IN THE SUPREME COURT OF FLORIDA

BENNIE DEMPS,

Appellant,

vs. CASE NO. 86,428

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BRADFORD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Demps contends that he has newly-discovered evidence that he was convicted wrongly. This is his fourth state motion for postconviction relief, in which he attacks a conviction for a crime committed almost 24 years ago. That conviction became final almost 20 years ago, when this Court issued its opinion affirming Demps' conviction and sentence. Florida Rule of Criminal Procedure 3.850 "does not authorize relief based on grounds that could have been or should have been raised at trial and, if properly preserved, on appeal of the judgment and sentence." Nor may a convicted capital defendant file and obtain relief on a 3.850 motion filed more than one year after the conviction and sentence became final unless he can, at a minimum, allege and demonstrate that the facts on which his claim is predicated were unknown to him or his attorney, that these facts could not have been ascertained earlier in the exercise of due diligence, "and that the motion was filed within one year of the discovery of evidence upon which avoidance of the time limit was based." Mills v. State, 684 So.2d 801, 804-05 (Fla. 1996). Furthermore, if the claim is one of newly-discovered evidence of innocence, the defendant must allege and present *admissible* newly-discovered evidence of such a nature that it would probably have produced a different verdict if it had been admitted at trial.

Jones v. State, 591 So.2d 922 (1991). The defendant not only carries the ultimate burden of proof on his claim, but also bears the burden of alleging sufficient facts to justify an evidentiary hearing; he must allege specific facts *in his motion* which, if believed, demonstrate both that he has acted with due diligence in presenting his claim, and that he would be entitled to relief if those facts are proven. The defendant may obtain an evidentiary hearing only if he has alleged such specific facts. E.g., Downs v. Dugger, 740 So.2d 506 (Fla. 1999); Rose v. State, 617 So.2d 291 (Fla. 1993); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Conclusory allegations are not sufficient to state a claim for relief. Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989).

It is the State's contention that Demps is raising nothing that he has not raised or could not have raised previously. To support its contention, the State will rely upon the entire record of State litigation concerning Demps' conviction and death sentence for the murder of Alfred Sturgis, including the original trial and the evidentiary hearing on Demps' original postconviction motion, which matters are contained within this Court's own records in this

case. See Conley v. Shutts & Bowen, P.A., 622 So.2d 559 n. 1 (Fla. 3rd DCA 1993)("This court has a right to take judicial notice of its own record."). In addition, the State will rely on published decisions of the Eleventh Circuit Court of Appeals involving Demps' attacks on his conviction and death sentence, as well as pretrial depositions furnished to the court below.

The original trial record will be cited to as "TR." The trial transcript will be cited to as "TT." The transcript of the 3.850 evidentiary hearing of December 13 and 14, 1983, will be referred to as "PC-T," while the Supplemental Record on Appeal in Case No. 64,787, will be referred to as "PC-R." The record on appeal of Demps' third 3.850 motion will be referred to as "PC3-R."

Although the State originally drafted a brief on this appeal, pursuant to this Court's directive, before ruling by the court below and without the benefit of a record on appeal, a record on appeal has now been filed. The State therefore files this updated brief, and will refer to the record on this appeal as "PC4-R."

Any citations to the transcript of the May 12 hearing will be in accordance with the pagination of the real time transcript provided to the Attorney General by the Court Reporter shortly after the hearing.

Demps' counsel has accused and may again accuse the State of having failed to attach relevant portions of the record to its response to Demps' fourth 3.850 motion (May 12 hearing, real time transcript at 5). The State would just note that the State's certificate of service as to its Response to Successive 3.850 Motion for Postconviction Relief, filed on or about January 14, 2000 in the circuit court, shows that, on that date, "this response and *copies of the trial record and the state postconviction evidentiary hearing record* were furnished to the trial court by Federal Express" (PC4-R 154)(emphasis supplied). Moreover, the State would also note that, in Demps' previous appeal, Mr. Salmon as Demps' appellate counsel contended the trial court had erred in its summary denial of Demps' third 3.850 motion "without attaching relevant portions of the record." Demps v. Dugger, 714 So.2d 365, 367 (Fla. 1998). This Court rejected this contention, noting that the circuit court "must *either* state its rationale in its decision *or* attach those specific parts of the record that refute" the claim. Ibid. Thus, Mr. Salmon's contention that the State's response was inadequate for failure to attach the record is both factually incorrect and legally meritless.

PROCEDURAL HISTORY

On September 6, 1976, Alfred Sturgis was stabbed to death in a cell on "W" wing at Florida State Prison. In a dying declaration to corrections officer A.V. Rhoden, Sturgis named Bennie Demps and two other inmates as his assailants, stating that Demps and Harry Mungin held him while "Toothless" Jackson stabbed him (TR 441-562). Inmate Larry Hathaway corroborated Sturgis' dying declaration by testifying at trial that, while everyone else was at chow, he saw Harry Mungin standing in a cell doorway, apparently acting as a lookout, while, inside the cell, Demps was holding Sturgis and Jackson was stabbing him (TR 716-761).

At his trial, Demps and his codefendants pursued a joint defense, contending that Arthur Copeland (Sturgis' homosexual lover) was Sturgis' killer. This theory of innocence was rejected; Demps was convicted of murder and sentenced to death.

Although defense depositions were taken pretrial, neither Chief Prison Inspector and Investigator Cecil Sewell nor Departmental Investigator Ronnie K. Griffis nor Secretary Louie Wainwright testified at trial.

On appeal, Demps argued, *inter alia*, that his death sentence was disproportionate to the life sentences imposed upon his codefendants, because Jackson had stabbed the victim while Demps held him, citing Slater v. State, 316 So.2d 539 (Fla. 1975). This Court reaffirmed the principle enunciated in Slater that equally culpable defendants should receive equal sentences, but held that nothing in Slater "prohibits a trial judge from taking into consideration the quality of aggravating circumstances applicable to each defendant." Demps v. State, 395 So.2d 501, 506 (Fla. 1981), *cert. denied* 454 U.S. 933,

102 S.Ct.430, 70 L.Ed.2d 239 (1981). **Noting that, of the three defendants, "only appellant had the loathsome distinction of having been previously convicted of the first-degree murder of two persons and attempted murder of another," this Court held that the "record amply supports the judge's determination that [Demps] was especially deserving of the death sentence." Ibid.**

Demps then initiated postconviction proceedings pursuant to Fla.R.Crim.P 3.850, alleging, *inter alia*, prosecutorial interference with defense witness Michael Squires. The trial court denied relief without hearing; however, this Court remanded the case to the trial court for an evidentiary hearing on Demps' claim of State interference with a defense witness. Demps v. State, 416 So.2d 808 (Fla. 1982).[1]

At the evidentiary hearing on remand, "Demps sought to demonstrate ... that the state, through Department of Corrections Investigator Bill Beardsley, induced Michael Squires not to testify that the state's central witness, Larry Hathaway, had told Squires that he was pressured to testify and that he did not know who killed Sturgis." Demps v. State, 462 So.2d 1074, 1074-75 (Fla.

