IN THE SUPREME COURT OF FLORIDA

WAYNE TOMPKINS,

Appellant,

v. CASE NO. SC03-1902

STATE OF FLORIDA,

Appellee.
_____/

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

_____

ANSWER BRIEF OF APPELLEE

_____

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PRELIMINARY STATEMENT

Appellee respectfully submits that oral argument is unnecessary in this case since the issues raised are largely repetitious and duplicative of the issues and arguments most recently decided by this Court after full briefing and argument. Any new claim is procedurally barred because it could have been pursued earlier with the exercise of due diligence.

STATEMENT OF THE CASE AND FACTS

(A) PROCEDURAL HISTORY:

Mr. Tompkins has had a lengthy appellate and postconviction history. In 1985 he was convicted of the first degree murder of Lisa DeCarr and sentenced to death following a unanimous death recommendation by the jury. The trial court found three aggravating factors and one mitigating circumstance. Tompkins raised ten issues on appeal and the Court found no reversible error and affirmed the judgment and sentence. Tompkins v. State, 502 So. 2d 415 (Fla. 1986). Appellant filed his first motion for postconviction relief which included nineteen claims. Following an evidentiary hearing primarily related to Brady and ineffective assistance of counsel claims, the trial court denied relief and this Court affirmed that denial. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). The Court contemporaneously denied Tompkins' habeas corpus petition which raised nine claims. Ibid. Tompkins sought federal habeas corpus relief. The District Court denied relief and the Court of Appeals affirmed, rejecting claims of violations of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and ineffective assistance of counsel at the guilt and penalty phases under Strickland v. Washington, 466 U.S. 668 (1984). Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999), reh. en banc den., 207 F.3d 666 (11th Cir. 2000), cert. den., 531 U.S. 861,

148 L.Ed.2d 99 (2000), reh. den., 531 U.S. 1030, 148 L.Ed.2d 522 (2000).

Tompkins filed a successive motion to vacate and the lower court denied relief on all claims except the granting of a new penalty phase. The trial court also denied Tompkins' motions for DNA testing. On appeal, Tompkins raised four issues: (1) whether the trial court erred in denying his Brady claims without an evidentiary hearing; (2) whether the trial court erred in denying his motion for DNA testing; (3) whether the state's failure to preserve evidence violated his due process rights; (4) whether the trial court erred in denying his motion to compel the production of public records. The state cross-appealed the trial court's order granting a new penalty phase. This Court affirmed the trial court's denial of relief to Tompkins and reversed the order granting a new penalty phase. Tompkins v. State, --- So. 2d ---, 28 Fla. L. Weekly S767 (Fla., Oct. 9, 2003). The Court issued a revised opinion on April 22, 2004. Tompkins v. State, --- So. 2d ---, 29 Fla. L. Weekly S177 (Fla. Apr. 22, 2004).

(B) THE INSTANT PROCEEDINGS:

On or about February 5, 2003, while Tompkins' last appeal was pending in this Court, he filed a motion in the circuit court for DNA testing, citing Rule 3.853, Fla.R.Crim.P. He sought testing of several hairs discovered with DeCarr's body

(and alluded to his prior Motion for DNA Testing in April, 2001, which was part of the then-pending appeal) as well as testing of the remains found buried in a shallow grave under the house (R. Vol. I, 5-10; R. Vol. II, 222-227). Tompkins had filed a Motion to Relinquish Jurisdiction in this Court on February 3, 2003, but this Court denied the motion. Also on February 5, 2003, appellant filed a Motion to Vacate Judgment and Sentence in the lower court contending that the state had failed to disclose material and exculpatory evidence and/or presented misleading evidence and/or counsel failed to discover and present exculpatory evidence (R. Vol. I, 53-85; R. Vol. II, 229-261).

On August 22, 2003, the Honorable Daniel L. Perry, Circuit Judge, entered an Order Dismissing Motion for DNA Testing, noting that the issues in the April 10, 2001 Motion and the February 5, 2003 Motion were related and the lower court was without jurisdiction to rule on the DNA motion. The Court cited McFarland v. State, 808 So. 2d 274 (Fla. 1st DCA 2002). With regard to the accompanying Motion to Vacate Judgment and Sentence with Request for Leave to Amend, the court again noted that the claims relating to the state's failure to disclose a June 8, 1984 police report and handwritten lead sheets prepared by Detective Burke had been the subject matter of the prior motion to vacate which was now pending in this Court in Case No. SC01-1619; that the issues were related and this Court had not

yet ruled on the appeal and dismissed the petition as without jurisdiction (R Vol. I, 1-4; SR ____).

On or about September 3, 2003, appellant filed a Motion for Rehearing in the lower court and also filed in this Court a Motion to Relinquish Jurisdiction to Permit Consideration of Rule 3.850 Motion and Rule 3.853 Motion for DNA Testing (SR ____).

On September 10, 2003, the lower court entered its Order Denying Motion for Rehearing, reaffirming its view that it had properly dismissed the Motion for DNA Testing and Motion to Vacate Judgment and Sentence with Request for Leave to Amend and thus, no relief was warranted (SR ____).

Tompkins now appeals.

SUMMARY OF THE ARGUMENT

ISSUE I: The lower court did not commit error in following this Court's decisions in State v. Meneses, 392 So. 2d 905 (Fla. 1981); Bryan v. State, 743 So. 2d 508 (Fla. 1999); and Daniels v. State, 712 So. 2d 765 (Fla. 1998), by determining that appellant's successive motion for postconviction relief and successive motion for DNA testing precluded the court from considering such matters again while Tompkins' previous collateral challenge which included a request for DNA testing was pending on appeal in this Court. Appellant's request for relief would risk conflicting and confusing rulings by different courts on the same issue. If this Court should order the trial court to do anything, it should order that relief should be summarily denied.

ISSUE II: The lower court did not err in dismissing appellant's successive Rule 3.850 motion without an evidentiary hearing. Tompkins' current presentation of an affidavit by James M. Davis, Jr. does not entitle appellant to relief or reconsideration of his previously rejected claims. Tompkins has failed adequately to explain why he did not present this information at his first motion for postconviction relief in 1989. Tompkins has not demonstrated that he exercised due diligence in obtaining the information. Furthermore, this item of slight impeachment value -- even with consideration of other

evidence cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict, as this Court has recently reaffirmed with the affirmance of denial of the last postconviction motion by Judge Perry.

