

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-277

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WAYNE TOMPKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

This proceeding involves the appeal of the circuit court's summary denial of a post-conviction motion. 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 third 3.850 appeal to this Court;

"4PC-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. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. State, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003). 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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## 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 immediately 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).

In 1989, Mr. Tompkins filed a post-conviction motion, and the circuit court held an evidentiary hearing. The circuit court found trial counsel's performance was deficient regarding the penalty phase, but denied relief. This Court affirmed the denial of relief. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). Mr. Tompkins filed a federal habeas petition. The petition was subsequently denied. 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 death warrant in 2001, Mr. Tompkins filed a number of motions, including a second Motion to Vacate under Fla. R. Crim. P. 3.850 (2PC-R. 182-307). The circuit court granted an evidentiary hearing on Claim V of the Rule 3.850 motion pertaining to 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, including Mr. Tompkins' request for DNA testing (Id.). Mr. Tompkins appealed the denial of these claims, and the State cross-appealed the grant of sentencing relief. This Court affirmed the circuit court's denial of some claims and reversed the grant of sentencing relief. Tompkins v. State, 872 So. 2d 230 (Fla. 2003).<sup>1</sup>

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), in order to provide the circuit court with jurisdiction to consider a Rule 3.850 motion based upon new evidence. This evidence was discovered as a result of records the State first disclosed in 2001. These records revealed that James Davis had made statements contradicting Kathy Stevens. Follow up investigation led

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<sup>1</sup>This Court affirmed the denial of DNA testing saying "we conclude that even if the DNA analysis indicated a source other than Lisa Decarr or Tompkins, there is no reasonable probability that Tompkins would have been acquitted or received a life sentence."

counsel to locate James Davis, who provided an affidavit. However, this Court refused to relinquish jurisdiction.

At the same that he filed his motion to relinquish, Mr. Tompkins filed a Rule 3.850 motion in the circuit court based upon the Davis affidavit. Mr. Tompkins also 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.

The circuit court entered an order dismissing both motions on August 22, 2003, saying that it lacked jurisdiction. Mr. Tompkins appealed.<sup>2</sup> After briefing was completed, this Court held that the circuit court properly dismissed Mr. Tompkins' motions for lack of jurisdiction, but allowed Mr. Tompkins to re-file his Rule 3.850 motion *nunc pro tunc* to February 5, 2003, the date on which Mr. Tompkins had originally filed the dismissed motion. Tompkins v. State, 894 So. 2d 857, 859 (Fla. 2005).<sup>3</sup>

On March 18, 2005, Mr. Tompkins re-filed his Rule 3.850

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<sup>2</sup>In the meantime, this Court issued its opinion regarding the previous motion to vacate on October 9, 2003.

<sup>3</sup>For the same procedural reason, this Court also authorized Mr. Tompkins to re-file his Rule 3.853 motion. However, Mr. Tompkins did not re-file that motion in light of this Court's opinion in the prior appeal saying "we conclude that even if the DNA analysis indicated a source other than Lisa Decarr or Tompkins, there is no reasonable probability that Tompkins would have been acquitted or received a life sentence." It seemed to Mr. Tompkins that that ruling precluded DNA testing.

motion (4PC-R. 139-74). The State filed a response (4PC-R. 84-100). The circuit court heard oral argument (Supp. 4PC-R. 24-49). The court issued an order summarily denying relief, finding that Mr. Tompkins had failed to adequately plead that he had exercised due diligence in locating James Davis, and even if he had, the presentation of the Davis evidence at trial would not have necessarily resulted in an outcome that "would have been any different" (4PC-R. 53-54). Mr. Tompkins filed a motion for rehearing, which the court denied (4PC-R. 39-47, 3-38). Mr. Tompkins filed a notice of appeal (4PC-R. 1-2).

#### **STATEMENT OF THE FACTS**

The core of the State's case, as established by a Bill of Particulars, was that Mr. Tompkins killed Lisa DeCarr "between 8:30 a.m and 5:00 p.m. on March 24, 1983" (R. 397-98).<sup>4</sup> Although it presented 8 witnesses at trial, the State advised that "the key testimony will come from three [] witnesses"--Barbara DeCarr (the victim's mother), Kathy Stevens (the victim's best friend), and Kenneth Turco (the jailhouse snitch)--and that "[t]hose three will provide the overwhelming evidence" that Mr. Tompkins killed Lisa DeCarr on the morning of March 24, 1983 (R. 108). The State acknowledged that its case was entirely

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<sup>4</sup> At the 1989 hearing, the trial prosecutor, Mike 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).

"circumstantial," save for alleged "direct evidence" of a statement of Mr. Tompkins elicited by snitch Turco (R. 117).

The State's theory, as outlined in its opening statement, was as follows:

Wayne Tompkins and Barbara DeCarr were boyfriend and girlfriend, Mr. Tompkins having moved in with DeCarr, along with her three children, including 15-year old Lisa (R. 107-08). On the morning of March 24, 1983, Barbara went to Mr. Tompkins' mother's house to help her move; before she left the house between 8:30 and 9:00 A.M., she checked in on Lisa, who was in bed and was wearing a pink bathrobe (R. 110). After dropping Barbara's son Jamie off at school, Mr. Tompkins came by his mother's house to assist, along with Barbara, with the packing (R. 110-11). At some point, at Barbara's request, Mr. Tompkins went back to his house to get some newspapers to help with the packing (R. 111). After he came back to his mother's house, Mr. Tompkins told Barbara that Lisa was on the couch watching TV (Id.). However, at 3:00 p.m. that day, Mr. Tompkins told Barbara that Lisa had run away (Id.). Barbara went home, did not find Lisa, and contacted the police; she questioned Mr. Tompkins, who told her that the last time he saw Lisa was when she was going out the back door to the store wearing a pair of blue jeans and a burgundy colored blouse (R. 111-12). Barbara and her sons eventually moved out of the house a month later, and Lisa remained missing for over one year (R. 112), until a body identified as Lisa's was found under the house in a shallow grave<sup>5</sup>

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<sup>5</sup> According to Laura Rousseau of the Florida Department of Law Enforcement, the grave was "one foot ten inches after the body was removed, and that was including the four inches we went down below the body" and was "three feet five inches long" (R. 155-56). In order to dig such a grave, one would have to "lay down or kneel under the house" because "[y]ou could not walk underneath the house" (R. 157). Because there were other houses in the area, if it was daylight, neighbors "could see someone [dragging something under the house]" (R. 158).

wrapped<sup>6</sup> in a pink bathrobe with a ligature mark around her neck and some jewelry (R. 113).

