IN THE SUPREME COURT OF FLORIDA

NO. 74831

PAUL WILLIAM SCOTT,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

CONSOLIDATED REQUEST FOR A THIRTY-DAY STAY OF EXECUTION IN ORDER TO ALLOW FOR THE PROPER PRESENTATION OF PLEADINGS ON PETITIONER'S BEHALF AND IN ORDER FOR VOLUNTEER COUNSEL TO UNDERTAKE PETITIONER'S REPRESENTATION AND ENTER AN APPEARANCE; PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS; MOTION FOR PERMISSION TO HAVE VOLUNTEER COUNSEL ENTER AN APPEARANCE; AND, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI[1]

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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INTRODUCTION AND STATUS OF COUNSEL

Mr. Scott is scheduled to be executed on Tuesday, October 30, 1990, at 7:00 a.m. The death warrant was issued in this case on the afternoon of Friday, October 19, 1990. The CCR office was not then counsel and had never represented Mr. Scott in the past. The death warrant was a remarkably short one -- shorter than any other issued recently -- and its signing and the short period of time it encompassed took everyone by surprise. On Tuesday, October 23, 1990, Mr. Scott's former counsel (the Law Offices of Paul Morris, P.A.) filed in the trial court a motion to withdraw and withdrew from this case. The document (Att. 1) stated, "The

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[1]Petitioner also seeks leave to file an amended petition and proper pleadings in the trial court upon being represented by volunteer counsel. Volunteer counsel is available. Although it cannot do so under the pendency of this death warrant, under the current 7-day (5-working day) time frame, the law firm of Clyde M. Taylor, Jr., of Tallahassee, Florida, has agreed to undertake Mr. Scott's representation as lead counsel and will enter an appearance should the relief requested herein be granted, as explained in this pleading. Although Mr. Scott is entitled by statute and by the Florida Constitution to pursue post-conviction relief in this Court via a petition for writ of habeas corpus, in the trial court via a motion for post-conviction relief and, if necessary, in the federal courts via 28 U.S.C. section 2254, and although he is entitled by the mandatory provisions of section 27.001, et seq., Fla. Stat., to be represented effectively in these courts by the Office of the Capital Collateral Representative (CCR), under the circumstances described in this pleading he shall not be so represented under the confines of this remarkably short death warrant. His initial request for a 30-day stay of execution is intended only to put him in the same posture as other petitioners similarly situated, and to allow volunteer counsel to enter an appearance and expeditiously but properly to litigate this case.

undersigned is a sole practitioner who has been representing the defendant in this capital case on a pro bono basis. The undersigned can provide no further representation to the defendant. Pursuant to its statutory obligations, CCR in Tallahassee, Florida will assume responsibility for further representation of the defendant" (Att. 1). Thus, on Tuesday (October 23) CCR became responsible for a capital case under a remarkably short death warrant with an execution scheduled five working days thereafter. See Att. 2 [Capital Collateral Representative's Certification of Caseload Conflict conerning the Scott case] (Although "CCR has undertaken, within the parameters of this 7-day time frame, to investigate and research possible claims on behalf of Mr. Scott," CCR cannot do so effectively under the current circumstances).

The CCR office has attempted to work around-the-clock on Mr. Scott's case. The compelling results of the facts uncovered by the investigation, albeit incomplete, during this remarkably limited time frame are discussed in subsequent portions of this submission. Investigation of the facts discloses that there are significant and compelling issues which should be considered before the petitioner's execution is allowed to go forward. However, proper investigation has not been completed and cannot be completed within the limited confines of this short death warrant, nor can proper research be undertaken, nor can proper

pleadings be prepared or even timely delivered to the trial court under these circumstances. This submission, under the circumstances, is all that CCR can do for Mr. Scott. The potential claims noted below, however, do indicate that the issues to be presented if this Honorable Court allows a reasonable (thirty-day) time frame will be far from frivolous, particularly once they are developed through proper research and investigation.[2]

This Honorable Court has recently recognized that there is a predicament in the litigation of capital cases in post-conviction proceedings. In re: Supreme Court Committee on Postconviction Relief Proceedings (Oct. 24, 1990). Because of the specific predicament faced by CCR in Mr. Scott's case, and CCR's caseload conflicts, the Capital Collateral Representative has issued a Certification of Caseload Conflict relating to Mr. Scott's representation. The Certification is appended hereto at Att. 2. As therein indicated, "Although CCR is attempting to assist Mr. Scott, CCR cannot provide effective assistance of counsel to him

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[2]Most other death warrants issued in cases in a procedural posture similar to Mr. Scott's have death warrants of approximately thirty days. All that this pleading seeks is an opportunity for Mr. Scott to be properly represented within such a time frame. This pleading initially requests that a stay of execution of thirty days' duration be entered in order for volunteer lead counsel to undertake Mr. Scott's representation properly.

under a 7-day warrant and under current caseload conditions."[3]

The CCR, the Volunteer Lawyers Resource Center of Florida (VLRC), and the American Bar Association Post-Conviction Project (ABA) all made efforts to secure volunteer counsel to represent Mr. Scott after his former counsel withdrew. All potential volunteer counsel contacted have stated that they could not become involved in a capital case with a seven-day (including Saturday and Sunday) death warrant, but that they would reconsider should a more reasonable time frame (e.g., thirty days) be allowed. CCR informed the potential volulnteers, and represents to this Honorable Court, that it would assist the volunteer attorney as co-counsel, thus assuring the expeditious and orderly litigation of this action. But five-working days does not allow for anyone to reasonably represent this petitioner.

As this submission was being prepared (on October 26, 1990) the law offices of Clyde M. Taylor, Jr., 1105 Hays Street, Tallahassee, Florida 32301 (904/224-1191), authorized CCR to expressly represent to this Court that although it could not undertake Mr. Scott's representation within this short time

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[3]This Honorable Court noted in Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), that capital post-conviction petitioners are entitled to effective representation of counsel, pursuant to Fla. Stat. section 27.001 (the CCR office's enabling statute), during post-conviction proceedings.

frame, it could and would enter an appearance as lead counsel on Mr. Scott's case should the Court allow a reasonable, albeit expedited, 30-day stay of execution in order to afford counsel the opportunity for the proper preparation and submission of post-conviction pleadings. Mr. Taylor is an experienced capital litigator who recently successfully represented a defendant in a complex capital action in Wakulla County, Florida. State v. Fox. The entry of appearance of Mr. Taylor as lead counsel, with CCR's assistance as co-counsel, shall assure the orderly and expeditious presentation and resolution of the significant claims for relief that this case involves and shall allow for the effective representation of this petitioner within that time frame. However, neither Mr. Taylor nor CCR can properly represent this petitioner within the 5-working day period discussed herein.

