IN THE SUPREME COURT OF FLORIDA

WAYNE TOMPKINS,

Appellant,

v. Case No. SC06-277

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. LANDRY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully requests that Appellant's suggestion of the desirability of oral argument be denied. This is a successive and abusive motion to vacate and almost everything asserted herein has been considered and rejected after almost two decades of postconviction litigation by this Honorable Court (twice) and by the federal district court (Judge Nimmons) and by the Eleventh Circuit Court of Appeals. Repetition of rejected meritless claims do not render them valid on the mere third or fourth retelling.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY – GENERAL SUMMARY:

(a) Tompkins was convicted of first-degree murder of fifteen-year-old Lisa DeCarr, received a unanimous jury death recommendation and was sentenced to death. Tompkins took a direct appeal and raised ten claims, four guilt phase and six penalty phase issues. Tompkins v. State, 502 So. 2d 415 (Fla. 1986), cert. den., 483 U.S. 1033 (1987) (Tompkins I).

Tompkins sought postconviction relief and raised nineteen issues in the circuit court. Relief was denied after an evidentiary hearing. Tompkins appealed and argued, *inter alia*, that there had been a violation of Brady v. Maryland, 373 U.S. 83 (1963) and that trial counsel had rendered ineffective assistance at the guilt and penalty phases. He also filed a habeas corpus petition raising nine grounds for relief. This Court affirmed the trial court's denial and denied habeas relief. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989), stay den., Tompkins v. Florida, 493 U.S. 998 (1989), cert. den., Tompkins v. Florida, 493 U.S. 1093 (1990) (Tompkins II).

Tompkins sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254 and the United States District Court for the Middle District of Florida, the Honorable Ralph W. Nimmons, Jr., denied the petition in a thorough, unpublished opinion.

Tompkins v. Singletary, Case No. 89-1638-CIV-T-99B, 1998 U.S. Dist. LEXIS 22582 (M.D. Fla. April 17, 1998).

In Tompkins' Brady claim there Judge Nimmons addressed the contention that the State had failed to provide prosecutor Benito's file memoranda regarding two telephone conversations he had with Kathy Stevens and the Missing Children Help Center file on Lisa DeCarr. J. Nimmons ruled: "However, none of the Brady claims justify habeas corpus relief." Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.31. The district court denied relief on the Benito file issue since trial defense counsel had cross-examined Kathy Stevens and elicited from her that she had initially lied to prosecutor Benito and thus had access to the information. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.34-38. The district court concluded:

> … there is no reasonable probability that availability of such evidence, either separately or collectively, would have changed the outcome of the trial. It cannot reasonably be said that the Petitioner was denied a fair trial as a result of the prosecuting attorney's failure to affirmatively disclose these materials.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.38. The court also rejected the complaint that the prosecutor assisted Stevens in arranging for a visit with her boyfriend who was in jail on an unrelated charge since "such failure can hardly be regarded as implicating such gravity as would put the

case in a different light or undermine the confidence in the verdict." Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.39. Similarly, the district court rejected the claim pertaining to a "deal" with cellmate Kenneth Turco. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.40. Additionally, Tompkins' complaint that the prosecutor failed to disclose school records could not be a Brady violation since defense counsel and deponent Detective Burke at the deposition had the notation in question. The district court also rejected the Brady claim on the records from the Missing Children Help Center, a collateral matter without overarching significance; and they could have been discovered by defense counsel through due diligence. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.41-44.

The district court additionally rejected the argument that the State knowingly used false and misleading testimony and made misleading and inaccurate closing argument in violation of Giglio v. United States, 405 U.S. 150 (1972). Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.44-55. Tompkins' other related assertions characterizing Mrs. DeCarr's testimony was misleading was "meritless." Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.49-50. The district court further rejected an assertion that Dr. Diggs gave false testimony.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.50-53. After repeating the challenges to Stevens and Turco, the district court determined:

> Petitioner has not shown that any of the witnesses gave false testimony, that the State knew the testimony was false, or that the alleged testimony was material, i.e., that there was a reasonable likelihood that the alleged false testimony could have affected the judgment of the jury.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.55.

Additionally, the federal district court rejected the contention that trial counsel Daniel Hernandez rendered ineffective assistance at the guilt phase. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.56-69. The Court of Appeals agreed. On the contention that trial counsel did not do enough to show that Lisa DeCarr was alive after the morning of March 24, 1983 when Tompkins was seen struggling with her on the couch, the Court of Appeals noted that counsel had considered using Wendy Chancey as a witness and decided not to do so because he believed she would not make a good witness. An investigator had interviewed Chancey who had no recollection at all of having seen Lisa on the day in question and could not even identify a photograph of her. The Court of Appeals concluded that Tompkins had not shown any basis for admission of part of the police report Chancey supposedly made but can no

longer recall and "we will not hold an attorney ineffective for failing to offer inadmissible evidence." Tompkins v. Moore, 193 F.3d 1327, 1334 (11th Cir. 1999)(Tompkins III).