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<sup>6</sup> The remains were not clothed in the robe; rather, "[t]he skull was fully wrapped and then this cloth was kind of underneath part of the body" (R. 153-54). The cloth was "more of a white" color rather than pink (R. 153).

Donald Snell testified at trial that he met Barbara DeCarr in May, 1984 (R. 123-24). Snell headed a volunteer group that located missing children, and employed the services of a psychic to do so (R. 124). In June, 1984, Snell again met with Barbara, who assigned him power of attorney to search for Lisa (R. 129). Snell subsequently spoke with Wayne Tompkins, who told him that "if we found anything, to contact him and not Barbara, due to her being in the hospital, and give him the information" (R. 130). Barbara DeCarr had checked herself into the psychiatric ward of a hospital in Tampa. On or around June 6, 1984, Snell's organization conducted a search of Barbara's former house (R. 130-31). Snell recounted that "the house was raised in the front part" and when they looked under it, "we could see a depression which we were sure was a grave." When someone reached under the house, "the earth gave way" and "saw the bones" (R. 132). The depression was "on the right hand side under the front part, the front section, what was the porch" and was about "two to three feet under the house" (R. 133; 135). The police were then contacted (R. 135). On cross-examination, Snell testified that it was not difficult to go under the house to see where the depression was located, and that there were houses on both sides of the DeCarr house, and people from those houses could see what they were doing (R. 138-39). Snell did

not know if Barbara knew where the body was before he went there, but "just didn't believe that she was telling me the whole truth" (R. 138; 40).

Tampa Police Department Sergeant Rademaker testified that the "most significant" discovery found in the grave was "a finger bone with a ring around it" (R. 168). Rademaker testified that they were looking for the ring because "[f]rom talking with Barbara DeCarr, we had learned that her daughter had actually three pieces of jewelry: Two earrings and a ring" (R. 169-70). During a conversation with Barbara, she told him that she believed the body "was someplace on the property and possibly under the house" (R. 170); even though this interview was conducted after the discovery of the body, "we didn't tell her during the interview. We didn't tell her until after we were sure what we had" (Id.).

The medical examiner later identified the body as being Lisa DeCarr based upon information received from Barbara DeCarr.<sup>7</sup> Medical examiner Diggs testified that based on the discovery of a ligature around the neck of the corpse, the cause of death was asphyxiation (R. 184). There was no way to determine how long

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<sup>7</sup>Mike Benito, the trial prosecutor, testified in 1989 that "[o]ther than Mrs. DeCarr's description of the strange tooth in her daughter's mouth" there was no basis for the dental identification (PC-R. 233).



the body had been in the grave, and that it is possible it could have been as little as six or seven months prior to June, 1984 (R. 191).<sup>8</sup> It was impossible to determine whether the ligature was placed on the body after it was in the grave or after the person had died, and but for the ligature, it would have been impossible to determine the cause of death (R. 192). Moreover, the ligature could have been used to drag the body to the gravesite (R. 193-94). The hyoid bone, which is "one of the bones that you look for" to determine if strangulation occurred, was "intact" (R. 193). Diggs also testified that he did not receive Lisa DeCarr's dental records (R. 196). However, dental x-rays which were taken from the corpse "were used in order to make an identification" and he displayed those x-rays (R. 195). Dr. Powell was the one who made the dental identification, but he was not called as a witness and the basis for his opinion was never revealed (R. 195-96). However, Barbara DeCarr had reported that Lisa had an occluded tooth.

Barbara DeCarr testified that she had been separated from her husband Harold since 1980; Harold lived in New York (R. 199). She first met Mr. Tompkins in May, 1981, when she was living with her daughter, Susan LaBlanc, Susan's boyfriend Greg,

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<sup>8</sup>Six or seven months prior to June of 1984 was November or December of 1983. This was eight or nine months after Lisa's March of 1983 disappearance.

and her other children Lisa, William, and Jamie (Id.). Mr. Tompkins moved in with the family in September, 1981, and they dated about 3 years (R. 200-01). At one point, they lived in the Shady Lane Trailer Park, and would have been there during Halloween, 1982 (R. 201). By January, 1983, they had moved to the East Osborne house (R. 202).

On March 24, 1983, Barbara awoke at around 7 a.m. when Mr. Tompkins woke her up and 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 wore (R. 207).<sup>9</sup> The jewelry had been 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 there, Mr. Tompkins was there with other

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<sup>9</sup> The only source of this information was Barbara DeCarr, the same witness who had told the police where to look for the body. In fact, Kathy Stevens (if she can be believed) testified that when she saw Lisa on March 24<sup>th</sup> she was not wearing earrings (R. 260).

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 Mr. Tompkins was gone, and he returned with newspapers (R. 209-10).<sup>10</sup> 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, Mr. Tompkins left again with his stepfather (Id.).

Barbara further testified that at 3:00 that afternoon Mr. Tompkins told her that Lisa "was gone, she had run away" (R. 211).<sup>11</sup> 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).

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<sup>10</sup> According to an undated typed statement of Barbara DeCarr that was provided to the police before Kathy Stevens provided her information about March 24th, Barbara had a different story. She stated: "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."

<sup>11</sup> The Missing Children records that were stipulated into evidence in 1989 show the following notation at 4:30 pm. 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." (Exh. 10). The prosecutor stipulated to the accuracy of Det. Gullo's representations (PC-R. 301).

Barbara then contacted the police from Mr. Tompkins' mother's house (Id.).<sup>12</sup> 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. 213).<sup>13</sup> About a month later, she moved out of the house and into Mr. Tompkins' mother's house (R. 214).

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<sup>12</sup> According to a two-page police report (that had the State disclosed a legible copy in 1989 would have revealed that the two pages should be read as one document), Barbara DeCarr, the "Complainant" (according to page one) said "she last saw Lisa at the listed residence at the listed time. Compl. Stated that everything was fine at home and has no trouble with Lisa running away or anything. Compl. Stated Lisa was having some trouble in school but nothing to cause her to runaway" (according to page two). The first page revealed the time the complainant last saw Lisa was "24 March 83 1330-1400." In other words, **Barbara told the police officer on March 24<sup>th</sup> that she, Barbara saw Lisa at 1:30 to 2:00 pm. on that date.** Neither at trial nor in the 1989 proceedings did the State reveal that Barbara DeCarr's testimony that she told the police that Mr. Tompkins was the last one to see Lisa alive was contradicted by both Det. Gullo and the written record of Barbara's statement on March 24<sup>th</sup>.

