IN THE SUPREME COURT OF FLORIDA

BENNIE E. DEMPS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee(s).
_____/

CASE NO. SC00-1118

Lower Tribunal No. 77-116-CF

ON APPEAL FROM THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT, STARKE,
BRADFORD COUNTY, FLORIDA

DENIAL OF APPELLANT'S FOURTH MOTION TO
VACATE JUDGMENT AND SENTENCE, PURSUANT
TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

CASE NO: 77-116-CFA

MERIT BRIEF OF APPELLANT

BILL SALMON
Attorney for Appellant, DEMPS
Post Office Box 1095
Gainesville, Florida 32602-1095
(352) 378-6076
Florida Bar No: 0183833

ISSUES PRESENTED

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This brief is in supplementation to the rough draft of Merit Brief of Appellant which was fax-filed with the Clerk on June 1, 2000. Counsel thanks the Court to its patience and consideration.

The current Record on Appeal consists of four volumes. In this brief, Appellant will cite to the record by using the volume number, comma, page number(s) in parentheses. For example, a citation to page 12 of Volume One would read (I,12).

References to the record on appeal from appeal of Mr. DEMPS' third motion for post conviction relief are also referenced herein. Appellant will cite to that record by using "V" for the volume number, a dash, and page number(s) in bold parentheses. For example, a citation to page 12 of volume one of the previous record would read **(V1-12)**.

TABLE OF CITATIONS

CASES **PAGE(S)**

OTHER AUTHORITIES

STATEMENT OF THE CASE

The judgment of conviction and death sentence at issue in this appeal were rendered by the Circuit Court of the Eighth Judicial Circuit, in and for Bradford County, Florida.

Appellant Demps and two co-defendants, James Jackson and Harry Mungin, were indicted for first degree murder on April 5, 1977. **(V1-3)** On March 16, 1978, a jury found all three guilty of first degree murder. **(V1-3)** At the end of penalty phase the next day, the jury recommended death for Appellant and co-defendant Jackson, and life for co-defendant Mungin. **(V1-3)**

The trial Court imposed sentence on April 17, 1978. It overrode the jury's death recommendation and gave Jackson, the for more culpable defendant, a life sentence. **(V1-3)** The Court also sentenced Mungin to life. **(V1-3)** As to Appellant Demps, however, the trial Court imposed the death sentence. **(V1-3)**

Appellant's conviction and death sentence were affirmed on direct appeal. Demps v. State, 395 So. 2d 501 (Fla.), cert. denied, 454 U.S. 433 (1981). Previous collateral proceedings were also unsuccessful. See, Demps v. State, 416 So. 2d 808, 809 (Fla. 1982); Demps v. State, 462 So. 2d 1074 (Fla. 1984); Demps v. Wainwright, 805 F. 2d 1426 (11th Cir. 1986); Demps v. Dugger, 108 S.Ct. 209 (1987); Demps v. Dugger, 514 So. 2d 1092 (Fla. 1982) (Kogan and Barkett, JJ., dissenting); Demps v. State, 515 So. 2d 1385 (11th Cir. 1989); Demps v. Dugger, 58 USLW 3685 (U.S. April 16, 1990).

On May 7, 1990, this Honorable Court granted a stay of Appellant's scheduled execution subject to a petition for extraordinary relief. The Court directed Appellant to file within that time "any motions or petitions seeking post conviction or collateral relief..." Demps v. Dugger, No. 75,944 (Fla. May 7, 1990).

Pursuant to this order, Appellant filed his third successive Motion to Vacate Judgment and Sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure on September 7, 1990. **(V1, 1-64)** The trial Court summarily denied the motion by order dated September 1, 1994.

The Defendant filed his fourth successive motion for post conviction relief (I, 79) which also incorporated the newly discovered claims contained in his third successive motion for post conviction relief.

The trial court entered its order granting and scheduling an evidentiary hearing on his fourth motion (I, 244), confirmed same by its order continuing said evidentiary hearing (II, 256) and then entered its order denying the Defendant's fourth motion for post conviction relief (IV, 863) without conducting the evidentiary hearing it had granted. This appeal follows.

STATEMENT OF FACTS

At Demps' jury trial, the State's case rested on the testimony of two witnesses: inmate Larry Hathaway, who testified that he saw Demps involved in the murder of Alfred Sturgis, and A.V. Rhoden, a prison guard who testified that Sturgis named Demps, Jackson and Mungin as the one who did it, in a "dying declaration." (II, 432)

The Assistant State Attorney who prosecuted Appellant was Thomas Elwell. Sturgis was killed on September 6, 1976. Thereafter, another inmate, Leroy Colbreth, was killed at Florida State Prison. Mr. Elwell also prosecuted that murder case, State v. Bolius and Jacobitti, No. 77-213-CF (Bradford County) in 1977.

In depositions taken in the Bolius/Jacobitti case, several inmates indicated that it was Leroy Colbreth, who killed Sturgis for not paying a drug debt. **(V1-75-195)**. Assistant State Attorney Elwell never disclosed this information to Appellant Demps or his attorneys.

Numerous inmates have now come forward via affidavits contained in Mr. DEMPS third motion and incorporated herein, to tell a shocking story of the systematic frame-up of Appellant Demps by several State officials.

Additionally, newly discovered evidence of a report completed by Cecil L. Sewell, Chief Inspector/Investigator to the Secretary of the Department of Corrections (I, 74) reveals for the first time, through direct evidence that Mr. Demps is innocent. Said report categorically contradicts the alleged dying declaration testified to by Rhoden and vitiates the whole of the material trial testimony presented in this case. Significantly, jury deliberations confirm this exculpatory fact which reflect that the jury was out for almost five hours before returning hung and deadlocked on the issue of any guilty verdict against Mr. DEMPS. Only after two Allen charges did the jury deliberate for

approximately five additional hours before returning its verdict of guilt in this cause. Notwithstanding the compelling nature of this exculpatory evidence demonstrating Mr. DEMPS' innocence, the trial court denied the Defendant an evidentiary hearing, after granting one, on his fourth 3.850 motion.

These are the facts that underlie Mr. DEMPS' 3.850 motion at issue here and this appeal.

SUMMARY OF THE ARGUMENT

The trial errors raised in this appeal on behalf of the Appellant Bennie Demps are bottomed on the fundamental principle of innocence. All of appellant's claims are based on a violation of equal protection under Article I, §2 of the Florida Constitution, due process under Article I, §9 of the Florida Constitution, right of effective assistance of counsel under Article I, §16 of the Florida Constitution, and equal protection and due process under the Fourteenth Amendment to the United States Constitution. These errors render the imposition of Mr. DEMPS' execution arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The Appellant was convicted and sentenced to death in 1978 and appeals the summary denial by the trial Court below of his fourth motion for post conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure.

