeper. Deeply, profoundly . . . sinking down and down. Way, way down, Billie Mae. [It was her nickname.] Deeper and deeper."

He had her extend her right arm rigidly, then told her she was unable to move it upon command. She didn't. He told her she had no feeling in her right hand. "Would either one of the doctors like to test her for anesthesia?" he asked.

Dr. Gilbert jabbed a pin in her palm. "Found reflex withdrawal when I pricked the palm," he announced. McCawley asked his subject if she felt anything. "No," she said. "Thank you very much Doctor." Then, like an auctioneer registering years, not bids, Joe McCawley telescoped time: Now it is 1967 . . . 1966, 1965, 1964. It is the eve of the crime, July 31, 1963. Joe McCawley was a fast worker. He had peeled back five years in fewer minutes. Willie Mae Lee, slumping, eyes closed, had "regressed" to the army payday party at Wilbert Lee's house. She "relived" it. She was drunk on moonshine.

"What are you doing now?" McCawley asked.

"Going back down here and get me another drink," she said.

". . . Now where are you going and what are you doing?"

"Get another drink," she said, her head slumping on to her left shoulder. Eight different times, in her trance testimony, Willie Mae Lee gulped down Preacher Man's homemade whiskey. "Going out in the yard to get me a drink of this 'shine."

It was then that she supposedly embarked on the trip to the Mo-Jo.

"A little bit louder, Billie Mae, I can't hear you. Speak up," said McCawley.

She murmured something unintelligible.

"Go ahead."

"Well, what are you doing there?"

"Who are you talking to?" McCawley asked.

"Talking to Wilbert."

"Wilbert. Okay. Where is he?"

"Laying down . . . Laying in the seat . . . Picked a hell of a place to sleep."

"Louder, I can't hear you, Willie Mae, you must speak up so I can hear you. Louder now, so I can understand you."

Even though a microphone had been attached to her blouse a few inches from her mouth, McCawley couldn't get her to speak distinctly. In trying to transcribe the testimony, a stenographer would later write: "(unintelligible answer)" on thirteen occasions, "(unintelligible words)" forty-three times, and "(no response)" four times.

The stenographic report would also note: "mumbling," "sobbing," "moaning," "witness swaying in chair," "witness screaming," and "witness in extreme emotional state."

No one who heard Willie Mae Lee that day, though, would dwell on the incomprehensible qualities of her testimony. She screamed and she screeched and she almost fell out of the witness chair and she cried and blubbered and sobbed. But her message was starkly apparent:

"No, no, don't do this!!" she yelled.

"Don't do what?" McCawley asked.

"Oh, don't do it. Just don't do it. Lord have mercy. Don't do this."

"Don't do what, Billie Mae?"

"Pulling them in, pulling them in, pulling them in."

"Tell me what's happening, Billie Mae."

"Get out. Okay, I get out. Oh, God. No! No! . . ."

"Tell me what's happening, Billie Mae."

"Got mans in the car."

"Got who in the car?"

"That fat man and that old man . . . Mr. Burkett and Floyd . . ."

"Billie Mae, I want you to speak a little louder so I can hear you. Plainly and loudly so I can hear you."

"Don't beg that damn nigger. Don't beg that damn nigger."

"Who's saying that?"

"The fat man . . ." She began to weep. "No! No! Don't do it."

"Don't do what?"

"Let me go! Let them go!" Her screams pierced the stilled courtroom. "Oh, no! Oh, no! Don't . . . Oh, God . . . Let me go . . . Let me go . . . Talking with Freddie. I talking to him. 'Shut up your goddamn mouth.' . . . Freddie told me to shut up . . . They're getting out. . . . 'Hand me my gun, you ain't got no damn nerve.'"

"Who's saying that?"

"Freddie."

"Who's he saying it to?"

"He telling Wilbert. . . . No, no! No, don't do it, please!" She was sobbing uncontrollably.

"Lord have mercy, don't do it! Don't kill men! Don't carry men down there. . . . Oh, dear God! I'm sorry I ran away. So scared, so scared. . . . I'm running."

"You're running? Where are you running?"

"Down the side of the road. . . . Coming back, nowhere to go. 'Freddie, what you all did? What you did! What you did? What you did. . . . Take me home, I won't tell. I ain't going to tell. I won't tell, I swear I won't, I swear. I won't . . . carry me home, please. . . . Nothing wrong

with me, I just want to sleep. Ain't nothing wrong with me. I won't stay out this late any more. . . . "

Joe B. McCawley informed the court that she had "not been as detailed as the first two times she went through this."

"Do either of counsel have questions that they wish to put through Mr. McCawley?" Judge Holley asked.

"On the basis of our prior objection, we cannot present questions, your honor," Block said. Dr. Gilbert examined her again.

Moments later McCawley had his subject out of her trance. "You're totally normal in every respect. You're refreshed and rested. You're slowly becoming more alert."

Judge Holley recessed for lunch. In the jail five minutes later, Willie Mae Lee became hysterical. Screaming and incoherent, she collapsed. Linda Emerick, a secretary for the attorney general's office, struggled with her on the floor to quiet her. McCawley rushed to the rescue. Instantly, so he acknowledged years later, he placed her back into hypnosis and calmed her down. None of the prosecutors would ever mention it in a courtroom.

Later that day in the courtroom, Dr. Gilbert, an articulate Michigan-educated psychiatrist who headed a federal research project on brainwashing during the Korean War, cast doubt on the depth of the trance. Block noticed that Willie Mae Lee had referred to the victims by name. In her early August 1963 statements she had not known their names. Under regression, would she be able to recall what she didn't know at the time? he asked.

"Not ordinarily," said Dr. Gilbert. By pricking her hand twice while under hypnosis, Dr. Gilbert said he detected a reaction to pain. A person in trance, he said, "doesn't have to be sleepy and dopey. They can be alert, speak clearly, and get up and act out anything the hypnotist wishes. I frankly think she was play-acting," he said.

The state's expert witness on hypnosis, Dr. Israel Hanenson, was from Chattahoochee, the nearby mental institution, and in a pronounced European accent he candidly admitted that he didn't "know much about hypnosis" and had never witnessed regression before.

In a spontaneous recitation of his qualifications, Dr. Hanenson, a rumpled, chubby man, informed the court that the army had drafted him with one eye and a heart condition. (At the institution, matter of fact, he would

occasionally show a visitor his military uniform, which he kept in a zipper bag on a coat rack in his office.)

Before employment at Chattahoochee ten years before, he practiced at an institution in West Virginia because his wife was from West Virginia and she wanted to live in West Virginia, but he finally "got sick and tired of people from the state house, especially senators, coming over [and saying[, 'I want you to hire so and so.'" All this was spontaneous.

"What experience, Doctor, have you had with hypnosis in your work?" Judge Holley asked.