Petitioner consequently has no option but to request that this Honorable Court allow him a thirty-day stay of execution, thus putting him in the same posture as virtually every other capital litigant under similar circumstances, and thus allowing for volunteer counsel (with CCR's assistance) to properly complete investigation and to properly present submissions for relief on petitioner's behalf. As it stands, it is not possible for petitioner to file proper pleadings, or submissions other than the instant, in the trial court or any other court. The

facts uncovered during the last three days and the developments in this case during that time period (discussed immediately below) do demonstrate that important and compelling issues are involved in this action. A thirty-day stay would allow for the proper completion of investigation and presentation of claims in a manner that the petitioner and the Courts of the State of Florida deserve; the prima facie issues arising from the facts discussed below demonstrate that this request is neither frivolous, nor intended to delay, and that it is truly made in good faith.

PRELIMINARY STATEMENT CONCERNING THE FACTS WHICH HAVE RECENTLY COME TO LIGHT

The facts which have recently come to light shed an important light on the question of the propriety of Mr. Scott's capital conviction and certainly warrant consideration as to the propriety of petitioner's death sentence.

Because of these recently uncovered facts, the CCR office this week contacted the original Judge, the Honorable Circuit Judge Vaughn S. Rudnick, who sentenced both Mr. Scott and his codefendant Richard Kondian, and inquired whether he would be opposed to reconsider the proportional propriety of the death sentence originally imposed upon proper submission of newly disclosed facts. Judge Rudnick noted that he would not be opposed to reassessing the propriety of the sentence originally

imposed, that he would be willing to consider his original ruling in light of facts recently developed, and did not oppose a representation by counsel as to his views on these questions. This is not a case where the original sentencing Judge would be unwilling to consider recently developed facts. All that petitioner seeks at this juncture is a short but reasonable time frame in order to allow him the opportunity to complete investigation, prepare, and present a proper pleading to the trial court.

Judge Rudnick's view is appropriate. The roles of the participants, the propriety of the sentences imposed, and the important questions of culpability involved in this case cannot be deemed to be properly resolved until the recently discovered facts are considered.[4] Paul Scott was sentenced to death. His codefendant (Kondian) was sentenced to 45 years imprisonment

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[4]Neither can the questions under Brady v. Maryland and its progeny, see Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), the questions as to the reasonableness of former trial and collateral counsels' representation, see Harich v. State, 542 So. 2d 980 (Fla. 1989); see also Toles v. Jones, No. 88-7400 (11th Cir. June 7, 1990)(pending in banc consideration on the question of the reasonableness of post-conviction counsel's representation), the question of the proportionality of the sentences of the codefendants arising from the recently disclosed facts, see Craig v. State, 510 So. 2d 857 (Fla. 1987), or the extremely important questions under Enmund v. Florida, 458 U.S. 782 (1982), upon which the newly discovered facts shed light, be properly assessed until the facts are fully investigated, presented, and considered.

pursuant to a negotiated plea agreement after death was imposed on Mr. Scott. Judge Rudnick originally refused to accept the codefendant's plea, apparently recognizing the disparity in the treatment of the codefendants. Kondian's counsel and the State Attorney eventually persuaded Judge Rudnick to accept the plea and he did so. Judge Rudnick nevertheless remained concerned over the relative roles of and the sentences received by the participants.[5]

The newly disclosed facts -- from Kondian himself, from other witnesses, and most importantly from the key witness for the prosecution (Vincent Soutullo)[6] -- demonstrate that Judge Rudnick's original concerns were more than appropriate. Even on the basis of what occurred originally, it was not only Judge Rudnick, however, who was concerned. In dissenting from the denial of rehearing on direct appeal, on the basis of the record then in existence, Justice Overton stated:

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[5]Judge Rudnick was thereafter transferred to the civil division and did not preside over subsequent proceedings in this case.

[6]Soutullo's under oath affidavit account, when properly presented and considered by the trial court, especially in light of the other facts which have recently come to light, is as significant in this case as was the recantation by the key witness for the prosecution in Smith (Frank Lee) v. State, 15 F.L.W. 581 (Nos. 75,038 and 75,208), rehearing denied with corrected opinion, ___ F.L.W. ___ (Fla. 1990). In Smith, this Honorable Court ordered that an evidentiary hearing be held. In Mr. Scott's case, Judge Rudnick is willing to consider the evidence recently uncovered.

> I dissent from the denial of the petition for rehearing. There is a serious disparity in the sentencing of Scott and his co-defendant, Kondian, who pleaded guilty to murder and was sentenced to forty-five years imprisonment after the petitioner, Scott, was tried by a jury, convicted of murder, and sentenced to death. Petitioner correctly asserts that we have not addressed this issue in these proceedings. Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for this Court to consider the propriety of disparate sentences, see Witt v. State, 342 So. 2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. We should consider this issue at this time, rather than wait and see it arise for a second review in a motion under Florida Rule of Criminal Procedures 3.850. It appears from the record that the trial judge considered the respective roles of Scott and his co-defendant in committing the murder, and this is an issue we can decide in this review.
>
> I would, therefore, grant the petition for rehearing to allow this Court to address the appropriateness of Scott's death sentence in view of the sentence imposed on his co-defendant. This issue should not be left unresolved.

Scott v. State, 419 So. 2d 1058, 1058 (Fla. 1982)(Overton, J., dissenting)(emphasis added).

The facts that have now come to light, discussed immediately below, tellingly shed a very, very important light on these very issues, and others.

Mr. Scott and his codefendant, Richard Kondian, were indicted for the murder of James Alessi. The cases were severed

and no eyewitnesses to the crime testified at the trial. Mr. Kondian did not testify at Mr. Scott's trial. The State's case against Mr. Scott at trial was based primarily on the testimony of Mr. Charles Soutullo, A.K.A. Eddie McCarthy, and circumstantial physical evidence obtained from the scene of the crime. The circumstantial evidence did not shed a light on the roles of the participants. Mr. Soutullo's testimony was the key evidence relied upon by the State, by Judge Rudnick originally, and by this Court on direct appeal. Following the trial and sentencing of Mr. Scott, Mr. Kondian entered into a plea agreement with the State wherein his charge was reduced to second degree murder and he was sentenced to a term of imprisonment of forty-five years. He shall soon be paroled.