Because the facts and law are so overwhelmingly in favor of this Court's analysis leading to a reversal of the trial court's order summarily denying Mr. DEMPS' pending 3.850 motion and the shortness of time allowed by this Court to brief the issues, Mr. DEMPS is constrained to maintain brevity in the summary of his argument as well as the other issues raised in his brief with as much thoroughness as allowed by the shortened briefing schedule imposed by this Court. The only apparent reason for the Court's radical reduction of time normally allowed by its rules to submit the Appellant's brief is the fact that the Governor of the State of Florida has issued a warrant for the execution of Mr. DEMPS.

There does not appear to be any lawful justification for the foreshortening of the Appellant's time for submitting his initial brief, or from the complete denial to file any kind of reply to the State's brief.

Mr. DEMPS was convicted of capital murder and sentenced to death in 1978. The only testimony of any merit was the dying declaration of the victim, testified to at trial by correctional officer A.V. Rhoden. Indeed, Mr. Rhoden's trial testimony is the only relevant, or admissible portion of the actual record in this cause which the State has ever submitted, an illogical anomaly in that the newly discovered exculpatory evidence submitted by Mr. DEMPS herein is that which completely contradicts Mr. Rhoden's testimony and thus the only support for the verdict returned at Mr. DEMPS' trial. Specifically, Mr. DEMPS presents the unrebutted, in a trial record sense, report of the Department of Corrections chief inspector/investigator proving that Mr. Sturgis named only one person as his assailant rather than three, including Mr. DEMPS, as testified to by Mr. Rhoden at trial. The trial testimony of Mr. Rhoden was without the exculpatory evidence contained in the report of Cecil L. Sewell stating that Mr. Sturgis named only one person, not Mr. DEMPS. Also the absence of Mr. Rhoden's handwritten report, also hidden from the Defendant as the newly discovered testimony of several witnesses prevented from testifying from threats as serious as guns being placed to theirs heads was also missing all of which would have enabled Mr. DEMPS' trial counsel to mount a successful defense at trial. That this is so is illuminated by the fact that Mr. DEMPS' jury was out for five hours before returning deadlocked in its ability to return any verdict of guilt against Mr. DEMPS and then after the giving of two Allen charges by the trial court an additional five hours of deliberation by Mr. DEMPS' jury during the guilt phase before returning with the guilty verdict. It is inescapable that the newly discovered exculpatory evidence raised by Mr. DEMPS would inevitably have produced a different result during the guilt phase of his trial. That same evidence even more certainly would not have produced an advisory or actual sentence of death.

The trial court through both the Honorable Larry Gibbs Turner and the Honorable Chief Judge Robert P. Cates have on multiple occasions indicated by their orders that an evidentiary hearing is justified and has in fact been granted and scheduled in the trial court below. The months of meticulous review by the trial court based on valid judicial considerations leave no alternative judicial analysis other than that the trial court's order summarily denying Mr. DEMPS' 3.850 motion should be reversed with directions to the trial court to conduct that evidentiary hearing previously ordered on both guilt and sentencing phases of Mr. DEMPS' trial. To do otherwise would constitute the practice condemned by the United States Supreme Court in Furman: the arbitrary and capricious imposition of the death sentence.

In closing this summary it must be pointed out that Mr. DEMPS' counsel has labored under the unconscionable burden of his wife's grave illness which negatively impacts Mr. DEMPS' constitutional entitlement to the effective assistance of counsel and due process in this appeal, a burden which has been raised and rebuffed several times by this Honorable Court. Mr. DEMPS respectfully requests this Court to overlook, due to that burden, the imperfections of briefing that a brief of this magnitude deserves and which normal repetitive editing and reviewing would have eliminated. Mr. DEMPS' counsel has made every human and professional effort to comply with this Court's briefing schedule, and apologizes for being unable to present his brief in the more acceptable and professional manner but which cannot be avoided.

WHEREFORE, the Appellant seeks this Honorable Court's opinion reversing the trial Court's denial of the Appellant's motion for post conviction relief and remand with directions to the trial Court to hold a full evidentiary hearing.

ARGUMENT

I. FUNDAMENTAL DENIAL OF DUE PROCESS

This Honorable Court, in its order of May 25, 2000, directed Mr. DEMPS' counsel to write on any issue which he contends is an issue for relief by this Court and reversal of the trial court's order summarily denying Mr. DEMPS' 3.850 motion for post conviction relief. Although this Court has set a briefing and oral argument schedule that is violative of its own procedural due process rule with regard to death penalty appeals from summary denials of petitions for Rule 3.850 relief, *See* for instance, Rule 9.140, Florida Rules of Appellate Procedure, Mr. DEMPS shall attempt to address each of said issues. Mr. DEMPS is further hindered in his ability to address all issues here because as the Court has been informed, neither he nor this Honorable Court have the entire record before it. *See*, DEMPS' multiple requests for extension of time to complete the preparation of the record on appeal.

The first and most fundamental issue for relief by this Honorable Court is that it has overlooked and disregarded the fact that the issues in this cause involve life and death. As the United States Supreme Court has held on many occasions death penalty cases necessarily reflect an appreciation of the fundamental fact that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more than life imprisonment than 100 year prison term differs from one of only a year or two. *See* Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). Likewise it has been held that the imposition of death by public authority is profoundly different from all other penalties. Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71, L. Ed. 2d 1 (1982). Thus, as an initial matter of supreme importance to this Honorable Court is that to abrogate rules of this Court which are designed to assure due process,

equal protection, effective assistance of counsel and the assurance of other equally important constitutional and human rights is to engage in a process that was so thoroughly condemned by the United States Supreme Court in Furman: the arbitrary and capricious consideration and review of the death sentence as imposed on Mr. DEMPS. A sentence being considered and reviewed by this Court in the face of clear evidence which demonstrates that Mr. DEMPS is innocent. It is respectfully submitted and requested that this Court grant the amount of time this Court has deemed reasonable to adequately and appropriately brief the issues, reply to the State's position to assure what this Court has deemed appropriate in death cases, the guarantee of due process and effective assistance of counsel.

Although counsel deeply wishes it were not so, his wife's serious medical condition which requires undersigned counsel, as her sole caretaker, to maintain her fragile health prevents counsel from adequately and fully effectively presenting Mr. DEMPS' brief. Undersigned counsel apologizes to this Court for what counsel is sure are ineptitudes displayed in this brief, irregularities in format, failure of proper citation and other formalities deserving of a brief in this death case under different circumstances and reasonable additional time.

II. DENIAL OF DUE PROCESS, PREJUDICIAL WITHHOLDING OF EXCULPATORY MATERIAL AND STATE'S FAILURE TO COMPLY WITH ABSOLUTE DISCOVERY OBLIGATION.

