

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

PAUL WILLIAM SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

SUMMARY INITIAL BRIEF ON APPELLANT'S APPEAL
FROM THE DENIAL OF HIS MOTION FOR FLA. R.
CRIM. P. 3.850 RELIEF AND IN SUPPORT OF
APPELLANT'S APPLICATION FOR STAY OF EXECUTION

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

INTRODUCTION

At the time of Mr. Scott's trial, the State possessed evidence that Mr. Scott's codefendant, Richard Kondian, had admitted killing James Alessi and that Kondian had said that Mr. Scott had run out of Alessi's home before Kondian dealt the fatal blows to Alessi. The State did not disclose this evidence to defense counsel and also has never disclosed this evidence to post conviction counsel. After years of diligent effort, Mr. Scott's counsel has now uncovered the evidence which the State hid. However, the State is asking this Court to allow Mr. Scott's execution to be carried out because Mr. Scott's counsel did not catch the State's nondisclosures and false arguments soon enough. The State is saying that an execution may be carried out despite the existence of significant exculpatory evidence because the State managed to hide that evidence for so long. The State's argument is repugnant to the most basic notions of fairness and reliability. At a minimum, Mr. Scott should be granted a stay of execution and an evidentiary hearing at which he can prove his allegations.

In Mr. Scott's case, the State had extrajudicial statements of Richard Kondian, Mr. Scott's co-defendant, made prior to the time of trial. In one statement, Mr. Kondian had told a fellow jail inmate, Dexter Coffin, that he, Richard Kondian, had killed "that fag" (App. 1). Kondian took full credit and responsibility for the homicide (App. 1). This statement was not disclosed to

Mr. Scott's trial counsel and has been suppressed by the State throughout the postconviction proceedings (App. 27).

Prior to trial, the State was also aware of extrajudicial statements by Richard Kondian to Robert Dixon. According to Mr. Dixon, Mr. Kondian had been looking for someone to accompany him to Mr. Alessi's house on the night of the homicide (App. 3). When he could not get someone else to go, he finally got Paul Scott to go along. However, "Rick [Kondian] was calling the shots" (App. 3). Later, when Mr. Scott and Mr. Kondian returned, Kondian "was yelling at Paul Scott for running out on him" (App. 3). The State never disclosed Mr. Kondian's statements to Mr. Dixon to trial counsel or to postconviction counsel.

The State also had a crime scene photograph showing a ring of blood which was not introduced or shown to the medical examiner, and which was not disclosed to trial counsel. Had the State's medical examiner, Dr. Cuevas, seen the photograph, he would have testified that the ring of blood was consistent with a champagne bottle being the object used to administer the lethal blows (App. 5). Kondian had made statements to the Rhode Island police acknowledging that he struck Mr. Alessi with a champagne bottle.¹ During clemency proceedings the State explained that "Evidence relating to the bloody bottle circles was not introduced in Scott's trial because no connection could be proved

¹Mr. Scott, in his previous 3.850 motion, asserted that the failure to disclose this police report and/or present it to his jury rendered his trial an inadequate adversarial testing.

to Scott." In other words, the photograph of the circle of blood was exculpatory.

The State also did not disclose that Charles Soutullo lied when he indicated that Mr. Scott had participated in a discussion of a plan to murder Mr. Alessi. Originally, Charles Soutullo stated that Richard Kondian had spoken to him, but that Paul Scott was not involved in this discussion. The trial judge ruled Mr. Soutullo's testimony inadmissible unless he indicated that Mr. Scott had made the statements too, and thus Mr. Soutullo included Paul Scott in the conversation (R. 725). Mr. Soutullo says he lied at the State's urging.²

In his prior Rule 3.850 motion, Mr. Scott presented a Brady claim based on Soutullo's recantation and a newly discovered evidence claim based on numerous confessions Kondian had made after Mr. Scott was convicted and sentenced. Here, the evidence concerns statements made by Kondian to Coffin and Dixon before Mr. Scott's trial. The State knew about these statements before Mr. Scott's trial but did not disclose them. The Kondian statements to Coffin and Dixon exculpate Mr. Scott: according to those statements, Mr. Scott ran out of Mr. Alessi's house before Kondian beat Alessi to death.

Mr. Scott's case is virtually identical to Brady v. Maryland, 373 U.S. 83 (1963). Mr. Brady was charged and convicted of capital murder. He was subsequently sentenced to

²Mr. Scott presented a claim regarding Soutullo previously, but this Court said without more it did not warrant an evidentiary hearing.

death by his jury. His defense had been that his co-defendant, Mr. Boblit, "did the actual killing." 373 U.S. at 84. Mr. Boblit, who was tried after Mr. Brady, had made an extrajudicial statement which was not disclosed to Mr. Brady's trial counsel. In this statement, Mr. Boblit indicated that he and Mr. Brady had discussed how to kill the victim and that finally he, Mr. Boblit, "twisted the shirt about the victim's neck." 373 U.S. at 88. The United States Supreme Court found that Mr. Brady's death sentence could not stand because the State's failure to disclose Mr. Boblit's extrajudicial statement violated due process. The Supreme Court adopted the Maryland Court of Appeals reasoning as to how Mr. Brady was prejudiced:

We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck.

* * *

[I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

Brady, 373 U.S. at 88.

This Court applied Brady in Garcia v. State, 622 So. 2d 1325 (Fla. 1993). There, Mr. Garcia had been charged and convicted of capital murder. The jury returned an eight to four death recommendation. His defense had been that a co-defendant was the triggerman. This co-defendant, who pled to a life sentence after Mr. Garcia's trial, had made extrajudicial statements to a third

party who had in turn disclosed them to the State.³ These extrajudicial statements were not disclosed to Mr. Garcia's counsel. This Court found the nondisclosure violated due process and warranted a resentencing:

The statement was clearly material as to penalty, for it would have eviscerated the State's theme that Joe Perez did not exist and that whatever deeds Garcia attributed to Perez in his initial statement to police were in fact Garcia's own acts. Because Lisa Smith said exactly the same thing that Garcia said in his statement to police three days after the crime--that Joe Perez is the same person as Urbana Ribas--the statement would have greatly aided the defense in arguing that Ribas, not Garcia, was a shooter, and Garcia was thus undeserving of the death penalty. The State's failure to disclose the statement undermines the integrity of the jury's eight-to-four recommendation of death and constitutes a clear *Brady* violation.

622 So. 2d at 1330-31 (footnotes omitted).

As in *Brady*, Mr. Scott's jury did not know that his co-defendant had admitted being the killer. As in *Brady*, the State did not disclose this evidence to defense counsel either at trial or during the postconviction proceedings. As in *Brady*, this evidence was highly significant in the penalty phase proceeding, negating aggravating circumstances and establishing mitigating

³In *Garcia*, a transcript of this third party's statement existed and was disclosed in post-conviction. In Mr. Scott's case, no transcript or report regarding codefendant Kondian's statements or its contents has ever been disclosed despite repeated requests for full disclosure.

circumstances.⁴ As in Brady, due process has been violated and confidence is undermined in the outcome of Mr. Scott's trial.

PRELIMINARY STATEMENT

This case is before the Court on the appeal of the circuit court's denial of Rule 3.850 relief and the underlying application for a stay of execution. Given the time constraints involved in this action, this brief presents a summary of the reasons why the circuit court's denial of a stay of execution and Rule 3.850 relief was improper. Mr. Scott requests and urges that this Court enter a stay of execution.

Citations in this brief designate references to the records, followed by the appropriate page number, as follows: "R. ___" -- Record on Direct Appeal to this Court; "PC-R. ___" -- Record on Appeal from denial of the 1986 Motion to Vacate Judgment and Sentence; "H. ___" -- Transcript of hearing conducted in the circuit court on November 2, 1994; "App. ___" -- Appendix Number from the Appendix filed on October 31, 1994 which accompanied Mr. Scott's Motion to Vacate. All other citations will be self-explanatory or will otherwise be explained.

⁴Without this exculpatory evidence, the jury returned a death recommendation by a vote of seven to five. This exculpatory evidence would have tipped the scales for at least one juror, and a life recommendation would have been returned.

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STATEMENT OF THE CASE AND FACTS

On December 5, 1978, Jim Alessi was killed at his home in Palm Beach County. Within a month, Paul William Scott and Richard Kondian were taken into custody and charged with first degree murder. Mr. Scott was arrested in California after Robert Dixon told Florida authorities where Mr. Scott could be located. Mr. Dixon's name was included on the State's witness list but with a "last known address" (R. 1854). Mr. Scott's trial counsel was led to believe that Mr. Dixon was relevant only to how law enforcement was able to locate Mr. Scott. The State did not disclose that Mr. Dixon had told Florida Detective Collins much more. Mr. Dixon in fact told Detective Collins:

One night I was at a pool hall with a man named Allan Brasher. Allan told me that he was supposed to go back to the hotel, meet Rick, and go have dinner with the homosexual man. Allan did not want to go with Rick so he stayed at the pool hall with me. We were playing pool at a place called the Elbow Room.

Later that night I went back to the hotel. Paul's old lady told me that Paul left with Rick. I met Paul Scott for the first time two to three days prior to that night.

I stayed in the room with Paul's old lady. Later that night Rick and Paul came in. When they came in I knew something had happened. Rick was in an uproar. He was pacing around, very demanding and yelling at Paul Scott for running out on him. Rick also called Paul a punk. Rick was also saying things like, "Let's go, pack you shit, we got to get the fuck out of here."

(App. 3). Mr. Dixon further discussed with Detective Collins Kondian's homosexual relationship with Mr. Alessi (see App. 3).

Mr. Scott's trial counsel was unaware that Mr. Dixon was familiar with Mr. Kondian's efforts to recruit someone to accompany him to Mr. Alessi's house, and that according to Mr. Dixon "Rick [Kondian] was calling the shots." See App. 27. Mr. Scott's trial counsel was unaware that Mr. Dixon had reported to law enforcement Mr. Kondian's anger at Paul Scott for running out on him (App. 27). Similarly, the State did not disclose to postconviction counsel Mr. Dixon's statements. In fact, the State specifically indicated that there were no statements of witnesses to disclose (R. 1849). The State has hidden this evidence up until the present time, and has failed to disclose these statements.

Prior to the trial in early 1978, law enforcement contacted an inmate in jail with Mr. Kondian by the name of Dexter Coffin in an effort to obtain evidence against Mr. Kondian. Mr. Coffin reported to law enforcement Mr. Kondian's statements confessing to killing Mr. Alessi. Mr. Coffin has recently explained:

My name is Dexter Coffin. I presently live in Charlottesville, Virginia. In 1978, I was incarcerated at the Palm Beach County Jail with Richard Kondian.

A certain cell block at the Palm Beach County Jail was known as "The Captain's Cell." It was named for Captain Jack Donnelly who had a reputation for trying to get information about the important cases of the inmates at the jail. It was common knowledge that anyone housed in the Captain's Cell either had information in which the State and police were interested or were there to help Captain Donnelly obtain this information.

Richard Kondian and I were both placed in the Captain's Cell. Captain Donnelly pulled me aside soon after I arrived at the

jail and told me he wanted my help getting information from Richard Kondian. From that point on, we had daily meetings in which I briefed the state on anything that Richard Kondian revealed to me about the murder of James Alessi.

It turned out that Richard Kondian did end up confiding in me and asking for my advice quite a bit. Actually, many of the inmates asked for my advice because they felt that I understood the law. In seeking advice, Rick would tell me a lot about what happened on the night that the victim was killed. Rick clearly stated to me many times that he killed James Alessi or "that fag," as Rick would call him. Rick specifically told me that he "beat the shit out of him and killed him" by hitting him over the head. He was talking about how he killed James Alessi and he never mentioned anything about Paul Scott helping him.

In my daily meetings with Captain Donnelly and the representatives of the state, I would divulge to them whatever I had learned from Rick. I repeatedly informed them that Rick said that he was responsible for killing James Alessi. I told them what Rick said about beating the shit out of and killing the victim by beating him over the head.

(App. 1) (emphasis added). Mr. Coffin also indicated that Mr. Kondian discussed Mr. Alessi's sexual orientation as it related to the crime (App. 1).⁵

The State did not disclose Mr. Coffin's name to Mr. Scott's trial counsel (App. 27). Nor did the State disclose the contents of Mr. Coffin's statements to Mr. Scott's postconviction counsel. Mr. Scott's trial counsel was unaware of the existence of this

⁵At trial, the State successfully argued to the judge that defense counsel should be precluded from presenting any evidence of the victim's sexual orientation and drug usage since the defense could cite to no specific evidence indicating that these matters contributed to the homicide (R. 687).

witness who could tell Mr. Scott's jury that Mr. Kondian had admitted to being the person who actually killed Mr. Alessi (App. 27). Such evidence was in fact consistent with the theory of defense and would have been presented by trial counsel had he been aware of it (App. 27).

At Mr. Scott's trial, the State's theory was that Mr. Scott and Mr. Kondian jointly planned the robbery and murder of Mr. Alessi. The State's only witness as to such planning was Mr. Charles Soutullo. "Without question, Soutullo was the State's key witness. Soutullo testified that Kondian and appellant discussed their plan to rob and murder Alessi." Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989). However, Mr. Soutullo has now admitted that he lied at the State's direction because he was afraid of potential charges.⁶

The State called twenty-one witnesses at Mr. Scott's trial. These witnesses were:

1. **Charles Vincent Soutullo:**

Mr. Soutullo testified that he had come to Ft. Lauderdale in June or July of 1978 after stealing some jewelry from a drug dealer in California. (R. 714-15). He met Richard Kondian at the end of the summer and lived with him and Felicia Brooks at the Lauderdale Terrace Hotel and Tradewinds Hotel for a month. (R. 716-717). He met Paul Scott in October of 1978. (R. 718).

⁶Mr. Scott previously presented to this Court his claims arising from Mr. Soutullo's recantation. However, this Court found that, without more, Mr. Soutullo's recantation was insufficient to warrant an evidentiary hearing. Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1993).

On the evening of December 4, 1978, Mr. Soutullo had a discussion with Rick Kondian and Paul Scott. (R. 720). Rick wanted Soutullo to go with him to "rob this guy named Jim." Paul and Rick were both asking Soutullo to come along and help them tie Alessi up and throw him in the closet. (R. 726). They were going to rob Alessi. (R. 728). They were going to "inject him with some acid, battery acid or acid." (R. 728).

Soutullo refused to go because didn't want to get in trouble with the police. (R. 731). He packed up his things after Kondian and Scott left and moved to the Sheraton. (R. 733). He never saw Paul Scott or Richard Kondian again. (R. 736).

Mr. Soutullo thus gave no evidence regarding either Mr. Scott's or Mr. Kondian's condition after the homicide. He made no mention of a champagne bottle, nor of Kondian's cut finger.

2. David Thomas:

He arrested Paul Scott and Bernadine Bernard in Sacramento, CA (R. 776).

3. Robert Reece:

He searched the hotel room in Sacramento and collected evidence from the room (R. 785).