Mr. Kondian's plea agreement was eventually accepted by the Honorable Vaughn J. Rudnick and Mr. Kondian was sentenced to forty-five years. Because Mr. Kondian's plea agreement was made and accepted subsequent to Mr. Scott's trial and sentencing, the disparity between Mr. Scott's sentence and the sentence received by Mr. Kondian was not raised initially on direct appeal. Nevertheless, in his Motion for Rehearing, Mr. Scott attempted to raise the issue of disparity of sentence between the codefendants. Justice Overton dissented from the denial of rehearing, stating:

> I dissent from the denial of the

> petition for rehearing. There is a serious disparity in the sentencing of Scott and his co-defendant, Kondian, who pleaded guilty to murder and was sentenced to forty-five years imprisonment after the petitioner, Scott, was tried by a jury, convicted of murder, and sentenced to death. Petitioner correctly asserts that we have not addressed this issue in these proceedings. Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for this Court to consider the propriety of disparate sentences, see Witt v. State, 342 So. 2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. We should consider this issue at this time, rather than wait and see it arise for a second review in a motion under Florida Rule of Criminal Procedures 3.850. It appears from the record that the trial judge considered the respective roles of Scott and his co-defendant in committing the murder, and this is an issue we can decide in this review.
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Scott v. State, 419 So. 2d 1058, 1058 (Fla. 1982)(Overton, J., dissenting).

As Justice Overton noted in his dissent from the denial of the motion for rehearing: "This issue should not be left unresolved." The disparity of the sentence in this case raises serious questions about the propriety of Mr. Scott's sentence of death; this is especially so in light of the facts uncovered this

week, facts of which the courts were unaware earlier. The evidence recently uncovered establishes that the murder was commited by Mr. Kondian without the prior knowledge of nor in the presence of Mr. Scott. This evidence is discussed below and raises a constitutional bar to the imposition of the death penalty against Mr. Scott.

The key to the State's case against Mr. Scott under either theory of first degree murder (felony/premeditation) was the testimony of Mr. Soutullo. Throughout the litigation of Mr. Scott's case, the State and courts consistently have relied upon Mr. Soutullo's trial testimony to support Mr. Scott's conviction and sentence. Indeed, every court that has reviewed this case has acknowledged the significance of Mr. Soutullo's testimony. In discussing the sufficiency of the evidence against Mr. Scott, this Court on direct appeal emphasized the import of Mr. Soutullo's testimony:

> Scott and Kondian made a definite statement preceding the murder of their plans to rob and kill Alessi.

Scott v. State, 411 So. 2d 866, 868 (Fla. 1982).

Mr. Soutullo's testimony was not true. There was no plan to rob or kill Mr. Alessi. During his guilty plea colloquy and sentencing, Mr. Kondian stated under oath that there was no such plan:

> THE COURT: Do you have any memory of that day that he died?

THE DEFENDANT: A little bit.

THE COURT: Tell me about it.

THE DEFENDANT: Well, started off early that day in Fort Lauderdale. Started off to be a drug transaction between me and Mr. Alessi and Mr. Scott. We were going to purchase the drugs from him.

THE COURT: Who?

THE DEFENDANT: Mr. Alessi later that evening and it was arranged for him to pick us up in Fort Lauderdale to go to his house and make two drug transactions.

(App. 5 at p. 25-26). According to Mr. Kondian, he and Mr. Scott were not going to rob or murder Mr. Alessi, but to obtain drugs from him. Based upon this sworn testimony, Judge Rudnick accepted the plea and sentenced Mr. Kondian to forty-five years imprisonment pursuant to the agreement, although not without hesitation because of the disparity.

The facts recently uncovered involve far more compelling evidence that Mr. Soutullo's testimony at trial was not true. In a sworn affidavit, provided this week, Mr. Soutullo admits that his testimony at Mr. Scott's trial was not accurate:

(1) My name is Charles Vincent Soutullo. I testified at the trial of State of Florida v. Paul W. Scott in 1979. I was 21 years old then.

(2) At the time I testified, I went along with what the police and state wanted me to say even if it wasn't accurate. I said everything they wanted me to say. They kept pressuring me because they wanted to get

Scott (Paul William Scott) bad. The police kept telling me that they wanted to get Scott.

(3) When I saw Rick (Kondian) and Scott, the night that Jim (Alessi) was killed, Rick did all of the talking. Scott never said anything to me about robbing, stealing from or hurting anyone. He did not say anything about doing those kind of things to Jim. In fact, when Rick told me those things, Scott didn't even hear it.

(4) Even before this night, Rick talked about robbing people. Once, on a speed boat, out of no where, Rick asked me to help him tie the guy up that owned the boat so that they could rob him. I told him the same thing that I told him the night that he asked me to go with him to Jim's house. I told him I would not go.

(5) When Scott's case was going on, I had my own legal problems with the courts in Fort Lauderdale and California. I was scared that I would have to do time in jail. I was sure that the police and state would help me on my case. They told me that they would put in a good word and help me.

(6) I was surprised that Scott was charged with murder. He was the kind of guy to stay out of trouble. Rick was the kind of person that usually called all of the shots. He was a leader type. Rick knew Jim.

(7) Like I said above, I didn't say these things at Scott's trial because I was scared and I just said what the state and police wanted me to say. It was Rick, not Scott who asked me to go to Jim's. The only other person around was my girl friend, Felicca Brooks, and she did not hear what was said. I never told her that Scott said anything, because he didn't.

(App. 3). Based upon this evidence and the prior testimony of

Mr. Kondian, there are extremely serious questions as to the propriety of Mr. Scott's conviction and resulting death sentence. This newly discovered evidence supports Mr. Scott's contention that he never planned to threaten, hurt, or murder Mr. Alessi.

Mr. Soutullo's recent recantation must be accepted as true at this juncture. See Smith (Frank Lee) v. State, 15 F.L.W. 581 (Fla.), rehearing denied with corrected opinion, ___ F.L.W. ___ (Fla. 1990). See also Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989). Moreover, that he failed to testify truthfully at trial is not inconsistent with what the State has already acknowledged: that Mr. Soutullo may have wanted some assistance from the State with his criminal problems. What was not disclosed was that a promise of assistance had in fact been made (See App. 3).