The most glaring absence of response by the State is its complete failure to ever address, answer or explain how or why its failure to provide the official Department of Corrections' report authored by Cecil L. Sewell ("the Sewell report") which is a primary focus of Mr. DEMPS' Rule 3.850 motion, which evidences his innocence, is not a denial of due process, withholding of

exculpatory evidence under Brady, and violation of its absolute discovery obligation constituting grounds for summary reversal of the trial court's order denying Mr. DEMPS' 3.850 motion and granting of a new trial by this Court. They have ignored that imperative obligation because they know the Sewell report, had it been provided to Mr. DEMPS' counsel as required, would have enabled Mr. DEMPS and his counsel to demonstrate to the jury that Mr. DEMPS should not be convicted of capital murder and sentenced to death. Furthermore they know that this result would have been inescapable because the jury in Mr. DEMPS' case was out for approximately five hours before it hung on the issue of any verdict of guilt against Mr. DEMPS and even after two Allen charges remained out for an additional five hours before returning their verdict.

More compellingly under these circumstances, it is beyond peradventure that Mr. DEMPS would not have received an advisory sentence of death by his jury nor sentenced to death in light of the evidence of innocence contained in the Sewell report. It makes no difference whether the egregious error of the State was intentional or inadvertent. Not only was the Sewell report prejudicially withheld from Mr. DEMPS but the record also reveals that the handwritten report of Mr. Rhoden, the officer testifying to the damning dying declaration, and reports of other witnesses' statements were also prejudicially withheld from Mr. DEMPS, all potentially exculpatory and requird to be produced.

The State's glaring deficiency is the first and most important issue to be resolved as a denail of due process.

III. EVIDENTIARY HEARING GRANTED, SCHEDULED AND CONTINUED

The next fundamental issue for relief here is that an evidentiary hearing has been authorized, as a matter of law, and granted, scheduled and continued by the trial court. Confirmed for reasons of due process, effective assistance of counsel and to further the interests of justice, by a plethora of opinions from this Honorable Court.

As far back as October 29, 1999 the trial court by order of the Honorable Larry Gibbs Turner, directed the State to file an appropriate written response to Mr. DEMPS' 3.850 motion. Appropriate, in the sense of directing the State to provide facially sufficient portions of the record which conclusively refute Defendant's claims, a burden the State failed in response to Judge Turner's order directing them to do so and which the State has never complied with notwithstanding being given a four month reprieve and even additional time to do so by successor trial court, Judge Cates. (II, 271) Judge Turner in his order specified as follows:

> "The State shall attach to the response all relevant portions of the record which conclusively refute Defendant's claims."

(I, 122). The record reflects that the State did not and could not attach any portion of the record of this cause which meets both the trial court and this Honorable Court's requirements to avoid the granting of an evidentiary hearing to Mr. DEMPS. It is important to note that Judge Turner's order was not hastily entered but was entered after months of review by the law clerk system in the Eighth Judicial Circuit and upon thorough review by Judge Turner of Mr. DEMPS' motion. Judge Turner's order was a reasoned one following this Court's many opinions requiring the State to respond in its answer as directed by the Court in order to avoid the summary granting of an evidentiary hearing. The only response of the State, which has been rejected by the trial court, was that Mr. DEMPS'

motion was not based on newly discovered evidence and that the content of the Sewell report evidencing Mr. DEMPS' innocence was a hearsay document and thus inadmissible. As mentioned previously, the State submitted no portions of the record which would conclusively or otherwise refute Mr. DEMPS' claims of innocence. This failure per the mandate of Rule 3.850 entitles Mr. DEMPS to the evidentiary hearing that has previously been granted by the trial court to establish his innocence.

Notwithstanding the failure of the State to respond as required in its answer it was nonetheless given an additional four months to attach portions of the record which would conclusively refute the claims of Mr. DEMPS by the trial court's, Order Directing Limited Supplemental Response. Even with its unlawful, unreasonable and unjustified opportunity to comply with a fundamental requirement of the provisions of Rule 3.850, more than four months after its unjustified failure to respond, the State by its supplement still failed to attach any relevant portion of the record conclusively refuting Mr. DEMPS' claims. Relevant portions of the record would of course be admissible testimony or documents that otherwise were part of the record and relevant to this critical aspect of procedural and substantive due process.

Notwithstanding its violation of the court order directing a limited supplemental response, the State attached something called "Summaries" completed by a Bill Beardsley which are clearly not pre-trial or trial testimony as required by the order and clearly not relevant as they are wholly inadmissible. The State also submitted pre-trial depositions of certain witnesses which are completely inadmissible and in fact not even part of the record (co-counsel's review of the trial record reveals that depositions were never made part of the record) before this Court and thus equally insufficient to meet this critical aspect of Rule 3.850 procedural and substantive due process.

Lastly the State attached, for some reason, the trial testimony of A.V. Rhoden, the witness testifying at Mr. DEMPS' trial to the alleged dying declaration of the victim in this cause. Even the State can't believe that the trial testimony that is the very subject of the official Department of Corrections' report refuting that testimony and establishing Mr. DEMPS' innocence could possibly be sufficient to meet the procedural and substantive lawful requirement to attach relevant portions of the record which conclusively refute the relief sought by Mr. DEMPS. Thus, not only has an evidentiary hearing been granted and scheduled by order of this court, the same should have been entered as a matter of law as far back as January 15, 2000, the date on which the State completely failed to comply with its obligation mandated by Rule 3.850, to avoid the summary granting of an evidentiary hearing.

The claim by the State that its unjustified failure to respond as ordered and its insufficient response when given a four-month reprieve is somehow sufficient to meet its procedural and substantive obligation to avoid the summary granting of an evidentiary hearing is telling evidence of the absence of any portion of the record of this cause that could be attached to show that Mr. DEMPS is not entitled to an opportunity to prove his innocence.

That Mr. DEMPS has already been granted an evidentiary hearing which should be affirmed by this Court on the basis of its many opinions, is evidenced most clearly by the trial court's "Order Scheduling Evidentiary Hearing. (I, 244) The body of that order more specifically details the proper granting of an evidentiary hearing by the trial court's language that "the court finds that an expedited evidentiary hearing is necessary in order to enhance the court's consideration of the issues." The court goes on to say, "an evidentiary hearing will take place on Friday, May 5, 2000...", and lastly if the State were to argue that the trial court has not appropriately granted an evidentiary hearing in

this cause, any such argument would be rebuffed by the fact that the trial court found fit to handwrite into its order scheduling an evidentiary hearing that the evidentiary hearing would be to present testimony and other evidence, "as set forth in Defendant's 3.850 motion." (I, 244) Due to undersigned counsel's wife's dire medical condition the trial court was kind enough to entertain a motion for a continuance of the granted evidentiary hearing to allow for the appropriate and effective presentation and consideration of evidence and testimony pertinent to Mr. DEMPS' claims. Although the court did not have the file in front of it in the recreation center in Lake Butler, Union County, Florida at the time of the hearing, the court indicated at that hearing that there "may have been some misunderstanding about what the hearing on Friday was to be all about." (III, 670) Nonetheless the court went on to say that he was "postponing that hearing to a later date." (III, 670) The court's earlier entered order, had it been in front of the Court, would have cleared up any misunderstanding and made it abundantly certain that an evidentiary hearing had in fact been granted and scheduled.

