

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1619

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WAYNE TOMPKINS,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

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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 appeal involves the summary denial of Mr. Tompkins' second Rule 3.850, as well as related motions on which evidence was taken. References in the Brief shall be as follows:

(R. \_\_\_) -- Record on Direct appeal;

(PCR. \_\_\_) -- Record on first postconviction appeal;

(PCR2. \_\_\_) -- Record in this instant appeal;

(T. \_\_\_) -- Transcript of Hearings below.

Other citations shall be self-explanatory.

**REQUEST FOR ORAL ARGUMENT**

Mr. Tompkins requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

**STATEMENT OF FONT**

This brief is typed in Courier 12 point not proportionately spaced.

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**STATEMENT OF THE CASE AND OF THE FACTS**

**A. PROCEDURAL HISTORY.**

Mr. Tompkins was indicted for first-degree murder and pled not guilty. Trial commenced September 16, 1983, and a jury found him 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).

After a death warrant was signed, a post-conviction motion was filed and an evidentiary hearing was conducted. Though the circuit court found trial counsel's performance was deficient, relief was denied. This Court stayed the execution and later affirmed the denial of relief. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). After a second death warrant a federal habeas petition was filed, and the federal district court stayed the execution. An amended petition was subsequently filed, and denied. On appeal, the Eleventh Circuit affirmed. Tompkins v. Moore, 193 F.3d 1327 (11<sup>th</sup> Cir. 1999), cert. denied, 121 S.Ct. 149 (2000).

Pursuant to the signing of a third death warrant Mr. Tompkins filed a number of motions, including a Motion for DNA

Testing (PCR2. 31-56), a Motion to Compel Production of Public Records (T. 3-74), and a second Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.850 (PCR2. 182-307). The lower court took evidence on various of these motions, including the DNA motion (T. 95 *et. seq.*), as it had been alleged that the items sought to be tested had been lost. On April 17, 2001, the circuit court conducted a Huff<sup>1</sup> hearing and granted an evidentiary hearing on Claim V of Mr. Tompkins' Rule 3.850 motion pertaining to the issue of the sentencing judge's error in failing to independently weigh aggravating and mitigating circumstances and in failing to disclose to Mr. Tompkins the fact that the State prepared the findings in support of the death sentence. The evidentiary hearing occurred on April 18, 2001, after which the court granted sentencing relief on Claim V and vacated Mr. Tompkins' death sentence (PCR2. 433 *et. seq.*) The circuit court denied all other claims without an evidentiary hearing (Id.). Mr. Tompkins filed a motion for reconsideration (PCR2. 677-730), which was denied (PCR2. 755-96). A timely notice of appeal was filed (PCR2 797). The State has also cross-appealed the lower court's grant of sentencing relief (PCR2. 813).

**B. RELEVANT FACTS ADDUCED AT TRIAL.**

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>2</sup> Although it presented 8 witnesses at trial, the State's position was 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 "circumstantial," save for alleged "direct evidence" of a statement of Mr. Tompkins elicited by snitch Turco (R. 117).

Essentially, the State's theory, as outlined in its opening statement, was as follows: Wayne Tompkins and Barbara DeCarr were boyfriend and girlfriend, Wayne 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 Wayne's 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, Wayne came by his mother's house to assist, along with Barbara, with the packing (R. 110-11). At some point, at Barbara's request, Wayne 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, Wayne told Barbara that Lisa was on the couch watching TV (Id.). However, at 3:00 p.m. that day, Wayne told Barbara that Lisa had run away (Id.). Barbara went home, did not find Lisa, and contacted the police; she questioned Wayne, 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 wrapped

<sup>1</sup> in a pink bathrobe with a ligature mark around her neck and some jewelry (R. 113).

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 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 (another family had moved in when Barbara left) (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).

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<sup>1</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).

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 on June 5, 1984, 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>2</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 the body had been in the grave, and that it is possible it could have been six or seven months prior to June, 1984 (R. 191). 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"

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<sup>2</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 (PCR. 233).

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 was separated from her husband Harold, and had been since 1980; Harold lived in New York (R. 199). She first met Wayne in May, 1981, when she was living with her daughter, Susan LaBlanc, Susan's boyfriend Greg, and her other children Lisa, William, and Jamie (Id.). Wayne 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 Wayne woke her up and told her that Lisa had a headache and she'd like to stay home from school (R. 204). Barbara finally got up around 8 a.m., by which time Wayne had left to take Jamie to school (R. 205). Before she left to go to Wayne's mother's 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>3</sup> The jewelry was given to her by her boyfriend (Id.).

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<sup>3</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

Barbara left the house at 9:00 a.m. with just Lisa at home (R. 208). When she got to Wayne's mother's, Wayne was there with other people (Id.). Barbara stayed there until 3:00 that afternoon (R. 209). At some point she sent Wayne home to get newspapers to use as packing material; she did not know how long Wayne was gone, and he returned with newspapers (R. 209-10).<sup>4</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, Wayne left again with his stepfather (Id.). Barbara further testified that at 3:00 that afternoon Wayne told her that Lisa "was gone, she had run away" (R. 211).<sup>5</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). Barbara then contacted the police from Wayne's mother's house (Id.).***<sup>6</sup> Barbara

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March 24<sup>th</sup> she was not wearing earrings (R. 260).

<sup>6</sup>According to an undated typed statement of Barbara DeCarr that was provided to the police before Kathy Stevens provided her information about March 24<sup>th</sup>, Barbara had a clearer memory. 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>5</sup>The Missing Children records that were stipulated into evidence in 1989 indicate 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. Gull insisted that she did not tell him this." (emphasis in original). Further, Mike Benito stipulated to the accuracy of Det. Gullo's representations (PCR. 301).

<sup>6</sup>According to a two-page police report (that the State neglected to disclose a clearly legible copy of which would have revealed that 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

testified that prior to calling the police, however, Barbara 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>7</sup> About a month later, she moved out of the house and into Wayne's mother's house (R. 214).<sup>8</sup>

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>9</sup> Barbara acknowledged that after the day Lisa disappeared, several people had informed her that Lisa

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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 March 24<sup>th</sup>. Neither at trial nor in the 1989 post-conviction proceedings did the State reveal that Barbara DeCarr's testimony on this critical point was false.

<sup>7</sup>The two-page police report indicated that Lisa was wearing "blue jeans, maroon shirt, diamond ring, cross earrings." Implicit in the report is that this was the attire Lisa was wearing at the time she was last seen by the complainant, Barbara DeCarr. 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, Mike Benito, 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." (PCR. 22).

<sup>8</sup>The rent at the Osborne St. residence was \$300 per month, after moving Wayne and Barbara paid \$65 per month (DeCarr depo. at 11). Barbara was receiving AFDC at the time (Id.).

<sup>9</sup>According to Ms. Stevens, she has never been known as Kathy Sample (R. 242; Stevens Depo. at 15). She had one discussion with Barbara DeCarr after Lisa disappeared at which 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

had been seen elsewhere in the community (R. 219).

<sup>10</sup> 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>11</sup> It was not until June, 1984, after she found out Wayne was having an affair with another woman that she told the police of her suspicions that Wayne killed Lisa (R. 226, 237).

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depo. at 20). When Lisa disappeared, Ms. Stevens assumed that she had run away as she had been planning and so she told the lie that she had promised to tell (R. 257-58).

<sup>10</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 gave Det. Gullo the wrong last name. Det. Gullo, according to his logs, was never able to speak with Kathy.

<sup>11</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" (PCR. 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 Detective Gullo, the police officer who was looking for Lisa, Lisa's possible pregnancy until April 26th. 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>12</sup> She did not become suspicious or tell the police anything when Wayne gave her an allegedly incorrect description of Lisa's clothes in March, 1983 (Id.).

13

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 Wayne on the phone while he was incarcerated pending trial in order to solicit a confession from him, but Wayne never admitted any involvement (R. 229). She also testified that on March 24, 1983, Wayne 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 he ex-husband sexually abused Lisa (Id.).

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<sup>12</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 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 pm. he had "checked the yards located at the address and found no areas that looked suspicious as to a grave." This was pursuant to Barbara's suggestion on June 1st: "She stated that she talked to Det. Gullo via phone and had asked him to go check the back yard of the residence of 1225 E. Osborne because she now suspects that her daughter may be buried in the back yard."

<sup>13</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."

<sup>14</sup> She denied telling anyone at the hospital in May of 1984 that her husband had sexually abused Lisa (R. 231).

<sup>15</sup> She also denied being in a fight in a bar when someone blamed her for Lisa's death, it was more of an "argument" than a fight (R. 231-32).

<sup>16</sup> Mrs. DeCarr testified that "it wasn't exactly a fight." It was "[a]n argument" (R. 232).

Following Wayne's arrest for murdering Lisa, Barbara sent Wayne letters with copies of photographs of skeletal remains, as well as detailing how nice Lisa's funeral was, although she initially denied it until she was shown the letters (R. 234).

Barbara also testified that she did not practiced 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

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<sup>14</sup>However, according to the hospital records, Barbara when seeking treatment provided the following statement, "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>15</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>16</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."

regarding her sexual relationships with 12 and 13 year old boys (R. 235).<sup>17</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 indicated in her deposition that as for her daughter Susan LaBlanc, "We do not have a relationship." (DeCarr depo. at 36). Barbara also denied telling the police in June, 1984, to specifically check the yard and under the house, but then stated that "I don't remember saying it" (R. 235-36).

According to Barbara, Lisa never complained that Wayne had made any sexual advances, but did complain about other people like Bob McKelvin (R. 236-37). Barbara also found out that after 1983, Wayne had gone to bed with another woman but denied that she was angry that her boyfriend was having an affair (R. 237). Finally, 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

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<sup>17</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 subjs 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."

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>18</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>19</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 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>20</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 Wayne "struggling on the couch" (R. 252). Wayne 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 Wayne 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>21</sup>

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<sup>18</sup>The school records establish that both girls were suspended on March 23, 1983, for smoking under a tree off campus. However, the school records also show that marijuana was found in Kathy's purse.

<sup>19</sup>In discussions with Kathy about her desire to run away, Lisa reportedly had said, "if anything happens, I want you to tell my mom that I'm going to be all right" (Stevens depo. at 20).

<sup>20</sup>In her deposition, Kathy stated, "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>21</sup>According to her deposition, this other man: "He 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

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 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>22</sup> She then went to school because she did not want to get involved (R. 255).<sup>23</sup>

Stevens and another 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). 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).

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she first informed him that she had seen Lisa on March 24, 1983.

<sup>22</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>25</sup>Stevens also testified to an incident on Halloween night, 1982, when she and Lisa were in bed when Wayne 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). Wayne 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). Wayne 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, Wayne 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 Wayne made the remark "I want to eat you out"; Lisa "turned around, looked at him, and we walked away" (R. 248).

At trial, her testimony was around lunchtime to 1:00 Stevens went back to the house because she still had not gotten her purse; she knocked at the door and Wayne answered (R. 256).<sup>25</sup> She asked if Lisa was there, and he said no, that she had left with her mother (Id.).<sup>26</sup>

Subsequently, 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.). 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 following year, Stevens thought Lisa had run away. She testified before the jury "it was after the body was discovered [that she] came forward with the information that [she told the] jury" (Id.).

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<sup>24</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>25</sup>The version she told Benito on March 12, 1985, is 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>26</sup>In her deposition, Kathy indicated that this conversation was between Kim and Wayne while she "was at the corner waiting." She indicated as to the conversation, "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.

On cross-examination, Stevens said that each time she went to Lisa's house that day, Wayne was there, and confirmed that 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 Wayne, 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>27</sup> She initially told Benito that she knew nothing about what happened to Lisa that day, and that this conversation was in mid-March 1985.<sup>28</sup> She then recounted that, after "talking

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<sup>27</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" (PCR. 20-21).