Not only did Mr. Scott not go to Mr. Alessi's home with any intent or plan to murder (or, likely, even to rob him), the evidence now makes it clear that he did not strike the fatal blow to Mr. Alessi and was not even present when Mr. Kondian killed Mr. Alessi.[7] At Mr. Scott's trial, the State argued that he was the individual who had struck the fatal blow. The State's theory was based upon the medical examiner's testimony that the fatal

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[7]Indeed, the fact that Mr. Scott had run away and was not even present when Mr. Kondian killed the victim is confirmed by statements Kondian himself made to other inmates in the past which have only come to light this week (See App. 9).

blow or blows to Mr. Alessi's head were on the right side. The State argued that this meant that the actual kiler used his left hand to strike the fatal blows. The State argued at trial that Mr. Scott was left handed. At the trial and at Kondian's plea Judge Rudnick was told that Kondian was not left-handed. Therefore, the State argued Mr. Scott was the individual that struck the fatal blow to Mr. Alessi's head and not the right handed Mr. Kondian.

At Mr. Kondian's plea colloquy and sentencing, his counsel argued this theory to Judge Rudnick as the principal basis for accepting his plea to second degree murder and a forty-five year sentence:

> There is, also, uncontradicted testimony that the death blows, uncontradicted testimony I believe, the State believes that the blows -- this, as well, is based on my conversation with Mr. Selvig, that the death blows in this case were not struck by Mr. Kondian. If in fact there were any blows struck by Mr. Kondian, there would be one blow -- and I am going to have Mr. Kondian to testify, to one blow, of little impact, in which no bottles or vases or anything else were broken, and the only way, I believe, that the State can prove, if they could prove that Mr. Kondian did strike the decedent at all, is by virtue of his statement given in Rhode Island in which he did indicate that he struck in self-defense Mr. Alessi on one occasion, during the particular day in question.

(App. 5 at p. 10-11).

As his counsel represented, Mr. Kondian testified that he

struck Mr. Alessi only once:

> MR. ROTH: Did you ever strike Mr. Alessi?
>
> THE DEFENDANT: I did one time.
>
> MR. ROTH: How hard a blow did you strike him?
>
> THE DEFENDANT: Not very hard.
>
> MR. ROTH: Did it break the object that you had?
>
> THE DEFENDANT: No.
>
> MR. ROTH: What kind of object was that?
>
> THE DEFENDANT: A bottle.
>
> MR. ROTH: Did you tell the police about that at the time that you surrendered?
>
> THE DEFENDANT: Yes, sir, I did.

(App. 5 at p. 28-29). Mr. Kondian's account was then relied upon by everyone, including the State and the court, as accurate and "consistent" with the evidence:

> THE COURT: Okay.
>
> You have heard Mr. Kondian's recitation of what he recalls occurred this evening. Of course, as presiding Judge I remember the testimony from the first trial. There is some slight variances, but to the best of my memory, not many variances, from what actually transpired, but there was lacking <u>any direct testimony as to who struck the fatal blow, even though if I recall correctly, the testimony indicated Mr. Scott wield the several blows because of the location of the wound on the head and the position of the parties</u>.

Does my memory serve me correct?

MR. SELVIG: Yes, sir.

It's the State's theory, from the beginning, that the blow which actually caused Mr. Alessi's death was struck by Mr. Scott. There are some things inconsistent with what Mr. Kondian said, but I think it's fair to say not substantially inconsistent.

MR. ROTH: Judge, I think the evidence, you may be pointing to is the doctor indicated that the death blow or the hardest of all the blows was struck at a 135 degree angle which to the doctor indicated it would have been from a left-handed person.

The State has stipulated that Mr. Scott, at least during the trial, was left-handed to the extent that he wrote with his left hand. Mr. Kondian is right-handed.

(App. 5 at p. 35-37)(emphasis added). Unbeknownst to Judge Rudnick, Mr. Kondian's testimony was not true.

Mr. Kondian has now provided an affidavit which indicates that he did not strike Mr. Alessi just once. In fact, Mr. Kondian admits that he continued to struggle with Mr. Alessi after Mr. Scott retreated:

1. My name is RICHARD KONDIAN and I am presently incarcerated at the Adult Correction Institution in Rhode Island.

2. In 1979 Paul Scott and I were arrested and charged with the murder of James Alessi.

3. I knew Alessi prior to the night he was killed. Paul, I and Alessi went to Alessi's house to by some drugs and do drugs with him. We had no intent to commit any crimes against Mr. Alessi.

4. Paul and I were shooting speed and drinking before we went to Alessi's house. We were both pretty high. Paul just came along to get drugs. At no time did Paul act as a leader organizing some kind of crime. Paul could not tell me what to do. He was not the kind of guy who would plan and carry out anything, especially not a deliberate robbery or murder. After we got to Alessi's house, we all had some drinks and he gave us some marijuana to smoke. There was something more than just marijuana in the joints he gave us. From what I can figure out now, it was probably PCP or Angel Dust. Anyway, I know it made us all really crazy.

5. Paul was away in another part of the house when Alessi came out from the bedroom completely nude and came on to me. He was a lot bigger than Paul or I. Alessi and I struggled but I couldn't get away from him. I called out to Paul for help and he tried to get Alessi off of me. But Alessi was so out of his head that he would not stop. The three of us struggled. Alessi was like a possessed man. He just would not stop. I picked up a bottle and struck Alessi in the head twice to get away from him. At that point a strong arm struggle took place. It was during this struggle when I left the bloody hand print on the wall. Paul stopped and I continued, out of fear for my life, to struggle with Mr. Alessi. I finally got him off of me.

6. When I initially gave statements regarding what happened I was scared, young, and confused. When I gave the statement in Rhode Island I was in withdrawal from drugs. I voluntarily turned myself in because I knew it was strictly self defense.

7. I never talked to Soutullo about robbing, stealing from, or killing Alessi. And certainly Paul never did either. Paul had no idea about anything other than hanging out with me and Alessi when he came

with us. I never told Soutullo or my girlfriend (Sunshine) that we intended to kill or rob Alessi. I think they had the words put in their mouth.

8. I was never subpoenaed to testify at Paul's trial. Nobody ever asked me pointblank before today about what I could have said at Paul's trial. Had I been called as a witness I would have said the same things I am today. Paul never intended to kill Alessi or anybody that night and did not intend to harm anybody. He never did murder anybody.

(App. 5).