It cannot be gainsaid that the trial court did not have authority to grant Mr. DEMPS an evidentiary hearing. Indeed, the court recognized that fact when it entered its order subsequent to the hearing held in Union County entitled, "Order Continuing Evidentiary Hearing and Setting Hearing. (II, 256) In that order the court again noted that it had "previously entered its order granting an evidentiary hearing... ." The court also mentioned that its concern included whether or not the issues in Mr. DEMPS' motion were really newly discovered evidence, a matter resolved in favor of Mr. DEMPS in the court's order denying his motion for post conviction relief. As stated there the trial court accepted that the basis of Mr. DEMPS' claims was newly discovered affirming the State's failure to show or prove that it was not. The trial court went on to say in its oral

pronouncements at the hearing on May 3, 2000 that if it was found that the Sewell report was newly discovered evidence and that Mr. DEMPS is entitled to a hearing (which had already been granted) then he will get one.

The trial court's order directing a limited supplemental response further establishes the appropriateness of the granting of an evidentiary hearing. There the court found that, "the court has determined that the significance of the document (Sewell report) is partially dependent upon the availability of pre-trial or trial testimony that contradicts or corroborates a statement in the document." (*emphasis added*) (II, 272) The court went on in that order to say that it "finds that review of the testimony, if any, of those people (those referred to the inadmissible non-record "summaries" and unfiled depositions) is critical to a ruling on the motion before it. Furthermore, the court finds that those portions of pre-trial or trial testimony are not only relevant but may conclusively refute defendant's claims and, consequently, should have been attached to the State's previous responses." (*emphasis added*) First, the supplements provided by the State, except for the trial testimony of Mr. Rhoden, are not pre-trial or trial testimony and more importantly, are not relevant as they are inadmissible. The so-called "Summaries" of Beardsley are hardly pre-trial or trial testimony of any kind. The depositions are not even so much a part of this record and are inadmissible as they are truly hearsay statements and thus not relevant for consideration of the court's concerns expressed in its reprieve order to the State.

The trial court subsequently entered its order denying the Defendant's fourth successive motion for post conviction relief and its order denying DEMPS' motion for rehearing. In both of those orders, there is ample support for reversal of those orders by this Court. The court finds that an unavoidable inference from the Defendant's motion is that the Sewell report was not available to

him at the time of trial. A further unavoidable inference made by the court is that Rhoden's testimony contained a statement or statements in conflict with the memorandum (Sewell report). The trial court also noted in its order denying motion for rehearing that, contrary to the Defendant's argument, the "handwritten portion of the order (granting and scheduling an evidentiary hearing) was meant to limit the grounds for relief to be addressed to *only* (*emphasis supplied)* those in Defendant's current motion and not, as defendant contends, to extend to *all issues.* (*emphasis supplied*) (IV, 1018) This notation is important because apparently the trial Court overlooked that portion of Mr. DEMPS' current motion for post conviction relief which in fact incorporated and included issues previously raised in the Defendant's third motion for post conviction relief. This of course is consistent with those opinions holding that a motion for post conviction relief based on newly discovered evidence must necessarily include consideration of all previously alleged newly discovered evidence in order to lawfully and properly rule. Thus, for all the other reasons why this Honorable Court should affirm the previously granted evidentiary hearing by reversing the trial court's order denying same, is the requirement that an evidentiary hearing must be held to correct the court's misunderstanding of Mr. DEMPS' current motion for post conviction relief.

The court in its order denying motion for rehearing found that Mr. DEMPS' motion for post conviction relief addressing the issue of sentencing and the imposition of the death sentence was procedurally barred. As the trial court has accepted that the Sewell report is newly discovered evidence on the issue of guilt, moots any notion that it is not equally newly discovered evidence for purposes of sentencing. Moreover, this Court's most recent opinion in Brown v. State, 721 So. 2d 274 (Fla. 1998) confirms even without the Sewell report, and certainly vastly strengthens the claim

that the far, far less culpable defendant, Mr. DEMPS, cannot receive the death sentence when the far more culpable and killer defendant, Mr. Jackson, got a life sentence.

The trial court's order denying the Defendant's motion for post conviction relief is also erroneous. The court finds that "the defendant argues that the memorandum could have been used for impeachment purposes and to reveal potential defense witnesses." (III, 680) As presented at hearing in the non-record proceedings of May 12, 2000, it was pointed out to the court that the Sewell report is not just impeachment but from the face of the document, a first-person account from the Department's chief inspector and investigator to the Secretary of the Department of Corrections, that Mr. DEMPS is innocent, as he was not an assailant of Mr. Sturgis.

The court points out that Sewell's statement in the memorandum is that "before Sturgis died, he named James Jackson, B/M, #029667, as his assailant." This reference doesn't even support the connection of Mr. Jackson as that is not his prison number.

The trial court in its order then goes on to attempt to distinguish the Sewell report as referencing only Mr. Sturgis' assailant. The court uses, as does the State, contrary to a plain definition of the word assailant, that the report might refer accurately to just Jackson as the assailant. A clear definition of the word assailant is one who attacks another, and would have to include DEMPS because Rhoden testified at trial that "Demps held me down" clearly bringing DEMPS within the ambit of "assailant" if he had in fact been one. The first-hand report from Mr. Sewell proves that Mr. DEMPS was not the, or an assailant of Mr. Sturgis and that report, together with other evidence which would have inevitably been discovered would have enabled Mr. DEMPS to prove to the jury his innocence. This is corroborated by the indisputable record proof that the jury at Mr. DEMPS trial deliberated for over five hours before announcing to the court that it was hung

on the issue of the guilt of Mr. DEMPS. Moreover, the court gave two Allen charges before the jury, and only after another five hours of deliberation, returned its verdict.

Although there are multiple lawful and reasonable justifications for granting Mr. DEMPS an evidentiary hearing, this irrefutable fact alone establishes that there was reasonable doubt as to Mr. DEMPS' guilt and there can be no legitimate argument that the Sewell report would not have been sufficient to have maintained a jury deadlock and in all probability would have returned a far different verdict in Mr. DEMPS' case, if not one of acquittal. The trial court itself acknowledges that the Sewell report constitutes the possibility that a different verdict would have been returned by the jury.

The trial court goes on to erroneously state that there was the availability of prior consistent statements and the apparent availability of eyewitness testimony to rebut the value of the Sewell report. As mentioned previously the attachments supplemented by the State four months after its inexcusable failure to provide them earlier, are neither admissible nor portions of the record which the trial court or this Court could rely on.

SENTENCING PHASE

The trial court likewise denies Mr. DEMPS' motion for post conviction relief addressing his sentence as procedurally barred. The only support is the trial court's finding that this court determined the issue of proportionality on direct appeal in 1981. After finding that the Sewell report is admissible, impeachable and raises the possibility of a different result the court nonetheless erroneously finds that the defendant's newly discovered evidence fails to question this Court's previous determination of the relative culpability of Mr. DEMPS versus his co-defendants. The Sewell report evidences Mr. DEMPS' innocence and inescapably it must be argued that there is no

question that it would have resulted in a life sentence being imposed against Mr. DEMPS if the jury had somehow been able to find him guilty.