<sup>28</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 Wayne's mother's house at "approximately 9:00 am." (DeCarr depo. at 16). In Barbara's undated statement, she further indicated that Wayne 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 Wayne "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; he chose to die rather than go back to jail. 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 Wayne wasn't, while Kathy said during that time period Wayne was assaulting Lisa on the couch).

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 Wayne, 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 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>29</sup> Burke also interviewed Mr. Tompkins on June 12, 1984 (R. 278). Wayne 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). Wayne 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 Wayne (R. 285). Burke was unsure if he spoke with a Wendy Chancey (R. 286).<sup>30</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

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<sup>29</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 Wayne was not arrested until later that day.

<sup>30</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.

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).

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 Wayne 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 Wayne, in which Wayne 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>31</sup> Turco said that he did not talk with Wayne about the

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<sup>31</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,

specifics of the case at that time, "but he talked a lot about his case" (R. 305).

Turco and Wayne 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 Wayne about his own case and then asked him what had happened to Lisa DeCarr (R. 308).<sup>32</sup> Turco then clarified that "I didn't ask. He volunteered the information, you know" (Id.). Wayne 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, Wayne told Turco, Lisa said "I stayed home from school. I don't feel good" and then Wayne tried to force himself on Lisa and she kicked him and he strangled her (Id.). Wayne did not tell Turco what he strangled Lisa with (Id.). Then, Wayne said that he panicked because "he didn't know what to do with the body because Barbara would be coming back to the house, so he buried the body under the house" (R. 310). He also said he buried some clothing "to make it look like she ran away," specifically it was a pair of jeans, a sweatshirt or blouse, "and he did say a pocketbook for sure" (R. 310). Wayne 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>33</sup>

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and that about a week and a half before the deposition, Wayne confessed to him (Turco depo. at 8).

<sup>32</sup>Between the deposition and the trial, Turco moved the date of the Wayne's confession forward in time. This was clearly in response to defense counsel's questions regarding Turco's access to depositions in Mr. Tompkins' possession.

<sup>33</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.

On cross-examination, Turco did not know whether Wayne 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 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.

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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." (PCR. 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." (PCR. 236).

## SUMMARY OF ARGUMENTS

1. The lower court erred in summarily denying Mr. Tompkins' allegations that documents disclosed for the first time in April, 2001, warranted an evidentiary hearing and Brady relief. Despite requests for all public records in 1989 during Mr. Tompkins' initial postconviction proceedings, the State, for the first time in 2001, disclosed numerous exculpatory police reports establishing Mr. Tompkins' factual innocence and undermining confidence in the outcome of the guilt-innocence phase of his capital trial. Mr. Tompkins also alleged his diligence, a fact which the State disputed. Given the existence of disputed issues of fact, the lower court erred in failing to grant an evidentiary hearing. The lower court also failed to conduct a proper cumulative analysis of the previous claims raised by Mr. Tompkins. Reversal for an evidentiary hearing is warranted.

2. The lower court erred in denying Mr. Tompkins' request for DNA testing. No procedural bar forecloses such testing at this time. There is available biological evidence which can be DNA tested.

3. The lower court erred in denying Mr. Tompkins' claim that due process was violated by the State's destruction of evidence. Mr. Tompkins also submits that this Court should recede from the Arizona v. Youngblood analysis for establishing the entitlement to relief when there is destruction of evidence.

4. The lower court erred in denying Mr. Tompkins' request to compel state agencies to disclose public records pursuant to Fla. R. Crim. P. 3.852.



## ARGUMENT I

**THE LOWER COURT ERRONEOUSLY FAILED TO GRANT AN EVIDENTIARY HEARING ON LEGALLY SUFFICIENT ALLEGATIONS THAT THE STATE FAILED TO HONOR ITS OBLIGATION UNDER BRADY V. MARYLAND TO DISCLOSE TO MR. TOMPKINS FAVORABLE EVIDENCE THAT DEMONSTRATED THAT THE THREE MAIN WITNESSES AT MR. TOMPKINS TRIAL TESTIFIED FALSELY AND THAT THE PROSECUTOR'S CLOSING ARGUMENT WAS FALSE IN VIOLATION OF GIGLIO V. UNITED STATES.**

### A. INTRODUCTION.

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is oft-stated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). Accord Patton v. State, 784 So. 2d 380, 386 (Fla. 2000); Arbelaez v. State, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a second postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant,<sup>3</sup> warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). In Mr. Tompkins' case, the lower court erroneously failed to grant an evidentiary hearing despite extensive allegations as to the nature and content of the withheld documents

and that the documents had not been previously disclosed to Mr. Tompkins or his trial or collateral counsel.

**B. THE ALLEGATIONS CONCERNING DOCUMENTS FIRST PRODUCED IN 2001.**

In Mr. Tompkins' second Rule 3.850 motion, he alleged, *inter alia*, that numerous documents were disclosed to him by the State in the discovery process pursuant to Fla. R. Crim. P. 3.852, and that the documents had not been previously disclosed either at trial or in the prior postconviction proceedings in the face of due diligence and public records requests during the first postconviction proceedings in 1989. The trial court categorized the undisclosed information as follows:

1. A June 8, 1984 police report;
2. A legible copy of the 1983 FBI report;
3. A July 28, 1983 report;
4. Handwritten lead sheet by Detective Blum;
5. A May 1984 report with W.H. Gingham;
6. An August 18, 1982 report regarding an establishment known as "Naked City";
7. A December 27, 1983 State Attorney;
8. A May 21, 1984 report;
9. W.H. Gingham's report dated 1983, raping one of the girls who worked at the 'Naked City' on June 24<sup>th</sup>;
10. A police report of a June 14, 1983 phone interview with Lori Lite;

1984 W.H. Gint that reveals additional holes in the area where the body believed to be Jessie Albach was found;

12. A May 19, 1984 report by Detective Gint;

13. A list of questions to be asked Detective Burke;

14. The affidavit of Kathryn Stinson served in 1986

(PCR2. 435-36).

As to the issue of diligence, Mr. Tompkins' motion specifically alleged that all of this information had not been disclosed either prior to trial or during his first Rule 3.850 proceedings, despite public records requests made in 1989 (2PCR. 214; 216; 217; 220-27). At the Huff hearing, Mr. Tompkins' counsel repeated that "there is a wealth of favorable evidence that was just disclosed this past week" (T. 135-36). Counsel also argued that the newly provided documents were not listed either in pretrial discovery (T. 139), or during Mr. Tompkins' first 3.850 proceedings in 1989 (T. 143; 145-46; 148).<sup>4</sup> In response, the State directly challenged the factual allegations made by Mr. Tompkins as to the issue of diligence, arguing that Mr. Tompkins received an evidentiary hearing in 1989 on Brady and Giglio issues, and thus "[a]ll these claims have previously been raised" and that Mr. Tompkins "could have made these [Chapter 119] requests years ago" (T. 166).<sup>34</sup>

In the order summarily denying relief as to this issue, the lower court concluded that, with regard to the June 8, 1984, police report, the July 28, 1983, police report, and the handwritten lead sheets of

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<sup>34</sup>He did make Chapter 119 requests in 1989; the point is that the State did not disclose this information as a result of those requests. This is obviously a disputed issue of fact warranting an evidentiary hearing.

Detective Burke, Mr. Tompkins was entitled to no relief because he had already raised and litigated a Brady claim in 1989 (PCR2. 436). As to the legible copy of the March 24, 1983, report, the court concluded that Mr. Tompkins' counsel could have obtained a legible copy by the use of due diligence (Id.). As to the documents pertaining to the Albach case, the court concluded that they were "not relevant to the DeCarr case" and counsel could have obtained them by due diligence (PCR2. 437). As to the script of questions provided to Detective Burke, the court concluded that the "answers to the questions pertain to issues that are irrelevant to the substantive testimony of the detective" and thus Mr. Tompkins was not entitled to relief (Id.). As to the disclosure of Kathy Stevens' perjury conviction, the court concluded that the allegation "is conclusory, which is insufficient for relief" because Mr. Tompkins did not allege that Stevens committed perjury at trial (PCR2. 438).

Mr. Tompkins filed a motion for rehearing, arguing, *inter alia*, that the subject of his present Brady claim was different from the claim previously presented because "[h]e has now been provided documents not turned over to him at trial or in 1989" (PCR2. 679). Mr. Tompkins also re-emphasized that "the State, despite a public records request in 1989 for all files and records regarding Wayne Tompkins, did not reveal the documents turned over in 2001. This factual allegation must be accepted as true for purposes of Rule 3.850" (Id.). He also argued once again that "[i]n 1001, Mr. Tompkins was provided documents from the State never previously disclosed; these documents contain favorable or exculpatory information" (PCR2. 680). In denying the rehearing, the lower court concluded that the original order adequately addressed Mr. Tompkins' arguments (PCR2. 756).

Mr. Tompkins will address each of these categories of documents below, and submits that the

lower court erred as a matter of law in failing to accept Mr. Tompkins' allegations as true with respect to diligence, as well in determining the legal question of the materiality of the suppressed documents.

### **1. Undisclosed Police Reports and Lead Sheets**

In response to requests made by Mr. Tompkins in 2001 pursuant to Fla. R. Crim. P. 3.852, 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 were 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 8<sup>th</sup> report by Detective Milana nor disclose it at the time of trial (R. 596).<sup>5</sup>

The significance of these reports is that they lend support to the statement provided by Wendy

Chancey to the police on the date of Lisa's disappearance. A report filed at the time of Lisa's disappearance stated that Wendy Chancey saw Lisa at approximately 3:00 p.m. on March 24, 1983:

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

It was not until April 2001 that the State disclosed a legible enough copy of this March 24, 1983, report to discern significant information which is corroborated by the Maureen Sweeney statement. 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 now clear from the first page of the report disclosed in April, 2001, that Barbara DeCarr is the complainant. In the code box next to her name appears "C/P". Above her name the codes are explained, "V=Victim C=Complainant J=Juvenile O=Owner A=Defendant P=Parent I=Firm Name M=Missing D=Deceased OT=Other". Thus, Barbara was identified as both the Complainant and the Parent. On this page of the report in the reconstruction section it is handwritten, "Mrs. Decarr stated her daughter ran away from home for no apparent reason." The second page of the report next to the phrase "Restricted Persons" has more codes, SP=Suspect W=Witness JA=Juvenile Arrest JR=Juvenile Runaway". Lisa DeCarr is listed as "JR". Wendy Chancey is listed as "W". The report then contains the following in the Narrative section with the instruction "Do Not Repeat in Narrative Any Information Already Contained in Report. The following is then handwritten by Officer Griffin:

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.

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, the complainant, Barbara DeCarr last saw her daughter, Lisa, at 1:30-2:00 p.m. on March 24, 1983, at 1225 E. Osborne.** This report clarifies the Missing Children records that were stipulated into evidence in 1989 and which contained 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” (emphasis in original). As Detective Gullo maintained throughout his investigation, Barbara DeCarr was the last person to see Lisa alive, not Mr. Tompkins.

Furthermore, the legible March 24, 1983 report contradicts Barbara’s deposition testimony that “I didn’t tell the police anything. Wayne did all the talking.” (DeCarr depo. at 41). If Mr. Tompkins “did all the talking,” his name would either be listed as the complainant or as a witness. The report further indicates that Wendy Chancey stated "she observed Lisa get into the suspect vehicle at 12th St.

and Osborne and was last seen heading north on 12th St.” Barbara in fact testified that Wendy Chancey said that she had seen Lisa getting into a brown Pinto the afternoon she disappeared, “she said she seen it from her bus.” (DeCarr depo. at 40). During Mr. Tompkins’ 1989 evidentiary hearing, the prosecutor acknowledged there was evidence that Chancey saw Lisa after she was allegedly murdered and that this was inconsistent with the State's theory (PCR. 232). Yet Chancey was never called to testify at trial. The jury never heard this evidence and never got to evaluate the reliability of Chancey's statement to law enforcement officers made the same day she saw Lisa alive and well. The affect this information would have on the jury is strengthened by the corroboration provided by Maureen Sweeney’s statements in the June 8, 1984 report.