[1] Demps also alleged that the State had illegally solicited the testimony of Larry Hathaway through inducements. The Florida Supreme Court found this claim to be procedurally barred as having been effectively raised on direct appeal or, if "not exactly raised, it could have been." Id. at 809.

1985). **In preparation for the evidentiary hearing, defense counsel, *inter alia*, sought Florida Parole Commission files concerning William Michael Squires (PC-R 4-5). In addition, defense counsel subpoenaed all the members of the Florida Parole Commission for deposition; the Commission members moved to quash (PC-R 18-21). Their motion to quash the subpoena was denied, and Commission members were ordered to submit to depositions (PC-R 51). Two Commissioners (Kenneth Simmons and Barbara Greadington) testified at the evidentiary hearing (PC-T 166-224).** The trial court denied relief, finding that Demps had failed to prove his claim of State interference with Squire's testimony "by any believable evidence." This Court affirmed, finding that the trial court's order was "supported by competent, substantial evidence." Id. at 1075.

Demps next initiated federal habeas corpus proceedings, alleging, among other things, that the State had failed to reveal a deal it had made with Hathaway and had interfered with defense witness Michael Squires. The district court denied relief without an evidentiary hearing, and Demps appealed to the Eleventh Circuit Court of Appeals. That Court found that Demps' "argument that Hathaway received a deal from the state is simply unsupported by the record." Demps v. Wainwright, 805 F.2d 1426, 1432 (11th Cir. 1986). As to the witness-interference claim, the Eleventh Circuit noted that a state-court hearing had been conducted on this issue "after approximately eighteen months of extensive preparation." Id. at 1433. The Court found the conclusion that the State had not interfered with defense witness Squires to have been "amply

supported by the [State-court] record." Id. at 1435. The Court affirmed the denial of federal habeas corpus relief. The United States Supreme Court denied certiorari. Demps v. Dugger, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 160 (1987).

While his federal habeas proceedings were pending on appeal, Demps filed a second federal writ of habeas corpus alleging that death-qualification of the jury venire denied him his right to a jury representing a fair cross section of the community. This petition was dismissed and Demps did not appeal.

After the Governor of Florida signed a second death warrant, Demps petitioned this Court for a writ of habeas corpus on the ground that his sentencing proceeding was unconstitutional under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). This Court denied relief, finding any Hitchcock error harmless. Demps v. Dugger, 514 So.2d 1092 (Fla. 1987).

Next, Demps filed a second 3.850 motion, contending, *inter alia*, that the State had withheld evidence regarding (1) Larry Hathaway's complicity in the crime, (2) the "true" deal the State had with Hathaway, and (3) Hathaway's anti-social personality disorder and propensity to lie. The trial court denied relief, finding that these claims could and should have been raised previously. On appeal, this Court affirmed, noting that "Rule

3.850 bars an untimely petition based on information previously ascertainable through the exercise of due diligence." Demps v. State, 515 So.2d 196, 198 (Fla. 1987).

Demps then filed a third federal habeas corpus petition, claiming, *inter alia*, Hitchcock error and that the State had withheld exculpatory evidence regarding its witness Larry Hathaway. The federal district court denied relief without a hearing, finding any Hitchcock error harmless, and that Demps' Hathaway claim had already been raised in his first petition and was therefore successive. The Eleventh Circuit Court of Appeals affirmed. Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989). The Court concluded the Hitchcock error was harmless because Demps would not have been able to present any persuasive mitigating evidence; his military record was unfavorable, there was no evidence that he had abused drugs while in prison, Demps' prison record showed that he had a history of disciplinary problems, and the life sentences imposed on his codefendants was not mitigating in view of Demps' prior record of having been convicted of two murders and an attempted murder. Id. at 1390-91.[2] The Hathaway claim, the Court concluded, constituted an abuse of the writ. Id. at 1392-93.

[2] **Judge Clark, concurring specially, found that the record "demonstrates that ... mitigating circumstances do not exist. The petitioner has failed to allege facts to prove the existence of nonstatutory mitigating circumstances." Id. at 1396.**

On May 4, 1990, Demps filed a second state habeas petition in this Court, raising two claims. In his first claim, he contended that this Court erred in affirming his death sentence on direct appeal despite having struck two aggravators. Secondly, Demps contended the penalty-phase jury instructions improperly shifted the burden of proof.

On September 7, 1990, Demps filed a third state 3.850 motion in the circuit court, containing three claims, the second two of which were identical to the two claims raised in Demps' most recent state habeas petition. The first claim was the lengthiest claim. In it, Demps once again raised the issue of prosecutorial tampering with defense witnesses, and also contended once again that the State withheld exculpatory evidence. What motivated this alleged misconduct, Demps contended, was a prison reform movement at Florida State Prison that officials with the Department of Corrections wanted so badly to stop that, with the collusion of the prosecutor in this case, they created "Perjury Inc." in order to falsely prosecute (for murder) certain inmate activists for prison reform, including Bennie Demps, in order to quash the movement. Demps alleged that DOC officials engaged in a conspiracy to blame Demps, Jackson and Mungin for the murder of Alfred Sturgis, and then "systematically terrorized witnesses who knew the truth." The

real killer of Alfred Sturgis, Demps now suggested, was an inmate named Leroy Culbreth, who in turn was later murdered by one Bo Brown.

