

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	25
SUMMARY OF ARGUMENT	29
ARGUMENT	30

ISSUE I.....30

SCOTT'S CLAIM THAT CRITICAL EXCULPATORY
EVIDENCE WAS NOT PRESENTED IS
PROCEDURALLY BARRED AS IT HAS ALREADY
BEEN RAISED IN ALL PRIOR PROCEEDINGS

ISSUE II.....36

SCOTT'S CLAIM THAT THE STATE
DELIBERATELY USED FALSE AND MISLEADING
TESTIMONY IS PROCEDURALLY BARRED FOR
FAILING TO RAISE IT IN PRIOR LITIGATION

ISSUE III.....37

MR. SCOTT'S CLAIM OF INNOCENCE IS
PROCEDURALLY BARRED AS IT HAS BEEN
RAISED IN PRIOR LITIGATION

ISSUE IV.....42

SCOTT'S CLAIM THAT HE IS MENTALLY
RETARDED AND BRAIN DAMAGED IS
PROCEDURALLY BARRED FOR FAILING TO RAISE
IT IN A PRIOR MOTION

ISSUE V.....43

SCOTT IS PROCEDURALLY BARRED FROM A
RAISING A "POTENTIAL" JOHNSON v.
MISSISSIPPI CLAIM AS SAME COULD HAVE
BEEN RAISED IN A PRIOR MOTION

ISSUE VI.....46

PROCEDURAL BAR RULES HAVE NOT BEEN
ARBITRARILY APPLIED IN SCOTT'S CASE,
SCOTT IS BARRED FROM RAISING THIS CLAIM
NOW

ISSUE VII.....47

SCOTT'S ALLEGED PUBLIC RECORDS IS
PROCEDURALLY BARRED

CONCLUSION.....48

CERTIFICATE OF SERVICE.....49

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Agan v. Dugger</u> , 560 So. 2d 222 (Fla. 1990).....	47
<u>Clark v. Dugger</u> , 533 So. 2d 1144 (Fla. 1988).....	47
<u>Davis v. State</u> , 589 So. 2d 896 (Fla. 1991).....	2
<u>Enmund v. Florida</u> , 458 U.S. 782 (1982).....	12-13
<u>Foster v. State</u> , 614 So. 2d 455 (Fla. 1992).....	36
<u>Francis v. Barton</u> , 581 So. 2d 583 (Fla. 1991).....	2
<u>Henderson v. Singletary</u> , 617 So. 2d 313 (Fla. 1993).....	2
<u>Herrera v. Collins</u> , 122 L.Ed. 2d 203 (1993).....	23
<u>Johnson v. Mississippi</u> , 486 U.S. 578 (1988).....	43
<u>Johnson v. State</u> , 593 So. 2d 206 (Fla. 1992).....	46
<u>Jones v. State</u> , 591 So. 2d 911 (Fla. 1992).....	34
<u>Kelly v. State</u> , 569 So. 2d 754, 756 (Fla. 1990).....	36
<u>Kennedy v. State</u> , 599 So. 2d 991 (Fla. 1992).....	2
<u>Koon v. State</u> , 619 So. 2d 246 (Fla. 1993).....	39
<u>Mitchell v. State</u> , 527 So. 2d 179 (Fla. 1988).....	46
<u>Ponticelli v. Dugger</u> , 618 So. 2d 154 (Fla.) cert. denied, <u>U.S.</u> 114 S.Ct. 352, 126 L. Ed. 2d 316 (1994).....	39
<u>Preston v. State</u> , 564 So. 2d 120 (Fla. 1990).....	35
<u>Sawyer v. Whitely</u> , 112 S.Ct. 2514 (1992).....	37
<u>Scott (Abron) v. Dugger</u> , 604 So. 2d 465 (Fla. 1992).....	43
<u>Scott v. Dugger</u> , 634 So. 2d 1062 (Fla. 1993).....	2
<u>Scott v. State</u> , 411 So.2d 866 (Fla. 1982).....	2
<u>Scott v. Wainwright</u> , 433 So.2d 974 (Fla. 1983).....	2
<u>Scott v. State</u> , 513 So.2d 653 (Fla. 1987).....	2

Scott vs. Dugger, 634 So. 2d 1062 (Fla. 1994).....2-3

Scott v. Dugger, 686 F.Supp. 1488 (S.D. Fla. 1988).....3

Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989).....3

Spaziano v. State, 570 So. 2d 289 (Fla. 1990).....36

State v. Stewart, 636 So. 2d 16, 17 (Fla. 1994).....24

Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).....41

Stewart v. State, 632 So. 2d 59, 61 (Fla. 1993).....37

Swafford v. State, 569 So. 2d 1264, 1267 (Fla. 1991).....47

Woods v. State, 531 So. 2d 79 (Fla. 1988).....41

Zeigler v. State, 632 So. 2d 48 (Fla. 1994).....34

FLORIDA STATUTES:

Section 921.141(5)(3)(1989).....12

I.

PRELIMINARY STATEMENT

"R" will designate record on appeal. Given the extensive procedural history of this case before this court, all other record references will designate the page number and the corresponding case number of that particular case.

II.

STATEMENT OF THE CASE

Scott's entire motion, his third motion for postconviction relief, his fourth state collateral proceeding overall, should be summarily denied as it is procedurally barred. It is successive and untimely. Kennedy v. State, 599 So. 2d 991 (Fla. 1992); Davis v. State, 589 So. 2d 896 (Fla. 1991); Francis v. Barton, 581 So. 2d 583 (Fla. 1991); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993). A detailed procedural history along with the facts adduced at trial as well as other evidence/facts presented in numerous prior proceedings demonstrate that Scott will not be able to overcome the procedural bar attached to this successive motion.

The procedural history of this case is very extensive and is summarized below. Scott is under the sentence of death for the December 1978 murder of James Alessi. This case has been reviewed by a number of courts since he was convicted and sentenced.

The trial court has reviewed the instant case pursuant to three motions for post-conviction relief. All relief was denied. This Court has reviewed this case via a direct appeal, two writs of habeas corpus, a writ of error coram nobis and two appeals from unsuccessful motions 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); Scott

v. Dugger, 634 So. 2d 1062 (Fla. 1994). This is the third appeal from an unsuccessful motion for postconviction relief.

Prior to this present appeal and the one appearing at Scott v. State, 634 So. 2d 1062, Scott sought relief in federal district court for the Southern District of Florida. Scott v. Dugger, 686 F.Supp. 1488 (S.D. Fla. 1988). The Eleventh Circuit Court of Appeals has upheld the 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.

II.a. Issues previously raised;

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 Tom 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.

This 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, Scott 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.

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

Appellant 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.

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

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

Scott 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). He 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.
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.

This Court denied all relief on appeal of the unsuccessful motion for post-conviction relief. Scott v. State, 513 So.2d at 653. Following that unsuccessful appeal Scott returned to federal court to seek relief. He 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 they 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 relief 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 reviewing the merits of each claim, the federal district denied all relief. Scott, 686 F.Supp. at 1523. Scott 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, failing 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 an mitigating 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 Florida signed a death warrant on October 19, 1990. This Court granted a stay on October 26, 1990 to allow new counsel an opportunity to file new motions. Scott, 634 So. 2d at 1064. The following issues were raised in a motion for postconviction relief;

1. The trial court improperly denied all relief without an evidentiary hearing.

2. Newly discovered evidence exists which casts doubt on Scott's conviction and sentence. The evidence is an affidavit from Richard Kondian, the co-defendant which states that Scott stopped hitting the victim after the initial struggle but Kondian continued because he was in fear for his life. Scott also claims that Kondian's forty-

five year sentence is also newly discovered evidence.