ISSUE III: Appellee repeats that Tompkins is not entitled to a new trial by virtue of the belated presentation of Mr. Davis' affidavit. Davis was not present at the commission of the offense, his affidavit does not alter the testimony at trial of witnesses Kathy Stevens, Barbara DeCarr or Kenneth Turco. The Court should reject his attempt at repeated reconsideration of claims this Court has found to be meritless. Appellant's conclusory allegation in a successive motion of ineffective assistance of counsel or a violation of Brady v. Maryland, 373 U.S. 83 (1963) are insufficient. Indeed, there is no basis presented to form the conclusion that the state withheld evidence which would create a reasonable probability of a different result.

ISSUE IV: The lower court did not err in denying appellant's motion for DNA testing. Tompkins merely presents the same request that he presented to Judge Perry in the last motion to vacate, the denial of which was approved by this Court most recently with the denial of Tompkins' motion for rehearing on April 22, 2004. This Court considered and applied the recent

statutory enactment of F.S. 925.11 and cited Rule 3.853 in approving Judge Perry's findings that any samples from the hairs, bone fragments, robe or pajamas would be unreliably contaminated, that the contention that the identity of the victim is not Lisa DeCarr is preposterous, and even if DNA analysis indicated a source other than Lisa DeCarr or Tompkins, there is no reasonable probability appellant would have been acquitted or received a life sentence.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD DIRECT THE CIRCUIT COURT TO CONSIDER AND RULE ON TOMPKINS' RULE 3.850 MOTION AND HIS MOTION FOR DNA TESTING.

Appellant contends that the lower court erred in dismissing for lack of jurisdiction his Motion for DNA Testing and Motion for Postconviction Relief, since they were similar or identical to previous motions rejected by the circuit court and currently pending on appellate review in this Court. He acknowledges this Court's rulings in State v. Meneses, 392 So. 2d 905 (Fla. 1981), Francois v. Klein, 431 So. 2d 165 (Fla. 1983)[1] and most recently in Bryan v. State, 743 So. 2d 508 (Fla. 1999), a decision without published opinion, a copy of which Appellee attaches to this brief. In Bryan, the Court curtly recited:

> OPINION: Appellant filed a successive motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court while that court's order on the previous motion was pending review before this Court. The trial court dismissed the motion based on lack of jurisdiction pending this Court's review of the previous order. Appellant then

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[1]In Francois, the Court explained and distinguished Meneses. The Court noted that since habeas corpus is the vehicle to challenge ineffective appellate counsel claims while the postconviction 3.850 motion is available for challenges to trial counsel performance, there were "two judicial attacks" on the convictions and sentences that were "separate and distinct" and no danger as in Meneses of conflicting and confusing rulings by different courts on the same issue as to require a holding that one pending proceeding deprives the other court of jurisdiction to proceed. Id. at 166.

> filed a notice of appeal to seek review of the dismissal order. We affirm the trial court's dismissal based on lack of jurisdiction. See State v. Meneses, 392 So. 2d 905 (Fla. 1981).
>
> HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

See also Daniels v. State, 712 So. 2d 765 (Fla. 1998)(during the pendency of a defendant's direct appeal the trial court is without jurisdiction to rule on a motion for postconviction relief and a ruling on the merits of the postconviction motion is a nullity and an appellate decision affirming or reversing it is also a nullity).

Obviously, the instant proceedings satisfy the Meneses/Francois rationale -- clearly if the trial court granted relief on the same issue upon which this Court approved the denial of relief, there would be "conflicting and confusing rulings by different courts on the same issue."

Is it clear also that the District Courts of Appeals have recognized that trial courts lack jurisdiction to entertain postconviction motions when direct appeals or prior postconviction motions are pending review in the appellate courts. See, e.g., Hodges v. State, 709 So. 2d 620 (Fla. 1st DCA 1998)(prior postconviction motion still pending on appeal since mandate had not issued); Walk v. State, 707 So. 2d 933 (Fla. 5th DCA 1998); Hulick v. State, 644 So. 2d 117 (Fla. 2d DCA 1994); Casseus v. State, 509 So. 2d 965 (Fla. 3d DCA 1987);

Martin v. State, 800 So. 2d 363 (Fla. 4th DCA 2001).

Since the case law is clear from Meneses, *supra*, Bryan, *supra*, and Daniels, *supra*, the lower court could not commit error in dismissing the motions for lack of jurisdiction because of the pending appeal. Appellant apparently is seeking this Court to mandamus the lower court to consider his claims while the lower court lacks jurisdiction. That is improper. But appellee would respond that if this Court should order the lower court to rule on the motions, it should order summary denial since the claims have been presented and rejected by the circuit court (any additional claim would be abusive) and this Court's decision of October 7, 2003, reaffirmed on April 22, 2004, demonstrates their meritlessness.

Appellant relies on a second line of cases. Some district courts of appeal have ruled that trial courts have jurisdiction to entertain subsequent motions for postconviction relief so long as the issues raised in the two cases are unrelated. See McFarland v. State, 808 So. 2d 274 (Fla. 1st DCA 2002); Bates v. State, 704 So. 2d 562 (Fla. 1st DCA 1997); Kimmel v. State, 629 So. 2d 1110 (Fla. 1st DCA 1994).

Some courts have ruled that when the trial court is precluded by a pending appeal from ruling on a motion for postconviction appeal, the better procedure is to stay the postconviction motion rather than dismiss it for lack of

jurisdiction. Perez v. State, 834 So. 2d 882 (Fla. 4th DCA 2002); Washington v. State, 823 So. 2d 248 (Fla. 4th DCA 2002).

Whatever may be said about what is the better procedure, appellant should not be entitled to relief since his Motion for DNA Testing was essentially the same request previously considered, rejected and raised in Florida Supreme Court appeal number SC01-1619 and his re-argument of Detective Burke's lead sheets and Detective Milano's report are similar to the prior motion which the Court addressed in its prior decision. The only matter that is new is the proffered Davis affidavit, but as explained *infra* the claim should not be considered for the failure to exercise due diligence in presenting it in the initial 1989 motion for postconviction relief.

