IN THE SUPREME COURT OF FLORIDA

NO. 76831

PAUL WILLIAM SCOTT,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

****

RESPONSE IN OPPOSITION TO A THIRTY-DAY STAY OF EXECUTION AND RESPONSE IN OPPOSITION TO PETITION FOR EXTRAORDINARY RELIEF AND WRIT OF HABEAS CORPUS

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I. STAY OF EXECUTION IS NOT WARRANTED

Petitioner's counsel claims that a stay of execution is necessary since CCR was not counsel for Petitioner until prior counsel recently withdrew and the Governor signed a death warrant. If this is so then Mr. Nolas made a misrepresentation to the prosecutor in this case back in April of this year. (Ap. A). Mr. Nolas stated then that he in fact did represent Petitioner and as such was entitled to all his files. Although the Office of the Attorney General is concerned about whether or not Mr. Nolas has resorted to making false claims to gain a stay it is more important to note that CCR has been in possession of Scott's files for more than six months. Under these circumstances, Respondent asserts that a stay of execution is not warranted. Trodel v. State, 479 So.2d 736 (Fla. 1985); Atone v. Dugger, 465 U.S. 200, 206 n. 4 (1984). A stay of execution should not be regarded as an automatic remedy granted simply on request in as much as the state has a legitimate interest in the finality of all litigation, including capital litigation. Witt v. State, 387 So.2d 922, 924 (Fla. 1984), cert. denied, 449 U.S. 1067 (1981).

The basis of this petition is the allegation that "new" evidence has come to light which warrants further review. Claims A through D, F and G are all based on this alleged new evidence. However it is clear that this alleged new evidence has already been presented to this Court on two prior occasions. Scott v.

Wainwright, 433 So.2d 974 (Fla. 1983); Scott v. State, 513 So.2d 653 (Fla. 1987). Since this Court has already addressed this claim this petition is an abuse of the process. Therefore a stay should not be granted. Bundy v. State, 538 So.2d 445 (Fla. 1989).

Respondent will address the propriety vel non of a stay based on the remaining two claims, E and H in the corresponding argument below.

II. PROCEDURAL HISTORY

The procedural history of this case is very extensive and is summarized below.

Petitioner is under the sentence of death for the December 1978 murder of James Alessi. Petitioner's case has been reviewed by a number of courts since he was convicted and sentenced. Both the Honorable Judge Aronowitz of this dictrict and the Eleventh Circiut Court of Appeals detailed the procedural history of Petitioner's case. Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989). Scott v. Dugger, 686 F.Supp. 1488, 1495-1496 (S.D.Fla. 1988). Respondent briefly summarizes the nature of relief previously sought by Petitioner.

The trial court reviewed the instant case pursuant to a motion for post-conviction relief. The Florida Supreme Court has reviewed this case via a direct appeal, a writ of habeas corpus, a writ of error coram nobis and an appeal from an unsuccessful

motion for post-conviction relief.Scott v. State, 411 So.2d 866 (Fla. 1982); Scott v.Wainwright, 433 So.2d 974 (Fla. 1983); Scott v. State, 513 So.2d 653 (Fla. 1987). The federal district court for the Southern District of Florida, has reviewed Petitioner's case via a writ for habeas corpus. Scott v. Dugger, 686 F.Supp. 1488 (S.D. Fla.1988). The Eleventh Circuit Court of Appeals has upheldedthe district court's order denying relief. Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989). The United States Supreme Court denied certiorari review on October 1, 1990.

Petitioner was convicted and sentenced to death for the murder of James Alessi. Scott v. State, 411 So.2d 866 (Fla. 1982). The following issues were raised on direct appeal:

> 1. Sufficiency of the evidence as the evidence adduced at trial did not exclude a reasonable hypothesis of innocence. The evidence was also insufficient to establish premeditation and felony murder.
>
> 2. The trial court erroneously limited cross examination of state witness,. Soutullo.
>
> 3. Trial court erred in admitting into evidence a gold bracelet that was similar to the one taken from the victim's store. This particular bracelet was taken from a codefendant's girlfriend.
>
> 4. Trial court erred in giving an instruction on felony murder for the underlying felonies of robbery and burglary.
>
> 5. Trial court erred in holding jury selection on Yom Kippur.