The trial court summarily denied the motion by order dated September 1, 1994, finding that Claim I was procedurally barred, as it was dependent upon alleged witnesses long known to the defense and therefore not newly discovered; furthermore, the court found, Demps' "untimely utilization of Chapter 119" defeated any claim of "due diligence." In addition, the trial court found that Claim II was procedurally barred for having already been raised on direct appeal, and that Claim III was procedurally barred because it could and should have been raised on direct appeal (PC3-R 628-29).

The appeal from the trial court's denial was orally argued in combination with the pending state habeas petition. This Court affirmed the trial court's summary denial of relief under 3.850, concluding that the trial court "properly applied the law" in denying the motion without an evidentiary hearing. This Court also denied the habeas petition. Demps v. Dugger, 714 So.2d 365 (Fla. 1998).

STATEMENT OF THIS CASE AND FACTS

On July 2, 1999, Demps filed the instant 3.850 motion – his fourth such motion and, *in toto*, at least his ninth postconviction

attack on his conviction and death sentence. **In this motion, Demps contended that a memorandum from Cecil Sewell to Louie Wainwright dated September 7, 1976, is newly discovered evidence of his innocence (PC4-R 1-79). Accompanying the motion was a requesto for appointment of counsel (PC4-R 80) and an affidavit of indigency, sworn to before notary public Bill Salmon (PC4-R 81).**

On July 16, 1999, attorney Baya Harrison III filed his notice of appearance in the case as appointed counsel (PC4-R 82). An investigator was appointed by the circuit court to assist Mr. Harrison (PC4-R 88).

On August 10, 1999, Bill Salmon, who previously had represented Demps in his clemency proceedings (PC4R 118-20), and who also had notarized Demps' sworn fourth 3.850 motion, filed a "special limited" notice of appearance on behalf of Bennie Demps "for representation in the trial court only" (PC4-R 121). This notice, Mr. Salmon represented, "does not otherwise affect" the order appointing Baya Harrison to represent Demps (PC4R-121). This notice of appearance was not served upon the Attorney General, and neither undersigned counsel nor anyone else in the office of Attorney General was on notice of any purported limitations in Mr. Salmon's representation of Demps.

On November 19, 1999, the circuit court conducted a hearing to clarify the representation issue. The office of Attorney General was not notified of this hearing, and no representative of this office attended that hearing. According the order of the circuit court dated November 20, 1999, Mr. Demps advised the court that he wanted Mr. Salmon to represent him and did not wish further representation by Mr. Harrison. The circuit court therefore relieved Mr. Harrison of any further responsibility for representing Mr. Demps. Mr. Salmon was advised that since he was not appointed, he should not look to the State for payment of his fees in this matter. (PC4-R 136).[3]

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[3] **The record contains an unsigned order stating, *inter alia*, that "Mr. Salmon has filed his Notice of Appearance to represent the Defendant Demps at the Circuit Court level," and that "the Court shall determine, by further order of this Court, the appointment of counsel beyond that of Bill Salmon at the Circuit Court level, if appointment of counsel is requested or required." Undersigned counsel presumes**

this unsigned document was a proposed order rejected by the trial court in favor of the order the court did sign. Undersigned counsel saw this document for the first time less than a week ago, when provided with a copy of the record on appeal in this case.

On December 7, 1999, Demps, through now retained counsel Bill Salmon, filed a supplement to his fourth 3.850 motion, consisting of affidavits from his trial counsel, John Carroll, and from Peter Enwall and Leonard Ireland, trial counsel for his two co-defendants (PC4-R 130-35). None of the three affiants could recall whether or not they had received a copy of the Sewell memorandum at trial.

Pursuant to order of the circuit court dated October 20, 1999, directing the "State" to file a written response to Demps' fourth 3.850 motion,[4] undersigned counsel filed a response on January 14, 2000, contending that the motion should be denied because (1) Demps had failed sufficiently to allege due diligence, and (2) had failed to demonstrate that he could present any new evidence which would be admissible at trial (PC4-R 139-54).

On April 13, 2000, Demps filed a second supplement to his motion, accompanied by an affidavit from Bill Salmon, stating that after being appointed to represent Bennie Demps on his Petition for Clemency, Mr. Salmon had "reviewed" material submitted by the "State" on the weekend of "July 3-5, 1998," and had "discovered" the Sewell memorandum (PC4-R 237). In the supplemental pleading itself, Demps alleged that the reason he had not discovered the Sewell memorandum earlier was that the State "hid" this document from him for over 20 years (PC4-R 238). In addition, he also alleged that the memorandum was "Brady" material, and that if he had obtained this document before trial, he could have used it in a "myriad" of ways, because it could have been used for "impeachment" and it also revealed witnesses unknown to him (PC4R 238-39).

On April 24, 2000, Governor Bush signed a death warrant in this case (PC4-R 242).

The State responded to Demps' second supplemental pleading on April 25, 2000, contending (1) Demps still had not explained when he had received the Sewell memorandum, or identified the State agency which had furnished the material, or offered anything more than a conclusory allegation that the State "hid"

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[4] **This order was not served upon the office of Attorney General; however, undersigned counsel was apprized of its existence in time to file a response by the due date.**

the document to justify failing to present it to the Court previously, and (2) despite having a year and ten months to investigate and develop any evidence following the "discovery" of the letter, Demps had not identified any admissible evidence he might use to advance his claim (PC4-R 246-50).

On April 26, 2000, this Court issued an order directing that "any further proceedings in this case be expedited" and setting oral argument for May 23, 2000, with simultaneous filing of documents to be reviewed by this Court to be filed by May 15, 2000 (PC4-R 243).

Following a status conference in circuit court on May 3, 2000, which undersigned counsel attended telephonically, the cause came on for Huff hearing in the circuit court on May 12, 2000. At this hearing, counsel for Demps for the first time identified the Parole Commission as the State agency which had provided the materials in which he had "discovered" the Sewell memorandum (May 12 hearing, real time transcript at 13).[5] Counsel also contended for the first time that he could not have obtained these records earlier because Parole Commission records are "confidential;" even if he had filed a request for public records from the Parole Commission, "the response would have been: You get nothing" (May 12 hearing, real time transcript at 19). Counsel asserted that the memo "could not have been otherwise discovered ... earlier than I found it ...[;] nobody else could have found it" (May 12 hearing, real time transcript at 12).