ISSUE II

WHETHER THE LOWER COURT ERRED AS A MATTER OF LAW IN DISMISSING TOMPKINS' RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

Appellant contends that the lower court erred in dismissing his Rule 3.850 motion without an evidentiary hearing. Tompkins contends that he obtained an affidavit from James M. Davis, Jr. in April of 2002 -- about a year after the trial court had ruled on his last motion for postconviction relief. Davis disagrees with Kathy Stevens' recollection that she saw Davis at a convenience store the day of Lisa DeCarr's disappearance. Tompkins asserts that he was diligent in the attempt to locate Davis and alludes to the lead sheets prepared by Detective Burke and a supplemental police report by Detective Milana dated June 8, 1984, which he asserts were turned over in April of 2001. Thereafter, he claims he was able to find Mr. Davis. For the reasons that follow, appellee submits that Tompkins' claims and his assertion of the exercise of due diligence are meritless and relief must be denied.

In this Court's most recent decision of Tompkins' claim, the Court opined:

> In a case such as this, where the defendant files a successive motion for postconviction relief, the trial court may dismiss the motion if it "fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant

> or the attorney to assert those grounds in a prior motion constituted an abuse of procedure governed by these rules." Fla. R. Crim. P. 3.850(f). However, if the trial court does not dismiss the successive motion for the above stated reasons, the trial court must hold an evidentiary hearing unless "the motion, files and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.850(d).
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> When the trial court denies postconviction relief without conducting an evidentiary hearing, "this Court must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record." Rose v. State, 774 So. 2d 629, 632 (Fla. 2000); see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997) ("Under rule 3.850, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief. Thus we must treat the allegations as true except to the extent they are rebutted conclusively by the record.") (citation omitted). However, the defendant has the burden of establishing a legally sufficient claim. See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). If the claim is legally sufficient, this Court must then determine whether the claim is refuted by the record. See id.
>
> 29 Fla. L. Weekly at S178
> (Fla. April 22, 2004)

Appellant, in his motion below, presented the affidavit of James M. Davis, Jr., which apparently was executed on April 29, 2002 (R I, 83-85; R II, 259-261). The affidavit recites that Lisa DeCarr was his girlfriend at the time she disappeared, that what Kathy Stevens said about running into him at the store on the day of Lisa's disappearance was not true; he recalled

speaking to the police once. Tompkins, in his motion, contended that he attempted to locate Junior Davis in 2002 after receiving two lead sheets prepared by Detective Burke (2PCR - Supp R 2, 64-65) and the interview of Sweeny and Willis by Detective Milana on June 8, 1984 (2PCR - Supp R 2, 45-46; R I, 73; R II, 249).

Appellee notes that Judge Perry entered his order denying relief on the Brady claim on April 20, 2001, more than a year prior to the affidavit of Mr. Davis.

The state respectfully submits that this Court should deny relief summarily. This Court has already ruled (and affirmed the trial court's prior denial) regarding his Brady challenge to the documents obtained during the last warrant. This Court ruled:

> As to the remaining documents, we conclude that even if the information they contain could be said to be favorable to Tompkins, the record in this case conclusively demonstrates that the documents are not material because they cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Cardona, 826 So. 2d at 982 (quoting Way, 760 So. 2d at 913). (29 Fla. L. Weekly at S179)
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> * * * *
>
> Finally, we conclude that as to Burke's lead sheets, prejudice is conclusively refuted by the record. Tompkins contends that the lead sheets show that Burke spoke with Lisa's boyfriend, Junior Davis, and had

> Tompkins known this he would have ascertained whether Davis told police about meeting Stevens at the corner store on the day of Lisa's disappearance. Tompkins also asserts that the lead sheets indicate the true identity of a Bob McKelvin, who allegedly attempted to solicit Lisa. However, the record shows that defense counsel was aware of both Junior Davis and Bob McKelvin during trial. Defense counsel asked Stevens on cross-examination about her encounter with Davis at the corner store.
>
> (29 Fla. L. Weekly at S179)

Additionally, relief is appropriately denied since Tompkins inadequately has explained why he failed to pursue and present his current evidence years earlier in prior postconviction matters. As this Court noted, the defense had been aware of Junior Davis before and at the time of trial. Detective Burke in his deposition (which trial counsel Hernandez had) mentioned his interview with Junior Davis in which the latter reported not having any information about the case and counsel examined both Burke and Stevens about him. That Tompkins may only have begun a search for Davis in 2001 or 2002 is an insufficient and inadequate explanation for the failure to seek him out during the first round of postconviction litigation. See Bolender v. State, 658 So. 2d 82, 85 (Fla. 1995) (". . . Bolender must demonstrate as a threshold requirement that his motion for relief was filed within two years of the time when evidence upon which avoidance of the time limit was based could have been discovered through the exercise of due diligence. . . . We

conclude Bolender has failed to meet the threshold requirement for newly discovered evidence. The facts upon which Bolender relies could have been obtained through the use of due diligence more than two years prior to the filing of this motion. The issues therefore are procedurally barred."); Swafford v. State, 828 So. 2d 966 (Fla. 2002)(successive motion to vacate was untimely when statement relied upon could have been discovered earlier with the exercise of due diligence); Downs v. State, 740 So. 2d 506, 514 (Fla. 1999)("Because we find Downs was aware at the time of trial of the evidence he now claims is newly discovered, his claim for ineffective assistance of guilt-phase counsel based on newly discovered evidence is procedurally barred. Accordingly, we find no error in the trial court's summary denial of this claim."); Glock v. Moore, 776 So. 2d 243, 251 (Fla. 2001)(rejecting claim made in successive postconviction motion of racial profiling of drivers in New Jersey as procedurally barred for the failure to present earlier with the exercise of due diligence).

Tompkins and his collateral counsel knew at the time of the first motion for postconviction relief in 1989 what Kathy Stevens' trial and deposition testimony had been, and knew what James M. Davis, Jr. had told Detective Burke from Burke's pre-trial deposition and a police report furnished to trial defense

counsel in discovery (DAR V, 530).[2] Since at that time Tompkins and his collateral counsel were urging that Kathy Stevens (and others) should not be believed in their testimony, they could have investigated and sought out Mr. Davis at that time. After the initial postconviction motion was denied, Tompkins could have investigated and sought Mr. Davis while this Court considered the appeal from the denial of postconviction relief.