4. James Valle:

He was the manager of Caribbean Tradewinds Hotel in Ft. Lauderdale. He testified regarding hotel records and that Soutullo stayed there (R. 798).

5. Carmen Alessi:

⁷Mr. Soutullo's testimony was ruled inadmissible unless and until he indicated that Paul Scott joined into the conversation and specifically stated that he was part of the plan (R. 725). After the trial judge so ruled, the State was able to get Mr. Soutullo to indicate that Mr. Scott was part of the conversation and was saying the same things Mr. Kondian said.

James Alessi came down to borrow his car on December 4, 1994. Paul Scott and Rick Kondian were with him. Paul Scott did not say anything and stayed in the car the entire time. Paul Scott wore glasses. When they drove away, Kondian was driving Alessi's car and Alessi drove his father's car (R. 812).

6. Arlene Syler:

She had ordered flowers from James Alessi. She went to Alessi's house on December 5, 1978 and called police. She had no contact with Paul Scott or Richard Kondian (R. 831).

7. Bernard Collins:

He was the investigating officer. He did a video-tape of the crime scene (R. 856).

8. Phillip Sweeting:

He processed the crime scene. He testified regarding crime scene evidence collection (R. 890, 1290).

9. Felicia Brooks:

She was Soutullo's girlfriend. She was not present at a conversation between Kondian, Scott and Soutullo. She did not see Scott or Kondian after Alessi's death (R. 1001).

10. Clarence Quinn:

He was the evidence technician who dusted for fingerprints and collected evidence (R. 1033).

11. Kevin McCoy:

He was the evidence technician who collected blood samples and viewed autopsy (R. 1045).

12. Pat McGowan:

He was the evidence custodian who helped Sweeting with evidence and delivered it to crime lab (R. 1051).

13. Betty Gardner:

She was the nurse who took a blood sample from Kondian (R. 1107).

14. Oral Woods:

He was the fingerprint expert who testified regarding latents lifted by Boca Raton Police (R. 1111).

15. Verna Reddick, R.N.:

She was the nurse who took blood and hair samples from Paul Scott (R. 1137).

16. John Palmisino:

He was the property custodian for Boca Raton Police (R. 1144).

17. Richard Tanton:

He was the serologist who examined blood taken from scene and compared to samples from Paul Scott and Richard Kondian (R. 1156).

18. Gabino Cuevas: (R. 1186)

He was the medical examiner who testified regarding autopsy of James Alessi. Dr. Cuevas testified that James Alessi died as the result of being struck in the head with an unidentified object (R. 1210). No champagne bottle was mentioned as a possible murder weapon during his testimony. Cuevas' only testimony regarding the possible weapon was that the object had to have a 135 degree angle (R. 1204-05).

19. Nancy Flair:

She was a business partner of James Alessi. She identified gold "similar" to gold from his shop (R. 1238).

20. Lillian Alessi:

Lillian Alessi testified that James Alessi had a lot of girlfriends and was going to marry one of them (R. 1252). Ms. Alessi also testified regarding gold in the shop.

21. Diane Swafford:

She was a toxologist who tested samples of Mr. Alessi's blood and urine. She testified that he did not test positive for the drugs for which she tested (R. 1263).

Mr. Kondian did not testify at Mr. Scott's trial. No statements attributed to either Mr. Kondian or Mr. Scott were presented except those testified to by Mr. Soutullo. No witness to or participant in the events at Mr. Alessi's home testified. The only evidence as to what occurred when Mr. Alessi died was the physical evidence found at the crime scene.⁸

In closing arguments, the attorneys relied on the crime scene evidence to support their respective theories regarding what occurred. Mr. Scott's trial counsel argued that while Mr. Kondian killed Mr. Alessi, Mr. Scott ran out of the house and through the patio screen (R. 1370). Mr. Scott's counsel could only rely on the absence of any blood within the house which could be Mr. Scott's blood and only Mr. Scott's blood. This according to counsel showed Mr. Scott was not bleeding. Since there was no blood near the area of the ripped patio screen, trial counsel argued that this was consistent with Mr. Scott running out through the screen in a panic while Mr. Kondian was killing Mr. Alessi (R. 1369-70).

In response to Mr. Scott's defense that Mr. Kondian actually killed Mr. Alessi while Mr. Scott ran out the back (R. 1370), the State argued:

⁸The State falsely represented to the circuit court judge on November 2, 1994, that evidence regarding Mr. Kondian striking Mr. Alessi with a champagne bottle was present at trial. That representation is patently false.

The reason that that's such an expected defense in this case -- especially when the Defendants get tried separately -- is because what do you think Richard Kondian is going to say -- or his lawyer is going to say -- when he comes to trial? "It wasn't me. Paul Scott did everything. I ran out the back."

If you accept that -- if you accept that as reasonable, then nobody is ever going to get convicted in a case like this. I don't raise that as saying that that would be a wrong thing to do if the evidence wasn't there, but the evidence is there. The evidence of his presence in the house, the evidence of the blood, the pattern -- I won't go through it again -- but the evidence is there.

(R. 1418-19) (emphasis added). The prosecutor also argued that the murder weapon was a bear statute that possessed the necessary 135° angle.

Neither Mr. Scott's counsel nor the jury knew that the State possessed evidence supporting Mr. Scott's defense that Mr. Kondian killed Mr. Alessi while Mr. Scott ran out of the house and through the patio screen. The State possessed evidence establishing the prosecutor's closing argument was false when he represented that Mr. Kondian claimed Mr. Scott "did everything."

After convicting Mr. Scott, the jury returned a death recommendation by a vote of seven to five (App. 18). The prosecution argued that the "avoiding arrest" aggravator was present because the final blows to the victim were unnecessary to completion of the robbery and could only have been struck to prevent identification (R. 1676-77). The prosecution made this argument even though it possessed undisclosed evidence that Mr. Kondian, not Mr. Scott, administered the fatal blows. The

prosecution also argued "heinous, atrocious, or cruel" even though it possessed evidence that Kondian had killed Mr. Alessi while Mr. Scott ran out on Kondian and that Mr. Scott was not present when Mr. Kondian beat Mr. Alessi to death. The defense argued that Kondian was the actual killer and the dominant force in the murder. However, the defense was unaware of the statements of Robert Dixon, Dexter Coffin, and Dr. Cuevas, all of which support the theory of defense. The State conceded the age mitigating circumstance. Non-statutory mitigation regarding Mr. Scott's background and family history was presented to the jury. The jury recommended death by a seven to five vote (App. 18).

On January 3, 1980, Mr. Scott was sentenced to death when the judge gave great weight to the jury recommendation. However, the judge found the presence of mitigation in Mr. Scott's background and history. On direct appeal, this Court affirmed Mr. Scott's conviction and death sentence. The opinion noted that the State's case against Mr. Scott consisted of the testimony of Mr. Soutullo as to advance planning, the victim's father seeing the victim with both Mr. Scott and Mr. Kondian the night of the murder, Mr. Scott's fingerprints being found in the house, and his being in later possession of jewelry similar to that owned by the victim. Nothing in this Court's opinion on direct appeal was inconsistent with Mr. Kondian's having been the actual killer. Scott v. State, 411 So. 2d 866 (Fla. 1982). After Mr. Scott's death sentence, Mr. Kondian was allowed on

February 6, 1980, to plea to the reduced charge of second degree murder and was sentenced to forty-five years in prison.⁹

Mr. Scott's conviction and sentence of death were affirmed on appeal. Scott v. State, 411 So. 2d 866 (Fla. 1982), rehearing denied 419 So. 2d 1058 (Fla. 1982). On May 31, 1983, Mr. Scott then petitioned this Court for a writ of habeas corpus and a writ of error coram nobis. Both petitions were denied. Scott v. Wainwright, 433 So. 2d 974 (Fla. 1983).

In June of 1983, Mr. Scott filed a federal petition for habeas corpus relief. The federal petition was subsequently held in abeyance pending exhaustion of Mr. Scott's Rule 3.850 claims. Mr. Scott's initial Rule 3.850 motion was dismissed without prejudice for the failure to file a motion which included a proper oath. Scott v. State, 464 So. 2d 1171 (Fla. 1985).

Mr. Scott then filed a verified Rule 3.850 motion. An evidentiary hearing was held and relief denied. On appeal, the denial of relief was affirmed. Scott v. State, 513 So. 2d 653 (Fla. 1987). Mr. Scott then again sought federal habeas relief. The United States District Court denied relief in part because of the mistaken belief that Mr. Kondian pled guilty to first degree murder and was sentenced to life in prison. Scott v. Dugger, 686 F. Supp. 1488, 1513 (S.D. Fla. 1988). The Eleventh Circuit affirmed. Scott v. Dugger, 891 F.2d 800 (11th Cir. 1989).

⁹After serving fifteen years in prison, Kondian was released and is now a free man.

On October 19, 1990, Governor Martinez signed a death warrant setting Mr. Scott's execution for the week of October 29, 1990. On October 23, 1990, private counsel withdrew. On Monday, October 26, 1990, the Office of the Capital Collateral Representative entered the case for the first time, filing pleadings and seeking a stay of execution. On October 29, 1990, this Court entered a stay to allow volunteer counsel time to file Rule 3.850 pleadings which were filed on December 18, 1990.

In that motion, Mr. Scott presented numerous affidavits. These affidavits included one from Mr. Soutullo acknowledging that he lied at Mr. Scott's trial. Mr. Scott also relied upon a Rhode Island police report indicating that Mr. Kondian indicated at the time of his arrest he cut his finger on a champagne bottle that Kondian used to strike Mr. Alessi. Mr. Scott argued that these matters showed that he had not had an adequate adversarial testing. Other affidavits were presented indicating that Mr. Kondian had confessed to a number of individuals over the years following Mr. Scott's trial as having been the actual killer of Mr. Alessi. These latter affidavits were argued as newly discovered evidence of innocence not available at the time of trial.

This Court affirmed the summary denial of Mr. Scott's 1990 motion to vacate. As to Mr. Scott's claim that newly discovered evidence of innocence warranted an evidentiary hearing under Jones v. State, 591 So. 2d 911 (Fla. 1992), this Court said:

The assertion that Kondian had committed the murder and that Kondian had injured his

finger during a struggle with the victim were both known prior to the initial trial and raised at trial and in prior collateral proceedings. See Scott v. State, 411 So.2d 866 (Fla.1982); Scott v. State, 513 So.2d 653 (Fla.1987). We find that these are not new issues. One of Scott's theories at trial was that Kondian killed the victim. Furthermore, Scott previously raised these claims in a motion for writ of error coram nobis. See Scott v. Wainwright, 433 So.2d 974. As we stated in Scott v. Wainwright: "The 'new evidence' that Scott wants to present at a new sentencing hearing relates to his version of how the murder was committed. This is not 'newly discovered' evidence." Id. at 976. Last, none of the affidavits submitted with the instant rule 3.850 motion exonerates Scott. Kondian's affidavit and his statements at his plea hearing acknowledge that Scott participated in the savage beating of the victim. The only allegation beneficial to Scott in Kondian's affidavit is Kondian's statement that Scott never intended to kill the victim. We note that the evidence establishes that the victim died from multiple blows to the head that he received after he had been bound hand and foot. Looking at the entire record of all three proceedings before this Court, we find that the evidence asserted as new in these proceedings is not newly discovered evidence. Jones v. State, 591 So.2d 9011 (Fla.1992); Preston v. State, 564 So.2d 120 (Fla.1990). We conclude that Scott is procedurally barred from relitigating this issue. Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, U.S. _____, 111 S.Ct. 2879, 115 L.Ed.2d 1045 (1991).

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

As to Mr. Scott's claim of a violation of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Strickland v. Washington, 466 U.S. 668 (1984), this Court stated:

Scott's next claim concerns the affidavit of Charles Soutullo, the State's

witness wherein he recants that part of his trial testimony where he stated that Scott had expressed his intention to rob the victim. We find that, under the record in this case, Soutullo's change of testimony would not have produced a different result.

Scott v. Dugger, 634 So. 2d at 1065. This Court's opinion did not specifically address the Rhode Island police reports regarding Mr. Kondian's cut finger in which Kondian had reported he cut the finger on the champagne bottle he had used to strike Mr. Alessi and the cut was observed to be on his left hand.

In March, 1994, Mr. Scott's collateral counsel were for the first time, despite previous requests, given access to crime scene photographs which had not been introduced into evidence at Mr. Scott's trial (App. 24(b)). After reviewing one of these photographs, the State's medical expert, Dr. Cuevas, was able to opine that the circle of blood depicted in the photograph "would be consistent with a champagne bottle being the object used to strike the fatal crushing blows" (App. 5). Dr. Cuevas indicated he had never previously been shown this photograph. Dr. Cuevas further indicated that the bear statute, argued by the prosecutor as the murder weapon, had insufficient blood on it and could not have been the murder weapon (App. 5).

In April 1994, Mr. Scott's collateral counsel, after years of searching, finally located Robert Dixon (App. 24(b)). Upon interviewing Mr. Dixon, Mr. Scott's counsel learned for the first time that Mr. Dixon had told Florida Detective Collins in December of 1978 that Mr. Kondian had been trying to recruit someone to accompany him to Mr. Alessi's residence (App. 3.).

Only after no one else was available did Mr. Kondian take Mr. Scott. However, "Rick [Kondian] was calling the shots" (App. 3). Mr. Dixon also revealed to the police that, when Mr. Kondian and Mr. Scott returned to the hotel, "Rick [Kondian] was in an uproar. He was pacing around, very demanding and yelling at Paul Scott for running out on him. Rick also called Paul a punk" (App. 3).

At no time has the State ever revealed that Mr. Dixon advised Detective Collins of this information. No police report or statement regarding this has been provided to any of Mr. Scott's counsel (R. 1849)..

In August of 1994, Mr. Scott's collateral counsel, after years of searching, finally located Dexter Coffin. Up until August of 1994, Dexter Coffin was unavailable. At that time, Mr. Coffin revealed to Mr. Scott's counsel that the State used him as a jail house informant. He had provided the State with Mr. Kondian's statements in jail. Mr. Coffin revealed that in 1978 he had apprised law enforcement that Mr. Kondian claimed sole responsibility for killing Mr. Alessi (App. 1).

At no time did the State reveal to Mr. Scott's trial counsel that Dexter Coffin was a material witness (App. 27). The State, to this day, has not provided any of Mr. Scott's attorneys a statement or report reflecting the information obtained from Dexter Coffin regarding Mr. Kondian's confession to the killing.

In response to Mr. Scott's claims based upon the affidavits of Robert Dixon and Dexter Coffin, and the statement of Dr.

Cuevas, the State argued below that the claims should not be considered because "All of the above fact/issue have already been brought out at trial or litigated in one of the prior collateral proceedings." Response at 19.

In the circuit court proceedings on November 2, 1994, the State stated its position as follows:

Mr. McClain said that the State is complaining that this is not a new issue, this is not a new issue. Yes, we have said that, but we are also saying this is not evidence. These two affidavits are not new evidence.