The newly disclosed June 8, 1984 police report also corroborates the theory that Lisa ran away and is significant evidence of Mr. Tompkins' innocence. Barbara DeCarr stated in her deposition that she believed that Lisa had run away to New York (Deposition of Barbara DeCarr, pp. 41-43), and that several of Lisa's friends reported seeing her **the summer after her disappearance** (Id. at 43).

School records further verified that Lisa had run away:

**March 23rd** - caught smoking off campus - suspended [illegible] - parent arrives

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**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

Thus, "students" heard from Lisa "from N.Y" and she was pregnant. Her mother suspected she was pregnant. Additionally, a police report dated September 2, 1983, stated that Lisa had been sighted 6 months after her alleged disappearance (R. 553). Another police report dated April 26, 1983, stated that Lisa had run away to New York because she was pregnant (R. 551). The theory that Lisa had run away was further supported by a police report by Detective Burke dated June 22, 1983 (R. 517).

The Tampa Police Department has also disclosed in April of 2001 for the first time a July 28, 1983 report which included Det. 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.

It is important to note that Barbara DeCarr did not tell the police of her suspicions that Wayne killed Lisa until June 1984 (R. 226). She did not become suspicious or tell the police anything when Wayne gave her what she thought was an incorrect description of Lisa's clothes in March, 1983 (Id.). Barbara DeCarr testified that she awoke around 7 a.m., on March 24, 1984, when Wayne 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 Wayne had left to take her son to school (R. 205). Before she left to go to Wayne's mother's 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 wore cross pierced earrings and a little diamond ring which she always wore (R. 207). The jewelry was given to her by her boyfriend (Id.).

Barbara left the house at 9:00 a.m. with just Lisa at home (R. 208). When she got to Wayne's mother's, Wayne was there with other people (Id.). Barbara stayed there until 3:00 that afternoon (R. 209). At some point she sent Wayne home to get newspapers to use as packing material; she did not know how long he was gone, and he returned with newspapers (R. 209-10). When he returned, he told her that Lisa was sitting on the couch watching TV (R. 210). At some point after returning with the

newspapers, Wayne left again with his stepfather (Id.).

At 3:00 that afternoon Wayne told Barbara that Lisa "was gone, she had run away" (R. 211). He said the last time he saw her was at the back door "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). Prior to calling the police (id.), Barbara went back home and did not see Lisa; she found Lisa's pocketbook and robe missing, but her wallet was there as was a maroon blouse (R. 213). Barbara DeCarr is the only source for the timeline to which she testified at trial.

Mr. Tompkins' contention that Lisa was last seen wearing a maroon blouse and jeans was supported by information contained in police reports. A report dated July 9, 1984, authored by Detective Gullo, contains a statement by Gladys Staley, Mr. Tompkins mother, in which she told the police that she saw the victim at approximately 1430 hours wearing a red shirt and blue jeans (R. 511-12). Staley was never deposed by the defense prior to trial or called by the defense to testify to having seen Lisa after the time of the alleged murder. At the 1989 evidentiary hearing, Staley's affidavit was admitted into evidence, wherein she affirmed that Lisa appeared at her house about 2:30 p.m. on the day of her disappearance in short shorts and a reddish-pink top, and that she scolded her because it was cold and rainy that day and she was not warmly

dressed. Trial counsel testified that he had talked to Staley prior to trial but he could not recall her telling him anything significant that would have been useful (PCR. 97). Likewise, the description of the clothes which Wendy Chancey said Lisa DeCarr was wearing on March 24th matched the description given by Mr. Tompkins to the police. At trial, the State argued that Mr. Tompkins' statement was a lie. The jury did not know that Wendy Chancey's description corroborated Mr. Tompkins' statement.

Both the June 8, 1984 police report and the July 28, 1983 report, which had never been seen by Mr. Tompkins or his counsel until April 2001, completely contradict Barbara DeCarr's trial testimony. The newly disclosed evidence, coupled with that which was disclosed in 1989, further would have impeached the State's belittling of the defense attempts to demonstrate that Lisa had run away; this was a point that was hammered by the State in its closing argument (R. 356). Maureen Sweeney provides an entirely different account of what occurred on March 24, 1983. 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.

Evidence which might be inadmissible for one purpose can be admissible for other legitimate constitutional purposes such as impeachment. United States v. Abel, 469 U.S. 45,56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another is thereby rendered inadmissible; quite the contrary is the case"). Here, the undisclosed police reports were "critical" to Mr. Tompkins' defense: "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 419 U.S. 284, 294 (1973). Sweeney's statement to the police is admissible impeachment evidence which directly relates not only to the credibility of Barbara, but to Kathy Stevens credibility as well. Cross-examination would have destroyed the State's theory that Wayne was the last person to see Lisa alive. It would also have given the jury substantive evidence on the crucial issue of

whether Lisa was killed at the time alleged and required to be proven by the State. The evidence also goes to whether Barbara was not being honest in her effort to ensure Wayne's conviction.

Included in the lead sheets that were first disclosed in April of 2001 was a notation, "call Junior Davis back [illegible]- dates Barbara came to his house [illegible]- deadend LEAD school record's revealed she was in school". Junior Davis' name was not disclosed on the State's Notice of Discovery. Nor were any statements by him regarding Barbara coming to his house on a day when school records show that Lisa was in school. Whether or not the police spoke to Junior Davis, who is Lisa's boyfriend, is relevant to verifying or discrediting Kathy Stevens account of the events of March 23, 1983. Stevens testified that when she saw Wayne and Lisa struggling, Lisa asked her to call the police (R. 252-53). Stevens did not call the police but "went up to the store" and ran into Lisa's boyfriend, Junior Davis (R. 254). She told him that she wanted to call the police, but didn't 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.). Kathy Stevens is the sole source of this information. Mr. Tompkins, nor his counsel, has ever had knowledge regarding this contact between Detective Burke and Junior Davis.

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

The June 8, 1984 report, the July 28, 1983

report, and the handwritten lead sheets of Detective Burke were not disclosed in 1989, despite public records request on both the State Attorney's Office and the Tampa Police Department. Nor were the reports and notes disclosed to Mr. Tompkins or his counsel at any time prior to April, 2001, pursuant to the State of Florida's obligation. Despite the fact that there is no indication in the record that these items were previously disclosed to Mr. Tompkins, and in fact Mr. Tompkins alleged the exact opposite, the circuit court concluded that Mr. Tompkins "allegations regarding this new Brady material are the same as [his] previous Brady allegations and argument" and have "been addressed and rejected at trial, and by numerous courts on appeal and through post-conviction proceedings." The new Brady evidence cannot simply be dismissed based on what previous courts have ruled, since the new Brady evidence was not disclosed by the State until April of 2001. Because the State failed to disclose these new materials until April, 2001, Mr. Tompkins should be put in the position he should have been in in 1989 had the State complied with its duty

to disclose. Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993). The original judge and jury were not aware of the new Brady material addressed here, nor the information disclosed in 1989. Likewise, prior appellate courts had no knowledge of the newly disclosed notes and reports or the significance they play in corroborating the Brady material discovered in 1989. While the trial court has characterized the new allegations as the same as Mr. Tompkins previous Brady allegations, this is an inaccurate review of the claims before the court. All of the reports and/or notes disclosed in April 2001 are entirely separate and distinct from the Brady material which was disclosed for the first time in 1989.

## **2. Police Reports Regarding Other Suspects.**

Also disclosed for the first time in April of 2001 were numerous police reports and statements regarding the investigation into the disappearance of a young woman named Jessie Albach. Albach and Lisa Decarr were friends, the disappearance of both girls was originally investigated as one case, with the prime suspect in both being Mr. Tompkins.<sup>6</sup> As noted,

substantial information was disclosed in April, 2001, regarding the Albach investigation; because both cases were being treated as a single police investigation, compelling information as to the Albach case also relates to the DeCarr case. See Rogers, 782 So. 2d at 380.

A July 28, 1983, report that has just been disclosed 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.

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. The Tampa Police Department disclosed for the first time a May 3, 1984, police report concerning interviews with W.H. Graham, the individual who found the body identified as Albach:<sup>35</sup>

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<sup>35</sup>In November of 1980, Mr. Graham also reported finding bones, although the police report indicates that

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.

Interestingly, the 11/26/81 Criminal Intelligence Report regarding Everett Knight (A.K.A. Bob McKelvin) indicates that Mr. Knight owns a green '70 Pontiac Catalina. A May 9, 1984, report which was not disclosed until April of 2001 reveals that in fact there were two W.H. Graham's:

W/M GRAHAM, W.H., DOB 2 JUL 31, ADD: 4304 E. WILDER, SS # 492-34-3794, D.L. #G650-888-31-242, 6'1", 185#, BLUE EYES, GREY HAIR, ARRESTED 8-18-82.

W/M GRAHAM, WESLEY HOWARD, DOB 1 FEB 54, ADD 4304 E. WILDER, SS # 488-64-0011, d.l. # g180-416-56-243, 6', 184 #, BLUE EYES, BRN HAIR, ARRESTED 27 AUG 82.

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

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those bones "where [sic] determined not to be human."

Tompkins was never aware of this connection because neither the reports on McKelvin or Graham were disclosed to the defense.

Another newly disclosed report reveals that on June 9, 1984, W.H. Graham found additional bones in the area where the body believed to be Jessie Albach was found. In the newly disclosed May 3, 1984, report, it is reported that, "Graham stated he has had a continual problem with prowlers and vehicles loitering in this field usually during the early morning hours (0230-0530 h., seven days a week). Graham stated he has found women's underclothing and purses in the field, on numerous occasions; he also stated he has heard what sounded like female screams on numerous occasions, but did not personally check on it himself."

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. Again, Mr. Graham is the person who reported the discovery of the remains that were identified as Jessie Albach.

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.

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 24<sup>th</sup>. 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 27<sup>th</sup> or June 30<sup>th</sup>. On July 6<sup>th</sup>, the police officer located someone at the trailer who reported that the victim had moved on June 25<sup>th</sup>. The case was closed with the victim listed as “LNU, Laurie”, address “At large”. A cab driver who had picked Laurie up on June 24<sup>th</sup> 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. On the June 7, 1983, juvenile runaway report regarding Jessie Albach it is represented that she was 4’11”, 97 lbs.

Further reports which were previously undisclosed detail a witness’ identification of Graham in the same area where both Lisa DeCarr and Jessie Albach lived. A May 21, 1984, report by Det. Burke included an account of an interview of Charlotte Mercier, DOB 11/1/67, that provided as follows:

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

would go to the East Lake Mall or go to her house on E. Giddens. She said she knew Jessie had participated at least one (1) time in sexual intercourse with her brother because she had walked in on them one (1) day when she was living on Giddens. She said at that time she believed Jessie to be about 11 thru 13 yrs old. She said at that time she and Jessie had never talked about the situation where she was caught during sexual intercourse. She stated that she and Jessie had never talked about sexual intercourse with anyone else. She advised also Jessie had never talked to her about having any older men approach her. She stated that on at least three or four occasions, that she has gone with Jessie up to the Wagon Wheel Restaurant to find Jessie's mother (They normally call Jesse Ladon). She said each time they would go to the Wagon Wheel, 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.

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.

The circuit court dismissed these Brady violations because the reports pertain to the investigation of the disappearance of Jessie Albach, not Lisa DeCarr, and "the evidence collected in the Albach

investigation is not relevant to the DeCarr case. The court failed to address the similarities in the two cases, the fact that the girls were friends, the fact that they disappeared within months of each other, the fact that many witnesses knew both girls, the fact that Lisa DeCarr is referenced in many of the reports pertaining to Albach's disappearance, and Barbara DeCarr, a key witness is referenced in the reports as well. Furthermore, when Mr. Tompkins counsel received the Albach records in April 2001, the Albach records were contained in one file and interspersed with the DeCarr records. Thus any previous demand for records in 1989 pertaining to Wayne Tompkins and/or Lisa DeCarr should have yielded the Albach records in addition to the DeCarr records. Contrary to the court's finding, there is nothing in the record which conclusively rebuts Mr. Tompkins diligence in requesting these records.

