

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-5596

TITLE JOSEPH ROBERT SPAZIANO, Petitioner
v.
FLORIDA

PLACE Washington, D. C.

DATE April 17, 1984

PAGES 1 thru 37



1
2
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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH ROBERT SPAZIANO, :
Petitioner : No. 83-5596
v. :
FLORIDA :

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Washington, D.C.
Tuesday, April 17, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:00 a.m.

APPEARANCES:

CRAIG S. BARNARD, ESQ., Chief Assistant Public
Defender, West Palm Beach, Florida; on
behalf of the Petitioner.
MARK C. MENSER, ESQ., Assistant Attorney General of
Florida, Daytona Beach, Florida; on behalf of
the Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
CRAIG S. BARNARD, ESQ.	3
on behalf of the Petitioner	
MARK C. MENSER, ESQ.	24
on behalf of the Respondent	
CRAIG S. BARNARD, ESQ.	35
on behalf of the Petitioner -- rebuttal	

- - -

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Barnard, I think
3 you may proceed when you're ready.

4 ORAL ARGUMENT OF CRAIG S. BARNARD, ESQ.

5 ON BEHALF OF THE PETITIONER

6 MR. BARNARD: Mr. Chief Justice, and may it
7 please the Court.

8 Mr. Spaziano is before the Court for review of
9 a death sentence imposed by the State of Florida. The
10 questions presented here involve whether the procedures
11 that were followed were adequate to assure reliability
12 of either the guilt determination or the penalty
13 determination.

14 Despite the evidence and the verdict,
15 Mr. Spaziano may or may not be guilty of first degree
16 murder. This is so because the jury was not given
17 options in its guilt deliberations. The one option that
18 the jury did have, the sentencing verdict it did choose
19 to exercise, and that was overridden by a judge that was
20 not -- the judge that was not privy to the guilt
21 deliberations of the jury.

22 The death sentence in this case thus results
23 from --

24 QUESTION: Well, when you say the judge was
25 not privy, the judge was there when the penalty jury

1 took place, was he not?

2 MR. BARNARD: My point was simply that the
3 judge was not a part of the guilt deliberations, and
4 that --

5 QUESTION: Well, of course, the judge never
6 is, is he?

7 MR. BARNARD: That's correct.

8 QUESTION: And the jury -- I see your point.

9 MR. BARNARD: Well, there are dual constraints
10 on the power of the jury's decisionmaking here. There
11 were constraints in the guilt phase on the jury's
12 ability to evaluate the defendant's culpability in any
13 reasonable manner.

14 The question here is whether, in the guilt
15 phase, the jury must be given more than two options; or,
16 if not, must the jury -- the jury's verdict for life in
17 the second phase at least be accorded finality.

18 QUESTION: If you prevail in this case,
19 counsel, what's the consequence of your prevailing? A
20 new trial?

21 MR. BARNARD: I believe a new trial is
22 appropriate under Beck.

23 QUESTION: Or the imposition of a life
24 sentence. Would that be of any --

25 MR. BARNARD: The imposition of a life

1 sentence, I believe, would be at least how far the
2 relief had to go. The question as to whether a new
3 trial is required was not settled in Beck, but the logic
4 of Beck would indicate that a new trial is required,
5 because the harm in Beck was the harm of a distorted
6 fact finding at a time when the defendant's life was at
7 stake.

8 QUESTION: Mr. Barnard, you're arguing two
9 quite separate points, though, aren't you? That
10 wouldn't be true of both of your points, would it?

11 You have a lesser included offense argument,
12 as I understand it, and also you argue that the jury
13 should not have been overridden on the penalty phase.

14 MR. BARNARD: That's correct.

15 QUESTION: As to the latter, you wouldn't want
16 to get a new trial, would you?

17 MR. BARNARD: No.

18 But the first issue is the Beck issue. It
19 involves an application of the Court's decision in Beck
20 v. Alabama. The Court held in Beck that the death
21 sentence, very simply, may not be imposed, consistent
22 with the Constitution, where it is imposed after a
23 verdict of guilt of a capital offense, where the jury
24 had no other options other than acquittal.

25 The Court reasoned that such a situation puts

1 pressure on the jury, if you will, that threatens the
2 efficacy of the reasonable doubt standard in that guilt
3 determination, so much so that in a capital case, that
4 risk can't be tolerated; that the risk of an unwarranted
5 conviction is just too great.

6 Therefore, in Beck, where the Alabama
7 legislature had passed a statute preventing the jury
8 from considering lesser offenses, that procedure was
9 held to be unconstitutional.

10 Similarly, in Keeble, where the Court was
11 faced with the prosecution of an Indian, and there was
12 no jurisdiction in the lower court over lesser offenses
13 for an Indian, the Court determined that nevertheless
14 there was error.