<sup>13</sup> The two-page police report indicated that Lisa was wearing "blue jeans, maroon shirt, diamond ring, cross earrings." Implicit in the report was the fact that this was the attire Lisa was wearing at the time she was last seen by the complainant, Barbara DeCarr at 2:00 p.m. Kathy Stevens testified that Lisa was not wearing earrings on March 24<sup>th</sup> when she saw her (R. 260). In 1989, Mr. Tompkins attempted to call Kathy as a witness. When the prosecutor objected, the court required the parties to confer with Ms. 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." (PC-R. 22).

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).<sup>14</sup> Barbara acknowledged that after Lisa disappeared, several people had informed her that Lisa had been seen elsewhere in the community (R. 219).<sup>15</sup>

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<sup>14</sup> According Ms. Stevens, she had never been known as Kathy Sample (R. 242; Stevens Depo. at 15). She had one discussion with Barbara DeCarr after Lisa disappeared when Barbara came to Ms. Stevens' house (R. 257, Depo. 20). Police records show that Detective Gullo made a notation dated April 26, 1983, indicating that he "received a telephone call from Mrs. DeCarr who advised that her son told her that Kathy Sample told him that Lisa called her. Mrs. DeCarr then contacted Kathy who told Mrs. DeCarr that Lisa called her yesterday (25 Apr.) from N.Y. and told her she was O.K. and that she was pregnant. Kathy could not supply any further information." Ms. Stevens acknowledged in her testimony that this was a lie she told Barbara because Lisa had been planning to run away and had told Ms. Stevens, "if anything happens, I want you to tell my mom that I'm going to be all right." (Stevens depo. at 20). When Lisa disappeared, Ms. Stevens assumed that she had run away as planned and so she told the lie that she had promised to tell (R. 257-58).

<sup>15</sup> Interestingly, Detective Gullo's log of his conversations with Barbara about these sightings shows that Barbara was never able to provide a name for any of the numerous individuals she claimed had told her they had seen Lisa after her disappearance. For example, the September 2, 1983 entry stated, "I received a phone call from Mrs. DeCarr who stated that she was told by friends of Lisa that they had seen Lisa on East 7th Ave. at about 46th St. Lisa was standing in the Jewel "T" parking lot speaking with two or three other w/f's. The informants told Mrs. DeCarr that Lisa might be living in a trailer park which is across the street. Mrs. DeCarr told the informants that they should call the police the next time they see her. Mrs. DeCarr was advised that they didn't want to get involved with the police." The only time Mrs. DeCarr supplied a name according to Det. Gullo's log was when she reported Kathy Stevens' lie that Lisa had called from New York. And when making that report, she

Lisa had also been suspended from school on March 23<sup>rd</sup> and could not return until she was accompanied by a parent (Id.).<sup>16</sup> 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).<sup>17</sup>

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gave Det. Gullo the wrong last name. Det. Gullo according to his logs was never able to speak with Kathy.

<sup>16</sup> In 1989, Mike Benito, the trial prosecutor indicated his understanding, "Apparently, the mother didn't know she was suspended, Judge, and that is one of the reasons Kathy thought she ran away, because she didn't want the mother to find out she was suspended" (PC-R 52). However, the school records reveal that there was a March 24th phone conference with Barbara DeCarr "who called to inform that Lisa had left." The records also show that on March 25th, "mom says child ran away yesterday (24th). Thinks child may be pregnant." Similarly, records from the Missing Child organization indicated that Barbara contacted the organization on March 29, 1983, and reported Lisa as missing, saying, "She may be on drugs and she may be pregnant." Barbara DeCarr did not mention to Det. Gullo, the policeman looking for Lisa, Lisa's possible pregnancy until April 26<sup>th</sup>. And in Barbara DeCarr's deposition she testified that Kathy Sample (aka Stevens) was the person who told Barbara that Lisa was pregnant (DeCarr depo. at 33). But since according to Kathy and according to the police records, that conversation did not happen until April 25th, it is unclear how Barbara knew on March 25th that Lisa "may be pregnant" unless Lisa told her on the day she disappeared.

<sup>17</sup> 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). This statement was made after Barbara had told both the police and the Missing Children organization that she had contacted to search the yard at the

She did not become suspicious or tell the police anything when Mr. Tompkins gave her what she later claimed was an incorrect description of Lisa's clothes in March, 1983 (Id.).<sup>18</sup>

In the period between March, 1982, to June, 1984, Barbara had three other boyfriends in addition to Wayne Tompkins (R. 227), including Gary Francis; she denied that she moved out of the trailer park because Gary had harmed Lisa (Id.). It was also true that a man named Bob McElvin had propositioned Lisa, that he would do "certain things for her for sexual favors" (Id.).

Barbara acknowledged calling Mr. Tompkins on the phone while he was incarcerated awaiting trial in order to solicit a confession from him, but Mr. Tompkins did not admit any involvement (R. 229). Also while Mr. Tompkins was in jail, Barbara sent him letters with copies of photographs of skeletal

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Osborne St. residence and she had been informed that the body had not been found. In fact, Detective Burke reported that on June 4, 1984 at 2:30 p.m. 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."

<sup>18</sup> But of course, according to the police report prepared on the date that Lisa was reported missing, the "compl." who was Barbara was the last person to see Lisa "at the listed residence at the listed time" and provided the description of the clothing.

remains and details of how nice Lisa's funeral was, although she initially denied it until she was shown the letters (R. 234).

She also testified that on March 24, 1983, Mr. Tompkins left his mother's house "[t]wice that I know of," but did not remember if he appeared to be mussed up or dirty when he returned (R. 230).

Barbara denied that her ex-husband sexually abused Lisa (Id.).<sup>19</sup> She denied telling anyone at the hospital in May of 1984 that her husband had sexually abused Lisa (R. 231).<sup>20</sup> She also denied being in a fight in a bar when someone blamed her for Lisa's death, saying it was more of an "argument" than a fight (R. 231-32).<sup>21</sup> Barbara also denied telling the police in

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<sup>19</sup> However, according to the hospital records, Barbara provided the following statement when seeking treatment: "1st [husband] used to beat her. he had m.s. 2nd - got along good. He ran around on her. He had sexual relation with daughter that split them up." The Missing Child records contain the notation that on 4/12/84 "Mrs. DeCarr called." During the conversation, she indicated "that Lisa's father had sexually abused his daughter by a previous marriage and one or two of their daughters."

