IN THE SUPREME COURT OF FLORIDA
CASE NO. 03-1902

WAYNE TOMPKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's dismissal of a post-conviction motion on the basis that the court lacked jurisdiction. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

“1PC-R.” -- record on first Rule 3.850 appeal to this Court;

"2PC-R." -- record on second 3.850 appeal to this Court;

“3PC-R.” -- recoRd on this 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Tompkins has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Tompkins, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

	PAGE(S)
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
STANDARD OF REVIEW	5
ARGUMENT	6
ARGUMENT I THIS COURT SHOULD DIRECT THE CIRCUIT COURT TO CONSIDER AND RULE ON MR. TOMPKINS' RULE 3.850 MOTION AND ON HIS MOTION FOR DNA TESTING	6
ARGUMENT II THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DISMISSING MR. TOMPKINS' RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING	12

ARGUMENT III
MR. TOMPKINS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE 21

A. THE AFFIDAVIT OF JAMES M. DAVIS, JR., ESTABLISHES THAT MR. TOMPKINS IS ENTITLED TO A NEW TRIAL 22

B. THE CLAIMS BASED UPON THE AFFIDAVIT OF JAMES M. DAVIS, JR., ARE BEFORE THE COURT ON THE MERITS 28

C. CUMULATIVE CONSIDERATION OF THE EVIDENCE INTRODUCED AT TRIAL AND IN POST-CONVICTION ESTABLISHES THAT A NEW TRIAL IS REQUIRED 30

ARGUMENT IV
THE CIRCUIT COURT ERRED IN DENYING MR. TOMPKINS' MOTION FOR DNA TESTING 71

CONCLUSION 75

CERTIFICATE OF SERVICE 76

CERTIFICATE OF COMPLIANCE 77

TABLE OF AUTHORITIES

PAGE(S)

CASES

Arbelaez v. State,
775 So. 2d 909 (Fla. 2000) 13

Baber v. State,
696 So. 2d 490 (Fla. 4th DCA 1997) 10

Banks v. Dretke,
124 S.Ct. 1256 (2004) 19

Bates v. State,
704 So. 2d 562 (Fla. 1st DCA 1997) 10

Berger v. United States,
295 U.S. 78 (1935) 25

Borland v. State,
848 So.2d 1288 (Fla. 2003) 6, 74

Brady v. Maryland,
373 U.S. 83 (1963) 4, 16

Braxton v. State,
568 So. 2d 1003 (Fla. 2d DCA 1990) 8

Bryan v. State,
743 So. 2d 508 (Fla. 1999) 8

Card v. State,
652 So. 2d 344 (Fla. 1995) 13

Cardona v. State,
826 So.2d 968 (Fla. 2002) 27

PAGE(S)

Davis v. Zant,
36 F. 3d 1538 (11th Cir. 1994) 36

Evitts v. Lucey,
469 U.S. 387 (1985) 75

Francois v. Klein,
431 So. 2d 165 (Fla. 1983) 9

Freeman v. State,
761 So. 2d 1055 (Fla. 2000) 74

Gaskin v. State,
737 So. 2d 509 (Fla. 1999) 13, 74

Gawronski v. State,
801 So. 2d 211 (Fla. 2d DCA 2001) 10

Giglio v. United States,
150 U.S. 150 (1972) 4, 16

Gobie v. State,
188 So. 2d 34 (Fla. 3d DCA 1966) 8

Gorham v. State,
597 So. 2d 782 (Fla. 1992) 38

Guzman v. State,
28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993
at 18 (Fla. 2003) 27

Jencks v. United States,
353 U.S. 657 (1957) 35

PAGE(S)

Jones v. State,
709 So.2d 512 (Fla. 1998) 29

Kimmel v. State,
629 So. 2d 1110 (Fla. 1st DCA 1994) 11

Knighten v. State,
829 So.2d 249 (Fla. 2nd DCA 2002) 74, 75

Kyles v. Whitley,
514 U.S. 419 (1995) 24, 73

Lee v. State,
392 So. 2d 913 (Fla. 1st DCA 1980) 8

Lightbourne v. State,
742 So. 238 (Fla. 1999) 29, 73

Lindsay v. State,
842 So. 2d 1057 (Fla. 4th DCA 2003) 11

Maharaj v. State,
684 So. 2d 726 (Fla. 1996) 6, 13

Manual v. State,
28 Fla. L. Weekly D1399 (Fla. 2nd DCA June 13, 2003) 75

McFarland v. State,
808 So. 2d 274 (Fla. 1st DCA 2002) 7

Mitchell v. State,
846 So. 2d 559 (Fla. 4th DCA 2003) 10

Montague v. State,
710 So. 2d 228 (Fla. 2d DCA 1998) 10

PAGE(S)

Newberry v. State,
827 So. 2d 387 (Fla. 4th DCA 2002) 11

Patton v. State,
784 So. 2d 380 (Fla. 2000) 13

Provenzano v. State,
616 So.2d 428 (Fla. 1993) 29

Riley v. State,
28 Fla. L. Weekly D1790 (Fla. 2nd DCA July 30, 2003) 75

Rogers v. State,
782 So. 2d 373 (Fla. 2001) 71

Rogers v. State,
783 So.2d 980 (Fla. 2001) 24

Roman v. State,
528 So. 2d 1169 (Fla. 1988) 38

Spencer v. State,
842 So. 2d 52 (Fla. 2003) 74

State v. Gunsby,
670 So.2d 920 (Fla. 1996) 27, 29

State v. Menses,
392 So.2d 905 (Fla. 1981) 2, 4, 7

State v. Sireci,
502 So. 2d 1221 (Fla. 1987) 8

Stephens v. State,
748 So. 2d 1028 (Fla. 1999) 6

PAGE(S)

Strickland v. Washington,
466 U.S. 668 (1984) 4, 16

Strickler v. Greene,
527 U.S. 263 (1999) 19

Tompkins v. Dugger,
549 So. 2d 1370 (Fla. 1989) 1

Tompkins v. Moore,
193 F.3d 1327 (11th Cir. 1999),
cert. denied, 121 S.Ct. 149 (2000) 1

Tompkins v. State,
28 Fla. L. Weekly S767 (Fla. Oct. 9, 2003) 2, 72

Tompkins v. State,
502 So. 2d 415 (Fla.),
cert. denied, 483 U.S. 1033 (1987) 1

Uniited States v. Agurs,
427 U.S. 97 (1976) 27

United States v. Bagley,
473 U.S. 667 (1985) 27

Washington v. State,
823 So. 2d 248 (Fla. 4th DCA 2002) 8

Way v. State,
760 So.2d 903 (Fla. 2000) 29

White v. State,
855 So. 2d 723 (Fla. 3d DCA 2003) 10

PAGE(S)

Young v. State,
739 So.2d 553 (Fla. 1999) 73

Zollman v. State,
820 So.2d 1059 (Fla. 2nd DCA 2002) 71, 72

STATEMENT OF THE CASE

Mr. Tompkins was indicted for first-degree murder and pled not guilty. Trial commenced September 16, 1983, and a jury found Mr. Tompkins guilty (R. 401). Following a penalty phase, the jury recommended the death penalty, and the judge imposed a sentence of death (R. 678-81). The conviction and sentence were affirmed. Tompkins v. State, 502 So. 2d 415 (Fla.), cert. denied, 483 U.S. 1033 (1987). After a death warrant was signed, Mr. Tompkins filed a post-conviction motion, and the circuit court held an evidentiary hearing. Though the circuit court found trial counsel's performance was deficient regarding the penalty phase, the court denied relief. This Court stayed the execution and later affirmed the denial of relief. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). After a second death warrant, Mr. Tompkins filed a federal habeas petition, and the federal district court stayed the execution. An amended petition was subsequently filed and denied. On appeal, the Eleventh Circuit affirmed. Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999), *cert. denied*, 121 S.Ct. 149 (2000).

After the signing of a third death warrant Mr. Tompkins filed a number of motions, including a Motion for DNA Testing (2PC-R. 31-56), a Motion to Compel Production of Public Records, and a second Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850

(2PC-R. 182-307). The lower court took evidence on various of these motions, including the DNA motion (2PC-R. 4/11/01 Transcript, pp. 95 *et. seq.*), as it had been alleged that the items sought to be tested had been lost. The circuit court heard argument and granted an evidentiary hearing on Claim V of the Rule 3.850 motion pertaining to the issue of the sentencing judge's error in failing to independently weigh aggravating and mitigating circumstances and in failing to disclose to Mr. Tompkins the fact that the State prepared the findings in support of the death sentence. After the evidentiary hearing, the court granted sentencing relief on Claim V and vacated Mr. Tompkins' death sentence (2PC-R. 433 *et. seq.*). The circuit court denied all other claims without an evidentiary hearing (Id.). Mr. Tompkins appealed the denial of these claims, and the State cross-appealed the lower court's grant of sentencing relief. This Court affirmed the circuit court's denial of some claims and reversed that court's grant of sentencing relief. Tompkins v. State, 28 Fla. L. Weekly S767 (Fla. Oct. 9, 2003).

In August of 2002, while Mr. Tompkins' appeal was pending, Mr. Tompkins filed a motion to relinquish jurisdiction under State v. Menses, 392 So.2d 905 (Fla. 1981), with this Court in order to provide the circuit court with jurisdiction to consider a claim based upon evidence Mr. Tompkins' counsel had discovered as a result of records only disclosed by the State in 2001 and 2002. This Court denied

Mr. Tompkins' motion.

Subsequently, Mr. Tompkins' counsel appeared before this Court in another case, Duest v. State, Case No. SC00-2366. During the oral argument, Justice Wells suggested that the proper procedure for counsel where new evidence is found while a case is pending on appeal is for counsel to go ahead and file a new motion to vacate in circuit court. As a result, Mr. Tompkins' counsel filed a Rule 3.850 motion based upon the new evidence even though an appeal of the prior motion to vacate was still pending in this Court. Mr. Tompkins' counsel simultaneously filed a Rule 3.853 motion seeking to have DNA testing conducted on the remains that had been introduced into evidence as those of Lisa DeCarr. Given that the previous request had been made and denied prior to the promulgation of Rule 3.853, Fla. R. Crim. P., Mr. Tompkins wished to file in order to guarantee invocation of the rule within the two year window then permitted.

The circuit entered an order dismissing both motions on August 22, 2003, on the basis that it lacked jurisdiction. Mr. Tompkins filed a motion for rehearing with the circuit court pointing out that the circuit court lacked jurisdiction to dismiss the motion. Mr. Tompkins timely filed a notice of appeal.

SUMMARY OF ARGUMENT

1. This Court should direct the circuit court to consider and rule on Mr.

Tompkins' Rule 3.850 and Rule 3.853 motions. The circuit court denied both motions on the basis of a lack of jurisdiction because the denial of similar motions is pending on appeal before this Court. Under State v. Meneses, 392 So. 2d 905 (Fla. 1981), the circuit court lacked jurisdiction to dismiss Mr. Tompkins' Rule 3.850 and Rule 3.853 motions. The dismissal must be reversed.

2. The circuit court erred in denying Mr. Tompkins' Rule 3.850 motion without an evidentiary hearing. The motion alleged facts regarding both his substantive claim and his diligence in pursuing the evidence giving rise to that claim. These facts are not conclusively rebutted by the record. Accepting these facts as true, as is required, Mr. Tompkins is entitled to an evidentiary hearing.

3. One of the "three key witnesses" at Mr. Tompkins' trial was Kathy Stevens, who testified that on the day Lisa DeCarr disappeared, she saw Mr. Tompkins assaulting Lisa DeCarr and that she told Lisa DeCarr's boyfriend about the assault. When Mr. Tompkins' counsel finally located the boyfriend, James M. Davis, Jr., in 2002, Mr. Davis attested in a sworn affidavit that he did not see Kathy Stevens on the day Lisa DeCarr disappeared and that Kathy Stevens did not tell him about Mr. Tompkins assaulting Lisa DeCarr. This evidence substantially impeaches Stevens' testimony and gives rise to claims under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 150 U.S. 150 (1972), and Strickland v.

Washington, 466 U.S. 668 (1984). Stevens' testimony was essential to the State's case. Under either the "reasonable probability" standard of Brady and Strickland v. Washington or the "no effect" standard of Giglio, Mr. Davis's affidavit establishes that Mr. Tompkins is entitled to a new trial. Further, when the evidence from Mr. Davis is considered cumulatively with the trial evidence and the evidence previously presented in postconviction, Mr. Tompkins' entitlement to a new trial cannot be questioned.

4. Under Rule 3.853, Fla. R. Crim. P., Mr. Tompkins is entitled to DNA testing of the skeletal remains identified at trial as Lisa DeCarr and of hairs found with those remains. In his Rule 3.853 motion, Mr. Tompkins alleged that he would be exonerated by this DNA testing because testing of the bones would establish that they were not Lisa DeCarr's bones and because testing of the hairs would establish that the hairs did not belong to either Mr. Tompkins or Lisa DeCarr. Mr. Tompkins' allegations satisfied the pleading requirements of Rule 3.853 and must be accepted as true. Denying Mr. Tompkins DNA testing under Rule 3.853 would violate due process.