> 6. . There was insufficient evidence to establish the aggravating factor that the crime was committed during the commission of a robbery or burglary. Furthermore the finding of felony murder would automatically establish this aggravating factor. There was insufficient evidence to establish the aggravating factor of heinous, atrocious or cruel.
>
> The trial court erred in excluding the testimony of a journalist, Don Reid, during sentencing. The trial court erred in allowing state to introduce evidence of a prior robbery for which no conviction was obtained.
>
> 7. The trial court erred in dismissing potential jurors for cause based on their statements that they could never recommend the death penalty.
>
> 8. Florida's death penalty statute is unconstitutional.

The Florida Supreme Court affirmed both conviction and sentence. Scott, 411 So.2d at 868-869. Mandate issued on October 20, 1982.

Pursuant to a death warrant signed on May 12, 1983, Petitioner filed a writ of habeas corpus in the Florida Supreme Court challenging the effectiveness of appellate counsel. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). The following issues were raised:

> 1. Appellate counsel should have argued that the trial court erred in precluding defense counsel's opening statement regarding victim's drug use and homosexual activity.
>
> 2. Appellate counsel should have argued that the state was allowed to present a surprise identification of Richard Kondian.
>
> 3. Appellate counsel should have argued that the trial court erred in limiting the cross-

examination of the witness who identified Kondian.

4. Appellate counsel should have challenged a statement in the State's brief on appeal regarding a statement by Petitioner as to his robbery and murder plans.

5. Appellate counsel should have argued that the trial court relied on non statutory aggravating factors.

6. Appellate counsel should have argued that the trial court erred in allowing the State cross-examine clinical psychologist Brad Fisher regarding past criminal activities since Petitioner waived reliance on the mitigating factor of no significant prior criminal activity.

7. Appellate counsel should have raised as error the trial court's denial of a motion for mistrial based on a witness' reference to Petitioner's inmate status as well as an outburst of the victim's mother.

8. Appellate counsel should have challenged the overruling of trial counsel's objection to the prosecutor's remarks regarding Soutullo's cooperation with police.

The Florida Supreme Court determined that Petitioner failed to demonstrate any ineffective assistance of counsel. Scott, 433 So.2d at 975 (Fla. 1983).

Petitioner also raised the following issues relating to alleged fundamental errors:

1. The State improperly relied on a felony murder theory without specifying the underlying felony.

2. The State improperly relied on a "multi-felony-murder theory."

3. There was insufficient evidence of the underlying felony of burglary.

4. The trial court impermissibly relied on non statutory aggravating circumstances.

5. The trial court impermissibly instructed the jury on lesser included offenses.

6. The sentencing jury instructions shifted the burden to the Petitioner to prove that death was not the appropriate sentence. 7. The trial court failed to take into account Petitioner's age as a mitigating factor.

8. The trial court failed to take into account other non statutory mitigating evidence.

9. The state should be required to prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.

10. The trial court gave an erroneous instruction on the number of votes required to recommend a life sentence.

11. The Florida Supreme Court should not reweigh the aggravating and mitigating factors once an aggravating factor has been vacated.

The Florida Supreme Court found no merit to any of these claims. Scott 433 So.2d at 975.

In conjunction with the habeas petition, Petitioner also filed a Writ of Error Coram Nobis alleging that new evidence demonstrates that Petitioner's codefendant was the dominant participant in the murder. Again the Florida Supreme Court denied relief. Scott, 433 So.2d at 976.

Petitioner then filed a federal writ of habeas corpus and was granted a stay of execution. He then obtained a stay of proceedings in federal court to pursue further state remedies via a motion for post conviction relief. Scott v. Dugger, 686

F.Supp. 1488, 1495 (S.D.Fla. 1988). Petitioner raised the following issues in his state collateral proceedings:

> 1. Petitioner alleges he received ineffective assistance of counsel for counsel's failure to put codefendant Kondian on the stand.
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> 2. Trial counsel should have more effectively impeached state witnesses Soutullo and the medical examiner.
>
> 3. Trial counsel should have presented non statutory mitigating evidence that while in prison in California, Petitioner's actions may have saved the life of a counselor.