15 So it is the unavailability of the --

16 QUESTION: And what was the result in Keeble,
17 do you know?

18 MR. BARNARD: I do not know. The final
19 result? It was remanded.

20 QUESTION: I suppose the inference is that the
21 Federal Court, despite the lack of jurisdiction, could
22 find him guilty, try him and find him guilty of the
23 lesser included facts. He didn't go free. At least
24 there is nothing -- or did he?

25 MR. BARNARD: I do not know that. It may have

1 been -- I do know that the Court here has since held
2 that it did not decide the question of jurisdiction in
3 Keeble.

4 QUESTION: I take it here, there was no
5 request for lesser included offense instructions, in
6 your case?

7 MR. BARNARD: Well, they never got to the
8 point of the request, because the statute of limitations
9 had run. The only way that there could have been
10 instructions is if there were no statute of limitations.

11 QUESTION: But you're now saying that there
12 should have been such an instruction, I take it.

13 MR. BARNARD: Yes.

14 QUESTION: And would you have had the judge
15 charge the jury on the elements of the offense, and also
16 tell the jury that the statute of limitations had run,
17 and that no judgment could be entered on the verdict if
18 they returned a verdict of that kind?

19 MR. BARNARD: No, I don't believe it would,
20 because the situation would be the same result as Beck.

21 QUESTION: Then you'd have the judge charge
22 the jury, and give the jury the impression that the
23 defendant could be sentenced if they returned a verdict
24 on the lesser included offense, even though, in fact,
25 the defendant couldn't be sentenced.

1 MR. BARNARD: Well, the jury would be doing
2 precisely what the jury is doing, what it is supposed to
3 do -- excuse me. See, our position is premised on the
4 fact that a jury is the fact finder that returns a
5 verdict and tells us essentially what offense has
6 occurred. And the statute of limitations, especially in
7 Florida, is a separate legal decision that the judge can
8 make. It is made, most of the time, by a judge, not by
9 a jury.

10 QUESTION: Well, but if the theory of a lesser
11 included offense charge is that the jury may be willing,
12 in a doubtful case, may be willing to find someone
13 guilty of a lesser included offense rather than a
14 greater offense, if they think they have that option,
15 rather than just the option between acquitting and
16 finding guilty of the greater offense, isn't it a little
17 inconsistent to give the jury the impression that they
18 can return a verdict of guilty on this lesser offense,
19 and that there will be punishment for it when, in fact,
20 there can't be any?

21 MR. BARNARD: My answer is that I believe that
22 it would not mislead the jury to instruct on the lesser
23 offenses, because if the jury were instructed on the
24 offense -- the lesser offenses -- determined, as juries
25 do, what offense has been committed, and if it was the

1 lesser offense, it would be doing precisely what a jury
2 should be doing. The judge would then determine the
3 statute of limitations.

4 But there are other options. If it is
5 believed that that would mislead the jury too much, the
6 State has other options, one of which is to change its
7 statute of limitations, which, incidentally, Florida has
8 since done. There are a number of options to get around
9 the harm identified in Beck, which is simply the
10 unavailability to that jury of the lesser offense.

11 QUESTION: And another of which is to indict
12 sooner than it did.

13 MR. BARNARD: Indict sooner. The State --

14 QUESTION: Certainly, if the statute weren't
15 present, your client would have been entitled, I take
16 it, to the lesser included offense instructions.

17 MR. BARNARD: Yes. That is absolutely clear
18 in Florida law. Yes.

19 QUESTION: Was he asked to waive the statute
20 of limitations?

21 MR. BARNARD: Yes. And he did not want to
22 waive the statute of limitations, and did not.

23 QUESTION: Is there any role in Florida for
24 the jury to make determinations in connection with the
25 statute of limitations defense or point?

1 MR. BARNARD: Yes. Juries can make -- by
2 their decisions, do speak to the statute of limitations
3 in some cases. It's a jurisdictional --

4 QUESTION: Is that only if there's a factual
5 dispute in connection with it? How would the jury be
6 involved in determining the statute of limitations issue?

7 MR. BARNARD: If, for example, the statute of
8 limitations -- the offense was alleged to have occurred
9 over a period, before the end of the statute and the
10 period ended after the statute -- what would be
11 submitted to the jury would be just the period that fell
12 within the statute as the charge on the offense. It
13 would be submitted to the jury in that way, not so much
14 as a statute of limitations, but as just something that
15 the jury --

16 QUESTION: But the court itself would
17 determine, as a matter of law, whether the statute had
18 run. Is that correct?

19 MR. BARNARD: The court could determine it
20 separately, yes. The jury is told about time, but the
21 court can determine it. The cases cited by the State in
22 their brief, in fact, are the courts determining the
23 factual questions regarding the statute of limitations.

