IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1619

WAYNE TOMPKINS,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE/CROSS-APPELLANT

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PRELIMINARY STATEMENT

Appellee/Cross-Appellant in this brief will refer to the instant record on appeal as "R" followed by the volume and page number; to the direct appeal record as "DAR" and to the record in Tompkins' prior post-conviction appeal as "1 PCR" followed by the page number. "EH" refers to the evidentiary hearing in that proceeding.

STATEMENT OF THE CASE AND FACTS

Following his jury trial in September, 1985, Tompkins was convicted of first-degree murder. The trial court, the Honorable Harry Lee Coe, III, followed the jury's unanimous recommendation and imposed the death sentence.

On direct appeal in Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 US 1033 (1987), this Court unanimously affirmed Tompkins' conviction and sentence and set forth the following summary of the facts:

> The victim, Lisa DeCarr, aged 15, disappeared from her home in Tampa on March 24, 1983. In June 1984, the victim's skeletal remains were found in a shallow grave under the house along with her pink bathrobe and jewelry. Based upon a ligature (apparently the sash of her bathrobe) that was found tied tightly around her neck bones, the medical examiner determined that Lisa had been strangled to death. In September 1984, Wayne Tompkins, the victim's mother's boyfriend, was charged with the murder.
>
> At trial, the state's three key witnesses testified as follows. Barbara DeCarr, the victim's mother testified that she left the house on the morning of March 24, 1983, at approximately 9:00 a.m.,

leaving Lisa alone in the house. Lisa was dressed in her pink bathrobe. Barbara met Wayne Tompkins at his mother's house a few blocks away. Some time that morning, she sent Tompkins back to her house to get some newspapers for packing. When Tompkins returned, he told Barbara that Lisa was watching television in her robe. Tompkins then left his mother's house again, and Barbara did not see or speak to him again until approximately 3:00 o'clock that afternoon. At that time, Tompkins told Barbara that Lisa had run away. He said the last time he saw Lisa, she was going to the store and was wearing jeans and a blouse. Barbara returned to the Osborne Street house where she found Lisa's pocketbook and robe missing but not the clothes described by Tompkins. Barbara then called the police.

The state's next witness, Kathy Stevens, a close friend of the victim, testified that she had gone to Lisa DeCarr's house at approximately 9:00 a.m. on the morning of March 24, 1983. After hearing a loud crash, Stevens opened the front door and saw Lisa on the couch struggling and hitting Tompkins who was on top of her attempting to remove her clothing. Lisa asked her to call the police. At that point, Stevens left the house but did not call the police. When Stevens returned later to retrieve her purse, Tompkins answered the door and told her that Lisa had left with her mother. Stevens also testified that Tompkins had made sexual advances towards Lisa on two prior occasions.

Kenneth Turco, the final key state's witness, testified that Tompkins confided details of the murder to him while they were cellmates in June 1985. Turco testified that Tompkins told him that Lisa was on the sofa when he returned to the house to get some newspapers for packing. When Tompkins tried to force himself on her, Lisa kicked him in the groin. Tompkins then strangled her and buried her under the house along with her pocketbook and some clothing (jeans and a top) to make it appear as if she had run away.

* * * *

At the penalty phase, the state presented evidence from three witnesses to show that Tompkins had been convicted of kidnapping and rape stemming from two separate incidents in Pasco County which occurred

> after Lisa DeCarr's disappearance. The defense presented testimony from three witnesses regarding Tompkins' good work record, shy and nonviolent personality, and honesty.
>
> The trial judge, finding three aggravating circumstances (previous conviction of felonies involving the use or threat of violence to the person; murder committed while the defendant was engaged in an attempt to commit sexual battery; murder was especially heinous, atrocious, or cruel) and one statutory mitigating circumstance (defendant's age at the time of the crime), followed the jury's recommendation and sentenced Tompkins to death.
>
> 502 So. 2d at 417-18.

Following the signing of the death warrant on March 30, 1989, Tompkins sought post-conviction relief in the circuit court. An evidentiary hearing was held before Judge Coe on May 19-20, 1989, after which his motion for post-conviction relief was denied. Tompkins appealed to this Court and also filed a petition for writ of habeas corpus. This Court entered a stay of execution on June 2, 1989 but on September 14, 1989, the stay was lifted and all relief was denied in a unanimous opinion Tompkins v. State/Dugger, 549 So. 2d 1370 (Fla. 1989),[1] cert. denied, 493 US 1093 (1990).

On November 9, 1989, Governor Martinez signed a second death warrant and Tompkins sought habeas corpus relief in the federal district court, a petition which he supplemented in 1992 and

[1] Tompkins on his direct appeal raised six issues. In his motion for post-conviction relief, he raised nineteen issues and in his habeas corpus petition in this Court he urged nine grounds for relief. A listing of the issues raised in those state appellate and post-conviction vehicles is provided in the Response to Motion to Vacate and Application for Stay of Execution (R III, 354-359).

amended in 1994. Judge Nimmons denied relief in a thorough and comprehensive one hundred and six (106) page unpublished opinion. Tompkins v. Singletary, No. 89-1638 CIV-T-21B (M.D. Fla. April 17, 1998). The Court of Appeals for the Eleventh Circuit affirmed the district court's denial of habeas corpus relief. Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999), rehearing en banc denied 207 F.3d 666 (11th Cir. 2000), cert denied 531 US 861, 148 L.Ed.2d 99 (2000), rehearing denied 531 US 1030, 148 L.Ed.2d 522 (2000).[2] The Court of Appeals in the course of rejecting Tompkins' claims of a violation of Giglio v. United States, 405 US 150 (1972) opined:

> "The district court cogently summarized the overwhelming evidence that the skeletal remains were those of Lisa DeCarr:
>
> > The State introduced Exhibit 10, a photograph of the skull that was taken from the grave (R 149), for the purpose of showing a dental anomaly of a tooth which had grown behind the subject's two front teeth in the same manner as Lisa's. Using Exhibit 10, Dr. Diggs described this unusual dental structure. (R 178) Subsequently, Barbara DeCarr testified that her daughter had the identical dental anomaly as that described by Dr. Diggs. (R 208) In addition, Stevens saw Petitioner, immediately prior to the time of the

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[2] The Court reviewed all the issues argued in Tompkins' brief, despite the district court's limitation of issues in the certificate of probable cause. 193 F.3d at 1331. The Court noted that many of the issues it didn't write about did not merit further discussion beyond agreeing with the district court that the claims do not provide a basis for federal habeas relief in this case. Appellant's Brady claim was one of those. 193 F.3d at 1331, n. 1.

disappearance, assaulting Lisa. The body was found in a shallow grave beneath the house where she was assaulted and where she resided with her mother, her siblings, and Petitioner. Her remains were identified in several ways: the unusual dental feature; the remains being wrapped in Lisa's robe; and Lisa's earrings and ring given to her by her boyfriend being found adjacent to the skeletal remains in a position indicating that they had been worn by the victim. Coupled with the unsolicited confession Petitioner gave to Kenneth Turco, even if the medical examiner had given misleading testimony regarding identification of Lisa's body, there is no reasonable likelihood that such testimony could have affected the judgment of the jury.

In a footnote to the summary, the district court pointed out that the death certificate identifying the skeletal remains as Lisa DeCarr came into evidence without objection.

We add to the district court's summary the additional facts that the skeletal remains were those of a female in her midteens, and there is no other evidence that any other female in her midteens was missing in the area. Nor has Tompkins offered any explanation for how anyone else came to be buried–with Lisa's jewelry–under the house he shared with her, the same house in which he had been seen struggling with her as she wore a pink robe, the very same pink robe found on the skeleton. (FN13) There is simply no doubt that it was Lisa DeCarr whose skeletal remains were found in that shallow grave. With all due respect to the advocacy obligations of Tompkins' present counsel, their argument in brief that "there was very little evidence of the identity of the deceased" is preposterous." (FN14)

(Id. at 1341-1342)

(FN13.) Lisa's mother was able to identify

> the pink robe found on the skeleton as Lisa's, because of the rose design or imprint it had on the collar.
>
> (FN14.) Tompkins also contends that *Giglio* errors were committed in connection with witnesses Stevens and Turco. We agree with the district court that those contentions are palpably without merit, and we do not believe they need any more discussion than that given them by the district court.