STANDARD OF REVIEW

As to Argument I, the issue presents a mixed question of law and fact requiring *de novo* review, giving deference only to any circuit court factfindings.

Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). The only possible "factfinding" made by the circuit court was that the motions presented issues similar to the issues presented in the appeal pending before this Court.

Arguments II, III, and IV present questions of law requiring *de novo* review. Stevens. Since no evidentiary development was permitted, Mr. Tompkins' allegations must be accepted as true. Borland v. State, 848 So.2d 1288, 1290 (Fla. 2003); Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

ARGUMENT

ARGUMENT I

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

The only issues properly before this Court in this appeal are whether the circuit court correctly dismissed Mr. Tompkins' Rule 3.850 and DNA motions on the basis of a lack of jurisdiction and whether the circuit court should be required to consider and rule upon the substance of those motions.[1] At the time Mr.

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[1]Although these are the only issues properly presented in this appeal, Mr. Tompkins is alternatively presenting issues regarding the substance of the Rule 3.850 motion in an abundance of caution. Mr. Tompkins is sentenced to death. The result of this appeal may determine whether he lives or dies. Mr. Tompkins does not wish to risk being accused of waiving the claims in his motion.

Tompkins filed the motions at issue in this appeal, Mr. Tompkins' and the State's appeals of the rulings on the prior Rule 3.850 motion were pending before this Court. The circuit court dismissed Mr. Tompkins' motions, ruling that it lacked jurisdiction because the previous Rule 3.850 motion was on appeal in this Court (3PC-R. 2-3, citing McFarland v. State, 808 So. 2d 274 (Fla. 1st DCA 2002)).[2]

In State v. Meneses, 392 So. 2d 905 (Fla. 1981), this Court held, "while appeal proceedings or certiorari proceedings are pending in an appellate court, the trial court is without jurisdiction to entertain a motion to vacate." Meneses, 392 So. 2d at 907. The Court also stated that its holding "does not preclude defendant's seeking an order from the appellate court to temporarily relinquish jurisdiction to the trial court for the purpose of filing and being heard on a motion to vacate prior to the appellate court's disposition of the case." Id. While the decision whether or not to grant relinquishment is within the appellate court's discretion, "denial of the request to relinquish . . . is not a ruling on the merits of the motion to vacate and will not prevent a subsequent filing of a motion to vacate with the trial court at the conclusion of the proceedings in the appellate court." Id.

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[2]The circuit court did not explain how it had jurisdiction to dismiss the motions if it lacked jurisdiction during the pendency of the appeal of the prior Rule 3.850 motion.

This Court has subsequently explained:

> The facts giving rise to the claim herein first became known to Sireci during the pendency of the appeal from the denial of the initial 3.850 motion. As soon as the facts were available, Sireci moved the Supreme Court to relinquish jurisdiction of his case to the circuit court in order to allow the facts and any claim derived from them to be ruled upon in the circuit court. This Court denied Sireci's motion. As Sireci points out, a denial of a request to relinquish jurisdiction to the trial court is not a ruling on the merits. State v. Meneses, 392 So. 2d 905 (Fla. 1981).

State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

Although Meneses involved the pendency of direct appeal proceedings, this Court has applied its holding to post-conviction appeals, ruling that when an appeal of the denial of a Rule 3.850 motion is pending, a circuit court lacks jurisdiction to entertain another Rule 3.850 motion. Bryan v. State, 743 So. 2d 508 (Fla. 1999); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). Florida's District Courts of Appeal likewise follow the Meneses rule when a post-conviction appeal, rather than a direct appeal, is pending. Washington v. State, 823 So. 2d 248, 249 (Fla. 4th DCA 2002); Braxton v. State, 568 So. 2d 1003 (Fla. 2d DCA 1990); Lee v. State, 392 So. 2d 913, 914 (Fla. 1st DCA 1980); Gobie v. State, 188 So. 2d 34, 34-35 (Fla. 3d DCA 1966).

The basis of the Meneses rule is that "a trial court has no power to rule on an issue which would interfere with the authority of the appellate court." Washington,

823 So. 2d at 249. This foundation has given rise to another group of cases in which the issues presented in the pending appeal are different from the issues presented in the motion or petition filed in the circuit court.

This Court has relied on this reasoning in one capital case. Francois v. Klein, 431 So. 2d 165 (Fla. 1983). There, the defendant filed a Rule 3.850 motion in the circuit court, alleging that he had received ineffective assistance of counsel at trial. While that motion was pending in the circuit court, the defendant filed a habeas corpus petition in this Court, alleging that he received ineffective assistance of counsel on direct appeal. After the defendant filed the habeas corpus petition, the circuit court dismissed the Rule 3.850 motion on the ground that it lacked jurisdiction while the habeas corpus petition was pending in this Court. The defendant sought a writ of mandamus from this Court to require the circuit court to consider the Rule 3.850 motion. This Court granted the writ of mandamus. The Court distinguished Meneses, reasoning that the pendency of the habeas corpus petition did not divest the circuit court of jurisdiction over the Rule 3.850 motion because the habeas corpus petition alleged the ineffectiveness of appellate counsel and the Rule 3.850 motion alleged the ineffectiveness of trial counsel. The Court concluded, “Since the the two judicial attacks on petitioner’s convictions and sentences of death were thus separate and distinct, there was no danger, as there

was in Meneses, of conflicting and confusing rulings, by different courts on the same issues." Francois, 431 So. 2d at 166.

The District Courts of Appeal have followed Francois in several cases in which circuit courts had dismissed Rule 3.850 motions because habeas corpus petitions were pending in the appellate courts. White v. State, 855 So. 2d 723, 724 (Fla. 3d DCA 2003); Gawronski v. State, 801 So. 2d 211 (Fla. 2d DCA 2001); Baber v. State, 696 So. 2d 490, 491 (Fla. 4th DCA 1997). In these cases, the District Courts of Appeal remanded the cases in order for the circuit courts to consider the merits of the post-conviction motions, as this Court did in Francois. The District Courts of Appeal have also applied reasoning similar to that of Francois in numerous cases. For example, in Mitchell v. State, 846 So. 2d 559, 561 (Fla. 4th DCA 2003), the Fourth District ruled that the circuit court erred in dismissing a Rule 3.850 motion challenging the defendant's conviction while an appeal on the defendant's resentencing was pending because "the issues [in the two proceedings] were entirely unrelated." In another case, the Second District ruled that the circuit court had jurisdiction to consider a motion Rule 3.800(a), Fla. R. Crim. P., although a Rule 3.850 appeal was pending in the appellate court because "the appeal of a postconviction motion will not deprive the trial court of jurisdiction in a subsequent motion unless the issues are similar." Montague v. State, 710 So.

2d 228, 229 (Fla. 2d DCA 1998), citing, Bates v. State, 704 So. 2d 562 (Fla. 1st DCA 1997). The First District Court of Appeal has also held that the Meneses rule does not automatically apply during the pendency of a post-conviction appeal to divest a circuit court of jurisdiction over another post-conviction motion. Kimmel v. State, 629 So. 2d 1110 (Fla. 1st DCA 1994). In Kimmel, the First District ruled that the pendency of a post-conviction appeal does not divest the circuit court of jurisdiction over another post-conviction motion "if the issues presented in a subsequent motion or petition are unrelated to those previously denied and which are then on appeal." 629 So. 2d at 1111. The Fourth District Court of Appeal has reached the same conclusion. Lindsay v. State, 842 So. 2d 1057, 1059 (Fla. 4th DCA 2003). The Fourth District has also relied upon this reasoning to hold that circuit courts have jurisdiction over motions for DNA testing filed under Rule 3.853, Fla. R. Crim. P., when a Rule 3.850 motion is pending on appeal. Newberry v. State, 827 So. 2d 387 (Fla. 4th DCA 2002). In all of these cases, as in Francois, the appellate courts directed the circuit courts to consider the merits of the new motions.

In McFarland v. State, cited by the circuit court in dismissing Mr. Tompkins' motions, the circuit court dismissed a Rule 3.850 motion which was filed while the appeal of a Rule 3.800(a) motion was pending on appeal. 808 So.

2d at 274. The district court stated, "While an appeal of a prior postconviction motion is pending, the trial court has no jurisdiction to rule on a subsequent post-conviction motion when the issues in the two motions are related."[3] Id. However, the district court reversed the dismissal specifically on the grounds that the issues in the two motions were "unrelated." Id.

Under either the Meneses or Francois lines of cases, Mr. Tompkins must be allowed to pursue his Rule 3.850 and DNA motions in the circuit court. Under Meneses, the circuit court lacked jurisdiction, and therefore, Mr. Tompkins' motions should not have been dismissed. Meneses, 392 So. 2d at 907. Under Francois, the circuit court was required to determine whether or not the issues presented in the motions were similar to those presented in Mr. Tompkins' pending appeal. If the issues are similar--as they plainly are and as the circuit court found--the circuit court was required to follow Meneses, and do nothing until the appeal that was pending before this Court was resolved. The order dismissing Mr. Tompkins' motions must be reversed.

ARGUMENT II

THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN

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[3]Logically it would seem that a court without jurisdiction does not have the jurisdiction to enter an order dismissing a properly filed motion for collateral relief.

DISMISSING MR. TOMPKINS' RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is oftstated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). *Accord* Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). In Mr. Tompkins' case, the lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Mr. Tompkins' diligence in attempting to unearth the new evidence.

Mr. Tompkins' Rule 3.850 motion pled facts regarding the merits of his claims and regarding his diligence which must be accepted as true. When these facts are accepted as true, it is clear that the files and records do not conclusively rebut Mr. Tompkins' claims and that an evidentiary hearing is required.

As the prosecutor said at trial and as this Court recognized on direct appeal, Mr. Tompkins' conviction and death sentence are entirely dependent upon the testimony of three witnesses. At trial, the prosecutor said that "the key testimony will come from three . . . witnesses"--Barbara DeCarr (Lisa DeCarr's mother), Kathy Stevens (Lisa DeCarr's best friend) and Kenneth Turco (a jailhouse snitch)--and that "[t]hose three will provide the overwhelming evidence" of Mr. Tompkins' guilt (R. 108). On direct appeal, this Court identified these witnesses as "the state's three key witnesses." Tompkins v. State, 502 So. 2d at 417.

The Rule 3.850 motion at issue in this appeal presents allegations raising constitutional issues regarding one of these "three key witnesses," Kathy Stevens. At trial, Stevens testified that on March 24, 1983, she went to Lisa DeCarr's house because "Lisa and me had made plans to run away" (R. 249). Stevens arrived between 6:00 and 6:20 a.m. (Id.). Lisa said she was not going to run away because she and her mother were "going to deal with it," and Stevens left (R. 250).

Stevens testified that she left her purse at the DeCarr house and went back

for it between 8:00 and 9:00 a.m, although it could have been after 9:00 a.m. (R. 251). When Stevens went to the front door of the house, she heard a "loud crash," and when she opened the front door, Stevens saw Lisa and Mr. Tompkins "struggling on the couch" (R. 252). Mr. Tompkins was on top of Lisa "trying to take her clothes off and that's about it" (R. 252). Lisa "asked me to call the police," and Stevens believed that Wayne yelled "get out" (R. 252-53). Stevens left, did not call the police, and instead "went up to the store" where she ran into Lisa's boyfriend (R. 254). Stevens told the boyfriend that she wanted to call the police, but she did not because "it was a little bit of being scared and not knowing what to expect" and Lisa's boyfriend "just walked away like it was nothing" (Id.). She then went to school because she did not want to get involved (R. 255).

Lisa DeCarr's boyfriend at the time of her disappearance was "Junior" Davis. After years of searching and after the State finally provided previously undisclosed documents about Davis in 2001 (see *infra*), Mr. Tompkins' counsel located "Junior" Davis in April of 2002. "Junior" Davis's full name is James M. Davis, Jr. Upon being contacted, Mr. Davis reported that he had been Lisa Decarr's boyfriend in March of 1983. In a sworn affidavit, Mr. Davis stated, "[t]he story of Kathy running into me at the store the day Lisa disappeared is not true. If anyone had told me that Wayne was attacking Lisa and she was screaming for

someone to call the police, I would have gone directly there" (Affidavit of James M. Davis, Jr., paragraph 6, 3PC-R. 260). Mr. Davis elaborated:

> If I thought there was anyway I could have helped [Lisa], I would have, especially if she were in trouble. This is why what Kathy said is not true. I never saw Kathy on the morning that Lisa disappeared, nor did Kathy ever tell me that she had just seen Lisa being attacked by Wayne. In fact, the first time I heard of anything having possibly happened to Lisa was when I heard on the radio she was missing.

(Affidavit of James M. Davis, Jr., paragraph 8, 3PC-R. 260).