Appellant and his collateral counsel could have attempted to locate Mr. Davis while his federal habeas corpus petition was pending in the district court from 1989 to Judge Nimmons' Memorandum Opinion and Order denying relief almost a decade later on April 17, 1998. Tompkins and collateral counsel could have pursued inquiry into Mr. Davis during the pendency of the appeal until the Court of Appeals decision denying relief in 1999 and denial of rehearing in 2000. They could have looked for Mr. Davis until the United States Supreme Court denied certiorari review late in the year 2000. They could have made further inquiry up to and during the last round of postconviction litigation in 2001.

Appellant attempts to justify his dilatory behavior by arguing that it was not until 2001 that he received the Detective Burke lead sheets and Detective Milana's supplemental report. This rationale is unpersuasive. Burke's lead sheets

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[2]That report had also listed a phone number for Mr. Davis.

add nothing to what was previously known. Nor does the Milana report add much, a mere notation of Davis, a boyfriend approximately seventeen years of age of 40th Street and Buffalo. But it had previously been known and discovery given that Junior was Lisa's boyfriend. Appellee further notes that nothing in Davis' affidavit mentions that he provided any information to law enforcement officers.

The suggestion that Tompkins could not initiate a search for Mr. Davis until receipt of Detective Burke's lead sheets (which added no information) or the Detective Milana supplemental report is contrary to common sense. With the exercise of due diligence, appellant could have sought Mr. Davis and obtained his recollection years ago at the time of the first motion for postconviction relief, rather than waiting until 2001 or 2002 to do so.

Since Tompkins has failed adequately to explain why with the exercise of due diligence he did not present the evidence in earlier proceedings and since this Court has determined that the record conclusively refutes any claim of prejudice or that the documents which were not previously furnished were material, it would be appropriate for the trial court to have summarily denied relief in addition to its having disposed of the motion by dismissal for lack of jurisdiction. See also State v. McBride, 848 So. 2d 287 (Fla. 2003)(The law of the case doctrine

requires that questions of law *actually decided* on appeal must govern the case in the same court and the trial court through all subsequent stages of the proceedings; the doctrine of *res judicata* prohibits not only relitigation of claims raised but also the litigation of claims that *could have been raised* in the prior action. Additionally, under the doctrine of collateral estoppel -- which applies in the postconviction context -- precludes a defendant from rearguing in a successive Rule 3.850 motion the same issue argued in a prior motion). This Court should similarly determine that Tompkins is barred from litigating and seeking further review of his considered and rejected claims. There is no manifest injustice that would preclude application of this bar.

ISSUE III

APPELLANT WAS NOT DEPRIVED OF HIS RIGHTS TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OR ANY OTHER CONSTITUTIONAL RIGHT.

(A) Tompkins contends that the Davis affidavit entitles him to a new trial:

Appellant contends that Davis' assertion that he did not see Kathy Stevens at a store the morning of Lisa DeCarr's disappearance impeaches her and that the failure of the state to disclose the exculpatory evidence possessed by Davis violated Brady v. Maryland, 373 U.S. 83 (1963). He further argues that the materiality standard is satisfied when the favorable evidence could reasonably be taken to put the whole case in such

a different light as to undermine confidence in the verdict. Tompkins additionally makes a blanket assertion that the Davis affidavit establishes that the state presented false or misleading testimony in violation of Giglio v. United States, 405 U.S. 150 (1972) and trial counsel rendered ineffective assistance. No additional facts are provided on these latter claims. As demonstrated below, the claims are meritless and no relief is warranted.

The affidavit of James M. Davis, Jr. does not establish that appellant is entitled to a new trial:

In order to prevail on a claim of newly-discovered evidence, the newly-discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial. See Jones v. State, 591 So. 2d 911, 915 (Fla. 1991); Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). The fact of Junior Davis and his relationship to Lisa DeCarr was well-known prior to trial and subsequent rounds of collateral litigation. The direct appeal appellate record includes among the discovery furnished to trial defense counsel the report of Detective Burke's interview of Junior Davis on June 21, 1984, even listing his phone number. Davis could not provide the officer with any "information as to the events surrounding Lisa [sic] disappearance" and indicated he last saw Lisa the weekend before her disappearance (DAR 530). The report specifically recited:

1200 hrs., 21 Jun 84

> INTERVIEWED JUNIOR DAVIS, who is the ex-boyfriend of LISA DeCARR. JUNIOR DAVIS has a home phone of 677-6915 and is out in the Gibsonton area.
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> JUNIOR DAVIS stated that he could help the u/signed with no information as to the events surrounding LISA [sic] disappearance. He stated that he was accused by BARBARA after she disappeared of harboring LISA and that he had talked to her several times trying to convince her that LISA was not with him. He stated that he even invited BARBARA inside the house to check for LISA on one occasion.
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> He further stated that LISA never said anything to him about being raped by WAYNE but that he knew that LISA did not like WAYNE because of the way WAYNE was. He stated that the last time he saw LISA was the weekend before her disappearance. He stated further that the whole family is in one big mess and there always seems to be fighting and drinking going on at the house.

Burke also gave a pre-trial deposition similarly reciting that he had interviewed Davis and his lack of information about events. The direct appeal record further reflects that trial counsel cross-examined Burke using that November 15, 1984 deposition (DAR 288, 295, 299) and at the postconviction evidentiary hearing a decade and a half ago trial counsel Hernandez admitted that he had access to Burke's pre-trial deposition taken by attorney Castillo (1PCR I, 98).

Any suggestion that the Davis affidavit indicates a violation of either Brady v. Maryland, 373 U.S. 83 (1963) or Giglio v. United States, 405 U.S. 150 (1972) is frivolous. A

Brady violation requires the threefold components: (1) favorable evidence to the accused; (2) the evidence was suppressed by the state; and (3) prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-282 (1999); Tompkins v. State, --- So. 2d ---, 29 Fla. L. Weekly S177 (Fla. April 22, 2004). Even if it could be said that the Davis affidavit is deemed favorable, there is no assertion that the state knew or suppressed Davis' assertions; certainly, Davis cannot be deemed a state agent. The prejudice prong also remains unsatisfied, as this Court's most recent opinion demonstrates. Similarly, any Giglio claim must fail since there is nothing in the Davis affidavit suggesting that the state knew of and failed to correct false testimony. Davis' mere disagreement with Kathy Stevens does not constitute knowing use of perjury by the state.