Defense counsel argued that the letter was Brady material because "the Department of Corrections, every guard that works there, every investigator that worked on this case for the state, everybody connected with the Department of Corrections from the institution where this crime occurred to the situs of the Capitol of the State of Florida in Tallahassee, everybody associated with the Florida Parole Commission, they are all agents of the state and if the document is in the custody and possession of agents of the state,

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[5] At a May 3, 2000 telephone conference, Mr. Salmon had stated that his supplemental pleadings "set out how and from whom I received the information, that being the *state.*" Transcript of May 3, 2000 telephone hearing, p. 14 (emphasis supplied).

it's just like it's in the custody and possession of the state attorney" (May 12 hearing, real time transcript at 14-15).

Defense counsel stated that he had sent his investigator to talk to A.V. Rhoden, the correctional officer who had testified at trial about Sturgis' dying declaration. However, counsel failed to inform the court what Rhoden had told his investigator or what either Rhoden or the investigator might say if called to testify at any evidentiary hearing (May 12 hearing, real time transcript at 15).

The trial court asked defense counsel "what is it that you are going to show me during [any evidentiary hearing] that is going to change the result in this case?" (May 12 hearing, real time transcript at 23). Counsel responded that "with this information and the discovery that [the Sewell memo] might logically and reasonably lead to," and "everything that it would produce," he could convince a jury that Demps was innocent (May 12 hearing, real time transcript at 25, 28). Defense counsel claimed the Sewell letter was admissible as a business record to contradict the testimony of A.V. Rhoden (May 12 hearing, real time transcript at 26). In addition, he stated that he would call Griffis and then Sewell and then confront Sewell with his letter (May 12 hearing, real time transcript at 27). Defense counsel acknowledged that he did not know if either Sewell or Griffis is still alive (May 12 hearing, real time transcript at 50).

Defense counsel also asserted, for the first time at the hearing, that the letter "enables" him to relitigate the issue of the proportionality of his sentence (May 12 hearing, real time transcript at 30).

The State attempted to introduce affidavits from Wendy Schulte, Capital Punishment Research Specialist for the Clemency Administration Office, Florida Parole Commission and custodian of clemency files in all cases referred to the Florida Parole Commission by the Governor, and from Janet Keels, Coordinator of the Office of Executive Clemency. These affidavits authenticated documents from the Florida Parole Commission showing that the September 7, 1976, Sewell memo which Demps is now contending is newly discovered evidence was contained in Demps' clemency report which was furnished by the Parole Commission, pursuant to Parole Commission rules, to Demps' then attorney John Carroll in February of 1982, by means of certified mail, for which the Parole Commission has a return receipt.

Demps' counsel objected on the grounds that the affidavits were late and that admitting the affidavits would in effect be giving the State a one-sided evidentiary hearing (May 12 hearing, real time transcript at 34-35). The trial court sustained the objection (May 12 hearing, real time transcript at 36).

Following the May 12 hearing, the trial court ordered the State to furnish any pretrial depositions which could corroborate or refute the Addendum Report of Inspector Bill Beardsley (TR 180), which recites that several witnesses in addition to A.V. Rhoden heard Sturgis name Demps, Jackson and Mungin as his assailants. On the morning of May 17, the State supplemented its response with pretrial depositions from Bill Beardsley, A.V. Rhoden, Billy Raulerson, and Hershel Wilson, plus Beardsley's report summarizing expected testimony (to which he had referred in his deposition), plus the trial testimony of A.V. Rhoden. State's Limited Supplemental Response to Successive 3.850 Motion for Postconviction Relief, filed on or about May 17, 2000.

These depositions show that several witnesses in addition to A.V. Rhoden heard Sturgis name his assailants. E.g., October 12, 1977 deposition of Hershel Wilson at 10 (as he was being carried down the stairs, "Sturgis looked at me and he said, 'Sergeant Wilson,' he said, 'get Mungin, Demps and Jackson.' Said, 'Mungin and Demps held me. James Jackson stabbed me.'"); October 12, 1977 deposition of Billy Raulerson at 6, 10 (as he was being carried down stairs, Sturgis told Raulerson it was "Demps, Mungin and Jackson and Jackson is the one that stabbed me."); October 12, 1977 deposition of Bill Beardsley at 15-16 (inmate W.T. Jackson told him that, while Sturgis was being carried down the stairs, he had heard Sturgis say that "Teethes or Toothes and Demps and Mungin were the ones that had stabbed him"); February 16, 1978 deposition of A.V. Rhoden at 15, 22 (on way to Shands hospital, Sturgis, aware that he was dying, had told him, "Mungin and Demps held me and Jackson stabbed me."); trial testimony of A.V. Rhoden (TT 543)(same).

The trial court summarily denied relief by order dated May 22, 2000 (PC4-R 678-1009). Although accepting without finding that the Sewell memo was newly discovered and that it might be usable for impeachment purposes, the circuit court concluded that it was not probable that the memo would produce

an acquittal on retrial (PC4-R 680). It had little impeachment value because it was not really inconsistent with the trial testimony of A.V. Rhoden, and because the numerous statements Sturgis had made to others identifying his assailants as Jackson, Mungin and Demps could have been used by the State to rebut any impeachment value of the memo (PC4-R 680-81). The circuit court also found that any issue of proportionality was procedurally barred because that issue had been determined by this Court on direct appeal and nothing in Demps' alleged newly-discovered evidence calls into question the previous determination of the relative culpability of Demps versus his codefendants (PC4-R 681). As for any Brady claim, the circuit court concluded that the Sewell memo simply did not undermine confidence in the verdict (PC4R-681-82). Accordingly, relief was summarily denied.

The next day (May 23), instead of appearing for the oral argument scheduled in this court, Mr. Salmon filed a motion for rehearing in the circuit court (PC4-R 1010-13). The circuit court denied the motion for rehearing by written order issued later that day (PC4-R 1016-19). *Inter alia*, the circuit court rejected Demps' contention that the summary denial was inconsistent with the court's own previous order setting the matter for evidentiary hearing on May 5; that order, the circuit court found, was superseded by subsequent order of continuance, issued at Demps' behest and *drafted by Mr. Salmon*, in which the issues were narrowed to include "whether the facts and circumstances of the case warranted a full-blown 3.850 evidentiary hearing" (PC4-R 1018). After hearing argument on May 12, the circuit court concluded that the facts and circumstances did not warrant evidentiary hearing (PC4-R 1018). The court restated its previous findings as to proportionality and Brady (PC4-R 1018-19).