This statement of Mr. Kondian is consistent with prior statements he made to others which have only now come to light, reflecting that he was the actual killer and that Mr. Scott had fled from the scene. Undersigned counsel has recently received a sworn affidavit from Mr. Scott's sister in which she explains receiving a letter from Mr. Kondian:

1. My name is Valerie Cooke and I am Paul Scott's sister. Or whole family has always called him by his nickname Bo.

2. I couldn't believe it when I heard that my brother had been arrested for this murder. Bo is not the kind of person to organize and carry out anything much less a murder like this. When he has gotten into trouble he was always tagging along with someone else and then would chicken out if it got rough.

3. After Bo got the death sentence, it seemed so unfair that I wrote a letter to Rick Kondian asking him what happened. He wrote back and admitted he was the killer but said he didn't want to incriminate himself. There is a copy of the letter he wrote to me

attached to this affidavit. He also said he exaggerated to the judge because he was looking out for himself.

4. I know Bo never got a good defense from his trial attorney, Mr. Barrs. Mr. Barrs told me that he was an alcoholic but said that he had quit drinking. I think he said that this was his first case since he had quit drinking. Although he told me he had quit drinking, one night during the trial my brother saw him drinking the entire evening at the Holiday Inn lounge.

5. I don't think it is fair for Rick Kondian to be getting out soon and for Bo to be executed when Rick had admitted doing the killing and that Bo did not kill anyone and did not want to kill anyone..

(App. 7). Ms. Cooke has attached a copy of that letter to her affidavit. The letter reads:

Monday 3rd

Dear Valerie,

I recieved (sic) your letter and to tell you the truth I was expecting it. Me and Paul have been in touch constantly since we both got railroaded!

Paul and I did not tell on each other because there was nothing to tell! Your brother went to court **first** and was convicted of this crime. I stayed out of his trial because it was best! 5 months later I pleaded **guilty** and got 45 yrs. on my first offence! That right there alone helps Paul on his appeal because I admitted to it, the champayne (sic) bottle and all -- I said a few things to the judge that I exagerated (sic) a little but you have to understand I was lookin (sic) out for myself to! Anything I said to that judge **can't** be used against Paul in anyway unless I'm there to tell it and that my dear is out of the question!

> Between me and you, and I'm being totaly (sic) honest with you Paul didn't do the actual killing.
>
> I'm afraid that's all I can say to you about that because I don't want to incrimanate (sic) myself any further!
>
> Have faith in your brother and believe him. He won't die. I told him last week that I will take my contempt charge and that will be that. I also didn't tell, any lies. I never told the judge that Paul killed him and can conferm (sic) that! The medical exam. testified that the killing blow came from a left handed person. I don't know if thats true or not because I wasn't in the courtroom, but I'm not left handed! I can't go back into the courtroom and change what I already said because I would get another 5 for perjury! The best I can do is stay out. Time heals all if you've ever heard the saying before! Paul won't die because he was convicted on circumstantial evidence so please have faith in him as I do.
>
> I sent him stamps and also theres a money order on the way for him from me! I love that guy like a brother too, and that's the last thing I want to happen to him. Write back if you wise (sic) too! I'll be glad to answer any questions you have.

(App. 7).

The account Mr. Kondian gave in his affidavit and in his letter to Ms. Cooke is consistent with statements he made to others, including a fellow inmate at the Palm Beach Jail, Mr. Robert T. Avera. Mr. Avera has provided a sworn affidavit explaining that:

> 1. My name is Robert T. Avera. I was in the Paul Beach County Jail from Sept., 1979 to February, 1980. I was on the same

cell range as Paul W. Scott.

2. Because Paul behaved so well, the authorities allowed him to be the houseman. This meant that he was trusted to be out of his cell on the range. Everyone else was locked in their cells. Paul would stop in front of my cell and talk to me on a daily basis.

3. One day I was out of my cell and I was going to a visit, when I recognized Paul Scott's co-defendant, Richard Kondian, or Rick, as he is called, from seeing him on tv. He was put on the chair in front of me. The chair is a long chair that inmates are handcuffed to when the authorities want to move us about the prison.

4. I knew that Rick was Paul's co-defendant. I called him a snitch. I wanted other inmates on the chair to know that you couldn't trust him. I told him I was in the cell with his "partner" (co-defendant), Paul Scott.

5. He replied that he wasn't a snitch and Paul Scott wasn't his partner. Paul, he stated, was his co-defendant, but Paul was a "punk-pussy" because when they were at that guy's house and a fight broke out with the guy, Paul got scared and ran out the door.

6. The guards who had us on the chair then made us both shut-up, because they could see that Rick and I were about to get in a fight.

7. When I got back to my cell, I told Paul what Rick had said about him being scared and running away. Paul confirmed to me what Rick said was true and he told me that he hoped Rick would come forward and admit what he said about what really happened.

8. From my conversations with Rick and Scott, it was clear to me that Scott never

had any intent of hurting the victim and that, based on what Rick said, that Rick was the responsible party.

9. It has puzzled me for over a decade that no one has come to talk to me about what I know about Scott's case. I would have talked to anyone and testified about what I know.

(App. 9).

Mr. Kondian's subsequent accounts are consistent with the State's theory at Mr. Scott's trial that the individual who struck the fatal blow to Mr. Alessi did so with his left hand and are consistent with the physical evidence. Indeed, a recently uncovered police report indicates that Mr. Kondian cut his left hand on a bottle during the struggle with Mr. Alessi:

The cut that RICK received on the left index finger, he claimed came from a bottle. This was treated at the Cranston, Rhode Island Emergency Room - and it required, what she believed to be, five stitches.

The significance of this evidence has only now come to light. Mr. Kondian was recently interviewed by Mr. Jeffrey Walsh, a CCR investigator, during which time Mr. Kondian explained that he cut his left hand while striking Mr. Alessi with a champagne bottle:

1. My name is Jeffry Walsh and I am employed as an investigator with the office of the Capital Collateral Representative.

2. On October 25, 1990 I interviewed Richard Kondian at the Adult Correctional Institution in Cranston, Rhode Island in regard to information concerning the case of State of Florida v. Paul Scott.

3. During the interview Richard Kondian described striking the victim, James Alessi, with a champagne bottle. During this incident, he explained to me that he cut his left index finger on the bottle. At this point Mr. Kondian pointed to a scar on his left index finger and said this is where the blood came from that resulted in my bloody prints being found. I observed the scar which was clearly visible.

4. Mr. Kondian went on to say that at a hearing after the trial, he was asked whether he was right or left handed and he testified that he was right handed. He was asked which finger was cut by the bottle and then he said he had to correct the attorney and tell him it was the index finger and not the ring finger. Furthermore, he said, "those jokers weren't even smart enough to even figure out which finger let alone which hand." He said no one figured it out before the hearing.