"Well, to be frank, none, your honor," Dr. Hanenson replied. "To compare myself with the illustrious colleague Dr. Michael Gilbert, I would classify him as a giant and I am a plain Lilliputian." He smiled. "We state psychiatrists -- without disrespect to Dr. Gilbert -- we cannot go into any fancy psychiatry. We would have to be rich I don't have time even to read that stuff because I'm too busy to go from one circuit court to another."

Suddenly Dr. Hanenson turned pale while testifying. He hesitated. "Excuse me, your honor, may I have half a minute?"

While a concerned Judge Holley peered at the witness, Dr. Hanenson took a pill.

"Want some water?"

"No, nitroglycerin," said Dr. Hanenson. "Forgive the interruption."

The courtroom seance had impressed Dr. Hanenson. "Splendid," he said. "Most vital," "vivid and accurate" description of "the original conflict," he called it.

Sometime later, after a transcript had been finished, reporter Gene Miller flew to Baltimore and interviewed Dr. Harold Rosen professor of psychiatry at Johns Hopkins University. He was the former chairman of the American Medical Association's Committee on Hypnosis.

As a search for the truth, the Port St. Joe seance, he said, amounted to "dangerous, degrading claptrap."

"Hypnotized subjects may confess to crimes they fantasize having committed or to crimes their hypnotist thinks they have committed," he said. "They can falsify testimony against themselves and against others, or be

induced to persuade themselves that they remember committing crimes that in actuality they never committed."

As a psychiatrist, Dr. Rosen said, he had served as a consultant in 203 cases where hypnosis caused dangerous adverse complications. McCawley had testified there could be no adverse effects.

"The dangers of hypnosis in police, as well as society at large, arise from its injudicious use by untrained or psychiatrically naive practitioners," Dr. Rosen said. "Raw undigested data from hypnotic sessions may be totally misleading. Any hypnotized individual is in what best can be characterized as a state of clouded consciousness." He said he would no more use hypnosis in a courtroom than he would expect an obstetrician to deliver a baby in court or a surgeon to perform an appendectomy. In regression, he pointed out, a subject may relive an experience he has never had. "The mere fact that he seems to be reliving an experience doesn't mean it occurred."

Under his chairmanship the AMA committee, the one that Joe McCawley mentioned, issued a position paper on hypnosis in 1958. It had recognized its medical values, which are sometimes substantial, and vigorously condemned its abuse. Any person of normal intelligence, Dr. Rosen said, can learn the technique in thirty minutes. A person can be hypnotized with or without his conscious consent, he said. And rigidly controlled experiments at Harvard University and Johns Hopkins University have proved that a person pretending to be hypnotized can fool the experts. Dr. Rosen cited a case where a man confessed under hypnosis to the murder of his sister. There was one thing wrong. He had no sister.

But in the Port St. Joe courtroom that afternoon, the prosecution wasn't concerned how science viewed the subject. As show biz justice, Willie Mae Lee's performance was boffo. Raymond L. Marky III, the assistant attorney general, was ecstatic. The night before the hearing, McCawley had hypnotized him. As Marky explained to Miller, "I wanted to discover my own true feelings about the case." He discovered that he believed Freddie Pitts and Wilbert Lee were guilty.

Following Willie Mae Lee, Judge Fitzpatrick took the witness stand for the state. He told how he had interviewed Freddie Pitts and Wilbert Lee in the privacy of his chambers during his first encounter with them and how they said they had not been mistreated. It was an intriguing assertion: How could the judge have questioned only Freddie Pitts and Wilbert Lee at that time? Why not Lambson Smith, Jr., as well? Smith was before him at the same hearing.

All three had been charged with first-degree murder at the time. Block, however, deemed it unwise to cross-examine Judge Fitzpatrick aggressively. Embarrassing him before Judge Holley, Block felt, would reap only harm. He let the matter slide.

Judge Fitzpatrick also testified that he had told both defendants that they did not have to testify at the mercy hearing.

"And if the trial transcript does not reflect that, could it possibly be that you think you did it but it might not have happened?" Block asked politely.

"If it's not in the transcript, then I can't explain why it's not," Judge Fitzpatrick said. It wasn't. He was mistaken.

David Carl Gaskin, the lawyer from Wewahitchka; County Judge Sam Husband; George Y. Core, the court clerk; Robert Sidwell, the volunteer Civil Defense chauffeur, all took the witness stand to say they never saw anyone mistreat the defendants in 1963 and that they never saw any signs of a beating. Joe Townsend and Deputy Wayne White also testified, asserting that the 1963 confessions had been free and voluntary.

b. Hypnosis in Florida Courts: You Are Getting Sleepy . . .

Subsequent to Mr. Spaziano's trial and direct appeal, the Florida Supreme Court decided *Bundy v. State*, 471 So. 2d 9 (Fla. 1985), holding that hypnotically-refreshed testimony, such as Dilisio's, would be *per se* inadmissible. The Florida Supreme Court in *Bundy* surveyed the analyses of the hypnotism question made by courts of other jurisdictions and concluded:

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

Id. at 18.

Counsel attacked Dilisio by using the traditional tools of impeachment. In closing argument, counsel did not characterize Dilisio as simply a malicious person. Rather, he urged the jury to feel sorry for Dilisio but not to believe him (R1-761). Counsel suggested that Dilisio might have honestly been confused, either by drugs or by the police (R1-762-63).

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 single most important detraction from Dilisio's credibility: the fact that Dilisio never "recalled" the alleged incident at the dump until after he went to a police hypnotist (R1-80). The prejudice resulting from this unreasonable omission is set out below.

Dilisio testified in his pretrial deposition that he was questioned by the police several times without mentioning the alleged trip. It was only after hypnotism that his memory "returned." Specifically, he stated in his deposition that he could not remember whether the hypnotist used mind-relaxing drugs, nor could he recall whether the hypnotist or the police suggested anything to him while under hypnosis (R1-82-85).⁴⁴

⁴⁴ Q. *What caused you to finally tell him about this sighting you made and this conversation you had about these bodies?*

A. *When I went to the hypnotist.*

Q. Explain that, if you would.

A. I went to a hypnotist and told him about it, and I knew about it and it wouldn't come out because it was in my subconscious.

Q. In other words, the times you were talking to Abbgly (a police lieutenant) about various incidents or what was being said between you and Joe Spaziano, you felt like you were telling him the whole truth and not holding back?

A. It felt like it was. I wasn't sure what it was, do you understand?

Q. *At the time it was not in your conscious mind that Joe had taken you to see dead bodies?*

A. *Yes, sir.*

Q. *And, it was in your subconscious mind?*

A. *Yes.*

Q. *And, somebody brought those things out to the point where you could relate them?*

A. *Yes, sir.*

Q. *And, it was a hypnotist?*

A. *Yes, sir..*

...

Q. *Actually before you went under hypnosis, you didn't recall any of these events but the conversation and bodies?*

A. *Right.*

Q. *Yes. I found there was something there but I wasn't sure what it was, just pictures of different things.*

...