The Florida Supreme Court denied all relief on appeal of the unsuccessful motion for post-conviction relief. Scott v. State, 513 So.2d at 653. Following this unsuccessful appeal Petitioner returned to federal court to seek relief. Petitioner raised the following thirty issues:

> 1. The trial court erred in precluding Petitioner from stating in opening argument that the victim was a drug user and a homosexual.
>
> 2. There was insufficient evidence of premeditation to sustain a conviction for first degree murder.
>
> 3. There was insufficient evidence of felony murder.
>
> 4. The trial court erred in holding jury selection on Yom Kippur.
>
> 5. The State presented a surprise in-court identification of codefendant Kondian.
>
> 6. The trial court impermissibly limited the cross-examination of the witness who identified Kondian.

7. A state witness impermissibly made reference to Petitioner's inmate status.

8. The state did not give adequate notice of which specific under felony it was relying on to prove felony murder.

9. The state improperly excluded for cause potential jurors who stated that the could not recommend the death penalty under any circumstance.

10. The trial court erred by giving lesser included offenses.

11. Petitioner received ineffective assistance of appellate counsel. Petitioner relied on the identical grounds raised in his state habeas petition. Scott, 686 F.Supp.at 1506.

12. The trial court impermissibly relied on nonstatutory aggravating factors specifically, the court took into account Petitioner's juvenile record.

13. The prosecutor improperly argued to the jury that Petitioner was charged with first degree murder in California but pled to second degree murder.

14. The trial court allowed impermissible cross-examination of defense witness Dr. Fisher. The state was allowed to question the witness regarding Petitioner's juvenile acts.

15. Jury instructions in sentencing phase impermissibly shifted the burden of proof to Petitioner requiring him to establish that death is not the appropriate penalty.

16. The trial court erred in not considering Petitioner's age as a mitigating factor.

17. The trial court erred in precluding the Petitioner from presenting the testimony of journalist Donald Reid at the sentencing phase. 18. The trial court erred in not considering other nonstatutory mitigating evidence. This evidence includes

Petitioner's decision not to bring a weapon into a juvenile reformatory as well testimony from family members regarding Petitioner's assistance in raising his siblings, his veracity, and his hard work to help his family.

19. Florida's sentencing scheme does not require the state to prove that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.

20. The trial court erroneously instructed the jury that a majority vote was required to recommend a life sentence.

21. Repeating an earlier claim Petitioner alleged that the trial court impermissibly instructed the jury on lesser included offenses.

22. Petitioner claims that the Florida Supreme Court improperly assumes the role of sentencer in Florida's sentencing procedure.

23. Florida courts do not consistently apply the aggravating factor of heinous, atrocious, and cruel.

24. The Florida Supreme Court failed to conduct a proportionality review of Petitioner's case.

25. Florida court's rely on an unconstitutional standard for determining the validity of a petition for coram nobis.

26. Petitioner's death sentence is precluded under Enmund v. Florida, 458 U.S. 782 (1982).

27. Petitioner alleges that he was impermissibly prosecuted under a multi-underlying felony theory.

28. Florida Supreme Court has an unconstitutional practice of reviewing ex parte information, i.e. Petitioner's clemency hearing testimony.

29. Florida's sentencing scheme allows for the consideration of an automatic aggravating factor.

30. Trial counsel was ineffective for failing to argue a "defense of others" defense as well as failing to properly impeach the state's key witness.

After the reviewing the merits of each claim, the federal district denied all relief. Scott, 686 F.Supp. at 1523. Petitioner then appealed to the Eleventh Circuit Court of Appeals. The following seven issues were raised:

1. Petitioner received ineffective assistance of counsel for trial counsel's failure to present a "defense of others" defense, failure to impeach the medical examiner, failing to impeach state witness through direct evidence.

2. The trial court improperly conducted jury selection on Yom Kippur.

3. There was insufficient evidence to sustain a conviction for felony murder.

4. Petitioner received ineffective assistance of counsel at the sentencing phase for counsel's failure to offer as mitigation Petitioner's "defense of others" defense as well as Petitioner's actions in prison where he allegedly saved the life of a prison guard.