24 QUESTION: Are you suggesting that there is
25 any possibility that if this instruction had been given

1 and the verdicts had been returned on the lesser
2 included offense or offenses, that he could have been
3 sentenced on them?

4 MR. BARNARD: Not on the record that we have
5 now.

6 QUESTION: No, of course not.

7 MR. BARNARD: But maybe the record -- maybe
8 there is something that we don't know.

9 QUESTION: Well, the statute of limitations
10 had either run or it hadn't, and that was not difficult
11 to determine with the aid of a calendar, was it?

12 MR. BARNARD: Well, it can be told by certain
13 things, none of which are a matter of record here, and I
14 don't want to suggest to the Court that they are. I am
15 just saying that there are a number of determinations
16 that could have been made that weren't.

17 QUESTION: In Florida, suppose the instruction
18 had been given and the jury had found guilt of a lesser
19 included offense. Would the jury in Florida -- the jury
20 then do that sentencing?

21 MR. BARNARD: No. No. If there had not been
22 a statute of limitations problem, no, the jury does not
23 sentence.

24 QUESTION: Who does? The judge does?

25 MR. BARNARD: Less than capital, yes, the

1 judge sentences.

2 I think 'very clearly here, that the lack of a
3 third option enhanced that risk of an unwarranted
4 conviction in this case. The record is quite easily
5 viewed as demonstrating precisely what the Court
6 predicted in Beck did actually come true. The jury had
7 a great deal of time wrestling with its two-option
8 dilemma. It deliberated it over a number of hours and
9 there was judicial interruption, asking the jury if it
10 could reach a verdict. There finally was a reported
11 deadlock and an Allen charge, and shortly thereafter we
12 had the verdict. Only after being dynamited was there a
13 verdict.

14 And then, in contrast, when it got to the
15 penalty trial, the jury rendered a very quick verdict
16 for life imprisonment. Those, I think, indicate --

17 QUESTION: Does the record tell us what the
18 vote of the jury was on the life sentence?

19 MR. BARNARD: I cannot tell you the vote.
20 It's not a matter of our record, that I know of.

21 QUESTION: Well, under Florida law, would it
22 be lawful, would it be possible to know, unless the jury
23 foreman reported it affirmatively to the judge?

24 MR. BARNARD: It is --

25 QUESTION: Ordinarily, a judge instructs the

1 jury foreman not to disclose the exact vote.

2 MR. BARNARD: That's correct. In this case,
3 however, the judge was going to poll the jury, and then
4 they all decided not to, I guess, not to embarrass the
5 jury. So we might have known, had they not changed
6 their minds.

7 QUESTION: Let me ask just one other question,
8 because I don't remember. Under Florida law, for them
9 to recommend life, what vote is required? Does the
10 majority have to vote in favor of life?

11 MR. BARNARD: The jury was instructed that it
12 was a majority. Currently, it's only 6-6, the current
13 practice in Florida is life. It would take 7 for death
14 and 7 for life under the current practice, but then --

15 QUESTION: At that time, it took 7 for life,
16 at least.

17 MR. BARNARD: Right.

18 So our position, very simply, is that the evil
19 of unreliability predicted by Beck came true here. The
20 jury was deprived of the opportunity of fully evaluating
21 the weight of the evidence in any reasonable manner, for
22 precisely the reasons the Court said in Beck, the
23 pressures that this Court identified in Beck.

24 QUESTION: Mr. Barnard, are you making any
25 claim that the State purposefully delayed this case

1 until the statute of limitations had run on the lesser
2 offenses?

3 MR. BARNARD: We are making a claim, not as to
4 intent so much, as to the possibility of intent. I --

5 QUESTION: Would your case be different if you
6 could prove that? Or does the State have the right to
7 do it?

8 MR. BARNARD: I just don't know. If the State
9 intentionally waited until after the statute of
10 limitations, I think that the argument would be
11 stronger, but nevertheless, I think under the facts of
12 this case, which is --

13 QUESTION: Why would it be any stronger? All
14 you have to do is waive the statute. I mean you could
15 protect yourself from that.

16 MR. BARNARD: Could, but that's a penalty.
17 That's a very harsh penalty for --

18 QUESTION: It just cancels out the delay is
19 all it does. I don't see any harsh penalty about that.
20 If they're deliberately delaying so that you'll have a
21 defense you wouldn't otherwise have, then you waive the
22 defense, it seems to me you're back where you started
23 from.

24 MR. BARNARD: I think I understand that.

25 In this case, I think it's important to know,

1 however, that there was only a three-week delay, and
2 that the State of Florida had, according to its records,
3 our record, had known for a year about Dilisio's
4 allegations here -- the complaining witness -- had known
5 for a year about them, and so we're left, I guess, with
6 an unresolved record, but one that certainly could be
7 interpreted as indicating intent.