The State originally filed a brief in this case on May 20, 2000. The State now files this updated brief within the new time limits established by this Court.

SUMMARY OF THE ARGUMENT

The State does not know for sure what Demps will argue on appeal, but the State will argue in this appeal (1) that Demps' petition is procedurally barred because he has failed to demonstrate that any issue regarding the Sewell memorandum could not have been litigated long ago; (2) that Demps has failed to

demonstrate that any sort of Brady violation occurred; (3) that Demps has failed to demonstrate that he has or can present any newly-discovered admissible evidence; (4) that Demps has failed to present any evidence which would probably result in a different verdict if he were given a new trial or resentencing, and (5) any issue of the proportionality of Demps' death sentence is procedurally barred because it was not timely raised following the receipt of the memo alleged to be newly discovered and because the issue of proportionality was raised and decided on direct appeal and nothing Demps has presented in this proceeding calls into question that previous determination.

ARGUMENT

ISSUE I

DEMPS' PETITION IS PROCEDURALLY BARRED BECAUSE HE HAS NOT AND CANNOT DEMONSTRATE THAT HE HAS ACTED WITH DUE DILIGENCE IN PRESENTING ANY CLAIM ARISING FROM THE SEWELL MEMORANDUM

The State recognizes that the circuit court did not decide the issue of procedural bar. However, while the State agrees with the circuit court that Demps is not entitled to an evidentiary hearing even if it is presumed that his memo is truly newly discovered, the memo is in fact not newly discovered; it is, more accurately, *anciently* discovered, as it has been readily available at least since 1982 and was in fact furnished to Demps' previous counsel at that time. Demps has made no demonstration to the contrary, and has failed to make any kind of showing whatever that the Sewell memo could not have been discovered in the exercise of reasonable diligence and presented in connection with whatever claim it might support long ago. This case illustrates the importance of the requirement that 3.850 motions include specific allegations which, if believed, would support a finding that the defendant has acted with due diligence. What Demps has attempted to do is present allegations that say as little as possible about what he has, where he got it and what he is trying to prove, and then claim that he is entitled to an evidentiary hearing on the ground that the "record" does not clearly refute these vague and conclusory allegations. Ragsdale v. State, 720

So.2d 203, 207 (Fla. 1998) ("A summary or conclusory allegation is insufficient to allow the trial court to examine the specific allegations against the record."). Furthermore, when confronted with virtually irrefutable evidence that Demps' previous attorney received a copy of this very memo by certified mail in 1982, Demps' response was not, "this is how I will rebut this evidence if given an evidentiary hearing," but, rather, that this evidence could not be considered except in a full-blown evidentiary hearing – no matter that Demps had supported his own pleadings with affidavits, and no matter that he cannot even begin to say what he would introduce to rebut the State's evidence, and no matter that the records refuting his claim come from the very same agency from which Mr. Salmon received the memo in 1998.

Not until the May 12 hearing did Mr. Salmon ever identify the State agency from which he had supposedly received the Sewell memo in 1998. Even then, he did not say (and never has said) how he obtained them or why the "State" had provided them. In fact, although Mr. Salmon filed an affidavit claiming that, on the weekend of July 3-5, 1998, he "reviewed" documents provided by the "State," he never has stated when he *received* them. As for *how* Mr. Salmon obtained the memo, the State would suggest that Demps made no allegations in this regard to avoid having to acknowledge that these documents were delivered to Mr. Salmon as a matter of course,

pursuant to clemency rules, without him having to so much as even lift a finger to obtain them. Compare Downs v. Dugger, supra, 740 So.2d at 512 (summary denial appropriate because Downs did not meet his burden of demonstrating that an allegedly withheld memo could not have been discovered earlier through the exercise of due diligence, where Downs failed to supply court with circumstances surrounding discovery of the memo, or to disclose when or under what conditions memo was revealed to defense).

It was Demps' burden to allege facts which, if believed, would demonstrate that he has exercised due diligence in presenting this claim. He has never offered more than a conclusory allegation that the State "hid" the memo for over 20 years to justify failing to present it to any court prior to July of 1999. Thus, as in Mills v. State, supra, he has failed to meet his threshold burden of alleging *specific facts* which, if believed, would demonstrate that he has exercised due diligence in presenting this claim; put another way, he has failed to allege *specific facts* which would support a conclusion that the State "hid" the document, or that for whatever reason he could not have obtained and did not obtain this document long ago.

Furthermore, although Demps' vague and conclusory motion gave the State no clue where to look for any rebuttal to the claim that

the memo could not have been discovered earlier than 1998, the State fortuitously discovered and submitted records from the Parole Commission – the same agency that Demps' counsel very belatedly admitted had provided the Sewell memo to him – which show that this very document was disclosed to Demps as early as 1982 – prior to the evidentiary hearing on his first 3.850 motion. Demps' objection to consideration of these documents should not have been sustained.

First of all, it should be noted that while these records were submitted in connection with affidavits, the affidavits essentially were merely the means by which these Parole Commission records were authenticated. Secondly, while it is true that genuinely controverted issues may only be resolved by means of an evidentiary hearing, Demps has only offered vague allusions to a "multitude of people, lawyers, that have been involved in Mr. Demps' case since his conviction and imposition of death sentence to show that each and everyone of them could not, understand [sic] any sense of due diligence, [have] been able to find this document." Demps not only has never identified even a single one of the "multitude," but he has never told us what any of them would say other than the very conclusion which he contends he can prove. Nor has he volunteered what Mr. Carroll (Demps' attorney in 1982) might say about the 1982 clemency file even though the record clearly shows that Mr. Salmon

has been in contact with Mr. Carroll. See PC4R-116 (Salmon's time sheet for clemency, showing telephone conversations with Mr. Carroll on miscellaneous dates) and PC4R-131 (September 23 affidavit of Mr. Carroll attached to supplement to motion to vacate). Nor has Mr. Salmon alleged, for example, that he reviewed Carroll's files from that period of time and the Sewell memo is not there. Thus he has not alleged *anything* which even begins to controvert the Parole Commission affidavits.