After the signing of Tompkins' third death warrant the instant proceeding commenced and a number of motions were filed. Tompkins filed a Motion for DNA Testing of Evidence and the state filed a Response in Opposition (R I, 31-56, 57-97). Tompkins filed a Motion to Vacate Judgment (R II, 182-307) and the state filed its Response (R III, 350-408). The Court conducted a hearing on public records requests on April 11, 2001 (R VII, 1-131), a hearing on April 17, 2001 on the Motion to Vacate (R VII, 132-177) and an evidentiary hearing on April 18, 2001 (R VIII, 178-226).

At the April 18th evidentiary hearing, trial defense attorney Daniel Hernandez identified the sentencing order from Page 678 of the direct appeal record on appeal and testified he had no knowledge of its being prepared by Mike Benito (R VIII, 182-183). Hernandez was not aware of any case law in 1985 or 1986 that prohibited the prosecutor from drafting a sentencing order. Judge Coe discussed the available aggravators or mitigators during the charge conference and the jury recommended

a sentence of death (R VIII, 184).

Former prosecutor Mike Benito testified that in this case the jury had unanimously recommended a sentence of death and that he had prepared the sentencing order that Judge Coe signed. He explained that Judge Coe's secretary had called after the sentencing phase and stated that Judge Coe needed an order prepared and that Benito cited the three aggravating circumstances that Judge Coe had allowed him to argue to the jury (R VIII, 191-192). Benito could not tell whether Judge Coe made any changes in the order that he drafted and dictated and sent to Judge Coe (R VIII, 193). He would assume that if he had any draft in his file back in 1989 that he would have disclosed it in his public records request (R VIII, 194). Benito did not have a specific recollection of being called by either Judge Coe or the secretary in this case. He recalled from other cases that after the jury returned with a recommendation he would tell Benito to prepare an order with aggravating circumstances and Benito didn't recall if it was off the record he was told to prepare the order before he left or whether a secretary called later about preparing the order (R VIII, 195). The witness identified the case progress note on the inside cover of Tompkins' file with the clerk at Page 486 of the direct appeal record. A notation indicated Judge Coe or someone from his office called Benito (R VIII, 196-197). Benito indicated it was

impossible that the phone call related to a new trial motion (R VIII, 198).

Martin McClain testified that he was Tompkins' prior counsel in the 1989 post-conviction matter (R VIII, 199-200). He stated that he learned that the state confessed error on the Holton case as to the sentencing order and on March 31st spoke to Linda McDermott regarding a conversation she had had with Jack Gutman about the Holton case. McClain stated that the 1989 public records documents he received did not indicate that Benito had drafted the sentencing order (R VIII, 201-202). He opined the 1987 entry in the case progress note was a mistake - it was clearly 1985 - and the notation indicated Benito had been called and advised of something set for October 11, 1985 (R VIII, 203). McClain stated that he was aware of the prior decisions in Nibert v. State, 508 So. 2d 1 (Fla. 1987) and Holton v. State, 573 So. 2d 284 (Fla. 1990), two cases involving Judge Coe addressing issues that Judge Coe had delegated the drafting of the sentencing order. McClain explained that the 1990 Holton opinion came out after 1989 and that the Holton opinion stated that the record did not support a claim that the state rather than trial judge was responsible for preparing the written findings of fact in support of the death penalty (R VIII, 205-207). McClain stated that Benito did not indicate to him in 1989 that he had written the sentencing order nor did Judge Coe

disclose any ex parte connections with Benito and he would have followed up on such disclosure (R VIII, 208).

The Court entered its written order Denying Motion for DNA Testing of Evidence on April 12, 2001 (SR 124-125) and on April 20th entered an order Denying Motion for Reconsideration and/or Renewal of Motion for DNA Testing (R III, 423).

On April 20, 2001, the Court entered its Order Denying in Part and Granting in Part Defendant's Motion to Vacate Judgment (R IV, 433-676). The Court denied relief on Claims I, II and III but granted relief as to Claim V and ordered a new penalty phase upon finding that prosecutor Benito drafted the sentencing order and that the sentencing judge failed to independently weigh aggravating and mitigating circumstances (R IV, 442).[3] The Court entered an Order Denying Defendant's Motion for Rehearing on June 15, 2001 (R V, 755-796) and these appeals follow.

[3] Judge Perry orally recited at the April 18th hearing that the sentencing transcript did not reflect any oral weighing of mitigating or aggravating circumstances and while Benito may have been aware Judge Coe would not allow him to argue certain things, "nothing that would indicate to me that the judge ever indicated of what the mitigating circumstances were" (R VIII, 224).

SUMMARY OF THE ARGUMENT

ISSUE I. The lower court did not err in denying an evidentiary hearing on appellant's claim of a violation of Brady v. Maryland, 373 US 83 (1963) or Giglio v. United States, 405 US 150 (1972). The Court correctly determined that the information appellant now relies on could have been discovered with the exercise of due diligence. Additionally, much of the material is irrelevant and in any event cannot satisfy the materiality requirement of Strickler v. Greene, 527 US 263, 144 L.Ed.2d 286 (1999) that the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict, i.e., whether in its absence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. In addition, appellant's mere repetition of contention previously asserted, considered and rejected by both the state and federal courts need not be reconsidered again as nothing submitted calls into question the resolution of those previously rejected claims.

ISSUE II. The lower court correctly denied appellant's motion for DNA testing. As stated in the court's order of April 12, 2001, the defendant failed to

set forth any compelling reasons for mitochondrial DNA testing and it would not have proved or disproved any material issues in this case. The lower court further explained in its Order Denying Rehearing on June 15, 2001, that there is overwhelming evidence that the remains are those of Lisa De Carr. See also King v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S65 (Fla. 2002).

ISSUE III The lower court correctly denied relief on appellant's claim that the state's failure to preserve hair evidence for seventeen years violates appellant's due process rights. The evidence does not demonstrate any bad faith on the part of the police and thus appellant cannot prevail under Arizona v. Youngblood, 488 US 51, 102 L.Ed.2d 281 (1988); see also King v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S65 (Fla. 2002); Merck v. State, 664 So. 2d 939 (Fla. 1995). Appellant's request that a different standard should be employed should be rejected.

ISSUE IV. The lower court did not err in not ordering production of public records. The court properly held a hearing and explained that appellant was

not entitled to relief since Rule 3.852 is not intended to be used as an eleventh hour fishing expedition for records unrelated to a colorable claim for post-conviction relief. See Sims v. State, 753 So. 2d 66 (Fla. 2000); Glock v. Moore, 776 So. 2d 243 (Fla. 2001). As to appellant's desire to learn of possible contributions to Judge Coe, financial disclosures of judges have been a matter of record for years, and therefore procedurally barred now. Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989). As to appellant's request for criminal records related to jurors in the trial, that could have been investigated years ago using the Public Records Act. See Buenoano v. State, 708 So. 2d 941 (Fla. 1998); Ziegler v. State, 632 So. 2d 48 (Fla. 1993).