8 The second issue presented is the second issue
9 or the second prong of the constraints on the jury's
10 decisionmaking ability. The second issue is a narrow
11 issue, an issue that concerns a narrow aspect of the
12 Florida statute, the Florida capital sentencing
13 statute. And it is simply whether a trial judge may
14 disregard a jury sentencing verdict after a sentencing
15 trial, a verdict that is in favor of the defendant.

16 QUESTION: When the state legislature, as
17 apparently the Florida State Legislature has done, gives
18 the judge that power, are they not saying in so many
19 words that the jury is permitted to make a
20 recommendation to the judge for whatever use the judge
21 wants to make of that recommendation. Isn't that what
22 it amounts to?

23 MR. BARNARD: Well, to answer that two ways.
24 First of all, Florida didn't make such a decision.
25 Florida's decision --

1 QUESTION: Isn't that the effect of it?

2 MR. BARNARD: It may be the effect of it, but
3 the essential question that we're presenting is whether
4 that's appropriate for the Court, constitutional for the
5 legislature to do. That is the question that we're
6 presenting.

7 QUESTION: Well, what if the legislature had,
8 in so many words, expressly said the jury, at its
9 option, may recommend to the judge the sentence to be
10 given, but the judge shall have sole and final power?
11 Would you have any problem with that kind of a statute?

12 MR. BARNARD: Under the arguments that we're
13 presenting, yes, I would have a problem with that
14 statute. Our position is that the Eighth Amendment
15 standards, as well as those standards being guided by
16 the Sixth Amendment, require that there be jury's
17 input. The unique nature of the capital --

18 QUESTION: I take it your position is that a
19 judge should never be entitled to sentence anybody to
20 death; that the jury in a death case -- it always has to
21 be the jury that is given the sentencing authority.
22 Isn't that your position?

23 MR. BARNARD: Our position probably will boil
24 down to that, but the question that we have before the
25 Court is whether, if there is a jury, may the judge

1 overrule it.

2 QUESTION: I know that's the question, but
3 your submission really is that the judge should not be
4 able to sentence a person to death.

5 MR. BARNARD: Well, yes. Under the Eighth
6 Amendment, that is our contention. Under the Fifth
7 Amendment, the Bullington, that would not be our
8 contention. But that involves different considerations.

9 QUESTION: Of course, as you know, jury
10 sentencing is not the uniform rule of this nation of
11 ours. There are a lot of states where juries don't
12 sentence at all.

13 MR. BARNARD: Yes, but I think we need to
14 examine that a little. The vast majority of states
15 require jury sentencing in capital cases. There are
16 only -- there are 38 states currently with capital
17 punishment; 31 of those states --

18 QUESTION: Your theory would outlaw judge
19 sentencing in all crimes, wouldn't it?

20 MR. BARNARD: In all crimes? I don't believe
21 so. Our focus is on the unique nature of the capital
22 sentencing decision; that capital sentencing brings
23 considerations that are not controlling in non-capital
24 cases. Non-capital cases are concerned with
25 rehabilitation and various aspects that the capital

1 sentencing decision is not.

2 QUESTION: Is your argument, Mr. Barnard, that
3 for a special theory in capital cases, that the jury is
4 a more reliable sentencer, or that you have to have
5 perhaps both a judge and jury agree? I am not sure
6 which it is.

7 Do you understand my question?

8 MR. BARNARD: Yes. It is very simply that a
9 judge may not impose a death sentence after a jury has
10 ruled in favor of the defendant on that sentence, if the
11 jury imposes life.

12 QUESTION: What if Florida set up a system
13 that just said the jury shall find on the question of
14 guilt and innocence, and then will have another trial,
15 and that will all be before a judge on whether the death
16 penalty should be imposed? That would not offend your
17 theory.

18 MR. BARNARD: That there was no jury at all
19 involved?

20 QUESTION: Well, that the jury found the
21 person guilty of first degree murder or capital
22 homicide, whatever the state called it. But then all
23 the sentencing trial was conducted before a judge,
24 without a jury.

25 MR. BARNARD: The sentencing decision, under

1 our Eighth Amendment analysis and Sixth Amendment
2 analysis, would have to be by a jury.

3 QUESTION: So it's the jury factor, and not
4 the kind of two bites at the apple factor you're arguing
5 for. You're not arguing that both a judge and a jury
6 must concur.

7 MR. BARNARD: We're arguing, in the
8 alternative, of course, that Bullington at the very
9 least says that a judge could overrule a jury if there
10 is a jury involved.

11 QUESTION: Well, I thought Bullington was just
12 describing the Missouri procedure. I didn't think that
13 it said that, as a matter of constitutional procedure, a
14 judge had to be permitted to overrule a jury.

15 MR. BARNARD: No. Under double jeopardy
16 principles, which is at the base of Bullington, which
17 that's the Bullington decision, whether a jury's verdict
18 of a life sentence must be final, and that's what the
19 Court held, and that's what we are urging here.