The information provided by James M. Davis, Jr., establishes that Kathy Stevens' trial testimony was not truthful and is significant impeachment of that testimony.[4] This information gives rise to constitutional claims under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Strickland v. Washington, 466 U.S. 668 (1984). Kathy Stevens' trial testimony was essential to Mr. Tompkins' conviction and death sentence. The prosecutor relied upon Stevens' testimony to urge the jury to convict Mr. Tompkins, arguing, "[h]er testimony alone . . . convicts this man" (R. 346; see also R. 346-49, 360). The prosecutor relied upon Stevens' testimony to urge the jury to recommend a death sentence (R. 444-45). The trial judge relied upon Stevens' testimony to support the

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[4]When considered cumulatively with previous allegations showing Kathy Stevens' lack of credibility, there is no question that Mr. Tompkins has shown his entitlement to relief. See Argument III, *infra*.

"committed during a felony" aggravating circumstance (R. 679). On direct appeal, this Court relied upon Stevens' testimony to sustain Mr. Tompkins' conviction and death sentence. Tompkins v. State, 502 So. 2d at 418, 420-21. The factual allegations regarding Mr. Davis and the constitutional issues his affidavit raises are not conclusively refuted by the record.

Mr. Tompkins' Rule 3.850 motion made extensive factual allegations regarding his diligence in attempting to locate Mr. Davis (3PC-R. 73-75). In April of 2001, Mr. Tompkins was under a death warrant. His counsel requested public records under Rule 3.852, Fla. R. Crim. P. As Mr. Tompkins' Rule 3.850 motion pled, documents first disclosed by the State in response to those requests led Mr. Tompkins' counsel to Mr. Davis. Included in the documents first turned over in April of 2001, were two lead sheets prepared by Detective Burke, the lead detective on the case (2PC-R. 64-65). In these previously undisclosed lead sheets were two references to "Jr. Davis". The first handwritten notation says, "Interviewed Jr. Davis' Lisa DeCarr's B.F. – could give only background – saw Lisa the weekend before she was reported missing." A later notation provided, "call Jr Davis back [illegible] – dates Barbara came to his house [illegible] – deadend LEAD school record's revealed she was in school on" (2PC-R. 64-65).

Also included in documents first disclosed in April of 2001, was a

supplemental police report dated June 8, 1984, written by Detective Milana. This report included a discussion of Detective Milana's interview of Maureen Sweeney and Mike Willis on June 8, 1984. Sweeney advised that after Lisa disappeared:

> JUNIOR, (Lisa' steady boyfriend) came to their house on Rio Vistat and asked if they had seen her. MIKE saw him much later at CHURCH'S CHICKEN and asked if he had heard anything from LISA at which time he advised that she had hurt him really bad and that she had never called him, never tried to get in touch with him and therefore he was finished with the family.

(2PC-R. 45-46). The feelings about Lisa attributed to "Junior" in this report contradict Kathy Stevens' testimony that when she told "Junior" that Mr. Tompkins was asaulting Lisa, "he just walked away like it was nothing" (R. 254). Maureen also gave the following information: "JUNIOR, LISA'S boyfriend approx., 17yrs of age of 40th St and Buffalo" (2PC-R. 46).

These documents first disclosed in April of 2001 provided Mr. Tompkins new information to continue his attempts to locate "Junior" Davis. Mr. Tompkins' counsel had previously attempted to locate Mr. Davis in 1989, even though Mr. Davis was not listed as a witness in the State's discovery responses (see R. 504-05, 591, 600, 654, 655). He was mentioned in one police report that was included in the discovery provided to trial and that appears in the record. This report did not indicate that Mr. Davis was in possession of any useful information, but just the

opposite: in the report, Detective Burke stated he interviewed Junior Davis who said he had “no information as to the events surrounding LISA[’s] disappearance” (R. 530).[5] The report listed a phone number for Mr. Davis, but in 1989, while Mr. Tompkins’ case was under warrant and his counsel was preparing his first Rule 3.850 motion, Mr. Tompkins’ counsel was advised that Mr. Davis was not at the listed phone number. Mr. Tompkins’ counsel could not locate Mr. Davis and had no indication that Mr. Davis possessed any relevant or useful information.

In 2001, the newly disclosed lead sheets and Det. Milana’s supplemental police report dated June 8, 1984, provided additional information which assisted in the search for Mr. Davis and which revealed for the first time that Mr. Davis may possess significant evidence. Using the information that Mr. Davis was 17 years old in 1984 and lived at “40th St and Buffalo,” Mr. Tompkins conducted follow up interviews after he was provided the newly disclosed reports in order to gather more information that might help counsel locate “Junior.” The legal team

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[5]Based upon this disclosure, it was reasonable for collateral counsel to rely on the “presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence.” Strickler v. Greene, 527 U.S. 263, 284 (1999). Nothing had been provided to indicate that Mr. Davis who was not listed as a witness at trial possessed any information. *See* Banks v. Dretke, 124 S.Ct. 1256, 1275 (2004)(“A rule thus declaring ‘prosecutor may hide, defense must seek’ is not tenable in a system constitutionally bound to accord defendants due process”).

representing Mr. Tompkins kept plugging the information gathered into computer data bases in order to try to locate "Junior". Mr. Tompkins was able to ascertain that Junior's given name was James Davis, Jr. Under the pendency of the 2001 warrant, counsel located a number of James Davis's, but each turned out not to be Lisa DeCarr's boyfriend. After Mr. Tompkins' execution was stayed, the search for James Davis, Jr. continued. Finally in April of 2002, the location of a James Davis, Sr. was turned up on one of the often repeated computer runs. This James Davis turned out to be the father of the James Davis, Jr., who had been Lisa DeCarr's boyfriend (3PCR. 75).

The facts regarding Mr. Tompkins' diligence in searching for Mr. Davis are not conclusively refuted by the record. The information now provided by Mr. Davis constitutes evidence of the prejudice suffered by Mr. Tompkins due to the failure of the State to timely disclose the police reports and lead sheets in its possession. Banks v. Dretke, 124 S.Ct. at 1275 ("A rule thus declaring 'prosecutor may hide, defense must seek' is not tenable in a system constitutionally bound to accord defendants due process"). Had these documents been disclosed in a timely manner, counsel would have followed up on the information contained therein and would have learned of the exculpatory information that Mr. Davis possessed.

The facts alleged in the Rule 3.850 motion regarding the exculpatory information Mr. Davis possessed and regarding Mr. Tompkins' diligence are not conclusively refuted by the record. An evidentiary hearing is required.

ARGUMENT III

MR. TOMPKINS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE FAILED TO DISCLOSE EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE.

As explained in Argument II, *supra*, Mr. Tompkins' conviction and death sentence rest upon the testimony of "three key witnesses." Tompkins v. State, 502 So. 2d at 417. The affidavit of James M. Davis, Jr., provides evidence significantly impeaching one of these witnesses, Kathy Stevens (Affidavit of James M. Davis, Jr., 3PC-R. 259-61). This affidavit gives rise to several constitutional claims which entitle Mr. Tompkins to a new trial. Further, when Mr. Davis's affidavit is considered cumulatively with other evidence previously presented in post-conviction, Mr. Tompkins' entitlement to a new trial cannot be questioned. In Section A, *infra*, Mr. Tompkins discusses the constitutional issues arising from

Mr. Davis's affidavit, in Section B, *infra*, Mr. Tompkins argues that the issues arising from Mr. Davis's affidavit must be considered on the merits, and in Section C, *infra*, Mr. Tompkins discusses the cumulative analysis which must be applied to Mr. Tompkins' claims.

A. THE AFFIDAVIT OF JAMES M. DAVIS, JR., ESTABLISHES THAT MR. TOMPKINS IS ENTITLED TO A NEW TRIAL.

Kathy Stevens' testimony was integral to Mr. Tompkins' conviction and death sentence. At trial, Stevens testified that on March 24, 1983, she went to Lisa DeCarr's house because "Lisa and me had made plans to run away" (R. 249). Stevens arrived between 6:00 and 6:20 a.m. (Id.). Lisa said she was not going to run away because she and her mother were "going to deal with it," and Stevens left (R. 250). Stevens testified that she left her purse at the DeCarr house and went back for it between 8:00 and 9:00 a.m. although it could have been after 9:00 a.m. (R. 251). When Stevens went to the front door of the house, she heard a "loud crash," and when she opened the front door, Stevens saw Lisa and Mr. Tompkins "struggling on the couch" (R. 252). Mr. Tompkins was on top of Lisa "trying to take her clothes off and that's about it" (R. 252). Lisa "asked me to call the police," and Stevens believed that Wayne yelled "get out" (R. 252-53). Stevens left, did not call the police, and instead "went up to the store" where she ran into

Lisa's boyfriend (R. 254). Stevens told the boyfriend that she wanted to call the police, but she did not because "it was a little bit of being scared and not knowing what to expect" and Lisa's boyfriend "just walked away like it was nothing" (Id.). She then went to school because she did not want to get involved (R. 255).

Lisa DeCarr's boyfriend at the time of her disappearance was "Junior" Davis. After years of searching and after the State finally provided previously undisclosed documents about Davis in 2001 (see *infra*), Mr. Tompkins' counsel located "Junior" Davis in April of 2002. "Junior" Davis's full name is James M. Davis, Jr. Upon being contacted, Mr. Davis reported that he had been Lisa Decarr's boyfriend in March of 1983. In a sworn affidavit, Mr. Davis stated, "[t]he story of Kathy running into me at the store the day Lisa disappeared is not true. If anyone had told me that Wayne was attacking Lisa and she was screaming for someone to call the police, I would have gone directly there" (Affidavit of James M. Davis, Jr., paragraph 6, 3PC-R. 260). Mr. Davis elaborated:

> If I thought there was anyway I could have helped [Lisa], I would have, especially if she were in trouble. This is why what Kathy said is not true. I never saw Kathy on the morning that Lisa disappeared, nor did Kathy ever tell me that she had just seen Lisa being attacked by Wayne. In fact, the first time I heard of anything having possibly happened to Lisa was when I heard on the radio she was missing.

(Affidavit of James M. Davis, Jr., paragraph 8, 3PC-R. 260).

The information provided by James M. Davis, Jr., establishes that Kathy Stevens' trial testimony was not truthful and is significant impeachment of that testimony. This information gives rise to constitutional claims under Brady v. Maryland, , Giglio v. United States,, and Strickland v. Washington. Kathy Stevens' trial testimony was essential to Mr. Tompkins' conviction and death sentence. The prosecutor relied upon Stevens' testimony to urge the jury to convict Mr. Tompkins, arguing that "[h]er testimony alone . . . convicts this man" and that she would not lie (R. 346-49, 360). The prosecutor also relied upon Stevens' testimony to urge the jury to recommend a death sentence (R. 444-45). The trial judge relied upon Stevens' testimony to support the "committed during a felony" aggravating circumstance (R. 679). On appeal, this Court relied upon Stevens' testimony to sustain the conviction and death sentence. Tompkins v. State, 502 So. 2d at 418, 420-21.

The State's failure to disclose the exculpatory evidence possessed by James M. Davis, Jr., violated Brady v. Maryland. This Court has explained: "Under Brady, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment. See Brady, 373 U.S. at 86 (suppression of confession is violation Fourteenth Amendment)." Rogers v. State, 783 So.2d 980 (Fla. 2001). *See* Banks v. Dretke, 124 S.Ct. at 1275 ("A rule thus

declaring 'prosecutor may hide, defense must seek' is not tenable in a system constitutionally bound to accord defendants due process").

The Supreme Court made clear in Kyles v. Whitley, 514 U.S. 419 (1995), that due process requires the prosecutor to fulfill his obligation of knowing what material, favorable and exculpatory evidence is in the State's possession and disclosing that evidence to defense counsel:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Kyles, 514 U.S. at 439. In order to comply with Brady, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf." Kyles, 514 U.S. at 437.

In Strickler v. Greene, at 281, quoting Berger v. United States, 295 U.S. 78, 88 (1935). the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." The Court also repeated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, and that the prosecuting attorney has a duty to learn of any favorable evidence known to individuals acting on the government's behalf.

Strickler, 527 U.S. at 280-81.

Most recently, the Supreme Court stated, "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. at 1275. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275.

Where exculpatory evidence is not timely disclosed, a new trial is warranted where the non-disclosure undermines confidence in the reliability of the jury's verdict rendered without the benefit of the exculpatory evidence. The Brady materiality standard is met when "the favorable evidence could reasonable be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. Significantly, this is not a sufficiency of the evidence standard: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. at 434-35. Further, in making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the

case." Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446. In addition, this review requires cumulative consideration be given to the all of the non-disclosures. Kyles v. Whitley. The withheld evidence is not to be analyzed item by item in a piecemeal fashion, but rather collectively. See Cardona v. State, 826 So.2d 968, 973 (Fla. 2002).

The affidavit of James M. Davis, Jr., also establishes that the State presented false or misleading testimony at Mr. Tompkins' trial. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-104 & n.8 (1976). *See* Giglio v. United States, 405 U.S. at 153. A conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667 (1985). This Court has explained, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman v. State, 28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993 at *18 (Fla. 2003).