ISSUE V. The lower court should have denied appellant's request for a re-sentencing proceeding which was based on his assertion that Judge Coe improperly delegated to the prosecutor the preparation of a written sentencing order. First of all, the claim should have been deemed procedurally barred for his having failed to raise this claim previously. With the exercise of due diligence appellant could have investigated this claim

and litigated it at the time of the prior post-conviction motion since a notation in the case progress notes of the direct appeal record referred to a call to the prosecutor regarding a sentencing order and collateral counsel was aware of decisions such as Nibert v. State, 508 So. 2d 1 (Fla. 1987) and Holton v. State, 573 So. 2d 284 (Fla. Sept. 27, 1990) in which challenges were made to Judge Coe having delegated the drafting of sentencing orders to a prosecutor. Secondly, while the prosecutor admitted that he relied on the three aggravators that Judge Coe had permitted him to argue to the jury, the sentencing findings signed by Judge Coe reflect that he found age as a mitigating factor, thereby demonstrating - contrary to the lower court's ruling - that Judge Coe did engage in independently weighing of the aggravating and mitigating circumstances in the instant case. Third, although it is true that in recent years the Court has insisted (properly) that trial judges must be the ones to draft capital sentencing orders, it must be recognized that the instant trial antedated such more recent pronouncements. Appellant should not be entitled to relief in a successive motion for post-conviction

relief unless appellant can satisfy the requirement of newly-discovered evidence that it would probably produce a life sentence. Appellant can not satisfy that burden in light of the unanimous jury death recommendation, the three powerful aggravating factors shown to exist, the paucity of mitigation presented at trial (even considered with the additional mitigation presented in Tompkins' prior evidentiary hearing in 1989).

ARGUMENT

ISSUE I

WHETHER THE LOWER ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF A VIOLATION OF BRADY v. MARYLAND, 373 U.S. 83 (1963) AND GIGLIO v. UNITED STATES, 405 U.S. 150 (1972).

The lower court correctly denied relief as the information now relied upon could have been obtained earlier with the exercise of due diligence, and in any event fails to satisfy the strict materiality requirements of Strickler v. Greene, 527 U.S. 263, 144 L.Ed.2d 286 (1999) and similar decisions of this Court.

A. The Information Could Have Been Obtained Earlier With Due Diligence.

The lower court correctly determined that appellant could have with the exercise of due diligence, obtained the documents and information he now urges he recently received in April of 2001. For example, the record demonstrates that among appellant's recent Public Records Requests and Responses, the Florida Department of Law Enforcement Response and Objection asserted that CCRC had previously filed a request in 1989 and FDLE had provided copies of all public records related to defendant in May of 1989 (R VI, 912). The Response and Objection by the Office of the State Attorney for the Sixth Circuit recited that it had responded in 1989 and provided approximately 845 pages of records (R VI, 971). Tompkins filed

a Demand for Additional Public Records pertaining to the Tompkins investigation of the De Carr homicide from the Office of the State Attorney for the Thirteenth Judicial Circuit (R VI, 983-988) and another demand for records of the homicide investigation of several of Bobbie Joe Long's victims and victim Jessie Ladon Albach (R VI, 993-997). Additionally the request by CCR for records an April 19, 1989 did not contain the name of Jessie Ladon Albach among the sixteen names enumerated in the request (R VI, 1010-1012; see also R VI 1025-1026). Appellant could have requested Albach files previously.

Additionally, the lower court found:

> "With regard to a legible copy of the March 24, 1983 report now being provided to the Defendant, the Court finds that the Defendant is not entitled to relief. During argument, defense counsel conceded that he had obtained a copy of this report in 1989, however, he was unable to read it. Consequently, the report was provided to Defendant previously. Defendant could have discovered the asserted facts in the March 24, 1983 report by the use of due diligence. As such, Defendant is not entitled to relief with regard to the March 24, 1983 report". (R IV, 436)

Similarly, since appellant could have sought and obtained the documents pertaining to the Jessie Ladon Albach investigation by the exercise of due diligence (items 5-12 listed by Judge Perry, R IV, 435) as explained above, the lower court correctly determined that relief should be denied due to appellant's lack

of due diligence. See Glock v. Moore, 776 So. 2d 243 (Fla. 2001); Sims v. State, 753 So. 2d 66 (Fla. 2000).

Furthermore, with regard to Detective Gullo's report on July 28, 1983, the record of the prior 1989 post-conviction record demonstrates that CCR attorney McClain indicated that Detective Gullo was still a potential witness, that Gullo was the investigator for a missing person's report between the time of March and September 1983. McClain added that there were a series of police reports concerning the investigation that was conducted, leads that they turned up as to Lisa's whereabouts. The Court asked if they were available to McClain and McClain answered affirmatively but he wanted to check with him in terms of any ambiguity in the police reports (I PCR, EH 358). On the following day, May 20, 1989, McClain reported to the court that he had talked to Detective Gullo, gave him access to the reports and if there was anything significant, McClain would submit it in an affidavit (I PCR EH 364). Clearly, Tompkins' collateral counsel was on notice of Detective Gullo. His request for relief now is untimely and abusive.

B. The Legal Standards - the Brady claim.

In Strickler v. Greene, 527 U.S. 263, 144 L.Ed.2d 286 (1999), the Supreme Court reiterated its ruling in Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963):

> [1b, 5a] This special status explains both the basis for the prosecution's broad

> duty of disclosure and our conclusion that not every violation of that duty necessarily establishes that the outcome was unjust. Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence (footnote omitted) - that is, to any suppression of so-called "Brady material" - although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. (emphasis supplied) (144 L.Ed.2d at 302)

The Court explained:

> Without a doubt, Stolzfus' testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial.
>
> That, however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that "there is a reasonable probability" that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles*: "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S., at 434, 131 L.Ed.2d 490, 115 S.Ct. 1555 (emphasis supplied) (144 L.Ed.2d at 307)

See also D.R. Spencer v. State, _So. 2d_, 27 Fla. L. Weekly S323 (Fla. 2002); Carroll v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S214, 218 (Fla. 2002); Thompson v. State, 759 So. 2d 650, 662 (Fla. 2000); Way v. State, 760 So. 2d 903, 913 (Fla. 2000); Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000); Sireci v. State, 773 So. 2d 34, 41-42 (Fla. 2000); Rose v. State, 774 So. 2d 629, 634 (Fla. 2000); State v. Reichmann, 777 So. 2d 342, 362 (Fla. 2000); Maharaj v. State, 778 So. 2d 944, 954-956 (Fla. 2000); Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001); Rose v. State, 787 So. 2d 786, 795 (Fla. 2001); Cook v. State, 792 So. 2d 1197, 1203-04 (Fla. 2001); Freeman v. State, 761 So. 2d 1055, 1062 (Fla. 2000)(no Brady violation where defense either had the information or could have obtained it through the exercise of reasonable diligence).

Newly - Discovered Evidence

In order for a conviction to be set aside on the basis of newly-discovered evidence, two requirements must be met. First, to be considered newly-discovered the evidence must have been unknown by the trial court, by the party or by counsel at the time of trial and it must appear that defendant or his counsel could not have known of it by the use of diligence. Second, the newly-discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); see also T. Johnson v. State,

804 So. 2d 1218 (Fla. 2001); State v. Reichmann, 777 So. 2d 342 (Fla. 2000); Glock v. Moore, 776 So. 2d 243, 250-51 (Fla. 2001); Sireci v. State, 773 So 2d 34, 43 (Fla. 2000); Robinson v. State, 770 So. 2d 1167 (Fla. 2000); Sims v. State, 754 So. 2d 657, 660 (Fla. 2000).

There is no newly-discovered evidence under the foregoing decisional case law that would entitle appellant to relief under Jones and its progeny. The alleged new impeachment of Kathy Stevens relates to her conduct years after trial which are irrelevant to her trial testimony. Mr. Episcopo's testimony at the Holton hearing regarding his practice of dealing with witnesses does not refute either Turco's trial testimony or prosecutor Benito's at the evidentiary hearing. Nothing changes the fact that appellant assaulted and killed Lisa De Carr and buried her under the house.

