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

REPLY 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.

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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.[1]

In its Answer Brief, the State seems to be confused as to Mr. Tompkins' argument.[2] To clarify, Mr. Tompkins reiterates that the circuit court was without jurisdiction to dismiss Mr. Tompkins' motion to vacate. Even though the circuit court found that it was without jurisdiction, the circuit court entered an order dismissing Mr. Tompkins' motion to vacate. Therefore, the order dismissing the motion must be vacated to permit the consideration of the motion once jurisdiction returns to the circuit court. *See* Initial Brief at 12.

Mr. Tompkins has **not** petitioned this Court "to mandamus" the circuit court. *See* Answer Brief at 10. Mr. Tompkins has filed an appeal seeking a

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[1]This is the caption for this Argument that appeared in the Initial Brief. Undersigned counsel believed that it was implicitly obvious from the text of the argument that the circuit court would only be able to consider and rule on Mr. Tompkins' motion once jurisdiction over the matter had been returned to the circuit court. Moreover, this Court certainly has the power to relinquish jurisdiction enabling consideration of the motion.

[2]The State asserts that "Appellant apparently is seeking this Court to mandamus the lower court to consider his claims while the lower court lacks ,jurisdiction." Answer Brief at 10.

determination that the circuit court was without jurisdiction to enter an order dismissing the motion to vacate.[3]

Setting aside the State's insistence that it disagrees with Mr. Tompkins' argument, examination of the law set forth in the Answer Brief reveals that the parties actually agree. For example, the State asserts:

> It is clear also that the District Court of Appeals have recognized that trial courts lack jurisdiction to entertain postconviction motions when direct appeals or prior postconviction motions are pending review in the appellate courts.

Answer Brief at 9. This is precisely what Mr. Tompkins argued in his Initial Brief:

> 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.

Initial Brief at 4.

The State tries to dodge the obvious--that the parties agree--by asserting that "Appellant relies on a second line of cases." According to the State, Mr. Tompkins asserted in his Initial Brief that the trial court had jurisdiction to entertain

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[3]As explained in the Initial Brief, undersigned counsel filed the motion to vacate at issue in the circuit court at a time that he believed that the circuit court did not have jurisdiction because of the suggestion made by a justice of this Court during the oral argument in *Duest v. State*, FSC Case No. SC 00-2366, that the proper procedure was to file a motion to vacate when new evidence was discovered even though a related appeal was pending.

the motion to vacate because "the issues raised in the two cases [the pending appeal and the motion to vacate] are unrelated." Answer Brief at 10.

However, Mr. Tompkins specifically argued that this line of cases did not apply. In his Initial Brief, Mr. Tompkins stated:

> Under *[State v.]Meneses*, [392 So. 2d 905 (Fla. 1981),] 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**.

Initial Brief at 12 (emphasis added).[4]

Thus, it would appear that the parties in fact agree that the circuit court lacked jurisdiction to consider Mr. Tompkins' motion to vacate. However, it is as to the effect of the circuit court's lack of jurisdiction that Mr. Tompkins and the

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[4]It should be observed that when Mr. Tompkins filed his Initial Brief, the State had not previously taken a position regarding the issues presented herein. The State had not filed a response to the motion to vacate. The State did not file a response to Mr. Tompkins' motion for rehearing. Thus in his Initial Brief, Mr. Tompkins was forced to anticipate potential arguments that the State might assert in support of the circuit court's dismissal of the motion to vacate.

Now that Mr. Tompkins knows that the State agrees that the circuit court lacked jurisdiction over the motion to vacate, the scope of the argument is much narrower.

State disagree. Mr. Tompkins argues that if the circuit court lacked jurisdiction, then it lacked jurisdiction to dismiss the motion to vacate. Conversely, the State argues in its Answer Brief that "the lower court could not commit error in dismissing the motions for lack of jurisdiction because of the pending appeal." Answer Brief at 10.

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

The State never explains how a court without jurisdiction can enter an order dismissing a motion to vacate filed pursuant to Rule 3.850. The State's only authority seems to be the "decision without published opinion" entered in *Bryan v. State*, 743 So. 2d 508 (Fla. 1999). However, given that this decision was not supported by a published opinion, Mr. Tompkins argues that it cannot stand for the proposition that a court without jurisdiction has jurisdiction to enter an order

dismissing a motion to vacate.[5]

The circuit court was without jurisdiction to enter an order dismissing Mr. Tompkins motion to vacate. Accordingly, the order should be vacated.

ARGUMENT II

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

In his Initial Brief, Mr. Tompkins presented this Argument in the event that this Court were to determine that the circuit court possessed jurisdiction to entertain Mr. Tompkins' motion to vacate. If the circuit court had jurisdiction to dismiss the motion to vacate, then the circuit court erred in dismissing the motion without the benefit of an evidentiary hearing.