This Court's 1981 opinion addresses the issue of the newly discovered evidence presented by Mr. DEMPS by way of its ruling on the discovery issue raised in that appeal. This Court's finding that there was "nothing in the record to refute the State's version, through Rhoden, of the dying declaration" has now been assailed by the Sewell report. It appears from this Court's own opinion in 1981, that had it been presented with the newly discovered Sewell report that it would have indeed found that there was record evidence to contradict Rhoden's rendition of the alleged dying declaration. It is submitted that this Honorable Court with that information would have reversed Mr. DEMPS' conviction as far back as 1981. The trial court seems to have been aware of this Court's decision in 1981 but also apparently, not the specifics of this Court's holding on the critical issue which would have been addressed by the newly discovered evidence contained in the Sewell report as well as newly discovered evidence alleged, and also unaddressed by the trial court in its order, raised in Mr. DEMPS' third motion for post conviction relief and incorporated and made part of his fourth motion for post conviction relief.

Overlaying all of the factual support for reversing the trial court's order are this Court's learned opinions addressing the need for evidentiary hearings in order to provide the court both with a record of an evidentiary hearing to review and to assure the many constitutional protections including due process, effective assistance of counsel, avoidance of cruel and unusual punishment and other human rights assured by this Court. In Stinhorst v. State, 498 So. 2d 414 (Fla. 1986), this Court stated:

> But where the motion contains allegations of substantial material facts stating a claim cognizable in post conviction proceedings, the motion must be evaluated in light of the trial record. Stinhorst's allegations were sufficiently adequate to at least require an examination of the record.

Id. at 415. It appears here that the only things examined by the Court in denying the Defendant's motion are non-record summaries, non-record depositions, and the trial testimony of the very witness whose sworn testimony is called into question by the Sewell report and other evidence and witnesses to be presented at trial. The trial court's focus on the standard of review is also erroneous in light of this Court's opinion in Young v. State, 739 So. 2d 553 (Fla. 1992), relying on the United States Supreme Court in Kyles v. Whitley, 414 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 490 (1995) saying:

> "...[T]hat the focus in post conviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward post conviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial (as here) is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different."

Young at 559. It seems clear that the trial court did not concentrate on the "nature and weight" of the report and whether non-disclosure undermined confidence in the jury's verdict. It appears more likely that the trial court relied on inapposite language in Jones which is simply too simplistic.

Specifically, this Court has explained that evidentiary hearings are required in most instances so as to avoid the possibility that a federal court will feel mandated to do so. Jones v. State, 446 So. 2d 1059 (Fla. 1984). Again in Jones v. State, 478 So. 2d 346 (Fla 1985) this Court held that a trial

court should grant an evidentiary hearing on 3.850 motions unless the motion, files and records conclusively show that the prisoner is entitled to no relief. Here, the motion clearly shows that Mr. DEMPS is entitled to relief as he can prove his innocence, the files have apparently not been reviewed and the only portions of the record submitted for the trial court or this Court's review are not record excerpts, are inadmissible and wholly insufficient to support the trial court's order denying Mr. DEMPS' motion for post conviction relief. Upon analogous facts to those here, the Eleventh Circuit Court of Appeals in James v. Singletary, 957 F. 2d 1562 (11th Cir. 1992) found that this Honorable Court erred in affirming the denial of a 3.850 motion without an evidentiary hearing. The facts in that case are analogous to the facts in Mr. DEMPS' case. That case based on federal notions of due process and other constitutional principles is and should be persuasive to this Court. Having granted an evidentiary hearing for all the right reasons after the court ordered the State to provide it with any record excerpts that would refute the relief sought, which it did not do and cannot do as evidenced by its subsequent supplementation, the court's acknowledging by its order that the granted evidentiary hearing was being continued, the clear and persuasive nature of the newly discovered evidence showing Mr. DEMPS' deserving claim, and this Court's many opinions cited above, should encourage this Honorable Court to exact justice in this matter and reverse the trial court's order and remand to for an evidentiary hearing.

In light of the ample and concrete newly discovered exculpatory information presented by Mr. DEMPS, the evidentiary hearing sought by him is necessary to assure fundamental constitutional protections relating to the sentence imposed on Mr. DEMPS if not the very finding of guilt as to the crime of first degree murder.

STATE'S RESPONSES INSUFFICIENT AND UNSUPPORTABLE

Although addressed in many ways the State's primary response to Mr. DEMPS' 3.850 motion has been that the Sewell report is not newly discovered and that it is otherwise inadmissible. All of these claims have been refuted by the trial court and such refutation should be affirmed by this Court. Nonetheless, the State's claims deserve mention.

The State claims that the Sewell report and other newly discovered evidence alleged in Mr. DEMPS' fourth motion as incorporated from his third motion is not newly discovered. That issue was joined by the State by claiming that Mr. DEMPS had not shown how or when it was discovered and why it was not discovered earlier. Those claims were absolutely refuted by Mr. DEMPS in that the newly discovered evidence was found within one year of filing Mr. DEMPS' motion and the reason is that the State hid it from Mr. DEMPS for over twenty years.

At the hearing at the non-record proceedings conducted before the trial court on May 12, 2000, the State emphasized over and over again that the newly discovered evidence was inadmissible, apparently relying on this Court's opinion in Sims. The argument of the State was not only disingenuous and an attempt to defraud the trial court but the very cases cited in support of its erroneous position contradicted and refute the State's position. The citations of the State clearly hold that when each alleged hearsay declarant is an employee of the subject agency, the declarations are not inadmissible hearsay but in fact establish the indicia of reliability making such a report admissible as a business records exception. This was pointed out to the trial court by Mr. DEMPS and as well the admissible scenario of testimony through Mr. Rhoden, Mr. Griffis and the first-hand testimony of Cecil L. Sewell. The newly discovered Sewell report is admissible and the State's attempt to defraud the trial court is unsupportable.

IV. DENIAL OF EQUAL PROTECTION

The State has, in affect been granted an evidentiary hearing by way of the trial court's order to supplement the record, and denied same to the Defendant, even though one had been granted.

In response to the Court's order of May 15, 2000, directing that the Court be provided with "those portions of the pre-trial or trial testimony (*emphasis added*) that contradict or corroborate the statement in the report authored by Department of Corrections Chief Inspector Cecil L. Sewell, the State provided the Court the following documents:

1. A pre-trial deposition of Mr. Bill Beardsley.
2. Pre-trial deposition of A.V. Rhoden.
3. Pre-trial deposition of Billy Raulerson.
4. Pre-trial deposition of Hershel Wilson.
5. Summary of expected testimony done by Mr. Beardsley.
6. Trial testimony of A.V. Rhoden.

