



inadmissible hearsay, and the State's argument that trial counsel's statement at trial when this evidence was unknown shows that he would not have presented it even though the State successfully objected to the testimony on May 7, 2009, of the trial attorney who in a proffer testified that he would have used the new evidence and it would have changed his trial strategies.

3. The standards governing the grant of a stay of execution and the grant of an evidentiary hearing are the same. A stay of execution is proper when the defendant presents "enough facts to show . . . that he might be entitled to relief under rule 3.850." *State v. Schaeffer*, 467 So. 2d 698, 699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution **and** an evidentiary hearing. *State v. Schaeffer*; see also, *State v. Crews*, 477 So. 2d 984, 984-85 (Fla. 1985); *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987); *O'Callaghan v. State*, 461 So. 2d 1354, 1355-56 (Fla. 1984); *Lemon v. State*, 498 So. 2d 923 (Fla. 1986). If an evidentiary hearing has been determined to be necessary and has occurred, then this Court certainly has the authority to stay a execution in order to permit the evidentiary hearing to be conducted in a reasonable fashion with the full panoply of due process rights. Recently, this Court granted a stay of execution on October 6, 2008, in the case of Wayne Tompkins even though the execution was not scheduled until October 30, 2008, in order to provide the parties with adequate time to permit a full opportunity to present the arguments and the circuit court with adequate time to consider its ruling. It also provided this Court with time to

more fully evaluate the issues raised on appeal and deliberate upon its decision. Certainly in the past, this Court has almost always granted a stay of execution when an appeal arose from Rule 3.851 in which an evidentiary hearing was conducted under the exigencies of a death warrant. For example, Pedro Medina received a stay of execution when an evidentiary hearing was necessary on his competency to be executed in late 1996 through early 1997, Leo Jones received a stay of execution after an evidentiary hearing was conducted on the constitutionality of the electric chair in April of 1997 (Mr. Jones' execution was stayed for nearly a year when this Court reversed and remanded for another evidentiary hearing on the electric chair and while an evidentiary hearing was conducted on Mr. Jones' newly discovered evidence claim), and Thomas Provenzano received a stay of execution in 2000 when an evidentiary hearing was ordered first on the constitutionality of the electric chair and then on his competency to be executed.<sup>1</sup>

4, Given that the issues after an evidentiary hearing are much more fact bound and require consideration of a record that includes transcripts of testimony just given last Wednesday and Thursday, this Court should grant a stay of execution the Court can fully review the record and transcripts from last week's hearing.

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<sup>1</sup>Stays of execution were issued by the circuit courts for Greg Mills and Wayne Tompkins in 2001 after evidentiary hearings were conducted in each case and each condemned prisoner was granted relief on their pending Rule 3.851 motions.

5. In order to give Mr. Marek the benefit of due process and the opportunity to be fully heard and his arguments properly considered, this Court should grant a stay of execution.

WHEREFORE, the Appellant respectfully requests that this Court grant a stay of execution.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to Carolyn Snurkowski, Assistant Deputy Attorney General, Department of Legal Affairs, The Capitol PL01, Tallahassee, Florida 32399-1050 , on this 11<sup>th</sup> day of May, 2009.

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