### **3. Undisclosed Script of Questions.**

Also disclosed for the first time in April of 2001 by the Tampa Police Department is a list of the questions that was to be asked Detective Burke by Assistant State Attorney Mike Benito at Mr. Tompkins' trial. Not only is this a list of the questions, but in places the answers have been typed in by the person who prepared the document. The fact that the prosecutor felt compelled to provide the lead detective with in essence a script is impeachment evidence. Moreover, the existence of this script was only discovered because it was kept with Det. Burke's file, its existence suggests that scripts for witnesses was a practice of Mike Benito and that he may have employed this practice with his three main witnesses: Barbara DeCarr, Kathy Stevens, and Kenneth Turco.

The trial court concluded that the "answers to the questions pertain to issues that are irrelevant to the substantive testimony of the detective." This is incorrect. The questions and answers pertain to the

investigation he conducted and his interview of Wayne Tompkins which contained very pertinent information as to Wayne's account of the events. Furthermore, the trial judge has missed the significance of the script. 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. See Rogers v. State, 782 So. 2d 373, 384-85 (Fla. 2001).

#### **4. Newly-Discovered and Undisclosed Impeachment Regarding Key Witnesses.**

Included in the information disclosed for the first time in April of 2001 is the fact that Kathy Stevens served time in jail for committing perjury in 1986:

KATHY STEVENS, A.K.A. SAMPLE, A.K.A. MAMROE, A.K.A.  
MONROE  
BOOKING REPORT-9/25/86

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VOP PERJURY CASE NUMBER 061-295KJ  
60 DAYS TO BE RELEASED TO DRUG CENTER ONLY

This information was not disclosed by the State of Florida in 1989 when Mr. Tompkins sought to call Ms. Stevens to testify at the state court evidentiary hearing. The State of Florida objected to Stevens having to testify, yet it never revealed that Stevens had a perjury conviction. The judge sustained the State's objection and forced counsel to talk to Stevens in the hallway and place on the record what she would say on the witness stand if she had been called. Stevens, like the State, neglected to reveal that at the time she was a convicted perjurer. Nor did the State reveal this when Mr. Tompkins and the State were ordered by the federal district court to prepare a pre-evidentiary hearing stipulation in advance of a possible federal evidentiary hearing.

The trial court failed to understand the nature of the claim regarding Stevens' perjury. Section 90.610 of the Evidence Code provides that "[a] party may attack the credibility of any witness . . . by evidence that the witness has been convicted of a crime . . . if the crime involved dishonesty or false statement regardless of punishment." Clearly, the State's conduct in 1989 was premised upon a desire to keep Kathy Stevens off the witness stand in order to prevent Mr. Tompkins from learning that she was a convicted perjurer.<sup>7</sup> Such information would certainly in 1989 given rise to a number of claims. Mr. Tompkins should be put back in the position he would have been in had the State revealed the perjury; instead, the State successfully endeavored to keep Kathy Stevens from being administered an oath to tell the truth. This newly-discovered impeachment evidence warrants, at a minimum, an evidentiary hearing. See State v. Mills, 748 So. 2d 249 (Fla. 2001).<sup>36</sup>

Meanwhile, Kenneth Turco, the convicted escapee who was allowed to withdraw his plea only to have his charges subsequently dropped after testifying for the State at Mr. Tompkins' trial, has continued to have run-ins with the law. For example, the individual

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<sup>36</sup>That an evidentiary hearing is warranted on this issue is even clearer in light of the State's arguments to the lower court at the hearing on Mr. Tompkins' motion for rehearing:

Regarding Kathy Stephens [sic], I don't--the State did not present the evidence regarding Kathy Stephens alleged perjury conviction. I'm not sure we even still have a perjury conviction, I don't believe any evidence has been submitted to the Court to establish that there's been a conviction. There is no certified conviction presented. . .

(T. Hearing 6/12/01 at 15-16). In response, Mr. Tompkins' counsel noted that "the State now seems to be disputing whether it in fact happened. That's contrary to case law. The allegations have to be accepted as true or an evidentiary hearing is warranted" (Id. at 22).

who Mr. Benito thought so highly of that he would nolle prosequere an escape for which Turco had pled guilty was convicted in 1995 of extortion. This too is newly-discovered impeachment evidence warranting, at a minimum, an evidentiary hearing. Mills, supra.

In addition, since the filing of the Rule 3.850 motion additional evidence has been disclosed and provided to the circuit court in Mr. Tompkins Motion for Rehearing. 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. Mr. Holton called Mr. Episcopo as a witness at an evidentiary hearing on a Rule 3.850 motion in connection with a Brady claim.<sup>37</sup> 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.

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<sup>37</sup>Mr. Holton was subsequently granted a new trial.

Thus, this is new evidence, previously undisclosed, 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' testimony. This new testimony also sheds light on the candor of Mike Benito when he went to court in Turco's case. At Turco's sentencing, Benito told the court that he "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.**

In light of prosecutor Episcopo's recent testimony at the Holton hearing regarding the practices of the Hillsborough State Attorney's Office, this claim warrants an evidentiary hearing. This is important new evidence regarding the testimony presented by the State from Kenneth Turco. The standard operation procedure means that no explicit promises were made to Mr. Turco because his exact benefit was dependent upon his performance before the jury and how much he ingratiated himself with the prosecuting attorney. The standard operating procedure is in fact undisclosed impeachment

evidence. As the Court of Appeals of Maryland recently noted in granting Brady relief:

The State argues that, even if there was some promise of leniency for Harkum and Cable prior to their testimony, the agreements were not finalized and that fuller disclosure, therefore, would not have been possible. Even assuming, *arguendo*, that the terms of the plea agreements between the State and Harkum and Cable were not finalized at the time of their testimony, **that does not alleviate the State's obligation to disclose the material evidence. In fact, a tentative plea agreement can be even more probative of a witness's motivations in testifying than a finalized one because it may be more likely that the witness will perceive that the agreement is contingent upon his or her performance on the stand.** As the United States Court of Appeals for the Fourth Circuit explained in Campbell v. Reed, 594 F. 2d 4 (4th Cir. 1979):

The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment. . . . [A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted.

Id. at 7-8 (internal citations omitted). See Boone v. Paderick, 541 F. 2d 447, 451 (4th Cir. 1976).

Wilson v. State, 363 Md. 333, 350 (Ct. App. Md. 2001) (emphasis added). An evidentiary hearing is warranted in Mr. Tompkins' case.

**C. MR. TOMPKINS IS ENTITLED TO RELIEF.**

As noted in the introductory section, the law is well-settled as to the requirement for an evidentiary hearing when there are disputed issues of fact. In Mr. Tompkins' case, there are disputed issues of fact, particularly as to diligence. The State argued, and the lower court found, that Mr. Tompkins' collateral counsel failed to exercise due diligence in 1989, when they "could have" discovered the wealth of evidence that has now been disclosed. On the other hand, Mr. Tompkins has alleged, in his written pleadings and at the Huff hearing, that he did make public records requests in 1989, and none of this information was disclosed. Collateral counsel also proffered that both counsel and the 1989 investigators were prepared to testify as to their diligence in 1989, yet the lower court, at the State's urging, summarily denied. This was error, for the court failed to accept Mr. Tompkins' allegations as true. Lightbourne v. Dugger, 549 So. 2d. 1364 (Fla. 1989); Card v. State, 652 So. 2d 344, 346 (Fla. 1995); Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996).

The law is also clear that the Due Process Clause

of the Fourteenth Amendment requires the State in a criminal case to disclose to the defense exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). This Court has also held in a capital post-conviction proceeding that “upon request, the State is obligated to disclose any document in its possession which is exculpatory. This obligation exists regardless of whether a particular document is work product or exempt from chapter 119 discovery.” Johnson v. Butterworth, 713 So. 2d 985, 986 (Fla. 1998) (citations omitted). In Johnson, the Court found that the State’s obligation to disclose favorable evidence was not extinguished by either a conviction or a sentence of death. It makes no difference that a capital defendant is litigating his case in post-conviction: “[T]he State is under a continuing obligation to disclose any exculpatory evidence.” Id. at 987. See also Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996) (Brady obligation continues in post-conviction).

Favorable evidence has been defined by the United

States Supreme Court as exculpatory evidence. Under due process, this includes evidence which impeaches a State's witness or the reliability of the State's criminal investigation. United States v. Bagley, 473 U.S. 667, 676 (1985). 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. See Strickler v. Greene, 527 U.S. 263 (1999). 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 behalf." Kyles, 514 U.S. at 437; Rogers, 782 So. 2d at 378. The United States Supreme Court specifically indicated that information

impeaching "the reliability of the investigation" was evidence favorable to the accused within the meaning of Brady. Kyles, 514 U.S. at 446. Thus, evidence demonstrating a shoddy or negligent investigation by law enforcement must be disclosed by the prosecution in order to comply with due process. Kyles, 514 U.S. at 447. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984).

In Strickler, the United States 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." Strickler, 527 U.S. at 281 (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, and that the prosecuting attorney has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler, 527 U.S. at 280-

81. This Court reiterated this holding recently: "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Rogers, 782 So. 2d at 378.

Despite the State's ongoing Brady obligation, and despite previous post-conviction public records requests in 1989, the State disclosed numerous reports and notes for the first time in April 2001 to Mr. Tompkins' collateral counsel. All of the undisclosed notes and reports are significant when considered in conjunction with the state's theory, testimony and evidence presented at trial. There is nothing in the record to conclusively refute the fact that the state failed to disclose these notes and reports. The notes and reports relate to credibility, impeachment and investigation, all of which would have affected the result. The fact that Mr. Tompkins' previously alleged Brady violations does not mean that Mr. Tompkins is disentitled to review of his present claims when in fact the State failed to previously

disclose this new information back in 1989. See Provenzano v. State, 616 So.2d 428, 430 (Fla. 1993); Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999).

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Because the lower court misanalyzed the allegations under Lightbourne and Provenzano, the entire analysis of the claim is tainted as the lower court then failed to conduct a cumulative analysis of the various Brady violations which have occurred in this case. In 2001, Mr. Tompkins was provided documents from the State never previously disclosed; these new documents contain favorable or exculpatory information. Mr. Tompkins is entitled to a full and cumulative consideration of his previous Brady and ineffective assistance of counsel claims. Way v. State, 760 So.2d 903 (Fla. 2000); Jones v. State, 709 So.2d 512 (Fla. 1998); Swafford v. State, 679 So.2d 736 (Fla. 1996); State v. Gunsby, 670 So.2d 920 (Fla. 1996).

#### **D. CUMULATIVE ANALYSIS.**

In assessing whether Mr. Tompkins is entitled to relief, the trial court is also required to review the

claims previously presented in order to do a cumulative analysis. See Kyles v. Whitley, 514 U.S. 419, 436 (1994); Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999); Jones v. State, 709 So. 2d 512, 521-22 (Fla. 1998); State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996); Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996).

**1. Previous Brady Information.**

It was undisputed in 1989 that there were a number of documents and facts in the State's possession that were disclosed then which had not been provided to the defense in violation of Brady. These discovery violations were material because the jury was specifically instructed that, in order to convict, they must find that the Lisa died on March 24, 1983, between 8:30 a.m. and 5:00 p.m., and because the State's prosecution theory required that Lisa must have died at about 9:30 that morning. Any evidence regarding when witnesses saw her that day, contacts with Lisa after March 24th, corroboration of Mr. Tompkins' account, and impeachment of witnesses' credibility was absolutely critical to the defense.