Finally, consideration of the Davis affidavit cannot meet the Jones standard of new evidence that would *probably* produce an acquittal on retrial. The affidavit of Davis does not recite any personal knowledge of the crime and at most would be of some slight impeachment value of Kathy Stevens, which is insufficient under Jones. See Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994)("The affidavits at issue in this case constitute, at best, impeachment evidence."); Buenoano v. State, 708 So. 2d 941 (Fla. 1998).

Since the identity of Davis was well-known at the time of

trial, since the substance of Kathy Stevens' testimony was available to collateral counsel who had the direct appeal transcripts at the time of the first round of collateral litigation in 1989, it is unconscionable that Tompkins' defense team asserts that in 2001 or 2002 -- a dozen years after the initial postconviction motion -- they began looking for Junior Davis. That cannot constitute due diligence.

(B) Appellant's Assertion That the Claims Based upon the Affidavit of James M. Davis, Jr. Are Before the Court on the Merits:

Appellee repeats its argument that Tompkins has not demonstrated due diligence. Additionally and alternatively, appellee contends that there is no merit in the suggestion that the Court should revisit and grant relief on Tompkins' prior presented claims, even with the addition of the Davis affidavit. The pleadings are insufficient to allege a claim of ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984), nor does the Davis affidavit add anything to suggest violations of Brady v. Maryland, 373 U.S. 83 (1963) or Giglio v. United States,
405 U.S. 150 (1972).

(C) Cumulative Consideration:

Appellant next repeats the litany of arguments and proffered evidence that has been considered and rejected repeatedly by both this Court and the federal courts. Appellee submits that

no further review of such arguments and materials is necessary or appropriate at this time. The Court should find that these repetitious, successive claims are an abuse of the postconviction process, procedurally barred and violative of the law of the case doctrine. See Robinson v. State, 865 So. 2d 1259, 1263 (Fla. 2004), wherein this Court opined:

> This Court has already ruled against Robinson regarding whether or not the substance of Fields's post-trial version of events, considered in the context of the entire circumstances of the case, establishes a violation of the precepts of Brady or Giglio. Robinson has failed to present any new law or fact in this new round of postconviction proceedings that warrants a reconsideration of our previous opinion.

Additionally, this Court noted in Robinson's successor postconviction appellate challenge on the racial bias issue:

> First, we note that Robinson previously argued this claim in a habeas petition to this Court, which we denied on the merits in Robinson v. Moore, 773 So. 2d 1, 5-6 n.4 (Fla. 2000). Therefore, this claim is procedurally barred. See Owen v. Crosby, 854 So. 2d 182, 187 (Fla. 2003) (stating that claims that were raised or could have been raised in a prior postconviction motion are procedurally barred unless such claims are based on newly discovered evidence).
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> (Id. at 1263)

See also Moore v. State, 820 So. 2d 199 (Fla. 2002)(a second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion); Foster v.

State, 614 So. 2d 455 (Fla. 1992); Bundy v. State, 538 So. 2d 445 (Fla. 1989)(assertion of claim which had been raised in earlier unsuccessful motion for postconviction relief was abuse of process); Swafford v. State, 828 So. 2d 966 (Fla. 2002) (postconviction claim that state withheld material evidence was procedurally barred where the allegation was previously raised in appeal of denial of postconviction motion and found to be without merit); Vining v. State, 827 So. 2d 201 (Fla. 2002)(postconviction court may summarily deny successive motion raising in piecemeal fashion claims of ineffective assistance of counsel); Jennings v. State, 782 So. 2d 853 (Fla. 2001)(Brady and ineffective counsel claims procedurally barred because raised in prior postconviction motion and appeal).

(1) Kathy Stevens: Appellant argues that Stevens' testimony should not be believed. Apart from the current, belated proffered affidavit of James M. Davis, Jr., appellant offers no reason for reconsideration.[3] Tompkins alludes to prosecutor Benito's undisclosed memoranda of his interviews with Stevens which have been dealt with previously and rejected by the postconviction courts. The Eleventh Circuit Court of Appeals noted that it was affirming without elaboration the district court's rejection of Tompkins' claim under Brady v.

[3]Davis' affidavit does not challenge the substantive testimony of Stevens regarding seeing Tompkins and Lisa at the house, but only the minor matter whether Stevens meet Davis at a convenience store later.

Maryland, 373 U.S. 83 (1963)(which had evaluated the argument regarding Benito's nondisclosure of the Stevens' memoranda). Tompkins v. Moore, 193 F.3d 1327, 1331 n.1 (11th Cir. 1999); see also Tompkins v. State, --- So. 2d ---, 29 Fla. L. Weekly S177, S183 n.8 (Fla. April 22, 2004).

Additionally, as this Court declared in its most recent decision on April 22, 2004:

> Further, even if we were to engage in a cumulative analysis and consider the undisclosed, favorable documents in conjunction with Tompkins' claims raised in his first motion for postconviction relief, our conclusion as to prejudice would not change. See Way, 760 So. 2d at 915 (noting that conducting a cumulative analysis would not change the Court's conclusion that the defendant failed to establish prejudice).
>
> (29 Fla. L. Weekly at S180)

In this latest appeal, case number SC01-1619, in which this Court denied rehearing on April 22, 2004, appellant renewed his assertion about the prosecutor's undisclosed memoranda regarding Kathy Stevens (see Tompkins Initial Brief at pages 63-66 in case number SC01-1619).