<sup>20</sup> On May 22, 1984, Nurse Yeager reported that Mrs. DeCarr was having difficulty controlling or disciplining her children. She related that she would threaten "to send them to their father, from whom she is separated. Mrs. DeCarr related that her husband had sexually abused her daughter."

<sup>21</sup> However, the hospital records reporting Mrs. DeCarr's statements when seeking treatment for "nasal bridge contusion - laceration below orbital rim" indicated that "pt became involved in fight with another victim's mother in a bar\because pt. was said to have some of the responsibility of both deaths."



June, 1984, to specifically check the yard and under the house, but then stated that "I don't remember saying it" (R. 235-36).

Barbara also testified that she did not practice witchcraft: "I am a Catholic." (Id.) In her deposition, Barbara said her daughter would be lying if she had said that Barbara had engaged in sex acts with "little boys" (DeCarr depo. at 65). At trial, Judge Coe refused to allow any questioning of Barbara regarding her sexual relationships with 12 and 13 year old boys (R. 235).<sup>22</sup> In her deposition, Barbara indicated Jenice DeCarr, Harold DeCarr, and Michelle Hays had all lied about her (DeCarr depo. at 65-66). She also said regarding her daughter Susan LaBlanc, "We do not have a relationship" (DeCarr depo. at 36).

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<sup>22</sup> Detective Burke's report dated June 22, 1984, noted that "Jenice DeCarr who is, the stepdaughter of Barbara DeCarr" stated, "that Barbara DeCarr was heavily into Witchcraft and while living in New York, Barbara participated in witchcraft to a great extent." Jenice also reported "that her brother Harold DeCarr, Jr. was seduced by Barbara when he was 12 yrs. old." Det. Burke noted that "this was confirmed by Harold as we were on a three party telephone conversation at the time. He stated that he was in fact, 12 yrs old when this took place."

Det. Burke reported that Michelle Hayes, "the sister to Lisa DeCarr and the daughter of Barbara DeCarr," made similar statements. Michelle "stated she knew of one time that her mother had at least three or four young boys in her bedroom locked up with her ranging from ages 12 to 14 yrs and that she knew that there was sex acts going on and that one of the subs that was in the bedroom with her mother was Harold, Jr., her stepbrother. She stated that she is certain that they were involved in some type of sex act with their mother. She said it got so bad, that the 12 and 14 yrs old boys would get in a fight over who was to have her mother's affections."

According to Barbara, Lisa never complained that Mr. Tompkins had made any sexual advances, but did complain about other people like Bob McKelvin (R. 236-37). Barbara found out that after 1983, Mr. Tompkins had gone to bed with another woman but denied she was angry at him over the affair (R. 237). Barbara denied that Lisa's boyfriend harmed Lisa, and that the ring he gave Lisa was a "pre-engagement" ring (R. 237-38).

The next "key witness" was Kathy Stevens, who testified that she was never known as Kathy Sample (R. 242). On March 24, 1983, Stevens went to Lisa's house; on the previous day, both girls had been suspended from school,<sup>23</sup> and Stevens went to Lisa's because "Lisa and me had made plans to run away because Lisa could not face her mother" (R. 249).<sup>24</sup> Stevens arrived between 6 and 6:20 a.m. (Id.). After receiving no response to her knocking at the front door, Stevens went to Lisa's window and "she dragged me through the window and she said, 'Kathy, I'm not going to run away. I talked about everything with my mother and we are going to deal with it'" (R. 250). After talking for a few more minutes, Stevens left (Id.). She forgot her purse

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<sup>23</sup> The school records show that both girls were suspended on March 23, 1983, for smoking under a tree off campus. The school records also show that marijuana was found in Kathy's purse.

<sup>24</sup> In discussions with Kathy about her desire to run away, Lisa reportedly said, "if anything happens, I want you to tell my mom that I'm going to be all right" (Stevens depo. at 20).

and went back between 8 and 9:00 a.m; it could have been after 9:00 a.m. (R. 251). No one went with her when she went back to the house; someone named Kim "went the third time" (R. 251).<sup>25</sup> When she went back to get her purse, there was a "loud crash" and when Stevens opened the front door, she 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 she believed that Mr. Tompkins yelled "get out" (R. 252-53). She also saw "a man sitting in the corner chair" maybe four or five feet away "just sitting there watching it like nothing was going on" (Id.).<sup>26</sup> 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 no earrings (R. 253-54). Stevens left, did not call the police, and instead "went up to the store" and ran

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<sup>25</sup> In her deposition, Kathy said, "And then Kim, my girlfriend, went to the house with me. It was 8 o'clock. And we went. And she was standing by the garage where the alley is by her house. And Kim told me, 'Don't call the police. Don't get involved.'" (Stevens depo. at 11). When she first told Mike Benito on March 12, 1985, of this March 24, 1983, incident, she indicated that "[a]t 8:00 a.m. [she] returned because she had left her purse in Lisa's bedroom."

<sup>26</sup> According to her deposition, this other man "was there the whole time when I was coming back and forth" (Stevens depo. at 13). This man was not mentioned to Mike Benito on March 13, 1985, when she first informed him that she had seen Lisa on March 24, 1983.

into Lisa's boyfriend (R. 254). She advised 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.).<sup>27</sup> She then went to school because she did not want to get involved (R. 255).<sup>28</sup>

At trial, her testimony was that Stevens and her girlfriend, Kim, went back to Lisa's house at some point later, but it was the friend who knocked at the door, not Stevens, and her friend may have spoken with Wayne Tompkins (R. 255).

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<sup>27</sup> According to her deposition, Kathy said she "grabbed my purse and I left." (Stevens depo. at 10) "I shut the door. And I told Kim, I said, 'Come on, Kim we got to call the police.' She said, 'Don't get involved.' And I said, 'Why?' And she said, 'Because you don't need to.' And I said, 'Okay.' And I went to the store and that's when I ran into Junior."