3. Alleged newly discovered evidence also includes Kondian's testimony at his plea hearing, a police report indicating that Kondian cut his finger the night of the murder, statements from Scott's sister Valerie Cook, Robert Avera and Ronald Maybusher regarding their opinion that Kondian was the actual killer, a partial recantation by Charles Soutullo.

4 Petitioner also claimed that the police report which referred to Kondian's cut finger was either intentionally withheld in violation of Brady v. Maryland, 373 U.S. 83 (1963) or was unreasonably not discovered by defense of counsel in violation of Strickland v. Washington, 466 U.S. 688 (1984).

5. Petitioner also claimed that he received ineffective assistance of counsel at the penalty phase and during his first motion for postconviction relief.

6. Petitioner next claimed that the jury was allowed to consider an improper aggravating factor; avoid arrest.¹ He further claimed that the state relied upon an unconstitutional aggravating factor that the crime was committed during the course of a robbery/burglary.

7. Lastly petitioner claims that the prosecutor remarks were improper victim impact and also precluded the jury from considering sympathy for the defendant.

Based on the same "newly discovered evidence" appellant filed a habeas corpus petition in this Court. He claimed that the new information demonstrated a violation of Enmund v.

¹ Section 921.141(5)(e)(1989).

Florida, 458 U.S. 782 (1982); calls into question the propriety of petitioner's death sentence in light of Kondian's sentence; demonstrates a violation of Brady v. Maryland, 373 U.S. 83 (1963); demonstrates a violation of Johnson v. Mississippi, 4486 U.S. 578 (1988) and a violation of Schad v. Arizona, 111 S.Ct. 2491 (1991).

Lastly, the newly discovered evidence illustrates that former trial and collateral counsel were ineffective. Again this Court denied all relief. Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993). This Court specifically found that all the claims relating to newly discovered evidence, i.e., Kondian's alleged greater culpability were procedurally barred as they all have been raised in prior collateral proceedings. Scott, 634 So. 2d at 1065. Furthermore this Court found the evidence, i.e.; affidavits were not new. Id.

The Court did address the merits of the claim involving the partially recanted testimony of Charles Soutullo;

"We find that, under the record in this case, Soutullo's change in testimony would not have produced a different result. Scott acknowledged his participation in the victim's murder and Scott's own testimony during his clemency proceedings contradicts Soutullo's new statements."

Scott, 634 So. 2d at 1065.

The Court also found procedurally barred petitioner's claim of alleged disparate treatment of Kondian based on his forty-five year sentence. Id., at 1065.²

The Governor signed a third death warrant on September 30, 1994. Scott's execution is presently set for November 16, 1994. On October 31, 1994, appellant filed a motion for postconviction relief. After considering brief testimony regarding the claim of ex parte communications, and arguments, the trial court denied all relief. This appeal follows.

II.b. Factual evolution of Scott's evidence.

Scott has been afforded ample time and opportunity to develop his claim of innocence of both his conviction and sentence and was given a full and fair evidentiary hearing in the state courts. The sequence of developing his claims, via trial, writ of error coram nobis, evidentiary hearing in first motion for postconviction relief, first federal habeas petition, second motion and third motions for postconviction relief and petition for relief under Rule 60(b) will now be detailed.

At trial, Scott's theory of defense was that he was at Mr. Alessi's house that evening³ however he left before the fatal beating was inflicted. (R 1355-1370). He claimed that although

² In his reply brief appellant for the first time attempted to challenge the constitutionality of the jury instruction regarding the "heinous, atrocious and cruel" aggravating factor. This Court found the entire motion procedurally barred. Scott v. State, 634 So. 2d 1062, 1065 (Fla. 1993).

³ During cross-examination of the finger print expert, counsel made a point of the fact that one could not determine the age of the prints. (R 1133). He pointed out that there were unidentified prints at the murder scene there as well. (R 1135). On direct appeal, petitioner argued that there was insufficient evidence of premeditated murder because there was insufficient evidence to establish when the prints were left there. (Initial brief on appeal at page 6-9). Case no. 58,588.

his fingerprints were found on various items in the house, that did not prove that he used any of the items as a weapon. Scott's fingerprints were found on a knife left by the victim. Scott at most would only conceded that the jury could find that he was there to rob their victim and help tie him up, but that he left right afterwards. Scott maintains that Kondian was responsible for the murder. His claim that he left before the blows were struck was rebutted by the following evidence: 1). there was blood on the knife that Scott used to cut the wire, that wire was used to tie up Mr. Alessi⁴. (R 865); 2). there was blood droplets found in the area where the cords and wire had been cut; (R 1404-1405, 862-865 3). The medical examiner testified that the victim did not receive any stab wounds. (R 1211). This evidence indicates that Scott had to have been there for at least a portion of the blows given the fact that blood was present while he was still present. Furthermore, given the evidence of the bloody struggle that occurred throughout most of the house and the fact that Kondian was much smaller than Mr. Alessi, Scott's participation was much greater than he wanted to admit at trial. Kondian could not have subdued Mr. Alessi by himself. The violent struggle indicates that Mr. Alessi had put up quite a fight, Kondian could not have done it by himself. The

⁴ During closing argument, Scott's counsel admitted that he could not explain how blood got on the knife. (R 1367-1370).

jury obviously rejected Scott's theory as they convicted him of first degree murder and sentenced him to death.

The jury's wisdom has since been proven to be correct given that Scott later changed his theory regarding the events of that night. He filed for writ of error coram nobis. In that petition he presented the affidavits of three people who state that Kondian told them that he was responsible for the murder. Katherine Ryan stated that Kondian told her that he and Paul were there together and that Mr. Alessi made a pass at Kondian. Kondian was the only one who struggled with Mr. Alessi, but she stated that both men left together. Both split up the cash and jewelry that was taken from Mr. Alessi.

Allen Brasher's affidavit states that the plan was simply to rob the victim but Kondian got panicked and killed him. He states that Scott ran out on him. Robert Avera's affidavit is similar to Brasher's⁵.

Scott also presented his first clemency testimony. In it, he admits that he and Kondian planned to rob Mr. Alessi. Kondian was to have sex with him while Scott searched the house for money and jewelry. A fight broke out between Kondian and Alessi. Scott joined in the fray admitting, for the first time,

⁵ Brasher and Avera's statements conflict with Ryan's in that she implicates Scott in the robbery, places him at the scene during the murder and contradicts all other assertions from various other people that Scott "ran out on him". (him being Kondian). See affidavits attached to petition for writ of error coram nobis. Case No. 63,736 and 63,737.

that he hit Alessi with a vase and a chair.⁶ Scott was told to tie Alessi up. He claims that Kondian hit Mr. Alessi him after he was tied up⁷, that is when he ran out of the house. Kondian allegedly was angry at Scott for running out of the house, however Kondian must have forgiven him because he states that Kondian picked him up on the street and brought him back to their hotel.

