

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1734

PAUL SCOTT

VS.

STATE OF FLORIDA

APPELLEE

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL  
CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA,  
(CRIMINAL DIVISION)

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ANSWER BRIEF OF APPELLEE

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**PRELIMINARY STATEMENT**

Appellant, Paul Scott Defendant below, will be referred to as "Appellant" or "Scott" and Appellee, State of Florida, will be referred to as "State" or "Appellee". Reference to the appellate record will be by "ROA", to the postconviction record will be "PCR", to the transcript of the hearing below by "PCR-T", followed by the appropriate volume and page number(s) and Scott's initial brief will be notated as "IB"

**STATEMENT OF THE CASE AND FACTS**

Paul Scott's conviction for the first degree murder of James Alessi was upheld on appeal over twenty-six years ago. Scott v. State, 411 So. 2d 866 (Fla. 1982). Since then, there have been six additional published opinions from the Florida Supreme Court and two published opinions from the Eleventh Circuit Court of Appeals.<sup>1</sup> The facts of the crime were recounted by this Court as follows:

On the evening of the murder, Scott and his co-perpetrator, Richard Kondian, told Charles Soutullo of their plan to rob and to kill Alessi and asked him to join them. Soutullo declined the invitation. Later that

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<sup>1</sup> Scott v. State, 419 So. 2d 1058 (Fla. 1982); Scott v. State, 433 So. 2d 974 (Fla. 1983); Scott v. State, 513 So. 2d 653 (Fla. 1987); Scott v. Dugger, 634 So. 2d 1062 (Fla. 1993); Scott v. Singletary, 657 So. 2d 1129 (Fla. 1995); Scott v. State, 717 So. 2d 908 (Fla. 1998); Scott v. Singletary, 891 F.2d 800 (11<sup>th</sup> Cir. 1989); Scott v. Singletary, 39 F. 3d 1547 (11<sup>th</sup> Cir. 1994).

evening, Alessi picked up Scott and Kondian. At approximately 11 p. m. they arrived at Alessi's father's home where the victim borrowed his father's station wagon and obtained a patio umbrella from his father. They then drove off in the victim's car and in his father's car. The patio umbrella was later found in the victim's backyard.

The next morning the victim's nude body, which was covered with blood, was discovered in his home. His hands and feet were tightly bound with electrical cord and telephone wire. He had been brutally beaten about his head, chest, and arms. He had sustained six blows to the head with a blunt instrument, one of which was so severe that it had caused a compressed fracture of the skull. The head injuries were the cause of his death. There were many signs of a violent struggle by the victim in his attempt to get away from his assailants. Throughout the house were broken articles and bloodstains on the walls, furniture, curtains, and floors. Scott's fingerprints were found on various items throughout the victim's home, including the neck of a broken vase and the bloodstained knife on the sofa which apparently had been used to cut the electrical cords used to tie the victim.

After bludgeoning the victim to death, Scott and Kondian rummaged through the house. The same night as the murder and as a part of their intended scheme to rob and to kill Alessi, they went to the victim's flower shop with a key and took most of the gold in the shop. They also took the victim's car. Scott was found a month later in Sacramento, California. He had in his possession various items of jewelry, including a golden bear charm. The victim wore a golden bear charm, and there was one in his shop the day he was killed.

Although Scott was indicted for the premeditated beating death of Alessi, the State, in addition to proceeding on the

theory of premeditated murder, also sought to prove felony murder.

Scott challenges his conviction of first-degree murder on several grounds, none of which we find to be meritorious. Initially, he argues that the evidence presented by the State was not sufficient to prove him guilty beyond a reasonable doubt and that the evidence does not exclude a reasonable hypothesis of innocence. We disagree and hold there is substantial, competent evidence in the record to sustain Scott's conviction. Scott and Kondian made a definite statement preceding the murder of their plans to rob and to kill Alessi. The victim's father identified Scott as one of the two men who had been with his son late on the evening of his death. The patio umbrella they had picked up was found the next morning at the victim's home, evidencing that the three had gone there later that evening. Scott's fingerprints were found throughout the house in places reasonably consistent only with the conclusion that he had committed the homicide. Items of gold jewelry were found in Scott's motel room in Sacramento, California, including a golden bear charm like the one that was taken from the victim's shop the day of his murder. Also, a gold bracelet like the one taken from the victim's shop was found in the possession of Kondian's girlfriend. Viewing all the evidence presented at trial, we conclude that the evidence is inconsistent with any reasonable hypothesis of innocence. See Thomas v. State, 374 So. 2d 508 (Fla. 1979), cert. denied, 445 U.S. 972, 100 S. Ct. 1666, 64 L. Ed. 2d 249 (1980).