The lower court correctly denied relief to Tompkins as none of the documents and evidence asserted as recently obtained can satisfy the materiality requirement demanded of Strickler, supra, and this Court's pronouncements. Tompkins' first points to undisclosed police reports and lead sheets of Detective Burke (items 1 - 4 listed in Judge Perry's order). As to the June 8, 1984 police report (SR 39-54), Detective Milana included a report of a statement by Maureen Sweeney when she and Michael Glen Willis were interviewed. Maureen Sweeney was apparently

another rape victim of Tompkins (he raped her at knife point in November) and when she told Lisa De Carr what had happened, Lisa replied "now do you believe me that he raped me as well." Tompkins focuses on the part of the report in which Sweeney remarked that it was strange the explanation she heard about Lisa's disappearance. She was told that Lisa, upon seeing appellant at the kitchen table and being told that he was going to move in, ran out the back door and that appellant chased to catch her but she was gone. Apparently Tompkins was one who reported that they had last seen Lisa when he moved in and she became upset and stormed out of the house (SR 53).

Appellee notes that the Sweeney - Willis report is hearsay; neither had personal knowledge of the events on the day in question and apparently were reporting on what they had heard from Tompkins or others after the disappearance. This report does not defeat the evidence at trial by Barbara De Carr, Kathy Stevens and Kenneth Turco concerning appellant's assault on Lisa the day of the disappearance and his report to Mrs. De Carr that Lisa had run away and Tompkins' admission of the crime (to Turco).[4]

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[4] It is not clear whether appellant is suggesting that had the trial defense counsel received the police report containing the Sweeney - Willis recollections, it would have been desirable for defense counsel to call Sweeney as a witness at trial to assert (a) that she too was a rape victim of appellant and that Lisa wanted her to believe the incident which had happened to her and (b) that she had no personal knowledge of Lisa's disappearance

Additionally, trial defense counsel was aware of the pre-trial deposition of Detective Burke. In that deposition Burke reported a statement by Sonia Howard and by Barbara De Carr that it was the day before Lisa's disappearance that appellant and Barbara De Carr got into a big argument about Lisa not wanting to live in the same house with appellant and he became violent (Deposition, pp. 97, 108-09).

As noted above, with regard to the legible copy of the March 24, 1983 report, Tompkins and his counsel had the report at the time of the 1989 evidentiary hearing. Tompkins additionally alludes to a July 28, 1983 report (item 3 in Judge Perry's order - SR 55-56) of Detective Gullo in the Jessie Ladon Albach case file which includes his June 13th telephone interview with Barbara De Carr in which she stated that she had received information from Mary Albach that Jessie had run away. Mrs. De Carr stated that Jessie and Lisa were close friends, that perhaps they were together and had many common friends. (Note that Tompkins' counsel McClain at the 1989 evidentiary hearing had spoken to Gullo and said he would submit an affidavit if anything significant developed. McClain didn't file anything thereafter). This report adds nothing to support a "reasonable probability that the suppressed evidence would have produced a different verdict" as Strickler requires. Moreover, trial

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but relied on hearsay reports of what others including Tompkins had said.

defense counsel was well aware from the pre-trial deposition of Detective Burke that Lisa De Carr and Jessie Albach were good friends (Depo. pp. 4-5).

Appellant also struggles to find significance in the item 4 handwritten lead sheets prepared by Detective Burke (SR 64-65). To the extent that the document suggests things that were done or might have been done during the course of the investigation, again nothing therein demonstrates that the information meets the stringent materiality requirement of Strickler v. Greene. Tompkins observes there are notations of things to do such as calling Lisa's boyfriend Junior Davis or inquiry about Bob McKelvin/Everett Knight. The direct appeal record reflects that trial counsel cross-examined Detective Burke using the November 15, 1984 deposition (DAR III, 288, 295; see also DAR III, 299). At the prior evidentiary hearing, trial counsel Hernandez admitted that he had access to Detective Burke's pre-trial deposition taken by attorney Castillo (1 PCR I, 98) and was questioned about that deposition (1 PCR I, 99). In the deposition Detective Burke stated that Bob McKelvin was in prison at the time of the investigation when it focused on Tompkins (Depo. pp. 30-34). Trial defense counsel also cross-examined Burke at trial (as well as Barbara De Carr - DAR II, 228) regarding McKelvin having made advances to and having propositioned Lisa (DAR III, 287). In the deposition Burke also

stated that he interviewed Lisa's boyfriend Junior Davis on June 21, 1984 who stated that he couldn't help with any information about events and had last seen Lisa the weekend before her disappearance (Depo. pp. 97-98).[5] See Medina v. State, 690 So. 2d 1241, 1249 (Fla. 1997)(additionally, even if this Court found that the material concerning Billy Andrews and Joseph Daniels was newly-discovered and hence, not time barred, there still would be no violation of *Brady*. *Brady* does not require disclosure of all information concerning preliminary, discontinued investigations of all possible suspects in a crime. Spaziano v. State, 570 So. 2d 289 (Fla. 1990). In other words, simply because someone other than the defendant "was a suspect early in the investigation, though this theory was later abandoned, is not information that must be disclosed under *Brady*.")

In appellant's next category Tompkins suggests there were police reports regarding other suspects (items 5 - 12 in Judge Perry's order)(SR 66-97). Apparently among the papers dealing with the Jessie Albach investigation, there was information that W.H. Graham who discovered the body identified as Albach had given an interview about his observations of a vehicle and driver in the area. An August 1982 report describes an incident

[5] Additionally, in the discovery furnished by trial defense counsel, Detective Burke stated he interviewed Junior Davis who said he could provide no information as to the events surrounding Lisa's disappearance (DAR V, 530).

at the “Naked City” establishment noting a beverage law violation or lewd and lascivious behavior. (SR 71-76)

A December 27, 1983 letter from the State Attorney recites the final disposition on W.H. Graham for keeping a house of ill fame - adjudication was withheld and eighteen months probation. (R II, 22). A report by Detective Burke in the Jessie Albach case on May 21, 1984 has an account of an interview with Charlotte Mercier on May 17th that the victim was a good friend of Leslie(sic) De Carr who is also missing. Mercier identified a photo of a white male between the ages of 30 and 40 as William Graham who was seen in the area around Keba Trailer Park and at the Wagon Wheel. The report also indicated an interview with Shirley Bedsole who reportedly had seen Jessie have sexual intercourse with Billy De Carr (SR 77-83).

Additionally, there is a record showing that in June 1983 W.H. Graham was being investigated for raping a girl who worked at the Naked City (SR 84-88; item 9 in Judge Perry’s list). There is a police report of a June 14, 1983 phone interview with Lori Lite (SR 89-95) in which she stated that she and Jessie Albach were fairly close friends but she didn’t know where Jessie was nor did Jessie tell her that she was going to run away. There is a report that on June 9, 1984 W.H. Graham found additional bones in the area where the body believed to be Jessie Albach was found (R II, 225). Another report reveals

there are two W.H. Grahams (SR 96-97). The trial court correctly ruled that these items relating to the Albach investigation could have been discovered earlier and are not relevant to the De Carr case (R III, 437). None of the items either singularly or cumulatively satisfy the materiality requirement of Strickler.

Appellant next argues that the list of questions to ask Detective Burke (item 13; SR 99-101) is not irrelevant to Burke's substantive testimony as the lower court ruled and compares the situation to that presented in Rogers v. State, 782 So. 2d 373 (Fla. 2001). Appellee disagrees. Unlike the general preparatory questions listed here, Rogers involved a cassette tape reflecting the state's attempt to influence McDermid's testimony (suggesting to him explanations for other witnesses' version and couching him as to where the getaway car was parked). Id. at 384.

Last, appellant contends there is newly-discovered evidence and undisclosed impeachment evidence. He contends that Kathy Stevens served time in jail for perjury in 1986 (after appellant's trial). The lower court found appellant's allegations insufficient:

> "Defendant does not set forth any facts that show Kathy Stevens committed perjury at his trial. Defendant also fails to set forth the circumstances leading to Ms. Stevens arrest for perjury. Therefore, Defendant's allegation with regard to Kathy Stevens is

> conclusory, which is insufficient for relief. Oramas v. State, 615 So. 2d 853 (Fla. 2 DCA 1993) and Flint v. State, 561 So. 2d 1343 (Fla. 1st DCA 1990)" (R IV, 438)

Appellee adds that any difficulties Stevens may have had after the instant trial are irrelevant. Furthermore, at the prior post-conviction evidentiary hearing, the parties stipulated as to what her brief testimony would be and it was determined her testimony was not required (1 PCR, EH 8-22).