In the federal habeas petition Scott presents the affidavits from the error coram nobis as well as his clemency testimony. The district court allowed him to hold that petition in abeyance so he could further pursue state court remedies. Scott v. Dugger, 686 F. Supp. at 1495.

In his first motion for post-conviction relief, among other claims Scott alleged that counsel was ineffective for failing to present evidence of a "theory of defense of others". Scott was granted an evidentiary hearing.⁸ He also presented the testimony of three people 1). Richard Kondian, 2). David

⁶ At trial there was evidence that the broken dining room chair had a big blood stain on it. There was also blood in the dining room indicating that the a part of the struggle occurred in there. (R 862-864, 1295, 1398).

⁷ The prosecutor argued at trial that the evidence indicated that at least one of the blows was inflicted after Mr. Alessi was tied up and was sitting on the couch. This view of the evidence is supported by the fact that there was a big splattering of blood on the wall behind the victim. (R 864, 1406).

⁸ Scott presented the identical affidavits attached to his writ of error coram nobis as well as the affidavits of Bernadine Bernard and Timothy Reining. (See record from case no. 69, 341 pages 299-317).

Roth, Kondian's trial attorney, and 3). George Barnes, petitioner's trial attorney. At the evidentiary hearing, Kondian recounted his prior two statements and then added a third:

When he was detained for this murder in Rhode Island, Kondian told police that a fight broke out between himself and Alessi when Alessi made unwanted sexual advances towards him. As a result of the sexual assault, Scott came to Kondian's rescue and hit Alessi with several objects. (Case no. 69,341 pp. 5-64). He admits to hitting Alessi twice with a champagne bottle, but stated that petitioner hit him until he was unconscious.

At his plea hearing it was established that Kondian had no prior record and was eighteen years old. He admitted to hitting Alessi one time only. He then stated that Scott hit Mr. Alessi five times with various objects. The victim was then tied up. Scott made an exculpatory statement for Kondian⁹. It was noted that Kondian was much smaller than Mr. Alessi. (See transcript of evidentiary hearing in Case no. 69, 341 at pages 5-36).

Kondian testified at the evidentiary hearing that his statements at his plea hearing were not true. He said the incident occurred because Mr. Alessi was attempting to sexually assault Kondian, so Scott came to his aid. He claims that petitioner hit the victim with a vase, but eventually Scott

⁹ The contents of that exculpatory statement are not in the record. (See transcript of evidentiary hearing in Case no. 69 341.R0.

stopped fighting while Kondian and the victim continued to struggle. Kondian denied that there was a plan to rob the victim and also denies that the victim was hit after he was tied up.¹⁰ Kondian states that both left together.¹¹

After unsuccessful litigation of the motion for post-conviction relief, Scott was allowed to amend his federal habeas motion to include a claim of ineffective assistance of trial counsel based on the testimony presented at the state evidentiary hearing. He again stated that the evidence indicated a 'defense of others theory' should have been presented.

In the second motion for postconviction relief, Scott presented affidavits from the following people: 1). Charles Soutullo who partially recanted his trial testimony; he now claims that only Kondian came to him with a plan to rob Mr. Alessi, and Scott did not hear the conversation¹²; 2). Robert Pauley who was told by an investigator named Joe Wyckoff that Kondian admitted to Wyckoff that he killed Alessi; 3). Richard Kondian's affidavit which is essentially the same as was presented in first motion for postconviction relief; 4). Valerie

¹⁰ Kondian's denial of a robbery plan and his denial that the victim was hit after he was tied up is contradicted by Scott's clemency testimony.

¹¹ This fact is corroborated by Ryan, but contradicted by Scott's theory at trial as well as statements of others affiants who claim that Kondian was angry because Scott left him there.

¹² The state's evidence that Scott heard of Kondian's plans for the night is corroborated by Soutullo's girlfriend's testimony. She stated that both Kondian and Scott approached Soutullo. (R 992-995, 997-998).

Cook, Scott's sister who allegedly received a letter from Kondian where he admits to the killing; 5). Jeffrey Walsh, investigator for CCR who interviewed Kondian. Kondian told him that he cut his finger on a champagne bottle that he used to strike the victim. Walsh describes petitioner as a very docile passive man; 6). affidavit of Robert Avera, which is similar to the one presented in writ of error coram nobis; 7). Susan Higginbotham who states that Scott's counsel Paul Morris told Scott not to tell the truth at the first clemency hearing regarding their purpose for being at the victim's house that evening; 8). Robert Maybusher, an inmate who states that Kondian admitted to killing Mr. Alessi. In essence, all the affidavits center around Scott's claim that Kondian was responsible for the murder of James Alessi.

In the most recent motion for postconviction relief, Scott presented affidavits from numerous people, many of whom have already presented their statements in any one of the three former state collateral proceedings and federal petition.¹³

Of the new affidavits presented, Scott relies heavily on the statement of Dexter Coffin and Robert Dixon. Coffin states that he and Kondian were in jail at the same time. Kondian told him that he killed a fag. Coffin claims that he

¹³ Included in the latest motion are the following who have already been presented in this court; Robert Avera, Katherine Ryan, Allen Brasher, David Roth, George Barnes, and Richard Kondian, Valerie Cook, James Maybusher, Bernadine Bernard, Timothy Reining. Also presented before was impeachment evidence regarding Charles Soutullo.

told the state about the conversations. Dixon was told by another affiant, Allen Brasher, that Alessi was a homosexual. Scott told Dixon that he did not kill Mr. Alessi.

Scott also relies heavily on an affidavit of the medical examiner. Dr. Cuevas states that the evidence is consistent with the possibility that the murder weapon could have been a champagne bottle. He also stated that he could not tell whether the killer was left handed or right handed. Lastly he again stated as he did at trial, that the presence of sperm could have been from sexual activity or spontaneous omission as a result of the severe injuries. (R 1209-1210).

A review of the evolution of Scott's theories demonstrates his lack of credibility and in no way exonerates him or establishes his innocence. There are inconsistencies among the affidavits as well as inconsistencies and flat out contradictions between Scott's own presentations as well as between his stories and those of some of his affiants. The lack of credibility of Scott's claims of innocence is shared by all the courts that have reviewed this case:

"Based on the facts in this record, a 'defense of others theory' and a theory that Kondian primarily was responsible for the murder could not have been asserted at the same trial".

Scott v. State, 513 So. 2d 653, 655 (Fla. 1987).

The federal district court has said:

"As noted by the Florida Supreme Court, Scott admitted in his clemency testimony that Kondian voluntarily engaged in sex

with Alessi so that Scott could look through the house for things to steal. Given this admission, Scott's claim of ineffective assistance of trial counsel is hypothetical. He cannot demonstrate that confidence in the result of his conviction and/or sentence is undermined because defense counsel did not present and argue an admittedly false theory of defense. (emphasis added).

Scott's present rape/defense of others theory is flatly inconsistent with his clemency testimony."

Scott v. Dugger, 686 F. Supp. at 1522.