**a. Undisclosed memoranda regarding Kathy**

**Stevens.** Prosecutor Benito's files, disclosed in post-conviction, revealed memoranda that detail statements made to him by Kathy Stevens. At the 1989 evidentiary hearing, Benito testified that these memoranda were the equivalent of a police report used to memorialize a witness' statement to law enforcement personnel (PCR. 221), and he did not disclose these memoranda to the counsel (PCR. 222). Trial counsel testified that he was not provided with these memoranda (PCR. 54, 57), and was not aware of their contents (PCR. 62, 65).<sup>9</sup> Stevens veracity was vouched for by Benito himself during closing arguments.<sup>38</sup>

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

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<sup>38</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").

The change was also important because 8:00 a.m. was outside the scope of the bill of particulars; were Kathy to have testified that the attack took place at a time not within the bill, the State would not have been able to prove this essential element beyond a reasonable doubt, as the jury was instructed.

Moreover, nowhere in her statement to Benito does Kathy indicate that Lisa begged her to call the police. That detail was added later to embellish the story. The defense attorney needed to know that such a change had occurred in order to effectively cross-examine Kathy. Significant omissions from prior statements can be just as impeaching as inconsistent statements. Jencks v. United States, 353 U.S. 657 (1957).

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

In the second undisclosed memo dated March 8, 1985, Stevens stated she spoke to Lisa on March 23, 1983, the day before her disappearance, and Lisa said she was going to run away from home. Kathy said she had no further contact with the victim after that date and her original statement to Barbara DeCarr that Lisa was in New York and

had contacted her was false.<sup>39</sup>

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

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<sup>39</sup>If she had no further contact with Lisa after March 23, 1983, than her whole story about what she observed the following day was also false.

Kyles not only provided inconsistent versions of important facts, they also gave rise to "a substantial implication that the prosecution had coached [the witness] to give it." Id. at 443. See also United States v. Brumel-Alvarez, 991 F. 2d 1452, 1461 (9th Cir. 1992).

The Stevens statements to Benito fall under the State's obligations pursuant to Brady. In Kyles, notes from the prosecutor's interviews with the key state witness were suppressed and found to be material Brady information requiring reversal. Id. at 429. The withheld notes in Kyles not only provided inconsistent versions of important facts, they also gave rise to "a substantial implication that the prosecution had coached [the witness] to give it." Id. at 443. See also United States v. Brumel-Alvarez, 991 F. 2d 1452, 1461 (9th Cir. 1992).

**b. Undisclosed deals with key witnesses.**

As noted, the credibility of Stevens and Turco was very much at issue during the trial, particularly given the State's vouching to the fact that they told the truth (R. 346). The defense did not know that when Kathy 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 could not get in to see. After providing Benito with her story, he arranged for her to visit her boyfriend (PCR. 9, 20).<sup>10</sup> She thus received benefit for her testimony. Defense counsel testified at the 1989 evidentiary hearing that he did not know this information at the time of Mr. Tompkins' trial. When defense counsel was asked whether that was evidence which defense counsel would regard as potential impeachment, the court responded, "Yes" (PCR. 67). However, because he suppressed this information, Benito was able to argue to the jury that Kathy 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' credibility. Florida law does establish 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 when it was disclosed that the State failed to turn over a prior statement of a witness that contained a discrepancy with the witness's testimony which would have supported the defense theory).

At trial, Kenneth Turco's credibility was also very much at issue since he had criminal charges pending against him which were nolle prossed in exchange for his testimony, and since he had access to the depositions and police reports before coming forward with his story. However, 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 Mr. Turco's assertion that he had pled guilty and was awaiting sentencing on an escape charge and his only expectation of a "deal" was a favorable word from the prosecutor on the escape charge, court files reveal that there was a deal that was not revealed to the defense. The escape charge to which Turco had pled guilty was to be nolle prossed, and in fact the charge was dropped after Turco's testimony against Mr. Tompkins. The prosecutor admitted to this at the state court evidentiary hearing (PC-R. 47). Certainly the fact that Turco had made work release prior to his

escape established that his main impediment to being released was the escape charge. Having that charge dropped was quite significant to Turco, yet the jury was led to believe that because Turco had pled guilty, he was going to serve significant time for the escape. In fact, Turco was released from prison in 1991.

**c. Undisclosed records from victim's school.**

Additional exculpatory material in the form of school records regarding the victim and Kathy Stevens were undisclosed. Trial counsel testified at the state court hearing that he had not seen these school records and had never heard about the information contained in them. The prosecutor did not dispute that these records were in his file. The defense was not provided with these records but was merely told that the records showed that the girls had been suspended from school on March 23rd, the day before Lisa's disappearance. However, the school records in fact showed that classmates claimed to have received phone calls from her around April 21, 1983, saying she was pregnant and in New York. Evidence that Lisa was still alive in April was highly exculpatory evidence which the defense did not have and had no means of obtaining.

**d. Undisclosed records from Missing Children's Help Center.**

Still more exculpatory material was kept from the defense. The police and the state attorney had in their files a copy of the Missing Children's Help Center's file on the victim. According to a notation in that file, Detective Gullo wrote that Barbara DeCarr was wrong when she claimed that she had told the police all along that Mr. Tompkins was the last person to see the victim alive: "Det. Gullo insisted that she did not tell him this." Trial counsel testified at the state court 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).<sup>11</sup> Gullo's statement, which was in the state attorney's file, should have been disclosed to the defense.

## **2. Previous Ineffectiveness Claims.**

There existed ample and compelling evidence of Mr. Tompkins' factual innocence. There was a considerable amount of information indicating that Lisa DeCarr was alive later in the day of March 24, 1983, and even that she was alive as much as a month later. There was also evidence corroborating Mr. Tompkins' statement that he saw the victim in the afternoon of March 24, 1983, wearing a maroon blouse and jeans. Other evidence indicated that the victim did not own the jewelry by which the body found under the house was identified. This evidence was readily available to defense counsel but was never presented.

Some of this information was contained in police reports admitted at the state court hearing. These police reports were compiled when Barbara DeCarr reported Lisa missing on March 24, 1983. According to the police report, the "Date/Time Reported" was "24 MAR 83 1730." "Mrs. DeCarr stated her daughter runaway from home for no apparent reason." Id. The report further identified Wendy Chancey as a witness, and included a summary of the interview of Wendy Chancey:

Interview: 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 Lisa was having some

trouble in school but nothing to cause her to runaway. Compl. checked with Lisa's friends and school for any 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.

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.

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 these reports, but failed to use them.

As previously stated, the description of the clothes which Wendy Chancey said Lisa DeCarr was wearing on March 24th matched the description given by Mr. Tompkins to the police. At trial, the State argued that Mr. Tompkins' statement was a lie. The jury did not know that Wendy Chancey's description corroborated Mr. Tompkins' statement. 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 (PCR. 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 (PCR. 82). Furthermore, he did not argue that this critical piece of evidence was admissible for its impeachment value for it established that both DeCarr and Burke made serious misstatements of fact.<sup>12</sup>

Had defense counsel interviewed Wendy Chancey, he would have been able to establish that

although she does not now remember the events surrounding Lisa DeCarr's disappearance, her statement to the police was reliable and admissible:

1. My name is Jeffrey Walsh and I work as an investigator at the Office of the Capital Collateral Representative (CCR) in Tallahassee, Florida.
2. Martin J. McClain, an Assistant CCR, instructed me to locate Wendy Chancey and question her concerning the validity of her statement to the Tampa Police Department on March 24, 1983 regarding the disappearance of Lisa Lea DeCarr.
3. After following up on every available lead and remaining unsuccessful, an outside agent was hired by CCR to assist in locating her. This was done following my May 24, 1989 contact with Wendy's brother in which it was revealed that Wendy was living in Colorado. On July 3, 1989 I learned that Wendy was living at 102 Penn Street, Walsenberg, Colorado 81089. On July 22, 1989 I traveled to Colorado and spoke with Wendy concerning this matter.
4. Wendy initially stated that she was young at the time and had no independent recollection of the events taking place on March 24, 1983 surrounding the disappearance of Lisa DeCarr. Wendy then read a copy of the 1983 statement she made to the Tampa Police Department and confirmed that it was indeed her that made the statement in that police report.
5. Wendy then proceeded to tell me that if she made a statement to the police in 1983 that it was in fact true. She confirmed this by stating that she would of had no reason to lie either on March 24, 1983 or July 22, 1989.
6. She said she had no idea as to why she was not called to testify at Wayne Tompkins' trial. Wendy confirmed that she was living in Tampa and available at the time of Mr. Tompkins's trial.

This affidavit was introduced during the 1989 appeal to the Florida Supreme Court. 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 resulted in significantly exculpatory evidence being kept from Mr. Tompkins' jury.

That the evidence was exculpatory is clear from the prosecutor's testimony at the 1989 hearing. Benito testified that he had subpoenaed Chancey to his office on March 13, 1985, several months prior to trial.<sup>40</sup> He had no recollection as to whether he in fact talked to her or what she might have said (PCR. 224). He did conclude, however, that Chancey was an unimportant witness because she was incorrect in her statement to the police (PCR. 225-26).<sup>41</sup> Benito's testimony establishes that there was no adversarial testing of Mr. Tompkins' guilt because the jury did not know of the exculpatory statement given by Chancey to the police the very day of the disappearance, a full fourteen months before it was even suspected that Lisa DeCarr was dead, and never had the opportunity to decide for themselves whether Chancey's statement was credible.

Gladys Staley was Mr. Tompkins' mother. According to Mrs. DeCarr's testimony, Mrs. DeCarr was at Gladys Staley's house from 9 a.m. to 3 p.m. on March 24, 1983, the day Lisa DeCarr disappeared. 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 her affidavit which was admitted at the state

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<sup>40</sup>Interestingly, this was a week after Barbara's DeCarr's deposition and the day after Kathy Stevens' sudden recollection of witnessing an assault by Wayne Tompkins.

<sup>41</sup>However, her statement is now corroborated by previously undisclosed statements of other witnesses.

court 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.

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.

The significance of the ring referred to by Mrs. Staley is that Barbara DeCarr identified the body by virtue of the ring found with it. According to DeCarr, it was an engagement ring Lisa received on her fifteenth birthday, September 26, 1982. However, neither Staley nor Stevens knew of an engagement ring being given to Lisa six months before her disappearance. Neither recalled an engagement ring, although Stevens was familiar with other rings Lisa wore (PCR. 16, 22). 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, 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, he failed to adequately investigate and prepare to use Staley at the guilt phase of the trial.

In addition to being unaware of the information above, the jury was not apprised of the myriad of

inconsistencies between DeCarr's deposition and her testimony. For example, police reports cast doubt on the claim that Lisa died the morning of March 24, 1983, and which supported the fact that Lisa had runaway. Additionally, records from the Missing Children Help Center confirm that when Barbara DeCarr called their office on March 29, 1983 to report Lisa missing, she suspected that Lisa was pregnant and in New York. Lisa's school records indicate that Barbara DeCarr called on March 25, 1983: "Mom says child ran away yestd (24th). Thinks child may be pregnant." Then on April 21, 1983, school records note that "students said child called from N.Y. Is pregnant." In a police report dated April 26, 1983, it was noted that Kathy Stevens had said that Lisa called her the day before and told her that she was in New York, she was pregnant, and she was okay. Records from the Missing Children Help Center also reveal serious discrepancies regarding who last saw Lisa DeCarr alive:

"Friday, June 1, 1984... Barbara [DeCarr] stated . . . 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 that last person to see Lisa alive!! Det. Gullo insisted that she did not tell him this. Barbara wanted me to contact Colonel Snell and ask him about the 'Fenced-in yard, Oak Tree and old Coca-Cola sign the psychic had told her (Barbara) about."