5. The trial court erred in precluding the testimony of journalist Donald Reid at the sentencing phase.

6. The district court erred in precluding Petitioner from amending his petition to include a claim based on Caldwell v. Mississippi, 472 U.S. 320 (1985).

7. Florida's aggravating factor of heinous, atrocious, and cruel *is unconstitutionally* vague.

The Eleventh Circuit denied all relief. Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989). The United States Supreme Court

denied certiorari review on October 1, 1990. The Governor of Florida signed a death warrant on October 19, 1990.

Petitioner attempts to use habeas corpus as a means to relitigate issues already determined in prior litigation before this court. This court has repeatedly condemned such practice and should do so in the instant case. Porter v. Dugger, 559 So.2d 201 (Fla. 1990). Furthermore, habeas corpus is not the proper vehicle in which to present a claim of newly discovered evidence, such claims should be brought in a motion for postconviction relief. Richardson v. State, 546 So.2d 1037 (Fla. 1989). Petitioner is attempting to get through the back door that which he is precluding from through the front.

III. ARGUMENT

CLIAMS A,B,C,D,F,G

As stated above most of Petitioner's claims are based on the new testimony of Vincent Soutullo and Petitioner's codefendant Richard Kondian. Prior to this petition, this Court has reviewed previous statements by Kondian via his plea hearing testimony and his post conviction testimony. Scott v. State, case no. 69,341 vol.I. and Supp.Record; Scott v. Wainwright, 433 So.2d 974 (Fla. 1983); Scott v. State, 513 So.2d 653 Fla. 1987). As discussed below the statements in this petition are identical to those mentioned above.

Record reference to prior proceedings will be as follows, SR will denote the supplemental record contained in the postconviction appeal, R will denote the record containing Kondian's testimony at the evidentiary hearing, Ap. will denote the attached appendix.

1. In this petition, Kondian states that Alessi attempted to have sexual intercourse with him while Scott was in another part of the house. Kondian states the same thing at his plea hearing. (S.R. 28). 2. In this statement Kondian states that he hit the victim twice and continued to struggle with him while Scott stopped fighting altogether. Kondian said the same thing at his plea hearing and post conviction hearing. (R 36-39). 3. Kondian states that there was never any intent to rob or kill the victim. He also attacked the credibility of Soutullo. Kondian made these same statements at the 3.850 hearing (R 46,56,60). 4. Kondian now states that he plead guilty because he was afraid and that the whole incident was one of self defense. He made this same statement before.(R 46,52). 5. Kondian again maintains Scott's innocence as he did previously and again claims that he would have testified if asked.(R 59,47). This Court was unpersuaded that this "newly discovered" evidence was in fact new, Scott, 433 So.2d at 976,and found it lacking in credibility as well as Scott, 513 So.2d at 654- 655. Petitioner has not demonstrated any possible reason to hold otherwise at this late juncture.

Vincent Soutullo now claims that he was only approached by Kondian when asked to join in on the robbery and murder. Even if this were true, Scott admitted at his clemency hearing that the plan was for him to rummage through the house looking for items to steal while Kondian engaged in sex with the victim. Scott, 513 So.2d at 655 n.*. Absent Soutullo's testimony regarding the prearranged plan there was sufficient evidence to establish premeditation. Scott, 411 So.2d at 868.

Equally unavailing although not previously considered by this Court are the affidavits of Scott's sister, Valerie Cooke, Robert Avera, Robert Pauley, Jeffery Walsh, Susan Higginbotham and Mark Evans. The contents of these affadavits include either personal opinions about Scott's minimal participation in the crime and hearsay accounts regarding Kondian's culpability.

The credibility of these statements must be questioned considering the fact that these people have waited twelve years to bring this forward. This is especially so regarding Valerie Cook. Petitioner would have this Court believe that his sister withheld this "new evidence" for the past twelve years. During that time Petitioner was involved in numerous state and federal postconviction proceedings including a previous death warrant.