The same conclusion has been made by the 11th Circuit Court of Appeals as well:

"Appellant's counsel did not render ineffective assistance of counsel by failing to present the theory that appellant was not in Alessi's home at the time of the murder. The Florida Supreme Court considered appellant's clemency testimony on this issue. In the clemency hearing, appellant testified that Kondian deliberately engaged in sex with Alessi so that appellant could rummage through the house for things to steal. Appellant now argues, however, that his lawyer should have presented a 'defense of others' theory. Such a defense would contradict appellant's clemency testimony and present a theory that Alessi attempted to rape Kondian and that appellant came to Kondian's aid. The defense theory would also assert that, after successfully interrupting the rape attempt, appellant left the house while Alessi was still alive. Obviously, appellant's clemency hearing testimony proved such a defense false. Thus, appellant's lawyer could not have rendered ineffective assistance by failing or refusing to present a false defense. The district court so found, and we agree."

Scott v. Dugger, 891 F.2d 800, 803 (11th Cir. 1989).

All reviewing courts have found sufficient evidence of petitioner's guilt"¹⁴. More importantly, this court as well as the 11th Circuit have also found petitioner's "newly discovered evidence" to be lacking in credibility. Given Scott's inability to establish "actual innocence" to overcome the numerous procedural bars attached to this successive appeal, this appeal must be summarily denied as must the request for stay of execution.

Given the fact that these affidavits have come in piecemeal fashion, mostly on the eve of scheduled executions¹⁵ and are patently inconsistent, petitioner has not demonstrated any colorable showing of innocence let alone one which would constitute an "extraordinarily high" showing as required in Herrera v. Collins, 506 U.S. __, 122 L. Ed. 2d 203, 113 S.Ct. __ (1993). In reversing a stay order of the trial court in a successive motion for postconviction relief this Court has recently said:

"All of Stewarts other allegations have been previously or certainly could have been made. Although he has not prevailed, he has had multiple opportunities to persuade us of the wrongness of his conviction or the correctness of his death appeal. The trial judge erred in granting

¹⁴ On appeal to the 11th Circuit, petitioner did not raise his challenge to the sufficiency of the evidence for premeditated murder.

¹⁵ This is petitioner's third death warrant.

the stay of execution and conducting
further proceedings."

State v. Salmon, State v. Stewart, 636 So. 2d 16, 17 (Fla. 1994).

All relief must be denied as this entire motion is procedurally
barred.

III. STATEMENT OF THE FACTS

Charles Soutullo [a/k/a Eddie McCarthy (R 641)], Rick Kondian, and Appellant knew each other well, especially Rick and Appellant. (R 719). On the evening of December 4, 1978, (R 719) between 7:00 and 10:00 P.M., Soutullo, Rick, and Appellant had a conversation. (R 720). Before speaking, Rick asked Felicia [Soutullo's girlfriend (R 717)] to leave their presence (R 721). Then both Rick and Appellant asked Soutullo to come with them "to rob this guy named Jim." Both of them said that "they planned to rob him, take his money, tie him up, throw him in the closet." (R 722, 725-728). In addition, they were going to kill the victim by injecting an overdose of battery acid into him (R 728). The conversation ended when the victim, Jim Alessi, drove up and Appellant and Rick entered Alessi's car. Soutullo then told Felicia about the conversation. (R 732). Felicia confirmed that a conversation between Appellant, Rick, and Soutullo had occurred. (R 992-995, 997-998). Soutullo testified that Mr. Alessi was Kondian's sugar daddy, and therefore he did not need to rob him. (R 755-756).

Defense counsel and Appellant inferred that Soutullo's testimony was made in exchange for leniency in his own, unrelated criminal prosecutions; this inference was proven false. (R 679-680). No authority ever told Soutullo that his testimony would help him in some other way, and at the time of Appellant's trial, there were no charges pending against Soutullo. (R 679-680),

because it would help his probation, but explained that his only reason for testifying was that he was under subpoena. (R 680). In other words, if he failed to obey the subpoena, his probation would be revoked. There was no evidence of any "deal" inducing Soutullo to testify.

At 11:00 P.M. (R 825), soon after the conversation between Appellant, Rick and Soutullo, Jim Alessi arrived at his father Carmen's house for the purpose of borrowing his father's station wagon for use in the florist business. (R 816, 834). While Jim, Rick and Carmen walked inside the house, Appellant sat silently in Jim's car wearing Jim's glasses. (R 822). After Carmen gave Jim an umbrella, which was placed in the rear of the station wagon (R 820), Jim, Rick and Appellant drove away in the two vehicles. Carmen saw the umbrella in Jim's back year after the homicide. (R 830).

On December 5, the morning following the homicide, investigating detectives found Jim's nude body in his living room, amidst a great deal of blood and disarray. Electrical cord and telephone wire bound Jim's hands and feet. (R 861; 1190). Throughout the entire house were broken articles, debris, and blood stains. (R 861-864, 903-904, 913, 920, 1301). Especially large amounts of blood were found on the living room wall next to the couch, on the couch (R 864), and on a portion of the dining room rug. (R 924). Blood was found in the living room, kitchen and dining room. Below Jim's feet was a statute of a teddy bear, partially broken and scattered. (R 864, 937).

Appellant's fingerprints were found throughout the house. Several were lifted from the cover of a book found on a coffee table. (R 945, 948, 1122-1124). Three prints were on the neck of a broken vase found in the kitchen. (R 946-947, 1123-1124,1300). Another print was found on an ashtray located in the family room. (R 948, 1125). Another was found on a blood-tipped knife found on a sofa next to the victim. (R 949, 1125-1126).

The medical examiner described Jim as a muscular 5'8", 200 pound person. (R 1191). Jim's wrists and feet had been tied very tightly while he was alive, causing swelling. (R 1193-1194), 1200). A ring had been taken from a finger. (R 1202). Jim had many bruises on the trunk of his body (R 1191, 1200). One finger was crushed. (R 1201). Three fatal blows caused lacerations to the head. (R 1203). The blows were struck by a blunt instrument. (R 1210). Jim's skull was fractured at each of those sites. There were six blows to the head altogether. The brain was swollen and bruised. (R 1206). The blows were very heavy (R 1209). There was no way to tell the length of time between blows; they could have been 15 minutes apart (R 1211). The doctor estimated that it would take anywhere from 15 minutes to an hour between the fatal blows to the head, and death. (R 1208). The medical examiner also stated that the sperm found on the victim's penis could have come from either sexual activity or spontaneous emission as result of the head injuries. He further opined that spontaneous emissions were not common, but that they did happen frequently enough. (R 1210).

On December 7, Soutullo told police about his conversation with Appellant and Rick. (R 740). On December 9, Jim's car was found in Orlando, five days after the homicide. (R 1033).

On January 4, 1979, Appellant was arrested in a Sacramento, California motel. (R 777-779). He apparently was going to flee (R 783), but stopped when he saw the officers' guns. (R 784). Appellant's room was secured (R 781), and various items of jewelry, including a golden bear charm, was seized. (R 787). Two of those gold pieces (R 886) were shown to the jury. (R 874-876). Testimony of a Nancy Flair, a business established that Jim always wore, and kept in his house, much jewelry. In addition, Flair testified that Alessi had three golden bear charms; he wore one around his neck (R 1242), and one had been in his shop on the day he was killed. (R 1240-1241). At the time the police processed Jim's house, however, only one piece of gold jewelry (a watch) was recovered. (R 1292-1293).