Appellant also claims that former prosecutor Episcopo recently testified at an evidentiary hearing in the case of State of Florida v. Holton, Case No. 86-8931.[6] Tompkins argues that Episcopo's testimony refutes prosecutor Benito's testimony at the 1989 evidentiary hearing regarding his treatment of Kenneth Turco. It does not.

At the Holton hearing former prosecutor Episcopo testified as a defense witness. On cross-examination by prosecutor Chalu, Episcopo testified that he did not make a specific plea offer to Mr. Burkins in exchange for testimony against Holton (R V, 713, 715). Then this colloquy ensued:

> Q Wouldn't it sometimes be standard operating procedure when dealing with a cooperating witness who had charges of his own not to make him a specific plea offer prior to his cooperation?
> A Well, no, because you know his testimony would be tainted and it wouldn't be as valuable.
> Q Would it also not be wise to make such an offer

[6] Tompkins presented the Holton transcript of Mr. Episcopo's testimony as an Attachment to his Motion for Rehearing below (R V, 689-721)

before you found out that in fact he was willing and did testify truthfully?

A Yeah, you also want to see what's going to come out. (R V, 716)

The questions and answers of Episcopo in a general hypothetical as to whether it is prudent to make a plea offer to a witness before learning whether he testified truthfully does nothing to call into question Mr. Benito's previous testimony at the 1989 evidentiary hearing in Tompkins' case. Benito testified that about two weeks after the trial,

> "I was about to offer Mr. Turco a negotiation. I got in here and I looked at Mr. Turco and I said 'this guy showed a lot of guts coming forward as a jailhouse informant to testify as to what Mr. Tompkins told him'". (1 PCR II, EH 235)

Benito looked at him across the room and decided to nolle pros the case. It was his decision and Turco was stunned by it. There was no indication to Turco that he was going to nolle pros it before he testified - it was a decision Benito made after the conclusion of the Tompkins' trial (1 PCR II, EH 236). Nothing appellant submits now alters the conclusion stated by the Court of Appeals in Tompkins, 193 F.3d at 1342, n. 14:

> "Tompkins also contends that Giglio errors were committed in connection with witnesses Stevens and Turco. We agree with the district court that those contentions are palpably without merit, and we do not believe they need any more discussion than that given them by the district court."

Tompkins continues to assert his previously-rejected

arguments that trial counsel rendered ineffective assistance of counsel and that the confrontation clause was violated by the limitation on his cross-examination of state witnesses by counsel's use of hearsay questions. These assertions need no extensive rebuttal. This Court rejected his confrontation clause argument on direct appeal. Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986). This Court rejected the post-conviction challenge that counsel was ineffective in failing to introduce the testimony of the witness who claimed to have seen Lisa after the murder. Tompkins v. Dugger, 549 So. 2d 1370, 1372 (Fla. 1989):

> "The evidence, however, reflects that counsel's investigator interviewed this witness. At the time of the interview, the witness had absolutely no recollection of ever having reported seeing Lisa. Moreover, this witness was "drying out" from drugs and had great difficulty with her memory. It is clear that a strategic decision was made not to call this witness and to try instead to present this testimony, to the extent permitted by the trial judge, through the hearsay testimony of Lisa's mother".

Appellant also refers to the testimony of Gladys Staley, appellant's mother who previously testified at the 1989 evidentiary hearing. She testified that Lisa De Carr was at her house about 2:30 p.m. the day of her disappearance (1 PCR II, EH 308).[7] Both this Court and the federal courts have been exposed

[7] Trial defense counsel Hernandez testified he did not recall any mention to him by Staley that she was sure of a date when

to her testimony and it need not be re-considered. Contrary to appellant's insinuation at Brief P. 75, the lower court did not find counsel deficient at guilt phase. ("There was investigation and presentation of evidence that was reasonable; and reasonable, competent counsel would not have done it any other way and there was not prejudice" - 1 PCR, III, 471). Rather, the lower court found deficiency in the penalty phase but that the prejudice prong of Strickland was not satisfied (1 PCR III, 471).

Nothing need be added to appellant's continued complaining that cellmate Brian Duncan committed suicide, and his challenge to a plea agreement with Kenneth Turco was heard considered and rejected by this Court and the federal courts.

Barbara De Carr testified at trial that appellant told her Lisa was wearing a maroon blouse and pair of jeans when he saw her on her way to the store/run away (DAR II, 211-212). Mrs. De Carr subsequently found the maroon blouse described by Tompkins in the dirty clothes and none of her jeans were missing (DAR II, 214). On cross-examination, despite the prosecutor's objection on hearsay grounds, De Carr admitted that several people had

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she saw the girl getting in the car (1 PCR I, EH 122) and that family members' allegations now were self-serving (1 PCR I, 124). Furthermore, appellee notes that in the state's response to discovery given to trial defense counsel, Gladys Staley when interviewed on July 9, 1984, stated that she was not certain that it was on the day of Lisa's disappearance that she saw her wearing a red shirt and blue jeans (DAR V, 51).

stated that Lisa had been seen around the community (DAR II, 219). Appellant now alludes to an excerpt of De Carr's deposition that Wendy said Lisa had gotten into a car. If appellant is urging this impeaches De Carr, appellee submits that it doesn't - it was hearsay from Wendy Chancy (and has already been litigated that counsel chose not to use her) - and could have been used to impeach De Carr at trial (if it was impeachment). There is no need to revisit it here. See Swafford v. State, _So. 2d_, 27 Fla. L. Weekly S349 (Fla. 2002)(competent, substantial evidence supported trial court determination that collateral counsel failed to exercise due diligence by failing to discover and file within two years evidence of witness Lestz' statements; other alleged Brady violation procedurally barred since allegation was previously raised in appeal of his Third Rule 3.850 motion and found to be without merit).

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION FOR DNA TESTING.

Tompkins filed a Motion for DNA Testing of Evidence on April 10, 2001 contending that according to the FBI Lab Report several hairs discovered with De Carr's body and forwarded for comparison "are suitable for possible future comparison" and other hairs "did not possess sufficient individual microscopic characteristics to be of value for significant comparison purposes" (R I, 31-34). The state filed a Response in Opposition noting that appellant had previously asserted that the remains found buried under the house in a shallow grave were not those of Lisa De Carr under an ineffective assistance of counsel claim. The state further argued that the request was untimely and through due diligence could have been asserted previously. See Ziegler v. State, 654 So. 2d 1162 (Fla. 1995), Sireci v. State, 773 So. 2d 34, 43 (Fla. 2000)(finding DNA testing claim time barred as not filed within two years of the test becoming available and further finding that even if conducted the test would not "probably produce an acquittal on retrial"). And the state argued that the evidence was absolutely compelling that the body was that of Lisa De Carr. See Tompkins v. Moore, 193 F. 3d 1327 (11th Cir. 1999)(R I, 57-65).

At a hearing on April 11, 2001, prosecutor Williams related

that the hairs in question could not be located and prosecutor Vollrath testified to the efforts to locate them. An entry in the log book in 1990 indicated that Detective Black may have checked out a sealed package (R VII, 89-109). Detective Aubrey Black testified that he had no involvement in the Albach or De Carr cases, that it was his PIN on the property ledger, but not his signature and assumed someone else signed it. He had no recollection of receiving or having the property released to him since he was not involved in the case (R VII, 109-116). The Court denied the Motion for DNA Testing (R I, 102; R VII, 89). In the Court's order Denying Motion for DNA Testing of Evidence on April 12, 2001, the Court commented that at the April 11th hearing, the defendant conceded that hair evidence found at the scene of the crime now sought for mitochondrial DNA testing had been available since 1984, that mitochondrial DNA testing has been available in judicial proceedings since 1996 and the Court was concerned about the timing of Defendant's request (SR 124-125).