In short, there is no real controversy. That being the case, there is no controversy to be resolved by evidentiary hearing and Demps has no right to ask this Court to ignore clear proof that his allegation that the State "hid" the Sewell memo for over 20 years is utterly baseless. In reality, Demps himself is playing hide and seek on this issue. He should not be allowed to do so. An evidentiary hearing in this case on the issue of diligence would be a waste of scarce judicial resources. This claim could and should have been raised, if at all, in his first 3.850 motion, not his fourth. Davis v. State, 742 So.2d 233, 237 (Fla. 1999) (claim was abuse of process where it could have and should have been raised in previous 3.850 motion).

Even if the affidavits are ignored, however, he has failed to demonstrate due diligence in presenting this claim. His contention at the May 12 hearing that Parole Commission records are confidential and would have been unavailable to him prior to 1998 is refuted first of all by the fact that the Parole

Commission *did* provide numerous documents in 1998, including the memo at issue here. Since these records and this memo obviously were *not* confidential or unavailable then, why would they have been unavailable earlier? Demps has not attempted to explain this.[6] In addition, the record of Demps' first 3.850 motion and evidentiary hearing shows that he subpoenaed Parole Commission records of Michael Squires, was granted leave to depose all the Florida Parole Commissioners, and that, at the evidentiary hearing, called as witnesses two members of the Parole Commission, Kenneth Simmons and Barbara Greadington. If he could have obtained and did obtain Parole Commission records of Michael Squires, surely he could have obtained his own Parole Commission records. He certainly has offered no explanation of why he could not have done so.

Finally, this Court has previously noted that Demps has utilized the Florida Public Records Act, Demps v. State, supra, 515 So.2d at 198, and Demps has not explained why he could not have obtained the Sewell memo long before 1998 from the Department of Corrections through Chapter 119, Florida Statutes. As this Court ruled in Demps' third successive 3.850 motion, Demps' "untimely utilization of Chapter 119, Fla. Stat., defeats any claim of 'due diligence' just as it did in Demps [supra, 515 So.2d]." 714 So.2d at 367 (affirming the trial court's order on this point). Because the Sewell memo could have been presented long ago, his present claim based upon that memo is procedurally barred. Bryan v. State, 748 So.2d 1003, 1007-

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[6] Although at the May 12 hearing Mr. Salmon finally identified the agency which had provided the records which included the Sewell memo, he still has not explained why they were disclosed. In fact, Mr. Salmon was appointed to represent Demps in his 1998 clemency proceedings and these records were disclosed to him as required by the rules of clemency proceedings. What Mr. Salmon also has not explained is why such records would have been disclosed during his 1998 clemency proceedings but not during his 1982 proceedings. One would think that the 1998 file would have been an update of the file as it existed in 1982, and would have included everything in the 1982 file (including this 1976 memo) plus whatever documents had been generated in the intervening 16 years.

08 (Fla. 1999) (claim procedurally barred where based on evidence that could have been obtained previously through the exercise of due diligence).

Demps has not acted with due diligence in presenting this claim. He could have raised any issue involving the Sewell memo many years ago. He did not do so, and not because the memo was unavailable, or because his previous attorneys were in any way inadequate, but for the more obvious reason that his present theory that Jackson was not merely *one* assailant but the *only* assailant is utterly contrary to the theories of innocence he spent years litigating, i.e., initially that Arthur Copeland was the killer and later that Leroy Culbreth (AKA "Ninety-Nine") was the killer. Demps' previous attorneys did not use the memo because it was of no help to them whatever, not because the State concealed it from them.

ISSUE II

NO BRADY VIOLATION OCCURRED

Demps did not cite Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in any of his pleading in this case. Nor did he claim that the prosecution suppressed any exculpatory evidence. Indeed, he virtually conceded in his initial motion that the prosecutor was never in possession of the Sewell memo. Motion to Vacate at 3 (the "face" of the report shows "that it was not sent to the State Attorney's Office")(PC4-R 3). However, at the May 12 hearing, Demps' counsel argued that Brady was violated, under a theory that every employee of any state agency, no matter how far removed from the prosecution of the case, is an agent of the State, and any evidence in the hands of any such "agent" is construed to be in the hands of the prosecution. This is not the law. In Jones v. State, 709 So.2d 512, 520 (Fla. 1998), this Court declined to find that certain evidence was "withheld by the police" even though the witness charged with nondisclosure was himself a police officer, where the officer was not involved in the homicide investigation, his statements were not part of any documents or reports in the possession of the police, and he affirmatively testified that he had not told anyone about his information. While Sewell's title was from the face of the memo apparently "Chief Prison Inspector and Investigator," the letter indicates no more than that an investigator on the scene had called Sewell to report that an inmate had been murdered and that

Sewell had thereafter sent a memo to the Secretary of Corrections. Demps has made no showing that Sewell was anywhere near Florida State Prison, was personally involved in the investigation or had talked to anyone with first-hand knowledge of the crime. Nor has he shown that Inspector Griffis or any other DOC investigator, or any police or state attorney investigator, or any state attorney was ever aware of Sewell's memo. Thus, he has failed to allege facts from which we might conclude that the "prosecution" suppressed any evidence. Ibid. See also Demps v. Wainwright, supra, 805 So.2d at 1432 ("We decline to hold that [prison inspector] Beardsley's memorandum requesting a transfer for Hathaway and Zeigler, for the purpose of protection, forms the basis for a Brady claim.").

Furthermore, as in Jones, there is no reasonable probability that if the Sewell memo had been disclosed the outcome of the proceedings would have been different. The statement simply is not material. For one, it is not an admissible document itself. Nor has Demps shown that it could have led to substantively admissible evidence. And even if Demps could have admitted it, he could only have done so by abandoning the defense he did present at trial. Furthermore, he would have faced strong rebuttal evidence from the state, because in fact Sturgis had identified his *three* assailants, including Demps, to a number of persons, not just to A.V. Rhoden.

Demps is not entitled to an evidentiary hearing or relief on his *Brady* claim.

ISSUE III

DEMPS HAS FAILED TO DEMONSTRATE THAT HE HAS OR CAN PRESENT NEWLY DISCOVERED ADMISSIBLE EVIDENCE THAT PROBABLY WOULD RESULT IN A DIFFERENT VERDICT.