During penalty phase testimony, Scott presented among other witnesses, the following testimony from Dr. Fisher. He testified that he had reviewed all materials including psychiatric reports, psychological reports, psychological testing. Included in these reports was an intellectual evaluation based on the WISC test. (R 1553). On cross examination Fisher stated that appellant was not retarded, nor was he psychotic, and his intelligence was normal. (R 1565).

SUMMARY OF ARGUMENT

Scott's Issues I through III are procedurally barred as they have all been raised in a previous motion or the facts have been raised in a previous motion under the guise of a different legal theory.

Issue IV regarding alleged mental incapacity is barred for failing to raise it a prior collateral proceeding.

Issue V is procedurally barred as it was raised before as a potential claim and it still remains just that, an alleged potential claim.

Issue VI is procedurally barred as it could have been raised in the prior collateral proceeding. In any event it is without merit.

Issue VII is procedurally barred as any claim alleging a violation of chapter 119 could have been raised before now.

ARGUMENT

ISSUE I

SCOTT'S CLAIM THAT CRITICAL EXCULPATORY
EVIDENCE WAS NOT PRESENTED IS
PROCEDURALLY BARRED AS IT HAS ALREADY
BEEN RAISED IN ALL PRIOR PROCEEDINGS

Scott claims that the following newly discovered overcomes the procedural bar attached to this successive motion.

1). The state concealed a "confession" by the codefendant Richard Kondian to inmate, Dexter Coffin; 2). Kondian also told a friend, Robert Dixon, that he was angry at Scott for running out on him the night of the murder. Both men indicated that Kondian described the victim as a homosexual; 3). Charles Soutullo is a liar as evidenced by impeachment evidence obtained through Kondian's attorney, and Soutullo's affidavit that he was coerced into testifying by the police¹⁶ 4). The state manipulated the

¹⁶ Soutullo's veracity or lack thereof was litigated in the first postconviction motion under the guise of ineffective assistance of trial counsel for his failure to adequately impeach Soutullo. Scott again presents this same information from the same witness who appeared before, David Roth, the codefendant's attorney. Scott v. State, 513 So. 2d 653, 654-653 (Fla. 1987).

In the last postconviction motion, Scott obtained a partial recantation of Soutullo's trial testimony where he says that he was only approached by Kondian involving the plan to rob and murder Mr. Alessi. This court found that Soutullo's recantation would not have provided a different result. This Court has noted the inconsistency between Soutullo's recantation and Scott's own clemency testimony. Scott v. State, 634 So.2d 1062, 1065 (Fla. 1993).

At Scott's first clemency hearing, Scott admitted that there was a plan to rob Mr. Alessi while Kondian was having sex with him. Scott v. State, 513 So. 2d 653 n.* (Fla. 1987).

testimony of the medical examiner regarding the potential murder weapon as well as erroneously implying that the killer was left handed; 5). The state failed to reveal evidence of the victim's sexual orientation via Coffin and Dexter¹⁷; 6). Sperm found on the victim was most likely from sexual activity¹⁸; 7). Evidence that Kondian showered after the murder¹⁹; 8).The state engaged in

¹⁷ In his first habeas petition to the Florida Supreme Court, Scott argued that appellate counsel was ineffective for failing to raise on appeal that the trial court erred in precluding comment during opening argument that the victim was a homosexual. Scott v. Wainwright, 433 So. 2d 974, 975 n* (Fla. 1983). The issue was then raised in federal district court. Scott v. Dugger, 686 F.Supp. 1488, 1500 (S.D. Fla. 1988).

At trial the jury heard evidence that Mr. Alessi was considered Kondian's sugar daddy. And that Soutullo told Kondian that there wa no need to rob Mr. Alessi given that the status of thier relationship. (R 755).

¹⁸ At trial the medical examiner stated that the presence of sperm on the victim could have been caused from sexual activity or as a result of death. He further opined that it is not common for such an emission at death but it happens frequent enough. (R 1210). The affidavit submitted by Dr. Cuevas now does not differ from that testimony.

In litigation of the first motion for postconviction relief, Scott argued that trial counsel was ineffective for failing to adduce testimony to establish that sexual activity had occurred. This Court found that the medical examiner did in fact testify that the presence of sperm could have been the result of either sexual activity or a spontaneous emission.

This Court also found that the alleged rape defense was contradicted by Scott's own clemency testimony. Scott v. State, 513 So. 2d at 655.

¹⁹ Testimony to that effect was adduced at trial. There was blood on the bathroom door that could have been attributed to Kondian, Scott or Alessi. (R 1175). There was also blood in the shower that could have come from either Kondian or Scott but not form Alessi. (R 1183). Scott's blood was never identified to the

ex parte discussions with the Chief Judge to arrange for a different judge²⁰; 9). Kondian has repeatedly confessed²¹ to the murder to several people: Bernadine Bernard; Robert Avera; Valerie Cook; Kondian's statement to Rhode Island police; Timothy Reinig; Michael Malley; Jeff Hastings; 10). Crime scene evidence reveals that the murder was a disorganized crime rather than a prearranged plan to murder; 10). Bernadine Bernard did not see blood on Scott's clothes that night; 11). Kondian had a cut on his finger²²; 12). Scott ran out of the house through a torn screen; 13). Kondian says that the plan was to buy drugs from

exclusion of the other two possible contributors. (R 1183).

The jury was aware that Kondian cut his finger during the struggle. (R 614, 618, 1278, 1322, 1324, 1931).

²⁰ Barry Krisher testified at the argument on the motion for postconviction relief that he does not remember speaking to any judge regarding reassignment of the case.

There was a note in the file from Barry Krisher to Ken Selvig telling him to talk to the public defender's office regarding reassignment. Furthermore, there was a letter from the first judge recusing himself because he did not feel comfortable handling a capital case.

²¹ The affidavits of all these people indicate that either Kondian told them or that he told someone else that Scott ran out of the house during the struggle. The following people have provided identical affidavits on prior occasions; Valerie Cook, Robert Avera, John Maybusher, Allen Brasher, Kathryn Ryan Robert, Pauley Robert Ruglio, Susan Higginbotham, Bernadine Brenard and Timothy Reinig.

Kondian's numerous statements have also been provided in prior postconviction motions. Scott, 513 So. 2d at 655; Scott, 634 at 1065.

²² See foot note 19.

Alessi and not to rob him²³; 14). Phone records indicate a call was made from Alessi's florist shop to Kondian's parents; 15). Scott has an IQ of 69²⁴; 16). Kondian is a violent homosexual; 17). Scott's prior violent felony is invalid²⁵ and the aggravating factor of "heinous, atrocious and cruel is invalid because the jury instruction is vague²⁶ ; 18). Judge

²³ Scott's own clemency testimony disputes that. Scott v. State, 513 So. 2d 653 n.* (Fla. 1987).

²⁴ Dr. Fisher testified at trial that he based his evaluation on a lot of materials, including psychiatric reports, psychological reports, Rorschach, TAT, MMPI, and the WISC intellectual evaluation. (R 1553). Fisher stated that Scott is not retarded, he possess normal intelligence and he is not psychotic. (R 1565).

During litigation of the second motion for postconviction relief, Scott presented an affidavit from Dr. Caddy who stated that Scott's IQ was 84. See Scott's appendix to Case No. 76,831 and 76,756. Scott v. State, 634 So. 2d 1062 (Fla. 1993).