(2) Barbara DeCarr: Similarly, appellant again repeats, without adding anything new, his challenge to the testimony of Barbara DeCarr; he again argues as he did in pages 35-41 of his brief in case number SC01-1619 that the now-legible copy of a police report that Tompkins had in the 1989 postconviction proceeding impeaches Mrs. DeCarr. This Court's recent

disposition of his argument regarding Mrs. DeCarr need not be revisited:

> We also agree with the trial court's conclusion that the March 24, 1983, police report was not withheld by the State. As the trial court noted, "[d]uring argument, defense counsel conceded that he had obtained a copy of . . . [the March 24] report in 1989, however, he was unable to read it." Because defense counsel knew of the report and could have requested a legible copy, a Brady violation is conclusively refuted. Cf. Way, 760 So. 2d at 911-12 (noting that evidence is not "suppressed" where the defendant was aware of the exculpatory information).
>
> (29 Fla. L. Weekly at S179)

This Court added in its most recent decision:

> Tompkins also argues that a July 28, 1983, report contains an account of a phone call from Barbara DeCarr that contradicts her trial testimony. We disagree. In the phone call, Ms. DeCarr stated that she reported that Lisa ran away on March 24, 1983, and that she thought Lisa might be with Jessie. At trial, Ms. DeCarr never stated that she did not, at first, believe that Lisa ran away. In fact, Ms. DeCarr testified that after Tompkins told her Lisa ran away, she called the police. She also testified that she contacted Child Search of Florida and that prior to May 1984 she refused to suspect that Tompkins was involved in Lisa's disappearance. Accordingly, the record conclusively refutes Tompkins' claim that the July 28 report is material evidence because the report would not have impeached Ms. DeCarr's trial testimony. Compare Cardona, 826 So. 2d at 981 (concluding that withheld impeachment evidence regarding the State's key witness was of such a degree that it "could reasonably be taken to put the whole case in

> such a different light as to undermine the confidence in the verdict").
>
> (29 Fla. L. Weekly at S179)

As noted above, this Court has concluded that even engaging in a cumulative analysis and considering the undisclosed, favorable documents in conjunction with the claims raised in the first motion for postconviction relief, the conclusion as to prejudice would not change. 29 Fla. L. Weekly at S180.

Tompkins repeats his reliance on the police report of the Maureen Sweeny interview in the June 8, 1984 police report, but this Court addressed and disposed of the claim:

> We reject this argument for several reasons. First, as previously noted, Chancey did not testify at trial. Second, although Tompkins appears to assume that Sweeny's information was gained from Barbara DeCarr and Tompkins, the report does not indicate who told Sweeny about the version of the events she gave to the police. Third, the fact that Lisa DeCarr's brother and boyfriend went to look for her does not shed any new light on her disappearance because it is clear from the record that Lisa was originally classified as a runaway. Lastly, other than conclusory statements, Tompkins provides no evidence or argument to support his claims of an unreliable investigation by police. Therefore, the only part of the June 8, 1984, report that is even conceivably favorable to Tompkins is a statement made by Sweeny's fiancé, Mike Glen Willis, that includes an account of the events on the day Lisa disappeared that is inconsistent with Barbara DeCarr's trial testimony. However, this one piece of undisclosed inconsistent information, even taken together with any other favorable evidence the State may have failed to disclose to Tompkins, does not rise to the level necessary to undermine our

> confidence in the verdict in this case. (29 Fla. L. Weekly at S179)

Appellant's mere attempt to repeat what has been considered and rejected does not warrant continued and unending review of such matters. The Davis affidavit neither adds to nor detracts from Mrs. DeCarr's testimony.

(3) Kenneth Turco: Appellant here merely repeats the argument raised in pages 66-68 of his brief in case number SC01-1619 that there was an undisclosed deal with witness Kenneth Turco. This Court summarily disposed of his challenge:

> Further, Tompkins fails to allege any basis to establish that Stevens or Turco perjured themselves at his trial. Accordingly, we find no error in the trial courts summary denial of this claim. (29 Fla. L. Weekly at S179)

Appellant's repeated effort to relitigate what has already been considered and rejected, e.g., the previously considered exhibits of what some witnesses hypothesize when Lisa was last seen alive or what her clothing was, need not be revisited. This Court considered appellant's claims on the first postconviction motion and denial.[4] Tompkins v. Dugger, 549 So.

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[4]Appellant continues to rely on the self-serving testimony of his mother, Gladys Staley, who testified at the 1989 evidentiary hearing. Both this Court and the federal courts were exposed to and had the opportunity to consider her testimony; it need not be reconsidered. Appellee notes that trial counsel Hernandez testified he did not recall any mention to him by Staley that she was sure of the date when

2d 1370 (Fla. 1989). The federal courts have considered Tompkins' claims. Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999). And this Court has reviewed and denied relief on appellant's successive motion to vacate. Tompkins v. State, --- So. 2d ---, 29 Fla. L. Weekly S177 (Fla. April 22, 2004). Mr. Turco's testimony at trial that Tompkins admitted to him in the county jail that he tried to force himself on Lisa, strangled her and buried her under the house (DAR 309-310) remains undisturbed by Mr. Davis' affidavit.

(4) No further repetitious review is demanded. Appellant's continued assertion suggesting that the body found buried under the house is not Lisa DeCarr's is more than meritless. As stated by the Court of Appeals:

> 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.
>
> (emphasis supplied)
> (193 F.3d at 1342)

(5) Other suspects: There is no basis for this Court to revisit appellant's argument about other suspects, a contention

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she saw the girl getting in the car (1PCR I, E.H. 122) and that family members' allegations now were self-serving (1PCR I, 124). Additionally, in the state's response to discovery given to trial defense counsel, Gladys Staley when interviewed on July 9, 1984, stated 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, 511).

this Court has only days ago rejected. Tompkins again alludes to lead sheets or police reports about McKelvin, about Jessie Albach and Lisa DeCarr being friends, about interviews or reports of W.H. Graham and the "Naked City" club. This Court disposed of these matters in the April 22, 2004 decision:

> The Albach documents contain statements regarding Lisa DeCarr and provide information about a W.H. Graham, a person who Tompkins apparently claims is another likely suspect. However, other than the fact that Jessie and Lisa were friends, there is no indication in these reports that Lisa ever had contact with W.H. Graham. Further, the statements about Lisa are general--that Lisa was missing and was friends with Jessie. Thus, these files do not provide the same type of information that this Court concluded was favorable to the defendant in Rogers.
>
> (29 Fla. L. Weekly at S179)
>
> * * * *
>
> Finally, we conclude that as to Burke's lead sheets, prejudice is conclusively refuted by the record. Tompkins contends that the lead sheets show that Burke spoke with Lisa's boyfriend, Junior Davis, and had Tompkins known this he would have ascertained whether Davis told police about meeting Stevens at the corner store on the day of Lisa's disappearance. Tompkins also asserts that the lead sheets indicate the true identity of a Bob McKelvin, who allegedly attempted to solicit Lisa. However, the record shows that defense counsel was aware of both Junior Davis and Bob McKelvin during trial. Defense counsel asked Stevens on cross-examination about her encounter with Davis at the corner store. Defense counsel also questioned both Detective Burke and Barbara DeCarr about McKelvin. Detective Burke testified that he

> could not recall hearing the name McKelvin but he was aware of a neighbor who made sexual advances towards Lisa. Barbara DeCarr testified that McKelvin did proposition her daughter.
>
> (29 Fla. L. Weekly at S179)

Since this Court has considered and rejected the very claims appellant now repeatedly presents again, review and relief should be denied. Now as on April 22, 2004, the undisclosed documents are not Brady material because they are neither favorable to Tompkins nor suppressed, or Tompkins has not demonstrated that he was prejudiced by the lack of disclosure. Even with a cumulative analysis in conjunction with the claims raised in the prior motion for postconviction relief "our conclusion as to prejudice would not change." 29 Fla. L. Weekly S177. See also Way v. State, 760 So. 2d 903 (Fla. 2000).