Alternatively, the affidavit of James M. Davis, Jr., also establishes that trial

counsel provided ineffective assistance. Strickland v. Washington. If the State did not fail to disclose this information and/or did not present false or misleading evidence, trial counsel was ineffective in failing to locate, speak to and present evidence from Mr. Davis. State v. Gunsby, 670 So.2d 920 (Fla. 1996). Under Strickland, Mr. Tompkins must establish deficient performance and prejudice. However, counsel may very well have been misled by the one police report mentioning Davis which was provided in discovery and which said Davis had no information (R. 530). The Strickland prejudice standard is the same as the Brady materiality standard and requires establishing that confidence is undermined in the outcome. Kyles, 514 U.S. at 434.

The affidavit of James M. Davis, Jr., undermines confidence in Mr. Tompkins' conviction and death sentence. As explained above, Kathy Stevens' testimony was essential to the State's case, and evidence that she was not truthful "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. Under the Giglio standard, it is clear the State cannot establish beyond a reasonable doubt that Stevens' testimony was harmless. Guzman.

B. THE CLAIMS BASED UPON THE AFFIDAVIT OF JAMES M. DAVIS, JR., ARE BEFORE THE COURT ON THE MERITS.

Mr. Davis's affidavit is presented in a third Rule 3.850 motion. As explained in Argument II, however, Mr. Tompkins' post-conviction counsel diligently pursued attempts to locate Mr. Davis beginning in 1989 with the first post-conviction proceedings in Mr. Tompkins' case. Based upon these factual allegations regarding diligence, the substantive allegations regarding Mr. Davis must be considered on the merits (*See* 3PCR. 73-75).

Thus, all constitutional claims arising from Mr. Davis's affidavit must also be considered on the merits and decided as if they were being presented in an initial Rule 3.850 motion. Mr. Tompkins has alleged that Mr. Davis's affidavit gives rise to claims under Brady v. Maryland, Giglio v. United States, and Strickland v. Washington. The fact that Mr. Tompkins previously alleged violations of Brady, Giglio and Strickland v. Washington does not mean that Mr. Tompkins is disentitled to review of his present claims when his post-conviction counsel has exercised diligence since 1989. See Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999).

Likewise, Mr. Tompkins is entitled to a full and cumulative consideration of his previous Brady, Giglio and ineffective assistance of counsel claims. Way v. State, 760 So.2d 903 (Fla. 2000); Jones v. State, 709 So.2d 512 (Fla. 1998); State v. Gunsby, 670 So.2d 920 (Fla. 1996). The cumulative evidence is discussed in

Section C, *infra*. As to many pieces of that evidence, under Giglio and Banks v. Dretke, the State violated its affirmative obligation "to set the record straight" when it failed to disclose material, exculpatory evidence and/or presented false and misleading evidence. Banks, 124 S.Ct. at 1263. "Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney, will be faithfully observed.'" Banks, 124 S.Ct. at 1275, quoting Berger v. United States, 295 U.S. at 88. Rather than "faithfully observ[ing]" this duty here, the State failed to disclose exculpatory evidence and/or presented false or misleading evidence.

In the face of Mr. Tompkins' post-conviction counsel's diligence and the State's violations of its duties under Banks, Mr. Tompkins' claims have been presented piecemeal in several post-conviction proceedings. Due process, the Eighth Amendment, and the need for accuracy and reliability in obtaining capital convictions and sentences requires that Mr. Tompkins' claims be considered on the merits and analyzed cumulatively.

C. CUMULATIVE CONSIDERATION OF THE EVIDENCE INTRODUCED AT TRIAL AND IN POST-CONVICTION ESTABLISHES THAT A NEW TRIAL IS REQUIRED.

The State's case for convicting Mr. Tompkins of murdering Lisa DeCarr required proving that Mr. Tompkins was alone with Lisa at the DeCarr house at

about 9:30 or 10:00 a.m. on March 24, 1983.[6] Without this proof, there was no case against Mr. Tompkins. Establishing that Mr. Tompkins was at the DeCarr house on that date and at that time rested upon several subissues: could any of the "three key witnesses" be believed, when was Lisa last seen, and what was Lisa wearing when she was last seen. Proving that Mr. Tompkins murdered Lisa DeCarr also required proving that the body found under the house was Lisa's. Of course, the State's position was that all three witnesses were telling the truth, that Lisa was last seen when Kathy Stevens came upon Mr. Tompkins assaulting her, that Lisa was wearing the pink bathrobe which was found with the body under the house, not the jeans and maroon shirt which Mr. Tompkins described, and that the body under the house was Lisa's. However, substantial evidence not presented at trial undermines all of these conclusions. This evidence existed at the time of trial, but was not presented because the prosecutor did not disclose it and/or because defense counsel failed to discover it. Putting all of this evidence together with that presented at trial undermines confidence in the outcome of the trial.

1. Could the "three key witnesses" be believed?

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[6]The Bill of Particulars stated that Mr. Tompkins killed Lisa DeCarr "between 8:30 a.m and 5:00 p.m. on March 24, 1983" (R. 397-98). At the 1989 post-conviction hearing, trial prosecutor Benito confirmed that his theory was that the offense occurred at about 9:30 or 10:00 a.m. on that date (PC-R. 87).

a. Kathy Stevens

i. Trial testimony

Stevens testified that on March 24, 1983, she went to Lisa DeCarr's house because "Lisa and me had made plans to run away" (R. 249). Stevens arrived between 6:00 and 6:20 a.m. (Id.). Lisa said she was not going to run away because she and her mother were "going to deal with it," and Stevens left (R. 250).

Stevens testified that she left her purse at the DeCarr house and went back for it between 8:00 and 9:00 a.m, although it could have been after 9:00 a.m. (R. 251). When Stevens went to the front door of the house, she heard a "loud crash," and when she opened the front door, Stevens saw Lisa and Mr. Tompkins "struggling on the couch" (R. 252). Mr. Tompkins was on top of Lisa "trying to take her clothes off and that's about it" (R. 252). Lisa "asked me to call the police," and Stevens believed that Wayne yelled "get out" (R. 252-53). Stevens left, did not call the police, and instead "went up to the store" where she ran into Lisa's boyfriend (R. 254). Stevens told the boyfriend that she wanted to call the police, but she did not because "it was a little bit of being scared and not knowing what to expect" and Lisa's boyfriend "just walked away like it was nothing" (Id.).

She then went to school because she did not want to get involved (R. 255).[7]

Stevens testified that she and another girlfriend, Kim, went back to Lisa's house at some point later, but Kim knocked at the door, not Stevens, and Kim may have spoken with Wayne Tompkins (R. 255). Stevens testified that she then returned to the house a third time, alone: “[a]round lunchtime to one o’clock, I had been back because I still had not gotten my purse because of the second time I went back.” (R. 256). She knocked at the door, and Mr. Tompkins answered (Id). Stevens asked if Lisa was there, and was told she had left with her mother (Id.).

On cross-examination, Stevens testified that she did not come forward until after the body was found because she "realized that something more was involved than just her disappearing" (R. 263). She told prosecutor Benito her story after he called her ten months after the body was discovered (R. 263). She initially told Benito that she knew nothing about what happened to Lisa that day, in mid-March 1985. She then testified that, after "talking to her pillow" one night, she decided to

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[7]Stevens also testified that while Mr. Tompkins was assaulting Lisa, there was "a man sitting in the corner chair" maybe four or five feet away "just sitting there watching it like nothing was going on" (R. 252-53). Stevens had never seen the man before (Id.). Lisa was wearing a pink robe, and "I believe she still had her rings on that morning" but she was not wearing earrings (R. 253-54).

call Benito again and tell him her story (R. 264). Stevens denied telling different versions of the events to different people, but acknowledged lying to Barbara DeCarr and initially to Benito (R. 265).

ii. Evidence impeaching Stevens

The affidavit of James M. Davis, Jr., discussed above, is totally contrary to Stevens' trial testimony. According to this affidavit, Stevens did not encounter Mr. Davis at "the store" and did not tell him that Mr. Tompkins was assaulting Lisa. This affidavit is raised in the current Rule 3.850 motion as the basis of claims under Brady, Giglio and/or Strickland v. Washington.

Prosecutor Benito's undisclosed memoranda of his interviews with Stevens show that her story changed significantly between those interviews and her trial testimony. These memoranda memorializing Stevens' statement were not disclosed until Mr. Tompkins began preparing his first Rule 3.850 motion in 1989. At the 1989 evidentiary hearing, Benito testified that these memoranda were the equivalent of a police report used to memorialize a witness's statement to law enforcement personnel (PCR. 221), and that he did not disclose these memoranda to the counsel (PCR. 222). Trial counsel testified that he was not provided with these memoranda (PCR. 54, 57), and was not aware of their contents (PCR. 62,

65). At trial, Benito had vouched for Stevens' veracity during closing arguments.[8]

Benito's memoranda detailed 2 phone conversations he had with Stevens. In a memo dated March 13, 1985, Benito recorded that Kathy said she saw Wayne attacking Lisa *at 8:00 a.m.* However, at trial the story had changed, and she testified that the time of this alleged event was 9:30 a.m. This change was exceedingly significant, for it made Kathy's story fit with Barbara DeCarr's testimony that she left home at 9:00 a.m. and that Lisa was alive and alone.

The change was also important because 8:00 a.m. was outside the scope of the bill of particulars. Had Kathy testified that the attack took place at a time not within the bill, the State would not have been able to prove this essential element beyond a reasonable doubt, as the jury was instructed. Moreover, nowhere in her statement to Benito does Kathy indicate that Lisa begged her to call the police. That detail was added later to embellish the story. The defense attorney needed to know that such a change had occurred in order to effectively cross-examine Kathy. Significant omissions from prior statements can be just as impeaching as inconsistent statements. Jencks v. United States, 353 U.S. 657 (1957).

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[8]*See* R. 346 ("Kathy Stevens, she has got -- absolutely none -- no reason to lie. . . . Her testimony alone, ladies and gentlemen, alone, convicts this man. She has got no reason to lie"); R. 349 ("She told you the truth").

According to Benito's memorandum, Kathy also claimed that at 6:30 a.m., "Lisa asked Kathy to come back later around 11:00 or 12:00 that she was going off somewhere with her mother." Defense counsel was never given this information which is certainly inconsistent with the testimony of Barbara DeCarr. According to Barbara, Lisa was supposed to be in school, but she stayed home sick. There were no plans for mother and daughter to go anywhere together.

In the second undisclosed memo dated March 8, 1985, Benito recorded that Stevens stated she spoke to Lisa on March 23, 1983, the day before her disappearance, and Lisa said she was going to run away from home. Kathy said she had no further contact with the victim after that date and her original statement to Barbara DeCarr that Lisa was in New York and had contacted her was false. If she had no further contact with Lisa after March 23, 1983, than her whole story about what she observed the following day was also false.

In addition, Kathy discussed an alleged incident between Lisa and Mr. Tompkins on Halloween, 1982. According to Benito's memo, Kathy said that after Lisa hit him, Mr. Tompkins told Lisa, "*if you ever hit me again*, I will kill you." This is a significantly different statement than that to which she testified at trial: "'I'm going to kill you'" (R. 247). The change in Kathy's story allowed Benito to argue that Mr. Tompkins had been planning the murder for five months:

> October, 1982, this man says "I'll kill you" to Lisa, and five months later he did. Is that evidence of an intentional, premeditated killing? Without question. Five months before this murder, the defendant threatened to kill her. The thought is already in his mind. The thought is in his mind five months before he actually killed her.

(R. 347). Because Benito did not disclose Stevens' inconsistent statement to him, his misleading argument went unchallenged by the defense, to Mr. Tompkins' substantial prejudice. Davis v. Zant, 36 F. 3d 1538, 1551 (11th Cir. 1994).[9]

Stevens' statements to Benito were raised as a Brady violation in Mr. Tompkins' 1989 Rule 3.850 motion, but are not mentioned in this Court's opinion affirming the circuit court's denial of relief. *See* Tompkins v. Dugger. The memoranda are clearly Brady material. In Kyles, notes from the prosecutor's interviews with the key state witness were suppressed and found to be material Brady information requiring reversal. Kyles, 514 U.S. at 429. The withheld notes in Kyles not only provided inconsistent versions of important facts, but also gave rise to "a substantial implication that the prosecution had coached [the witness] to give it." Id. at 443.

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[9]Another significant change in Stevens' testimony from her statement to Benito was that at trial she claimed a third person was watching Mr. Tompkins attack Lisa. No mention was made of this startling fact to Benito. This was relevant to Stevens' credibility, demonstrating that her story was not true and subject to the inconsistencies associated with fabrications.