5. Recently I have had occasion to meet with both Paul Scott and Richard Kondian. The first word that comes to my mind in describing Paul Scott is dreamy. Paul comes across as a very passive, suggestible, docile kind of guy. On the other hand, Richard Kondian is an aggressive, dominating and in-your-face person. When I suggested to Richard Kondian that Paul may have presented as leading him around in regard to the incident with Alessi, he totally rejected the idea. He immediately said, "Paul? No way." Given my observations of both of these men, I find it impossible to believe that Paul Scott would ever have assumed a primary role in the aggression against Alessi.

(App. 9). This statement obviously belies the account Mr. Kondian provided at the time of his plea. It is contrary to Mr. Kondian's sworn testimony during his plea colloquy in which he indicated he struck the victim only once with the bottle; not

very hard; and that the bottle did not break (App. 5 at p. 28-29).

Moreover, recently received affidavits from Mr. Robert Pauley and Ms. Susan Higginbotham support the recently discovered evidence that Mr. Kondian was the actual killer. Mr. Pauley explains:

> 1. My name is Robert Pauley and I reside in West Palm Beach, Florida.
>
> 2. Back at the time of Paul Scott's trial I was tending bar. A guy named Joe Wyckoff used to come into the bar and talk to me. I don't know for sure but it was my impression that he was working for the state on Paul Scott's case.
>
> 3. Joe Wyckoff was very upset because he was working on a case where an innocent man was going to be executed. He had taken a statement from Kondian, Paul Scott's codefendant, who had admitted to killing the victim with a heavy champagne bottle after Paul had run away. He thought Paul was a frightened wimpy kind of guy while Kondian was much cooler and tougher and had actually taken the time to shower to remove all the blood before he left the victim's house. He said the evidence at the scene verified that this was what happened right down to blood that was found in the shower.
>
> 4. Joe said that the Kondian family had a lot of money and some connections which is why things were going this way. He had no confidence in what Paul's lawyer was doing to stop this and asked me to help try to raise some money to help Paul. He knew that I had written a song that Mel Tillis had performed and he thought maybe I could write a song about Paul and raise some money that way. I wrote a song but we could never get any money together.
>
> 5. I attended Paul's trial. I had to

sit in the hallway with other witnesses. Charles Soutullo was next to me on the bench. I had a very poor impression of Mr. Soutullo. He tried to act very cocky and streetwise. I listened while somebody for the State told him what to say. It was very clear to me as I listened to them that Soutullo was not being asked to just tell what he knew. It was as if he was being fed a script of what he should say to make sure he would get it right.

6. Had I been asked, I would have been glad to make these same statements at the time of Paul Scott's trial.

(App. 4).

Ms. Higginbotham provides the following information:

1. My name is Susan Higginbotham and I reside in Jacksonville, Florida.

2. I became acquainted with Paul Scott through Joe Wyckoff. Joe knew a lot about Paul's case because he had taken statements from Kondian where Kondian had admitted that he was the real killer. Joe Wyckoff believed that Paul was an innocent man who would be executed because Kondian's family had money and connections. He told me that the facts supported that Kondian was the killer. He enlisted my help to try to raise money for Paul's defense. He knew that Paul's lawyer was not doing what he should. He wasn't preparing the case. He wasn't looking for witnesses or arranging for them to be present at the trial. He was in a good position to make a judgment since he was familiar with the preparation of cases in his work.

3. Over the years I visited Paul Scott many times. I got an inheritance from my father which enabled me to pay about $35,000 to Paul Morris to take Paul's case. At the time that Paul went to his clemency hearing I was talking to both Paul Scott and Paul Morris on a weekly basis. Since Paul Morris

couldn't get to the prison every week like I did, I carried messages back and forth for them. I was in a unique position to know exactly what was going on between the two of them because not only did I carry messages, but they both trusted and confided in me.

4. When it came time for Paul to make his clemency statement, he told Paul Morris the truth about what happened. Paul Morris did not want Paul to go with that version. I remember that Paul Morris told Paul not to worry about it because the statement could not be used against him in court. I particularly remember that Paul Morris told Paul not to say that he went there to use drugs but that he went there to steal. Paul Morris said it was better to say that he went there to rip the guy off because the clemency board would never believe him if he said he just went there for drugs. Paul and I both had our reservations about whether that was a good idea but we went along with Morris because he said he had gotten clemency for another guy and he knew what to do.

(App. 10).

Mr. Maybusher provided similar information through Mr. Mark Evans, a staff attorney with CCR:

1. My name is Mark Evans and I am employed as an attorney with the office of the Capital Collateral Representative.

2. On October 26, 1990 at 3:40 pm I spoke to Ronnie Maybusher by telephone. He is currently incarcerated at Northern State prison in Newark, New Jersey.

3. Mr. Maybusher advised me that he had been incarcerated at Hendry Correctional Institution in Florida with a Bill Kuhn in 1985. He knew Mr. Kuhn because they used to play handball together. Mr. Maybusher gave the following statement:

> One time while they were talking, Mr. Kuhn mentioned that he knew a Richard Kondian who told him that he had killed a guy but that another guy was on death row for the crime. He said the other guy was Paul Scott. I knew Paul Scott and I asked him more about it. He said, "This is the way it was." He then told me Kondian said that he and the victim were smoking marijuana laced with angel dust and that Kondian went crazy on the victim and killed him. Scott ran away through a back screen door while Kondian was still beating the guy. Kondian also talked about going to a jewelry and florist store and taking jewelry.
>
> 4. Mr. Maybusher said that he knew Paul Scott. He said Paul was a very nonviolent and caring guy. He had never heard anything about Paul ever being aggressive or violent toward someone else in the prison or on the street. He said he can't see how it is just that Kondian can get off while Paul is about to be executed.
>
> 5. Had he been asked, Mr. Maybusher would have been glad to make these same statements.

(App. 12).

This newly discovered evidence raises serious questions concerning the propriety of Mr. Scott's conviction and, especially, the propriety of his sentence of death. This evidence establishes that Mr. Kondian was primarily responsible for Mr. Alessi's murder and that Mr. Scott's role was secondary. See Craig v. State, 510 So. 2d 857 (Fla. 1987). Given this evidence, the serious disparity between Mr. Scott's and Mr. Kondian's sentence cannot be reconciled. The trial court and

this Court should have the opportunity to afford petitioner proper consideration and resolution of this evidence and the issues it raises.