In response to this argument, the State's only real contention is that Mr. Tompkins has failed to adequately allege his diligence in discovering the evidence

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[5]In the final paragraph of its argument, the State mysteriously asserts, "Whatever may be said about what is the better procedure, appellant should not be entitled to relief since his Motion for DNA Testing was essentially the same request previously considered, rejected and raised in [the] Florida Supreme Court appeal number SC01-1619 and his re-argument of Detective Burke's lead sheets and Detective Milano's report are similar to the prior motion which the Court addressed in its prior decision." Answer Brief at 11.

The State makes no effort to explain how this contention can be considered if the circuit court was without jurisdiction to entertain the motion.

supporting the motion to vacate. The State asserts that Mr. Tompkins has "attempt[ed] to justify his dilatory behavior by arguing that it was not until 2001 that he received the Detective Burke lead sheets and Detective Milano's supplemental report." Answer Brief at 17. Yet, the State concedes that Mr. Tompkins was advised by law enforcement in sworn testimony that Junior Davis had no information:

> Detective Burke in his deposition (which trial counsel Hernandez had) mentioned his interview with Junior Davis in which the latter reported not having any information about the case and counsel examined both Burke and Stevens about him. That Tompkins may only have begun a search for Davis in 2001 or 2002 is an insufficient and inadequate explanation for the failure to seek him out during the *first* round of postconviction litigation.

Answer Brief at 15. Thus, according to the State, Mr. Tompkins should have assumed that Detective Burke's testimony was not correct.

Apparently, the State is unfamiliar with the United States Supreme Court decision in *Banks v. Dretke*, 124 S.Ct. 1256, 1263 (2004)("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."). In *Banks*, the Supreme Court found that the prosecution had violated the Fourteenth Amendment when evidence favorable to the defense was withheld. The Supreme Court rejected the State's contention that the petitioner had not used due diligence

in discovering the due process violation, saying, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id*. at 1275.[6]

Here, the State has asserted:

> Detective Burke in his deposition (which trial counsel Hernandez had) mentioned his interview with Junior Davis **in which the latter reported not having any information about the case** and counsel examined both Burke and Stevens about him.

Answer Brief at 15 (emphasis added). Given this sworn testimony, neither Mr. Tompkins nor his counsel was obligated to assume that this testimony was wrong. It was only when the State finally disclosed additional documentation in 2001 that Mr. Tompkins and his counsel had any reason to assume that Detective Burke's testimony was not true. The documents first disclosed in April of 2001 contained a

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[6]The Supreme Court elaborated:

> Bank's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. [Record citation omitted] It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful."

Id. at 1276.

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 assaulting Lisa, "he just walked away like it was nothing" (R. 254).

Also 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).

Under *Banks*, "[i]t was not incumbent on [Mr. Tompkins] to prove the[]

representations [made by law enforcement regarding Junior Davis] false; rather, Mr. Tompkins was entitled to treat the [factual representations] as truthful." *Banks v. Dretke*, 124 S.Ct. at 1276. If the circuit court had jurisdiction to rule upon the motion to vacate,[7] not only must Mr. Tompkins' factual allegations that he was diligent be accepted as true at this juncture, *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996), but the circumstances that the State acknowledges were present do not demonstrate a lack of diligence because law enforcement misled Mr. Tompkins and his counsel. *Banks v. Dretke*, 124 S.Ct. at 1276.

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.

In his Initial Brief, Mr. Tompkins presented this Argument in the event that this Court were to determine that the circuit court possessed jurisdiction to entertain

[7]In Argument I, Mr. Tompkins argues that the circuit court lacked jurisdiction, and in the State's response to Argument I, the State conceded that the circuit court lacked jurisdiction over the motion to vacate.

Mr. Tompkins' motion to vacate. If the circuit court had jurisdiction to dismiss the motion to vacate, then the circuit court erred in dismissing the motion without the benefit of an evidentiary hearing as to Mr. Tompkins' due process claim.

In its Answer Brief, the State contests the factual allegations on which this Argument is premised. For example, the State argues that Junior Davis's affidavit does not represent information that the State knew or suppressed. Yet, contrary to Detective Burke's erroneous testimony that Junior Davis had no information regarding the matter, the State was sitting upon a police report that indicated otherwise. A supplemental police report dated June 8, 1984, written by Detective Milana, indicated that Maureen Sweeney and Mike Willis had 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)(emphasis added). The feelings about Lisa attributed to "Junior" in this report contradict Kathy Stevens' testimony that when she told "Junior" that Mr. Tompkins was assaulting Lisa, "he just walked away like it was nothing" (R. 254). Certainly, Kathy's testimony if true constitutes an instance in which Lisa tried

to get in touch with him.