In any event these statements are merely cumulative as to what Petitioner has already brought forth on numerous occasions starting with his direct appeal, i.e. Kondian was the more culpable. Scott 513 So.2d at 654.

This evidence having already been considered by this Court on three separate occasions, has not been made any more compelling by virtue of the fact that Petitioner's execution is imminent.

Petitioner has not presented any new factual or legal reason to have this Court review this case again based on Enmunds v. Florida, 458 U.S. 782 (1982). Petitioner presented this claim in a motion for rehearing on the direct appeal. Nothing in this petition warrants another review.

Likewise with Petitioner's claim of proportional propriety under Craig v. State, 510 So.2d 857 (Fla. 1987) there is no reason for this Court to conduct further review. The fact that the former sentencing judge would or would not reconsider Petitioner's sentence is irrelevant. First of all Judge Rudnick is no longer on the criminal bench and under no circumstances would he be assigned this case. As a matter of fact if Petitioner had chosen to pursue a postconviction remedy in state court, the case would be heard by Judge Tom Johnson. Judge Johnson presided over Petitioner's prior postconviction hearing. Judge Johnson was aware of Kondian's sentence in this case and heard all the "new evidence" that has been presented in this petition. Judge Johnson and this Court have already determined that Kondian's "new evidence" lacks credibility. Scott, 513 So.2d at 654-655. Consequently, since this Court has already reviewed Petitioner's sentence in light of this information, there is no need to do so again.

Furthermore, at Kondian's plea hearing, there was information brought forth by his attorney that would mitigate against the death penalty, i.e. Kondian had no prior record, he was eighteen years old at the time of the crime, and he has an extensive history of drug and alcohol abuse. (SR 24,30).

It has come to the attention of undersigned counsel that Judge Rudnick has never said he would be willing to reassess the sentence imposed based on this new evidence. Opposing counsel's assertions otherwise or a total misrepresentation. The judge, when pressed on the issue by opposing counsel has stated that if he were ordered to rehear this case he would. He never stated expressly or otherwise any opinion regarding the merits of this claim.

Petitioner's claim under Brady v. Maryland is also unavailing as Petitioner has hardly made the allegation let alone the argument that the State has withheld any exculpatory evidence. In any event this Court has already found that the "newly discovered" evidence included facts of which the Petitioner was already aware. Scott,433 So.2d at 976.

Petitioner can hardly demonstrate that previous or present counsel was ineffective considering that the claims relied upon to prove ineffectiveness have been denied on the merits. Furthermore Petitioner has failed to properly set forth with specificity the alleged deficiencies and prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

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Petitioner speculates that his California conviction for second degree murder will soon be overturned thereby placing the constitutionality of his death sentence into question.

Petitioner's claim is procedurally barred for failure to raise it on either direct appeal or in a timely motion for postconviction relief. Bundy v, State, 538 So.2d 445,447 (Fla.1989); Eutzy v. State, 541 So.2d 1143,1146 (Fla. 1989). The fact that a California judge has set this for a hearing does not translate into relief on the merits. This Court should not allow Petitioner to bring this speculative claim at this juncture. This is nothing more than a classic attempt to delay the execution. Such dilatory tactics should not be condoned through the granting of a stay of execution. Respondent requests that this Court issue a plain statement regarding Petitioner's irrevocable procedural default on this claim to preclude federal intrusion. Harris v.Reed, 489 U.S. 255 (1989).

Even if Petitioner's sixteen year old California conviction were to be overturned there are two other valid aggravating factors, along with no statutory mitigating evidence and very weak nonstatutory mitigating evidence. Scott, 411 So.2d at 869. Any error would considered harmless beyond a reasonable doubt. Bundy, 538 So.2d at 447. Respondent respectfully urges this Court to deny this claim based on Petitoner's irrevocable procedural default or on the merits.

SPECIAL VERDICTS

Petitioner claims a stay is warranted in the instant case based on the fact that the United States Supreme Court has recently accepted certiorari review in Schad v. Arizona, 90-5551, 48 Crim. L. 3040 (Oct. 24, 1990). Respondent asserts that a stay of execution is not warranted merely because cert. review was granted in a case with this identical issue. In Darden v. State, 521 So.2d 1103 (Fla. 1988) this Court refused to grant a stay of execution under similar circumstances. In Darden Petitioner raised a claim based on Caldwell v. Mississippi, 472 U.S. 320(1985). This Court had already decided that claim adversely to Petitioner in a previous hearing, consequently, a stay was not granted. Darden, 521 So.2d at 1105.