The cause of the victim's death was reportedly strangulation, yet the coroner clearly testified at trial that the only basis for this conclusion was the presence of a cloth ligature that had a diameter of only two and one half inches. No soil samples or other testing was done to determine when the body was placed in the gravesite or how long it had been there. No testing was done to show how long the earrings and ring had been present in the gravesite. No explanation was offered as to why there had never been any horrendous odor detected when a body was purportedly decaying under the house for

over a year in central Florida. No explanation was offered as to why the body was found in a crouched position and why no tests were conducted regarding whether the body had thus been stored in another location and moved there later.

Barbara DeCarr's history of perverse and suspicious activities at her house on Osborne Street at the time of Lisa's disappearance is not only well-known but documented through police reports in this case. Yet the jury was never presented with any of this evidence. Lisa spoke frequently to her friends and family that she planned to run away because she couldn't stand being in her mother's house. Lisa often spent time with Mr. Tompkins' mother and often confided in her how unhappy she was at her mother's home. Brian Duncan, a cellmate of Wayne Tompkins, stepped forward pre-trial and claimed that Wayne confessed to him that he had murdered Lisa. Duncan agreed to testify and was released on bail. Mr. Duncan called Benito and left a message on his answering machine that he needed to talk to him. Benito testified that the only reason Duncan would have been calling him was because of Tompkins' case (PCR. 234). Later the same day as his call, Duncan committed suicide. Police reports from Pasco County show that Duncan had committed another burglary. When the police knocked on his motel room door, he apparently ingested cyanide rather than return to jail. He died from cyanide. This clearly demonstrates a strong willingness to do whatever it took to avoid incarceration. Moreover, the confession that Duncan claimed to have elicited from Wayne Tompkins (this was before Kathy Stevens suddenly recalled witnessing a previously unreported assault when she wanted to get into jail to visit her boyfriend) was simply that he had at some point strangled Lisa DeCarr. The other jail inmates that Duncan said could corroborate his story, in fact did not

corroborate his story that Wayne confessed.

Kenneth Turco stepped forward after Kathy Stevens had magically remembered the assault after consulting her pillow. Not surprisingly, the confession Turco reported matched Kathy Stevens' story. A few weeks after the trial, Mr. Turco's pending escape charges that Turco had already pled guilty to) were nolle prossed by request of Benito of the state attorney's office.

Counsel's failure to adequately investigate and prepare cost Mr. Tompkins his ability to establish his innocence at trial. Counsel's failings were ineffective assistance of counsel. Had the jury known that Wayne was not the last person to see Lisa alive and those who saw her subsequent to him verified his description of her clothing, undoubtedly a different outcome would have resulted. Counsel failed to present evidence establishing that Mr. Tompkins had copies of police reports and depositions in his jail cell, which Kenneth Turco could have read and used to create the fabricated confession. Counsel failed to object to the medical examiner's testimony that someone else had conducted a dental exam of the victim's dental x-rays and identified her as Lisa. This was not only hearsay, but also was a complete untruth.

Mr. Tompkins was denied the effective assistance of counsel during the guilt-innocence phase of his capital trial, and there is a reasonable probability that had this evidence been adequately investigated, prepared and presented by counsel, such evidence would have created reasonable doubt on a critical, disputed issue at trial and changed the outcome of the trial. Moreover, the cumulative prejudicial impact caused by the State's nondisclosure of other similar evidence (all of which would

have substantially corroborated the limited information disclosed to counsel) further rendered counsel ineffective and denied Mr. Tompkins' rights under the Sixth and Fourteenth Amendments. Kyles v. Whitley, 514 U.S. 419 (1995). Moreover, to the extent that the State argues that any of the newly disclosed police records discussed within this claim should have been discovered by trial counsel (despite the State's breach of its duty under Brady), the defense attorney's failure to discover the highly exculpatory evidence must be viewed as ineffective assistance under this Court's analysis in State v. Gunsby, 670 So.2d 920 (Fla. 1996).

### **3. Previous Claims Of Confrontation Clause Violations.**

Significant evidence existed to the effect that other witnesses had seen Lisa DeCarr alive after the time she was allegedly killed by Mr. Tompkins; these witnesses also verified Mr. Tompkins' version of what occurred. Moreover, there were other suspects to the crime. When trial counsel attempted to present this available evidence, the court ruled it was inadmissible. Mr. Tompkins was denied his right to present a defense and to impeach the witnesses against him, in violation of the Sixth Amendment.

#### **a. Other witnesses had seen the victim alive.**

The State's case turned upon its theory that Lisa was killed in her bathrobe on the morning of March 24, 1983, and that she was killed, as alleged in the Bill of Particulars, between 8:30 a.m. and 5:00 p.m. on that date. To prove this, the State presented Barbara DeCarr, Kathy Stevens, and Kenneth Turco, to establish that the offense could only have occurred between 9:00 a.m. and 10:00 a.m. on March 24, 1983. In this context, any evidence indicating that Lisa was alive at a time inconsistent with the Bill of Particulars was exculpatory and would have required an acquittal. There

was considerable evidence which the jury never heard indicating just that. Evidence existed indicating that the victim was alive later in the day on March 24, 1983, and that she was wearing the clothes Mr. Tompkins had said she was wearing that afternoon. Evidence also existed indicating that the victim was alive as much as a month after the day on which the State contended she was murdered.

Defense counsel first attempted to elicit this evidence during the cross-examination of Barbara DeCarr to impeach the State's efforts to persuade the jury through her testimony that Mr. Tompkins was the last person to see Lisa DeCarr alive, as well demonstrate bias against her former boyfriend. The defense inquiries, however, were cut off and the State's objections were sustained based on hearsay. See R. 217-221. Furthermore, during the cross-examination of the lead detective regarding the scope of his investigation, the defense was again limited from eliciting evidence which impeached the detective and supported the defense theory. See R. 285-287; 294-295.<sup>13</sup> The exclusion of this testimony denied Mr. Tompkins his right to present a defense and to effectively impeach the State's witnesses in violation of the Sixth Amendment.

The proffered evidence was not only valid impeachment but also was clearly exculpatory and corroborated by substantial additional evidence that buttressed the trustworthiness of the evidence. For example, a police report by Detective Gullo dated September 2, 1983, stated that Lisa had been sighted six months after her alleged disappearance (R. 553). Another police report dated April 26, 1983, stated that Lisa had run away to New York because she was pregnant (R. 551). The theory that Lisa had run away was further supported by a police report by Detective Burke dated June 22, 1983 (R. 517). As noted above, another report filed at the time of Lisa's disappearance stated that it was

Wendy Chancey who last saw Lisa at approximately 3:00 p.m. on March 24, 1983. In addition, Barbara DeCarr stated in her deposition that she believed that Lisa had run away to New York (Deposition of Barbara DeCarr, pp. 41-43), and that several of Lisa's friends reported seeing her **the summer after her disappearance** (*Id.* at 43). As noted elsewhere in this brief, school records further verified the information that Lisa DeCarr had run away.

Counsel's cross-examination, if allowed, would have destroyed the State's theory, advanced through Barbara DeCarr's testimony, that Mr. Tompkins was the last person to see Lisa alive. Additionally, the cross-examination, if allowed, would have provided the jury with substantive evidence dealing directly with the crucial issue of whether the victim was deceased at the time alleged (and required to be proven) by the State, i.e., Mr. Tompkins innocence of the offense as charged. The evidence goes to whether Barbara was not being honest in her effort to insure a conviction of her former boyfriend. Because counsel was not allowed to examine Detective Burke and Barbara DeCarr regarding and exculpatory evidence that they had found during their investigation, the Sixth Amendment and due process were violated.

**b. Corroboration of Mr. Tompkins statements.**

The defense contention that Lisa was last seen wearing a maroon blouse and jeans was supported by information contained in police reports. A report dated July 9, 1984, authored by Detective Gullo, contains a statement by Gladys Staley, Mr. Tompkins mother, in which she told the police that she saw the victim at approximately 1430 hours wearing a red shirt and blue jeans (R. 511-12). Staley was never deposed by the defense prior to trial or called by the defense to testify to having

seen Lisa after the time of the alleged murder. At the evidentiary hearing, Staley's affidavit was admitted into evidence, wherein she affirmed that Lisa appeared at her house about 2:30 p.m. on the day of her disappearance in short shorts and a reddish-pink top, and that she scolded her because it was cold and rainy that day and she was not warmly dressed.<sup>14</sup> Trial counsel testified that he had talked to Staley prior to trial but he could not recall her telling him anything significant that would have been useful (PCR. 97).

Barbara DeCarr also reported that Lisa's friends had seen her dressed in a maroon top and jeans, which corroborated Mr. Tompkins' account that the last time he saw Lisa she was wearing jeans and a maroon top:

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).

**c. Other suspects to the crime.**

The jury also never knew that, shortly before Lisa's disappearance, a man had promised her a color television and other rewards for agreeing to have sex with him. Barbara confronted this man and asked him to leave Lisa alone. Counsel should have known this from Burke's deposition, but failed to investigate or elicit this information during Burke's testimony.

**E. CONCLUSION.**

When the newly disclosed Brady violations are considered cumulatively with the previously presented claims, it is clear that a new trial is required. At a minimum, the files and records do not conclusively refute Mr. Tompkins allegations and an evidentiary hearing is required. Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Scott v. State, 657 So. 2d 1129 (Fla. 1995).

## ARGUMENT II

### **THE LOWER COURT ERRED IN DENYING MR. TOMPKINS' MOTION FOR DNA TESTING.**

Below, Mr. Tompkins moved the court to order mitochondrial DNA testing on any and all biological evidence in the case, including but not limited to hairs identified by the FBI Crime Laboratory in 1984,<sup>15</sup> as well as bones and other matter which currently are in the possession of the Tampa Police Department property room (PCR2. 31-56).<sup>42</sup> Also in evidence at the clerk's office is the robe and

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<sup>42</sup>Mr. Tompkins not only filed a Motion for DNA testing and filed a request in his 3.850 motion, but also requested DNA testing and a stay of execution from Governor Bush via letter dated April 6, 2001. Unbeknownst to Mr. Tompkins' counsel until a hearing on April 11, 2001, the Governor's Office responded to the State Attorney in Hillsborough County within hours of receiving Mr. Tompkins' counsel's letter. This letter provided in relevant part:

Prior to the Governor signing the warrant, I contacted your office to determine if there was any evidence remaining that was suitable for DNA testing. I spoke to State Attorney Investigator Richard Hurd and asked for his assistance in obtaining this information. He advised that, after discussions with prosecutors and detectives at the Hillsborough County Sheriff's Office, no evidence was preserved that would contain DNA. Relying on this crucial information, the Governor signed the death warrant.

Today, Governor Bush received a letter from CCRC attorney Todd Scher, requesting an executive stay of the execution of Wayne Tompkins so that DNA testing may be conducted on hair evidence found on the victim. Attached to his letter is an FBI lab report dated July 18, 1984, which documents the discovery of light brown hairs (suitable for testing) on items submitted. I have attached copies of both his letter and the lab report for your review.

The Governor has made it his policy that he will sign no death warrant with respect to an inmate until DNA evidence that could exonerate the inmate has been tested. Please advise whether or not this evidence is,

pajama top in which the victim's remains were wrapped. These items are covered in debris, from which the original hair samples sent to the FBI were taken. Thus hair samples may still be obtained from the debris, even if the State has lost or destroyed the original samples.<sup>43</sup> Moreover, as noted above, bone fragments are clearly available for testing. It is now known that bone fragments can provide a source for mitochondrial DNA testing (PCR2. 131).

In response to Mr. Tompkins' motion, the State argued that the request was procedurally barred

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in fact, available despite my conversation with Investigator Hurd.

Due to the seriousness of this matter, your prompt attention is appreciated.

This letter was not copied to Mr. Tompkins' counsel, and was only disclosed after Mr. Tompkins separate DNA motion had been denied and Assistant State Attorney Sharon Vollrath mentioned the existence of this letter during her testimony on the "missing" hair evidence.