Scott also contends that the evidence does not support a finding of premeditation nor does it prove robbery or burglary. The manner in which the victim was murdered in itself evidences premeditation. There was a long bloody chase throughout the house, the

victim was badly beaten, his hands and feet were tied while he was still alive, and he was struck on the head six times with a blunt instrument. The evidence was clearly sufficient to establish premeditation. See Mines v. State, 390 So. 2d 332 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S. Ct. 1994, 68 L. Ed. 2d 308 (1981). We likewise reject Scott's contention regarding lack of proof of the robbery and burglary.

411 So. 2d at 867.(emphasis added).

In order for this Court to thoroughly assess whether the trial court denied properly Scott's request for DNA discovery pursuant to Fla. R. Crim. Pro. 3.853, it is imperative to illustrate how his defenses have "evolved" over the last quarter century plus. Scott has presented differing accounts regarding the level of his participation in the robbery and murder of James Alessi, which occurred on December 4, 1978. Scott's explanations have traversed the spectrum from a claim of: "complete innocence", I was not there during the commissions of the crimes; "partial guilt", I was there only to rob the victim while my co-defendant subverted the victim's attention by engaging in sex with him and I ran out before the beating; "defense of others", I was there and I participated in the beating as I was attempting to assist Kondian in warding off the unwanted sexual advances of the victim. *A fortiori* Scott's own statements throughout the years have been inconsistent with each other as well as inconsistent with the physical evidence.



Scott's defense at trial was that the co-defendant, Richard Kondian, was **the** major participant in the murder and Scott's role was minor. In fact Scott argued at trial that he ran out of the house before the victim was robbed and killed. (ROA 1355-1356, 1370). See also Scott v. State, 513 So.2d 653, 654 (Fla. 1987); Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995)

In 1987 Scott filed a motion for postconviction relief alleging numerous claims of ineffective assistance of counsel. At an evidentiary hearing Scott argued that trial counsel should have presented a "defense of others" theory rather than the defense that Kondian was the major participant.<sup>2</sup> The theory goes that Scott came to Kondian's defense after the victim made homosexual advances to Kondian which resulted in the violent struggle that cost Alessi his life. Scott, 513 So. 2d at 655. This Court rejected the ineffective assistance of counsel claim by pointing out the glaring inconsistency between the two defenses;

Moreover, Kondian's story to the Rhode Island police completely contradicted defense counsel's theory that Kondian did the killing. Indeed, Kondian told police that Scott had dealt the majority of the blows suffered by Alessi and that his own role in the struggle had been minimal. Based

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<sup>2</sup> In support of that theory Kondian testified that he and Scott were Alessi's home to buy drugs when Alessi "attacked" Kondian. Scott came to his rescue. Both left the house together. (PCR 4211-4255).

on the facts in this record, a "defense of others" theory and a theory that Kondian primarily was responsible for the murder could not have been asserted at the same trial. Thus, even if Kondian's testimony had been available, we would have to decide whether counsel was ineffective in failing to pursue one theory of defense rather than the other.

Id. (emphasis added). And the Court also noted that any claim that Scott was acting in defense of Kondian due to the alleged rape was completely inconsistent with the physical evidence.<sup>3</sup>

We cannot view this choice as anything but a strategic one, especially in light of medical evidence indicating that Alessi had been beaten and killed after he had been bound with the electrical cord.

Id.