This Court should deny all relief.

ISSUE IV

THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR DNA TESTING.

In his Motion for DNA Testing filed in the lower court on February 5, 2003, Tompkins acknowledged that in March of 2001 he had requested DNA testing, that the trial court had denied it and that after the lower court had entered an order granting resentencing, both parties appealed. Tompkins asserted that the FBI lab report indicated that several hairs discovered with Lisa DeCarr's body are suitable for possible future comparison and Tompkins also requested that DNA testing of the remains found buried under the house in a shallow grave be done. (R I, 5-10; R II, 222-227).

The lower court dismissed this renewed Motion for DNA Testing noting that it had been the subject matter of Tompkins' prior round of collateral litigation in that court and that the parties had appealed to this Court. In Tompkins' initial brief (in Argument II, pp. 85-92) in Tompkins v. State, Florida Supreme Court case number SC01-1619 he argued that "if DNA from someone other than Wayne Tompkins was found present along with material possessing the DNA of Lisa DeCarr, that would identify an assailant other than Wayne Tompkins and would exonerate him." (Appellant's Initial Brief, p. 90). Similarly, in Tompkins' Cross Answer/Reply Brief filed in August 2002, he argued at page 32:

> Mr. Tompkins has repeatedly argued that the identity of the victim is not the only issue to be resolved by DNA testing. Obviously, if the DNA testing of the bone, hair or other organic material established that the decedent was not Lisa DeCarr, Mr. Tompkins would be exonerated. But, if DNA from someone other than Wayne Tompkins was found present along with material possessing the DNA of Lisa DeCarr, that would identify an assailant other than Wayne Tompkins and would exonerate him as well.

Tompkins added at page 34 of that pleading: "If this Court were to determine that Mr. Tompkins' showing in support of DNA testing were in some way inadequate, this Court should nonetheless

remand to permit Mr. Tompkins' an opportunity to make the requisite showing."[5]

Following oral argument and due deliberation on the issues raised, this Court issued its decision on April 22, 2004. Tompkins v. State, --- So. 2d ---, 29 Fla. L. Weekly S177 (Fla., Apr. 22, 2004):

II. DNA TESTING

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[5]To the extent that Tompkins seeks testing not only of the contaminated debris which both the circuit court and this Court rejected on the last appeal, but also of the remains provided to the DeCarr family twenty years ago, this Court in Hitchcock v. State, 866 So. 2d 23 (Fla. 2004) noted that "Rule 3.853 is not intended to be a fishing expedition." Id. at 27. Certainly, F.S. 925.11 and Rule 3.853 need not be construed as requiring carte blanche exhumations merely to satisfy collateral counsel's insinuations that Mrs. DeCarr might be a proper suspect (R VII, 161 in case no SC01-1619), and that the victim is not Lisa DeCarr, yielding the conclusion that perhaps that the mother killed someone else who had Lisa's robe, jewelry and occluded tooth.

On April 10, 2001, Tompkins filed a motion for DNA testing, seeking to have several pieces of evidence tested, including hair samples discovered with Lisa's remains at the grave site. A hearing was held on April 11, 2001, at which Tompkins argued that since the time this evidence was originally submitted for testing by the State in 1984, mitochondrial DNA testing had developed and would now allow DNA to be extracted from the hair samples. [FN16] After the trial court orally denied the motion at the hearing, the State revealed that it could not locate the hair samples and Tompkins was permitted to question several witnesses regarding this missing evidence. [FN17]

In an order dated April 12, 2001, the trial court denied Tompkins' motion, finding that the evidence sought to be tested had been available since 1984, that mitochondrial DNA testing had been available in judicial proceedings since 1996, and that mitochondrial DNA testing had been used in the Thirteenth Judicial Circuit in 1999. The trial court also found that Tompkins failed to set forth any compelling reasons for the DNA testing and that mitochondrial DNA testing would not prove or disprove any material issues in the case.

The trial court again denied Tompkins' request for DNA testing in its order denying Tompkins' motion for postconviction relief and in its order denying Tompkins' motion for rehearing. In the latter order, entered on June 15, 2001, the trial court expanded on its reason for denying the motion for DNA testing in light of the enactment of section 925.11, Florida Statutes (2002).

Section 925.11 requires that the trial court make the following findings after the defendant has filed a sufficient petition and the State has responded:

1. Whether the sentenced defendant

> has shown that the physical evidence that may contain DNA still exists.
>
> 2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and
>
> 3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

§ 925.11(2)(f), Fla. Stat. (2002). In this case, the trial court rejected Tompkins' claim that there is an issue of the identity of the remains, noting that the Eleventh Circuit Court of Appeal had addressed this issue and found Tompkins' argument that " 'there was very little evidence of the identity of the deceased' ... preposterous." Tompkins, 193 F.3d at 1342. The trial court further found that any samples of DNA obtained from the hairs, bone fragments, robe or pajamas would be "unreliably contaminated due to the location of the remains and would not prove [Tompkins'] innocence or result in a mitigation of sentence."