<sup>43</sup>At a hearing on the DNA motion, the State, only after the extensive legal arguments presented by both sides and after the court had denied the motion for DNA testing, announced that "um, the hairs cannot be located" (T. 89). According to the State, a Detective Black had checked out some items from the police department back in 1990, after which "[t]here is no other record whatsoever of what could have happened to those things" (T. 93). The court then took testimony from Assistant State Attorney Sharon Vollrath, who testified to her efforts to look into the location of the hairs once she had received Mr. Tompkins' motion for DNA testing (T. 96-99). Vollrath had know knowledge why evidence in either the DeCarr or Albach cases would have been checked out of the police department in 1990 (T. 107). Mr. Tompkins also questioned Detective Aubrey Black from the Tampa Police Department (T. 109). Black testified that he had no involvement ever with either the DeCarr or Albach investigations (T. 110). Black was shown the property ledger from the Tampa Police Department indicating he had checked out property from the DeCarr/Albach cases in 1990 (T. 111). According to Black, the ledger reflected his personal identification number, but "that's not my signature or my hand[writing]. I can only assume that this was made by somebody else" (T. 111-12). Black did not know if the fact that his name had been forged in order to check out evidence in capital homicide cases was being investigated by the Tampa Police Department (T. 115). Subsequently, Mr. Tompkins filed a motion for a supervised inspection of the Tampa Police Department evidence and property room (PCR2. 159), but the motion was denied (PCR2. 425-26).

under the authority of Zeigler v. State, 654 So. 2d 1162 (Fla. 1995) (PCR2. 58). Following an evidentiary hearing on the issue of the "lost" hair evidence (T. 95 *et. seq*), the lower court denied the motion, writing:

During argument and testimony on April 11, 2001, Defendant conceded that the evidence now sought to be tested was available since 1984. The Court finds that mitochondrial DNA testing was available in judicial proceedings since 1996. Additionally, mitochondrial DNA testing was used as evidence in the Thirteenth Judicial Circuit in 1999. The Court is concerned regarding the timing of Defendant's request.

After hearing the argument and testimony, the Court finds the Defendant has failed to set forth any compelling reasons for the mitochondrial DNA testing. Additionally, the Court finds that mitochondrial DNA testing would not prove or disprove any material issues in the case.

(PCR2. 143).

As to the timeliness issue, the lower court utilized an improper standard to measure Mr. Tompkins diligence in requesting DNA testing. It is not when the evidence was available, as it was clearly in existence at the time of Mr. Tompkins trial, but when the most recent technology became available. While the court stated that mitochondrial DNA testing had been available since 1996 and in the Thirteenth Judicial Circuit of Florida since 1999, the court cited no authority for either proposition. Nor did the court point to any authority by this Court finding that mitochondrial DNA testing is admissible under the Frye<sup>44</sup> standard. Fla. R. Crim. P. 3.850 provides that as a general rule, a motion for post-conviction relief

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<sup>44</sup>Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

must be filed within one year of the date of discovering new evidence. In the case at bar, however, we deal not with newly discovered evidence, but with newly developed technology. Mitochondrial DNA testing is a relatively new technology that is now available. If this testing method is applied to the available evidence, the resulting observations and conclusions are evidential facts which is the actual newly discovered evidence; but the testing methodologies themselves are not evidential facts and thus not the basis for determining when new evidence was discovered. This distinction between newly discovered facts and newly discovered technology is crucial to the proper application of Rule 3.850. Newly-evolved technology is not synonymous with newly discovered evidence; newly applied technology, when applied to existing evidence, may result in observations and conclusions which are themselves the newly discovered evidence.

As to the State's reliance on Zeigler, counsel for Mr. Tompkins pointed out that Zeigler is distinguishable from Mr. Tompkins' case as it involved an entirely different method of DNA testing which had been recognized by Florida courts for five years prior to the request by Mr. Zeigler. In any event, the State's argument is now moot. Fla. Stat. §925.11 and Fla. R. Crim. P. 3.853 supersede the Court's decision in Zeigler. See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 26 Fla. L. Weekly S687 (October 18, 2001) (Anstead, J., concurring in part and dissenting in part). That DNA testing should now be done is further supported by the fact the enactment of Fla. Stat. §925.11 (2001) as well as this Court's adoption of Fla. R. Crim. P. 3.853 to allow DNA testing upon request. Rule 3.853 provides that "No motion shall be filed or considered more than 2 years after the date that this rule is adopted by the Supreme Court of Florida, nor more

than 2 years after the judgment and sentence in the case become final, whichever is later." Moreover, the rule provides that "the time periods set forth in Fla. R. Crim. P. 3.850-3.851 shall commence on the date that the written test results are provided to the court, the movant and the prosecuting authority pursuant to subsection (c)(8)." Similarly, Fla. Stat. §925.11 also provides for a window of 2 years for inmates to seek DNA testing once the bill becomes law.

The circuit court further determined "that mitochondrial DNA testing would not prove or disprove any material issues in the case." However, if the DNA testing of the bone, hair or other organic material established that the decedent was not Lisa DeCarr, Mr. Tompkins would be exonerated. Similarly, if DNA from someone other than Wayne Tompkins was found present along with material possessing the DNA of Lisa DeCarr, that would identify an assailant other than Wayne Tompkins and would exonerate him. The lower court's conclusion also is contradicted by the fact that the Tampa Police Department sent evidence to the FBI Lab for testing: if the police did not believe that such testing would "prove or disprove" a material issue in the case, then why did the evidence get sent in the first place?

As further grounds for DNA testing in this case, Mr. Tompkins submitted an affidavit below regarding new information as to the discovery of the jewelry used to identify the body as Lisa DeCarr (PCR2. 686; 729-30). Thus, contrary to the trial testimony, the jewelry was **not** found the same day that the body was found. The police had to return the next day to the unsecured crime scene where the body had been found in order to locate the jewelry that Barbara DeCarr had advised them to look for. The fact that the police never disclosed that jewelry was found on a subsequent trip to the crime scene

**after** the crime scene had been left unsecured is a significant fact impeaching the identification of the remains.

The bottom line is that no time bar should have been imposed on Mr. Tompkins' request for DNA testing, and even if a bar was properly found, it is no longer valid in light of this Court's recent adoption of Rule 3.853. Moreover, given the overriding importance of ensuring that no innocent person is convicted of a crime, much less sentenced to death,<sup>45</sup> there can be no prejudice to the State to have the biological evidence in this case tested. Of course, the State believes that the evidence of Mr. Tompkins' guilt is "overwhelming." However, if this were the standard, then no defendant could get DNA testing. This matter should be reversed and remanded with directions that DNA testing be conducted.

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<sup>45</sup>Unfortunately, Florida has the dubious distinction of leading the country with the most postconviction exonerations from death row. That the State of Florida continues to oppose attempts made by defendants, particularly capital defendants, to obtain DNA testing is disturbing to say the least.

### **ARGUMENT III**

#### **THE STATE'S FAILURE TO PRESERVE EVIDENCE WHICH COULD BE DNA TESTED VIOLATES DUE PROCESS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS.**

In 1984, the Tampa Police Department sent various evidentiary items in the DeCarr and Albach cases to the FBI Crime Laboratory for forensic testing. The FBI was able to determine that several hairs discovered with the items from the DeCarr case contained hairs "suitable for possible future comparison." Moreover, other hairs "did not possess sufficient individual microscopic characteristics to be of value for significant comparison purposes." According to the FBI report, these items were eventually returned to the Tampa Police Department evidence section.

On March 30, 2001, a lawyer from CCRC-South went to the Tampa Police Department and requested to review all evidence on the DeCarr case. However, the attorney was told that the Tampa Police Department had no evidence on the DeCarr case and was told to check the Clerk of Court for the evidence. The attorney explained that there was evidence not introduced at trial that should still be at the police department, but the person with whom he spoke kept insisting that the evidence was at the Clerk's Office.<sup>16</sup> As a result of this visit, Mr. Tompkins' counsel wrote a letter dated April 3, 2001, clarifying that he was requesting inspection of "any and all physical evidence in the department's possession" relating to the Lisa DeCarr and Jessie Ladon Albach cases, and included the FBI reports indicating that the evidence had been returned to the Tampa Police Department in 1985. Mr. Tompkins never received a response from the Tampa Police Department.

On April 6, 2001, Mr. Tompkins' counsel wrote a letter to Governor Bush, requesting an executive stay of execution so that DNA testing could be conducted on the evidence identified by the FBI as being suitable for possible future comparison. The letter was copied to Assistant State Attorney Sharon Vollrath and Assistant Attorney General Robert Landry. On April 9, 2001, Mr. Tompkins filed a motion to compel against, *inter alia*, the Tampa Police Department for failing to respond to or honor Mr. Tompkins' request to inspect physical evidence. Also on April 9, Mr. Tompkins filed his motion for DNA testing.

On April 11, 2001, a hearing on Mr. Tompkins' motion was conducted. At that time, the State (after persuading the court to deny Mr. Tompkins' motion for DNA testing on timeliness grounds), disclosed that the evidence in question might be "missing." To ascertain the basis for the State's representation, Mr. Tompkins' counsel questioned Assistant State Attorney Vollrath, who indicated that in the late afternoon of April 6, she had been made aware of a letter from the Governor's Office to the Attorney General's Office regarding Mr. Tompkins' letter to the Governor earlier that same day. She could not recall the exact language of the letter, nor did she (or the other four representatives sitting at the State's counsel table), have a copy of the letter.<sup>46</sup> Upon request of Mr. Tompkins' counsel, the Court ordered the letter to be disclosed (which it was on April 12, the following day). Ms. Vollrath also disclosed during her testimony that, after being made aware of the Governor's letter, she immediately attempted to contact former Tampa Police Department Detective Burke (who was the lead

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<sup>46</sup>Nor did the State's representatives disclose the existence or content of this letter to Mr. Tompkins or the Court during the argument on the DNA motion.

detective in Mr. Tompkins' investigation). On April 11, 2001, Ms. Vollrath testified that she, Detective Burke, Kirby Rainsberger, and a Sgt. Simenson, all went to the Tampa Police Department and reviewed the evidence. Ms. Vollrath testified that no evidence as described in the FBI reports could be located. She did indicate that a page from the property ledger indicated that a sealed envelope labeled FDLE had been removed from the evidence by Detective Gene Black in 1990.

Detective Black also testified at the April 11 hearing. He testified that he had nothing to do with either the DeCarr or Albach cases, never looked at the property in either case, and never removed anything from property in either case. Moreover, he never placed his name or PIN number in the property ledger. Thus, someone else forged his name on the property ledger. Following the conclusion of the hearing, a copy of the one page of the log referred to by Ms. Vollrath was provided to Mr. Tompkins' counsel. Upon review of the log, it reveals that Ms. Vollrath's testimony as to what the log actually says was highly misleading at best. The log does *not* indicate that what was removed in 1990 was a sealed package from FDLE (thereby giving rise to the insinuation made by the State that it was the evidence from the FBI). The log actually states that on September 16, 1985, "1 sealed package reentered from 85-0507E." September 16, 1985, coincides with the start of Mr. Tompkins' trial.

In Arizona v. Youngblood, 488 U.S. 51 (1988), the Supreme Court imposed on defendants the burden of demonstrating "bad faith" when evidence is lost or destroyed by State authorities. Mr. Tompkins asserts that he has made a sufficient showing of bad faith. The State has made numerous misleading statements to the court and to the Governor's office regarding the existence of testable evidence. Detective Black's testimony established that his name and PIN number were forged by

some unknown person. Based on the misrepresentations and testimony of Detective Black and Sharon Vollrath, it is clear that the State and the Tampa Police Department have failed to adequately preserve crucial evidence from a capital trial.

In the alternative, Mr. Tompkins submits that the “bad faith” burden is impossibly high and requests that this Court recede from requiring a defendant to meet this standard. Rather, Mr. Tompkins submits that the standard announced by Justice Stevens in his concurrence in Youngblood should apply: “In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.” As a second alternative, Mr. Tompkins asserts that the standard announced by the dissenters in Youngblood should apply; their standard would focus on the materiality of the evidence, its potential to exculpate, and the existence of other evidence on the same point of contention.