In 1992, Scott filed a successive motion for postconviction relief. Therein he alleged the following:

In this appeal, Scott alleges that: 1) the circuit court erred by summarily denying his second rule 3.850 motion without conducting an evidentiary hearing or attaching those portions of the record that refute his claims; 2) newly discovered evidence establishes that Scott was innocent of first-degree murder; 3) newly discovered evidence of Scott's codefendant's 45-year sentence renders Scott's sentence disproportionate, and that other newly discovered evidence negates the aggravating factors found by the trial court and

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<sup>3</sup> In addition to the numerous theories developed over the years, Scott admitted at a clemency hearing that he and Kondian planned for Kondian to have sex with the victim while Scott went through the house looking for items to steal. Scott v. State, 513 So. 2d at 655.

establishes additional mitigating factors; 4) he was erroneously denied an opportunity to present exculpatory evidence to the jury due to either prosecutorial misconduct or the ineffectiveness of defense counsel; 5) he was denied the effective assistance of counsel; 6) the prosecutor improperly argued inapplicable aggravating factors; and 7) his sentence was unconstitutionally founded on arbitrary, capricious, and impermissible evidence because the state emphasized nonstatutory aggravating factors during the penalty phase proceeding.

Scott's claims I through V are based on the following allegedly new evidence: 1) the affidavit signed by Scott's codefendant, Richard Kondian, which acknowledges Kondian's and Scott's violent struggle with the victim and asserts that Scott did not intend to murder the victim; 2) the affidavit of one of the State's witnesses, Charles Soutullo, in which he recants his testimony at trial that Scott had told him that he (Scott) planned to rob the victim; 3) the fact that Kondian told Rhode Island police that he had cut his finger on a broken bottle during the struggle with the victim; 4) Kondian's forty-five-year sentence, imposed after Scott's conviction and sentence pursuant to a negotiated plea; and 5) Scott's trial and postconviction counsel rendered ineffective assistance by failing to investigate the facts stated above and by failing to raise them at trial or in postconviction proceedings.

Scott v. Dugger, 634 So. 2d 1062, 1064 (Fla. 1993). In rejecting relief, this Court again relied on the evidence which completely refuted any claim that Scott did not participate in the fatal and brutal beating of Alessi;

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.

Id. 634 So. 2d at 1064. (emphasis added).

Scott filed a third motion for postconviction relief alleging numerous instances of prosecutorial misconduct in violation of Brady v. Maryland, 373 U.S. 83 (1963). The specific allegations were as follows:

Principally, he contends that the State violated the principles of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by not disclosing: (1) a statement by Dexter Coffin, a cellmate of Scott's codefendant Richard Kondian, in which Coffin states he told a police officer that Kondian admitted killing the victim; (2) a statement by Robert Dixon, in which Dixon states he told a police officer that Kondian was angry with Scott for running out on him at the murder scene; and (3) a medical examiner's photograph that suggested that Kondian had struck the fatal blow by hitting Alessi on the head with a champagne bottle. Scott claims that, in light of this newly discovered evidence, we should revisit our ruling in Scott v. Dugger, 634 So. 2d

1062 (Fla. 1993), and grant a new sentencing hearing.

Scott v. State, 657 So. 2d 1129, 1130 (Fla. 1995). Following an evidentiary hearing, the Florida Supreme Court again denied all relief finding:

Finally, Scott claims that the trial court erred in excluding certain evidence from the evidentiary hearing. As noted above, this Court remanded this case for an evidentiary hearing on Scott's Brady claims, which included the claim that the State had failed to disclose a medical examiner's photo showing a bloody circle that could have supported Scott's claim that Kondian struck the fatal blow by hitting Alessi on the head with a champagne bottle. During the evidentiary hearing on January 23, trial prosecutor Selvig testified that he had disclosed the photo, and the record sustained his averments. In light of this proof, the court granted the State's motion to exclude any further testimony relating solely to the materiality of the photo under Brady. Scott contends that this was error because trial counsel's failure to present a material photo could give rise to an ineffectiveness claim. We disagree. This Court remanded this case solely for resolution of the Brady claims, not for resolution of an ineffectiveness claim. We find no abuse of discretion.

Scott v. State, 717 So. 2d 908, 912-913 (Fla. 1998). Eight years later, Scott filed a motion for DNA testing. The trial court summarily denied the motion given the fact that the motion was legally insufficient and any "favorable" results would not have lead to reasonable probability of exoneration or a lesser sentence. This appeal follows.