Prosecutor Benito's undisclosed deal with Stevens was also raised in the 1989 Rule 3.850 motion, but it, too, is not mentioned in this Court's opinion. *See* Tompkins v. Dugger. Stevens' credibility was very much at issue during the trial, particularly given the State's vouching that she told the truth (R. 346, 349). The defense did not know that when Stevens called Benito on March 12, 1985, 2 years after the victim's disappearance, to say for the first time that she saw her friend being attacked by Mr. Tompkins, Kathy had a boyfriend in jail who she had not been allowed to visit. After providing Benito with her story, he arranged for her to visit her boyfriend (PCR. 9, 20).[10] She thus received undisclosed benefit for her testimony. Defense counsel testified at the 1989 evidentiary hearing that he did not know this information at the time of Mr. Tompkins' trial. When defense counsel was asked whether that was evidence which defense counsel would regard as potential impeachment, the court responded, "Yes" (PCR. 67). However, because he suppressed this information, Benito was able to argue to the jury that Kathy

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[10]In 1989, prosecutor Benito objected to Mr. Tompkins' effort to call Kathy Stevens to the witness stand. Judge Coe sustained Benito's objection, but ordered the parties to speak to Kathy Stevens in the hallway and place on the record what she said. The parties then represented that Kathy Stevens "state[d] after she talked with [Benito, he] arranged a visit with her and her boyfriend in the jail because she didn't have proper ID, and [Benito] did make it easy for her to get in there. [Benito] brought her over to visit the boyfriend" (1PCR. 20-21).

Stevens had no motive to lie (R. 346, 348).

Any benefit a witness receives for testimony must be disclosed in order to insure an adversarial testing of the defendant's guilt by testing the witness's credibility. Due process requires that the State has an affirmative duty to disclose to the defense any promises it has made to a witness.[11]

b. Barbara DeCarr

i. Trial testimony

Barbara DeCarr testified that on March 24, 1983, she awoke at around 7 a.m., when Mr. Tompkins told her that Lisa had a headache and wanted to stay home from school (R. 204). Barbara got up around 8 a.m., by which time Mr. Tompkins had left to take Barbara's son Jamie to school (R. 205). Before she left the house, Barbara looked in on Lisa, who was in bed in a pink bathrobe which had a sash; she couldn't tell if Lisa had anything on under the robe (R. 206). Lisa also had jewelry: cross-shaped pierced earrings and a little diamond ring that she always

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[11]*See* Gorham v. State, 597 So. 2d 782 (Fla. 1992)(murder conviction overturned because the State failed to reveal a payment of $10 to a witness during the pendency of the criminal charges against Gorham); Roman v. State, 528 So. 2d 1169 (Fla. 1988)(new trial ordered when it was disclosed that the State failed to turn over a prior statement of a witness that contained a discrepancy with the witness's testimony which would have supported the defense theory).

wore (R. 207).[12] The jewelry was given to her by her boyfriend (Id.) Barbara left the house at 9:00 a.m. with just Lisa at home (R. 208). She went to Mr. Tompkins' mother's house to help her pack. When she got to there, Mr. Tompkins was already there with other people (Id.). Barbara stayed there until 3:00 that afternoon (R. 209). At some point she sent Mr. Tompkins home to get newspapers to use as packing material; she did not know how long Wayne was gone, and he returned with newspapers (R. 209-10). When he returned, he told her that Lisa was sitting on the couch watching TV (R. 210). At some point after returning with the newspapers, Wayne left again with his stepfather (Id.).

Barbara further testified that at 3:00 that afternoon Wayne told her that Lisa "was gone, she had run away" (R. 211). He said that the last time he saw her she was at the back door of the house "on her way to the store" (Id.). He also said that Lisa was wearing a "maroon blouse, a pair of jeans that he had never seen before, and her pocketbook" (R. 212). Barbara then contacted the police from Wayne's mother's house (Id.). Barbara testified that prior to calling the police, however, she went back home, but did not see Lisa; she discovered Lisa's pocketbook and robe missing, but her wallet was there, as was a maroon blouse in the dirty clothes (R.

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[12] Kathy Stevens (if she can be believed) testified that when she saw Lisa on March 24th she was not wearing earrings (R. 260).

213). About a month later, she moved into Wayne's mother's house (R. 214).

On cross-examination, Barbara testified that shortly after March 23, 1984, she had a discussion with Kathy Stevens, who was known to her as Kathy Sample (R. 217). Barbara acknowledged that after the day Lisa disappeared, several people had informed her that Lisa had been seen elsewhere in the community (R. 219). Lisa had also been suspended from school on March 23rd and could not return until she was accompanied by a parent (Id.). It was not until June, 1984, after she found out Mr. Tompkins was having an affair with another woman, that she told the police of her suspicions that Mr. Tompkins killed Lisa (R. 226, 237).[13] She did not become suspicious or tell the police anything when Mr. Tompkins gave her an allegedly incorrect description of Lisa's clothes in March, 1983 (Id.).

ii. Evidence impeaching Barbara DeCarr

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[13] This was after the body was found under the house where Barbara DeCarr had told the police to look after she committed herself to a psychiatric ward. According to Detective Rademaker, Barbara DeCarr told him, "she couldn't give any reason as to why she thought the body was under there, but she thought she thought [sic] the body was under there, but she thought that it was someplace on the property and possibly under the under the house." (R. 170). In fact, Detective Burke reported that on June 4, 1984 at 2:30 pm. he had "checked the yards located at the address and found no areas that looked suspicious as to a grave." This was pursuant to Barbara's suggestion on June 1st: "She stated that she talked to Det. Gullo via phone and had asked him to go check the back yard of the residence of 1225 E. Osborne because she now suspects that her daughter may be buried in the back yard." (3PCR. 239).

Barbara DeCarr first told police she last saw Lisa at 1:30 or 2:00 p.m. on March 24, 1983. Barbara reported Lisa missing on March 24, 1983. The initial police report, dated March 24, 1983 at 5:30 p.m., is a two-page report. The first page lists the complainant, the date and the time of the incident being reported. The "Date Time Occurred" is listed as "24 Mar 23 1330-1400". It is clear from the first page of the report that Barbara DeCarr is the complainant. In the code box next to her name appears "C/P". The codes are explained above her name, with "C=Complainant" and "P=Parent." Thus, Barbara was identified as both the Complainant and the Parent. A handwritten notation on page one of the report states, "Mrs. Decarr stated her daughter ran away from home for no apparent reason." The second page of the report lists Lisa DeCarr as "JR," which means "Juvenile Runaway," and Wendy Chancey as "W," meaning "Witness." The report then has a "Narrative" section containing the instruction, "Do Not Repeat in Narrative Any Information Already Contained in Report." In the Narrative section, the reporting officer wrote:

> Compl. stated *she last saw Lisa* at the listed residence at the listed time. Compl. stated that everything was fine at home and has had no trouble with Lisa running away or anything. Cmpl. stated that Lisa was having some trouble in school but nothing to cause her to runaway. Cmpl. checked with Lisa's friends and school for information as to where she might be with negative results. Cmpl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Cmpl.

> checked with Beach Place with negative results. Cmpl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.

(3PCR. 145)(Emphasis added). Determining the listed time and residence requires referring back to page one of the report. Page one shows the listed time as 1:30-2:00 on March 24, 1983 and the listed residence as 1225 E. Osborne St., Lisa's residence. Thus, at 5:30 p.m. on March 24, 1983, just hours after Lisa went missing, the "Complainant/Parent," Barbara DeCarr, told the officer that "**she** last saw Lisa" at 1:30-2:00 p.m. on March 24, 1983, at 1225 E. Osborne.

Allegations regarding this reports were raised in Mr. Tompkins' 1989 and 2001 Rule 3.850 motions. In 1989, the report was the basis of an ineffective assistance of counsel claim because the report had been disclosed in discovery, although it was largely illegible (1PCR. 541-42). This Court's 1989 opinion on the appeal of the 1989 motion does not mention the allegations regarding this report. *See* Tompkins v. Dugger. In 2001, when the State disclosed a legible copy of the report, its contents were raised as a Brady violation because the initial disclosure had been illegible. This Court found no Brady violation "[b]ecause defense counsel knew of the report and could have requested a legible copy." Tompkins v. State, 2003 Fla. LEXIS 1718 at *18. If the legible report disclosed in 2001 does not support a Brady violation, it does establish ineffective assistance of counsel.

Gunsby. However, under Giglio v. United States and Banks v. Dretke, the State violated its affirmative obligation "to set the record straight" when Barbara DeCarr testified at trial that Mr. Tompkins was the last person to see Lisa. "Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney, will be faithfully observed.'" Banks, 124 S.Ct at 1275, quoting Berger v. United States, 295 U.S. at 88. Rather than "faithfully observ[ing]" this duty, the State allowed Barbara DeCarr to testify falsely and has taken the position that Mr. Tompkins was required to "set the record straight."

Barbara DeCarr did not tell the police all along that Mr. Tompkins was the last person to see Lisa alive. The police and the state attorney had in their files a copy of the Missing Children's Help Center's file on Lisa's disappearance. The Missing Children's records which were stipulated into evidence in 1989 contained the following notation at 4:30 p.m. on June 1, 1984: "Barbara went on to state . . . that Det. Gullo had been in touch with her, and she again told him, as she had when Lisa first disappeared, that Wayne had been the last person to see Lisa alive!! Det. Gullo insisted that she did not tell him this" (3PCR. 236)(emphasis in original). Trial counsel testified at the 1989 hearing that he did not receive any files regarding the child search organization and had not seen

this memorandum (PCR. 33, 34). Gullo could have been called to establish that the victim's mother was wrong in her testimony. Without Gullo's statement, the prosecutor was able to argue in closing that Barbara DeCarr "knew who had last seen Lisa alive" (R. 351). Gullo's statement, which was in the state attorney's file, was raised in Mr. Tompkins' 1989 Rule 3.850 motion as a Brady violation, but this Court's opinion in that appeal did not address it.

In a statement to police, Barbara DeCarr said Mr. Tompkins did not leave his mother's house to get newspapers from the DeCarr house until 10:00 a.m. In an undated typed statement, Barbara DeCarr told the police: "Wayne had taken Jamie (my youngest son) to school just before 8:00 am. and then went to his mother's house for breakfast and coffee. He stayed at his mother's house until approximately 10:00 am. when he left to get some newspapers to pack dishes with."(3PCR. 235).

Barbara DeCarr knew that Lisa's friends had last seen her dressed in a maroon top and jeans, but falsely testified that she found the maroon top in the dirty clothes hamper. The fact that others had seen Lisa wearing the maroon top and jeans corroborated Mr. Tompkins' account that this is what she was wearing on the afternoon of March 24, 1983. In her deposition, Barbara DeCarr

acknowledged that she was present on March 24, 1983, when Wendy Chancey told the police Lisa was wearing a maroon top and jeans when Chancey saw her getting into a car.[14] Mr. Tompkins presented this deposition testimony in his 1989 Rule 3.850 motion as a violation of the Confrontation Clause. This Court's opinion in that appeal did not address this testimony. *See* Tompkins v. Dugger.[15] Thus,

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[14]In the deposition, Barbara Decarr testified as follows:

> Q. Were you there when Wendy was giving the statement?
> A. Yes.
> Q. Do you remember what Wendy said?
> A. She said she go into a brown Pinto --
> Q. And do you --
> A. -- with colored windows.
> Q. And do you remember what Wendy said she was wearing?
> A. Jeans and a top and a pocket book.
> Q. Jeans and a maroon or a red top?
> A. Yes.
> Q. And her purse.
> A. Her purse.
> Q. Okay. And Wendy saw her do that?
> A. She said she seen Lisa getting into a car.
> Q. And that was the afternoon that Lisa disappeared.
> A. Yes. She said she seen it from her bus.

(Deposition of Barbara DeCarr, p. 45).

[15]On direct appeal, this Court rejected Mr. Tompkins' Confrontation Clause claim regarding limitations on the cross-examination of Barbara DeCarr because "[t]he trial court found that each of the questions to which the state objected was irrelevant or called for hearsay testimony." Tompkins v. State, 502 So. 2d at 419. However, this ignored the fact this evidence contradicted her testimony that Mr. Tompkins was the last one to report seeing Lisa, thus constituted impeachment.

through manipulation of the rules of evidence, the State was permitted to mislead the jury and elicit false testimony from Barbara DeCarr regarding who reported what Lisa was wearing when she was last seen. *See* Banks v. Dretke.

Barbara DeCarr told police, friends and Lisa's school many times that she believed Lisa had run away. This evidence is significant because at trial, prosecutor Benito belittled the defense theory that Lisa had run away (R. 356-57). This evidence is also important because Barbara DeCarr did not tell police of her suspicion that Mr. Tompkins killed Lisa until June 1984 (R. 226). Before that, she had not raised any questions about Mr. Tompkins' supposed incorrect description of Lisa's clothes in March 1983 (Id.).

In April 2001, the Tampa Police Department for the first time disclosed a July 28,1983, report which included Detective Gullo's account of his June 13, 1983, interview of Barbara DeCarr. Det. Gullo reported:

14 Jun 83, 1430 hrs.
The u/signed received a phone call from BARBARA DeCARR. MRS. DeCARR who also reported her daughter, LISA DeCARR, RUNAWAY, on 24 Mar 83, OFF. #83-15919. MRS. DeCARR stated that she had received information from MARY ALBACH that JESSIE had run away. MRS. DeCARR stated that JESSIE and LISA were very close friends and that she thinks that perhaps they are together. Also MRS. DeCARR stated that she received some information that possibly LISA DeCARR and JESSIE are in the Hyde Park area, but she does not know at what location. MRS. DeCARR stated that LISA and JESSIE had many friends which were common to both of them and that is the reason she thinks they are together. MRS. DeCARR stated that she will call me if she learns any new information on

either of the girls.