Q. *Finally then, as I understand, from the time that you say you went over to this area that you described and viewed what appeared to be two bodies to the time that you went under hypnosis, your mind was blank concerning what you saw and what Joe Spaziano said to you about those bodies?*

A. *No. I didn't -- I said I remember pictures. I knew part of it but I didn't remember the whole thing. I was not sure I knew there was more there. Do you know what I'm saying?*

Q. *Then, after you were hypnotized all of it came back?*

Thus, the very testimony that convicted Mr. Spaziano and sentenced him to death was not "remembered" until hypnosis. Courts have increasingly recognized that testimony extracted by hypnosis is untrustworthy and should be treated with skepticism. *Stokes v. State*, 548 So. 2d 188 (Fla. 1989). See *People v. Shirley*, 641 P.2d 775 (Cal. 1982), analyzing this issue). In *Brown v. State*, 426 So. 2d 76 (Fla. 1st Dist. Ct. App. 1983) (cited with apparent approval in *Bundy v. State*, 455 So. 2d 330 (Fla. 1984) (*Bundy I*)), the First District Court of Appeal of Florida provided a helpful discussion of this question. To summarize briefly, the scientific consensus is that a subject's reaction while under hypnosis is characterized by eager suggestibility to even slight nuances in the hypnotist's words or manner, a distorting desire to please the hypnotist, and the subject's later inability to distinguish between memories existing before hypnosis and pseudo memories existing on account of the hypnosis. That the hypnotist's influence may be completely unintentional does not detract from his impact on the reliability of the "memory" that is distorted or created and

A. *Most of it, not all of it. I remembered --*

Q. The details?

A. Yes.

Q. *And, what you said today essentially concerned that trip and what you viewed has surfaced in your memory since your hypnosis?*

A. Yes.

Id. (emphasis added).

the ability of the accused to subsequently confront the hypnotized individual about his memory.

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 while under hypnosis." *Brown*, 426 So. 2d at 83-4. This is not only to suggest that subjects consciously lie. The insidious damage of hypnosis is far more subtle.

It is now well-established that hypnotized subjects engage in "confabulation," *i.e.*, the invention of details to supply unremembered events in order to make the witnesses' account complete, logical and acceptable to the hypnotist. This tendency to "fill in the gaps" of memory is extremely difficult to detect, particularly when it combines with another danger of hypnosis:

[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. This process is caused by the fact that both before and during hypnosis the witness is told that he will remember everything clearly. . . . This . . . occurs when something learned under hypnosis is carried into the wakened state but the fact that the memory or thought was learned under hypnosis is forgotten. . . . A subject who has lost the memory of the source of his learned information *will assume that the memory is spontaneous to his own experience. Such a belief can be unshakable, last a lifetime, and be immune to all cross-examination. It is especially prone to 'freeze' if it is compatible with the subject's prior prejudices, beliefs or desires.*

As Professor Bernard Diamond notes, most witnesses not previously subjected to hypnosis, when cross-examined as to their recall of events, communicate their uncertainties by hesitancy in answering, expressions of doubt, and body language revealing a lack of self-confidence. These crucial indicators of demeanor are equal to or greater than the bare substance of the testimony in forming the foundation on which a jury determines the weight of the evidence. 'Because the [previously hypnotized] witness subjectively believes the veracity

of the memory, cross-examination loses effectiveness as a means of attacking credibility and the accuracy of recall.'

Id. at 85 (emphasis added, citations omitted).

Part of the problem is that the exact nature of the hypnotic state still is not understood. It seems to be a trance-like condition induced by a hypnotist. Scientists have observed empirically that hypnosis is characterized by loss of initiative; redistribution of attention (the hypnotist can direct attention beyond the usual range consciously available to the subject); reduction in reality testing and tolerance for reality distortion; increased suggestibility; and amnesia regarding what happened during the hypnotic state.

In *Bundy v. State*, 471 So. 2d 9 (Fla. 1985), Florida joined the ever-growing roster of jurisdictions which hold that hypnotically-produced testimony is *per se* inadmissible. The Florida Supreme Court in *Bundy* surveyed the analyses made by other courts and held that hypnosis "has not been proven sufficiently reliable by experts in the field to justify its validity as competent evidence in a criminal trial." *Id.* at 18 (emphasis added). In reaching this conclusion, the court recognized these problems: (1) hypnosis is not widely accepted by "the relevant scientific community" (psychiatrists and psychologists) as a reliable method of refreshing or enhancing memory of past perceptions and experiences, *id.* at 14 (citing *Collins v. State*, 447 A.2d 1272 (Md. 1982)); (2) hypnosis subjects are often so susceptible to suggestion and are so receptive to the hypnotist's verbal and nonverbal cues that they respond in accordance with what they perceive to be the desired response in order to please the hypnotist, *id.* (citing *State ex. rel. Collins v. Superior Court*, 180, 644 P.2d 1266 (1982)); (3) subjects "confabulate," or fill in the gaps in their memories, *id.* at 15; (4) the recall induced by hypnosis may be totally incorrect, *id.* (citing *State v. Grier*, 630 P.2d 575 (Ariz.

Ct. App. 1981)); (5) the subject can willfully lie, *id.*, (citing *Hurd v. State*, 432 A.2d 86 (N.J. 1981)); (6) the subsequent opportunity for cross-examination at trial of a hypnotized witness is virtually ineffective, *id.* at 14, (citing *State v. Mena*, 624 P.2d 1274 (Ariz. 1981)), because hypnotically-created memories become "frozen" in the subject's mind, *id.*, (citing *State v. Mena*, 624 P.2d 1274 (Ariz. 1981)); and (7) no set of procedural safeguards is effective in eliminating these problems, *id.* at 17, (citing *People v. Shirley*, 641 P.2d 775 (Cal. 1982), *cert. denied* 458 U.S. 1125, 103 S. Ct. 13 (1982)). It is important to note that each of these arguments for excluding hypnotically-refreshed testimony had been advanced by the scientific community by 1975, and should have been presented to the jury by Mr. Spaziano's counsel.