(II, 275-612)

None of these six items would be sufficient nor could any one of them be attached to an order summarily denying MR. DEMPS' current motion for post conviction relief as conclusively showing that MR. DEMPS is not entitled to relief. They are not even a part of record in this cause, except for Rhoden's trial testimony. Moreover, at least a portion of the items submitted by the State do not comply with the Court's order and to the extent that the alleged summary of expected testimony prepared by Mr. Beardsley does not comport with the directive of the Court in its May 15, 2000 order, MR. DEMPS would respectfully request this Court to strike that particular item from further consideration. The reason that none of the items submitted by the State could be utilized to

conclusively show that MR. DEMPS is entitled to no relief and support a summary denial by this Court is because none of the documents, in whole or in part, show any such thing, and are not any part of the record, except Rhoden's trial testimony.

Based on the very brief and insufficient amount of time prior to the deadline set by this Court for May 18, 2000 at 4:00 p.m., MR. DEMPS shall attempt as best he can under such limited circumstances to briefly discuss each item submitted by the State. (The State provided its information on May 17, 2000 in the afternoon hours.)

(1) Pre-trial deposition of Bill Beardsley.

In this deposition Beardsley does nothing more than read from summaries created by him of what he apparently expects certain witnesses to testify to at MR. DEMPS' trial. Its evidentiary value is nil as it is all hearsay, at best, more obviously could and could be addressed by MR. DEMPS as to Mr. Beardsley's deposition but in the limited time available that will not be possible. MR. DEMPS submits that Mr. Beardsley's pre-trial deposition, with regard to the summaries he refers to, are again, hearsay, and it would appear are nothing more than what Mr. Beardsley, who was not a witness to this incident, supposes certain witnesses may say. Further, there is no other lawful basis on which Mr. Beardsley's summary deposition testimony would be admissible at trial and is not legally or factually sufficient upon which to base a ruling in MR. DEMPS' case. Indeed, Mr. Beardsley's reference to summaries at his deposition speak to earlier interviews done of certain witnesses which reports were destroyed and not provided to the defense. This document supports the need for an evidentiary hearing to address the issues in MR. DEMPS' petition for post conviction relief.

(2) Pre-trial deposition of A.V. Rhoden.

Mr. Rhoden was the trial witness who testified to the alleged dying declaration of Mr. Sturgis in which he named all three of the co-defendants, including MR. DEMPS, as Mr. Sturgis' assailants. The Sewell report is the evidence which raises the contradiction and impeachment of Mr. Rhoden's trial testimony and thus Mr. Rhoden's deposition testimony could not supply the basis for this Court's ruling on MR. DEMPS' petition. As with the other items supplied by the State the deposition of Mr. Rhoden constitutes only factual material necessitating an evidentiary hearing for a full and fair adversarial testing of facts applicable to MR. DEMPS' petition.

(3) Pre-trial deposition of Billy Raulerson.

Again, Mr. Raulerson's testimony as to the victim's statement is rank hearsay, and inadmissible, and therefore of no value to conclusively establishing that MR. DEMPS is not entitled to the relief he seeks. Raulerson admits at pp.16 - 18 of his deposition that Sturgis made the statement to him very shortly after the stabbing occurred, that Sturgis was strong and loud, and that he did not appear to be in fear that he was dying. This of course eliminates that possibility of Mr. Raulerson's testimony being considered as a dying declaration exception to the hearsay rule and renders his testimony on the relevant issue inadmissible and of no value.

(4) Pre-trial deposition of Herschel Wilson.

Again, this deposition is complete hearsay. At pp. 10-12 Mr. Wilson admits that Sturgis' statement was made very shortly after the stabbing occurred, that his voice was not low, that he had his senses, and that he said nothing about his wound or how he felt. There is no testimony from Mr. Wilson that Sturgis made the statement while he reasonably believed that his death was imminent; therefore, it is not admissible under the dying declaration exception to the hearsay rule.

(5) Summary of expected testimony done by Mr. Beardsley.

These summaries do not qualify as pre-trial or trial testimony as mandated by this Court in its May 15, 2000 order, are rank hearsay and of no value to this Court in ruling on MR. DEMPS' petition.

The summaries do evidence that other and more vital statements of key State witnesses were taken at an earlier time, material MR. DEMPS was absolutely entitled to receive in preparation for trial and again support MR. DEMPS' entitlement to an evidentiary hearing on the issues in his petition as the earlier statements, allegedly destroyed and not provided to MR. DEMPS, were clearly discoverable and potentially of highly exculpatory and/or impeachment value.

(6) Trial testimony of A.V. Rhoden.

Although the State indicates that the trial testimony of A.V. Rhoden was supplied in its supplemental response, undersigned counsel certifies that he did not receive a copy of the trial testimony of A.V. Rhoden. Nonetheless, the entire point of MR. DEMPS' motion is that the newly discovered Sewell report, had the State not hidden or otherwise kept it from the defense prior to trial in 1977, could have and would have been used to impeach Rhoden's trial testimony as to the dying declaration, both directly and indirectly. First, it could and would have been used directly because the defense could have gotten it admitted into evidence on its own as a business records exception to the hearsay rule. MR. DEMPS would refer to Section III below for the full explanation of the business records exception to the hearsay rule which unfortunately was not provided by the State at hearing before this Court on May 12, 2000. Briefly, not only the case cited by the State but other cases cited below show that when each of the alleged hearsay declarants in the agency's document are all employees of the agency, that the document is still admissible as a business records exception. The State has acknowledged and stipulated that each of the declarants referred to in the Sewell report

are all employees of the Department of Corrections. That fact provides the indicia of reliability required by the business records exception and makes the Sewell report directly admissible. Secondly, it could have been well used indirectly because it would have led the defense to a string of testimony by Griffis and Sewell to impeach Rhoden by prior inconsistent statements. Again, in his post hearing memorandum MR. DEMPS refers to Jones v. State, 709 So. 2d 512 (Fla. 1998) in which the Florida Supreme Court specifically found the litany submitted by MR. DEMPS as an available means of admissibility of the Sewell report.

It is imperative for the Court to note that the only testimony the State presented at trial as to Sturgis naming all three defendants including MR. DEMPS, was that of A.V. Rhoden. The reason for this is simple: Rhoden and only Rhoden was able to lay a foundation for a dying declaration by Sturgis. Mr. Rhoden's deposition testimony itself, is equivocal and uncertain at best as to the dying declaration he claims to have obtained from Mr. Sturgis and again highlights the need for a full and fair evidentiary hearing on the issues raised on MR. DEMPS' petition for post conviction relief.

This is the bottom-line reason why the newly discovered report of Mr. Sewell is so critical and would have produced a different verdict and/or a different jury recommendation as to sentencing at MR. DEMPS' trial. The Sewell report would have attacked the credibility of Rhoden's testimony at trial, implicating MR. DEMPS through the alleged dying declaration of Mr. Sturgis.

The items submitted by the State are of no value to the trial court's ruling on MR. DEMPS' motion and MR. DEMPS requests that this Court strike each of the items submitted by the State and confirm the evidentiary hearing previously ordered by this Court to assure that due process and fair trial and other constitutional and civil rights raised by MR. DEMPS are preserved in this case involving the execution of MR. DEMPS.