During his first clemency proceeding, Scott stated that he was studying for his GED and that he improved his intellectual functioning from a 6th grade level to an 11th grade level. See transcript of clemency hearing attached to writ of error coram nobis. Case no. 63,736 and 63,737. Scott v. Wainwright, 433 So. 2d 974 (Fla. 1983).

²⁵ In the last collateral motion, Scott indicated to this Court that he was currently in litigation in California state court, attempting to get his 1974 guilty plea overturned. The plea still stands as Scott was denied all relief in state court on February 21, 1991. Scott did not commence federal proceedings until June of 1994. Scott has yet been able to obtain relief.

The state argued that the Johnson v. Mississippi claim was procedurally barred and no valid claim was presented given that his California conviction was still valid. This Court denied all relief based on a procedural bar. Scott v. State, 634 So. 2d 1062 (Fla. 1993).

²⁶ Scott attempted to challenge the "HAC" instruction for the first time in this Court during the last appeal of a motion for postconviction relief. He did so in his reply brief to this Court. The state argued at oral argument, that the issue was

Rudnick's letter to the parole commission objecting to Kondian's release²⁷; 19). An affidavit from the trial attorney stating that the statements of Soutullo, Coffin, Dexter and the medical examiner would have been exculpatory evidence used by him.²⁸

All of the above facts/issues have already been brought out at trial or litigated in one of the prior collateral proceedings consequently they are all procedurally barred.²⁹

Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1993); Jones v.

Court. The state argued at oral argument, that the issue was procedurally barred for raising it for the first time in a reply brief, for failing to raise it at trial, on direct appeal or in the first motion for postconviction relief. This Court found the entire motion for postconviction relief to be procedurally barred. Scott v. State, 634 So. 2d 1062, 1065 (Fla. 1993).

²⁷ This Court found Scott to be procedurally barred from raising the alleged disparate treatment of the two codefendants. Scott v. State, 634 So. 2d 1062, 1065 (Fla. 1993).

Kondian's guilty plea and sentence were known since February 6, 1980. Judge Rudnick's letter does not overcome the procedural default attached to the untimely nature of this issue.

²⁸ Trial attorney George Barrs testified at the first motion for postconviction relief, Scott v. State, 513 So. 2d 653, 654 (Fla. 1987), consequently, relitigation of same facts based on a different argument is procedurally barred. Francis v. Barton, 581 So. 2d 583 (Fla.), cert. denied, ___U.S.___, 111 S.Ct. 2879, 115 L. Ed. 2d 1045 (1991).

²⁹ Scott claimed in number 8 that the prosecutor engaged in improper/ ex parte communications with the Chief Judge. This claim is procedurally barred for failing to raise it on appeal. If Scott objected to the recusal as he claims he did, then he could have raised the issue on appeal.

Scott does not even attempt to explain why he failed to raise this claim before now. Furthermore, if he claims that he was not aware of the allegation until he received 119 material from the state attorney's office such will not overcome a procedural bar as he should have pursued same before now. Zeigler v. State, 632 So. 2d 48 (Fla. 1994).

State, 591 So. 2d 911 (Fla. 1992); Preston v. State, 564 So. 2d 120 (Fla. 1990); Francis v. Barton, 581 So. 2d 583 (Fla. cert. denied, ___ U.S. ___, 111 S.Ct. 2879, 115 L. Ed. 2d 1045 (1991)).

As detailed above, most of the information/evidence presented in this motion was already raised in any one if not all the prior state collateral proceedings. The "new" affidavits of Coffin and Dixon do not overcome the procedural barred attached to this successive motion. More importantly, the "new" information does nothing to exonerate Scott or establish a probability that a different result would have occurred if this evidence was presented. Williamson v. Dugger, Case No. 74, 973 & 76, 860 (Fla. November 10, 1994). Curiously in this motion Scott claims that this exculpatory evidence was never presented before because of state misconduct. In the past, Scott claimed it was not presented before because of ineffective assistance of counsel. Scott v. State, 513 So. 2d 653 (Fla. 1987). Consequently not only are his prior statements and theories inconsistent with one another, the legal theories under which he repeatedly brings forth the claims are also inconsistent. In summation, the "new" information is identical in content to what has previously been presented and already found by this Court to be lacking in credibility. Williamson. This issue remains procedurally barred. Preston; Jones; Francis.

ISSUE II

SCOTT'S CLAIM THAT THE STATE DELIBERATELY USED FALSE AND MISLEADING TESTIMONY AND ARGUMENT IS PROCEDURALLY BARRED FOR FAILING TO RAISE IT IN PRIOR LITIGATION

In issue II Scott claims that the State misled the judge and jury and withheld evidence. Specifically he claims that the state withheld evidence of the victim's sexual orientation, misled the jury when it claimed that a particular weapon was the murder weapon, misinformed the jury when it stated that the killer was left handed, presented perjured testimony of Charles Soutullo, misrepresented to the jury Kondian's position, presented false argument regarding who may have torn the screen from the door, and falsely argued that other crime scene photographs were not relevant.

As with Issue I this claim is also procedurally barred as it is again a variation of Scott's previous arguments, i.e.; Kondian killed the victim. Scott, 634 So. 2d at 1065; Francis v. Barton, 581 So. 2d 583, cert. denied, 111 S.Ct. 2879, 115 L. Ed. 2d 1045; Foster v. State, 614 So. 2d 455 (Fla. 1992); Spaziano v. State, 570 So. 2d 289 (Fla. 1990). Furthermore to the extent that any part of this issue was not previously raised, Scott cannot overcome the procedural bar that such issues should have been raised on direct appeal. Allegations of prosecutorial misconduct is something that should have been raised on direct appeal. Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990).

ISSUE III

MR. SCOTT'S CLAIM OF INNOCENCE IS
PROCEDURALLY BARRED AS IT HAS BEEN
RAISED IN PRIOR LITIGATION

In claim three, Scott again is claiming that he is innocent of murder and innocent of the death penalty. Sawyer v. Whitely, 112 S.Ct. 2514 (1992). In Sawyer the United States Supreme Court, articulated an "actual innocence" exception that would overcome the procedural bar of abuse of the writ. Sawyer is not applicable to the instant case. Under Florida case law this Court will consider a claim of newly discovered evidence if the evidence was not known and could not have been known by them with the use of diligence. Jones v. State, 591 So. 2d 911, 913-916 (Fla. 1992). The Court notes in the opinion that this standard is currently used by the federal courts as well. Jones, 591 So. 2d at 915.³⁰

Scott cannot overcome the procedural bar attached to this successive motion. In Stewart v. State, 632 So. 2d 59, 61 (Fla. 1993) the Florida Supreme Court stated:

"Now Stewart argues that he is 'innocent of the death penalty' and that the prejudice part of the test for ineffectiveness should be reconsidered. This is reargument of the claim of ineffectiveness, which is not proper in successive motions.

³⁰ Scott challenged the error coram nobis standard in federal court. The district court upheld the constitutionality of same and analogized it to the federal standard regarding procedural bar. Scott v. Dugger, 686 F. Supp. 1488, 1513-1515 (S.D. Fla. 1988).