THE PRIOR CONVICTION

Aggravation argued to the jury by the prosecution at the time of the original sentencing, argued to and relied upon by Judge Rudnick, found as two statutory aggravating factors, and then relied upon by this Court in affirming the death sentence originally imposed, involved a prior conviction of Mr. Scott's in the State of California. As part of its emergency efforts on Mr. Scott's behalf, the CCR office requested that counsel in California review the propriety of that conviction and undertake collateral proceedings in California should there exist a good faith basis to conclude that that conviction was unconstitutionally imposed. California counsel (the California Appellate Project ["CAP"]) cannot be engaged in proceedings outside of California and thus could not assist CCR in litigation in Florida. California counsel, however, agreed to review Mr. Scott's California conviction.

As a result of that review, California counsel "concluded that the judgment in [the California case] is constitutionally invalid because [petitioner] was not advised of and did not waive" certain fundamental constitutional rights at the time of

the California plea and because petitioner's competency to enter the plea was not properly assessed. (Petitioner was then a juvenile and found to be mentally handicapped by authorities in California.) These and other grounds were presented to the California state trial court on this date (October 26, 1990). Copies of the submissions made in California are appended hereto for this Honorable Court's review (App. 11).

In attempting to have the matter resolved as expeditiously as possible, a hearing has been scheduled in the California state trial court for 1:30 p.m. (Western time) on this afternoon (October 26). An expeditious ruling has been requested. Although the trial court's ruling is unavailable at the time of the drafting of this pleading, undersigned counsel understands that if the application for relief is not afforded final ruling today it shall have a final ruling within 10 days of this date pursuant to the applicable Rules of the California Courts and the request for expedited resolution made in that Court.

The California conviction was the primary, indeed sole evidence upon which two aggravating factors were found in this case. See Preston v. State, 564 So. 2d 120 (Fla. 1990). Certainly questions under Johnson v. Mississippi, 108 S. Ct. 1981 (1988), shall be very relevant in this action. Current counsel has moved with all speed possible to obtain a resolution of those questions. No more has been possible within the 5-working day

time frame that this case involves. If there is no final resolution in California today, one shall be had within ten days.

Under these circumstances, the request for a 30-day stay of execution[8] in order to allow for these issues to be resolved on an expedited basis is altogether reasonable. A proper determination of these questions, and the others arising from issues and facts which have come to light in the last 72 hours, should be afforded in this case before they are rendered moot by Mr. Scott's execution. A proper determination of these issues is warranted here -- the issues are substantial and not frivolous. The provision of an expedited but reasonable (30-day) time period, and of counsel who can litigate within that time period (Mr. Taylor) is in this case particularly critical to the considered judgment so essential for this Honorable Court's review of death penalty cases in Florida.

CLAIMS FOR RELIEF

The outline presented above is relevant to a number of significant claims for relief which should be addressed in this case. Given the substance of what has been uncovered during the last 72 hours, pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution, other relevant Florida and federal

---

[8]Which would put Mr. Scott in the same posture as most other similarly situated capital litigants.

constitutional provisions (e.g., the eighth amendment's requirement of heightened scrutiny and reliability in capital cases), and Rule 9.030(a)(3) of the Rules of Appellate Procedure, petitioner prays that this Honorable Court grant a thirty day stay of execution and allow volunteer counsel (Mr. Taylor) to enter an appearance in order for this case to be litigated in an orderly and expeditious manner within that time period. The claims involved in this action, many arising from the discussion in the outline presented above, are summarized below.

JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court, the result of the appellate review process, and the legality of Mr. Scott's capital conviction and sentence of death.

Fundamental error in capital cases can occur in a number of ways. This Court has consistently exercised its authority to correct such errors. When this Court is presented with an issue demonstrating that the prior resolution of a capital petitioner's

case is fundamentally at odds with the Florida and federal constitutions, the Court does not hesitate to correct such errors. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights. . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). This analysis is particularly appropriate where facts unavailable earlier, or legal bases for relief which were earlier unavailable, raise fundamental questions about the propriety of the capital conviction and/or death sentence. This case is such a case. The substance of what this case involves is becoming manifest on a daily basis. The relief herein requested is appropriate.

B. REQUEST FOR STAY OF EXECUTION

This application includes a request that the Court stay petitioner's execution (currently scheduled for Tuesday, October 30, 1990 at 7:00 a.m.). The issues involved in this case are substantial and warrant a stay. This Court has not hesitated to stay executions to ensure judicious consideration of capital cases presented by petitioners litigating during the pendency of a death warrant. See, e.g., Puiatti v. Dugger, No. 74,869 (Fla. Oct. 24, 1989); Parker (Robert) v. Dugger, No. 74,978 (Fla. Nov.

8, 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1989). Similarly, the Court has been especially vigilent to the need for procedural fairness in capital proceedings, and has accordingly not hesitated to enter stays of execution in order to assure that capital petitioners are treated fairly in the litigation of claims for relief during the pendency of a death warrant. See Hardwick v. State, Case No. 75,556 (Fla., Mar. 15, 1990); Spaziano v. State, Case No. 75,874 (Fla., Apr. 24, 1990). Consequently, this Court has never required a capital inmate to pursue collateral relief when represented by counsel who cannot litigate effectively under the circumstances. See Parker, supra; Puiatti, supra. The circumstances involved in this case counsel the granting of the relief sought by this application. A thirty day stay of execution in order for volunteer counsel to effectively and expeditiously litigate this case is reasonable.

The claims Mr. Scott seeks to present are substantial. The problems he and his current counsel face are significant. We therefore respectfully pray that this Honorable Court enter a thirty day stay of execution, allow volunteer counsel to undertake the role of lead counsel in this case, and grant all other and further relief which the court may deem just and proper.

C. GROUNDS FOR HABEAS CORPUS RELIEF

By this petition, Mr. Scott asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. Petitioner's case involves the following claims for relief.

(A)

This case, in light of the discussion presented above, involves significant questions as to the propriety of petitioner's death sentence arising under Enmund v. Florida, 458 U.S. 782 (1982), and its progeny.

(B)

This case, in light of the discussion presented above, involves significant questions as to the proportional propriety of petitioner's death sentence, particularly in light of the relevant roles of and sentences imposed upon the codefendants. See Craig v. State, 510 So. 2d 857 (Fla. 1987).