The Court further says, we conclude that Scott is procedurally barred from relitigating this issue.

I think this Court, this trial Court is bound by the Supreme Court's directive in this opinion. These two, new affidavits are identical to affidavits submitted in the prior three collateral proceedings.

(H. 87). This was a false statement; the affidavits of Robert Dixon and Dexter Coffin establish the State had exculpatory evidence pre-trial which it did not disclose to Mr. Scott's trial counsel. The State misrepresented Dr. Cuevas' statement as indicating "the champagne bottle is consistent with having inflicted one of the blows" (H. 89). This was a false statement. The State also said "It came out at trial that Kondian hit him with that champagne bottle" (H. 89). This was a false statement. The State was unable to give any record cites for where Robert Dixon, Dexter Coffin or the photograph of the ring of blood had been previously litigated or discussed because there were none.

The circuit court summarily denied without explanation.

ARGUMENT I

MR. SCOTT WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT OR PENALTY PHASES OF MR. SCOTT'S TRIAL. AS A RESULT, MR. SCOTT WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE.

Mr. Scott was represented at trial by Assistant Public Defender George Barrs. At the trial, Mr. Barrs' theory of defense was that Richard Kondian was homosexually assaulted by the victim and Mr. Kondian later killed the victim when the victim taunted him after Paul Scott had left the scene. However, the State withheld evidence supporting this defense.

The State never disclosed that Richard Kondian confessed to Dexter Coffin that he, Richard Kondian, killed Mr. Alessi by "beating the shit out of and killing the victim by beating him over the head" (App. 1). In this statement, Kondian claimed sole responsibility for the killing. In early 1978, the State had daily contact with Dexter Coffin and obtained Mr. Kondian's confession from him. Yet, the State did not disclose Kondian's confessions to Dexter Coffin to Mr. Scott's trial counsel. Even to this day, the State has not disclosed these statements. Mr. Scott only learned of these statements by spending years trying to find Dexter Coffin, and once locating him, obtaining the information from him.

The State suppressed Kondian's statements to Dexter Coffin and then argued to Mr. Scott's jury: "what do you think Richard

Kondian is going to say -- or his lawyer is going to say -- when he comes to trial? 'It wasn't me. Paul Scott did everything. I ran out the back'" (R. 1418). The State's suppression of Kondian's statements and the State's false argument violated due process.

The State also suppressed Robert Dixon's statements to Detective Collins regarding Kondian's statements and conduct the night of the homicide. Kondian "was calling the shots" (App. 3). He got Paul Scott to go with him only after others refused to accompany Kondian. Later, Kondian berated Paul Scott calling him a punk "for running out on him" (App. 3). Again, the State's nondisclosure violated due process.

The State also failed to disclose a crime scene photograph of a circle of blood. According to the State's medical examiner this photograph would have supported Paul Scott's statement that Kondian killed Alessi with a champagne bottle (App. 5). Again, the State violated due process.

Mr. Barrs, Mr. Scott's trial counsel, has recently attested:

It was my personal belief, based on what I knew, that the victim taunted Richard Kondian by telling him he knew how to find him and that Paul Scott panicked and ran away while Richard struck the fatal blows. Although this was my belief, I didn't have enough pieces of the puzzle to put it together. Furthermore, I had confidence in the fairness of the State in providing any exculpatory evidence.

(App. 27, p. 1).

At the trial, I attempted to argue that the violence involving the victim had been

precipitated when the victim made a sexual assault against Richard Kondian.

Id. at 3. Mr. Barrs further states: "I have recently reviewed the statements by Dexter Coffin, Robert Dixon, Dr. Gambino Cuevas, and Vincent Sontullo which have been provided to me by Paul Scott's present counsel. I did not have the information provided in these documents at the time of Paul Scott's trial" (App. 27) (emphasis added). Under Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), Mr. Barrs' affidavit must be accepted as true. An evidentiary hearing is required.

A. EXCULPATORY AND IMPEACHMENT EVIDENCE WITHHELD BY THE STATE CONTRARY TO BRADY V. MARYLAND.

Evidence which supported the theory of defense was obviously exculpatory. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Thus, evidence which established that Richard Kondian actually committed the murder was exculpatory at both the guilt and penalty phases of the trial since this evidence directly supported Mr. Barrs' trial

strategy.¹⁰ However, such exculpatory evidence was not disclosed as Mr. Barrs states in his affidavit.

At the time of Paul Scott's trial, the State suppressed evidence that Richard Kondian had admitted killing James Alessi after Paul Scott ran out on him. Dexter Coffin told the State that while he was sharing a cell with Richard Kondian, Richard admitted that he, and not Paul Scott, had committed the crime:

My name is Dexter Coffin. I presently live in Charlottesville, Virginia. In 1978, I was incarcerated at the Palm Beach County Jail with Richard Kondian.

A certain cell block at the Palm Beach County Jail was known as "The Captain's Cell." It was named for Captain Jack Donnelly who had a reputation for trying to get information about the important cases of the inmates at the jail. It was common knowledge that anyone housed in the Captain's Cell either had information in which the State and police were interested or were there to help Captain Donnelly obtain this information.

Richard Kondian and I were both placed in the Captain's Cell. Captain Donnelly pulled me aside soon after I arrived at the jail and told me he wanted my help getting

¹⁰Currently pending before the United States Supreme Court is the case of Kyles v. Whitley, 113 S. Ct. 1610, cert. granted (May 31, 1994). Therein, the questions presented are:

Questions presented: (1) Would production by state of exculpatory materials, proper prosecutorial conduct, and effective performance by petitioner's trial counsel have resulted in acquittal or mistrial? (2) Would production by state of exculpatory materials, proper prosecutorial conduct, and effective performance by petitioner's trial counsel have produced sufficient residual doubt in mind of at least one juror to result in life sentence rather than death penalty?

Kyles v. Whitley, 55 Crim. L. Rptr. 3037.

information from Richard Kondian. From that point on, we had daily meetings in which I briefed the state on anything that Richard Kondian revealed to me about the murder of James Alessi.

It turned out that Richard Kondian did end up confiding in me and asking for my advice quite a bit. Actually, many of the inmates asked for my advice because they felt that I understood the law. In seeking advice, Rick would tell me a lot about what happened on the night that the victim was killed. Rick clearly stated to me many times that he killed James Alessi or "that fag," as Rick would call him. Rick specifically told me that he "beat the shit out of him and killed him" by hitting him over the head. He was talking about how he killed James Alessi and he never mentioned anything about Paul Scott helping him.

In my daily meetings with Captain Donnelly and the representatives of the state, I would divulge to them whatever I had learned from Rick. I repeatedly informed them that Rick said that he was responsible for killing James Alessi. I told them what Rick said about beating the shit out of and killing the victim by beating him over the head.

(App. 1) (emphasis added). Mr. Coffin also indicated that Mr. Kondian discussed Mr. Alessi's sexual orientation as it related to the crime. This evidence would have been of critical importance to Paul Scott's defense. Mr. Coffin's name was not disclosed to Paul Scott's trial counsel, nor was his oral statement to law enforcement disclosed to defense counsel (see affidavit of George Barrs, App. 27).¹¹ Mr. Coffin could not be located until 1994 and was thus unavailable. Despite diligent search by collateral counsel, Coffin's whereabouts have only

¹¹Interestingly, Mr. Coffin was represented by Mr. Kondian's counsel.

recently been discovered (see App. 2). Dexter Coffin's testimony was relevant and exculpatory at both the guilt and penalty phases of the trial. His testimony would have revealed the State's misrepresentations to the judge, jury and this Court. The nondisclosure undermines confidence in the outcome (see App. 27).

Before Paul Scott was arrested, the police arrested Robert Dixon on an unrelated charge. When he was arrested, he provided information as to Paul Scott's whereabouts. He also told the police that immediately after the offense, when Richard Kondian and Paul Scott returned to the hotel room, that Kondian was very angry at Mr. Scott because Mr. Scott had run out on Kondian (App. 3). The police then put Mr. Dixon on the phone to Detective Collins in Florida, and Mr. Dixon repeated his statement. Robert Dixon has recently provided an affidavit regarding the information he provided Detective Collins:

One night I was at a pool hall with a man named Allan Brasher. Allan told me that he was supposed to go back to the hotel, meet Rick, and go have dinner with the homosexual man. Allan did not want to go with Rick so he stayed at the pool hall with me. We were playing pool at a place called the Elbow Room.

Later that night I went back to the hotel. Paul's old lady told me that Paul left with Rick. I met Paul Scott for the first time two to three days prior to that night.

I stayed in the room with Paul's old lady. Later that night Rick and Paul came in. When they came in I knew something had happened. Rick was in an uproar. He was pacing around, very demanding and yelling at Paul Scott for running out on him. Rick also called Paul a punk. Rick was also saying things like, "Let's go, pack your shit, we got to get the fuck out of here."

(App. 3). In this affidavit, Dixon further discussed Kondian's homosexual relationship with Mr. Alessi (see App. 3).

Robert Dixon's name was disclosed to Mr. Scott's trial counsel but only with a "last known address" (R. 1854). The State did not disclose a statement from Mr. Dixon, but merely implied Mr. Dixon was relevant only to how Mr. Scott's whereabouts were ascertained (see affidavit of George Barrs, App. 27). Until recently, Robert Dixon has been unavailable. Despite diligent efforts, collateral counsel was unable to locate Dixon to make a statement as to what he told the police until 1994 (see App. 2). Clearly the information he possessed was exculpatory. Robert Dixon's testimony was relevant and exculpatory at both the guilt and penalty phases of the trial. The nondisclosure undermines confidence in the outcome (see App. 27).

The State did not disclose either to the defense or to the jury that Mr. Soutullo's testimony was false (see affidavit of George Barrs, App. 27). Mr. Soutullo lied at the urging of Detective Collins out of fear of potential charges and promises of being held on pending charges (App. 22). Even though Mr. Scott previously pled Mr. Soutullo's recantation in his prior Rule 3.850 motion and this Court concluded that it without more did not warrant an evidentiary hearing, that conclusion must be revisited in light of Robert Dixon's affidavit, Dexter Coffin's affidavit and George Barrs' affidavit. Taking them all together and accepting them as true, confidence is undermined in the outcome. Lightbourne v. Dugger, 549 So. 2d at 1365. An

evidentiary hearing is therefore required, and thereafter Rule 3.850 relief.

At the time of trial, the State presented the testimony of Gabino Cuevas, M.D., to explain the facts of the homicide. Neither Dr. Cuevas nor the defense were aware of the crime scene photo depicting a circle of blood on the floor of the victim's house. Unaware of this photograph, Dr. Cuevas stated that there was a violent struggle resulting in numerous injuries, that the victim was tied up while he was still alive, and that three severe blows to the head by a curved object caused death. The State argued to the jury that a bear statue found at the scene was the murder weapon (R. 1406). However, the State never asked the doctor's opinion as to whether the bear statue was in fact the murder weapon. Had Dr. Cuevas been asked if the bear statue was the murder weapon, his answer would have been "no":

Numerous objects introduced into evidence at Paul Scott's trial appear to have been used to strike the victim. However, it is my opinion that none of the items which were introduced into evidence at Paul Scott's trial were in fact the instrument which caused the fatal crushing blows to the head. The bear statue is the only object introduced into evidence at trial which would have the requisite shape and weight to cause the fatal crushing head injuries. However, it is my opinion that the fatal crushing blows were not caused by the bear statue, since the felt base had only a few drops of blood instead of the amount of blood which would be found on the murder weapon.

(App. 5) (emphasis added). If Dr. Cuevas had been shown the photo of a bloody circle found at the scene, he would have stated

that the circle is consistent with a bloody champagne bottle being used as the murder weapon:

My testimony from Mr. Scott's trial indicates that the instrument used to strike the fatal crushing blows had a 135 degree angle. That is still my opinion today. At the trial I was not asked to identify a murder weapon nor do I recall being aware of allegations that Richard Kondian had struck the victim with a champagne bottle. The 135 degree angle, to which I testified at the trial, and the photograph of a bloody circle at the crime scene would both be consistent with a champagne bottle being the object used to strike the fatal crushing blows.

(App. 5).

The State hid the necessary evidence from Dr. Cuevas, the defense, and the jury. This evidence has been found now only because collateral counsel finally in 1994 had access to the picture of the bloody ring and had the time to consult a forensic expert, Dale Nute (see App. 6). The picture of the bloody ring was not made available until 1994 (Apps. 2, 24). Once the picture was disclosed, collateral counsel was able to uncover the State's misconduct. Mr. Scott has used due diligence in discovering this undisclosed evidence which the jury did not hear (see Apps. 2, 24). The disclosure of the photograph of the ring of blood and Dr. Cuevas' resulting statement demonstrates exculpatory evidence was not disclosed to the jury. Either the prosecutor failed to disclose or defense counsel unreasonably failed to discover this relevant exculpatory evidence. Either way, confidence is undermined in the outcome at both the guilt

and penalty phases. Accepting the allegations as true as required in Lightbourne, an evidentiary hearing is required.

Both Richard Kondian and Paul Scott told the police that the violence was precipitated in self defense from a homosexual attack on Richard Kondian by James Alessi. The State argued to the court that there was no evidence that James Alessi was homosexual despite the fact that three witnesses had given statements to the police that Richard Kondian was engaged in prior homosexual activity with Mr. Alessi and that James Alessi had been arrested for homosexual solicitation (Apps. 8, 9, 10). The State contended that Mr. Alessi's sexual orientation was not relevant to the crime. The State used this argument to justify nondisclosure. It used this argument to preclude the defense from making an opening statement referring to Mr. Alessi's sexual assault upon Mr. Kondian as the precipitating event (R. 679-855). It used the lack of evidence (caused by its own actions) to argue to the jury that Mr. Alessi was not homosexual and that sexual orientation had nothing to do with his death (R. 1415). Once again, the judge, the jury and the defense were misled by the State's manipulation of the process, in violation of the Sixth, Eighth and Fourteenth Amendments. Collateral counsel was only able to obtain affidavits from Dexter Coffin and Robert Dixon recently. Collateral counsel was diligent in trying to locate these witnesses (see App. 2). This evidence, which is supported by the police report recently disclosed by the Boca Raton police department (see App. 19), establishes a due process violation.

Mr. Scott has been diligent. The evidence of Mr. Alessi's sexual orientation and history would have been used by defense counsel to justify an opening statement. Counsel would have had real evidence that he now says he would have presented. Accepting this as true as required by Lightbourne, an evidentiary hearing is required.

The crime scene evidence shows that there was residual blood in the shower indicating that the killer had showered after the crime. Kondian's fingerprint was found on the bathroom door, and Bernadine Bernard reported in her 1983 deposition that Kondian returned to the hotel with wet hair as if he had recently showered. The evidence of Richard Kondian's fingerprint in the proximity of the bloody shower has only recently been discovered (see App. 38). The State failed to disclose this fingerprint which corroborates that it was Mr. Kondian who was covered with blood and had to shower because it was Mr. Kondian who killed Mr. Alessi. Mr. Scott has used due diligence regarding this matter. This Brady violation must be considered now. This evidence refutes the prosecutor's arguments at trial and would have been extremely significant at trial, particularly the penalty phase. Either the State failed to disclose or defense counsel unreasonably failed to discover this evidence. Its nondisclosure undermines confidence in the outcome.