Again Scott claims that the newly discovered evidence just uncovered consists of the affidavits of Coffin and Dixon and Soutullo's recanted testimony. Scott claims that these affidavits prove his innocence. This Court has already found similar affidavits not to be "newly discovered evidence." Scott, 634 So. 2d at 1065.³¹

Also based on these same affidavits is Scott's claim that his sentence is in violation of Enmund v. Florida, 458 U.S. 782 (1982). This issue is procedurally barred as it has been raised and rejected in Scott's state habeas petition. Scott v. State, 433 So. 2d 974 (Fla. 1983).³²

Scott's attack on the aggravating factors is also procedurally barred. Kelly v. State, 569 So. 2d 754, 756 (Fla. 1990). Scott challenged the sufficiency of the evidence to establish "heinous, atrocious, and cruel on direct appeal. That challenge is without merit and remains so. Scott v. State, 411 So. 2d 866, 869 (Fla. 1983); Scott v. Dugger, 686 F. Supp. 1488 (S.D.

³¹ The substance of the Coffin and Dixon affidavits are identical to the substance of all previous affidavits filed in prior collateral proceedings, i.e., Kondian is more culpable. Soutullo's recantation has been previously litigated in the prior motion and found to be unmeritorious. Soutullo's girlfriend testified that they were approached by Kondian and Scott. Scott was present during the conversation with Soutullo. (R 992-998).

³² The district court made a finding that Scott's clemency testimony alone satisfied the requirements of Enmund v. Florida, 458 U.S. 782 (1982). Scott v. Dugger, 686 F. Supp. 1488, 1520 n.10.

Fla. 1988); Scott v. Dugger, 891 F. 2d 800 (Fla. 1989).
Relitigation is barred.

Scott now is attempting to attack the constitutionality of the "HAC" jury instruction. Such a claim could have been raised on direct appeal but was not. Failure to do so precludes review now. Koon v. State, 619 So. 2d 246 (Fla. 1993); Ponticelli v. Dugger, 618 So. 2d 154 (Fla.) cert. denied, U.S. 114 S.Ct. 352, 126 L. Ed. 2d 316 (1994).

Scott is presently attempting to challenge the constitutionality of the jury instruction on "HAC" in both federal district court and in the 11th Circuit Court of Appeals.³³ In both courts he is proceeding under a theory that a recent panel decision of the 11th Circuit, Glock v. Singletary, F.3rd (11th Cir. October 7, 1994) is an intervenening change in the law. Glock overturned a Florida death sentence based on an vague jury instruction pursuant to Espinosa v. Florida. 112 S.Ct. 2926 (1992).

In both federal venues the state argued that Scott has never presented this challenge to the jury instruction to any court, state of federal. Attached to the written response in federal district were all the pleadings from state and federal courts outlining how the issue has been previously presented.

³³ In district court, Scott argued that there has been an intervenening change in the law pursuant to Fed. R. of Pro. 60(b). In the 11th Circuit, Scott has argued that the Court should recall mandate from Scott v. Dugger, 891 F. 2d 800 (11th Cir. 1989).

(See attached exhibit). The state maintained that Scott has only challenged the application of the factor itself and never has challenged the instruction.³⁴ The federal district court has determined that Scott in fact did not challenge the instruction in federal court. (See attached exhibit).

Oral argument on the motion to recall the mandate was held in the 11th Circuit on Thursday, November 10, 1994. The Court has not yet ruled on the issue. A focus of the argument centered on whether this issue was properly presented in federal court. The circuit court did inquire as to the procedural posture of this "HAC" instruction issue in state court. The circuit court has requested a copy of the briefs filed in this appeal. The state urges this Court to find this claim in irrevocable procedural default for Scott's failure to ever properly raise this issue on direct appeal or in one of the previous collateral proceedings. The state also requests that this Court make that finding in a clear and explicit statement. Francis; Preston; Ylst v. Ninnemaker, 111 S.Ct. 2590 (1991).

On direct appeal Scott challenged the propriety of the aggravating factor that the murder was committed during the course of a robbery. Scott did not challenge the aggravating factors of under sentence of imprisonment and prior violent

³⁴ See footnote 26.

felony, consequently he is procedurally barred from raising that issue at this late juncture. Kelly.³⁵

Scott's claim that his sentence is disproportionate, based on Kondian's alleged greater culpability has been found to be procedurally barred in his last collateral proceeding. Scott, 634 So. 2d at 1065. Nothing presented in this appeal warrants revocation of that procedural bar. Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).

Scott's claim that he is mentally retarded is also barred for failing to raise it before now. Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, __ U.S. __ 111 S.Ct. 2879, 115 L. Ed.2d 1045 (1991); Woods v. State, 531 So. 2d 79 (Fla. 1988); Foster v. State, 614 So. 2d 455 (Fla. 1992); Spaziano v. State, 570 So. 2d 289 (Fla. 1990).³⁶

³⁵ The substance of this argument appears at issue V.

³⁶ See footnote 24 detailing the evidence to establish that Scott is not mentally impaired.

ISSUE IV

SCOTT'S CLAIM THAT HE IS MENTALLY
RETARDED AND BRAIN DAMAGED IS
PROCEDURALLY BARRED FOR FAILING TO RAISE
IT IN A PRIOR MOTION

Scott is procedurally barred from raising any claim regarding his intellectual functioning at this late date. As stated in issue III, the basis for this claim was available in the previous motion for post-conviction relief.³⁷ This successive motion is procedurally barred. Wood State, 531 So. 2d 79 (Fla. 1988)(executing a mentally deficient person could have and should have been raised on direct appeal).

³⁷ See footnote 24. The credibility of this claim must be seriously called into question given the contradictory statements that have been made throughout this case.

ISSUE V

SCOTT IS PROCEDURALLY BARRED FROM A
RAISING A "POTENTIAL" JOHNSON v.
MISSISSIPPI CLAIM AS SAME COULD HAVE
BEEN RAISED IN A PRIOR MOTION

Scott is procedurally barred from raising this potential claim again. In the prior collateral proceedings Scott asked this Court for a stay of execution in order to get his state conviction overturned in California state court. This Court granted a stay based on the appointment of new counsel. Scott v. State, 634 So. 2d 1962, 1063 (Fla. 1993).³⁸ Scott unsuccessfully challenged the prior conviction in California state court. Litigation in state court was concluded on February 21, 1991. Scott waited until June of 1994 to begin federal proceedings. Scott is now attempting to challenge his prior conviction in federal court in California, in an attempt to establish a Johnson v. Mississippi, 486 U.S. 578 (1988) claim.³⁹ As of the filing of this brief, Scott's prior conviction is still valid. That litigation did not commence until June of 1994.

³⁸ The state argued that this claim was procedurally barred for failing to raise it in a prior collateral proceeding. The state also argued that the issue was not even viable given that Scott's prior conviction was then and still is valid. In ultimately denying all relief, this Court did not discuss the procedural deficiencies regarding this claim. The court however did determine that entire collateral proceedings were procedurally barred. Scott, 634 So. 2d at 1065.