(3PCR. 120-21). This statement was not disclosed in the October 23, 1984, Notice of Discovery (R. 595). Nor was it disclosed in 1989 pursuant to Mr. Tompkins' public records request. Yet, Barbara DeCarr's name was disclosed and she was called by the State to testify. Rule 3.220(1)(B), Fla.R.Cr.Pro., was clearly violated. This report supports the statements of Chancey and Maureen Sweeney. The report was raised as a Brady violation in Mr. Tompkins' 2001 Rule 3.850 motion.

Also in response to public records requests made by Mr. Tompkins in 2001, the Tampa Police Department for the first time disclosed a June 8, 1984, police report which contains the following discussion regarding an interview of an individual named Maureen Sweeney taken on June 8, 1984, at 2130 hrs:

> SWEENEY advised that it was very strange the explanation given surrounding LISA'S disappearance. She advised that she was told that LISA had come home, found Wayne sitting at the kitchen table with her mother and asked 'what the hell is he doing here!' Her mother, BARBARA, explained that he had no place to go and that she was going to let him move in with them, until he could get on his feet. At that point LISA ran out the back door. According to MAUREEN it was very unusual for LISA to be outside without her makeup and supposedly she had been outside then come back inside and then gone out again without her makeup. Lisa's brother BILLY left the house to go find her and came back to take care of JAMIE. SWEENEY advised that she had been told that WAYNE had gotten up to chase after LISA to try and catch her but she was gone, by the time he got outside. SWEENEY advised that LISA had left her purse containing her makeup, etc. on the table.

(3PCR. 116). The report further stated:

> Sweeney advised that she was still in Tampa at the time that Lisa disappeared. She advised approx [sic] a week later she left for Michigan. They advised that Ida Haywood called Mike at his place of employment in June to ask if Lisa had gone with Maureen and she advised that she had not. Later, Junior, (Lisa's steady boyfriend) came to their house on Rio Vista and asked if they had seen her. Mike saw him much later at Church's Chicken and asked if he had heard anything from Lisa at which time he advised that she had hurt him really bad and that she had never called him, never tried to get in touch with him and therefore he was finished with the family.

Maureen provided Det. Milana with a photograph of Lisa in which she was wearing a ring that was supposed to be the ring she was wearing when she disappeared. The report also included a discussion of an interview with Mike Glen Willis. Mr. Willis was also interviewed on June 8, 1984, at 1500 hrs:

> It was sometime in Jun 83, that Mike Willis met both Barbara and Wayne in McDonald's. They advised that they were living together but not as lovers, just as friends and that Barbara was going to move in with a man named Ray (Retired Army Officer) who had a lot of money. She told Mike that she was actively seeking and looking for Lisa and she was calling people and places trying to locate her. Barbara also said that she has had an affair with Ida Haywood's son. She had kicked Wayne out temporarily and moved in with Dale in a small house. That is when Wayne and Barbara told Mike the story about the last time they saw Lisa. The day they last saw Lisa was the day Wayne moved back into the house on Osborne. She became upset because of the fact that she [sic] was moving back and stormed out of the house.

(3PCR. 117). Neither Maureen Sweeney nor Mike Willis was listed on the State's

October 23, 1984, Notice of Discovery as "persons known to the State of Florida to have information which may be relevant to the offense charged" (R. 594). Neither was Detective Milana. Further, the State did not list the June 8th report by Detective Milana nor disclose it at the time of trial (R. 596).[16]

Issues regarding the July 28, 1983, and June 8, 1984, police reports were raised in Mr. Tompkins' 2001 Rule 3.850 motion as Brady violations. This Court concluded that the reports were not material. Tompkins, 2003 Fla. LEXIS 1718 at *21-22, *23. Both of these reports contradict Barbara DeCarr's trial testimony. Had they been disclosed at the time of trial, defense counsel could have asked Barbara DeCarr whether she had made these statements to Detective Gullo,

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[16]According to Lisa's school records, Barbara also told the school that Lisa had run away:

> **March 23rd** - caught smoking off campus - suspended [illegible] - parent arrives
>
> **25th** -Mom says child ran away yesterday (24th). Thinks child may be pregnant.
>
> **3/29** -No word from Lisa. Authority feels okay. No report.
>
> **4/5** -No contact
>
> **4/19** -Visited home vacated
>
> **4/20** -Message, ph. Mom moved last week
>
> **4/21** -students said child call from N.Y. Is pregnant

(3PCR. 157-58). Barbara DeCarr believed Lisa had run away and suspected she was pregnant. In her deposition, Barbara DeCarr testified that she believed Lisa had run away to New York and that several of Lisa's friends reported seeing her **the summer after her disappearance** (Deposition of Barbara DeCarr at 41-43).

Sweeney and Willis. This evidence, coupled with other evidence such as the undisclosed school records would have impeached the State's belittling of the defense attempts to demonstrate that Lisa had run away. Sweeney's account coincides with the initial police report made by Barbara DeCarr, which was closer in time to the event and before she ended her relationship with Mr. Tompkins.

Issues regarding the school records and Barbara DeCarr's deposition were raised in Mr. Tompkins' 1989 Rule 3.850 motion as Brady and ineffective assistance of counsel claims. This Court rejected the school records issue because "[t]he record clearly reflects that counsel knew that Lisa reportedly was seen after the time established for her murder." Tompkins v. Dugger, 549 So. 2d at 1372.

c. Kenneth Turco

i. Trial testimony

The final "key witness" for the State was Kenneth Turco, who was serving a 30 year prison sentence for burglary and grand theft (R. 301-02). Turco also had been previously convicted of grand theft, forgery, and burglary (R. 302). At the time of his testimony, he had been charged with an escape, to which he pled guilty, and was awaiting sentencing (R. 303-04). While in the jail, he made contact with Wayne Tompkins after he "was placed in the cell with him" (R. 305).

In early to mid-June, Turco was talking to Mr. Tompkins about his own case

and then asked him what had happened to Lisa DeCarr (R. 308). Turco then clarified that "I didn't ask. He volunteered the information, you know" (Id.). According to Turco, Mr. Tompkins told him that after Barbara had sent him home to get newspapers, he went home, saw Lisa on the couch and "asked her for a shot of pussy" and she said no (R. 309). Mr. Tompkins told Turco that when Lisa said, "I stayed home from school. I don't feel good," Mr. Tompkins tried to force himself on Lisa, she kicked him, and he strangled her (Id.). Mr. Tompkins did not tell Turco what he strangled Lisa with (Id.). Mr. Tompkins said that he panicked because "he didn't know what to do with the body because Barbara would be coming back to the house, so he buried the body under the house" (R. 310). He also said he buried a pair of jeans, a sweatshirt or blouse and a pocketbook "to make it look like she ran away" (R. 310). Mr. Tompkins also said that he had had sex with Lisa in the past and that "sometimes she would and sometimes she wouldn't" (R. 311). After receiving this information, Turco contacted prosecutor Benito, who visited him personally, and promised only "my safety in the jail and that you would tell the judge at my sentencing hearing that I cooperated and I came forward and testified in a murder trial" (R. 311).[17]

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[17]In 1989, Mike Benito testified that he took over Turco's prosecution two weeks after Wayne Tompkins' sentence of death. He explained, "I walked down to court.

On cross-examination, Turco testified he had pled guilty to the escape charge, but did not know if his sentencing had been postponed until after his testimony in the Tompkins' trial (R. 314). Turco said that he was not hopeful that his testimony would help him on the escape sentence because he would still be doing time anyway (R. 315). However, it had crossed his mind that his testimony would help him (Id.). Turco acknowledged that there was a confidential informant system in prison, that he had been part of that for the last 4 or 5 years, and that he was "trustworthy" (R. 317).

ii. Evidence impeaching Turco

Prosecutor Benito never disclosed that the charges pending against Turco at the time of trial, to which Turco testified he had pled guilty, would be nolle prossed within two weeks of Mr. Tompkins' conviction. The defense tried to undermine Turco's credibility, but Turco testified that he had made no deals with the state (R. 303; 311). Contrary to Mr. Turco's assertion that he had pled guilty and was awaiting sentencing on an escape charge and his only expectation of a "deal" was a

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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.'" (1PCR. 235). So, Benito "got up and walked down here and announced the case, and said, 'I nol-pros it.'" A grateful Turco "looked at [Benito] like he had just been handed his first bicycle at Christmas." (1PCR. 236).

favorable word from the prosecutor on the escape charge, court files reveal that there was a deal that was not revealed to the defense. The escape charge to which Turco had pled guilty was to be nolle prossed, and in fact the charge was dropped after Turco's testimony against Mr. Tompkins. Benito admitted to this at the state court evidentiary hearing (1PCR. 47). Certainly the fact that Turco had made work release prior to his escape established that his main impediment to being released was the escape charge. Having that charge dropped was quite significant to Turco, yet the jury was led to believe that because Turco had pled guilty, he was going to serve significant time for the escape. In fact, Turco was released from prison in 1991.

In addition, the Hillsborough County State Attorney's Office has a standard operating procedure which mirrors what happened with Turco. At the time of Mr. Tompkins trial, the State was represented by Mike Benito. At the October 4, 1985, hearing on Mr. Tompkins' motion for new trial, the State was represented by Joe Episcopo. On April 19, 2001, Mr. Episcopo was called as a witness in the case of State v. Holton, Case No. 86-8931, in connection with a Brady claim. On cross-examination by the State, the following testimony was elicited from Mr. Episcopo:

> 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 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.

(2PCR. 670-730). This evidence establishes that the Hillsborough County State Attorney's Office had a standard operating procedure to not have an explicit agreement with a cooperating witness in order to circumvent the Brady obligation and to mislead the jury into believing that less, rather than more, was riding on the cooperating witness's testimony. At Mr. Tompkins' trial, Turco acknowledged that he had been part of the confidential informant system in prison for the last 4 or 5 years and that he was "trustworthy" (R. 317). Surely, Turco knew of the State's standard operating procedure and knew he could expect help from Benito. Episcopo's testimony explains Benito's statement at Turco's sentencing that "I wanted to tell this to the Court earlier but I didn't get the chance" and that he was going to allow Turco to withdraw a guilty plea to felony escape:

> He came forward with some vital information for me in a murder case I tried before Judge Coe two weeks ago. This guy who killed a 16 year old girl and found the body under the house. Turco coming forward with this admission from this inmate assisted us in putting this guy on death row two weeks ago. At the time when I talked to Mr. Turco I told him I could not promise him anything more than I would come in front of you, advise you that he assisted us. **Now after he's testified,**

> **Judge, it is going to be my position, 'cause I tried to balance this, I -- -- I wanted to tell this to the Court earlier but I didn't get the chance. I am going to recommend to the Court to allow Mr. Turco, on my suggestion, to withdraw his plea of guilty to the escape and then it will be my intention just to nol-pros it, 'cause I feel, Judge, he's got a 30 year sentence.**

The standard operation procedure means that no explicit promises were made to Mr. Turco because his exact benefit was dependent upon his performance before the jury and how much he ingratiated himself with the prosecuting attorney. The standard operating procedure itself is in fact undisclosed impeachment evidence. Claims based upon the dismissal of Turco's escape charge and upon the State's standard operating procedure were raised in the prior Rule 3.850 proceedings.

2. When was Lisa last seen?

According to the State, Mr. Tompkins was the last person to see Lisa alive on March 24, 1983. However, during the post-conviction proceedings, substantial evidence has surfaced that this was not true.

Barbara DeCarr first told police she last saw Lisa at 1:30 or 2:00 p.m. on March 24, 1983. Barbara reported Lisa missing on March 24, 1983. The initial police report, dated March 24, 1983 at 5:30 p.m., is a two-page report (3PCR. 145). The first page lists the complainant, the date and the time of the incident being reported. The "Date Time Occurred" is listed as "24 Mar 23 1330-

1400". It is clear from the first page of the report that Barbara DeCarr is the complainant. In the code box next to her name appears "C/P". The codes are explained above her name, with "C=Complainant" and "P=Parent." Thus, Barbara was identified as both the Complainant and the Parent. A handwritten notation on page one of the report states, "Mrs. Decarr stated her daughter ran away from home for no apparent reason." The second page of the report lists Lisa DeCarr as "JR," which means "Juvenile Runaway," and Wendy Chancey as "W," meaning "Witness." The report then has a "Narrative" section containing the instruction, "Do Not Repeat in Narrative Any Information Already Contained in Report." In the Narrative section, the reporting officer wrote:

> Compl. stated *she last saw Lisa* at the listed residence at the listed time. Compl. stated that everything was fine at home and has had no trouble with Lisa running away or anything. Cmpl. stated that Lisa was having some trouble in school but nothing to cause her to runaway. Cmpl. checked with Lisa's friends and school for information as to where she might be with negative results. Cmpl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Cmpl. checked with Beach Place with negative results. Cmpl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.