20 QUESTION: Yes, but what if a jury didn't
21 return anything except the verdict on whether the person
22 was guilty of the offense, and then the sentencing was
23 turned over to a judge? You still say that could not be
24 done.

25 MR. BARNARD: That's correct.

1 QUESTION: You are aware that a number of
2 states do that precise thing, and have a judge determine
3 the sentence in a capital case at a separate hearing,
4 with no jury determination.

5 MR. BARNARD: Yes. There are --

6 QUESTION: And it's your position that all
7 those states are operating under unconstitutional
8 procedures.

9 MR. BARNARD: There are four states
10 currently. And our position, we would think, would
11 counsel that yes, a jury is necessary for the capital
12 sentencing decision, at least under the Eighth
13 Amendment. That question, of course, is not presented.
14 We have not briefed it that way, but I think that that's
15 the logical conclusion. Yes.

16 QUESTION: You said there are four states with
17 a jury -- with an override provision?

18 MR. BARNARD: Not with -- oh, I'm sorry. With
19 a judge only sentencing, where a jury is not involved at
20 all.

21 QUESTION: There are four states. How many
22 have an override provision, as Florida does?

23 MR. BARNARD: Three.

24 QUESTION: So there are a total of seven
25 states in which the jury does not actually make the

1 decision, or is there a double-counting in there?

2 MR. BARNARD: No. There are 38 total, 31 that
3 require a jury's consent for death.

4 QUESTION: And of those 31, in how many must
5 the jury be unanimous?

6 MR. BARNARD: I have it in our appendix here.

7 QUESTION: Well, never mind. I'll find it if
8 it's in the papers.

9 MR. BARNARD: The number is there. It's 27, I
10 think.

11 QUESTION: What's your basic theory? I kind
12 of know what you want to win, but I don't really
13 understand what your theory is. Why should the jury
14 make this determination, under view?

15 MR. BARNARD: At bottom, it's because of the
16 uniqueness of the death sentencing decision.

17 QUESTION: Does it have anything to do with
18 the different theories of punishment that are at stake
19 in the death case, as opposed to other cases? You don't
20 seem awfully enthusiastic about your position, to be
21 very candid with you. I don't really understand your
22 argument from what you said orally.

23 MR. BARNARD: I am enthusiastic about our
24 argument. Our argument, very simply, follows the
25 methodology of the Court, which is the Eighth Amendment

1 testing the contemporary values. And you can see, since
2 the mid-19th century, the constant move towards jury
3 sentencing.

4 And then, looking now at what's going on, it
5 is still jury sentencing, and the states did not move
6 away from jury sentencing, including Florida, that had
7 jury sentencing for 100 years, until the Court's
8 decision in Furman, suggesting, as it was suggested in
9 Woodson v. North Carolina, that the states were not
10 reacting in any judgment about whether a judge or a jury
11 was a better sentencer, but simply trying to retain the
12 constitutionality of the statute after Furman.

13 So our decision or our argument is, first,
14 that the Eighth Amendment, tested by the evolving
15 standards, requires it and that the Court's independent
16 assessment also should counsel that way, because the
17 death decision is different. It requires the conscience
18 of the community. The Court has repeatedly emphasized
19 that the death penalty is an expression of moral
20 outrage, that it is retribution that is at issue, and
21 that can only be set by a jury.

22 QUESTION: Well, it isn't just retribution.
23 It's also deterrence with respect to the rest of the
24 community.

25 MR. BARNARD: Deterrence is relevant for a

1 legislature when it is deciding whether to pass a
2 statute or not. It's not, I don't believe, relevant at
3 the sentencing phase, selecting who is going to die,
4 because that type of an issue is directed towards other
5 people, not towards the uniqueness of the particular
6 individual themselves.

7 QUESTION: Well, I suppose the irony of your
8 position, if you really mean it, is that a judge would
9 never have a role in whether or not to impose a death
10 penalty, and if the jury imposed the death penalty, he
11 could not override that decision.

12 MR. BARNARD: No, I don't think that's the
13 result, any more than it would be the result in an
14 acquittal.

15 QUESTION: Well, you say that the jury is the
16 sole sentencer under the Eighth Amendment. What
17 business has a judge got overruling them?

18 MR. BARNARD: Well, the analogy is to trial
19 and guilt. A judge cannot overrule a jury's verdict for
20 the defendant, but can --

21 QUESTION: Well, are arguing that a judge
22 should have the power to overrule the jury only one
23 way? That is, if the jury makes the wrong decision.

24 MR. BARNARD: I don't think I could argue
25 that. I don't think it is either constitutionally

1 required that the judge overrule death, or that it's
2 constitutionally prohibited. I mean if it were, there
3 would be a number of states that would be
4 unconstitutional either way.