Mr. Spaziano's postconviction counsel (undersigned) retained two experts, Dr. Bernard Diamond and Dr. Robert Buckhout, to analyze of the existing audio tapes and transcripts of Dilisio's hypnosis sessions. See Appendix E. Their analysis demonstrates the prejudice caused by trial counsel's failure to investigate the hypnosis issue. Dr. Diamond is professor emeritus of law at the University of California at Berkeley, and professor of psychiatry at the University of California medical school at San Francisco. He has long been recognized as one of the world's most authoritative sources on hypnosis. Dr. Diamond has been cited as an authority in many of the ground-breaking hypnosis cases. See, e.g., *Stokes v. State*, 548 So. 2d 188, 190 (Fla. 1989); *Brown v. State*, 426 So. 2d 76, 85 (Fla. Dist. Ct. App. 1983); *People v. Shirley*, 723 P.2d 1354, 1375 n.32, 1377 n.24, 1381 n.45, 1382 n.46, 48, 49, 1383 n.51, 1385 n.54, 57; *State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1269, 1273 (Ariz. 1982); *Commonwealth v. Nazarovitch*, 436 A. 2d 170, 173 (Pa. 1981);

State v. Martin, 684 P.2d 651, 655 (Wash. 1984); *Collins v. State*, 464 A.2d 1028, 1034, 1039-42 (Md. 1983); *State v. Hurd*, 432 A.2d 86, 92 (N.J. 1981). He has published more than fifty articles and book chapters on forensic psychiatry, criminal behavior, evidence and related issues of psychiatry and law. Dr. Buckhout is professor of psychiatry at the City University of New York. Dr. Buckhout has published over fifty scientific articles and two books in the field of human perception and memory. He has testified in over eighty jury trials and more than 120 evidentiary hearings, having been found on each occasion to be a qualified expert on perception, memory and eyewitness identification. Doctors Diamond and Buckhout identified exactly the same problems with Dilisio's specific hypnosis that the Florida Supreme Court identified in its decision in *Bundy* to *per se* exclude hypnotically-refreshed testimony. As the reports reveal, the potential dangers set out in *Bundy* were present in this case.

In discussing a pre-hypnosis interview of Dilisio which had been conducted by a police officer Dr. Buckhout reported that:

I received a tape recording of an interview with Mr. Dilisio by the police a few days before the hypnosis session.⁴⁵ This tape gives some insight into the state of knowledge of the instant case of the witness. However, it is also a *remarkable example of pre-conditioning by the witness to a future hypnotic session by implying that his memory would be better and that he need not fear being named as an accomplice.* The interview begins with some vagueness of memory and frequent denials that certain conversations between the witness and the defendant had ever taken place. It is clear from the tape that the police had other conversations with Mr. Dilisio prior to this interview. It is also clear that many of the details under discussion had been part of the prior news media coverage. After a very brief period of time, the officer sought the witness's agreement to be hypnotized and only *then* reads him his rights. *The witness's statement: "You'll find out when I am under hypnosis," is remarkable*

⁴⁵This interrogation of Dilisio has been transcribed.

in that he is in the process of negotiating the conditions under which he will give evidence. The officer conducting the interview then meets every vague answer by giving more information, asking leading questions, providing details about another suspect, showing the witness a map of where the body was found, etc.

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

See Buckhout Report at 8-9, Appendix E (emphasis added).

In discussing the actual hypnosis sessions themselves, Dr. Buckhout reported that:

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

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

A: Some of their clothes.

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

[T. p. 1, 5/15/75.]

This exchange, typical of many, indicates that the hypnotist knew a great deal about the investigation of the case by the police, and, that it contributed to his excessive tendency to lead the witness. This question (as well as others), was specifically anticipated by questions used by the police officer in the interview cited above. Mention of a "left breast" by the witness clearly stems from the

leading questions indulged in by the police interviewer on May 13, 1975. By interjecting names and ages of victims, conclusions about the alleged behavior of the defendant, and assumptions about event sequences, *the hypnotist signals a clear line of expected answers and scenarios without waiting for the witness to freely volunteer information. This pattern violates the standards for conducting any type of hypnotic interview and resembles more the interrogation of a witness by an investigator who thinks he knows more about the crime than the witness.*

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

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

See Buckhout Report at 9-11, Appendix E (emphasis added).

Dr. Diamond first reviewed the hypnotist's qualifications:

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

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

Letter of Dr. Bernard Diamond to Michael Mello of 8/5/85, *See Appendix E.*

Dr. Diamond also performed an extensive analysis of the tapes and transcripts of the hypnosis sessions. He found that these sessions were beset by exactly the problems which led the *Bundy* Court to exclude hypnotically-refreshed testimony *per se* from future cases, which conclusion was, of course, revisited and reaffirmed in *Stokes*, 548 So. 2d 188 (Fla. 1989).

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

A habitual abuser of [such drugs] would be expected to have greater difficulty than the average individual in distinguishing truth from fantasy. *If some of the events claimed to be recalled occurred while the subject was under the influence of such drugs, it is almost certain that memory distortions will occur.* [I interpret the subject's statements on p.2 of the second transcript to mean that *he was under the influence of LSD ("acid"), alcohol, and marijuana during some of the time of these alleged events.*

See Diamond Report at 2, Appendix E (emphasis added).

Second, Dr. Diamond found the hypnotist provided Dilisio with an unacceptable degree of suggestion:

Leading questions are frequently asked:

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

Q: Can you see any other bodies?

A: Yeh.

Q: How many others do you see?

A: No.

Q: Uh?

A: I don't want to see it.

Q: You don't want to see it?

A: No.

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

...

Id. at 4, 5.

Third, Dr. Diamond found that Dilisio probably was confabulating:

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

Id. at 6 (emphasis added).

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

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

Such generated memories may be entirely false, yet the subject will usually have a totally unwarranted belief and confidence in the validity of such hypnotically induced memories. The sense of confidence may be so strong that it defeats all cross-examination.

Id.

He therefore concluded:

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

Id.

Another major problem with hypnotically-induced testimony is that it is impossible to make a truly accurate record of a hypnotic experience. A typewritten transcript is inadequate because, as demonstrated below, inflections and tone of the hypnotist's voice may transmit suggestions and cues. Even an audiotape is inadequate because the hypnotist's body language and other non-verbal cues may also transmit suggestions. In Mr. Spaziano's case:

The transcripts of the two hypnosis sessions are obviously incomplete. They do not appear to start with the beginning of the hypnotic sessions, nor do they continue to the end of the sessions. . . . Accordingly, *the record of these hypnotic sessions must be considered grossly inadequate, and does not meet even the barest minimum standards acceptable to the legal or scientific community.*

See Diamond Report at 2-3, Appendix E (emphasis added).

Even though the materials that we have are incomplete, the transcripts and recordings are sufficient to demonstrate that the hypnotic sessions were conducted in a wholly inappropriate manner:

Because the pre-hypnotic expectations of the witness are of importance in producing and influencing memory distortions, it is essential that there be an accurate record of everything that was communicated to the subject prior to the induction concerning the nature and effects of hypnosis. Also communications made to the subject immediately after the hypnosis termination are similarly important.

A transcript of a hypnosis session is not sufficient. Non-verbal communication by both hypnotist and subject is very influential. Facial expressions, gestures, tone of voice, etc. may be of considerable importance in evaluating the consequences of a hypnotic session. Hence, hypnotic sessions, in the context of a legal investigation, should be videotaped. At the very least, good quality audio tapes should be available. *The tapes of these sessions do not fulfill this requirement.*

Id.