When located, Junior Davis confirmed the representations made by Maureen Sweeney and Mike Willis as to his feelings for Lisa. He also indicated that Kathy Stevens' testimony describing him as not caring about Lisa being attacked were not true. He further indicated that Kathy had never run to him to report that Lisa was in trouble and needed his help. 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).

Clearly, the State's representation that Junior Davis was not a material witness and possessed no information was false, and the State possessed police reports indicating that it was false. In violation of the Fourteenth Amendment, the State did not disclose these police reports until April of 2001. Given that Junior

Davis indicates that Kathy Stevens' testimony is not true and given that she was the witness upon which the State built its case, confidence in the outcome must be undermined by Junior Davis's sworn statement. Certainly, when the affidavit is considered cumulatively with the other favorable evidence that the State suppressed, Mr. Tompkins' factual allegations make out a meritorious *Brady* claim.

If the circuit court had jurisdiction to rule upon the motion to vacate,[8] Mr. Tompkins' *Brady* allegations had to be accepted as true. Accepting those allegations as true, an evidentiary hearing was required upon the merits of Mr. Tompkins' due process claim.

ARGUMENT IV

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

In his Initial Brief, Mr. Tompkins presented this Argument in the event that this Court were to determine that the circuit court possessed jurisdiction to entertain Mr. Tompkins' motion to vacate. If the circuit court had jurisdiction to dismiss the motion to vacate, then the circuit court erred in dismissing the motion for DNA Testing without the benefit of an evidentiary hearing.

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[8]In Argument I, Mr. Tompkins argues that the circuit court lacked jurisdiction, and in the State's response to Argument I, the State conceded that the circuit court lacked jurisdiction over the motion to vacate.

In its Answer Brief, the State scoffs at the notion that Florida has created a substantive right to DNA testing that can only be denied in a fashion that comports with due process: "Florida Statute 925.11 has not created a new right that did not previously exist; the courts were previously addressing in postconviction vehicles assertions that DNA testing might be relevant in determining the guilt or innocence of the defendant." Answer Brief at 39.[9]

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. This was explained by the United States Supreme Court in *Evitts v. Lucey*, 469 U.S. 387 (1985). There, the Court noted that the States were not required to provide a right to a direct appeal of a criminal conviction. However, where the right was nonetheless extended, due process protection attached:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may chose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.

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[9]The eight page argument as to Argument IV really boils down to this single assertion that a substantive right to DNA testing has not been created by either §925.11 or Rule 3.853. The State's argument is like arguing that allowing convicted defendants the ability to file an appeal does not really create a substantive right to a direct appeal. It is a ridiculous argument. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

Evitts, 469 U.S. at 400-01.[10]

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. To deny Mr. Tompkins DNA testing of the available physical evidence while other similarly situated capital defendants have received such testing demonstrates an arbitrary process that violates the Eighth and Fourteenth Amendments. This Court *sua sponte* ordered DNA testing in the case of *Duckett v. State*, Case No. SC01-2149 (Order dated 3/21/03), and at the request of the Appellant relinquished jurisdiction to permit DNA testing in *Rivera v. State*, Case No. SC01-2523 (Order dated 7/11/02). Recently, this Court vacated an order

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[10]Similarly in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998),the United States Supreme Court found due process protection accompanied the extension of the right to seek clemency. In delivering the controlling plurality opinion for the Court, Justice O'Connor, along with three (3) other justices concluded, "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." *Id*. at 288 (O'Connor, J., concurring in part and concurring in judgment). In finding that due process attached to the right seek clemency, Justice O'Connor referenced her concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986). There, Justice O'Connor had found that "'[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of the States.'" 477 U.S. 399, 428,(O'Connor, J., concurring in part, dissenting in part)(*quoting Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). Justice O'Connor explained, "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." *Ford*, 377 U.S. at 428-429.

denying DNA testing and remanded for such testing. *Swafford v. State*, Case No. SC03-931 (Order dated 3/26/04).

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*. 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.

If the circuit court had jurisdiction to rule upon the motion for DNA testing,[11] Mr. Tompkins' factual allegations had to be accepted as true. Accepting those allegations as true, an evidentiary hearing was required upon the merits of Mr. Tompkins' motion for DNA testing. *See Swafford v. State*, Case No. SC03-931 (Order dated 3/26/04).

CONCLUSION

[11]In Argument I, Mr. Tompkins argues that the circuit court lacked jurisdiction, and in the State's response to Argument I, the State conceded that the circuit court lacked jurisdiction over the motion to vacate.

In light of the foregoing arguments, Mr. Tompkins requests that the order dismissing be vacated, so the circuit court can consider the motions on the merits when it possesses jurisdiction. To the extent that this Court determines that the circuit court had jurisdiction to rule on the motions, then the circuit court should be required to conduct a full and fair evidentiary hearing and thereafter grant the relief requested in the motions.

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 June 24, 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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MARTIN J. MCCLAIN