The Court denied relief as "the Court finds that Defendant has failed to set forth any compelling reasons for the mitochondrial DNA testing. Additionally, the Court finds that mitochondrial DNA testing would not prove or disprove any material issues in this case." (SR 124)

The Court repeated its denial of relief in the Order Denying

in Part and Granting in Part Defendant's Motion to Vacate Judgment and Sentence on April 20, 2001 (R IV, 440-441) and in its April 20th Order Denying Motion for Reconsideration and/or Renewal of Motion for DNA Testing (R III, 423) and in its Order Denying Defendant's Motion for Rehearing of the Motion to Vacate entered on June 15, 2001 (R V, 755-760). In this last order, the Court took occasion to expand on the earlier ruling to explain why no relief was available under F.S. 925.11 (2001). After reciting the requirements of a defendant to file a petition and the requisite findings a trial court must make after the state has responded, the Court re-emphasized that Tompkins could not prevail:

> "During the June 12, 2001, hearing, the Defendant argued that several items should now be tested for DNA evidence. Specifically, Defendant argued that the hairs, bone fragment, robe, and pajama's found should be tested for DNA. Defendant argued that the DNA testing will conclusively identify the remains. However, the issue of the identity of the remains was clearly proven at trial with overwhelming evidence as being those of Lisa DeCarr. With regard to the identity of the remains, the United States Court of Appeals for the Eleventh Circuit stated:
>
> > The district court cogently summarized the overwhelming evidence that the skeletal remains were those of Lisa DeCarr:
> >
> > The State introduced Exhibit 10, a photograph of the skull that was taken from the grave (R 149), for the purpose of showing a dental anomaly of a tooth which had grown behind the subject's two front teeth in the same manner as Lisa's. Using Exhibit 10, Dr. Diggs described this unusual dental structure. (R 178) Subsequently,

> Barbara DeCarr testified that her daughter had the identical dental anomaly as that described by Dr. Diggs. (R 208) In addition, Stevens saw Petitioner, immediately prior to the time of the disappearance, assaulting Lisa. The body was found in a shallow grave beneath the house where she was assaulted and where she resided with her mother, her siblings, and Petitioner. Her remains were identified in several ways: the unusual dental feature; the remains being wrapped in Lisa's robe; and Lisa's earrings and ring given to her by her boyfriend being found adjacent to the skeletal remains in a position indicating that they had been worn by the victim. Coupled with the unsolicited confession Petitioner gave to Kenneth Turco, even if the medical examiner had given misleading testimony regarding identification of Lisa's body, there is no reasonable likelihood that such testimony could have affected the judgment of the jury.

In a footnote to the summary, the district court pointed out that the death certificate identifying the skeletal remains as Lisa DeCarr came into evidence without objection.

> We add to the district court's summary the additional facts that the skeletal remains were those of a female in her midteens, and there is no other evidence that any other female in her midteens was missing in the area. Nor has Tompkins offered any explanation for how anyone else came to be buried - with Lisa's jewelry - under the house he shared with her, the same house in which he had been seen struggling with her as she wore a pink robe, the very same pink robe found on the skeleton. There is simply no doubt that it was Lisa DeCarr whose skeletal remains were found in that shallow grave. With all due respect to the advocacy obligations of Tompkins' present counsel, their argument in brief that "there was very little evidence of the identity of the deceased" is preposterous.

> Tompkins v. Moore, 193 F.3d 1327, 1341-1342 (11th Cir. 1999), cert. denied, Tompkins v. Moore, __U.S.–, 121 S.Ct. 612, 148 L.Ed.2d 99(2000). Therefore, the Court finds that any DNA obtained from the hairs, bone fragment, robe, and pajama's would be unreliably contaminated due to the location of the remains and would not prove the Defendant's innocence or result in a mitigation of sentence. Therefore, Defendant's allegations that Florida Statute 925.11 (2001) would apply to his case are without merit. As such, no relief is warranted with regard to claim II." (R V, 758-759)

The lower court was eminently correct. This Court recently addressed a similar request for mitochondrial DNA testing during the pendency of a death warrant in King v. State/Moore, _So. 2d_, 27 Fla. Law Weekly S65. King sought testing of a hair fragment found on victim Brady's nightgown and three hairs obtained in her pubic hair combings. This Court quoted approvingly from J. Schaeffer's order which recited in part:

> The hair fragment on Natalie Brady's nightgown: According to the attachment filed with the state's response, this fragment was a body hair, unknown as to where it came from, the arms, the legs, or some other part of the body. It was too small of a fragment to determine if it was Negroid or Caucasian in origin. It was too small a fragment to be microscopically matched to any known samples. When Patrolman Rosario Coniglione, Tarpon Springs Police Department, found Mrs. Brady, she was laying on her back in the porch door threshold area, presumably having crawled from her bedroom, where the fire was started, to that area where she expired. Her nightgown was up over her breast area, and she was naked, except for the nightgown. He and Officer Dawson found her and dragged her out of the burning house, where she was eventually covered with a sheet. Mrs. Brady was examined by the medical examiner preliminarily at the scene, and was

> identified by two neighbors at the scene. Many other fire and police personnel were at the scene. This hair fragment could have been transferred from any one's hair that was on Mrs. Brady's floor as she crawled from her bedroom to the back door, from any one's hair that was on her porch area where she expired, from any one's hair that was on the ground outside her house where she was dragged away from the fire, from the perpetrator of the rape and rape, from one of the men who dragged her away from the burning house, from the medical examiner, from any of those who identified her, from any other fire or police personnel present, or from Mrs. Brady. Thus, even if this fragment of a body hair could be further re-tested for DNA, and it was determined that it didn't come from Mrs. Brady, or from Mr. King, this court cannot make the required finding under the statute or the rule, that there exists a reasonable probability that the defendant would be acquitted, or that he would receive a life sentence if the requested re-testing were allowed. Fla. Stat. § 925.11(2)(f)3; Fla. R. Crim. P. 3,853 (c)(5)(C). (27 Fla. L. Weekly S at 68)

The contamination aspect was the same there as in the instant case. If a hair found on the robe was that of appellant it adds nothing since Tompkins lived in the residence with De Carr; if the hair is not that of De Carr, it means nothing since hair transfers in a contaminated scene should be expected, King, supra. Moreover, nothing detracts from the other evidence presented demonstrating the remains were that of DeCarr.[8]

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[8] We note that at the April 17th hearing, collateral counsel McClain seemed to suggest Mrs. De Carr as a proper suspect ("I know that it is unusual to make an allegation that a mother can be a suspect but certainly there have been numerous courts

ISSUE III

WHETHER THE STATE'S FAILURE TO PRESERVE HAIR EVIDENCE FOR SEVENTEEN YEARS VIOLATES APPELLANT'S DUE PROCESS RIGHTS.

This Court has consistently relied on the landmark case of Arizona v. Youngblood, 488 US 51, 57-58, 102 L. Ed. 2d 281 (1988):

> ...We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

See King v. State/Moore, __So. 2d__, 27 Fla. Law Weekly S65 (Fla. 2002)(defendant failed to show bad faith on the part of the state regarding the destruction of vaginal washings and rectal swab in the Medical Examiner's Office); See also Merck v. State, 664 So. 2d 939 (Fla. 1995)(failure to preserve Khaki pants was not a denial of due process pursuant to Arizona v. Youngblood); Kelley v. State, 569 So. 2d 754 (Fla. 1990).

Appellant seemingly acknowledges that he cannot satisfy the Youngblood test and suggests that the Court recede from requiring a defendant to show bad faith and to adopt lesser standards suggested by Justice Stevens or the dissenting

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during the past ten years of other cases that naturally, in which mothers have been suspects" R VII, 161). Collateral counsel Scher argued at the June 12, 2001 rehearing that "we still submit that there is an issue as to identity of the victim in this case..." (SR 14) If collateral counsel is suggesting that the victim is not Lisa De Carr but that her mother is a legitimate suspect in the murder of another who matches Lisa in all respects, that is beyond preposterous.