(C)

This case, in light of the discussion presented above, involves serious questions about the propriety of petitioner's

capital conviction and death sentence on the basis of the fact that the key witness at trial has recanted his trial testimony, and the other recently uncovered facts demonstrating the accuracy of that recantation. See Smith (Frank Lee) v. State, supra; Lightbourne v. Dugger, supra.

(D)

This case, in light of the discussion presented above, involves questions under Brady v. Maryland and its progeny. See Lightbourne, supra.

(E)

This case, in light of the discussion presented above, involves significant questions as to the propriety of petitioner's death sentence in light of the constitutional standards discussed by the United States Supreme Court in Johnson v. Mississippi, supra, and by the Florida Supreme Court in Preston v. State, supra.

(F)

This case, in light of the discussion presented above, involves important questions concerning the effectiveness of former trial and collateral counsel's representation, and concerning the issue of whether a fundamental miscarriage of justice has taken place. See n.4, supra, citing Toles and Harich.

(G)

This case, in light of the discussion presented in previous portions of this application, also involves significant equal protection and due process questions, see Holland v. State, 503 So. 2d 1250 (Fla. 1987), and questions pursuant to Fla. Stat. section 27.001, and Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988), as to whether petitioner's rights are being violated by the inadequate representation that his current counsel is providing under the circumstances.

(H)

This case also involves important constitutional questions concerning the propriety of Mr. Scott's capital conviction and death sentence which are strikingly similar to those upon which the United States Supreme Court has recently granted certiorari review in Schad v. Arizona, No. 90-5551, 48 Crim. L. 3040 (Oct. 24, 1990). The question therein presented is whether, when the prosecution proceeds on alternative felony/premeditated murder theories in a capital case, the constitution is violated by a trial court's failure to inform the jury (e.g., through instructions) that it must reach unanimity, or at least a 7-vote majority, as to one of the theories. Mr. Scott's case presents a classic example of this situation.

At the conclusion of Mr. Scott's trial, the jury was

instructed on both premeditated murder and felony murder (R. 1442-44); the State had proceeded on both theories. Both premeditated murder and felony murder constitute first degree murder under Florida law. The jury was instructed on the elements of robbery and burglary, as part of the felony murder instruction (R. 1445). The guilty verdict form returned by the jury did not specify whether the jury found Mr. Scott guilty of premeditated murder or felony murder or whether there was any agreement in the jury between the two.

Mr. Scott was prosecuted under both of the alternative theories of first degree murder. Within the confines of the evidence presented against Mr. Scott, the prosecutor argued that the jury could find Mr. Scott guilty of first degree murder under either a premeditated or felony murder theory. The court likewise instructed the jury on both premeditated and felony murder (R. 1442-44). The verdict form provided only that the jury found the petitioner guilty or not guilty of first degree murder.

Federal courts have long held that the jury must reach unanimity on the facts in issue, to convict a defendant. The first federal court of appeals to consider this issue was the court in United States v. Gipson, 553 F. 2d 453 (5th Cir. 1977). Using the United States Supreme Court's opinion in In re Winship, 397 U.S. 358 (1970), for guidance, the court in Gipson reasoned

that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F. 2d at 457, quoting In re Winship, 397 U.s. at 364. The court went on to say that "[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F. 2d at 458.

Other courts, both federal and state, have found the reasoning of Gipson persuasive. See, e.g., United States v. Beros, 833 F. 2d 455 (3rd Cir. 1987) ("persuaded by the analysis and rationale" of Gipson, the court held that "[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Payseno 782 F. 2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State v. Boots, 308 Or. 371, 380 P. 2d 725 (1989) (citing Gipson for authority in reversing defendant's capital murder conviction); Probst v. State, 547 A. 2d 114 (Del. 1988) (holding "[t]he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's

specific illegal action." city Beros, supra); State v. Flynn, 14 Conn. App. 10, 539 A. 2d 1005, cert. denied 109 S. Ct. 226 (1988) (Connecticut has adopted "holding and rationale" of Gipson); State v. Johnson, 46 Ohio St. 3d 96, 545 N.E. 2d 636 (1989), cert. denied 110 S. Ct. 1504 (1990) (quoting Gipson approvingly); and People v. Olsson, 56 Mich. App. 500. 244 N.W. 2d 691 (1974) (defendant could not be convicted of first degree murder when alternative theories of premeditated murder and felony murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory).

Requiring juror unanimity on a single theory of first degree murder is necessary to effectuate the reasonable doubt standard enunciated in In re Winship, supra. It begs the question to say that premeditated and felony murder are merely different methods of performing the same act. There are significant differences between a premeditated murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without juror agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated.

The United States Supreme Court has recently granted certiorari on this exact claim in Schad v. Arizona, No. 90-5551, 48 Crim. L. 3040 (Oct. 24, 1990). A stay should be granted until the United States Supreme court has an opportunity to rule on

this most fundamental and critical claim. Relief pursuant to Beck v. Alabama, 447 U.S. 625 (1980), and the fundamental eighth and fourteenth amendment questions that this case presents is also appropriate at this juncture.

CONCLUSION

In stark contrast to every other death-sentenced individual in Florida, Mr. Scott is without counsel who can effectively and reasonably assist him in post-conviction proceedings under the circumstances described herein. Volunteer counsel is willing to undertake Mr. Scott's representation should this Honorable Court allow a reasonable, albeit expedited, period of time (30 days) for proper representation. The infringement of Mr. Scott's rights to proper review arising from the current circumstances can be remedied if this Honorable Court allows the relief herein requested -- this case can then be resolved in a reasonable and expedited time period, without any needless delay. Accordingly, Petitioner prays that this Honorable Court enter an order:

a) staying Mr. Scott's execution for thirty days in order to allow for proper and expeditious litigation of this action;

b) authorizing volunteer lead counsel for petitioner (Clyde M. Taylor of Tallahassee, Florida) to enter an appearance and file post-conviction pleadings on Petitioner's behalf;

c) requiring for provisions (a) and (b) to be effective

that prospective counsel for Mr. Scott file a notice of appearance with this Court within seven (7) working days of the entry of any stay order;

d) giving prospective counsel the right to amend and supplement this habeas corpus petition and to file a Rule 3.850 motion; and

e) granting petitioner all further relief the court deems just and proper.

Respectfully submitted,

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Florida Bar No. 0125540

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Chief Assistant CCR
Florida Bar No. 806821

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By: _____
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by fascimile transmission to Celia Terenzio, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 26 day of October, 1990.

Attorney