The risk of unreliability is made even more evident by the jury's sentencing verdict. In contrast to the difficulty the jury had in reaching its guilty verdict, it almost immediately reached a sentencing verdict of life imprisonment. This verdict suggests strongly that the jury was using the life verdict as its only available safeguard against the overall weakness of the state's evidence.

Thus, even without the critical hypnotism evidence to show why Dilisio was totally unbelievable, the jury had great difficulty finding Mr. Spaziano guilty. With evidence of the unreliability of the testimony (and certainly with Dilisio's testimony entirely excluded), the jury would have found it impossible to convict Mr. Spaziano. Mr. Spaziano therefore can satisfy the prejudice portion of the test for ineffective assistance of counsel, if he is provided an evidentiary hearing to do so at which he would establish what he has asserted previously.

The fundamental problem here is that hypnosis was not developed as a device for obtaining truth. It was developed for the *therapeutic* recall of psychological events, such as in treatment to cure neuroses. *In such therapy factual accuracy is irrelevant* -- the therapist seeks the purgative recollection of *emotions* surrounding the traumatic event. In such a process, the recall of all the embellishments and distortions of the neurotic process is desirable; what matters is the patient's *perception* of events, not the phenomenological

accuracy of the memories of those events. "Hence, even experienced hypnotists may be naive in their appraisal of the reality value of hypnotic recall." Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313 (1980).

Two hypnotic techniques were employed in this case: the "screen" approach and the "age regression" approach. The TV or movie "screen" approach is particularly subject to distortion of memories, a fact intimately connected with the nature of memory itself. In general, the testimony of any witness is subject to the inaccuracies of observation, or the influence of personal needs, desires, and motivations existing in him at the time of his observations of an event. BARTLETT, REMEMBERING 31 (1964).

As Reiff and Scheerer demonstrated more than a decade prior to this trial, MEMORY AND HYPNOTIC REGRESSION (1959), memories of an event recorded in the subconscious mind may be changed or distorted by the conscious mind to fit the changing needs of a person as he grows older:

The inference is therefore that for remembrance either memory traces proper change considerably, or the present personality brings them into consciousness in a changed form, *e.g.*, by representing the past in terms of present interests, functions and needs.

Id. at 39-40. This distortion is not the result of the subject's intentional lying; the most honest person will not be able to remember a past event exactly the way it happened, though the degree of distortion varies depending upon the individual. Hypnosis, which instructs the subject to remember an event but to remain mentally in the present (hypermnnesia), may overcome the conscious distortion, but not the subconscious distortion. *Id.* at 34-35.

The second hypnotic technique used in this case is called age regression: The subject is instructed to regress mentally to the time of the occurrence, and relate the event as it

develops. This appears to be one technique used by the hypnotist on Dilisio. See Transcript of Second Hypnosis Session, May 16, 1975, at 1. However, by the time of this trial there were at least five studies which demonstrated that hypnotic regression does not exist, and that such a "state" is merely the product of the subject's dramatizing his concept of himself at the regressed age. Martin Orne, *The Mechanisms of Hypnotic Age Regression: An Experimental Study*, 46 J. ABNORMAL SOC. PSYCHOL. 213 (1951). See also Hilgard, HYPNOTIC SUSCEPTIBILITY 169-70 (1966); Martin Orne, *The Nature of Hypnosis: Artifact and Essence*, in THE NATURE OF HYPNOSIS 99 (Shor & Orne ed. 1968). Other studies available at the time of trial also questioned the existence of age regression. Sabin, *Contributions to Role-Taking Theory*, 57 PSYCHOL. REV. 255 (1950) (suggests role playing rather than actual regression); Young, *Hypnotic Age Regression: Fact or Artifact?*, 35 J. ABNORMAL SOC. PSYCHOL. 273 (1940) (subjects' performance on intelligence tests not commensurate with their suggested age). These studies indicated that hypnosis cannot overcome the natural distortions of memories -- thus further impugning the accuracy of honestly recalled memories.

Review of Dilisio's hypnotic session indicates that his drug use injected additional doubt on the validity and truth of his recollections:

A habitual user of drugs would be expected to have greater difficulty than the average individual in distinguishing truth from fantasy. If some of the events claimed to be recalled occurred while the subject was under the influence of such drugs, it is almost certain that memory distortions will occur. [I interpret the subject's statements on p. 2 of the second transcript to mean that he was under the influence of LSD ("acid"), alcohol, and marijuana during some of the time of these alleged events].

See Diamond Report at 2, Appendix D. Dilisio was an admitted drug user before, during, and after the alleged incident at the dump. He admitted to the use of LSD, marijuana, cocaine, and all sorts of drugs (R1-655-56). He also admitted that while on LSD he sometimes hallucinated, fantasized, saw things that did not exist, saw distortions while hallucinating (R1-656-57), and that he sometimes combined marijuana and LSD for an accelerated hallucinogenic experience (R1-661-62). Research by 1975 had indicated that natural distortions and memory processes made the accuracy of events recalled under hypnosis doubtful. The distortions that Dilisio induced in himself by drug use could only compound that doubt. There is a reasonable hypothesis that Dilisio imagined the bodies while hallucinating. Even hypnosis at its best would do no more than aid him in recalling the hallucination.

Hypnosis is not a state in which the subject loses total conscious control. Fisher, *Problems of Interpretation and Controls in Hypnotic Research*, in HYPNOSIS: CURRENT PROBLEMS 109, 114 (Estabrooks ed. 1962). It had been clearly demonstrated by 1975 that the residuum of a subject's conscious control includes his power to lie during hypnosis. See ARONS, HYPNOSIS IN CRIMINAL INVESTIGATIONS 137 (1962); Martin Orne, *The Potential Uses of Hypnosis in Interrogation*, in THE MANIPULATION OF HUMAN BEHAVIOR 194-95 (Biderman & Zimmerman eds. 1966), WOLFE & ROSENTHAL, HYPNOTISM COMES OF AGE (1948); Erickson, *An Experimental Investigation of the Possible Anti-Social Uses of Hypnosis*, 2 PSYCHIATRY 391, 398-99, 404 (1939); AMBROSE & NEWBOLD, HANDBOOK OF MEDICAL HYPNOSIS 23 (1958).

In an article discussing one of the landmark cases of hypnotically refreshed testimony, *State v. Nebb*, No. 39,540 (Ohio C.P. Franklin Co. May 28, 1962) (unreported), the author points out that:

The fact is that the subject actually lied at one time in the hypnotic trance. First he testified that he told Jesse Oliver, 'I got them both' and then . . . he stated that he [had] actually stated, 'I ought to kill them both.'

Myron Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS U. L.J. 205, 209 (1963) (footnotes omitted).

Dilisio had both a motive to lie -- his erroneous belief that Mr. Spaziano raped his stepmother (R1-49-50) -- and a tendency, recognized by his father, to exaggerate the truth (R1-182).