The State also did not disclose to the defense that it had been unhappy with the judge originally assigned to preside over Mr. Scott's trial, and that as a result, then Assistant State

Attorney Barry Krischner engaged in an ex parte discussion with the Chief Judge in order to arrange reassignment of the case to a judge more to the State's liking (see App. 21). As a result of the State's action, the originally assigned judge recused himself over defense objections (R. 1857). This blatant violation of due process was not disclosed by the State. Had it been, the defense would have been in a position to oppose Judge Rutter's recusal and to seek the disqualification of the state attorney's office.

A wealth of exculpatory and impeachment evidence was not disclosed to trial counsel. This evidence was discovered in the post-conviction process. This evidence would have been investigated, pursued and presented to Mr. Scott's jury had Mr. Barrs known of its existence. It was consistent with the theory of defense and would have effectively destroyed the State's case. It was not presented to the jury only because Mr. Barrs was unaware of its existence as Mr. Barrs has now indicated:

I have recently reviewed statements by Dexter Coffin, Robert Dixon, Dr. Gambino Cuevas, and Vincent Soutullo which have been provided to me by Paul Scott's present counsel. I did not have the information provided in these documents at the time of Paul Scott's trial. It is information which I would have wanted the judge and jury to know.

It was my personal belief, based on what I new, that the victim taunted Richard Kondian by telling him he knew how to find him and that Paul Scott panicked and ran away while Richard struck the fatal blows. Although this was my belief, I didn't have enough pieces of the puzzle to put it together. Furthermore, I had confidence in the fairness of the State in providing any exculpatory evidence.

If I could have presented the statements now being made by Coffin or Dixon to the jury, there is a strong likelihood that it would have resulted in a lesser degree of guilt and would certainly have swayed at least one more juror to vote for life. The testimony that either Coffin or Dixon had to offer regarding Kondian's guilt would have given me a starting point to unravel the other evidence that was available.

Vincent Soutullo was the State's star witness. Originally he stated that he had a conversation with Richard Kondian and he could not say for sure whether or not Paul Scott could overhear the conversation. I later succeeded in arguing to the court that he should not be allowed to testify about his conversation with Kondian unless Paul Scott was a party to the conversation. If Soutullo had testified to his original statement to the police, his testimony would not have been admitted.

I realized that Vincent Soutullo would be the key prosecution witness, but I was led to believe that they might not be able to produce him for the trial. Because of this, it wasn't until the morning of his testimony that I had the opportunity to take his deposition. Soutullo's testimony had a dramatic impact on both the guilt and penalty phases of the trial. Had I known the facts stated in his affidavit, I could have kept out his testimony.

At the trial, I attempted to argue that the violence involving the victim had been precipitated when the victim made a sexual assault against Richard Kondian. I argued that the State had not proved that Paul Scott was the killer. All of the evidence referred to in this affidavit would have been relevant both as to the guilt and penalty phases of the trial. Any one of the four statements referred to would have likely resulted in a second degree murder conviction or would certainly have changed one juror's mind in the penalty phase.

During the penalty phase I introduced evidence in mitigation of the death sentence. The additional evidence that there was no prearranged plan to kill the victim and that Kondian was the actual killer would have been very important at both phases of the trial.

If I could have presented evidence to prove that Paul Scott had no specific intent to torture the victim, it would have changed my strategy in both the guilt and penalty phases of the trial. For example, I could have argued that (1) the aggravating factor of heinous, atrocious and cruel did not apply; (2) Mr. Scott had abandoned the criminal enterprise; and (3) he was an accomplice in the capital felony committed by another person and his participation was relatively minor.

I have no doubt that I would have presented the evidence contained in these statements had the State disclosed such statements to me. Armed with these statements, perhaps the State would have been agreeable to the same result for Mr. Scott that was obtained for Mr. Kondian.

(App. 27). Certainly to the extent that the State argues that somehow Mr. Barrs' unawareness of this evidence was due to his lack of diligence, then Mr. Scott received ineffective assistance of counsel. Provenzano v. State, 616 So. 2d 428 (Fla. 1993).

Mr. Scott's allegations must be taken as true at this juncture. The affidavits of Robert Dixon, Dexter Coffin, and George Barrs must be accepted. Similarly, this Court must accept Dr. Cuevas' statement. All other allegations submitted herein must be accepted as true under Lightbourne v. Dugger, 549 So. 2d at 1365. Accepting them as true, it is clear that an evidentiary hearing is required for the same reasons set forth in Lightbourne.

The Supreme Court has explained:

... a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Scott was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. Scott. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, no one disputes the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. Confidence is undermined in the outcome since the jury did not hear the evidence. Garcia v. State, 622 So. 2d at 1331.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability

that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

In Mr. Scott's case, the undisclosed exculpatory evidence was central to the penalty phase proceedings. Mr. Scott's defense was that: Mr. Kondian inflicted the lethal blows; I ran out the back; I wanted no part of a murder; Mr. Kondian made the decisions; my role was minimal. Mr. Scott contended that because he did not inflict the fatal blows, the "heinous, atrocious or cruel" aggravating circumstance could not be applied to him. See Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994) (absent evidence that the particular defendant being sentenced had "any intent [] to inflict a high degree of pain or to otherwise torture the victims," HAC aggravator not properly considered); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991) ("the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously" absent proof of specific intent to torture). The undisclosed evidence supported Mr. Scott's claim. It further demonstrates withdrawal and/or abandonment of the underlying felony. Smith v. State, 424 So. 2d 726, 732 (Fla. 1982).

The undisclosed evidence supported mitigating circumstances. It demonstrates that Mr. Kondian was the dominant force. It

demonstrates that Mr. Scott was under duress. And as in Brady and Garcia, it supports the defense that the actual killing was done by the co-defendant. As in Brady and Garcia, that alone undermines confidence in the outcome and requires a new sentencing proceeding.¹²

¹²Certainly this exculpatory evidence in conjunction with the mitigation presented at trial undermines confidence.

It is not hard to see why five jurors understood the injustice of executing Paul Scott. The jurors had seen his co-defendant, Richard Kondian, if only briefly, and they had watched Paul Scott throughout his trial. The jurors could see the genuineness of Paul Scott's slow-witted manner and his vulnerable, dependent nature. His family members, burdened by their fear and desperation and unaided by Mr. Scott's trial counsel, gave testimony that was ill-focused and halting. But they gave the jurors a glimpse of the heart-breaking victimization that we now know marked Paul Scott's childhood and adolescence.

One horrific experience in particular typifies the callous mistreatment that Paul Scott's sadistic father inflicted on the boy. When Mr. Scott was nine years old his father returned to California from a four year absence (R. 1620-23). He promised to rescue the youngster from the impoverishment and squalor of a public housing project in which Paul Scott, his mother and siblings were living. His father would take the boy to a better life in Florida, he said, if only Paul Scott would give up his dog -- the think he loved most in the world. The boy allowed his father to take the dog to the pound and then gathered up his meager belongings for the trip to Florida. He waited all the next day in front of his home, until he received word that his father had left without him. When his mother took Paul Scott to the pound to reclaim his dog, it already had been destroyed (R. 1599-1601).

His mother's description of the youngster's anguish and how he "cried and cried" over his father's betrayal could not, of course, wholly mitigate a capital murder. But it was enough to spark a sense among jurors that the prosecution's case was not a true picture of Paul Scott. This evidence allowed the jurors intuitively to know that the guileless, compliant young man at trial did not significantly influence Richard Kondian's actions or the events that led to the victim's death.

(continued...)

The prosecution's suppression of evidence favorable to the accused violates due process. Garcia v. State, 622 So. 2d at 1330. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. A defendant's right to present favorable evidence is violated when the prosecution suppresses such evidence. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not disclosed to the defense (App. 27). This must be accepted as true. Lightbourne. This undisclosed evidence undermines confidence in the outcome of the guilt phase and certainly the penalty phase.

Confidence in the outcome of Mr. Scott's trial is undermined because the unrepresented evidence was relevant and material to Mr. Scott's guilt of first degree murder and certainly to whether a

¹²(...continued)

In fact, the sentencing judge found:

The defendant is the product of a broken home; raised in a ghetto area and in poverty. His father, a retired career Navy man visited with the defendant in September of 1965 and promised to take his son from the fifth in which he was being reared. After raising the young boy's hopes, without reason, cause or justification, his father walked away, leaving him emotionally devastated.

(R. 1942).

death sentence was warranted (see App. 18). Here, exculpatory evidence did not reach the jury. Moreover, the prosecution interfered with defense counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Mr. Scott was convicted and sentenced without a constitutionally adequate adversarial testing. Accordingly, an evidentiary hearing must be held, and thereafter, Mr. Scott's conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

ARGUMENT II

THE STATE'S DELIBERATE USE OF FALSE AND MISLEADING TESTIMONY AND THE INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF PAUL WILLIAM SCOTT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Here, as in Garcia v. State, the State suppressed exculpatory evidence and then presented false argument to the jury that the suppressed evidence would have refuted. In Garcia, this Court granted Rule 3.850 relief saying:

III. PROSECUTORIAL IMPROPRIETY

Garcia claims in Issues 5 and 10 that the withholding of the Smith statement when coupled with the State's opening and closing arguments constituted prosecutorial misconduct that deprived Garcia of a fair

trial. We note that while the State is free to argue to the jury any theory of the crime that is reasonably supported by the evidence, it may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts. In the present case, there is simply insufficient evidence in the record to sustain the State's argument that Joe Perez was a nonexistent person created by Garcia during questioning. The available evidence shows otherwise--that Perez was a common alias for Urbano Ribas.

The Perez/Ribas link was common knowledge with the State. At the time Ribas identified himself as Perez to Bradenton police on the night of the shootings, Garcia, who was in custody at the Sheriff's Department, had not yet told county detectives that Joe Perez was a coperpetrator. When deputies arrived in Bradenton shortly after Ribas was arrested to question him, he was identified not as Joe Perez, but Urbano Ribas, and was transported to the Sheriff's Department, booked under that name, and eventually released. Meanwhile, Garcia made his statement to county detectives Stout and David Perez implicating Joe Perez, and as soon as Detective Stout learned of the Perez/Ribas connection from local witnesses, he ordered Ribas rearrested:

At approx. 1054 hrs. Dep. W. Riley advised [me, Deputy H. Ordez,] by phone that he had found two witnesses ... who had informed him that the subject Jose Perez and Urbano Ribas, Jr. were one in the same.

Det. G. Stout was called and informed of the situation.

De. W. Riley was advised per Det. Stout to take Mr. Ribas into custody.

At about 1420 hrs. Dep. Riley arrived at HQ with Mr. Ribas....

By the next day, Detective Stout was so sure of the link he showed Garcia a single photograph--Urbano Ribas--to confirm the

identity of Joe Perez. And by the following week, when Detective David Perez interviewed Lisa Smith at the Sheriff's Department, county police unquestionably understood that Ribas had initially identified himself as Perez and used a birth registration card in that name.

For the State prosecutorial team to argue on this record that Joe Perez was a nonexistent person created by Garcia during questioning constitutes an impropriety sufficiently egregious to taint the jury recommendation. Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved:

Nonetheless, we are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law. This Court considers the sort of prosecutorial misconduct, in the fact of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.

Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) (citations omitted). See also *Nowitzke v. State*, 572 So.2d 1346 (Fla.1990).

Garcia v. State, 622 So. 2d at 1331-32 (emphasis added) (footnotes omitted).

A. THE STATE FALSELY ARGUED THAT KONDIAN'S DEFENSE WOULD BE THAT "PAUL SCOTT DID EVERYTHING. I RAN OUT THE BACK."

The prosecutor at Mr. Scott's trial argued to the jury in his closing argument:

The reason that that's such an expected defense in this case -- especially when the Defendants get tried separately -- is because what do you think Richard Kondian is going to say -- when he comes to trial? "It wasn't me. Paul Scott did everything. I ran out the back."

If you accept that -- if you accept that as reasonable, then nobody is ever going to get convicted in a case like this.

(R. 1418).

However, the State had Dexter Coffin's statement and Robert Dixon's statement, both of which indicated Kondian had been the killer and that Mr. Scott had fled and not participated. The evidence that the State hid demonstrated that the closing argument was false. However, the proof of the knowing falsehood only reached Mr. Scott in 1994. As in Garcia, due process was violated and Rule 3.850 relief is required.¹³

B. THE STATE MADE FALSE AND MISLEADING STATEMENTS WHEN IT TOLD THE JURY THAT THERE WAS NO EVIDENCE OF A HOMOSEXUAL ASSAULT OR SELF-DEFENSE.

In its closing argument, the State told the jury the following:

¹³Again, the State has continued to suppress Dexter Coffin's statement and Robert Dixon's statement, at trial and throughout post-conviction. Mr. Scott has exercised due diligence looking for these individuals and only now has been able to locate and learn that these witnesses provided this exculpatory evidence to the State prior to Mr. Scott's trial.

One other area I want to mention, and I mention this only because it's been hinted at so obviously throughout the trial that it needs to be addressed.

There has been an implication that Jim Alessi is homosexual. He clearly was not homosexual. He had been living with girls and he was planning on getting married. As recently as Thanksgiving, he had brought his intended home to meet his family. Jim Alessi may have been bisexual. There's no real evidence of that, but it's been hinted at. And I mention that and I say that to you because so what? Does that mean he deserved to die the way he did? Is there one single indication that his sexual orientation had a single thing to do with the way he died? Is there one single indication that what Paul Scott and Richard Kondian did to him was as a result of something that Jim Alessi was trying to do to them? No, there's not. Not one single piece of evidence that would point to that.

There is such a lack of evidence even hinting at that, that you will not even be instructed by the Judge on the defense of self-defense, because there's no evidence of it. None at all. So little that's it's not even entitled to be raised as a defense.

(R. 1414-15) (emphasis added). These statements were not based on the evidence at trial, and the State knew them to be false. The State was aware of Dexter Coffin and Robert Dixon. The State was aware that both individuals reported that Mr. Alessi was homosexual. The State, however, did not disclose this information to the defense. The State hid evidence and then relied upon the absence of that evidence to obtain a conviction and sentence of death. The State knowingly misled the jury.

The State was well aware that James Alessi was a homosexual. During its investigation of the case prior to Paul Scott's trial, detectives from the Boca Raton Police Department interviewed

several people who not only knew that James Alessi was homosexual, but also were aware of his sexual relationship with Richard Kondian. John Simone, a friend of James Alessi, had eaten breakfast with Richard Kondian and James Alessi at Alessi's home on December 4, 1978, the day before Alessi's death. James Alessi had informed Mr. Simone of his new-found relationship with Rick Kondian, and had also told him that he had spent the previous night with him (see App. 10).