We agree with both of the trial court's findings. Given the evidence presented at trial regarding the identity of the remains [FN18] and the location of the remains, we conclude that even if the DNA analysis indicated a source other than Lisa DeCarr or Tompkins, there is no reasonable probability that Tompkins would have been acquitted or received a life sentence. *See* § 925.11(2)(f), Fla. Stat. (2002); Fla. R.Crim. P. 3.853; *see also* King v. State, 808 So.2d 1237, 1247-49 (Fla.2002) (affirming trial court's denial of

> defendant's motion for mitochondrial DNA testing, where trial court found that even if test showed that hair found on victim's body did not come from victim or defendant, there was no reasonable probability that defendant would have been acquitted or have received a life sentence). Accordingly, we affirm the trial court's denial of Tompkins' motion for DNA testing.
>
> In a related claim, Tompkins argues that the trial court erred in finding that there was no bad faith on the part of the State regarding the loss of hair samples discovered with Lisa's remains. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless 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 also* King, 808 So.2d at 1242-43 (approving trial court's application of Youngblood in evaluating defendant's claim regarding State's destruction of evidence). In light of our conclusion that the trial court did not err in denying Tompkins' motion for DNA testing, we conclude that this issue is moot.

Appellant presents no reasonable or persuasive argument why this Court's prior rejection of his request for DNA testing should be reconsidered or re-reviewed again either by the trial court or this Court. This Court agreed with the prior courts that there remains no legitimate issue as to the identity of the victim and that samples now would be unreliably contaminated. This Court concluded:

> Given the evidence presented at trial regarding the identity of the remains and the location of the remains, we conclude that even if the DNA analysis indicated a source other than Lisa DeCarr or Tompkins,

> there is no reasonable probability that Tompkins would have been acquitted or received a life sentence. *See* § 925.11(2)(f), Fla. Stat. (2002); Fla. R.Crim. P. 3.853
>
> (29 Fla. L. Weekly at S180)

This Court should deem appellant's repeated requests for DNA testing or examining the remains -- after specific rejection by this Court -- to be procedurally barred and abusive. See also Hitchcock v. State, 866 So. 2d 23, 27-28 (Fla. 2004), wherein this Court approved the trial court's determination that the defendant failed to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate defendant or mitigate his sentence:

> The clear requirement of these provisions is that a movant, in pleading the requirements of rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. In order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. Here, Hitchcock failed to demonstrate such a nexus.
>
> With respect to the items listed in Hitchcock's motion, only a general reference and identification of the type of item was given, without any other relevant information. [FN2] Rule 3.853 is not intended to be a fishing expedition. Rather, it is intended to provide a defendant with an opportunity for DNA testing of material not previously tested or of previously tested material when the results of previous DNA testing were inconclusive and subsequent

> developments in DNA testing techniques would likely provide a definitive result, and when a motion for such testing provides a basis upon which a trial court can make the findings expressly set forth in subdivision (c)(5) of rule 3.853. It was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, "*how* the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or ... will mitigate the sentence received by the movant for that crime." He has not met that burden. Therefore, we find no error in the circuit court ruling that "the motion fail[ed] to set forth the evidentiary value of the evidence to be tested or explain how the results would exonerate Defendant or mitigate his sentence."

While appellant acknowledges at page 72 of his brief that this Court addressed his request for DNA testing in Tompkins v. State, 29 Fla. L. Weekly S177 (Fla., Apr. 22, 2004), he does not comment of this Court's rejection of the claim which cited and applied both F.S. 925.11(2)(f) and Rule 3.853. He argues, apparently, that both the lower court's prior denial of the request for DNA testing and this Court's decision of October 9, 2003 can be deemed a nullity because his request in 2001 was made before the statute and rule had been adopted.[6] The record reflects appellant's requests for DNA testing in April 2001 in the lower court and on June 15, 2001 Judge Perry's Order Denying

[6]F.S. 925.11 became effective October 1, 2001. Rule 3.853 was adopted on October 18, 2001. Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853, 807 So. 2d 633 (Fla. 2001).

Defendant's Motion for Rehearing addressed the effect of F.S. 925.11, which had recently been passed by the Legislature and signed by the Governor (2PCR, Vol. V, R 757-760). Appellant has no legitimate argument that he's had "no opportunity to be heard" since he argued in his Motion for Rehearing (on the prior motion) on May 7, 2001 (and adding in Attachment B) the new legislation; he contended that "This legislation in effect will statutorily overturn this Court's ruling denying DNA testing" (2PCR, Vol. V, R 685-686, 723-728). Since both the circuit court and this Court have now determined that the statute and rule provide no basis for DNA testing under the facts of this case, no valid purpose can be served simply by remanding the case to the lower court to repeat what both courts' analyses have concluded.

Florida Statute 925.11 has not created a new right that did not previously exist; the courts previously were addressing in postconviction vehicles assertions that DNA testing might be relevant in determining the guilt or innocence of the defendant. See, e.g., Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995) (noting that DNA typing was recognized in this state as a valid test in Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988)); Happ v. Moore, 784 So. 2d 1091, 1094 n.4 (Fla. 2001)(noting that this Court in September 2000 had allowed the defendant to amend his 3.850 motion on four issues, one of which was whether DNA

demonstrated Happ's innocence); Sireci v. State, 773 So. 2d 34 (Fla. 2000). All that F.S. 925.11 and the accompanying Rule 3.853 did was provide a procedural mechanism with guidelines to govern the presentation of DNA claims.

No right has been taken away from appellant; rather, this Court has merely determined that under the facts of this case, which include the location and circumstances of the discovery of the victim's body buried under the house, appellant's request for further testing is appropriately denied where there is no reasonable probability Tompkins would have been acquitted or received a life sentence.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Special Assistant CCRC-South, 141 N.E. 30th Street, Wilton Manors, Florida 33334, this ____ day of May, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

WAYNE TOMPKINS,

Appellant,

v. CASE NO. SC03-1902

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

Bryan v. State, 743 So. 2d 508 (Fla. 1999)

ANTHONY BRADEN BRYAN, Appellant, v. STATE OF FLORIDA, Appellee.

CASE NO. 96,822

SUPREME COURT OF FLORIDA

743 So. 2d 508; 1999 Fla. LEXIS 1963

October 26, 1999, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

JUDGES: HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

OPINION:

Appellant filed a successive motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court while that court's order on the previous motion was pending review before this Court. The trial court dismissed the motion based on lack of jurisdiction pending this Court's review of the previous order. Appellant then filed a notice of appeal to seek review of the dismissal order. We affirm the trial court's dismissal based on lack of jurisdiction. See *State v. Meneses, 392 So. 2d 905 (Fla. 1981).*

HARDING, C.J., and SHAW, WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.