A middle ground between simple but honest inaccuracies of recollection and deliberate lies under hypnosis is the phenomenon of "confabulation," in which the subject unconsciously creates details to fill in the natural gaps in his memory, or, out of a desire to comply with the hypnotist's suggestions, unconsciously creates details which he believes will please the hypnotist. Such confabulation was perhaps the key to Dilisio's testimony in this case.

The dangers of confabulation were well-known at the time of Mr. Spaziano's trial. Stalnaker & Riddles, *The Effect of Hypnosis on Long-Delayed Recall*, J. GENERAL PSYCHOL. 429 (1932). Rubenstein & Newman, *The Living Out of 'Future' Experience Under Hypnosis*, 119 SCIENCE 472 (1954). Hilgard, *THE EXPERIENCE OF HYPNOSIS* 164-75 (1968). Orne put the matter succinctly: "The significant point is that subjects in hypnotic trance show a marked tendency to confabulate with apparent verisimilitude." Martin Orne, *The Potential Uses of Hypnotism in Interrogation* at 194.

Dr. Diamond believed that Dilisio confabulated. His analysis concluded that:

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

Diamond Report at 6 Appendix D.

The most commonly recognized source for the introduction of error into hypnotic recall is the "hypersuggestibility" of a subject in a hypnotic state. Hypnosis is, almost by definition, a state of increased suggestibility. Underwood, *Experimental Psychology* 133 (1949); Hilgard, *Hypnosis*, 15 ANN. REV. OF PSYCH. 157 (Farnsworth ed. 1965).

The suggestions from the hypnotist can be either intentional or unintentional. From the perspective of confabulation, both are equally destructive of accurate recollections. One 1964 experiment indicated that simple variations in the examiner's tone of voice alone produced significant variations in the suggestibility of subjects.⁴⁶ Barber & Calvery, *Effect of E's Tone of Voice on "Hypnotic-Like" Suggestibility*, 15 PSYCHOL. REP. 139 (1964). The attitude, demeanor, and expectations of the hypnotist, and his body language may all communicate suggestive messages to the subject. Especially powerful is the context and purpose of the hypnotic session.

As detailed above, Drs. Diamond and Buckhout evaluated the transcripts of Dilisio's sessions for suggestivity and concluded that the sessions contained an unacceptable level of suggestion.

⁴⁶The auditory tapes of Dilisio's hypnosis sessions reveal marked changes in the hypnotist's vocal inflections, particularly as he asks the questions that Drs. Diamond and Buckhout have identified as leading or suggestive.

It is my opinion that the leading and suggestive manner of questioning [of] Mr. Dilisio by the hypnotist raises the possibility that the so-called memories generated by this process could have been a mixture of real facts, fantasies, confabulations, and outright fabrications. . . .

See Buckhout Report at 11, Appendix D.

Another extremely troublesome aspect of hypnosis recognized by 1975 is what follows the session: The subject develops a virtually unshakable sense of confidence in the accuracy and validity of the material developed during his session. This effectively precludes confrontation, in violation of Mr. Spaziano's sixth and fourteenth amendment rights. Specifically, as demonstrated above, hypnotically refreshed memories are apt to be a patchwork of (1) correct recollections; (2) distorted recollections, (3) deliberate lies, (4) confabulated details, and (5) suggested responses. A witness who has been hypnotized can rarely, if ever, recognize later that a suggestion implanted intentionally or unintentionally by the hypnotist is not the product of his own mind. Generally it is only with the severely mentally disturbed and in obsessive-compulsive neuroses that one's thoughts are ever experienced as alien; Diamond, 68 CAL. L. REV. at 333. Indeed, hypnotically "refreshing" a witness's memory is tantamount to the destruction or fabrication of evidence: Whatever honest -- however incomplete -- memories the witness had previous to hypnosis, these become forever inextricably tangled with the fabrications and suggestions created during hypnosis.

A remarkable feature of hypnosis is its ability to resolve doubts and uncertainties in the subject. Most persons, when aware of the deficiencies of their recall of events will communicate their awareness by hesitancy, expressions of doubt, and body language indicating lack of self-confidence -- demeanor evidence. Juries rely on these indications of

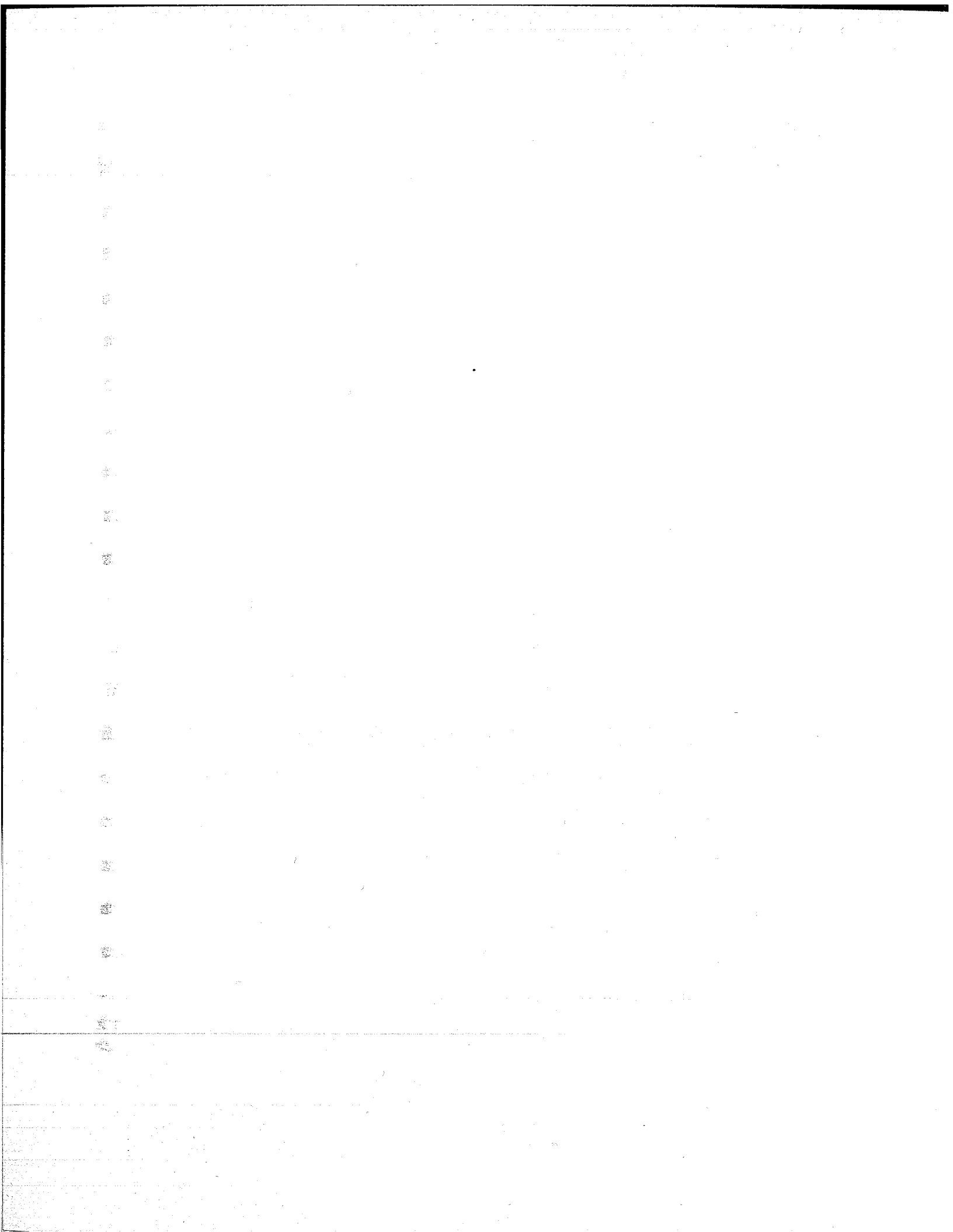
lack of certainty of recall, and their importance in the determination of the weight of the evidence may be equal nor greater than the bare substance of the testimony. But without adding anything substantive to the witness's memory of events, hypnosis may significantly add to his confidence in recall. Hilgard, *Experience of Hypnosis*, *supra* at 6-10; *Hypnotic Susceptibility*, *supra* at 166.