³⁹ A federal magistrate has recommended that the petition be dismissed for lack of subject matter jurisdiction. Scott has also just filed a successive petition in federal court in the Southern District of Florida regarding this issue. The state's response is due on Sunday November 13, 1994. Argument on the motion is set for November 14, 1994

Again Scott asks this Court for a stay to pursue this claim again in yet another venue. Scott's piecemeal litigation is procedurally barred. Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1993); Preston. The viability of this claim must be seriously questioned given that Scott suspended litigation of this claim for three and half years.⁴⁰

Furthermore this claim is untimely as it should have been raised within two years of the knowledge that his guilty plea was "invalid". In other words, Scott knew long before now that his guilty plea from 1974 was in some way unconstitutional. This claim is procedurally barred. Henderson v. Singletary, 617 So.2d 313 316 (Fla. 1993)(Johnson v. Mississippi claim barred when failure to attack the prior conviction was not done within two years of knowing basis for the attack).

The legal basis for this claim was also known before now. The reliability and relevance of Scott's prior conviction was known before litigation of his direct appeal. A person's criminal record/activity has always been considered relevant in a capital sentencing determination. Tucker v. Kemp, 762 F.2d 1480 (11th Cir.)(en banc), vacated, 474 U.S. 1001, 106 S.Ct. 517, 88 L. Ed.2d 452 (1985), reinstated, 802 F. 2d 1293 (1986), cert. denied, 480 U.S. 911, 107 S.Ct. 1359, 94 L. Ed. 2d 529 (1987). Furthermore a sentencing determination cannot be predicated upon

⁴⁰ Scott has filed a successive federal habeas petition in federal court in Miami raising this claim. Argument is set for Monday November 14, 1994 at 8:00 A.M.

unreliable, invalid or constitutionally impermissible factors. Zant v. Stephens, 462 U.S. 862, 884-885, 887 n. 24 (1983).

Under Florida law, a vacated conviction cannot be used as an aggravating factor. Oats v. State, 446 So. 2d 90 (Fla. 1984), appeal after remand, 472 So. 2d 1143. Finally the use of invalid prior convictions to enhance a sentence is unconstitutional. United States v. Tucker, 404 U.S. 443 (1972). As demonstrated above the legal and factual wherewithal to raise this claim has been present long before litigation of this fourth collateral proceeding. Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993).

ISSUE VI

PROCEDURAL BAR RULES HAVE NOT BEEN
ARBITRARILY APPLIED IN SCOTT'S CASE,
SCOTT IS BARRED FROM RAISING THIS CLAIM
NOW

Scott' challenge to his sentence based on Kondian's sentence is still procedurally barred. The case of Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992) does not remove the procedural bar attached to Scott's claim of disparate treatment. In Scott(Abron), this Court made it clear that the evidence regarding the codefendant's sentence must be new. In the instant case Kondian's sentence was known as of February 6, 1980. This Court's procedural bar in this case is consistent with the Court's holding in Scott (Abron). Furthermore, this argument regarding inconsistent application of a procedural bar based on Abron Scott is also barred for failing to raise it before now. Kennedy v. State, 599 So. 2d 991 (Fla. 1992); Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994).

Lastly juror polling is inadmissible and cannot form the basis for relief. Johnson v. State, 593 So. 2d 206 (Fla. 1992). This principle applies in capital cases. Mitchell v. State, 527 So. 2d 179 (Fla. 1988).

ISSUE VII

SCOTT'S ALLEGED PUBLIC RECORDS IS PROCEDURALLY BARRED

Scott's latest 119 claim is also procedurally as it is untimely. Zeigler v. State, 632 So. 2d 48 (Fla. 1994); Agan v. Dugger, 560 So. 2d 222 (Fla. 1990); Clark v. Dugger, 533 So. 2d 1144 (Fla. 1988). This request on the eve of execution is nothing more than a delay tactic.

Scott requested and received the state attorney's files in April of 1990. Scott made another request and received the same file again in March of 1994. If there was a complaint or allegation that the state's or the Boca Police Department's return was not complete same should have been made before October 31, 1994. Swafford v. State, 569 So. 2d 1264, 1267 (Fla. 1991).

III. REQUEST FOR STAY OF EXECUTION SHOULD BE DENIED


Because all of the claims presented by Scott constitute an abuse of the writ and/or are either procedurally barred or conclusively without merit, no relief is warranted. No stay of execution is justified. See Delo v. Stokes, 495 U.S. 320, 110 S.Ct. 1880, 109 L.Ed. 2d 325 (1990); Antone v. Dugger, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed. 2d 147 (1984). Further, because the issues presented are not debatable among jurists of reason, no certificate of probable cause should be granted. See Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed. 2d 1090 (1983); Autry v. Estelle, 461 U.S. 1, 104 S. Ct. 20, 78 L.Ed. 2d 1 (1983); Stewart v. State, 632 So.2d 59, 61 (Fla. 1993).

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant caselaw this entire motion should be summarily denied. This Court issued a plain statement in the last collateral proceeding finding the entire motion procedurally barred. Scott has not been able to overcome that bar. All of his claims are relitigation of prior claims. More importantly all the evidence presented to support those claims is also not new and has been before this Court on a number of occasions. To avoid further unnecessary delay, appellee requests that this Court again issue a plain statement finding this fourth successive motion to be in irrevocable procedural default.

Respectfully submitted,

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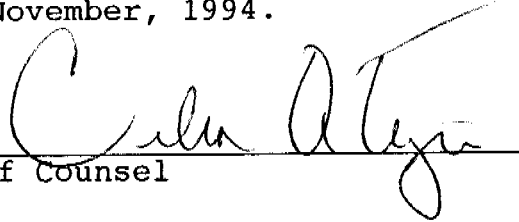


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by Federal Express Overnight Mail to: MARTIN J. McCLAIN, ESQUIRE, Chief Assistant CCR, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida, 32301, this 12th day of November, 1994.



Of Counsel

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INDEX

- Exhibit 1 Defendant's Special Requested Instruction
Record on Appeal #58,588 (Vol. 12, p. 1909-1913)
- Exhibit 2 Charge Conference/Penalty Phase
Record on Appeal #58,588 (Vol. 10, p. 1532-1533)
- Exhibit 3 Brief of Appellant [p. 20 (HAC instruction)]
Direct Appeal #58,588
- Exhibit 4 Answer Brief of Appellee [p. 16-17 (HAC instruct.)]
Direct Appeal #58,588
- Exhibit 5 Pet. for Writ of Habeas Corpus #83-8293 (6-3-83)
[p. 28-29 (Paragraph 10 "HAC")]
- Exhibit 6 Response to Pet. for Writ of Habeas Corpus #83-8293
[p. 33-34 (Par. 10 at p. 28)]
- Exhibit 7 Opening Brief of Petitioner-Appellant
Appeal - 11th Circuit #88-5536
Point IV / p. 68-73
- Exhibit 8 Answer Brief of Respondent-Appellee
Appeal - 11th Circuit #88-5536
Point IV / p. 46-48
- Exhibit 9 Suggestion for Rehearing In Banc and Petition for
Rehearing (Appeal - 11th Circuit #88-5536)
p. 12-13
- Exhibit 10 Petition for Rehearing and Suggestions for
Rehearing In Banc denied Feb. 16, 1990
(Appeal - 11th Circuit #88-5536)
- Exhibit 11 H. "HAC instruction"
Record on Appeal #58,588 (Vol. 11, p. 1704)
- Exhibit 12 Non-published Opinion and Order
Henderson v. Singletary (Case #93-55-Civ-Oc-16)
- Exhibit 13 District Court's Order Dismissing Motion