V. DENIAL OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS AND PROCEDURAL DUE PROCESS RAISED TO A SUBSTANTIVE LEVEL

BENNIE DEMPS was convicted of Capital First Degree Murder in the Circuit Court of Bradford County, Florida in 1978. The actual killer of the victim in this cause was sentenced to life. Notwithstanding the trial testimony that Mr. DEMPS was far less culpable than the actual killer, he was sentenced to death.

The Governor of the State of Florida issued a death warrant for Mr. DEMPS on April 24, 2000. The Governor's warrant has no date or time for the scheduled execution of Mr. DEMPS and on its face allows for the orderly judicial consideration of issues raised in Mr. DEMPS' fourth successive Motion for Post Conviction Relief. The central issue in Mr. DEMPS' Motion for Post Conviction Relief is based on newly discovered, admissible evidence which shows that Mr. DEMPS is innocent. This fact is unrebutted by the State as evidenced by its inability and failure to attach any portion of record proceedings which conclusively refute that Mr. DEMPS is not entitled to the relief sought.

In the face of the unrebutted, admissible evidence of Mr. DEMPS' innocence - evidence withheld and hidden from the Defendant or his trial counsel by the State for over 20 years - the refusal of the trial court to hold the evidentiary hearing it has already ordered abrogates all notions of due process and other fundamental constitutional protections which this Honorable Court is charged with protecting for all citizens of the State of Florida.

The constitutional touchstone of this Honorable Court's jurisdiction is a fair opportunity to be heard. For instance, Rule 9.140, Florida Rules of Appellate Procedure, mandates that "... any appellant's brief shall be filed within 15 days of the filing of the Notice of Appeal." That rule goes

on to say that "unless the record shows conclusively that the Appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing." To fail to order such a hearing for Mr. DEMPS abrogates the Court's own rules of procedure and orderly due process and denies the Appellant his most fundamental constitutional and moral protections which this Honorable Court is bound to preserve. Setting an unreasonable briefing schedule denies Mr. DEMPS his right to procedural and substantive due process and effective assistance of counsel, right to be free from cruel and unusual punishment and moral and civil rights recognized time and time again by this Honorable Court and the United States Supreme Court. The United States Supreme Court has held that death is different and the administration of justice should not be sacrificed by less than full and adequate review of the trial court's order summarily denying Mr. DEMPS' motion for post conviction relief by this Honorable Court.

The Appellant is not even certain that this Honorable Court has the required record before it to conduct a meaningful review under the briefing schedule set by this court. Having the full record is imperative to any meaningful review of this cause.

The Appellant simply does not have sufficient time to more fully address the momentous and fundamental issues which must be addressed by this Honorable Court. Additionally, the unfortunate medical emergency befalling undersigned's wife has made meaningful response to this Court even more difficult notwithstanding undersigned's effort on behalf of Mr. DEMPS as ordered by this Court.

Mr. DEMPS has made a full and sincere effort to try and understand a logical or reasonable justification for the expedited briefing schedule resulting in abrogation of this Court's own procedural and substantive rules of notice and fair opportunity to be heard, but there exists no reason

to deny Mr. DEMPS his fundamental, fair and due process right to be heard in this Court through a reasonable opportunity to brief the issues and prepare for oral argument pursuant to this Court's well-established time limits.

It is respectfully submitted that the justices of this Honorable Court dissenting to the unreasonable and unfair briefing schedule set by the majority of this Court should be followed. There simply does not appear to be any just reason for this Court to march to the beat of a prison official unconcerned and unmindful of this Court's otherwise orderly procedures to ensure meaningful review.

VI. PROSECUTORIAL MISCONDUCT, DENIAL OF DUE PROCESS, EQUAL PROTECTION AND SUMMARY GRANTING OF EVIDENTIARY HEARING.

The Court must review and address the State's failure to comply with the trial court's order which justifies the summary granting of an evidentiary hearing to Mr. DEMPS. Also the denial of equal protection of the law to Mr. DEMPS by way of the trial court's order granting the State, without any legal justification, the opportunity to supplement its response more than four months after the State's failure to comply with the court-ordered mandate.

On October 20, 1999 the trial court entered its specific order directing the State to answer the Defendant's motion for post conviction relief. Said order contained findings and rulings after a complete and thorough review of the Defendant's motion by the trial court's law clerk and the then Judge Turner. Judge Turner ordered the State to answer and specifically provide portions of the record which it contended conclusively refuted the relief sought by Mr. DEMPS. This order was obviously in compliance with Rule 3.850 which requires the court to grant an evidentiary hearing unless attached portions of the record conclusively refute the relief sought. Contrary to the rule and

the specific order of the trial court the State ignored and wholly disregarded the mandate of Rule 3.850 and the trial court's order directing it to answer by failing to attach any portions of the record. The State by its failure arrogantly took the position that it could disregard the court's order and mandate of Rule 3.850 and rely on the inequitable position that the State can do anything or nothing, as it pleases. The trial court, through the Honorable Robert P. Cates, Chief Circuit Judge of the Eighth Judicial Circuit, upon determining that the State had failed in its requisite obligation to attach portions of the record obviously found that such attachments were necessary for a summary denial of Mr. DEMPS' motion. Thereupon, the trial court, without any legal justification or reasoning by the State as to why it failed to comply with its requisite obligation for more than four months, summarily entered its order allowing the State to supplement the record. In effect, the trial court gave the State an evidentiary hearing after four-plus months to try and address its obligation in order to avoid what would otherwise have been a summary granting of an evidentiary hearing on the issues raised by Mr. DEMPS.

The State in its supplementation violated Judge Cates' order by submitting other than pre-trial or trial testimony. Moreover, the items supplemented are meaningless because they are all clearly inadmissible. The State submitted a "summary" of testimony prepared by a correctional officer which clearly violated the Court's order to supplement with pre-trial or trial testimony. The State also submitted depositions which contain no admissible testimony as all are nothing more than inadmissible hearsay and, apparently, the trial testimony of correctional officer A.V. Rhoden who related at trial the alleged dying declaration of the victim, Alfred Sturgis. As certified previously the trial testimony of A.V. Rhoden was not provided to Mr. DEMPS by the State.

VII. THE TRIAL COURT'S DENIAL OF A STAY AND THE TOTAL DISREGARD OF DEMPS' PROCEDURAL AND SUBSTANTIVE RIGHTS UNDER FLORIDA LAW IN DEFERENCE TO THE EXECUTIVE'S SCHEDULED EXECUTION DATE VIOLATE DEMPS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The procedural posture of this case can colorfully be described "Alice in Wonderland" jurisprudence: the death warrant is issued first, the appeal briefs are to be filed second, the trial court's order is to be rendered third, and the record on appeal is to be perfected last. In the rush to meet the Executive's scheduled execution date of May 31, 2000, the trial court reversibly erred in denying a stay of proceedings. The trial court erred in overruling the Defendant's objection that the denial of a stay under the unique facts of this case violates Article I, Section 2, Article I, Section 9, and Article I, Section 16 of the Florida Constitution and the Eighth and Fourteenth Amendments of the United States Constitution.