5 I think Florida can make that choice.

6 And if I could, I'd like to reserve the
7 remainder of my time.

8 CHIEF JUSTICE BURGER: Very well.

9 Mr. Menser.

10 ORAL ARGUMENT OF MARK C. MENSER, ESQ.

11 ON BEHALF OF THE RESPONDENT

12 MR. MENSER: Mr. Chief Justice, may it please
13 the Court.

14 Mr. Spaziano has presented three claims here
15 today. The first, of course, is the claim that he's
16 entitled to some relief from his tactical decision at
17 trial to send this case to the jury on an all-or-nothing
18 basis.

19 I think, in addressing this issue, we have to
20 start right off by discovering who did what to whom
21 here. And the fact is that it was Mr. Spaziano who went
22 to the Court, who said to the judge, if I did this
23 thing, I ought to be killed, and then whose attorney
24 went to the jury in closing argument, and he said, look,
25 folks, here's this man accused of first degree murder,

1 here's this man who's accusing him. And then he said,
2 in a classic golden rule argument, he said would you
3 want your life in the hands of Mr. Dilisio, who is a
4 drug user and a reprobate, and who knows what else?

5 It was a very strong argument. It led to the
6 jury being out for a great length of time before
7 returning a guilty verdict, but the fact is, it was
8 Mr. Spaziano's strategic choice to hit the jury right
9 between the eyes with this argument. And, having
10 gambled and lost, he wants another roll of the dice up
11 here. And we don't think it's fair to the State of
12 Florida to have constant retrials while defendants tests
13 their alternate defense theories. And that's basically
14 what they're asking for here.

15 The statute of limitations defense is not a
16 constitutional defense. It is a statutory defense. It
17 was set up by the State of Florida, and it was placed in
18 the hands of defendants in criminal cases to use as they
19 see fit. That's the whole thing.

20 Mr. Spaziano chose not to use it. Somebody
21 else might choose to use it. The very fact that he can
22 use it as a bargaining chip does not render
23 constitutionally suspect this proceeding, any more than
24 a waiver of speedy trial would, or a guilty plea would,
25 where he would waive his right to jury trial.

1 There is simply no constitutional problem
2 here. Mr. Spaziano, in fact, thought so little of this
3 argument that he didn't even appeal it to the Florida
4 Supreme Court. What he did was, he filed his brief, and
5 then when the Beck decision came out, he sent it up as
6 supplemental authority. So it didn't even dawn on him
7 that his rights had been so horrendously violated until
8 someone told him about it.

9 On the jury override question, we would submit
10 right off the bat, this is not a jury override case.
11 There was a Gardner remand here. The first time this
12 case came up for cert to this Court, the Florida Supreme
13 Court had decided to remand the case for resentencing
14 pursuant to Gardner, because what had happened was, the <
15 original trial jury was not told that Mr. Spaziano had
16 committed three other murders, four bombings, and then
17 had raped a girl in Orlando and cut her eyes out so she
18 couldn't testify against him. <

19 And there were some other cases where his
20 fellow members of the Outlaws Motorcycle Gang had scared
21 off the witnesses.

22 QUESTION: But, General Menser, isn't it true
23 that all those things could have been presented to the
24 jury at the first hearing?

25 MR. MENSER: Yes. The trial judge was under

1 the mistaken impression that he could not tell them
2 about it.

3 QUESTION: But did the prosecutor try to
4 submit those to the jury?

5 MR. MENSER: No, he did not.

6 QUESTION: So I mean, isn't this sort of the
7 other side of the coin on the first point? They had a
8 fair opportunity to present it to the jury, and elected
9 not to do so.

10 MR. MENSER: No, because in this particular
11 case, the trial judge had ruled, at least as to the --

12 QUESTION: But ruled erroneously as a matter
13 of Florida law.

14 MR. MENSER: Correct. That the issues could
15 not be presented to the jury because he felt that since
16 the one rape conviction was on appeal, that --

17 QUESTION: But he was wrong.

18 MR. MENSER: So he was wrong.

19 QUESTION: So it seems to me you kind of want
20 it both ways. You can't say the jury didn't have a fair
21 -- you know, they considered everything the State
22 submitted to them. And if the State didn't submit more
23 evidence, I don't know how you can say that the jury
24 didn't have a fair opportunity to judge the question of
25 life or death.

1 MR. MENSER: When I presented this argument,
2 in the context of it, it's why there was a Gardner
3 remand, not necessarily what was fair. What we have in
4 this case is a situation where the jury has rendered, as
5 far as the State is concerned, the worst possible
6 decision, okay, or advisory sentence. They have
7 recommended life. That's the bottom line. That's the
8 most they could do.

9 What we're concerned with here is the fact
10 that that was not the proceeding which led to
11 Mr. Spaziano being sentenced.