Mr. Tompkins acknowledges that this Court has employed the Youngblood standard. See Merck v. State, 664 So. 2d 939 (Fla. 1995); Kelly v. State, 569 So. 2d 754 (Fla. 1990). However, several other states have, on state law grounds, chosen to apply the less-harsh standard from either Justice Stevens’ concurrence or the dissenting opinion rather than the next-to-impossible “bad faith” standard. “[T]he majority of the states that have considered Youngblood in relation to their state constitutions have rejected the majority opinion.” State v. Krantz, 1998 WL 3621 at n.2 (Ct. Cr. App. Tenn. 1999). Mr. Tompkins submits that the Florida courts should recede from adherence to the

majority opinion in Youngblood.<sup>47</sup> This is even more important in light of the ever-changing advances in scientific technology which require preservation of old evidence; such advances, and the well-publicized exonerations of inmates all over the country, give law enforcement a motive to “lose” or destroy evidence. See Confronting the New Challenges of Scientific Evidence, 108 Harv. L. Rev. 1557 (May, 1995) (noting that “prosecutors and state officials under political pressure to reduce crime, as well as those with a firm belief in finality, may feel induced to destroy evidence as soon as the appeals process is initially exhausted. The supposed incentives that generally provide the state with a reason to preserve opaque evidence, if they exist prior to conviction, would virtually disappear after conviction. Cost and finality considerations may well push aside concerns about the convicted innocent, absent constitutional and legislative directions to the contrary”). Relief is warranted.

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<sup>47</sup>In fact, Larry Youngblood was eventually exonerated and released from prison in 2000 based on DNA testing.

## ARGUMENT IV

### THE LOWER COURT ERRED IN NOT ORDERING THE PRODUCTION OF RECORDS PURSUANT TO CHAPTER 119 AND RULE 3.852

In the lower court proceedings, Mr. Tompkins sought public records pursuant to Fla. Stat. Ch. 119 and Fla. R. Crim. P. 3.852 (h)(3) and (i). See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Effective legal representation has been denied Mr. Tompkins because the circuit court has denied access to public records from the following agencies: Hillsborough County Sheriff's Office; Office of the State Attorney, Thirteenth Judicial Circuit; Department of Corrections; Florida Department of Law Enforcement; Florida Parole Commission/Office of Executive Clemency; Department of State, Division of Elections.

On April 10, 2001, Mr. Tompkins filed a motion

to compel production of public records from all agencies who had not complied with Mr. Tompkins' previous demands. The aforementioned agencies filed objections to Mr. Tompkins' demands for additional public records.

The circuit court held a hearing on April 11, 2001 for the purpose of resolving all pending public records matters, including any outstanding objections and/or motions which had been filed in response to Mr. Tompkins' demands. At that time, the court denied Mr. Tompkins access to the records from the aforementioned agencies. These records are essential to conducting an adequate investigation in Mr. Tompkins' case.

The demands sent to the Florida Department of Law Enforcement and the Office of the State Attorney requested criminal records related to the jurors in Tompkins' case. Whether or not any of the jurors had any criminal history and/or involvement with the criminal justice system, law enforcement or the state is relevant because it gives rise to a claim for

relief if a juror failed to disclose this information to the court at the time of trial. In Buenoano v. State, 708 So. 2d 941 (Fla. 1998), this Court made it clear that any such claim will be procedurally barred if counsel fails to exercise due diligence. When Buenoano came out in 1998, Mr. Tompkins was litigating his case in federal court. Thus, he was unable to file public records requests since the circuit court had no jurisdiction. In the interim, Fla. R. Crim. P. 3.852 was adopted and prohibited Mr. Tompkins from making further public records requests until a death warrant was signed. Mr. Tompkins only means of obtaining this information is through the public records demands directed to FDLE and the State Attorney's Office.

The records requested from the Department of State, Division of Elections were not vague or overbroad. The only request made was for records regarding Judge Harry Lee Coe III and were made in good faith after learning of improprieties of Judge Coe while in office as the State Attorney for the

Thirteenth Judicial Circuit. These records are necessary to investigate a claim whether the trial judge engaged in any other improprieties not known by Mr. Tompkins or whether he received contributions from any persons having an interest in Mr. Tompkins case. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Porter v. Singletary, 49 F. 3d 1483 (11th Cir. 1995). Mr. Tompkins is prohibited from questioning a judge directly without first showing good cause. State v. Lewis, 656 So. 2d 1248 (Fla. 1994); Porter v. Singletary. As a result, Mr. Tompkins has no other means of establishing good cause.

Each of the demands sent to the above listed agencies were sent after a thorough search of the records previously received by Mr. Tompkins. These records were not intended as a "fishing expedition", nor as a dilatory tactic. The information sought in the demands was limited to only those individuals or information which directly pertains to the investigation of valid claims for relief. For example, the individuals who were the focus of the

bulk of the demands were possible suspects which went uninvestigated by the police and key witnesses including Barbara DeCarr, Kathy Stevens and Kenneth Turco. These records should be produced to Mr. Tompkins, and he should thereafter be permitted to amend his Rule 3.850 motion.

**CONCLUSION**

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Robert Landry, Office of Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607, on January 3, 2002.

**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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<sup>1</sup>Huff v. State, 622 So. 2d 982 (Fla. 1993).

<sup>2</sup>At the 1989 hearing, the trial prosecutor, Mike Benito, confirmed that his theory was that the offense

<sup>3</sup>In order to raise a claim in a second or successive postconviction motion, the defendant must demonstrate that the facts upon which the claim is predicated were unknown and could not have been discovered through the exercise of due diligence. See Fla. R. Crim. P. 3.850 (b)(1). The Supreme Court has explained that "[d]iligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate.... [I]t does not depend ... upon whether those efforts could have been successful." Williams v. Taylor, 529 U.S. 420, 435 (2000).

<sup>4</sup>Specifically, counsel stated:

I am prepared to testify we made the [119] request and the request we got records and we didn't get . . . Maureen Sweeney's report in 1989 and our investigator in 1989 in here in the courtroom and can testify to that as well, we didn't get that record in 1989 and I would have been screaming bloody murder in '89 had I had that record.

(T. 143).

<sup>5</sup>These reports were made in connection with the disappearance of Jessie Albach; however, they clearly contained information directly related to Lisa DeCarr's case. Thus, the lower court's conclusion that the Albach reports were "irrelevant" to the DeCarr case is simply incorrect. It should also be noted that at a hearing on Mr. Tompkins' motion for rehearing, the State below conceded that the Albach reports "were not provided in discovery because the case was regarding victim Lisa DeCarr" and that the reports were only disclosed to Mr. Tompkins' counsel by the Tampa Police Department in 2001 (T. Hearing 6/12/10 at 15). The State's position--that evidence in the Albach case did not trigger its discovery obligation under Brady--is erroneous as a matter of law. Rogers v. State, 782 So. 2d 373, 380 (Fla. 2001) ("Our holding is dictated by our conclusion that the police reports of the various law enforcement agencies in the joint investigation of the similar robberies were in the constructive possession of the prosecutor and were material documents within the scope of materiality as set forth by Kyles, Strickler, and Young").

<sup>6</sup>This was confirmed by Detective Burke, who, on April 11, 2001, told Mr. Tompkins' collateral counsel while inspecting evidence at the Tampa Police Department, that Jessie Albach and Lisa DeCarr were killed by the same individual based upon his examination of the remains. He acknowledged that no charges had ever been filed in the Albach case because he just could not prove that Mr. Tompkins committed that murder. He asserted that in Lisa DeCarr's case he had Kathy Stevens and the jailhouse informant so he could make a case. Undersigned counsel pointed out that at the time charges were filed Det. Burke did not have Kathy Stevens. Det. Burke responded that he had a couple jailhouse informants then. Undersigned counsel then pointed out that there had only been one jailhouse informant, Brian Duncan, who after being released from jail committed another burglary. When police came to arrest him, he was so desperate to avoid incarceration he took cyanide and died. The fact that Det. Burke believes, that based upon the crime scene, both the Lisa DeCarr and Jessie Albach murders were

committed by the same individual is important information given the disclosure in April of 2001 that there were other suspects in the Albach homicide.

<sup>7</sup>In fact, at the hearing on Mr. Tompkins' rehearing motion below, the State conceded that "certainly the State didn't disclose this evidence. This was brought in by [Mr. Tompkins' collateral counsel] and he provided copies to us" (T. Hearing 6/12/01 at 16).

<sup>8</sup>Indeed, the lower court's resolution of this claim is directly contrary to the Court's 1999 decision in Lightbourne. There, the Court held that cumulative analysis of Mr. Lightbourne's Brady claim and his newly discovered evidence was required. This was true even though this Court noted that Mr. Lightbourne had first presented a Brady claim years before. See Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989). In fact in Lightbourne, the Brady claim presented in 1989 was "based on the State's failure to disclose that police had engaged in a scheme with Chavers and Carson to elicit incriminating statements from Lightbourne." Lightbourne, 742 So. 2d at 242. The Brady claim presented in 1994 was supported by evidence not previously available ("the State committed a Brady violation in withholding evidence that Chavers' and Carson's testimony was false and elicited in violation of Henry"). Id. at 247. In 1989, Mr. Tompkins previously presented a Brady claim and an ineffective assistance claim. He has now been provided documents not turned over to him at trial or in 1989. The evidence not previously available to him establishes the merits of the previously-raised claims; without the new evidence, these claims were previously rejected. This is nearly identical to the situation in Lightbourne.

<sup>9</sup>Judge Coe disposed of the Brady allegations by simply stating that "I will find that the Brady violations, if any, did not undermine the confidence in the outcome of the trial or verdict" (EH 470-71), and relied on his oral "ruling" in the written order (PCR. 699).

<sup>10</sup>No such discussion or arrangements occurred after Stevens' initial discussion with Benito when she indicated she had no knowledge regarding Lisa's disappearance.

<sup>11</sup>Moreover, the records disclosed in April of 2001 establish that the prosecutor's representation was patently false.

<sup>12</sup>Certainly, had counsel known of the police reports released in April of 2001, he would have all the more reason to present every single witness that disputed Barbara's claim that Wayne was the last witness to see Lisa.

<sup>13</sup>For example, Burke was questioned about whether his investigation revealed the existence of other individuals who had seen Lisa alive after March 24, 1983, whether other people had seen Lisa wearing jeans and a maroon top, and whether Lisa had been sighted getting into a car on March 24 (R. 285-87; 294-95).

<sup>14</sup>Weather bureau records confirmed that on March 24, 1983, it was rainy, with hail reported at the airport. The high temperature was 71 degrees at 1:00 p.m., but by 4:00 p.m. had fallen to 63 degrees, considerably below normal for that time of year (PCR. 411-12).

<sup>15</sup>Mr. Tompkins' motion alleged that during the course of the 1984 investigation into Lisa DeCarr's death, several evidentiary items were sent to the FBI Crime Lab for forensic testing. These items were sent along with evidence from the Jessie Albach case, whose decomposed body was found about one month before the discovery of Lisa DeCarr's remains (PCR2. 32). According to the FBI Lab report, several hairs discovered with DeCarr's body and forwarded for a comparison "are suitable for possible future comparison." Moreover, other hairs "did not possess sufficient individual microscopic characteristics to be of value for significant comparison purposes" (PCR2. 32-33).

<sup>16</sup>Curiously, when Mr. Tompkins' counsel did eventually gain permission to review the evidence at the Tampa Police Department following the hearing on April 11, 2001, Mr. Tompkins' counsel discovered that the evidence had in fact been reviewed and opened by Kirby Rainsberger, the counsel for the Tampa Police Department on March 30, 2001, the very day that Mr. Tompkins' lawyer was requesting to review the evidence.