### SUMMARY OF THE ARGUMENT

Issues I-III - The trial court denied relief properly. Any further evidence establishing the presence of the victim's blood on an alleged weapon, a champagne bottle, would not have established that the co-defendant administered the fatal blow as both defendants have admitted to striking the victim with the bottle. Similarly any evidence that pointed to the presence of the co-defendant's blood to the exclusion of Scott's blood would not negate Scott's presence at the scene given that his fingerprints were found throughout the house. And finally, any DNA evidence establishing the presence of Appellant's blood at the scene would have completely obliterated his defense at trial that he left prior to the robbery and beating death.

**ARGUMENT**

**ISSUES I - III**

**THE TRIAL COURT DENIED PROPERLY APPELLANT'S  
REQUEST FOR DNA TESTING (restated)**

Scott is challenging the trial court's summary denial of his request for DNA testing pursuant to Fla.R. Crim. Pro. 3.853. He claims that the trial court failed to adequately explain its determination that the motion was technically legally insufficient and the court failed to adequately explain how Scott failed to demonstrate that a reasonable probability existed that he would be exonerated or receive a lesser sentence. The state asserts that the trial court's rulings were correct.

Generally, Scott sought to conclusively determine the identity of various blood stains left at the scene of the crime, i.e., the victim's house. As noted above, there was a violent and bloody struggle throughout the house which culminated in the savage beating death of James Alessi. All the items to be tested contained blood that belonged to either the victim, Jim Alessi, the co-defendant, Richard Kondian, or Appellant. In his motion, Scott sought testing of the following items; a blood stain on a wood chair; a blood stain resembling a "circle of blood" similar to the bottom of a champagne bottle; a blood stain from the south wall; a blood stain from the dividing wall between the bedroom and family room; and a blood stain from the

hall wall. (PCR 4190-4191).

Scott explained that DNA testing of the first two items would, "establish that the blood circles are consistent with the victim's, James Alessi's blood, and consistent with an item (champagne bottle) that the other party, Richard Kondian, charged in the victim's murder has stated, post-trial, that he used to kill the victim." (PCR 4191). He argued to the judge the following:

With regard to those items B, we'd ask for blood testing on that, which is a circle of blood that was found. There has been certainly a long history procedurally on this case. As regard to the 3.850 motions and appeal, one of the issues that always arises in those cases in general is that Mr. Alessi was alive at the time that he was tied up and that the fatal blow was struck after he was tied up. And so, establishing that this circle of blood was the victim's blood on it would help establish that, that one of the instruments that was used to strike that blow would have been the fatal blow, would have occurred after he was tied up, would have been while he was not struck by this defendant but he might have been struck by the co-defendant.

(T-PCR 9-10). Regarding the last two items, Scott asserted that DNA testing, "would establish that the blood stains did not belong to the victim, as alleged at trial, but rather to Kondian or Scott. This would be in direct opposition to the State's theory at trial, which was supported by these blood stains." (PCR 4191).<sup>1</sup> Appellant

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<sup>1</sup> Scott never explained the relevance of the third item, a blood stain from the south wall.



then presented two mutually exclusive arguments regarding this evidence. First, as between Kondian and Scott, if the blood belonged to Kondian, Appellant would be entitled to relief based on the following:

The identification of Scott is a genuinely disputed issue in this case in that Scott denied being present at the murder, although he acknowledges being present for an altercation between Kondian and the victim. The DNA evidence sought in the motion would help support this theory.

(PCR 4191).

On the other hand, if the blood proves to belong to Scott, than he makes the alternative argument,

Also relevant to the motion are the decisions of prior courts in Scott's case. Scott's case has a lengthy appellate history. In deciding against Scott's motion for postconviction relief, the Supreme Court of Florida held that failure to present a "defense of others" defense at trial was not ineffective, as the physical evidence did not support the theory. Scott v. State, 513 So. 2d 653 (Fla. 1987). The DNA testing sought in this motion would provide physical evidence that would support the theory.

(PCR 4192). The trial court held a non-evidentiary hearing on the motion. Scott offered the following argument:

Your Honor, ultimately what we are seeking here to do is, is to get the evidence tested to help establish that Mr. Scott did not strike the fatal blow, that it would either be exculpatory or at least might lead to a lesser punishment which is one of the circumstances contemplated by the rule.