12 QUESTION: Well, he was sentenced to death in
13 that proceeding also.

14 MR. MENSER: But that set aside and remanded,
15 pursuant to Gardner. When he was actually sentenced,
16 there was no jury there. It was a straight proceeding
17 before the judge --

18 QUESTION: The net result is that the trial
19 judge overruled the jury twice. The jury recommended
20 life, the only opportunity it had to pass on the
21 question. And the judge overruled that.

22 MR. MENSER: We don't know that the jury --
23 what the jury would have done in the second sentencing.

24 QUESTION: Well, you can't blame the defendant
25 for that, can you?

1 MR. MENSER: No, but I can give the judge one,
2 but I won't hang two on him. I think that he overrode
3 the jury one time.

4 QUESTION: All right. But still, that's the
5 issue in the case as to whether that's constitutionally
6 permissible. And I understand you, of course, think it
7 is.

8 MR. MENSER: Well, no, we don't; because,
9 quite frankly, the jury doesn't sentence the man
10 anyway. The question was asked, when counsel was
11 arguing about whether the Florida statute has a jury
12 sentencing or a mere advisory sentence, counsel has
13 indicated that he thought it was a sentence. But the
14 statute is very clear, the section -- Florida Statute
15 921, 141(b) -- I'm sorry -- 2 -- is titled Advisory
16 Sentence by the Jury.

17 And Proffitt and Earclay make it abundantly
18 clear that the jury doesn't sentence anybody. This is a
19 straight sentencing by the judge. It's in compliance
20 with the Constitution, and we really have no problem
21 here.

22 QUESTION: Well, your opposition says that a
23 jury do the sentencing in this case, and if Florida
24 purports to put the decision in the hands of a judge,
25 it's wrong, it's not complying with the Constitution.

1 What have you got to say about that?

2 MR. MENSER: Well, Mr. Justice White, we have
3 200 men on death row. We have 80 cases where the judge
4 erred in overriding the jury verdict, and we have 120
5 cases where the judge blindly followed the jury and
6 refused to exercise his discretion and superior
7 abilities, okay.

8 The argument just doesn't have any merit. The
9 fact is that Florida is a very unique state.
10 Mr. Spaziano may be happy going with a jury decision in
11 Orlando or Seminole County, which is rather urban, but I
12 guarantee you, if you put him in Ocoee or Apalachicola
13 or Ku Klux Klan country somewhere, he'll be thanking God
14 every day that there was a judge there to override the
15 jury.

16 So it's just a specious argument.

17 QUESTION: May I inquire? You say there are
18 120 cases where the judge followed the jury's
19 recommendation or advisory verdict of death, and 80
20 where they overrode.

21 How many are there in which the judge or jury
22 recommended death, and the judge overruled and gave life?

23 MR. MENSER: That, I don't know. I'm sorry.

24 When the judge enters a life sentence, they do
25 not have the automatic review by the Supreme Court of

1 Florida. When there is a life sentence, it would just
2 go to a District Court of Appeal which would make the
3 final determination.

4 QUESTION: So, in effect, the way it seems to
5 work out is if the jury recommends death, it's going to
6 be death. And if the jury recommends life, there may be
7 a second opportunity for the State to impose the death
8 sentence.

9 MR. MENSER: No. In fact, this Court observed
10 in both Proffitt and Barclay, that the Florida Supreme
11 Court has rejected almost 80 percent of the jury
12 overrides where death has been imposed. And, in cases
13 where the jury has recommended death, we don't know how
14 many times the judge has given life. But we have to
15 assume it happens.

16 QUESTION: Those statistics you were citing
17 were just from the people on Death Row who, I suppose,
18 by definition, end up with a death sentence.

19 MR. MENSER: Correct.

20 That's the long and the short of it, unless
21 the Court has any particular question.

22 QUESTION: Well, let me ask you this question
23 about it, because I am somewhat interested in the
24 question whether it's appropriate to impose a death
25 sentence when the jury has apparently unanimously

1 recommended life, which is fair to infer, I think, from
2 the promptness with which they acted here.

3 What is the rationale for the death penalty,
4 for Florida's death penalty? Is it rehabilitation?

5 MR. MENSER: Well, we do know that no one
6 who's received it has ever broken the law again. But
7 the fact is that -- not to be facetious -- but the fact
8 is there are three prongs, okay. There is the fact that
9 society has to be protected. In Mr. Spaziano's case,
10 perhaps 12 murders, 4 bombings, who knows how many
11 rapes, okay.

12 QUESTION: But they would not be protected by
13 incarceration for life, without possibility of parole,
14 for example.

15 MR. MENSER: No, because the murders go on in
16 prison, and there is a real and present danger to prison
17 guards and other inmates.