In the instant case a stay is not warranted as this Court has repeatedly over the years rejected this identical claim. Buford v. State, 492 So.2d 355 (Fla. 1986); Brown v. State, 473 So. 2d 1260 (Fla.), cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed. 2d 585 (1985); Haliburton v. State, 561 So.2d 248 (Fla. 1990).

The fact that the Schad v. Arizona has been accepted for review does not automatically create a federal constitutional right to special verdict forms. The propriety of general verdict forms was established in Stromberg v. California, 283 U.S. 359 (1939). Under Florida Law the state is allowed to proceed on

either theory of murder as long as there was evidence to sustain a conviction under both theories. Larry v. State, 104 So.2d 352 (1958); Buford, 492 So.2d at 358; Brown, 473 So.2d at 1265

The five courts that have previously reviewed this case (this Court having done so three times) have all determined that there was sufficient evidence to sustain a conviction under either premeditation or felony murder. Furthermore Florida's capital first degree murder statute is constitutional both as to premeditation and to felony murder, see e.g. Profitt v. Florida, 428 U.S. 242 (1976) and Enmund v. Florida, 458 U.S 782 (1982).

Unlike Florida, Arizona's case law on the use of special verdicts is in a state of flux. See Annotation, Jury Unanimity, 75 A.L.R. 91 (1985).

The facts of Schad v. Arizona are distinguishable from the instant case as the jury in Schad was never instructed on the crime of robbery which was the underlying felony upon which felony murder was based. State v. Schad, 788 P.2d 1162, 1168 (Ariz. 1989). The jury was so instructed in the instant case. Schad has presented this question to the United States Supreme Court as a violation of Beck v. Alabama, 447 U.S. 625 (1980). Consequently, to suggest that a stay is warranted based on Schad is not compelling given the additional basis for cert review and the factual difference between Schad and the instant case.

In any event even if the United States Supreme Court were to decide that special verdicts forms are now required in capital cases, Petitioner would not be entitled to the benefit of

that decision. Teague v. Lane, 489 U.S. __, 103 L.Ed. 2d 334, 109 S.Ct. __ (1989). Since a special verdict requirement would create a new rule it would not be afforded retroactive application status. Teague 103 L.Ed. 2d at 353. A special verdict requirement must satisfy one of the two exceptions to that rule, i.e. does it place certain activity /conduct beyond the power of the State to regulate or does it impact on the procedures that are implicit in the concept of ordered liberty. Teague, 103 L.Ed.2d at 356.

It is clear that a special verdict requirement would does not meet the requirements of either exception. Penry v. Lynaugh, 492 U.S. __, 106 L.Ed. 2d 256, 285-286, 109 S.Ct. __ (1989); Swayer v. Smith, __U.S. ___,110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). "A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Teague,489 U.S. at 311. It is unlikely that many such components of basic due process have yet to emerge. The Supreme Court has said that unanimity would not contribute to the goal of attaining a commonsense judgement. Williams v. Florida, 399 U.S. 78)1970).

The rationale behind the holding in Teague is that the purpose of habeas review is to ensure that at the time of the defendant's conviction the existing federal constitutional law was applied. At the time of Scott's conviction there was no such requirement. As a matter of fact jury unanimity has never been

required in criminal cases. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). To apply such a new rule to final convictions would not serve that rationale. Teague.

Schad is before the United Supreme Court on direct review. Furthermore the defendant in Schad requested a special verdict form. Scott has never requested a special verdict form prior to trial nor did he ever challenge the absence of one before this petition. Given the procedural default hurdles over which Scott must climb he would not be entitled to the benefits of a new rule if one were to be announced in Schad. Since Petitioner could not benefit from a new rule there is no need to issue a stay based on Schad.