Justices in Youngblood. No persuasive reason is advanced for the Court to abandon Supreme Court precedent and the Court should decline appellant's invitation.

Obviously the passage of time of some seventeen years from the time of trial to the initial request by appellant for testing (years after the trial, the direct appeal and a round of post-conviction litigation completed in 1989) simply reinforces this Court's observation in McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997):

> "As time goes by, records are destroyed, essential evidence may be tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable."

There was no bad faith by the state in this case. The state volunteered the information at the hearing on April 11, 2001. Despite the state's best efforts to find the hair originally sent to the FBI, it could not be located (R VII, 89-108). The lower court correctly found in its order Denying Defendant's Motion for Rehearing on June 15, 2001:

> "Additionally, the Court notes that the Tampa Police Department conducted an investigation regarding the missing hairs and submitted the reports to the Defendant (See Notice of Filing, attached). The Court finds that this report demonstrates that the loss of the hair evidence is not a result of bad faith but rather inadvertence. As such, no relief is warranted with regard to claim III."
>
> (R V, 760)

Appellant's failure to demonstrate that the state's failure

to preserve evidence was the result of bad faith is fatal to his claim. See King v. Moore, supra. Relief must be denied on this meritless claim.[9]

ISSUE IV

WHETHER THE LOWER COURT ERRED IN NOT ORDERING THE PRODUCTION OF PUBLIC RECORDS.

In his final claim, appellant contends that the lower court erroneously denied access to public records from the Hillsborough County Sheriff's office; Office of the State Attorney of the Thirteenth Judicial Circuit; Department of Corrections, Florida Department of Law Enforcement; Florida Parole Commission/Office of Executive Clemency; and Department of State, Division of Elections. The claim is meritless.

A hearing on the motion to compel production of public records was held on April 11, 2001 (R VII, 1-130) and the Court subsequently entered its order denying relief (R I, 111-113):

> "Defendant's Motion requests that the Court compel production from various public agencies that had not responded to Defendant's public records requests prior to April 10, 2001. However, during argument Defendant conceded that most agencies had provided the requested records to the repository. Defendant stated that the only remaining outstanding issues for the Court to resolve regarding public records request were as follows:
>
> 1. Defendant's request for the Hillsborough County

[9] As noted by the lower court, the missing hair evidence does not change or challenge the other evidence established at trial confirming Lisa's identity (the evidence of her unique occluded tooth, physical evidence of jewelry, robe and sash wrapped around her neck as a ligature).

Sheriff's Office to provide a list of names for individuals with no identifying information supplied by Defendant.

2. Defendant's request for the Hillsborough County Sheriff's Office to provide the records for victims of Bobby Joe Long and Donald Michael Santini.

3. Defendant's request for the State Attorney's Office for the Thirteenth Judicial Circuit to provide a list of names for individuals with no identifying information supplied by Defendant.

4. Defendant's request for the State Attorney's Office for the Thirteenth Judicial Circuit to provide the names and personal information attached to the grand jury manual.

5. Defendant's request for the Florida Department of Law Enforcement to provide information regarding the jurors in the Defendant's trial.

6. Defendant's request for the Department of Corrections to provide information regarding the identity of individuals administering the lethal injection, identifying the execution team, time specifications, command post radio logs, and notification list.

7. Defendant's request for the Florida Parole Commission and Board of Executive Clemency's to provide any records.

8. Defendant's request for the Division of Elections to provide information related to the Honorable Harry Lee Coe, III.

9. Defendant's request for the Repository to provide the records to CCR on an expedited basis.

The Court, after hearing testimony and argument, finds that Defendant has failed to provide sufficient specific and identifiable reasons as to the request for public records listed above. The Florida Supreme Court has held that the Defendant must be able to identify specific concerns or issues to the trial court that could warrant relief. See Bryan v. State,

748 S. 2d 1003, 1006 (Fla. 1999). The Defendant should also provide good cause why the new public records requests were not made until after the death warrant was signed. Id.

The only specific issue raised at the hearing by the Defendant dealt with potential juror misconduct. Counsel for Defendant conceded that this issue was known to both himself and trial counsel in 1985. Counsel provided no explanation as to why the requests were not made until after the Governor signed the death warrant. The Florida Supreme Court has held that any concerns regarding the construction of rule 3.852(h)(3) leading to a harsh result in the nonwarrant situation should be ameliorated by rule 3.852(i). Sims v. State, 753 So. 2d 66 (Fla. 2000). Rule 3.852(i) allows collateral counsel to obtain additional records at any time if collateral counsel can establish that a diligent search of the records repository has been made and "the additional public records are either relevant to the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence. Id. 71. The Court is concerned regarding the timing of the voluminous public records requests. Defendant's public records requests appear to be at best a "fishing expedition" and at worst a dilatory tactic.

The Florida Supreme Court has held that this discovery tool is, "not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. To prevent such a fishing expedition, the statute and the rule provide for the production of public records from persons or agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey." Id. 70. Rule 3.852 is not intended for use by defendants as nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry. Id.

Accordingly, the Court finds that Defendant is not entitled to receive the records from the individuals or entities listed in items 1 through 8 for the reasons set forth above.

As to Defendant's Motion to Compel the Repository

> to produce the record, the Repository having filed a response and affidavit. The Court finds that the Repository is not being dilatory in complying with Defendant's request for public records and the Defendant's request for a Motion to Compel is hereby denied."

This Court has repeatedly indicated that Rule 3.852 requests for public records made after a death warrant has been signed are not intended to be used as nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry. Sims v. State, 753 So. 2d 66 (Fla. 2000); Glock v. Moore, 776 So. 2d 243, 253-254 (Fla. 2001); As in Glock no good cause was shown why these public records requests were not made until after the death warrant was signed. See Bryan v. State, 748 So. 2d 1003, 1006 (Fla. 1999), Buenuano v. State, 708 So. 2d 941, 947 (Fla. 1998).

As to appellant's complaint regarding a desire to learn of possible contributions to Judge Coe, as this Court noted in Lightbourne v. State, 549 So. 2d 1364, 1366 (Fla. 1989) financial disclosures of judges have been of record for many years and therefore procedurally barred now.

As to appellant's request for criminal records related to the jurors in his trial, collateral counsel could have investigated that matter years ago in the prior motion for post-conviction relief. The Public Records Act has been available since the time of conviction. See Buenoano v. State, 708 So. 2d

941, 952-953 (Fla. 1998); Ziegler v. State, 632 So. 2d 48 (Fla. 1993).[10] There was no abuse of discretion by the trial court.

[10] See also Salmon v. State, 755 So. 2d 148, 150 (Fla. 3 DCA 2000)(jurors' criminal records and non-disclosure are insufficient as a matter of law to vitiate the entire trial or render counsel's performance so deficient as to warrant relief).

ISSUE V

THE LOWER COURT ERRED IN HOLDING THAT TOMPKINS WAS ENTITLED TO A NEW SENTENCING PROCEEDING.

The lower court concluded that Tompkins should be given a new sentencing proceeding based on former prosecutor Benito's testimony that he had been requested by Judge Coe to draft a sentencing order and did so, utilizing the three aggravators Judge Coe had allowed him to argue to the jury. The state would respectfully submit that relief should have been denied on this point (a) since the claim could have and should have been presented earlier (b) the sentencing order of Judge Coe reflects an independent consideration and weighing of aggravating and mitigation circumstances as the judge found age as a mitigator, and (c) even if prosecutor Benito's admission were to be regarded as newly-discovered evidence, Tompkins cannot satisfy the requirement that it would probably produce a different result, i.e., the imposition of a life sentence.