(Tr. Vol. XXVI at 11). The Court orally denied the request and ruled as follows:

At best the movant has found an argument that would result in a, may be it would have made a difference; but there has been no showing and no meeting of the reasonable probability standard and that is what is required. And I refer you to Sireci versus Florida S-i-r-e-c-i at 908, 312 Supreme Court 2005, in which the Supreme Court, found to the contrary that the technical requirements were met but still found that the motion was insufficient to support a hearing because it did not meet the reasonable probability test. So, if you look at everything in the light most favorable to the movant here I get all through the technical requirements, I still find that the reasonable probability certainly has not been shown and as in that case, for example, there was fingerprint evidence. And so it was not really in dispute as to whether the individual was present. I do not find that the actually has been technically complete, there has not really been a showing as to how the evidence would exonerate Mr. Scott. So for those reasons, I deny the motion to the extent that the motion seeks an evidentiary hearing because I think this does not meet those two legal criteria but even if it did meet the technical criteria, there has not been a reasonable probability shown. So for that reason, I deny the motion.

(T Vol. XXVI at 19-20)(emphasis added). The trial court reduced its order to writing,

2. The Motion is technically legally insufficient in that Defendant fails to allege that he is innocent and fails to allege how the DNA testing required by the Motion would exonerate him of the crime of which he was convicted.

3. However, even if the motion was technically sufficient, it fails on its merits because the Defendant has failed to show reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence if the DNA evidence tested favorably and had been admitted at trial. The other evidence at trial, specifically fingerprint evidence, indisputably demonstrated that the Defendant was present at the scene.

(PCR 4300-4301).

On appeal, Scott complains that the trial court erred in ruling that the motion was technically legally insufficient and the court failed to attach portions of the record or in any way detail its rationale for denying relief on the merits. Appellant is incorrect, as a review of the facts established at trial, including the defense offered by Scott, clearly establish that his identity was never genuinely disputed. Moreover, it was Scott who was required to explain **how** this blood evidence establishes his innocence. It was not the judge's burden to prove the negative. This Court has stated that,

it is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence.

Robinson v. State, 865 So. 2d 1259, 1265 (Fla. 2004).

The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case.

Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004). Scott failed to do so.

When assessing the possible relevance of the DNA testing, a court must take into account, the evidence that is to be tested in connection with the disputed issues in the case. Hitchcock, supra 866 So. 2d at 27. In this case the victim was savagely beaten to death in his own home. The unassailed evidence adduced at trial included the following. A violent struggle occurred at the victim's home. Alessi's injuries were brutal and numerous. Among the injuries inflicted upon him were six blows to the head, three of which were fatal. One of the head injuries was so severe it caused a compressed fracture to his skull. (ROA 1191-1211). The victim's hands and feet were tied very tightly while he was alive, with electrical cord and telephone wire. (ROA 861, 1190, 1193-1194). Jim Alessi had many bruises on the trunk of his body. Three fatal blows caused lacerations to the head. (ROA 1203). The victim's head was fractured at each of those sites. (ROA 1204). Throughout the entire house were broken articles, debris, and blood stains. (ROA 861-864, 903-904, 913, 920, 1301). Especially large amounts of blood were found on the living room wall next to the couch, on the couch and on a portion of the dining room rug. The victim was found on the couch. (ROA 864,924). Below the victim's feet was a statute of a teddy bear, partially broken and scattered. (ROA 864, 937). The jury was shown a video of the entire crime scene which included a graphic depiction of the

tremendous amount of blood that was left at the crime scene. There was blood in almost every room of the house. (ROA 613, 766-776, 813- 816, 824-842). The jury knew that most of the blood found at the scene belonged to the victim, James Alessi.

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

Appellant was arrested in California approximately a month after the crime. (ROA 777-779). Various items of jewelry including a golden bear charm was seized from Appellant's hotel room. Jim's business associate and his mother testified that Jim owned much jewelry including three golden bear charms. (ROA 1241-1242).

Two witnesses testified that Appellant and the co-defendant told them that were going to rob and kill a guy named Jim. (ROA 717-721, 722, 725-728). The conversation ended when the victim Jim Alessi drove up and Appellant and the co-defendant entered the victim's car. (ROA 732,992-995, 997-998).

The jury knew that co-defendant Richard Kondian's blood was at the scene because he had cut himself during the struggle. (ROA 614, 618, 1368, 1094-1096, 1430). The jury also knew that other blood stains at the scene, specifically from the shower could have belonged to either Scott or Kondian but not Alessi. (ROA 1175, 1184).