<sup>28</sup> Stevens also testified to an incident on Halloween night, 1982, when she and Lisa were in bed when Mr. Tompkins came in, dropped his towel, and "attempted to crawl into bed with us" (R. 246). He was trying to fondle Lisa, and Lisa "dug her nails into him and I believe she did hit him, but I'm not sure" (R. 246-47). Mr. Tompkins was "telling her to stop and calling her a bitch and vulgar names" and then he said "I'm going to kill you" and "then he looked at Lisa and then he got up, and he looked disgusted and he left the room" (R. 247). Mr. Tompkins was in the room fifteen or twenty minutes (Id.). The first time Stevens told anyone of this incident was when she received a phone call from the prosecutor (R. 247). She did not say anything before because Lisa had asked her not to (R. 248). According to Mike Benito's file memorandum, Mr. Tompkins said, "if you ever hit me again, I will kill you." Stevens also testified that one day, she and Lisa were walking to the store, and Mr. Tompkins made the remark "I want to eat you out"; Lisa "turned around, looked at him, and we walked away" (R. 248).

However, she went 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).<sup>29</sup> She knocked at the door and Mr. Tompkins answered (R. 256).<sup>30</sup> She asked if Lisa was there, and he said no, that she had left with her mother (Id.).<sup>31</sup>

Later, Stevens had a discussion with Barbara DeCarr, who had come to Stevens' house to ask her if she had seen Lisa (R. 257). Stevens told her that Lisa "had left for New York" (Id.). Barbara asked if Stevens expected to hear from her, and Stevens replied, "Yes, she will call me when she gets there" (Id.).

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<sup>29</sup> In her deposition, Kathy indicated that she "grabbed her purse" when she left at 8:00 am. (Stevens depo at 10). She also indicated that after she talked to Junior, "me and her [Kim] went back to the school. I cleaned out my locker, and I went to my stepmother's and sat on her porch until she got back. And then I met Kim at school at 2:00 o'clock. And she cut class. And we went to go check on Lisa" (Stevens depo. at 14). "It takes about twenty minutes to get from the school to her house. It was about 2:20, 2:30, something like that" (Id.).

<sup>30</sup> The version she told Benito on March 12, 1985, was different. "Kathy stated she was scared and left but that she returned later around 11:00 or 12:00 and knocked on the door and Wayne answered and said that Lisa had left with her mother. Kathy then sent a friend of her's named Kim Lisenbee over to Lisa's house to check on Lisa and Kim reported back that Lisa had apparently disappeared."

<sup>31</sup> In her deposition, Kathy indicated that this conversation was between Kim and Mr. Tompkins while she "was at the corner waiting." She stated, "I did not hear it" (Stevens depo. at 14). Obviously, this testimony rendered the statements inadmissible hearsay, so by the time of trial the story had changed.

Stevens said this was a lie but that she believed at the time that Lisa had run away (R. 258). Until the body was discovered the next year, Stevens thought Lisa had run away. She told the jury, "it was after the body was discovered [that she] came forward with the information that [she told the jury]" (Id.).

On cross-examination, Stevens said that each time she went to Lisa's house that day, Mr. Tompkins was there. The first time was between 6 and 6:30, and she did not know if Barbara was home at the time (R. 259). She reaffirmed that Lisa did not have her earrings on that day (R. 260). She saw Lisa's boyfriend at the corner store after she left Lisa's house at 6 or 6:30, and he was drunk (R. 260). She denied that Barbara had other boyfriends besides Mr. Tompkins, but acknowledged that in her deposition she said otherwise (R. 261-62). Stevens did not come forward until after the body was found because she "realized that something more was involved than just her disappearing" and told prosecutor Benito her story after he called her (R. 263).<sup>32</sup> She initially told Benito that she knew

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<sup>32</sup> In 1989, Mike 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" (PC-R. 20-21).

nothing about what happened to Lisa that day, and that this conversation was in mid-March 1985.<sup>33</sup> She then recounted that, after "talking to her pillow" one night, she decided to 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). She reaffirmed that she did not call the police after seeing the struggle between Lisa and Mr. Tompkins, and it did not make her suspicious "because I figured, you know, she would eventually get it under control, and it just didn't dawn on me" (R. 266).

Detective K.E. Burke testified that among his duties in the

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<sup>33</sup> Benito first called Kathy Stevens on March 7, 1985. This was two days after Barbara DeCarr's March 5<sup>th</sup> deposition in which Barbara had indicated she went to Mr. Tompkins' mother's house at "approximately 9:00 am." (DeCarr depo. at 16). In Barbara's undated statement, she further indicated that Mr. Tompkins had already arrived at his mother's house and "stayed at his mother's house until approximately 10:00 am when he left to get some newspapers to pack dishes with." In her deposition, she indicated Mr. Tompkins "could have been" gone "[t]wenty minutes, half an hour." (DeCarr depo. at 20). He subsequently left again with his stepfather (DeCarr depo. at 21). At the time of Barbara's deposition, the previous jailhouse informant had committed suicide when police showed up to arrest him on new burglary charges. After Barbara's deposition, Mr. Benito clearly decided he needed to find some additional evidence. By the time of trial, Barbara's account of time shifted (as did Kathy's), since their initial statements could not both be true (between 8:00 am and 9:00 am, Barbara said she was home and Mr. Tompkins wasn't, while Kathy said during that time period Mr. Tompkins was assaulting Lisa on the couch).

case was to interview Barbara DeCarr, who he interviewed 3 times (May 28th, June 1st, and June 6th) while DeCarr was in the hospital (R. 277-78).<sup>34</sup> Burke also interviewed Mr. Tompkins on June 12, 1984 (R. 278). Mr. Tompkins said the last time he saw Lisa was in the afternoon of March 24, 1983, wearing a maroon blouse and blue jeans and going out the back door and said she was going to the store (R. 284). Mr. Tompkins denied ever saying that Lisa ran away the day she disappeared (Id.).

On cross-examination, Burke acknowledged speaking to numerous witnesses in addition to Barbara and Mr. Tompkins (R. 285). Burke was unsure if he spoke with a Wendy Chancey (R. 286).<sup>35</sup> He was unsure if he spoke with a Bob McKelvin; he claimed 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 DeCarr, and "[i]f it was Bob McKelvin who lived next door,

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<sup>34</sup> Burke's report indicated that he interviewed Barbara on May 28, 1984, at 1300 hrs. She called him from the psychiatric ward. "She stated at that time, she also had a boyfriend that was living with her at the time her daughter disappeared by the name of Wayne Thompkins [sic] who had been arrested in Pasco County for some rapes that he had committed in that county." However, the records from Pasco County clearly establish that the second rape did not occur until May 30, 1984, and Mr. Tompkins was not arrested until later that day.