18 The second one is the deterrence factor. We
19 do know that -- well, we'll never know how many people
20 don't commit murder because they might get the chair.
21 We do know, again, that the recidivism rate for executed
22 prisoners is zero, and that -- and if one life is saved
23 that way, that's fine with us. It's worth it.

24 And the third factor, of course, is so
25 miniscule as to be nonexistent, but counsel refers to

1 the retribution factor, which it's discussed, but I
2 personally don't accept it. Basically, it's the
3 protection of society and the prevention of future
4 murders.

5 QUESTION: You don't think retribution is a
6 significant factor in Florida's scheme?

7 MR. MENSER: I don't -- I don't really see
8 how. I mean maybe if I was on a jury and got all worked
9 up about some guy, maybe I would want to get even. But
10 I just can't make that decision for someone else. It's
11 there, I'm sure, but I just don't know how important it
12 is.

13 If I might digress, there was an article
14 recently -- there was a column by Jim Kilpatrick,
15 regarding the fact that the federal system does not have
16 a death penalty, and how two prisoners here in
17 Washington, D.C. were trying to get into the Aryan
18 Brotherhood, and to get in they had to kill somebody.
19 And all that could happen to them -- they killed two
20 prison guards in the space of an hour -- and all the
21 Federal Government could do was return them to their
22 cell, because they were already under a life sentence.

23 This is what I mean when I say that we look at
24 it in terms of protecting society, including the society
25 within the prison walls.

1 QUESTION: This is why some penologists have
2 said that the death sentence should be imposed for
3 prisoners, life prisoners who commit a murder within the
4 prison or in the process of escape -- limiting the death
5 sentence to that narrow category, because there is no
6 other deterrence on them.

7 MR. MENSER: That could be. If we have
8 someone who managed to get himself a life sentence and
9 then kept on going, yes.

10 QUESTION: Do you have any comment as to why
11 the indictment here was delayed?

12 MR. MENSER: Your Honor, the bodies were
13 discovered by some strangers in 1975. There are
14 actually two bodies that were discovered, but only one
15 that they could piece together. Mr. Spaziano's modus
16 operandi was to dismember his victims while they were
17 still alive, and then scatter the parts.

18 They could not find any evidence directly
19 linking Mr. Spaziano to the crime. The prosecution did
20 not commence from the record, only because they did not
21 have enough information to get an indictment or
22 information until the time they finally did.

23 They had Mr. Dilisio's ramblings in the jail,
24 but I would agree with the defense; he was not the most
25 reliable individual in the world. I wouldn't go and put

1 someone in jail on a first degree murder charge, just
2 based on something he said, without getting some
3 corroboration.

4 It was not our fault that Mr. Spaziano avoided
5 arrest for two years, and he shouldn't benefit from it.

6 Now, under the old -- this case came up under
7 Florida's old limitations statute. Under the new
8 statute, the limitations problem would not exist,
9 because when a defendant avoids arrest, the statute of
10 limitations is tolled. But, unfortunately, this was under
11 our old statute where, if you just hid out for two
12 years, you could get away with murder.

13 That's all I have.

14 CHIEF JUSTICE BURGER: Very well.

15 Do you have anything further, counsel? You
16 have two minutes remaining.

17 ORAL ARGUMENT OF CRAIG S. BARNARD, ESQ.

18 ON BEHALF OF THE PETITIONER - REBUTTAL

19 MR. BARNARD: Very briefly, just to clear up
20 some facts. Justice Stevens's question regarding
21 overruling a death verdict, judges overruling a death
22 verdict -- those statistics are not kept, but there are
23 some indications in our certiorari petition -- the
24 petition itself -- we had attached an appendix which set
25 out some of those statistics from data done by --

1 collected by Linda Foley, Professor Foley, who has done
2 a study.

3 That data reports -- and again, it's set out
4 in the certiorari petition appendix -- that where death
5 is involved, either the jury or the judge is thinking
6 about death, or has decided on death, the disagreement
7 is about 6 percent the judge would impose life or the
8 jury would impose death; in 28 percent, where the jury
9 would impose and then the judge imposes death.

10 So the disagreement is quite vast there.

11 About avoiding detection, that is, of course,
12 not true. The -- all that's required in Florida is that
13 the State file an arrest warrant, and that tolls the
14 statute of limitations, so there is absolutely no
15 indication in this record at all that Joe Spaziano was
16 avoiding detection.

17 We would ask the Court to require a new trial
18 under Beck v. Alabama or to require the imposition of a
19 life sentence consistent with what the jury has said.

20 Thank you.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.
22 The case is submitted. We'll hear arguments next in
23 ARCC against the State Tax Commissioner of Virginia --
24 West Virginia.

25 [Whereupon, at 11:41 a.m., the case in the

1 above-entitled matter was submitted.]

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:
#83-5596 - JOSEPH ROBERT SPAZIANO, Petitioner v. FLORIDA

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BY

Karen H. Green

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