Aside from being time-barred, Demps' newly-discovered evidence claim fails on its face to demonstrate that he has newly-discovered, *admissible* evidence, which would probably produce a different verdict. Jones v. State, 709 So.2d 512, 521 (Fla. 1998) (court should initially consider whether alleged newly-discovered

evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility). Inadmissible hearsay will not support the grant of a new trial. Jones v. State, 678 So.2d 309 (Fla. 1996).

All Demps has, and all he alleges, is a letter written over 22 years ago by someone who was not a witness at trial and was not directly involved in the investigation of this case. This letter itself obviously is hearsay, and Demps did not even allege in his motion how it might be substantively admissible. After the State filed its response arguing that Demps had failed to demonstrate that he had any admissible evidence, Demps suggested, indirectly through the affidavits filed in supplementation to his motion, that it would be admissible to impeach, presumably the testimony of A.V. Rhoden who testified at trial about Sturgis' dying declaration.

However, at the May 3 telephone conference, counsel for Demps suggested for the first time that the letter would be admissible as a business record of the Department of Corrections (May 3 hearing at 15).

Although Demps' proffers in this regard are opaque at best, the State will attempt to address them.

First, although there is a business record exception to the hearsay rule, the business record exception will not justify the

admission in evidence of hearsay contained within the business record without an independent justification for the internal hearsay. Harris v. Game and Fresh Water Fish Com'n, 495 So.2d 806, 809 (Fla. 1st DCA 1986) (assuming that report of agency's internal investigator was business record, where investigator had based his findings on discussions with third persons, "the information contained in the investigator's report was hearsay" not falling under any hearsay exception). In this case, there is no indication that Sewell had personal knowledge of anything contained in his memo to Wainwright. On its face, he appears to be communicating information he was told by someone else, presumably Inspector Griffis. Just who Griffis had talked to at this point, however, can only be a matter of speculation. The trial record shows that Sturgis had identified his assailants to numerous persons, any one of whom could have been the source of any information provided to Sewell by Griffis or anyone else. (See TR 180, Addendum Report of Inspector Bill Beardsley; see also pretrial depositions of Raulerson, Wilson, Beardsley and Rhoden, attached to the State's limited supplemental response).[7] Thus, Sewell's letter is inadmissible hearsay unless the hearsay contained within the report

[7] Only Sturgis' final statement to Rhoden was admitted in evidence because it was the most clearly a dying declaration. Trial transcript at p. 21.

itself comes within some exception to the hearsay rule. Thomas v. State, 581 So.2d 993, 995 (Fla. 2d DCA 1991) (although police report may constitute business record, hearsay statement contained within report must itself fall within a hearsay exception to be admissible).[8]

The only possible such exception raised by Demps is impeachment, but he has been at best vague as to just how he might use this report to impeach anyone. His most concrete suggestion came during the May 12 hearing, when his counsel stated:

> So it might be that I would have to call Sewell, Griffis, the officer that he talks to, and Mr. Rhoden who is the officer that I believe Mr. Griffis refers to in the report and ask them the appropriate questions, in going up the chain, and eventually we get to Mr. Sewell and if I ask Mr. Sewell what's your testimony and he says – and I ask him something like, well, didn't you report to Louie Wainwright that only one person was called by Mr. Sturgis in his dying declaration to be the assailant - to be his assailant? No no no no I told him all three. That document immediately becomes admissible to show to Mr. Sewell.

[8] **Demps argued in his supplement to his post-hearing memorandum in the circuit court that the business record exception was applicable because "each declarant mentioned directly or indirectly" in the memo was an employee of the Department of Corrections. In fact, there is *no* declarant explicitly identified in the memo. Furthermore, possible declarants include non-employees of the Department of Corrections, including at the very least Sturgis himself and inmate W.T. Jackson.**

(May 12 hearing, real time transcript at 27). In response to a question by the court wondering how Griffis could be impeached with this document when he did not testify at trial, Mr. Salmon elaborated:

> Mr. Rhoden is called to the stand and he's asked isn't it true that you reported to Mr. Griffis that only one person, James Jackson was Mr. Sturgis' assailant. No no no no I told Mr. Griffis that all three people were involved. Mr. Griffis gets up there on the stand, isn't it true that Mr. Rhoden told you that just one person . . . was the assailant of Mr. – no. No. No. No. Isn't it true that you told Mr. Sewell that there was only one assailant, Mr. Jackson, of Mr. Sturgis? No. No. No. I told him all three.
>
> Last witness, Mr. Sewell, isn't it true that you reported to the secretary of the Department of Corrections that only one person was named in a dying declaration as the assailant of Mr. Sturgis? No. No. No. No. I told him all three.
>
> The document is immediately admissible at that point as it's shown to Mr. Sewell to refute his testimony.

(May 12 hearing, real time transcript at 51-52). Thus, by Demps' own theory, the document is admissible only to impeach Sewell – a witness called by no one at trial, who was not at the scene of the crime, and knew only what someone else had told him about the crime.

Even if, tangentially, the Sewell memo could somehow have been usable to impeach Ronnie Griffis *if* he had testified at trial, he did not.[9] Therefore, Demps has not shown how it would be admissible at all, except under some scenario where he called Griffis himself just so he could impeach him. As the trial court stated, "I can't conceive of a circumstance under which Inspector Griffis would have been called to testify by either side in this case." See Buenoano v. State, 708 So.2d 941 (Fla. 1998) (successive 3.850 summarily denied where evidence at most could have been used to impeach person who never testified).

[9] Under no circumstances could the memo have been used to impeach A.V. Rhoden directly. The memo was not written by him, and there is no indication in the memo that Sewell had ever talked to Rhoden. See Ehrhardt, Florida Evidence, 2000 Edition, Section 614.1, pp 535-36 ("In order to prove the making of a prior statement it is necessary to call a person who was present when the statement was made to testify to what was said or written ...").