The police had also interviewed Richard Alworth, an employee of James Alessi, regarding his knowledge of the relationship between Richard Kondian and James Alessi. Mr. Alworth stated that James Alessi had told him he had met a "really nice kid" named Rick on the beach. Mr. Alworth told Detective Collins of the Boca Raton Police Department that Mr. Alessi made a habit of picking up young guys at bars and by the beach, and that he sometimes joked about bondage (see App. 9 at pp. 4-7).

Additionally, the police had interviewed Katherine Bauer, a good friend of James Alessi. Ms. Bauer told police that on the Sunday prior to his death, James Alessi had brought Richard Kondian over to the house to introduce him to her. Ms. Bauer told police that Mr. Alessi had confided to her that he and Mr. Kondian had spent the previous night together and that they had sex, and that Rick was "well endowed" (see App. 8). Ms. Bauer further indicated that James Alessi often picked up men and that drugs were involved.

The State was also aware that on November 28, 1976, James Alessi had been arrested on a charge of Offering Lewd and Lascivious Acts, in which Mr. Alessi had attempted to solicit homosexual acts from a police officer in return for money (see App. 19). However, the State did not disclose this prior arrest to Mr. Scott's trial counsel.

People Mr. Kondian spoke to around the time of Mr. Alessi's death clearly were aware that Mr. Alessi was a homosexual, and that Mr. Kondian and Mr. Alessi had been involved in a homosexual relationship. Clearly, the State knew this while arguing to the jury that it was not true.

Before Paul Scott's trial began, the State made strenuous objections to any evidence of James Alessi's homosexuality coming before the jury (R. 6798). The State was successful in preventing the defense from mentioning "homosexual" (R. 685).

In addition to numerous witnesses which the State knew of who would attest to Mr. Alessi's homosexuality, his relationship with Richard Kondian, and that a sexual attack by Mr. Alessi provoked that struggle, the State possessed physical evidence that a sexual attack had occurred on the night of Mr. Alessi's death. Penile swabs taken from Mr. Alessi right after his death revealed the presence of spermatozoid, confirming Mr. Kondian's statements that a sexual attack had taken place that night (R 1209).

On direct examination of its medical expert, Dr. Gabino Cuevas, the State elicited the following testimony:

Q. If I can just explore that for just a moment. In other words, the fact that there was sperm or semen around Mr. Alessi's penis when he died, does not indicate recent prior sexual activity?

A. That is correct.

Q In fact, it's rather common when someone dies under circumstances like that.

A Not common, but it happens frequently enough.

(R. 1209). The implication which the State made to the jury was clear, but as now explained by Dr. Cuevas it was also false. In a letter dated August 31, 1994, Dr. Cuevas states:

In deaths resulting from head injury, spontaneous emission of sperm occurs in a minority of cases. However, the possibility of spontaneous emission does not establish that such an emission, as opposed to sexual activity, was the source of the sperm on the victim's penis.

(App. 5). It is clear that the State deliberately manipulated Dr. Cuevas' testimony in order to mislead the jury.

Also designed to mislead the jury were the State's questions to Lillian Alessi, James Alessi's mother. During direct examination, the following exchange took place between the State and Lillian Alessi:

Q All right. Now, ma'am, James lived, I believe, at 97 Seminole Lane there in Boca; did he not?

A Yes, he did.

Q How long had he lived there?

A It would have been a year.

Q November of 1978?

A Yes.

Q Did he ever live there with anyone?

A Oh, he had girlfriends come a lot.

Q Mrs. Alessi, were there times when Jim lived there at that house and also other places when you know, of your own knowledge, that Jim was living with a girl?

A Yes.

Q Do you know if at the time, let's say back around Thanksgiving of last year, just before December, whether Jim was planning on getting married?

A Yes, he was. He brought her home -
- to our home for Thanksgiving dinner.

Q What was her name?

A Patricia Brown.

(R. 1251-52). Even though the State had precluded the defense from mentioning homosexual, these statements were elicited for the sole purpose of misleading the jury into thinking that James Alessi was not a homosexual. Furthermore, the State knew, through statements made to police by Richard Alworth, that James Alessi kept his sexual relationships with other men a secret from his mother as it upset her (App. 9).

C. THE STATE MADE FALSE AND MISLEADING STATEMENTS WHEN IT TOLD THE JURY THAT THE BEAR STATUE WAS THE INSTRUMENT USED TO STRIKE THE KILLING BLOWS TO JAMES ALESSI, WHEN IN FACT THE STATE KNEW THAT RICHARD KONDIAN HAD KILLED JAMES ALESSI WITH A CHAMPAGNE BOTTLE.

In its closing argument, the State made the following statements to the jury:

And if you look in that photograph on the wall behind [Alessi] there's a shower of blood. A shower of blood that starts here

(indicating) and goes upwards from that direction (indicating), as if someone had taken a big, heavy object with a corner on it of approximately 135 degrees from this side (indicating) -- struck from the left side toward the right side -- the blow that crushed his skull and showered the wall behind him with blood.

That's the only way that blood on the wall behind him could have gotten there. The only way the blood on the wall behind him -- you can look and examine the pattern -- is that way.

There was a bear statue found right down here (indicating). There was some blood on the base of it. I ask you to look at that when you get in there. And on one of the corners of the base -- it's a rounded corner -- but one of the corners is approximately 135 degrees. And 135 degrees is a right angle, a 90 degree plus a 45 degree -- one of the corners. He was struck from the left side to the right side.

(R. 1406-1407). These statements were in no way supported by the evidence and were presented to the jury in an attempt to hide the fact that it was Richard Kondian, and not Paul Scott, who struck the killing blows to James Alessi. Now, Mr. Scott has discovered that the State knowingly misled the jury. This evidence was not available to Mr. Scott until the State recently provided collateral counsel with a copy of the photo of a ring of blood in Mr. Alessi's house and counsel was able to show it to Dr. Cuevas.

Physical evidence found by the police and previously undisclosed belies the State's assertion that the bear statue was used to inflict the killing blows to James Alessi. There were only two small drops of blood on the felt base of the bear statue which was not enough blood for it to have been the weapon used to strike multiple blows to Mr. Alessi (see Dr. Cuevas' statement,

App. 5). The State's own expert knew that the State's case was false. The State had to know that it was misleading the jury. The State did not ask the expert in front of the jury about whether the bear statue was the lethal weapon because the State knew what the answer would be. The State knowingly misled the jury that the bear statue was the murder weapon.

In fact, the State had the evidence of the actual murder weapon in its possession, in the form of a photograph at the crime scene of a three-inch bloody circle which the State kept from Dr. Cuevas and the defense. Crime scene analysis has shown that the quantity of blood on the object leaving this bloody circle is consistent with the amount expected to be on an object used to inflict multiple blows of the intensity inflicted on Mr. Alessi (see report of Dale Nute, App. 6). Moreover, a champagne bottle is a perfect match to the bloody ring.

The object which made this bloody circle was not found in Mr. Alessi's house. However, the State possessed ample evidence which explained the existence of the bloody ring, and which revealed that it was in fact Richard Kondian who killed James Alessi with a champagne bottle. The State has now conceded that "Evidence relating to the bloody bottle circle was not introduced in Scott's trial because no connection could be proved to Scott."

The State was also aware of statements which Mr. Kondian had made to fellow inmate Dexter Coffin while awaiting trial in the Palm Beach County Jail to the effect that he had killed James

Alessi by hitting him over the head. However, Coffin's statement has never been turned over to Mr. Scott or his attorneys.

Richard Kondian had previously asserted that he hit James Alessi over the head with a champagne bottle. However, this evidence was not available at the time of trial.

The State's own expert has agreed that the murder weapon could not have been the bear statue. Dr. Gabino Cuevas, the medical examiner who testified at Paul Scott's trial for the State, has stated:

My testimony from Mr. Scott's trial indicates that the instrument used to strike the fatal crushing blows had a 135 degree angle. That is still my opinion today. At the trial I was not asked to identify a murder weapon nor do I recall being aware of allegations that Richard Kondian had struck the victim with a champagne bottle. The 135 degree angle, to which I testified at the trial, and the photograph of a bloody circle at the crime scene would both be consistent with a champagne bottle being the object used to strike the fatal crushing blows.

Numerous objects introduced into evidence at Paul Scott's trial appear to have been used to strike the victim. However, it is my opinion that none of the items which were introduced into evidence at Paul Scott's trial were in fact the instrument which caused the fatal crushing blows to the head. The bear statue is the only object introduced into evidence at trial which would have the requisite shape and weight to cause the fatal crushing head injuries. However, it is my opinion that the fatal crushing blows were not caused by the bear statue, since the felt base had only a few drops of blood instead of the amount of blood which would be found on the murder weapon.

(App. 5) (emphasis added). It is clear from Dr. Cuevas' testimony that he was not informed of material facts relating to evidence

found at the scene. The State intentionally withheld evidence from the jury to present the false impression that the murder weapon was something other than the champagne bottle which Mr. Kondian had admitted using to strike Mr. Alessi.

The foregoing evidence clearly shows that the State had in its possession abundant evidence proving that it was Richard Kondian who killed James Alessi with the champagne bottle - and which eliminated the bear statue as the murder weapon. Yet the State deliberately withheld information from its own experts and from the jury in order to falsely assert that Paul Scott killed James Alessi with the bear statue. Ironically, the State assured the jury that while "a number of other photographs and a number of other things were not introduced in the trial" that it was "not done to hide anything from you" (R. 1395). That is exactly what the State did in this case. Again, the State intentionally misled the jury.

D. THE STATE MADE FALSE AND MISLEADING STATEMENTS TO THE JURY WHEN IT INFORMED THEM THAT JAMES ALESSI'S KILLER WAS LEFT-HANDED.

In its closing statement, the State made the following assertion to the jury:

One of the other things that I hope you noted throughout the trial just by observing and watching was that up until the time Dr. Cuevas testified in this case -- he testified about the heavy blows being on the right side of the face -- the Defendant was taking notes. He was sitting at the table -- at his table like this (indicating), taking notes like this (indicating).

When Dr. Cuevas testified that the heavy blows that did the damage to Jim Alessi were

on the right side of the head, he never picked up another pencil.

(R. 1408). The prosecutor, in essence, testified. Besides being false testimony, the prosecutor's argument was reversible error. See Gomez v. Ahitow, 29 F.3d 1128 (7th Cir. 1994); United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984). The State also told the jury that Mr. Alessi had been struck "from the left side to the right side" (R. 1407). These statements were wholly unsupported by the evidence and were made in an attempt by the State to mislead the jury as to the identity of Mr. Alessi's murderer.

The State's own expert, Dr. Cuevas, the medical examiner who testified at Paul Scott's trial, has now indicated that:

The evidence does not establish whether the person who killed James Alessi was right or left handed. There is no evidence either from the autopsy I performed on Mr. Alessi or the crime scene which would allow me to make a determination regarding that matter. The blow could have been struck with either hand or with both hands.

(App. 5). Dr. Cuevas' statements make it clear that the State had absolutely no basis for implying to the jury that Paul Scott was left-handed and that he was therefore James Alessi's killer. This false statement misled the jury into concluding that it was Paul Scott, and not Richard Kondian who must have been the killer.

Richard Kondian is left-handed (App. 24). In an interview with Detective Mancuso of the Rhode Island Police Department shortly after the murder, Mr. Kondian explained that he had

received a deep cut on his left ring finger while hitting James Alessi over the head with a champagne bottle. Again, the State intentionally misled Mr. Scott's jury.

E. THE STATE PRESENTED PERJURED TESTIMONY TO THE JURY REGARDING PAUL SCOTT'S INVOLVEMENT IN THE MURDER OF JAMES ALESSI AND MADE FALSE AND MISLEADING ARGUMENTS TO THE JURY REGARDING THIS PERJURED TESTIMONY.

At Paul Scott's trial, the State's star witness, a witness "of consequence" according to the State (R. 1383), was Charles Vincent Soutullo. Charles Soutullo testified that Richard Kondian and Paul Scott had had a conversation regarding the murder of James Alessi on the evening of his death (R. 626-683). In its closing argument, the State apologized to the jury for calling such "an unsavory character" (R. 1383-84), but insisted that his testimony was truthful (R. 1385-1388). The State assured the jury that Charles Soutullo would not have been called otherwise, because "you can't put a witness on the stand to testify to things you know are a lie" (R. 1385-86). It is clear that the State did exactly that.¹⁴

Bernard Collins of the Boca Raton Police Department first interviewed Charles Vincent Soutullo, on December 7, 1978. During that interview, Mr. Soutullo told Detective Collins that it was Richard Kondian who had attempted to involve him in stealing money from James Alessi. No mention of beating or

¹⁴Mr. Scott previously presented this claim in his prior Rule 3.850 motion. This Court ruled Mr. Soutullo's recantation alone without more was not sufficient to warrant an evidentiary hearing regarding the State's misconduct. However, that ruling must now be reconsidered in light of a wealth of additional evidence of the State's misconduct.

killing Mr. Alessi was made and in fact Mr. Soutullo admitted that he had not been told how Mr. Kondian wanted to take the money. Paul Scott's name was never mentioned during this exchange. It was not until December 15, 1978, that Mr. Soutullo alluded to Paul Scott as being present during his conversation with Mr. Kondian. This time Mr. Soutullo changed his version of the story to declare that Mr. Kondian and Mr. Scott were going to take Mr. Kondian's clothes off, take his money and stick him in a closet. However, Mr. Soutullo has now indicated in his affidavit that the changes in his story were as a result of Detective Collins' direction as to what he needed to say (App. 22). The State knew that Mr. Soutullo testified falsely when he indicated that Paul Scott participated in his conversation with Mr. Kondian about Mr. Alessi.

Paul Scott went to trial in October of 1979. In a deposition taken on October 1, 1979, the day before Mr. Scott's trial, Mr. Soutullo changed his version of the events again, now stating that Richard Kondian had become involved with James Alessi in order to rob him (see deposition of Charles Vincent Soutullo, App. 22 at p. 13). Mr. Soutullo has indicated in his affidavit that this change was at Detective Collins' direction. Mr. Soutullo nevertheless insisted in his deposition that this had been Mr. Kondian's idea, and that it had been Mr. Kondian who had done all the talking and planning. Id. at 17, 23. He further indicated that Mr. Kondian "got mean" and changed after he had been taking drugs that day. Id. at 20. However, during

the deposition, Mr. Soutullo remarked that Richard Kondian and Paul Scott talked about injecting James Alessi with battery acid. Id. at 22. Mr. Soutullo stated that Rick and Paul told him "we're going to rob and kill [Alessi] if we have to."¹⁵ Again, Mr. Soutullo says in his affidavit the changes were at Detective Collins' direction.