The defense at trial was that Scott, although present at some point, left before the robbery and murder occurred. (ROA 1355-1356, 1370). In support of that defense, Scott relied on that fact that no blood stains found that at the scene could be definitively tied to him. (ROA 1368, 1183). He argued, "I think from the testimony there is certainly no evidence that Paul Scott was bleeding." (ROA 1430. At no time did Scott ever admit that he participated in any struggle or altercation with the victim in self defense or in defense of someone else.

Based on the evidence presented at trial, it is undisputed that Scott was present at the scene of the crime as his fingerprints were found throughout the house. In fact Scott conceded this point to the trial court below. (PCR-T 16). Scott cannot identify what nexus exists between the blood evidence and his fingerprints found at the scene. Simply because he did not bleed at the scene does not establish that he did not administer any of the several fatal blows to the victim,

or that he did not participate in the underlying felony under a felony murder theory. That ruling was correct. The trial court properly concluded that the motion was technically legally insufficient. Summary denial was proper. See Galloway v. State, 802 So.2d 1173 (Fla. 1st DCA 2001) (upholding summary denial of DNA testing as it would only prove that co-defendants had sex with the victim, but it would not negate defendant's presence); Hartline v. State, 806 So. 2d 595 (5<sup>th</sup> DCA 2002) (upholding summary denial because defendant's admission to the crime illustrate that identity was not in dispute); compare Zollman v. State, 820 So. 2d 1059, 1063 (Fla. 2d 2002)(explaining that a challenge to identity was established as Zollman alleged he did not commit the rape, he was not there; there was only the victim and perpetrator; and the victim testified that the perpetrator ejaculated into her); Willacy v. State, 967 So. 2d 131, 145 (Fla. 2007)(upholding denial of DNA testing as such evidence would not negate Willacy's fingerprints at the scene, evidence of his presence in the neighborhood that day, use of the victim's credit card and car on the day of the murder); Robinson v. State, 865 So. 2d 1259, 1265-1265 (Fla. 2004)(affirming denial of DNA testing in murder and rape case as defendant stated that sex was consensual and shots were accidental); Preston v. State, 970 So.2d 789, 800 (Fla. 2007)(finding that other evidence linked defendant to victim including

fingerprints, therefore, simply because pubic hair on defendant's belt was not that of the victim did not create a reasonable probability of a different result); Cf. Clayton v. State, 912 So. 2d 355 (3<sup>rd</sup> DCA 2005)(upholding summary denial of request for DNA testing of because whether there was blood on defendant's shirt was not a disputed issue at trial).

Under Scott's alternative argument, if DNA testing revealed the **presence** of his blood, that would have bolstered his "defense of others" theory, that he was coming to the aid of another. This argument is in direct contradiction to his initial claim that DNA evidence would support his theory that his blood was not present and therefore he did not participate in the beating. Both theories cannot be true. The rule was never intended to allow a defendant to "float" several different contradictory theories and then pick the one that best suits his purposes. See Hitchcock v. State, 866 So. 2d 23, 28 (Fla. 2004) (recognizing that DNA testing is not to be used as a fishing expedition).

With respect to the presence of Scott's blood, the state asserts that such evidence would inculcate him even further. As noted above, Scott emphatically told the jury that he did not bleed at the victim's house. (ROA 1355-1356, 370). This enabled him to maintain his story that he left the scene before the



struggle ensued. Obviously, if DNA testing demonstrates that he was bleeding at the scene, his defense would have been destroyed. Scott's request for DNA testing was properly denied.<sup>5</sup> Cf. Melton v. State, 949 So. 2d 994, 1012-1013 (Fla. 2006) (rejecting claim of newly discovered evidence as it contradicts defendant's earlier version).

In fact, in one of Scott's previous collateral proceedings, he unsuccessfully argued the recantation of witness Sotullo, would have entitled him to relief. Therein, Sotullo recanted a portion of his trial testimony regarding the substance of Scott's confession to him. Relief was denied because the "new evidence" contradicted Scott's statements from other proceedings. This Court explained:

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 acknowledged his participation in the victim's murder and Scott's own testimony during his clemency proceeding contradicts Soutullo's new statements.