The following is a concise summary of the procedural history of this motion, a motion grounded on the simple fact that Mr. DEMPS is innocent.

1. On July 2, 1999, MR. DEMPS filed his fourth 3.850 motion seeking to have his first degree murder conviction and death sentence vacated.

2. On October 20, 1999, the trial Court gave the State until January 15, 2000 to respond to this 3.850 motion and directed the State to attach all relevant portions of the record conclusively refuting MR. DEMPS' claims. The State failed to even facially comply with this Order.

3. On April 24, 2000, Governor Jeb Bush signed a death warrant designating Tuesday, May 30, 2000 noon through June 6, 2000, noon, as the execution period. The Florida State Prison warden selected May 31, 2000 at 6:00 p.m. as the date and time of MR. DEMPS' execution.

4. On April 26, 2000, this Court scheduled oral arguments for May 23, 2000, in anticipation of the trial court's ruling.

5. The trial court entered an order excusing the State's procedural default.

6. On May 27, 2000 this court granted only a limited extension to 5:00 p.m. on June 1, 2000 to file the brief and denied further requested extensions. The execution is stayed only through June 7, 2000 at 5:00 p.m. and Mr. Demps is reportedly scheduled to be executed one hour later.

Mr. DEMPS renews his argument in this appeal that he has a statutory right to effective assistance of post conviction counsel. *See* Spaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995); and Spalding v. Dugger, 527 So. 2d 71, 72 (Fla. 1988). The practical effect of the trial court's denial of a stay is that Mr. DEMPS has been denied effective assistance of post conviction relief counsel on appeal. The Court's unprecedented "fast track" of this death penalty case is at the expense of the constitutional rights of Mr. DEMPS to have any meaningful opportunity to confer with his appellate counsel regarding the merits of appeal in violation of the Supreme Court's recent holding in Roe v. Flores Ortega, 13 Fla. L. Weekly Fed. S122, 120 S.Ct. 1029 (Feb. 23, 2000). This differential treatment of MR. DEMPS not only violates that Fourteenth Amendment, but equal protection guarantees under the Florida Constitution. *See* Green v. State, 627 So. 2d 188 (Fla. 1993). In Green this Court held that it violated equal protection to appoint counsel who could not be compensated for filing a petition for writ of certiorari where similarly situated persons represented by the Public Defender were provided counsel to prepare such petitions.

If the trial Court granted a stay of the execution for a reasonable length of time, this case could proceed in an orderly and judicious manner so that Mr. DEMPS could receive meaningful review of his legal claims. After all, DEATH IS DIFFERENT. The denial of a stay and the attendant

equal protection and due process violations have infected the death penalty sentence in this case so as to render it constitutionally infirm because the manner in which it is being imposed is arbitrary and capricious in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This Court should reverse the trial Court's denial of a stay and give MR. DEMPS a meaningful opportunity to be heard on the merits of this case by permitting an amended brief to be filed after both the undersigned counsel and MR. DEMPS' newly appointed court-appointed counsel, George Schaefer, have sufficient time to prepare such an amended brief.

CONCLUSION

BENNIE DEMPS has presented newly discovered exculpatory evidence to the trial court below which would enable him to demonstrate his innocence.

After thorough and complete review over the course of many, many months the trial court determined that an evidentiary hearing on Mr. DEMPS' motion was required and ordered accordingly. This, after the trial court order per the Honorable Larry Gibbs Turner ordered the State to answer Mr. DEMPS' motion with specific directions to the State to provide portions of the record conclusively refuting the relief sought. In the alternative, the clear meaning of Judge Turner's order is the summary granting of an evidentiary hearing.

The trial court through the Honorable Robert P. Cates thorough and complete review of the motions, files and record, and in the absence of a single piece of record evidence submitted by the State, entered its order granting and scheduling an evidentiary hearing on all issues in Mr. DEMPS' fourth successive 3.850 motion. Nothing has changed factually or legally since the entry of Judge Cates' order granting and scheduling an evidentiary hearing notwithstanding the continuing failure of the State to attach any relevant portion of the actual record in this cause which could suffice to

summarily deny Mr. DEMPS' motion and certainly nothing to cause Judge Cates to reverse himself and summarily deny Mr. DEMPS' motion pending before this Honorable Court.

It is abundantly and conclusively clear that Mr. DEMPS has produced newly discovered evidence intentionally and/or inadvertently withheld by the State from Mr. DEMPS' original trial counsel which would have enabled him to demonstrate his innocence to his jury and in light of the jury's deliberations would in all probability have resulted in a verdict of acquittal.

Moreover, the newly discovered exculpatory and momentous evidence of innocence contained in Mr. DEMPS' motion would unequivocally avoided either advisedly by the jury or imposed by the trial court a sentence of death.. This is pointedly so in light of the irrefutable fact that the far more culpable defendant got life while Mr. DEMPS, the far less culpable and innocent defendant, received death, a reality confirmed by all facts available to this Court and this Court's own precedent.

Although this Court has scheduled a precipitous briefing and oral argument schedule in opposition to its own rule of appellate procedure designed to insure due process, equal protection of law and effective assistance of counsel and which prevents Mr. DEMPS from having a reasonable and due process opportunity to address this Court in his briefs. There is everything, including facts, law and the State's willingness to misstate and misquote controlling caselaw on its major arguments, this Court requires to reverse the trial Court's summary denial and remand to that Court for an evidentiary hearing on both guilt and penalty phases of Mr. DEMPS' trial.

WHEREFORE, Mr. DEMPS respectfully requests this Court to reverse the trial Court's order summarily denying Mr. DEMPS' 3.850 motion and remand this cause to the trial court with

directions to conduct an evidentiary hearing on both the guilt and sentencing phases of Mr. DEMPS' trial.

I HEREBY CERTIFY that a true and correct copy of this finished version of the Merit Brief of Appellant has been furnished by facsimile and U.S. Mail this _____ day of June, 2000[1], nunc pro tunc 1st day of June, 2000 to the following persons:

Gregory P. McMahon
Assistant State Attorney
Post Office Box 1437
120 W. University Avenue
Gainesville, Florida 32601

Curtis M. French
Assistant Attorney General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399-1050

George F. Schaefer
The Liberty House
1005 S.W. Second Avenue
Gainesville, FL 32601

Respectfully Submitted,

_____

BILL SALMON
Attorney for DEMPS
Post Office Box 1095
Gainesville, Florida 32602-1095
(352) 378-6076
Florida Bar No. 0183833

[1]Merit Brief of Appellant was fax-filed with this Court on June 1, 2000 as ordered. Original certificate of service from that rough-draft filing is attached hereto as "Attachment A". Counsel again thanks this Court for its patience in this matter.