By the time Mr. Soutullo testified at trial, his story had changed again. With a great deal of prompting from the State, Mr. Soutullo told the jury that "the same thing that Rick said was the same thing that Paul said" (R. 638). Mr. Soutullo went on to tell the jury that Paul Scott had been a major participant in the plan to rob and kill James Alessi (R. 632-639). In closing, the State assured the jury that Mr. Soutullo had given virtually the same story to the police each time he had spoken to them (R. 1387-88). Yet, as Mr. Soutullo has since indicated, the State knew this was false.

Mr. Soutullo reveals in his affidavit that the State forced Mr. Soutullo to testify that Paul Scott was involved in planning the murder of James Alessi through threats of incarceration for pending charges, and that every effort was made by the State to mislead the jury regarding this issue. Mr. Soutullo has admitted that the State had made it very clear to him that they wanted to convict Paul Scott of first degree murder, and that they forced

¹⁵The State refused to allow Soutullo to answer any questions regarding Soutullo's prior inconsistent statements to Collins on December 7, and 15 of 1978. See Deposition of Charles Vincent Soutullo, pp. 26-27.

him to provide favorable testimony (see App. 22). Mr. Soutullo indicates that he had been assured that the State would "put in a good word for him" in his California case so that he wouldn't have to do time. He also indicates that Detective Collins pressured him, and that this was the reason he had falsely told the jury that Paul Scott had been involved in the conversation planning the murder of James Alessi. Id. At trial, the State had denied doing this in its closing argument.

Subsequent investigation has revealed that the State had in its possession depositions from two police officers and a school principal in Alabama, where Mr. Soutullo lived, asserting that they would not have believed statements made by Mr. Soutullo, even under oath (Apps. 20, 34).¹⁶ Moreover, according to Mr. Soutullo, Detective Collins knew he was lying to the jury (App. 22). Certainly, the State's position at Mr. Kondian's plea colloquy reflects knowledge of Mr. Soutullo's lies.

The State was also aware of several contradictory statements which Mr. Soutullo had made to David Roth, Richard Kondian's attorney, in which Mr. Soutullo had said things that he later admitted were not true (see App. 20, pp. 6-7). Richard Kondian was allowed to plead guilty to a reduced charge of second degree murder two months after Paul Scott was sentenced to death. At

¹⁶These depositions were conducted by Mr. Kondian's attorney after Mr. Scott's trial, but before his sentencing. The State did not disclose this evidence to either Mr. Scott's counsel or to the judge at the time of sentencing even though the State agreed with Mr. Kondian's lesser sentence in part based upon these depositions.

the plea, Mr. Kondian's attorney explained to the judge that the plea had been agreed to because Mr. Soutullo was not truthful.

The State had ample information at Paul Scott's trial that Charles Vincent Soutullo was lying. The State deliberately manipulated Soutullo's false testimony at trial while assuring the jury that he was telling the truth in order to obtain a conviction and sentence of death for Paul Scott.

F. THE PROSECUTOR PRESENTED FALSE ARGUMENT WHEN HE ARGUED THAT MR. ALESSI TORE THE SCREEN ON THE PORCH.

The prosecutor argued to Mr. Scott's jury:

This evidence shows you, I suggest, that the struggle -- that is, the fight -- started in here (indicating). It went out -- it went in this area (indicating). There were pots and planters knocked over. The screen kicked out would indicate that perhaps at some point Mr. Alessi was able to get away briefly. That a struggle got outside through the door into where the screen was, and either one of the people trying to hold him kicked the screen as they were chasing him or he fell against the screen.

(R. 1400). Evidence the state failed to disclose demonstrates that this argument was false. Again, the crime scene evidence was such that the person who ripped the screen was not bleeding. The only person whose blood could not be positively identified at the scene was Mr. Scott's. Robert Dixon advised the State that Mr. Kondian was upset because Mr. Scott ran out on him. Once again, the State presented knowingly false argument.

G. THE STATE'S ACTIONS, IN HIDING EVIDENCE, MANIPULATING TESTIMONY AND MAKING FALSE AND MISLEADING STATEMENTS, VIOLATED MR. SCOTT'S RIGHT TO DUE PROCESS OF LAW.

As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The Fourteenth Amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, but also to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, the credibility of a State's witness, Napue; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of

the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the court has applied a strict standard. . .not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985), quoting United States v. Agurs, 427 U.S. at 102. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is **any reasonable likelihood**, that the falsity affected the verdict. This test is the equivalent of whether the State has shown the error harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. Thus, if there is **"any reasonable likelihood"** that the uncorrected false and/or misleading testimony of the State's witnesses affected the verdicts at

guilt-innocence or sentencing, Mr. Scott is entitled to relief. Obviously, here, there is much more than just a possibility--as the factual allegations in this motion demonstrate.

When the "inquiry is whether the State authorities knew" of the falsity of a government witness' testimony, it is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge **will be imputed to state prosecutors.**" Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984) (citations omitted) (emphasis added); Garcia v. State, 622 So. 2d at 1330. In this case, the State not only withheld vital information from the jury, but made deliberately misleading and false statements regarding the circumstances under which the violent struggle which ended in Mr. Alessi's death occurred; the weapon used to strike the killing blows; the manner in which the blows were struck; the identity of the person who struck the killing blows; and what Mr. Kondian -- the co-defendant -- would claim at his trial. There is much more than a "reasonable likelihood" that this false and misleading testimony offered by State witnesses affected the jury's judgment at guilt-innocence or sentencing. See App. 18. Accordingly, Rule 3.850 relief must issue. Garcia v. State.

Mr. Scott asserts that the State's misrepresentations could not be fully uncovered until now. Mr. Scott used due diligence, but the State failed to disclose the evidence necessary to establish this misconduct. The State presented false and misleading argument and withheld evidence which would have

revealed the misrepresentations. With the new disclosure just now obtained from Dexter Coffin and Robert Dixon and with Dr. Cuevas' and Dale Nute's analyses, this claim must be considered now as the basis was not previously available.

Mr. Scott is entitled to a full and fair evidentiary hearing on this claim. Mr. Scott is entitled to an evidentiary hearing since he has alleged facts that are not conclusively rebutted by the record. At an evidentiary hearing, Mr. Scott will document the factual allegations in his claims through the testimony of witnesses and record evidence. At such time Mr. Scott can establish that he is entitled to Rule 3.850 relief. Garcia v. State. Relief is warranted.

ARGUMENT III

MR. SCOTT IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).¹⁷ This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 19 Fla. L. Weekly S337 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla.

¹⁷According to Sawyer, where a death sentenced individual establishes innocence, his claims must be considered despite procedural bars.

1991). The Florida Supreme Court has recognized that innocence of the death penalty also constitutes a claim. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992). Mr. Scott can show both innocence of first degree murder and innocence of the death penalty.

INNOCENCE OF FIRST DEGREE MURDER

In Florida, first degree murder requires proof that either the killing was premeditated or in the course of a felony. At trial, the State presented Mr. Soutullo's false testimony that Mr. Scott premeditated the killing. Mr. Soutullo now admits that testimony was false (App. 22). Thus, Mr. Scott can show that there was no valid evidence of premeditation.

The State also presented felony murder as an alternative theory to support first degree murder. For this, the State again relied upon Mr. Soutullo's testimony indicating that Paul Scott planned to steal from Mr. Alessi. Again, Mr. Soutullo has stated that his testimony was false (App. 22).

There was additional evidence undisclosed by the State that proves that this was not felony murder.¹⁸ Mr. Kondian made statements to Dexter Coffin and Robert Dixon that he went to Mr.

¹⁸This additional evidence was not available in 1990 and was thus not considered by the Florida Supreme Court in Scott (Paul) v. Dugger, 634 So. 2d 1062 (Fla. 1993). It consists of affidavits of Dexter Coffin and Robert Dixon. This evidence is new. It was not available previously (App. 2). In Jones v. State, 591 So. 2d 911 (Fla. 1991), this Court indicated new evidence not previously discoverable warranted an evidentiary hearing even though the new evidence corroborated evidence presented in prior post-conviction proceedings. Under Jones, an evidentiary hearing is required.

Alessi's to get drugs and that the homicide occurred not in the course of a robbery but after Mr. Alessi made unwanted sexual advances upon Mr. Kondian (see Apps. 1, 3). The State in agreeing to a second degree murder plea for Mr. Kondian conceded that there was support for Mr. Kondian's claim that the homicide did not occur in the course of a felony. This evidence which was undisclosed to Mr. Scott included Mr. Coffin's statement and Mr. Dixon's statement (see App. 27).

Further, the undisclosed evidence shows abandonment of any criminal enterprise by Mr. Scott. Mr. Dixon's statement shows that Mr. Scott fled when Mr. Kondian and Mr. Alessi began the fatal struggle. This Court has explained that the defense of withdrawal is available as follows:

To establish the common-law defense of withdrawal from the crime premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan....

For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felonies have been completed. Again the defendant would have to show reenunciation of the impending murder and communication of his renunciation to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Smith v. State, 424 So. 2d 726, 732 (Fla. 1982) (citations omitted) (emphasis supplied). See also Laythe v. State, 330 So.

2d 113 (Fla. 2d DCA), cert. denied, 339 So. 2d 1172 (Fla. 1976); Bryant v. State, 412 So. 2d 347, 350 (Fla. 1982).

The affidavit of Robert Dixon demonstrates abandonment (App. 3). The post-trial deposition of Bernadine Bernard demonstrates abandonment (App. 11). The affidavit of Dexter Coffin corroborates Mr. Scott's nonparticipation in the killing. The torn screen (R. 840) corroborates the evidence that Mr. Scott fled the house through the screen, tearing it out on his way.

INNOCENCE OF THE DEATH PENALTY

Innocence of the death penalty can be shown by establishing ineligibility for a death sentence. See Scott (Abron) v. Dugger. This can be shown by establishing circumstances which under either state or federal law preclude a death sentence.

A. ENMUND; TISON.

One way in which a person convicted of capital murder is ineligible for a death sentence is if his culpability is insufficient under Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). As explained in Fairchild v. Norris, 21 F.3d 799 (8th Cir. 1994), if a death sentenced individual can show that he lacked the mental intent required under Enmund and Tison, the individual is innocent of the death penalty.

Here, the State suppressed evidence demonstrating that Mr. Scott was not a major participant nor was he recklessly indifferent to human life. See Fairchild v. Norris, 21 F.3d at 804. Dexter Coffin's affidavit shows that Mr. Kondian was the

major player (App. 1). Robert Dixon's affidavit shows that Mr. Scott was very upset over Mr. Alessi's fate, that he abandoned the scene and communicated his withdrawal to Mr. Kondian (App. 3). Robert Dixon's affidavit shows that Mr. Kondian was the dominant force and that Mr. Scott was cast in a minor role (App. 3). Moreover, the report of Dr. Barry Crown (App. 16) and the statement of Dr. Brad Fisher (App. 25) further establish Mr. Scott lacked the requisite mental state.

This is further corroborated by Bernadine Bernard's deposition (App. 11). Again, Mr. Scott did not participate in the homicide; he withdrew, fled the scene and communicated his withdrawal to Mr. Kondian. The evidence Mr. Scott now presents demonstrates under Enmund and Tison, Mr. Scott was not eligible for death.

B. INSUFFICIENT AGGRAVATING CIRCUMSTANCES

Innocence of the death penalty can also be shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law.

The sentencing judge relied upon four aggravating circumstances in imposing death. Two of the aggravating circumstances ("prior conviction of a crime of violence" and "under sentence of imprisonment") are dependent upon the validity of the California conviction of second degree murder. However, that conviction is invalid. At no time was Mr. Scott advised prior to his guilty plea that specific intent to kill was an element of second degree murder. Under Henderson v. Morgan, 426

U.S. 637 (1976), that conviction is invalid. As a result, two of the aggravating circumstances relied upon by the sentencing judge are invalid.

The third aggravating circumstance relied upon by the judge was "heinous, atrocious or cruel." However, Mr. Scott's jury received an unconstitutional instruction regarding this aggravator. As a result, this aggravating circumstance was invalid in Mr. Scott's case. See Glock v. Singletary, ____ F.3d ____ (11th Cir. October 7, 1994). The jury was not advised that this circumstance requires a specific intent to torture. Stein v. State, 632 So. 2d 1361 (Fla. 1994); Omelus v. State, 584 So. 2d 563 (Fla. 1991). Moreover, the State suppressed evidence demonstrating that Mr. Scott lacked the requisite specific intent (see Dixon's affidavit, App. 1). Other evidence demonstrates Mr. Scott lacked the specific intent to torture (see Apps. 11, 12, 14, 22, 23, 29, 30, 33).

The fourth aggravating circumstance -- "in the course of a felony" -- has been held insufficient standing alone to establish death eligibility. Rembert v. State, 445 So. 2d 337 (Fla. 1984); Proffitt v. State, 510 So. 2d 896 (Fla. 1987). Further, in this case there was evidence undisclosed by the State demonstrating that the homicide was not in the course of the felony (see Dixon's affidavit, App. 3). Additional evidence demonstrates abandonment -- Mr. Scott fled the scene and communicated his withdrawal to Mr. Kondian (see Dixon's affidavit, App. 3; Bernard's depo, App. 11; Apps. 12, 28, 29, 30, 32, 33).

Moreover, the aggravator is an illusory aggravator in a felony/murder case which violated the Eighth Amendment when employed in a weighing state like Florida. Stringer v. Black, 112 S. Ct. 1130 (1992).

C. DISPROPORTIONATE

In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the undisclosed evidence, combined with the invalid California conviction and Kondian's second degree conviction, and Dr. Crown's findings regarding Mr. Scott's mental capacity, render the death sentence disproportionate. One aggravating circumstance is insufficient. Moreover, a co-defendant's life sentence will establish a death sentence to be disproportionate where this is no valid basis for distinguishing between the co-defendants. Scott (Abron) v. Dugger.

In Abron Scott's case, this Court held that a letter by the sentencing judge Clemency board expressing the view that the death sentence was disproportionate in light of a subsequently imposed life sentence for the co-defendant constituted admissible evidence establishing that Mr. Abron Scott was innocent of the death penalty. Here Mr. Paul Scott has affidavits from four jurors who expressed their views in the clemency process that the death sentence was disproportionate in light of previously unknown evidence (specifically including the co-defendant's plea to a lesser offense). There is no valid distinction between the

new evidence presented by Mr. Paul Scott and the new evidence presented by Mr. Abron Scott. This Court must grant Mr. Paul Scott the same relief accorded Mr. Abron Scott. Mr. Scott is innocent of the death penalty.

D. MENTAL RETARDATION

Finally, Mr. Scott is ineligible for a death sentence because he is mentally retarded. His I.Q. is 69. This is within the mentally retarded range. Mr. Scott's mental age is 12. Execution of the mentally retarded is unconstitutional under the evolving standards of the Florida and United States Constitutions. See Argument IV. Mr. Scott's mental age and I.Q. score render him ineligible for a death sentence and hence innocent of the death penalty.