As for the argument made at the May 12 hearing that the memo might have led to additional evidence, Demps has failed to inform us whether Rhoden himself or Sewell, or Griffis, or any other persons who may have made or heard any relevant statements by anyone are available to testify. Nor do we have a clue as to what their testimony might be if they were available to testify. For example, we have no allegation that as a result of being confronted with the Sewell memo, or for any other reason, A.V. Rhoden would now testify differently than he did at trial, even though we know from Mr. Salmon's petition for attorney fees in the clemency proceedings that his investigator had talked to Rhoden in September of 1998 (PC4-R 115).[10] Nor do we have any indication that any other witness would testify favorably to the defense. Finally, any suggestion that this memo somehow corroborates a theory that Rhoden's written statement, which was lost before trial, varied from his trial testimony is unavailing because there is nothing in the memo to indicate that any information in the memo came, directly or indirectly, from Rhoden. Demps' allegations here are based, at best, "on tenuous speculation and as such do not constitute newly

[10] **Mr. Salmon did state at the May 12 hearing that Rhoden's deposition shows that he was not even with Sturgis when he made his dying declaration (May 12 hearing, real time transcript at 31). A review of Rhoden's deposition testimony refutes this, however.**

discovered evidence." Davis v. State, 736 So.2d 1156, 1159 (Fla. 1999).

Even if the Sewell memo could have been presented to the jury over a hearsay objection, it is not probable that it would have resulted in a different verdict. To use the memo, Demps' trial counsel would have had to abandon the joint defense with Mungin and Jackson, jettison the reasonably plausible theory that Sturgis had been murdered by Arthur Copeland, and present a defense that Jackson had acted alone. Such a defense would have been supported only by what obviously was a very preliminary report submitted by one who had no personal knowledge of the events on trial. Furthermore, as noted previously, the memo does not identify the source of its information; therefore, we can only speculate that *maybe* the identification of Jackson as the assailant came from Sturgis, and we can only speculate as to which of the many witnesses who heard Sturgis identify his assailants might have been the source of any information in the memo provided to Sewell by someone who may have been Griffis, but may not have been. Thus, any defense theory in reliance on the memo that *someone* (don't know who) must have told Griffis who must have told Sewell that Sturgis had only identified one assailant - could have been rebutted not only by A.V. Rhoden, but also by several other witnesses, including Billy Raulerson, Hershel Wilson and inmate W.T. Jackson, all of whom had heard Sturgis identify Demps, Mungin and Jackson as his assailants, as trial counsel well knew from pretrial depositions. Demps has not alleged and cannot produce a single witness who can testify from personal knowledge that Sturgis ever named only Jackson as his assailant. Therefore, Demps cannot establish that this memo would have resulted in a different verdict. Sims v. State, 25 Fla. L. Weekly S128 (Fla. February 16, 2000).

ISSUE IV

THE ISSUE OF THE PROPORTIONALITY OF DEMPS' DEATH SENTENCE IS PROCEDURALLY BARRED

The claim that the Sewell memo demonstrates the disproportionality of Demps' death sentence is procedurally barred for two reasons. First, even accepting *arguendo* Demps' claim that he could not have

discovered the memo before July of 1998, he still did not raise this claim within a year of the discovery of the memo. Mills v. State, supra. Second, it is procedurally barred because the Florida Supreme Court determined the issue of proportionality on direct appeal, and nothing in Demps' alleged newly-discovered evidence calls into question the previous determination of the relative culpability of Demps versus his codefendants.

In fact, not only did this Court conclude that Demps' death sentence was not disproportionate when it addressed this issue on direct appeal, 395 So.2d at 506, but since that time Demps has attempted without success to raise this issue both in state and federal court.[11] Thus, in 1987, this Court stated:

> The defense also argued the three codefendant's sentences were disparate. However, as we noted in the initial appeal, only Demps "had the loathsome distinction of having been previously convicted of the first-degree murder of two persons and attempted murder of another, escaping the gallows only through the intervention of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)" Demps, 395 So.2d at 506.

514 So.2d at 1093-94. Not only did this Court again reject Demps' argument that the sentences in this case were "disparate," but this Court viewed the evidence in aggravation as so strong that it would have supported a death sentence for Demps even if the jury had

[11] **He did so in the context of raising a claim of error under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); nevertheless, integral to his Hitchcock claim was the contention that his death sentence was disproportionate to the life sentences of his two codefendants.**

recommended a life sentence. Id. at 1094. It would be difficult to imagine a stronger endorsement of the death sentence.

Demps thereafter raised this issue in federal court. The Eleventh Circuit Court of Appeals stated:

> Finally, petitioner stresses that the two co-perpetrators of the murder received a life sentence while he alone was sentenced to death. Petitioner claims that this should be considered as mitigating. Petitioner relies on the language of Downs v. Dugger, 514 So.2d 1069 (Fla. 1987), where the Florida Supreme Court stated that it "has recognized as mitigating the fact that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused." Id. at 1072 (citations omitted). However, in reviewing Demps' sentence as compared to that of his co-perpetrators, the Florida Supreme Court also recognized that "only Demps had the loathsome distinction of having been previously convicted of the first-degree murder of two persons and attempted murder of another, escaping the gallows only through the intervention of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Demps v. Dugger, 514 So.2d 1092, 1093 (Fla. 1987). We conclude that Demps' prior criminal record was sufficient to justify imposing a more serious penalty.

874 F.2d at 1384-85.

Although the identity of the "triggerman" is certainly relevant to any evaluation of the relative culpability of multiple codefendants, the death penalty may be "appropriate even when the defendant is not the triggerman." Van Poyck v. State, 564 So.2d

1066, 1070 (Fla. 1990), and even when it is clear that a codefendant was the person who actually administered the deadly blow. Larzalere v. State, 676 So.2d 394 (Fla. 1996). Just as statutory aggravating circumstances are not limited to circumstances of the crime, but also include factors extrinsic to the crime on trial, an evaluation of the overall culpability of codefendants is not limited to the circumstances of the crime, but includes all evidence in aggravation, including aggravators such as the prior violent/capital felony aggravator. Demps' codefendants have only committed one murder; Demps has committed three plus he also has attempted a fourth murder. Thus, his overall culpability is greater than that of his codefendants, as this Court has consistently held every time it has considered this issue.

Demps has presented nothing new regarding proportionality. He does not contend that his "new" "evidence" shows that he is less culpable than his codefendants; he contends that it shows he is not culpable at all. In fact, it does neither, and he may not at this late juncture argue the proportionality of his sentence.

CONCLUSION

For all the foregoing reasons, the trial court's summary denial of Demps' successive motion for postconviction relief should be affirmed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/facsimile to William Salmon, Esq., P.O. Box 1095, Gainesville, Florida 32602-1095, and to George F. Schaefer, 1005 S.W. 2nd Ave., Gainesville, Florida 32601-6116, this 1st day of June, 2000.

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