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<sup>5</sup> Contrary to Scott's assertion, Richard Kondian has never admitted to killing James Alessi. At most Kondian has stated, that Scott came to his defense when Alessi attempted to sexually assault Kondian. He stated that both he and Scott struck Alessi and he and Scott left there together. This statement was not available at the time of trial. Kondian stated this for the first time seven years after Scott's trial. (PCR 4279-4298).

Scott v. Dugger, 634 So. 2d 1062, 1065 (Fla. 1994). The analysis in that case applies with equal force herein.

And finally with respect to proof that the blood in the "circle of blood" belonged to Mr. Alessi, again that in no way exonerates Appellant. Appellant makes much of the fact that Kondian stated years later that he hit the victim with a champagne bottle. Scott opines that the circle of blood was from the champagne bottle.<sup>2</sup> However, according to Scott's statement to Detective Collins of the Boca Police Department made a month after the murder he admitted that he struck the victim with a champagne bottle. (PCR 4207-4209). Clearly, the fact that both defendants readily admitted using a champagne bottle to strike the victim is not evidence that would create a reasonable probability that Scott would be exonerated or receive a lesser sentence. Robinson, supra, (finding request for DNA testing to be legally insufficient as pled because defendant admitted to shooting victim but claimed that sex was consensual.) Scott has never explained how he can overcome these obstacles.

The fact remains that both Kondian and Scott participated in the robbery and brutal beating of the victim, James Alessi. DNA evidence will not alter that reality. See Galloway, supra

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<sup>2</sup> No champagne bottle was ever recovered.

(upholding denial of request for DNA testing because results could not refute evidence that defendant was present and was also participating with co-defendant in the crimes); Hitchcock supra, (explaining that defendant must establish the relevant nexus between the DNA results and "specific facts about the crime" that would entitle him to mitigation of his sentence).

Scott claims that reversal is also required because the trial court did not attach portions of the record in support of its ruling. See Schofield v. State, 861 So. 2d 1244 (Fla. 2d DCA 2003). Again Scott is wrong as the facts of this case are distinguishable. The entire record on appeal from the trial is included in this appellate record. This Court can review the evidence/testimony against Scott including the critical fingerprint evidence referenced by the trial court, as well as what issues were in dispute at trial.

In the alternative the state would argue that if the court was required to attach just specific portions of the record, the failure to do so in this case was harmless. First, the trial court's rationale for denying relief is clear from the order. Scott's presence at the scene was established through his fingerprints, and therefore identity was not a genuinely disputed issue in this case. Therefore DNA testing of the blood could not negate that evidence. Cf. Anderson v. State, 627 So.

2d 1170 (1993)(explaining that as long as trial court explains its rationale for denying postconviction relief it is not necessary to attach portions of the record).

Second, the basis for the trial court's ruling was evident from the record of the proceedings below. For instance, Scott's counsel admitted at the non-evidentiary hearing that the record would demonstrate that fingerprint evidence was not in dispute at trial. (T-PCR 16). And, Scott **admitted in his motion** that he was in fact present at the victim's home, and that he participated in the beating. (PCR 4192 ¶7). Consequently, the basis for the denial of relief is supported by the record.

Finally, at the conclusion of Scott's initial brief he makes a constitutional challenge to the denial of DNA testing. **See I.B. at 15-16.** However, this issue was never presented to the trial court below, therefore it is procedurally barred. See Occicone v. State, 570 So.2d 902, 906 (Fla. 1990)(explaining, "[i]n order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987). This claim, therefore, has not been preserved."). In any event it is without merit. Cole v. State, 895 So. 2d 398, 403, n.1 (Fla. 2004) (finding that because DNA evidence would not have entitled him to any relief, his claim

that he has been denied access to evidence that could prove his innocence is in applicable); Sireci v. State, 908 So. 2d 321,325 n.7 (Fla. 2005)(same).

#### **CONCLUSION**

Based upon the foregoing, the State requests respectfully this Court AFFIRM the trial court's summary denial of Appellant's request for DNA testing.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Todd Doss, 725 S.E. Baya Dr. Suite 102, Lake City, Fl. 32025-6092, this 30<sup>th</sup> day of April, 2008.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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