E. CONCLUSION

In Abron Scott's case, the Florida Supreme Court found that a letter to clemency authored by a co-sentencer (in that case, the judge) constituted newly discovered evidence proving innocence of the death penalty. Here, Mr. Paul Scott has four affidavits from jurors (the other co-sentencers) which were prepared in the course of clemency advising the clemency board that a death recommendation would not have been returned in light of evidence unknown at the time of trial (App. 18). This evidence is indistinguishable from the new evidence in Scott (Abron) v. Dugger. The result for Paul Scott must be the same as the result for Abron Scott. Had the jury recommended life, that

recommendation would have been binding. Hall v. State, 541 So. 2d 1125 (Fla. 1989).

This Court must accept Mr. Scott's allegations as true at this juncture. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). The allegations show bases for granting relief and require an evidentiary hearing. Lightbourne. This Court must grant an evidentiary hearing.

ARGUMENT IV

**THE EXECUTION OF PAUL WILLIAM SCOTT, A
MENTALLY RETARDED AND BRAIN DAMAGED YOUTHFUL
OFFENDER, WOULD CONSTITUTE CRUEL AND UNUSUAL
PUNISHMENT UNDER THE FLORIDA CONSTITUTION.**

Mr. Scott has significant mental deficiencies which render the application of the death penalty in his case cruel and unusual. The Florida Supreme Court has acknowledged that a death sentence may be improper under the Florida Constitution when the defendant is grossly impaired and functions at the level of a child. See Woods v. State, 531 So. 2d 79, 83-84 (Fla. 1988). The execution of a child is precluded. Allen v. State, 636 So. 2d 494 (Fla. 1994).

Paul Scott's level of intellectual functioning places him well within the mentally retarded range. His history and background are consistent: At a very early age he was abandoned by his father, and left in the care of his mother. Before his father left the home, he had often engaged in vicious beatings and sexual abuse of Paul. Paul's mother suffered from mental illness and was unable to provide ordinary nurture and support much less the special care the emotionally and mentally disabled

child required. Paul's only support from his mother often took the form of physical and emotional abuse which only exacerbated his mental deficiencies. This was made worse by the impoverished conditions in which Paul's family was forced to live (App. B, Exhibits 4, 14, 16).

Early on, his mental retardation precluded any achievement in school -- as a result of his deficiencies, he failed miserably. He was referred to a psychiatrist at the age of 11. This doctor prescribed heavy anti-psychotropic medications such as Mellaril and Thorazine to control Paul, rather than provide counselling, special classes, and testing for brain damage. When Paul was denied prescription drugs, he turned to addiction to street drugs in his early teens -- a coping mechanism to alleviate the pain of his life and to deal with his mental problems (App. B, Exhibits 14, 16).

On April 7, 1994, Dr. Barry Crown conducted a comprehensive neuropsychological evaluation of Paul Scott. This testing has revealed that Paul Scott has a full scale I.Q. of 69 and is functioning well within the range of mental retardation both on an intellectual and adaptive level. Testing has also revealed the presence of organic brain damage and fetal alcohol syndrome.

Dr. Crown has found that Paul Scott functions on the following mental age levels:

Abstract Reasoning and Problem Solving: Nine years and four months.

Memory Process Assessment: Between the ages of five years, four months and six years, eight months.

Listening Comprehension: Four years, ten months.

Attention and Vigilance: Six years, ten months

Oral Vocabulary Assessment: Ten years, eight months.

Visual Closure: Six years, eleven months

Concept Formation: Six years.

Ability to detect emotion from facial expression: Impaired.

Dr. Crown also found that:

He is easily led and directed.

He is unable to assess the long-term consequences of his immediate behavior.

Testing of specific frontal lobe functioning was in the significantly impaired (organic brain damage) range.

The findings of this examination indicate that Paul Scott is retarded by IQ and adaptive capacity measures. He has a diffuse, bilateral anterior neuropsychological impairment.

There is an Organic Brain Syndrome, Mixed and a Frontal Lobe Syndrome.

There is likely to be a multiple causative basis - neuro-developmental complications, toxic exposure, and head trauma.

Additionally, Dr. Crown made the following conclusions regarding both aggravating and mitigating circumstances.

Aggravating Circumstances...

The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

Paul Scott was led and directed into his prior involvement. He did not have the reasoning capacity to participate, nor did he have the capacity to effectively consult with his attorney and understand the ramifications of his plea.

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit ...

Paul Scott's organic brain damage impairs his ability to determine the long term consequences of his act. He is easily led and directed.

The capital felony was committed for pecuniary gain.

Paul Scott has the reasoning and concept formation capacity of a child. He is easily led and directed.

The capital felony was especially heinous, atrocious or cruel.

Paul Scott's frontal lobe brain damage renders him incapable of assessing the long-term consequences of his immediate behavior. He is easily led and directed.

Mitigating Circumstances...

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Paul Scott has organic brain damage. This is a permanent condition which results in extreme mental and emotional disturbance. It is exacerbated by drug and/or alcohol use.

The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

Paul Scott was led into this situation by another. Paul Scott is easily led and directed. His participation was relatively minor in contrast to the other participants.

The defendant acted under extreme duress or under substantial domination of another person.

Paul Scott is retarded. He has limited reasoning capacity. He is easily led and directed. He was led and directed by others.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Paul Scott has organic brain damage. This is a permanent condition. As a result of this condition, he is unable to comprehend the long-term consequences of his immediate behavior. Under stress, duress, and/or substances, he is unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

NON-STATUTORY MITIGATING CONSIDERATIONS

- A) Paul Scott is retarded with an IQ of 69.
- B) Paul Scott's reasoning and problem-solving capacities are below that of a 10 year old child.
- C) Paul Scott is learning disabled.
- D) His organic defects were undetected and mis-identified during his childhood resulting in improper treatment including treatments with large doses of anti-psychotic medications.
- E) That because of his emotional and intellectual deficits as well as his organic brain damage, he has poor impulse control.
- F) That because of his emotional and intellectual deficits, as well as his organic brain damage, he has difficulty in foreseeing the consequences of his actions.
- G) That at the time of the offense, due to the use of drugs and alcohol, coupled with his organic brain damage and low

intelligence, the capacity of Paul Scott to appreciate the criminality of this conduct and to conform his conduct to the requirements of the law was impaired.

- H) That at the time of the offense, due to the use of drugs and alcohol, coupled with his organic brain damage, the offenses were committed while Paul Scott was under the influence of mental and/or emotional disturbance.
- I) That during her pregnancy the mother of Paul Scott used and abused substances resulting in his birth with Fetal Alcohol Syndrome.
- J) As a child, Paul Scott was subjected to physical, emotional, and sexual abuse.
- K) Paul Scott had an impoverished upbringing.
- L) Paul Scott was raised in a grossly dysfunctional family, with no stable living environment.
- M) Paul Scott has not been a disciplinary problem and can adequately adjust to life imprisonment.

All of these findings, conclusions, and opinions are based upon a reasonable degree of psychological probability.

Barry M. Crown, Ph.D.
Diplomate, American Board of
Professional Neuropsychology

Certified Addictions Specialist

BMC/kl

(App. 16).

Dr. Brad Fisher, who examined Mr. Scott at the time of trial, now states:

I have reviewed both my own file of my evaluation of Paul Scott fifteen years ago, as well as the testimony I gave at that time in his trial. Additionally, I have reviewed the evaluation completed in April of 1994 by Dr. Barry Crown.

Based on this review, I offer the following opinions and conclusions:

1. The purpose of my evaluation was an assessment of prison adjustment potential, and in no way carried over into any intent or ability to assess his intelligence level. I did not evaluate for a determination of Mr. Scott's intelligence level.

2. The proper assessment for retardation includes three components. They are the assessment of intelligence through utilization of established testing of specific cognitive functions to determine IQ level; the study of adaptive function capabilities; and a consideration of the chronicity of the condition. While the report by Dr. Crown carefully studied each of these factors, my own assessment at the original trial did not look at any of them. Dr. Crown's report is professionally sound and establishes to my satisfaction that Mr. Scott is mentally retarded.

3. It is not appropriate for any clinician to comment on retardation without knowledge based on testing in these three areas when this is a critical area of evaluation focus. The fact that I commented in cross examination that my initial impression that retardation, psychosis, and possible neurological problems were not overly apparent was my attempt to focus attention on the issue of my own evaluation of prison adjustment and in no way meant to be conclusive or clinical findings based on appropriate testing. I certainly would have said as much if I had been further questioned in this area.

4. Dr. Crown's testing shows an I.Q. of 69 which indicates mental retardation. Such an I.Q. score is mitigating evidence of which I was unaware at the time of trial. It

further supports statutory mitigation in this case of age, under the domination of another, mental disturbance and impaired capacity. It is consistent with Mr. Scott's claim that he went along with Mr. Kondian unaware of any intent to kill and fled in panic before Kondian killed Alessi. Mental retardation would also negate aggravation dependent upon a specific intent to kill or torture. It corroborates Mr. Scott's claim that he did not have any contemplation that Mr. Alessi would be hurt. It would have reduced the weight to be accorded to aggravating factors arising from a prior conviction.

5. Certainly, Mr. Scott's I.Q. score of 69 indicates that Mr. Scott was mentally slow and would have a difficult time understanding legal terms of art. Such an I.Q. score would indicate that Mr. Scott would not understand the legal concept of a specific intent to kill without considerable explanation. I have been told that his understanding of that concept is at issue in his California plea of guilty to second degree murder. Clearly, absent specific and concrete explanation of specific intent to kill, Mr. Scott would not have been able to divine that such an intent was an element of second degree murder.

I hope this is helpful in understanding that I in no way intended to imply at his trial that I had made a proper study of his intelligence through the required testing of IQ, adaptive behaviors and condition chronicity, and therefore could give specific and accurate conclusions in these areas.

(App. 25).

Paul Scott has never functioned normally: his level of intellectual functioning is such that he cannot control his behavior, plan ahead, realize the consequences of his actions, or anticipate the long term results. He is and will always be, in terms of mental functioning, a child. His execution would therefore offend the evolving standards of decency of a civilized

society, see Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate phenological goal, see Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would therefore violate the Eighth and Fourteenth Amendments.

In this case, Mr. Scott's significant mental retardation, the disparity in the resolution of the codefendant's case, and age (mental as well as chronological) warrant consideration. Mr. Scott, like other significantly mentally retarded individuals, has a limited ability to understand the external world, a limited repertoire of responsive and coping behaviors, an inability to appropriately sequence behavior, and an inability to mediate and restrain aggression.

An individual such as Mr. Scott cannot fully or accurately understand the complex world in which he lives. As a result he, like other significantly retarded individuals, is continually subject to frustrations and confusions that the nonretarded never face. His limitations handicap him in trying to cope. See Handbook of Mental Illness in the Mentally Retarded, at 7 (F. Menolascino & J. Stark, eds. 1984). The mentally retarded lack the impulse controls of a nonretarded person, and are particularly prone to impulsive, unthinking action. Moreover, "the mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-431 (1985). As a consequence, the mentally retarded person generally has

great difficulty suppressing emotions or feelings of frustration. Mercer & Snell, Learning Theory Research in Mental Retardation, at 94-141 (1977). A mentally retarded person may therefore express his frustration as an aggressive reaction. The mentally retarded also tend to have "incomplete or immature concepts of blameworthiness and causation." Ellis and Luckasson, at 429 & n.78. As the facts of this case show, mentally retarded persons may find themselves engaging in criminal conduct when accompanying non-retarded individuals.

A significantly impaired and mentally retarded offender like Mr. Scott is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Tison. No legitimate penological purpose would be served by the execution of Paul William Scott. The "basic concept of human dignity," Gregg v. Georgia, 428 U.S. 153, 182 (1976), at the core of our system of jurisprudence in capital cases counsels that he not be executed.

In this case, it is not just mental retardation, but also mental age that warrants Eighth Amendment relief. In Allen v. State, 636 So. 2d 494 (Fla. 1994), this Court announced "the death penalty is either cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by Article I, section 17 of the Florida Constitution." The kinds of characteristics attributed to youthful offenders in Allen are precisely those characteristics attributable to Paul William Scott. His brain was, and is, quite

simply, dysfunctioning, because of his mental retardation. This dysfunction was further compounded by other deficits (e.g., substance abuse, emotional deficiencies, and brain damage). His level of functioning was at best that of a twelve year old child. The same Eighth Amendment concerns implicated by the execution of juveniles apply to the execution of mentally retarded offenders like Mr. Scott: no defendant who is mentally retarded is "capable of acting with the degree of culpability that can justify the ultimate penalty." Thompson, 108 S. Ct. at 2692. Under the decision in Allen v. State, Mr. Scott's execution is prohibited. He has a mental age of twelve (12). Homicides committed by the mentally retarded are prototypically the result of their limited ability to understand the external world, their limited repertoire of responsive and coping behaviors, their inability appropriately to sequence behavior, and their inability to mediate and restrain aggression. Mentally retarded offenders are thus the very opposite of the kind of offender whose "highly culpable mental state" permits imposition of the death penalty. Tison v. Arizona, 106 S. Ct. 1667, 95 L.Ed.2d 127, 144 (1987). Since no legitimate penological purpose is served by the condemnation of the mentally retarded, the "basic concept of human dignity at the core of the [Eighth] Amendment," Gregg v. Georgia, 428 U.S. 153, 182 (1976), forbids the condemnation and execution of the mentally retarded. Cf. Thompson, 108 S. Ct. 2699.

In Mr. Scott's case, the jury never got to hear about the wealth of evidence available about his mental impairment because counsel failed to investigate and pursue this evidence. The only mental health expert called at the penalty phase, Dr. Brad Fisher, was presented only as an expert in predicting future behavior in prison. He rendered his opinion to the jury based on a one hour interview with Mr. Scott. Most importantly, he had never administered any psychological or intelligence testing to Mr. Scott.

In Penry v. Lynaugh, 492 U.S. 302 (1989), the Supreme Court also recognized the need to consider "evolving standards of decency that mark the progress of a maturing society." Id. at 2953. In doing so, the Court stated that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Id. The Court went on to find that only one state banned the execution of retarded persons, and that therefore a national consensus against execution of the mentally retarded had not been met. Id. at 2955. The Penry decision came out in 1989. Since that time, at least eight states have adopted a policy against execution of the mentally retarded. In addition, the newly enacted "Federal Crime Bill" states that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 Section 848 of Federal Criminal Code and Rules. In Penry, the Supreme Court noted that "legislation . . . is an objective indicator of contemporary values upon which" the Court can rely and only a

"single state statute [Georgia's] prohibiting execution of the mentally retarded, even when added to the fourteen (14) states that have rejected capital punishment completely, does not provide sufficient evidence at present of a national consensus" against the execution of the mentally retarded. Id. at 2955. However, since the Penry decision in 1989 Arkansas, Colorado, Kentucky, Maryland, New Mexico, Tennessee, Washington and Georgia have enacted statutory provisions against executing the mentally retarded. When considered with the states which have no death penalty, executing the mentally retarded is unacceptable to the contemporary values of modern American society. Moreover, the recent decision in Allen v. State should apply to mental age, not just chronological age. The execution of the mentally retarded should be declared unconstitutional.