<sup>35</sup>Wendy Chancey is the individual who reported to a police officer on March 24th that she had seen Lisa that afternoon getting into a brown Pinto at 12th and Osborne.



yes, I was aware of some information regarding that" (Id.). Burke never followed up on that investigation (Id.), and McKelvin was never interviewed by the police (R. 288).

Burke testified that the height from the floor of the DeCarr house to the ground was about 36 inches, but acknowledged that during his deposition he said it was 16 inches at the greatest point between the floor and the ground, and that his deposition testimony "was correct" (R. 288). Someone looking from neighboring houses could see the yard area of the DeCarr house (R. 289). The investigation revealed that Barbara had been arguing with Mr. Tompkins in 1983 and 1984 about his having other girlfriends or affairs (Id.), and that Lisa had a record as a run-away (R. 293). He denied that Barbara told the police to specifically look under the house, but she did say to check the yard (R. 297). Furthermore, Burke acknowledged setting up a tape recorded phone call between Barbara and Mr. Tompkins, in which Mr. Tompkins made no admissions (R. 298).

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). He was presently charged with an escape, to which he pled guilty (R. 303), and was awaiting sentencing (R. 304). While in the jail, he made

contact with Wayne Tompkins after he "was placed in the cell with him" (R. 305).<sup>36</sup> Turco said that he did not talk with Mr. Tompkins about the specifics of the case at that time, "but he talked a lot about his case" (R. 305).

Turco and Mr. Tompkins were eventually put in another cell together and they continued talking about the case (R. 306-07). 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).<sup>37</sup> Turco then clarified that "I didn't ask. He volunteered the information, you know" (Id.). 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). Then, Mr. Tompkins told Turco, 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

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<sup>36</sup> Kathy Stevens' deposition occurred on June 12, 1985. Kenneth Turco's deposition occurred on July 15, 1985. At that time, he said that in late June, 1985, he first talked to Wayne Tompkins about his case, and that about a week and a half before the deposition, Mr. Tompkins confessed to him (Turco depo. at 8).

<sup>37</sup> Between the deposition and the trial, Turco moved the date of the confession forward in time. This was clearly in response to defense counsel's questions regarding Turco's access to depositions in Mr. Tompkins' possession.

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).<sup>38</sup>

On cross-examination, Turco testified he did not know whether Mr. Tompkins had copies of his depositions and police reports in the cell they shared together, that "I never messed with his papers" and only saw a coroner's report "after I had talked to Mr. Benito on a Saturday evening" (R. 312). Turco had

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<sup>38</sup> 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. 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.'" (PC-R. 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." (PC-R. 236).

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 and he had been part of that for the last 4 or 5 years, and that he was "trustworthy" (R. 317). Even though he was an informant, going through another prisoner's papers "is something you don't do, not in the prison system or in society or any place else" (Id.). Turco was the State's final witness, and the defense presented no testimony.

Throughout Mr. Tompkins' post-conviction proceedings, substantial evidence contrary to the State's case has continued to come to light. That evidence is detailed in Argument II, Section C, *infra*.

#### **SUMMARY OF ARGUMENT**

1. The circuit court erred in denying Mr. Tompkins' Rule 3.850 motion without an evidentiary hearing. The motion alleged facts regarding both Mr. Tompkins' 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. 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, 405 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' 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.

#### **STANDARD OF REVIEW**

Mr. Tompkins' arguments present questions of law requiring *de novo* review. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). 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

BECAUSE THE FILES AND RECORDS DO NOT SHOW THAT HE WAS CONCLUSIVELY ENTITLED TO NO RELIEF, THE LOWER COURT ERRED IN DENYING MR. TOMPKINS AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE STATE WITHHELD FAVORABLE EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND/OR PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE. THE NEW INFORMATION UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE ADVERSARIAL TESTING CONDUCTED IN ITS ABSENCE.

I. THE LOWER COURT'S FAILURE TO HOLD AN EVIDENTIARY HEARING CONSTITUTES REVERSIBLE ERROR.

A. Introduction.

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, 4PC-R. 130). 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, 4PC-R. 130).

The information provided by James M. Davis, Jr., establishes that Kathy Stevens' trial testimony was not truthful and is significant impeachment of that testimony.<sup>39</sup> This information gives rise to constitutional 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). 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.

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<sup>39</sup>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 II, *infra*.

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 "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.

**B. The Standard for Receiving an Evidentiary Hearing.**

This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" Lemon v. State, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "Under 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). 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).

The same standard applies to successive motions to vacate. Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of factual allegations impeaching trial testimony); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce and acquittal); Roberts v. State, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness claim that she was pressured by the State and received undisclosed consideration for her false testimony); Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]").

This Court, like the lower court must accept that Mr. Tompkins' allegations are true at this point in the proceedings. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989).

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

**C. The Lower Court's Analysis Demonstrates that the Court Did Not Take Mr. Tompkins' Allegations as True and Did Not Determine that the "Motion and the Files and Records Conclusively Show that Mr. Tompkins is Entitled to No Relief".**

**1. Mr. Tompkins' allegations as to his exercise of diligence were not taken as true.**

Regarding Mr. Tompkins' counsel's diligence in locating James Davis, the circuit court ruled:

[T]he name of Junior Davis was known to Defendant as far back as 1989 and yet the affidavit was not completed until 2002, nearly 13 years later. . . . The name Junior Davis was listed in the police reports and as such was or could have been known to the movant or his attorney. [citation omitted] Furthermore, Defendant has failed to show that this new evidence could not have been discovered by or through the use of "due diligence" before the expiration of the limitation period, nor did Defendant explain why it took 13 years to locate Junior Davis other than to say that Junior Davis or James Davis was a common name, and as such his request for the Court to consider the affidavit and the alleged newly discovered evidence is still time-barred.

(4PC-R. 53-54).

Contrary to the circuit court's ruling, Mr. Tompkins' Rule 3.850 motion presented extensive factual allegations regarding

Mr. Tompkins' diligence in attempting to locate Mr. Davis (4PC-R. 118-21). In April of 2001, Mr. Tompkins was under a death warrant, and his counsel requested the production of 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 ultimately 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 seem to 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). Maureen also gave the following information: "JUNIOR, LISA'S boyfriend approx., 17yrs of age of 40<sup>th</sup> St and Buffalo" (2PC-R. 46).