This newfound confidence can withstand the most vigorous cross examination. Allen, *supra* at 90. This raises serious constitutional problems, because defendants have a constitutional right to confront witnesses against them.

When a witness honestly believes he is telling the truth in good faith, there may be no way to test his or her subjective belief to ascertain the objective truth. The oath or affirmation loses its meaning, for although the witness may be prepared "to tell the whole truth and nothing but the truth" as he sees it, what the witness honestly believes to be the truth is a purely fictitious creation. This deprives the defendant of his sixth and fourteenth amendment rights. *See Clay v. Vose*, 599 F. Supp. 1505 (D. Mass 1984) ("very likely federal constitutional constraints will preclude the use of testimony from a hypnotized witness concerning matters not remembered before hypnosis") (case decided on other grounds); *Stokes*, *supra*.

Even in jurisdictions which at the time of this trial admitted testimony that had been hypnotically affected, courts were careful to specify that this admissibility was predicated upon the jury's awareness of the hypnosis, so that the credibility of the witness could be assessed. Mr. Spaziano's counsel even failed to take this precaution.

The line of cases concerning the effect of hypnosis on credibility began with the 1968 decision in *Harding v. State*, 246 A.2d 302 (Md. Ct. Spec. App. 1968). The alleged rape



victim in *Harding* could remember nothing about the incident until she had been hypnotized. At trial she was permitted to testify against the defendant, and her testimony helped convict him. *Id.* at 304. Maryland's Court of Special Appeals affirmed the conviction. The court ruled that the use of hypnosis did affect the weight of the testimony. The underlying theory was that with cautionary instructions about hypnosis, *id.* at 310, the jury would be able to gauge the correct weight to give to the evidence.

If the *Harding* court had received a more accurate description of the nature of hypnosis and the extreme vulnerability of the subject to suggestion, it might have been less disposed to admit the evidence.⁴⁷ Other jurisdictions in 1975 permitted the use of hypnotically refreshed testimony in court, but these cases also constantly stressed that the admission was proper only because the jury was aware of the hypnosis, and could assess credibility. *State v. Jorgensen*, 8 Or. App. 1, 9-10, 482 P.2d 312, 315 (1971) (hypnosis goes to weight of testimony); *Wyller v. Fairchild Hiller Corporation*, 503 F.2d 506, 509-10 (9th Cir. 1975) (hypnosis goes to weight or credibility); *Kline v. Ford Motor Company*, 523 F.2d 1067, 1069 (9th Cir. 1975). At a minimum, Mr. Spaziano's counsel should have argued that Dilisio's credibility was affected by his hypnosis.

Several jurisdictions had by 1975 recognized that the *Harding* approach was unsatisfactory for several reasons. First, it is doubtful that a jury is competent to assess the reliability of the testimony. An erroneous belief that hypnosis guarantees access to the truth may cause the jury to give increased weight to testimony uncovered via hypnosis. CHEEK &

⁴⁷The issue of hypnotically refreshed testimony was reargued in a later Maryland case, with a more thorough discussion of hypnosis. The *Harding* approach was repudiated in favor of *per se* exclusion.

LECRON, CLINICAL HYPNOTHERAPY 54 (1968). Moreover, the hardening effects discussed *supra* deprive the jury of demeanor evidence. These other jurisdictions had by 1975 rejected hypnotically refreshed testimony as *per se* inadmissible. *E.g.*, *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231, 235 (1975) ("the reliability of hypnosis has not been established"); *Greenfield v. Commonwealth*, 204 S.E.2d 414, 419 (Va. 1974) ("Most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements We agree with the vast majority of authorities . . . that hypnotic evidence . . . is not admissible."); *Jones v. State*, 542 P.2d 1316, 1327-28 (Okla. Crim. App. 1975).

"In 1975, it is my opinion that available experts reflecting the state of expert knowledge in the field at that time, would have been able to testify to the same conclusions and aid the trier of fact."

See Buckhout Report at 6, Appendix E (emphasis added).

Thus, at the time of this trial counsel should have discovered that a valid attack on the reliability of hypnotically induced testimony was possible. Such an attack should have resulted in the exclusion of the state's most powerful evidence against Mr. Spaziano. At a minimum, such an attack would have informed the jury *why* Dilisio should not be believed, even though he might appear in court to be a credible witness. At an absolute minimum, the jury should have known that one danger of hypnotism is the suspect's firm conviction that what he has recalled under hypnotism is accurate. Because of the high level of suggestibility, even unintentional suggestion can become firmly cemented in the subject's memory, regardless of the accuracy of the particular fact suggested. Once the distorted memory is

implanted, the subject develops an unshakable belief in its validity, and his tenacious reiteration of this belief is correspondingly enhanced. This false confidence interferes with the jury's proper function in evaluating the demeanor of the witness.

c. What Dilisio Says Today

Witness: Don't Kill Convict
by Lori Rozsa, *Miami Herald*, June 11, 1995

Starke, Fla. — "Crazy Joe" Spaziano — biker, dooper, and the most popular guy on death row — is scheduled to be executed in 16 days. But now the witness whose testimony convicted him can't remember a thing.

He can't remember Crazy Joe's taking him out to a back woods dump 22 years ago to see the corpses of two women.

He can't remember the hypnosis that helped him recall the incident in lurid detail for its investigators and the jury.

He can't even remember the trial or his gruesome testimony.

"How do I know what I said back then was reliable? Especially if it came out under hypnosis," Tony Dilisio said

He is now a 37-year-old, born again Christian who makes his living restoring classic automobiles in North Florida. He sometimes preaches mightily at an Alabama prison, where inmates call him Brother Nitro.