A. The Claim Could Have and Should Have Been Presented Earlier.

The record on appeal on direct appeal (and appellate record from the previous denial of motion for post-conviction relief) reflects an entry on the case progress notes of "set 10/11/85 for order per judge (told [assistant state attorney] Benito yesterday on phone)" (DAR 486; see also 1 PCR 480) and this entry clearly put any appellate or collateral counsel on notice

that it was an item to be investigated. This is particularly true since such a claim was being litigated across the state. See Patterson v. State, 513 So. 2d 1257 (Fla. 1987); see also Holton v. State, 573 So. 2d 284, 291 (Fla 1990); Spencer v. State, 615 So. 2d 688 (Fla. 1993). Since the claim could have been discovered through the exercise of due diligence, it is not proper to present in a successive motion for post-conviction relief. Buenoano v. State, 708 So. 2d 941 (Fla. 1998).

At the hearing below, trial defense attorney Hernandez testified he had no knowledge of prosecutor Benito's participation in preparing the sentencing order, but acknowledged that it is not uncommon for a judge to ask an attorney to prepare an order and he was not aware of case law prohibiting it in a capital case when this trial occurred (R VIII, 184).

Judge Coe discussed the available aggravators or mitigators during the charge conference between the attorneys (R VIII, 185). Hernandez opined it would be improper for a judge to have an ex parte communication with a prosecutor (R VIII, 189).

Prosecutor Benito testified that after the sentencing phase either Judge Coe or his secretary called him and needed an order prepared on Tompkins' case. He prepared an order based on the three aggravating factors Judge Coe had allowed him to argue (R VIII, 192). He couldn't recall with the passage of time whether

Judge Coe made any changes after he submitted it to him (R VIII, 193). Mr. Benito could not recall whether Judge Coe told him off the record to prepare the order or whether he got a call from his secretary later about preparing the order (R VIII, 195). When shown the case progress notes with the notation, Benito assumed that either Judge Coe or his secretary had called requesting he prepare an order and Benito "knew what aggravating circumstances he wanted in the order based on what he let me argue during the trial" (R VIII, 197). Benito further explained that Judge Coe would not call him for any reason except to tell him to do an order on that case. It was impossible that the phone call could have pertained to the next entry regarding the new trial motion (R VIII, 195).

Martin McClain, Tompkins' prior counsel in 1989, remained on appellant's case until 1998. He testified that he had not received documents indicating that Benito had drafted the sentencing order (R VIII, 200-202). He asserted that there was nothing in the case progress notation, suggesting that it merely reflected that Benito had been called and notified of something set for October 11, 1985. The next entry showed a hearing which had occurred on October 4. The phone call was a ministerial act and he maintained there was nothing to indicate the order had

been drafted by the state (R VIII, 203).[11] McClain stated he had no reason to investigate how Judge Coe drafted the sentencing order since under the law at the time the only issue was whether or not there was ex parte communications between the Judge and the state regarding the sentencing order (R VIII, 205-06). He was aware that Nibert v. State, 508 So. 2d 1 (Fla. 1987) and Holton v. State, 573 So. 2d 284 (Fla. Sept. 27, 1990) both involved Judge Coe and the issue of his delegating the drafting of the sentencing order (R VIII, 206-07).

The state submits that in light of the notation in the case progress notes in the direct appeal record about the order and call to prosecutor Benito, that information along with collateral counsel's awareness of such cases as Nibert, supra, and Holton, supra, involving contentions that Judge Coe had delegated the drafting of the sentencing order, there was sufficient information for collateral counsel to pursue the leads and discover the information now urged.

(B) The Sentencing Order of Judge Coe Reflects an Independent Consideration of Aggravating and Mitigating Circumstances.

In the lower court's order granting relief following an evidentiary hearing on April 18, 2001, the court found that former prosecutor Benito admitted to drafting a sentencing order after being contacted by the trial judge or the judge's office;

[11] The record reflects that Tompkins' motion for new trial was denied at a hearing on October 4, 1985 (DAR IV, 474-476).

that decisions like Card v. State, 652 So. 2d 344 (Fla. 1995) and Spencer v. State, 615 so. 2d 688 (Fla. 1993) declare that it is improper for a judge to request a party to draft a sentencing error which requires the weighing of aggravating and mitigating circumstances; and that the trial court's limitation of argument that the court had imposed on the state in arguing aggravating circumstances did not constitute a sufficient "weighing" by the trial judge and thus the failure to independently weigh aggravating and mitigating circumstances in this case entitled Tompkins to relief (R IV, 441-442).

The state respectfully submits that while the testimony below by prosecutor Benito supports this finding that there was an ex parte contact - that Judge Coe requested the prosecutor prepare a sentencing order - the conclusion that there was not an independent weighing of aggravating and mitigating circumstances by Judge Coe does not ineluctibly follow. Benito testified that he drafted a sentencing order and that the aggravating factors articulated were those that Judge Coe had permitted him to argue to the jury (R VIII, 192). But Benito did not testify that he included any mitigating factors. The written sentencing findings in Judge Coe's signed order includes a finding of age as a mitigating factor (DAR 680) as well as a discussion of nonstatutory mitigating circumstances:

> "None, notwithstanding testimony to the effect that the defendant was a good family

member and a good employee" (DAR 681)

It is obvious, therefore, that Judge Coe did not fail "to independently weigh aggravating and mitigating circumstances in this case".

Appellee does not wish to be understood as endorsing Judge Coe's contact with prosecutor Benito for assistance in preparing a sentencing order. It is clearly inconsistent with what is now understood to be the proper manner of preparing sentencing orders, as explained in cases such as Card v. State, 625 So. 2d 344 (Fla. 1995), Spencer v. State, 615 So. 2d 688 (Fla. 1993), and State v. Reichmann, 777 So. 2d 342 (Fla. 2000). However, we must temper today's condemnation with the acknowledgment that Tompkins' trial occurred seventeen years ago in 1985 (at a time when even trial counsel Hernandez acknowledged there was no case law prohibiting prosecutors from drafting orders for judges) and years before this Court's admonition in Nibert, supra, that "Although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing". Id. at 4.[12]

Here, while the trial judge may have initially improperly

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[12] The instant trial and sentencing order by Judge Coe even predated such decisions as Patterson v. State, 513 So. 2d 1257 (Fla. 1987) and Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

asked the prosecutor to draft an order - and the prosecutor drafted aggravators based on what the judge had agreed could be presented to the jury - since the Court ultimately did its own weighing after independently considering and finding age as a mitigating circumstance, the lower court erred in concluding that Judge Coe had failed to engage in independent weighing of the appropriate factors.

Even if this Court were to reject the view that Tompkins' claim about improper delegation of authority to draft a sentencing order could have been and should have been discovered through the exercise of due diligence and presented earlier, relief should be denied since such a claim - if now considered as one of newly-discovered evidence - cannot satisfy the test of Jones v. State, 591 So. 2d 911 (Fla. 1991).

(C) Under the Newly-discovered Evidence Standard, Tompkins Should be Denied Relief as There is no Reasonable Probability of a Different Result.

In the instant case the jury unanimously recommended a sentence to death. The aggravators were substantial (previous conviction of felonies involving the use or threat of violence to the person; murder committed while the defendant was engaged in and attempt to commit a sexual battery of the teen-age victim; and the murder was especially heinous, atrocious or cruel). The mitigation submitted was insubstantial - the defendant's age at the time of the crime and the assertion that

Tompkins had a good work record and shy and non-violent personality. These personality traits were refuted by the evidence of appellant's involvement in separate rape incidents in Pasco County (quite apart from the murder of Lisa De Carr) and even consideration of the additional mitigation subsequently urged in the prior post-conviction hearing, including the testimony of the palpably biased Dr. Pat Fleming would not have yielded a different result. If previously presented, the trial court would simply have - upon consideration of all the aggravating and mitigating evidence - agreed with the jury and imposed a sentence of death by rewriting the order. Since the Jones' standard cannot be satisfied, the lower court's order should be reversed.

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order denying post-conviction relief should be affirmed. That portion of the order granting a new sentencing proceeding should be reversed.

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. Regular Mail to, Todd G. Scher, Capital Collateral Regional Counsel, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301 this _____ day of May, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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

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