These documents first disclosed in April of 2001 provided Mr. Tompkins new information regarding the significance of "Junior" Davis as one who the State knew impeached Kathy Stevens' testimony. 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 counsel. 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).<sup>40</sup> The report listed a phone number for Mr. Davis, but in 1989, while Mr. Tompkins' case was under warrant and his counsel was preparing Mr. Tompkins' first Rule 3.850 motion, Mr. Tompkins' counsel called the phone number and 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 Detective 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 exculpatory 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 in order to gather more information that might help counsel locate "Junior." The legal team representing Mr. Tompkins kept plugging the information gathered into computer data bases in order to try to locate "Junior". Mr. Tompkins was able to

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<sup>40</sup>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.

ascertain that Junior's given name was James Davis, Jr. Under the pendency of the 2001 warrant, counsel located phone numbers for various James Davis', 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.

The facts alleged in the motion to vacate 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. 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.

- 2. The circuit court failed to give proper weight to Mr. Davis' affidavit, erroneously required Mr. Tompkins to prove the outcome of the trial would have been different, and conducted no cumulative analysis.**

The circuit court ruled that if the evidence contained in the Davis affidavit had been presented at trial, the court did

not believe "the outcome of the trial would have been any different" because "Kathy Stevens was subjected to staunch cross examination and the fact that as counsel for Defendant alleges, there might have been more material upon which to challenge her recollection of the facts of the case is insufficient in and of itself to vacate the judgement [sic] in this case" (4PC-R. 54). The circuit court's analysis did accept that the State failed to disclose the information that led to Davis as someone who impeached Stevens, but the circuit court failed to conduct the proper prejudice analysis required by either Giglio or Brady and its progeny.<sup>41</sup> The court's ruling imposed upon Mr. Tompkins the burden of proving that the outcome would have been different. It further did not take into account the significance of Kathy Stevens to the prosecution's case against Mr. Tompkins, and the

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<sup>41</sup>Alternatively, to the extent that the State did not violate its duty under Brady, because trial counsel was not diligent, the Davis affidavit also establishes that trial counsel provided ineffective assistance. Strickland v. Washington, 466 U.S. 668 (1984). 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). 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). If trial counsel's performance was deficient in failing to learn of the information possessed by Davis, then Mr. Tompkins was prejudiced just the same. 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.

court did not conduct a cumulative analysis of all the evidence which the jury never heard showing the weakness of the prosecution's case.

**a. proper prejudice standard under Giglio.**

The Davis affidavit 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. 150, 153 (1972). 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, 868 So. 2d 498, 506 (Fla. 2003).

Under the Giglio standard, it is clear the State cannot establish beyond a reasonable doubt that Stevens' testimony was harmless. Guzman. Yet, the circuit court conducted no analysis of Mr. Tompkins' Giglio claim under the proper standard.

**b. proper prejudice standard under Brady.**



The State's failure to disclose these police reports that suggested that Davis did not corroborate Stevens' claims violated Brady. As 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 of Fourteenth Amendment)." Rogers v. State, 783 So.2d 980 (Fla. 2001).<sup>42</sup> 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, therefore, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's

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<sup>42</sup>The Supreme Court recently 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, 540 U.S. 668, 675-76 (2004). 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 696.

behalf." Kyles, 514 U.S. at 437.<sup>43</sup>

When the State fails to disclose favorable information in its possession to the defense, a new trial is warranted when confidence is undermined in the reliability of the outcome of the proceedings conducted without the benefit of the exculpatory evidence. The Brady materiality standard is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 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

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<sup>43</sup>In Strickler v. Greene, 527 U.S. 263 (1999), 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." 527 U.S. 263, 281 (1999), quoting Berger v. United States, 295 U.S. 78, 88 (1935). The Court also repeated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, 527 U.S. at 280, 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 281.

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, 514 U.S. at 446.

Yet, the circuit court imposed upon Mr. Tompkins the burden to establish that "the outcome of the trial would have been any different." This was error. Under the proper analysis it is clear that the Davis affidavit undermines confidence in Mr. Tompkins' conviction and death sentence. Kathy Stevens' testimony was essential to the State's case, and evidence that she was not truthful and that the State failed to investigate the available evidence revealing her testimony was false "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.

Kathy Stevens was the only State witness to testify to seeing Mr. Tompkins with Lisa at the time the State contended Lisa was murdered. The prosecutor argued that Stevens' "testimony alone . . . convicts this man" (R. 346), and that she would not lie (R. 346-49, 360).

Stevens' credibility was therefore essential to Mr. Tompkins' conviction. However, the information provided by

James M. Davis, Jr., establishes that Kathy Stevens' trial testimony was not truthful and is significant impeachment of that testimony. Before trial, the State had known from its undisclosed interviews of Maureen Sweeney and Mike Willis that Junior Davis did not corroborate Stevens' story.

**c. cumulative consideration of all withheld evidence.**

In addition, the proper prejudice standard under due process requires cumulative consideration be given to 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. Cardona v. State, 826 So.2d 968, 973 (Fla. 2002). Mordenti v. State, 894 So. 2d 161 (Fla. 2004). In order to conduct the proper cumulative consideration, the circuit court was required to consider not just the Davis affidavit, but also all of the previously presented Brady claims and the undisclosed exculpatory evidence identified therein. Lightbourne v. State, 742 So. 2d 238, 249 (Fla. 1999). When the proper cumulative consideration is given, the factual allegations established a basis for relief and required the circuit court to conduct an evidentiary hearing.

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.<sup>44</sup> 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

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<sup>44</sup>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).

at trial undermines confidence in the outcome of Mr. Tompkins' trial.

**i. evidence not presented at trial which impeaches Kathy Stevens.**

Kathy Stevens' trial testimony is detailed in the Statement of the Facts. Substantial evidence impeaching her trial testimony has surfaced during post-conviction. This evidence significantly undermines Stevens' credibility and shows that her trial testimony was not believable.

**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 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 (PCR. 221), and that he did not disclose these memoranda to trial 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). Benito vouched for Stevens' veracity during closing arguments.<sup>45</sup>

Benito's memoranda detailed 2 phone conversations he had with Stevens. In a memo dated March 13, 1985, Benito recorded that Stevens said she saw Mr. Tompkins 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 Stevens' story fit with Barbara DeCarr's testimony that when she left home at 9:00 a.m., 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 Stevens 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 did Stevens indicate that Lisa begged her to call the police. That detail

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<sup>45</sup>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").

was added later. The defense needed to know that such a change had occurred in order to effectively cross-examine Stevens. Significant omissions from prior statements can be just as impeaching as inconsistent statements. Jencks v. United States, 353 U.S. 657 (1957).