When he testified in 1975, he was an 18-year-old pothead and motorcycle-gang wannabe.

"Surely they're not going to let Spaziano go to the chair, to have his blood shed, based on what a confused and scared kid said," Dilisio told the *Herald*, referring to himself in the third person.

For Dilisio, the Spaziano matter is a blank. The 20 years since the trial have been ones of struggle for Dilisio. Trouble with the law. Battles with Alcohol. Testicular cancer.

In the last 10 years, he says, he has exorcised the personal demons of his abusive childhood and chaotic adolescence by "letting God cleanse my soul." He remembers getting married at 21; the years before are a void to him.

When the execution date was set last month, *The Herald* began to examine the case in detail. The conviction is strongly based on the testimony of young Dilisio, who was twice hypnotized before he revealed details that tied Spaziano to the murder.

Hypnotically enhanced testimony has since been banned from Florida criminal trials as unreliable. The ban is not retroactive; it does not apply to the Spaziano case.

When told the details of the case and confronted with his testimony, Dilisio was appalled that police had hypnotized him. "You can't do that to a kid and get away with it. If I was falsely used by the state to bring this to court, to put this gentleman behind bars, if he's innocent, then I'm furious about that."

Governor Chiles, he said, should halt the execution.

"I want this to be out in the open. The state is responsible."

This is the latest twist in one of Florida's longest-running Death Row sagas.

Spaziano arrived on Death Row at Florida State Prison near Starke on July 19, 1976. Only eight of the 360 men on Death Row have been there longer.

His case has been through two decades of appeals. Four times it has been reviewed by the Florida Supreme Court. Once it was sent back to the judge for resentencing. Twice it has been reviewed by the U.S. Supreme Court.

In all that time, no one went back to Dilisio.

The case against Spaziano was a sensation in Central Florida. The decomposed body of Laura Lynn Harberts, 18, a pretty medical technician from Orlando, was found in a backwoods dump ground in rural Seminole County in August 1973, near the skeleton of another woman, never identified.

About a year after the crime, police started talking to Dilisio, who was in a juvenile detention center. He had a vague recollection of Joseph Spaziano's bragging about mutilating and murdering young women.

Spaziano was the local leader of the Outlaws motorcycle gang, which in the early '70s was terrorizing Florida and buliding a criminal network of prostitution and drugs.

Dilisio idolized Spaziano. He wanted to join the Outlaws himself. They later had a flalling out, Dilisio told detectives, when he said Spaziano raped his stepmother.

Detectives asked whether they could hypnotize Dilisio, to help him remember what he could about Spaziano. He agreed.

Under hypnosis the first time, Dilisiosaid Spaizano had bragged of killing young women.

Under hypnosis the second time, Dilisio said Spaziano had taken him out to the woods and shown him a body. Later, he recalled a second body.

In a light trance, Dilisio remembered the scene more vividly.

One girl was bloody. The other one was, I never known it 'cause he'd stabbed their chest. . . . He cut her chest up."

As part of the outing, they took LSD, smoked marijuana and drank beer, Dilisio added.

He later said he never told anyone about the incident because he was afraid the Outlaws wolud kill him.

His statement painted particularly horrible pictures. Spaziano chopped off his victims' body parts and showed them to the women as they died — "torturing them," Dilisio told investigators.

At trial, Dilisio's recollections were even stronger. He remembered the roads to the dump, had a crisp recall of the scenery, remembered there were two bodies at the dump and remembered the junk that was strewn around the area.

The jury was never told that hypnosis helped Dilisio sharpen his memory. When it came up, Spaziano's attorney objected to it, and the matter was dropped. Nor was the jury told that Dilisio was taken to the dump by police to help him remember.

Joe Spaziano didn't testify at the trial to rebut Dilisio. He says now he didn't think it was necessary.

I never, ever dreamed that anybody would believe what he was saying. It was all so far out, you know, so unbelievable."

Spaziano, now 51, is something of an entertainer. He wants people to like him. His fellow cons do. They find him fully, self-effacing.

His criminal record dates back to his Hell's Angel's days in Rochester, NY — larceny, grand theft, assault on rival gang members. He wasn't hard to find when detectives came looking for him — he was serving a life sentence for the brutal rape and mutilation of a 16-year-old girl, a crime he says he did not commit.

"I'm no saint," he said during a prison interview last week.

"I did what I did, and I admit it. But I didn't rape, and I didn't kill nobody.

Claude VanHook helped prosecute the case. He remembers Dilisio's testimony well.

"He was proof that it was a homicide. We couldn't prove the cause of death because she was so badly decomposed. His saying that he saw her and that she looked like she had been sliced with a knife . . . He was our pathologist. What he saw made it a homicide

"He had the ring of truth to him The jury believed him."

While the case hinged on Dilisio, there was other evidence Van Hook points out.

Dilisio's father said he heard Spaziano brag about raping and killing women. The victim's roommate had seen Spaziano at the house in the days before Harberts' disappearance.

"Another important thing to consider — Spaziano didn't testify. He could have taken the stand and denied it," Van Hook said.

"I know in my heart that he got a fair trial. He had a very fair trial."

Judge Robert McGregor, now retired, remembers, too.

When the jury in the case came back with a recommendation of life in prison, he overruled them and sentenced Spaziano to death. The jury didn't know about the brutal rape case, he said.

He remembers Dilisio. "He was surely a key witness, laying it at Spaziano."

And he remembers Dilisio on the stand." The defense did their best to belittle the testimony of the youngster. I didn't see any suggestion that the kid was making it up or fantasizing in any manner."

Dilisio doesn't have anything against the death penalty, but he said he doesn't want the wrong man to die in Florida's electric chair.

I'm not taking sides, I'm not showing favoritism." Dilisio said. "But I think we're just hitting the tip of the iceberg right now. I think as more things are revealed, we might learn that this child was manipulated," again using the third person when referring to himself as a teenager. "He could very well have been brainwashed."

He wants people to pray for him so he'll do the right thing.

Would he undergo hypnosis again to help jog his memory?

"It's witchcraft," Dilisio said. "With hypnosis, they paint things in your head."

d. Exculpatory Information Not Disclosed to Defense Counsel and Thus Not Given to the Jury

(1) The Joe Suarez Telephone Call

Laura Harberts had a roommate, and the roommate's name was Beverly Fink. At trial, Beverly Fink testified that the decedent 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, through cross-examination, was able to *argue* that the call may have been from any other "Joe," including Joe Suarez, the exhibitionist whom the decedent dated, 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 militating conviction. Indeed, the state has consistently argued that this evidence is highly incriminating throughout the various state court proceedings.

Yet, we now know from review of the recently disclosed police files that the police had determined that the caller was indeed Joe Suarez *and* that the state failed to disclose this