CONCLUSION

WHEREFORE, based on the procedural deficiencies as well as the merits, Petitioner has failed to demonstrate why he would be entitled to any relief let alone a thirty day stay of execution. Respondent respectfully requests that this Court DENY all relief.

Respectfully submitted,

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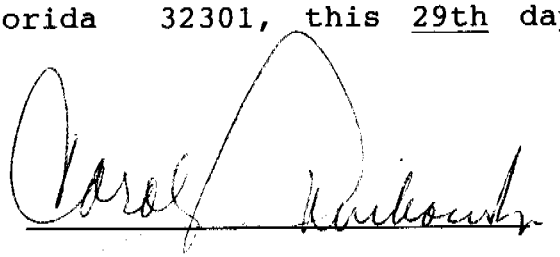
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response in Opposition to a Thirty-Day Stay of Execution and Response in Opposition to Petition for Extraordinary Relief and Writ of Habeas Corpus" has been forwarded, by mail to: Billy H. Nolas, Chief Assistant CCR, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 29th day of October, 1990.



Of Counsel

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complied 4-20-90

Larry Helm Spalding
Capital Collateral Representative

April 3, 1990

Jospeh Ackerman
Office of the State Attorney
Palm Beach County Courthouse
315 Third Street
West Palm Beach, Florida 33402

RE: Paul William Scott and Richard Kondian

Dear Mr. Ackerman:

The Office of Capital Collateral Representative currently represents Paul William Scott in post-conviction matters. This is a formal request for access to public records pursuant to Section 119.01 et seq., Florida Statutes (1985).

We ask that you provide a representative or representatives of our office immediate access to inspect and copy any and all State Attorney files and records (regardless of form and including, for example, all photographs and tapes or other sound or video recordings) relating to Mr. Scott and Mr. Kondian and any witnesses or potential witnesses relating to the crime for which Mr. Scott was convicted. Mr. Adams was sentenced on December 14, 1979 for the murder of James Alessi, circuit court case #79-167. Mr. Scott's date of birth is May 9, 1956 and Mr. Kondian's date of birth is March 3, 1960.

Our interest is in, but not limited to, the following:

1. Case reports.

2. Investigation reports, i.e., crime scene, witnesses, etc. (including any and all memoranda prepared by law enforcement and/or prosecutors during the course of the investigation and prosecution of this matter).

3. Classification files.

4. Interrogation records and reports.

5. Transmittal sheets of evidence to crime labs.

6. Reports/results of crime lab work.

7. Information with regard to other suspects or potential suspects.

8. Log sheets and/or other records which reflect the physical location and movements of Messrs. Scott and Kondian.

9. All handwritten and typed notes of investigators, detectives and other officers and personnel.

10. Medical records, including those concerning psychiatric or psychological evaluations.

11. Any and all statements made by Messrs. Scott and Kondian, or others, including any and all statements obtained from suspects or potential witnesses.

12. Any and all statements made by persons noted on the State's witness list and/or called by the state to testify.

13. All records and reports of polygraph examinations, hypnosis, or the administration of sodium pentathol, sodium amethol or any other drug.

14. Any and all physical and/or documentary evidence, including any which was not placed in evidence at trial.

This request is made for purposes of our preparation of Mr. Scott's post-conviction pleadings. For your information, I have enclosed a copy of a recent decision of the District Court of Appeal of Florida, Second District, which makes it clear that post-conviction proceedings do not constitute a "pending appeal" for purposes of determining whether criminal investigative files are exempt from public disclosure pursuant to the provisions of Sections 119.011(3)(d)2 and 119.07(3)(d), Florida Statutes (1985). On February 5, 1987, the Florida Supreme Court refused to review that decision. Thus, the present status of Mr. Scott's case is no impediment to my request. This request also

specifically includes the files and notes of any deputies, detectives or other officers who participated in the investigation and prosecution of this case.

Due to the exigencies of capital litigation, we are laboring under severe time restrictions and would therefore appreciate your prompt attention to these matters. Please contact our office upon receipt of this request so that appropriate arrangements can be made for our review of the records.

Thank you for your attention and assistance in this matter.

Sincerely,

Billy Nolas,
CCR Staff Counsel
/gh

Enclosures