According to Benito's memorandum, Stevens 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. Stevens 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, then 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).

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.

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, 549 So. 2d 1370 (Fla. 1989). 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.

**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).<sup>46</sup> She thus received a 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, he responded, "Yes" (PCR. 67). However, because he suppressed this information, Benito was able to argue to the jury that Kathy 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. Florida law establishes that the State has an affirmative duty to disclose to the defense any promises it has made to a witness. 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 because State failed to disclose a prior

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<sup>46</sup>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" (PC-R. 20-21).

statement of a witness that contained a discrepancy with the witness's testimony which would have supported the defense theory).

**ii. Evidence not presented at trial which impeached Barbara DeCarr.**

Barbara DeCarr's trial testimony is detailed in the Statement of the Facts. Substantial evidence impeaching her trial testimony has surfaced during post-conviction. This evidence significantly undermines the State's case regarding when the murder occurred, as well as DeCarr's credibility.

**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. Compl. stated that Lisa was having some trouble in school but nothing to cause her to runaway. Compl. checked with Lisa's friends and school for information as to where she might be with negative results. Compl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Compl. checked with Beach Place with negative results. Compl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.

(3PC-R. 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 report 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, 872 So. 2d at 239. 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. 78, 88 (1935). 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."

**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" (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."

**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:

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). Mr. Tompkins presented this deposition testimony in his 1989 Rule 3.850 to support his claim that limits on his ability to elicit this testimony at trial violated the Confrontation Clause. This Court's opinion in that appeal did not address this testimony. See Tompkins v. Dugger. 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. Thus, through manipulation of the rules of evidence, the State was permitted to mislead the jury and elicit

false testimony from Barbara DeCarr regarding what Lisa was wearing on the day she disappeared. 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.

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. However, 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.

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.

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).

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

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).

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, 872 So. 2d at 240-41. 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, Sweeney and Willis. This evidence, coupled with other evidence such as the 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. Yet in denying Mr. Tompkins current motion to vacate, the circuit court did not consider any of this information cumulative with the Davis' affidavit.

**iii. Evidence not presented at trial which impeaches Kenneth Turco**

Kenneth Turco's trial testimony is detailed in the Statement of the Facts, *supra*. Substantial evidence impeaching his trial testimony has surfaced during post-conviction. This evidence significantly undermines Turco's credibility and shows that his trial testimony was not believable.

The prosecutor 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 Turco's assertion that his only expectation of a "deal" was a favorable word from the prosecutor at sentencing 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 in Mr. Tompkins' first post-conviction proceedings (PC-R. 47). 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 had 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. 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.<sup>47</sup>

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). 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.**

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<sup>47</sup>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.

(Emphasis added). 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 Mr. Tompkins' 1989 and 2001 Rule 3.850 proceedings.

**iv. cumulative consideration.**

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. This evidence was not presented at trial.

**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. Compl. stated that Lisa was having some trouble in school but nothing to cause her to runaway. Compl. checked with Lisa's friends and school for information as to where she might be with negative results. Compl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Compl. checked with Beach Place with negative results. Compl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.

(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 report 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, 872 So. 2d at 239. 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. 78, 88 (1935). 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.

(3PC-R. 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 (PCR. 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 (PCR. 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 her interview:

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.

(1989 Rule 3.850 motion, App. 7). 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 (PC-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 (PC-R. 82).

Had defense counsel interviewed Wendy Chancey, he would have been able to establish that although she did not now remember the events surrounding Lisa DeCarr's disappearance, her statement to the police was reliable and admissible: (3PC-R. 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.

The State's position was 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 Rule 3.850 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.

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.

**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 (PC-R. 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 misled 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 Mr. Tompkins' 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. Yet, 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, Ex. 18 at 1989 hearing). Kathy Stevens was unaware of Lisa receiving an engagement ring before her disappearance, although Stevens was familiar with other rings Lisa wore (PC-R. 16, 22).

**Other suspects were not disclosed.** 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

The records also included the very lengthy rap sheet for Everett Knight. At trial, the defense inquired regarding the police investigation of Bob McKelvin, specifically asking Det. Burke 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 DeCarr, 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 by the police (R. 288).

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 never

learned 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 Det. Burke and Barbara DeCarr.

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, and the disappearance of both girls was originally investigated as one case, with the prime suspect in both being Mr. Tompkins (3PC-R. 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.

(3PC-R. 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 (3PC-R. 125-30). The Tampa Police Department disclosed for the first time a May 3, 1984, police report concerning interviews with W.H. Graham,<sup>48</sup> the individual who found the body identified as Albach:<sup>49</sup>

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<sup>48</sup>The May 3, 1984, report (disclosed in 2001) states, "Graham stated he has had a continual problem with prowlers and vehicles loitering in this field usually during the early morning hours (0230-0530h., 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

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 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.

(3PC-R. 125).<sup>50</sup> A May 9, 1984, report 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.

(3PC-R. 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

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screams on numerous occasions, but did not personally check on it himself" (3PC-R. 129).

<sup>49</sup>Another report disclosed in 2001 revealed that on June 9, 1984, W.H. Graham found additional bones in the area where the body believed to be Jessie Albach was found (3PC-R. 129).

<sup>50</sup>The 11/26/81 Criminal Intelligence Report regarding Everett Knight (A.K.A. Bob McKelvin) indicated that Mr. Knight owned a green '70 Pontiac Catalina (3PC-R. 123).

Grahams had four vehicles registered to the older Graham, including a 1971 Ford of an unknown model. Significantly, both the car registered to McKelvin and the '71 Ford registered to Graham match the description of the vehicle that Wendy Chancey saw Lisa DeCarr getting into on the day of her disappearance. Mr. Tompkins was never aware of this connection because the reports on McKelvin or Graham were not 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 (3PC-R. 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 (3PC-R. 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's 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.

(3PC-R. 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.

(3PC-R. 127-28).

**Also disclosed for the first time in April of 2001 by the Tampa Police Department was a list of the questions that was to be asked to Det. Burke by the prosecutor 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. 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 (3PC-R. 130). Most importantly, the script shows 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.

Rogers v. State, 782 So. 2d 373, 384-85 (Fla. 2001).

**v. conclusion**

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

**CONCLUSION**

In light of the foregoing arguments, Mr. Tompkins requests that this Court remand to the circuit court for a full and fair evidentiary hearing and grant Mr. Tompkins a new trial.

**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 \_\_\_\_, 2006.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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