(3PCR. 145)(Emphasis added). Determining the listed time and residence requires referring back to page one of the report. Page one shows the listed time as 1:30-2:00 on March 24, 1983 and the listed residence as 1225 E. Osborne St., Lisa's

residence. Thus, at 5:30 p.m. on March 24, 1983, just hours after Lisa went missing, the "Complainant/Parent," Barbara DeCarr, told the officer that "**she** last saw Lisa" at 1:30-2:00 p.m. on March 24, 1983, at 1225 E. Osborne.

Allegations regarding this reports were raised in Mr. Tompkins' 1989 and 2001 Rule 3.850 motions. In 1989, the report was the basis of an ineffective assistance of counsel claim because the report had been disclosed in discovery, although it was largely illegible (R. 541-42). This Court's 1989 opinion on the appeal of the 1989 motion does not mention the allegations regarding this report. *See* Tompkins v. Dugger. In 2001, when the State disclosed a legible copy of the report, its contents were raised as a Brady violation because the initial disclosure had been illegible. This Court found no Brady violation "[b]ecause defense counsel knew of the report and could have requested a legible copy." Tompkins v. State, 2003 Fla. LEXIS 1718 at *18. If the legible report disclosed in 2001 does not support a Brady violation, it does establish ineffective assistance of counsel. Gunsby. However, under Giglio v. United States and Banks v. Dretke, the State violated its affirmative obligation "to set the record straight" when Barbara DeCarr testified at trial that Mr. Tompkins was the last person to see Lisa. "Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly resting upon the prosecuting attorney,

will be faithfully observed.'" Banks, 124 S.Ct. at 1275, quoting Berger v. United States, 295 U.S. at 88. Rather than "faithfully observ[ing]" this duty in Mr. Tompkins' case, the State allowed Barbara DeCarr to testify falsely and has taken the position that Mr. Tompkins is required to "set the record straight."

Lisa was at Gladys Staley's house at 2:30 p.m. on March 24, 1983.

Gladys Staley was Mr. Tompkins' mother. Barbara DeCarr testified that she was at Gladys Staley's house from 9 a.m. to 3 p.m. on March 24, 1983, the day Lisa disappeared. A police report dated July 9, 1984, reports that Mrs. Staley said she saw Lisa at about 2:30 p.m. on the day she disappeared (R. 511-12).

Mrs. Staley was not called by either side to testify at Mr. Tompkins' trial. She was not even deposed pretrial. However, as she has explained in an affidavit admitted at the 1989 evidentiary hearing:

> The day that Lisa disappeared, she was at my house about 2:30 in the afternoon - she had stayed home from school because she didn't feel well. Lisa was wearing blue jean short shorts and a reddish-pink halter top. I scolded Lisa about her outfit because it was cold and rainy that day, and I told her to go home and put on some warmer clothes before she even got sicker. This was the last time I ever saw Lisa.

(3PCR. 149). Trial counsel testified at the state court hearing that he talked to Staley before the trial, but he did not recall her telling him anything significant that would have been useful (1PCR. 96-97). Significantly, in 1989, the state trial judge

found that trial counsel had inadequately investigated Mr. Tompkins' family background and that he had not talked to the family members, including Staley, enough to learn the relevant information they had (1PCR. 471). Similarly, trial counsel failed to adequately investigate and prepare to use Staley at the guilt phase of the trial. These facts were raised in Mr. Tompkins' 1989 ineffective assistance of counsel claim. This Court's opinion in that case does not mention this allegation. *See* Tompkins v. Dugger.

Wendy Chancey saw Lisa get into a car on March 24, 1983. A police report dated March 24, 1983, identified Wendy Chancey as a witness, and included a summary of the interview of Wendy Chancey:

> Interview: Witness [Wendy Chancey] stated she observed Lisa get into the suspect vehicle at 12th St and Osborne and was last scene heading North on 12th St. Witness could give no more information, but can identify the suspect vehicle.

(3PCR. 145). The police report identified the car as a 1973-76 Ford Pinto, brown in color, with tinted windows and an unknown license tag. Trial counsel was provided with this report, but failed to use it. Counsel attempted to bring out Chancey's statement through the testimony of other witnesses, but the court refused to allow the testimony, ruling that it was hearsay. Counsel did not attempt to call Chancey as a witness and, in fact, never even spoke to her (1PC-R. 84),

despite the clearly exculpatory nature of her statement to the police. Counsel failed to do any research regarding a possible hearsay exception which would have permitted the admission of Chancey's statement (1PC-R. 82).

Had defense counsel interviewed Wendy Chancey, he would have been able to establish that although she does not now remember the events surrounding Lisa DeCarr's disappearance, her statement to the police was reliable and admissible: (3PCR. 145). Because Wendy Chancey confirmed that she did make the statement to the police and that the statement was true, the statement was admissible under §90.803.5, Fla. Stat. Trial counsel's failure to contact Chancey and research the Florida Evidence Code as to what predicate needed to be laid to make this evidence admissible prejudiced Mr. Tompkins.

3. What was Lisa wearing when she was last seen?

The State's position that Lisa was wearing a pink bathrobe with a sash when she disappeared. Evidence not presented at trial, however, indicated that Lisa was dressed as Mr. Tompkins described, in jeans and a red or maroon shirt.

Gladys Staley saw Lisa wearing "blue jean short shorts and a reddish-pink halter top" at 2:30 p.m. on March 24, 1983. Mrs. Staley made this statement to the police in 1984 and repeated it in a 1989 affidavit. This allegation was presented in Mr. Tompkins' 1989 motion as part of the ineffective assistance

of counsel claim. This Court did not address it. *See* Tompkins v. Dugger.

The initial police report on Lisa's disappearance stated that Lisa was wearing jeans and a maroon top. This allegation was presented in Mr. Tompkins' 1989 Rule 3.850 motion as part of the ineffective assistance of counsel claim. This Court did not address it. *See* Tompkins v. Dugger.

4. Identification of the body under the house

The State's position was that the body under the house was Lisa's. The identification was based upon clothing and jewelry found with the body, Barbara DeCarr's testimony that Lisa had an occluded tooth, and the medical examiner's false testimony about dental records (1PCR 233).

The body was not identified through dental records. The State allowed the presentation of false testimony through the medical examiner who testified to identifying Lisa through her dental records. When asked by defense counsel if the dental records of Lisa DeCarr were compared with the skeletal remains in order to make an identification, the medical examiner responded affirmatively and displayed x-rays (R. 195-96). Contrary to the testimony of the medical examiner, Lisa DeCarr's dental records were not obtained (R. 217, 294). During the 1989 hearing, the prosecutor testified that no dental identification of the victim was ever made (1PCR. 233). The false testimony of the medical examiner was critical because

there was only circumstantial evidence of the identity of the deceased. This false testimony mislead the jurors to think that an expert had identified the body when in fact no such identification had taken place. The error was compounded when the dental records were sent to the jury room during deliberations (R. 399, 400). These allegations were presented in the 1989 Rule 3.850 motion. This Court did not discuss them. *See* Tompkins v. Dugger.

Lisa did not own a diamond engagement ring. One piece of evidence introduced as supporting the identification of the body was a diamond ring found near the body. According to Barbara DeCarr, the ring was an engagement ring Lisa received from her boyfriend on her fifteenth birthday, September 26, 1982. However, Gladys Staley has attested that Lisa did not have such a ring:

> Lisa talked about her boyfriend all the time and she told me he was planning to give her a ring. The last time I saw Lisa, she didn't have any engagement ring on. If her boyfriend had given her a ring, I'm sure that she would have been showing it off to me because she talked to me about getting married and getting away from Barbara as soon as she could.

(Affidavit of Gladys Staley, Exh. 18 at 1989 hearing). Kathy Stevens was unaware of Lisa receiving an engagement ring Lisa prior before her disappearance, although

Stevens was familiar with other rings Lisa wore (1PCR. 16, 22).[18]

5. Other evidence contradicting the State's case

i. Other suspects

Included in police records first disclosed in 2001 was a lead sheet with the following handwritten notation:

> B/M living at 1223 E Osborne - Name maybe Bob - Note left by Lisa about Bob wanting sex - last name McKelvin? Nothing in Records 6 Jul 84 - 11 Jul Real Name Everett Knight 167243

(3PCR. 122). The records included a lengthy rap sheet for Everett Knight.[19]

At trial, the defense inquired regarding the police investigation of Bob

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[18]In 1989, Mr. Tompkins attempted to call Stevens as a witness. When the prosecutor objected, the court required the parties to confer with Stevens and report to the court what she indicated. At that time, it was placed in the record that Kathy Stevens said that Lisa "always wore the rings all the time, and particularly there was a ring she remembered on the index finger that was flat like an initial ring, is the way, I believe, the word she used." (1PCR. 22).

[19]The name Everett Knight was never disclosed by the State, nor was Knight's lengthy rap sheet which was in the State's possession and included a conviction for "sex offense crime against nature." The fact that McKelvin was really Everett Knight was also never disclosed. Therefore, the jury was never made aware of the significance of Detective Burke's failure to follow-up on the McKelvin lead. Also disclosed in April of 2001 is a Criminal Intelligence Report dated Nov. 26, 1981, that set forth Everett Knight's criminal specialties, "Hi-jacking and armed robbery." Although Barbara DeCarr testified in cross-examination before the jury that "Bob McKelvin had propositioned Lisa and had basically told her that he would do certain things for her for sexual favors" (R. 228), because the State failed to disclose the extent of McKelvin's criminal background, defense counsel was unable to adequately cross-examine Detective Burke and Barbara DeCarr.

McKelvin, asking Detective Burke specifically about Bob McKelvin and his sexual advances toward Lisa DeCarr. Burke was unsure if he spoke with a Bob McKelvin, claiming that he did not recall the name of a black man who was a neighbor of the DeCarrs and whether he spoke with him (R. 287). Burke was aware of someone having made sexual advances toward Lisa, and "[i]f it was Bob McKelvin who lived next door, yes, I was aware of some information regarding that" (Id.). Burke never followed up on that investigation (Id.), and McKelvin was never interviewed (R. 288).

Also disclosed for the first time in April of 2001 were numerous police reports and statements regarding the investigation into the disappearance of a young woman named Jessie Albach. Albach and Lisa Decarr were friends, the disappearance of both girls was originally investigated as one case, with the prime suspect in both being Mr. Tompkins (3PCR. 124). Information regarding the Albach investigation was not disclosed until 2001 even though both cases were being treated as a single police investigation. Compelling information as to the Albach case also related to the DeCarr case. See Rogers, 782 So. 2d at 380.

A July 28, 1983, report contained the following report by Detective Gullo:

13 Jun 83, 0855

The u/signed went to 4507 Giddens, Apt. #57 and spoke to OTIS

> KIRNES, BM, No phone. Otis stated that he saw JESSIE ALBACH on Thurs., 10 Jun 83 in the early evening hours at the THORNTON GAS STATION. **She was with a WM, very thin build, approx., 6' tall with med length, blond hair, combed straight down**. He observed them buy a six pack of beer and then leave, but he does not know in which direction they went or if they had a car. OTIS stated that he did not know JESSIE was a RUNAWAY at that time, or he would have told the gas station attendant. OTIS stated that he does not know JESSIE that well, but that he has seen her in the gas station on numerous occasions, and on times, they have said 'hello' to each other, but he does not know her very well, but knows for sure that he did observe her at the gas station on Thurs., 10 Jun 83. There was no doubt in his mind.

(3PCR. 124). Jessie Albach had been reported as a runaway on June 7, 1983.

The materials disclosed in April 2001 indicate a suspect known as W.H. Graham(3PCR. 125-30). The Tampa Police Department disclosed for the first time a May 3, 1984, police report concerning interviews with W.H. Graham,[20] the individual who found the body identified as Albach:[21]

> Graham related he has observed an old (late 60's early 70's) model Oldsmobile or Buick, black in color, starting to frequent the field; the

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[20]In the newly disclosed May 3, 1984, report, it is reported that, "Graham stated he has had a continual problem with prowlers and vehicles loitering in this field usually during the early morning hours (0230-0530 h., seven days a week). Graham stated he has found women's underclothing and purses in the field, on numerous occasions; he also stated he has heard what sounded like female screams on numerous occasions, but did not personally check on it himself." (3PCR. 129).

[21]Another newly disclosed report reveals that on June 9, 1984, W.H. Graham found additional bones in the area where the body believed to be Jessie Albach was found (3PCR. 129).

> first time he noticed it was approx. three months ago and the last time he saw it was approx. two to three weeks ago.
>
> Graham is sure this is the same vehicle which pulls into the open field usually between 0300 h. and 0500 h., is driven by a B/M and he always has a W/F passenger. Graham stated he sometimes works in his yard during these hours and can clearly see the B/M driver but cannot describe or identify him.