In light of all of the above, relief is proper. Mr. Scott's factual allegations must be accepted as true. An evidentiary hearing must be granted. Thereafter Rule 3.850 relief will be required.

ARGUMENT V

MR. SCOTT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE PROCEDURAL RULES HAVE BEEN ARBITRARILY APPLIED SO AS TO PRECLUDE CONSIDERATION OF MERITORIOUS CLAIMS PRESENTED BY MR. SCOTT.

Mr. Paul Scott has never had this Court, the judge or the jury give mitigating effect to Richard Kondian's life sentence. Yet, this Court recognized in Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992), that a co-defendant's life sentence subsequent to sentencing must be given mitigating effect. At no time has Kondian's life sentence been analyzed to determine if it warrants a life sentence for Paul Scott. The failure to conduct the proper analysis under Scott (Abron) violates the Eighth and Fourteenth Amendments. It is clear that if the Scott (Abron) analysis is followed in Paul Scott's case, a life sentence would be required. See App. 18.

This Court has arbitrarily applied procedural bars so as to render Mr. Scott's death sentence arbitrary and capricious. Other death-sentenced individuals have received resentencings for errors contained in Mr. Scott's penalty phase proceedings. James v. State, 615 So. 2d 668 (Fla. 1993); Glock v. Singletary, ___ F.3d ___ (11th Cir. Oct. 7, 1994). Mr. Scott's jury was given an unconstitutional instruction regarding "heinous, atrocious or cruel." The jury was told to consider the "avoiding arrest" aggravator, but was not told (over objection) of the narrowing construction which rendered the aggravator inapplicable.

In non-capital cases, Florida law provides "a sentencing error which causes an individual to be restrained for a time longer than that allowed by law may be heard in any and every manner possible." Rodgers v. State, 19 Fla. L. Weekly D2175 (1st DCA 1994). The failure to follow this rule in capital cases is arbitrary.

ARGUMENT VI

THE STATE CONTINUES TO SUPPRESS EVIDENCE WITHOUT EXPLANATION. ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. SCOTT'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. SCOTT CANNOT PREPARE AN ADEQUATE RULE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

In preparing to file post conviction challenges, Mr. Scott has continued to seek access to evidence being suppressed by the State. He has sought public records from the Office of the State Attorney for the Fifteenth Judicial Circuit, Palm Beach County Sheriff and the Boca Raton Police Department. Earlier this year, Mr. Scott's counsel made Chapter 119 requests and has been unable to obtain full compliance with Chapter 119.

Effective legal representation was denied Mr. Scott because public records from the following agencies were not received by Mr. Scott's collateral counsel:

EVIDENCE COLLECTED FROM PAUL SCOTT CRIME SCENE
BY BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

- 01 Photo album as to pictures previously the property of James Alessi - turned over to his sister Jane Battilla.
- 03 Standard from hall (south wall)
- 04 Cigarette Butts - family room ashtray
- 05 Hair on white rug
- 07 Silver 4" medal figure with hair
- 08 Piece of pot with blood and hair
- 10 Cigarette filter found on west rug
- 11 Cigarette found on family room floor
- 12 Hair in family room floor
- 14 Silver 3" metal figure - family room with hair
- 15 Piece of vase found in couch under cushion (east end)
- 17 Cigarette butt in family room floor
- 18 Blood drop on the kleenex box in family room
- 19 Empty package of kool filter pack in the family room
- 20 White antenna wire from TV in family room - a black cord from TV
- 22 A standard of wall (the hall wall)
- 23 Plaster to the standard - bedroom divided wall
- 24 Blood from plastered wall (dividing wall of bed and family room, south end)
- 25 Blood stains from hall wall
- 27 Tissue - family room floor

- 28 Match book from Tradewinds Motel
- 29 White shag rug from family room floor
- 34 Kleenex box - family room floor
- 35 An envelop containing two (2) Tuberculin - in envelop marked with a circle with the letter 'n' inside of it
- 35 Envelop no. 2, is marked B+A with printed names Dr. Albert F. Robins, 51 S.E. 3rd St., containing four (4) Tuberculins
- 36 Hair from dining room chair located in the kitchen
- 37 Blood stains from chair - a wood chair found in kitchen
- 38 Standard from dining room chair found in kitchen
- 43 Hair from electric socket in dining room
- 44 Blood smear on carpet in dining room
- 46 Plastered standard from east dining room wall, 4' from floor
- 48 Rug standard - dining room
- 49 Blood smear on rug
- 50 Hair from paper weight in dining room
- 51 Hair on the east dining room wall
- 52 Leaf with blood - dining room
- 60 Quantity two (2) blood drops - back cover of guest book
- 66 Blood from foyer floor
- 67 Hair from a mirror stand
- 71 Electrical cord used to tie hands of victim
- 72 Black electrical cord used to tie feet of victim
- 73 Bracelet off the right wrist and ring off ring finger of victim

- 74 Fingernail clippings from right and left hand of victim
- 75 (1) Hair from victim's head
(2) foreign hair in the left hand of victim
(3) Hair from victim's beard
(4) Pubic hair of victim
(5) Hair from victim (standard)
(6) Piece of material taken out of skull of victim
- marked 'A' on diagram
- 80 Blood from commode seat in N.W. bedroom (one (1) drop)
- 81 Blood sample from master bedroom bath door frame
- 82 Pitcher found on night table top drawer, S.W. corner of room; Coins unlimited card with poem, black sheet of paper
- 84 Standard on bathroom door (master) frame
- 85 Standard from front door - blood sample
- 86 Cigarette butts from master bedroom (ashtray on dresser)
- 87 Hair (one (1)) from dresser against east wall N.W. bedroom
- 88 A flood lamp with shade (minute amount of blood in attached pill box)
- 89 Blood taken with wet paper towel off of front door knob (inside)
- 90 Blood stain from family room - hallway to bedroom - floor area - circle of blood 3-1/2 to 4 inches in diameter
- 91 Cotton swab (two (2)) from floor rug dining room area 30 to 36 inches from step-down to living room
- 92 Telephone address book located in the S.W. bedroom on the S.W. corner end table left drawer
- 93 Standard - S.E. bedroom door frame
- 94 Two (2) syringes found in garbage on porch
* taken to county lab for analysis 8-31-79
- 96 Blood stains on bedspread

Blood stains from a bedspread in master bedroom

100 Blood stains on bedspread in master bedroom

106 Hair from obelisk - living room

136 Suspected blood - shower floor

137 Suspected blood - shower floor

138 Suspected blood - shower floor

139 Suspected blood - shower floor (visible on shower
step)

140 Blood from shower door (Inside scrape)

142 Cotton swab with sample of drainwater

143 Brown turtle neck sweater

144 Brown shirt

145 "Water Finger" shower message

146 Conair hair dryer

147 Box containing plaster wall sample (area of wall
where visible blood was cleaned off with some type
of acid cleaner. This is where the blood print
was found. When this sample was taken there was
no visible blood. Test sample to determine if
there is still any evidence of blood)

149 Marijuana on top of guest book

EVIDENCE COLLECTED FROM VICTIM'S AUTO
BY BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE OR PROVIDED TO CCR

Item No.

107 White towel on driver's floor board

109 Vacuum - driver's area

110 Vacuum - driver's side rear

111 Vacuum - passenger's side rear

112 Vacuum - front passenger

113 Vacuum - rear compartment

115 Hair from rear seat

116 Cigarette butts from rear of driver's door

118 Blood - driver's side rear floor and hair

120 Blood stain driver's door

121 Cigarette butts on console

123 Possible blood stain on carpet - driver's floor

124 Possible blood stains on carpet - driver's floor

127 Hair/floor left driver's seat

129 Paper with possible blood - driver's seat, floor - left side

130 Tissue with blood

132 Cigarette butts - rear passenger side

134 Butts from ashtray

001 Roll 400 asa kodak color film - photos of homicide victim's auto

EVIDENCE COLLECTED FROM 1450 NE 5TH AVENUE
BY BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

147 Gold earring - "cross" (found on floor in front of jewelry case)

EVIDENCE COLLECTED FROM BETHESDA HOSPITAL
BY BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

01 Blood red top (2)

02 Urine red top

03 Blood gray top

04 Mouth washing red top
05 Penile washing red top
06 Rectal washing red top
01 Color film 400asa depicting autopsy at Bethesda
Hospital. James Alessi

EVIDENCE COLLECTED FROM THE TRADEWINDS MOTEL ROOM 301
BY THE BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

01 Color film, 400 asa, depicting crime scene on room
301

EVIDENCE COLLECTED FROM 100 NW 2ND AVENUE
BY THE BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

01 Roll of color film 400 asa depicting fingerprint
of bear and knife used in xxxxx

EVIDENCE COLLECTED FROM B.R.P.D.
BY BOCA RATON POLICE DEPARTMENT,
NOT ADMITTED INTO EVIDENCE AND NOT PROVIDED TO CCR

Item No.

01 Package containing the following:
#1 - one hundred and twenty-eight latents
#2 - Nineteen photographs of latent prints
#3 - Inked prints of; 1. James Alessi
2. Paul Scott 3. Richard Kondian
4. Roger Scott

OTHER EVIDENCE NOT PROVIDED TO CCR BY THE STATE ATTORNEY'S
OFFICE, THE BOCA RATON POLICE DEPARTMENT, AND/OR THE PALM BEACH
COUNTY SHERIFF DEPARTMENT

Item No.

Taped statement of Vincent Soutullo dated 12/7/78

Taped statement of Felicia Brooks dated 12/7/94

Statement of Vincent Soutullo dated 12/12/78

Statement of Vincent Soutullo dated 12/13/78

Statement of Vincent Soutullo dated 12/15/94

Statement of Vincent Soutullo dated 1/11/79

Tapes and complete notes of statements of Kenneth
Budlong and Dexter Coffin

The Office of the State Attorney for the Fifteenth Judicial Circuit; the Boca Raton Police Department; and the Palm Beach County Sheriff have failed to comply with Chapter 119. The failure to promptly provide the requested public records has and is materially hampering Mr. Scott's defense, preventing the state courts from conducting a full and fair hearing, and creating a chilling effect on Mr. Scott's defense. The noncompliance is effectively violating Mr. Scott's rights under Chapter 119 of the Florida Statutes, Article I of the Florida Constitution; and the Eighth and Fourteenth Amendments to the United States Constitution. The State's refusal to provide evidence and failure to comply with the public records law is disrupting the judicial process by unnecessarily delaying the pursuit of Mr. Scott's post-conviction motion and preventing timely consideration of the case by this Court.

This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. Muehleman v. Dugger, 623 So. 2d 481 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1039 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Mr. Scott is also entitled to have an in camera inspection of any materials claimed to be exempt from Chapter 119. Walton v. Dugger; Jennings v. State, 583 So. 2d 316 (Fla. 1991). Mr. Scott is entitled to an evidentiary hearing to determine why evidence and public records continue to be withheld by the State. This trial court failed to grant Mr. Scott's request for such a hearing. A hearing is required. Muehleman; Walton.

Mr. Scott continues to seek the public records necessary to determine what post-conviction claims he has to present to the trial court. This Court has held it is proper for capital post-conviction litigants to present in Rule 3.850 motions claims premised upon Chapter 119. Moreover, to the extent any state agency invokes an exemption, Mr. Scott is entitled to have this Court conduct an in camera inspection to determine the validity of the claimed exemption. See State v. Kokal, 562 So. 2d 324 (Fla. 1990); Jennings v. State, 583 So. 2d 316 (Fla. 1991).

Until the State fully discloses these records, Mr. Scott cannot know if other claims may exist in this case under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1970); United States v. Cronin, 466 U.S. 648 (1984);

Richardson v. State, 546 So. 2d 1037 (1989); Roman v. State, 528 So. 2d 1169 (Fla. 1988); and Strickland v. Washington, 466 U.S. 668 (1984). Mr. Scott's request for leave to supplement is integral to his rights in the post-conviction process; and as this Court has held, due process is what governs post-conviction litigation. Holland v. State, 503 So. 2d 1250 (Fla. 1987); see also Brown v. State, 596 So. 2d at 1028; Woods v. State, 531 So. 2d 79 (Fla. 1988).

The people of Florida have long been committed to open government and to an open judicial process. "Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit appointment of judges and for attorney discipline. We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." In re Petition of Post-Newsweek Stations, 370 So. 2d 764, 780 (Fla. 1979). Throughout this state's history, Floridians have required that their government function in full view of the citizenry. E.g., Davis v. McMillian, 38 So. 666 (Fla. 1905). Although recognizing that open government may have certain disadvantages, Floridians have consistently determined that the costs are inconsequential compared to the benefits. Open Gov't Law Manual, p. 5 (1984). This determination underlies the Florida Public Records Act which gives effect to the policy that "all state, county, and municipal records shall at all times

be open for a personal inspection by any person." Section 119.01, Fla. Stat. (1991).

Florida's courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. App. 4 Dist. 1985). Such open government preserves our freedom by permitting full public participation in the governing process. City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); see Wolfson v. State, 344 So. 2d 611 (Fla. 2d DCA 1977). Thus, every public record is subject to the examination and inspection provisions of the Act unless a specific statutory exemption applies. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 370 So. 2d 633 (Fla. 1980).

Exemptions to disclosure are construed narrowly and limited to their purposes. Information gathered or held while that purpose is not being served are not exempt. Tribune Company v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So. 2d 1075 (1984), app. dismd, 105 S. Ct. 2315 (1985) (criminal investigative information exemption did not prevent disclosure of records); see also State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976) (exceptions to the general law are construed narrowly).

This Court must therefore grant Mr. Scott's request for leave to amend the instant motion. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993). Counsel in good faith initiated Rule

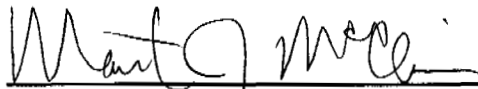
3.850 proceedings in order to obtain the benefit of Chapter 119 for Mr. Scott. Yet, the trial court has erroneously denied him his rights by denying the motion.

The state's failure to provide the requested records has delayed Mr. Scott's post-conviction investigation and made it impossible for him to fully plead and raise any violations which may become apparent from the records which he seeks. The failure to comply with Chapter 119 law constitutes external impediments which have thwarted Mr. Scott's efforts to establish he is entitled to post-conviction relief. The matter must be remanded to permit Mr. Scott an opportunity to pursue Chapter 119 materials.

CONCLUSION

Based upon the foregoing argument, Mr. Scott respectfully requests that this Court stay his execution, reverse the lower court, remand for an evidentiary hearing, and grant all other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by Federal Express, to all counsel of record on November 14, 1994.



MARTIN J. MCCLAIN
Florida Bar No. 0754773
Chief Assistant CCR
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Celia Terenzio
Assistant Attorney General
1655 Palm Beach Lakes Boulevard
Third Floor
West Palm Beach, FL 33401-2299