(3PCR. 125). A May 9, 1984, report which was not disclosed until April of 2001 reveals that in fact there were two W.H. Graham's:

> W/M GRAHAM, W.H., DOB 2 JUL 31, ADD: 4304 E. WILDER, SS # 492-34-3794, D.L. #G650-888-31-242, 6'1", 185#, BLUE EYES, GREY HAIR, ARRESTED 8-18-82.
> W/M GRAHAM, WESLEY HOWARD, DOB 1 FEB 54, ADD 4304 E. WILDER, SS # 488-64-0011, d.l. # g180-416-56-243, 6', 184 #, BLUE EYES, BRN HAIR, ARRESTED 27 AUG 82.

(3PCR. 129).

The arrests in August of 1982 were both for the sale of alcoholic beverages without a license, apparently at a club known as "Naked City." This report also reveals that the Graham's had four vehicles registered to the older Graham, including a 1971 Ford of an unknown model. Significantly, both the car registered to McKelvin[22] and the '71 Ford registered to Graham match the description of the

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[22] The 11/26/81 Criminal Intelligence Report regarding Everett Knight (A.K.A. Bob McKelvin) indicates that Mr. Knight owns a green '70 Pontiac Catalina (3PCR. 123).

vehicle that Wendy Chancey saw Lisa DeCarr getting into on the day of her disappearance. Mr. Tompkins was never aware of this connection because neither the reports on McKelvin or Graham were disclosed to the defense.

Also disclosed for the first time in April of 2001 is a police report dated August 18, 1982, regarding an establishment known as the "Naked City" which was operated by W. H. Graham. Police charged five young white female dancers with lewd and lascivious acts. Mr. Graham was cited "for maintaining premises where alcohol is sold unlawfully." One of the girls admitted that she was under age and that Graham had altered her driver's license to change her birth date.

Additionally, the State disclosed for the first time in April of 2001 a December 27, 1983, letter from the State Attorney of Hillsborough County detailing the final disposition of charges pending against W. H. Graham. Mr. Graham was convicted of **"KEEPING HOUSE OF ILL FAME"** and he received withheld adjudication and 18 months of probation. On September 26, 1981, W.H. Graham was charged with aggravated assault. Reportedly, he attacked an 18 year old white male with a pipe (3PCR. 126).

Records disclosed for the first time in April of 2001 show that in June of 1983, W. H. Graham was being investigated for raping one of the girls who worked at the "Naked City" on June 24th. One of the documents describes W.H. Graham

as “6’ 01” and weighing approximately 185, with either gray or white hair that was straight and dirty or sloppy. However, the police officer was not able to find the victim on June 27th or June 30th. On July 6th, the police officer located someone at the trailer who reported that the victim had moved on June 25th. The case was closed with the victim listed as “LNU, Laurie”, address “At large”. A cab driver who had picked Laurie up on June 24th had been advised of the rape and had contacted the police. He described her as a white female about 4’10” to 5’ tall. The cab driver also advised “that Graham stated to him that he was having trouble with the girls and was going to shut down Naked City.” Thereafter, it was noted that Naked City in fact closed (3PCR. 128-29). On the June 7, 1983, juvenile runaway report regarding Jessie Albach it is represented that she was 4’11”, 97 lbs. Further reports which were previously undisclosed detail a witness’ identification of Graham in the same area where both Lisa DeCarr and Jessie Albach lived. A May 21, 1984, report by Det. Burke included an account of an interview of Charlotte Mercier, DOB 11/1/67, that provided as follows:

> She further stated that the victim in this offense was a very good friend of a girl by the name of Leslie DeCarr who is missing. She state at one time she had stayed with the DeCarr’s in the trailer park where Jessie lives known as the Keba. She further states that she knew one of Jessie’s brothers had abused her quite a bit and that she had often seen this take place in front of her, most of which was pushing and shoving and pulling hair and she has seen George Albach hit Jessie on

> a few occasions. She said normally when she and Jessie would go out, they would go to the East Lake Mall or go to her house on E. Giddens. She said she knew Jessie had participated at least one (1) time in sexual intercourse with her brother because she had walked in on them one (1) day when she was living on Giddens. She said at that time she believed Jessie to be about 11 thru 13 yrs old. She said at that time she and Jessie had never talked about the situation where she was caught during sexual intercourse. She stated that she and Jessie had never talked about sexual intercourse with anyone else. She advised also Jessie had never talked to her about having any older men approach her. She stated that on at least three or four occasions,that she has gone with Jessie up to the Wagon Wheel Restaurant to find Jessie's mother (They normally call Jesse Ladon). She said each time they would go to the WagonWheel, that there was a WM, somewhere between 30 and 40 yrs old who would give Jessie quite a bit of attention and also give her money. She stated she does not know who this subject is. At this point, the u/signed showed a photopak to Mercier at which time she picked out a photograph of WM Graham as the subj she had seen in the area several times around the Keba Trailer Park also at the Wagon Wheel and also at Farmer John's Market.

(3PCR. 126-27).

The report also contained an account of a May 17, 1984, interview of Sherry Bedsole, DOB 10/3/69, revealing additional suspects:

> It should be noted at this point that Charlotte Mercier and Sherry Bedsole are sisters, having different father. She made aprox. The same statement as did her sister, with exception that she had also seen Jessie have sexual intercourse with a subject by the name of Billy DeCarr and also her brother Eddie Mercier who is now 18 yrs old. She stated she made these observations once at the DeCarr trailer and once at her house when they lived on E. Giddens.

(3PCR. 127-28).

ii. **Script of Questions**.

Also disclosed for the first time in April of 2001 by the Tampa Police Department is a list of the questions that was to be asked Detective Burke by prosecutor Benito at Mr. Tompkins' trial. Not only is this a list of the questions, but in places the answers have been typed in by the person who prepared the document. The fact that the prosecutor felt compelled to provide the lead detective with in essence a script is impeachment evidence. Moreover, the existence of this script was only discovered because it was kept with Det. Burke's file, its existence suggests that scripts for witnesses was a practice of Benito and that he may have employed this practice with his three main witnesses: Barbara DeCarr, Kathy Stevens, and Kenneth Turco (3PCR. 130). The trial court concluded that the "answers to the questions pertain to issues that are irrelevant to the substantive testimony of the detective." This is incorrect. The questions and answers pertain to the investigation he conducted and his interview of Wayne Tompkins which contained very pertinent information as to Wayne's account of the events. Yet, the trial judge has missed the significance of the script. The script suggested that there may be a practice of scripting witnesses. This is extremely relevant given the fact that the key witnesses' stories changed several times and only coincided with each other at trial. *See* Rogers v. State, 782 So. 2d 373, 384-85 (Fla. 2001).

6. Conclusion

When all of the evidence discussed above is considered cumulatively, Kyles v. Whitley, Mr. Tompkins is entitled to a new trial.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. TOMPKINS' MOTION FOR DNA TESTING.

Along with his Rule 3.850 motion, Mr. Tompkins filed a motion for DNA testing under Rule 3.853, Fla. R. Crim. P. (3PC-R.222).[23] Mr. Tompkins had previously requested DNA testing, and this Court addressed that request in Tompkins v. State, 28 Fla. L. Weekly S767 (Fla. Oct. 9, 2003). However, at the time of that request, neither §925.11(2)(f), Fla. Stat. (2002), nor Rule 3.853 had been adopted.

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[23]In his Rule 3.853 motion, Mr. Tompkins requested testing of hairs found with the body and of the bones. Mr. Tompkins argued that DNA testing of the bone identified as the remains of Lisa DeCarr would determine definitively whether the remains were those of Lisa DeCarr (3PCR. 224) ("Certainly testing of the remains and the hair could produce results that would exonerate Mr. Tompkins. Clearly, if the remains are not those of Lisa DeCarr, the State's case crumbles.")). Given that Mr. Tompkins was convicted of murdering Lisa DeCarr, DNA evidence that the remains were not those of Lisa DeCarr would have resulted in Mr. Tompkins' acquittal. Mr. Tompkins also contended that testing of the hairs would produce evidence exonerating him: "If the hair that was found with the remains does not match Mr. Tompkins nor Lisa DeCarr, it would be evidence of Mr. Tompkins' innocence. Zollman v. State, 820 So.2d 1059 (Fla. 2nd DCA 2002)" (3PCR.225).

Section 925.11, Fla. Stat., adopted in 2001, extended to convicted criminal defendants the substantive right to obtain DNA testing in order to challenge their conviction or sentence.[24] When this Court issued Fla. R. Crim P. 3.853, it established the court procedure to be employed when exercising that substantive right. Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853, 807 So.2d 633 (Fla. 2001). Rule 3.853 sets forth the pleading requirements to be used to obtain DNA testing of biological evidence. "[T]he purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a 'credible concern that an injustice may have occurred and DNA testing may resolve the issue.'" Zollman v. State, 820 So.2d 1059, 1062 (Fla. 2nd DCA 2002), quoting In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853, 807 So.2d at 636 (Anstead, J., concurring).

Rule 3.853 provides that in passing upon a motion for DNA testing, the circuit court should assess "[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the

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[24]Having extended to Mr. Tompkins a right to obtain DNA testing of the physical evidence in his case, the State of Florida can only extinguish that right in a manner that comports with due process.

DNA evidence had been admitted at trial."[25] Thus, a motion for DNA testing should be granted "if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had

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[25]The "reasonable probability" standard is a familiar legal standard that was first adopted and explained by the Supreme Court in Strickland v. Washington. The next year, the Supreme Court used that standard for determining whether undisclosed exculpatory evidence was material. United States v. Bagley. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

The Supreme Court and this Court have explained that the "reasonable probability" standard requires the court to analyze the evidence that the jury did not hear "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. at 436 (1995); Young v. State, 739 So.2d 553, 559 (Fla. 1999). Thus, the proper standard is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435 (footnote omitted). See Lightbourne v. State, 742 So. 238, 247-48 (Fla. 1999). Thus, the "reasonable probability" standard mandated by Rule 3.853 requires cumulative consideration of all the evidence not heard by the jury as a result of either the State's failure to disclose under Brady or defense counsel's failure to adequately investigate under Strickland when determining whether there is a "reasonable probability" of a different outcome. The wealth of exculpatory evidence not presented at trial but discovered during postconviction proceedings, *see* Argument III, *supra*, must be considered when considering whether the alleged DNA results could create a "reasonable probability" of a different outcome. Lightbourne v. State; State v. Gunsby. It is not a question of whether there was sufficient evidence to convict. In Kyles, the Supreme Court explained: "[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution." 514 U.S. at 453.

been admitted at trial." Knighten v. State, 829 So.2d 249, 252 (Fla 2nd DCA 2002). In making this determination, the allegations contained in the motion must be taken as true. Borland v. State, 848 So.2d 1288, 1290 (Fla. 2003)("If [ ] the State's response creates a factual dispute, the trial court should conduct an evidentiary hearing to resolve the dispute"). Mr. Tompkins has alleged that the DNA testing can establish that the remains are not those of Lisa DeCarr. This allegation must be accepted as true.[26]

The fact that an eyewitness identified the defendant at trial is no bar to obtaining DNA testing under Rule 3.853. Manual v. State, 28 Fla. L. Weekly

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[26]This Court has long held that under Rule 3.850, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show he is entitled to no relief or unless the motion is legally insufficient. Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). The trial court must accept all allegations in the motion as true to the extent that they are not conclusively rebutted by the record. Gaskin, 737 So. 2d at 516. While the defendant has the burden of pleading a *prima facie* basis for relief, "an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to no relief." Gaskin, 737 So. 2d at 516 (emphasis in original). Thus, under Rule 3.850, "the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief." Id. In order to support a summary denial, the circuit court "must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Spencer v. State, 842 So. 2d 52, 69 (Fla. 2003). These principles are equally applicable to Rule 3.853, as explained in Borland. No sworn evidence subject to confrontation was presented by the State regarding the matter. This absence of evidentiary development cannot support denial of Mr. Tompkins' motion.

D1399 (Fla. 2nd DCA June 13, 2003); Knighten v. State, 829 So.2d 249, 251 (Fla. 2nd DCA 2002). With favorable DNA results, the eyewitness "testimony may not have been sufficient to convict." Riley v. State, 28 Fla. L. Weekly D1790 (Fla. 2nd DCA July 30, 2003).

Rule 3.853 and § 925.11(2)(f), Fla. Stat. (2002), created a substantive right. Where the State of Florida extends a right or a liberty interest, the right or liberty interest may only be extinguished in a manner that comports with due process. Evitts v. Lucey, 469 U.S. 387 (1985). Here, Mr. Tompkins has been denied his substantive right to obtain DNA testing, in disregard of the standards appearing in §925.11 and Rule 3.853, because at the time of the prior proceedings those provisions did not exist. No notice and opportunity to be heard in conformity with due process occurred. Mr. Tompkins is entitled to be heard on his Rule 3.853 motion.

CONCLUSION

In light of the foregoing arguments, Mr. Tompkins requests that this matter be remanded to the circuit court for consideration of and ruling upon the merits, for a full and fair evidentiary hearing and for other relief as set forth in this Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished

by United States Mail, first-class postage prepaid, to Robert Landry, Office of Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607, on March 26, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in Times New Roman 14 point

not proportionally spaced and complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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