Tompkins appealed and raised several claims including ineffective assistance of counsel, violations of Brady, *supra*, and violations of Giglio v. United States, 405 U.S. 150 (1972). The Court of Appeals affirmed the district court's denial. Tompkins v. Moore, 193 F.3d 1327 (11th Cir. 1999), rehearing en banc denied, Tompkins v. Moore, 207 F.3d 666 (11th Cir. 2000), cert. denied, Tompkins v. Moore, 531 U.S. 861 (2000), rehearing denied, Tompkins v. Moore, 531 U.S. 1030 (2000) (Tompkins III).

(b) Tompkins next filed a second, successive motion for postconviction relief pursuant to Rule 3.850. After a hearing the trial court concluded that Tompkins was entitled to a new penalty phase but denied relief on all other claims, and denied motions for DNA testing and to compel disclosure of public records. Tompkins appealed and raised four issues: (1) whether the trial court erred in denying his Brady claims without an evidentiary hearing; (2) whether the trial court erred in denying his motion for DNA testing; (3) whether the State's failure to preserve evidence violated his due process rights; and (4) whether the trial court erred in denying his motion to compel the production of public records. The State cross-

appealed the trial court's order granting a new penalty phase. This Court affirmed, rejecting Tompkins' Brady claims, affirmed the denial of request for DNA testing, and affirming the denial of public records request. The Court reversed the trial court's order granting a new penalty phase trial and reinstated the death sentence. Tompkins v. State, 872 So. 2d 230 (Fla. 2003) (Tompkins IV).

In Tompkins IV Appellant claimed trial court error in the summary denial of his claim that the State withheld police reports and other documents which contained exculpatory evidence. These documents included: (1) a June 8, 1984 police report; (2) a legible copy of a March 24, 1983 police report; (3) a July 28, 1983 police report; (4) handwritten lead sheets prepared by Detective Burke; (5) a May 3, 1984 report concerning interviews with W. H. Graham; (6) an August 18, 1982 report; (7) a December 27, 1983 letter from the State Attorney; (8) a May 21, 1984 report; (9) records showing that in June 1983 W. H. Graham was being investigated for raping one of the girls who worked at the "Naked City on June 24th;" (10) a June 14, 1983 police report of a phone interview with Lori Lite; (11) a June 9, 1984 report; (12) a May 9, 1984 report; (13) a list of questions to be asked of Detective Burke during trial; and (14)

undisclosed impeachment evidence regarding witnesses Stevens and Turco. Tompkins v. State, 872 So. 2d 230, 238 n.12 (Fla. 2003).

This Court affirmed the summary denial. The Court held that the information related to the credibility of Stevens and Turco was insufficiently pled (and apparently concerned events subsequent to Appellant's trial); the March 24, 1983 police report was not withheld by the State. The list of questions to be asked of Detective Burke and the Jessie Albach files failed to meet Brady's first prong because they do not contain information favorable to Tompkins. 872 So. 2d at 239-240. The June 8, 1984 police report of information related to police by Maureen Sweeny does not undermine confidence in the verdict since Chancey did not testify at trial, the report does not indicate who provided the information to Sweeny, and the fact of Lisa's boyfriend and brother looking for her does not shed new light on her disappearance since she was originally classified as a runaway. 872 So. 2d at 240.

Further, the record conclusively refuted Tompkins' claim that the July 28, 1983 report of a phone call from Barbara DeCarr was material because the report would not have impeached her trial testimony. Additionally, as to Burke's lead sheets, prejudice was conclusively refuted by the record – the record

shows that trial defense counsel was aware of both Junior Davis and Bob McKelvin during trial. Thus:

> Either the undisclosed documents are not Brady material because they are neither favorable to Tompkins nor suppressed, or Tompkins has not demonstrated that he was prejudiced by the lack of disclosure.

Id. at 241. And even applying a cumulative analysis and consideration of the undisclosed, favorable documents in conjunction with Tompkins' claims raised in his first motion for postconviction relief, the Court's conclusion as to prejudice would not change. 872 So. 2d at 241-242, citing Way v. State, 760 So. 2d 903, 915 (Fla. 2000).

(c) Tompkins returned to this Court following the trial court's order dismissing for lack of jurisdiction another (third) successive motion to vacate and a motion for postconviction DNA testing filed under Rule 3.853. This Court agreed that the trial court's order of dismissal for lack of jurisdiction was proper but permitted Tompkins to file a new postconviction motion raising his newly discovered evidence claims. Tompkins v. State, 894 So. 2d 857 (Fla. 2005) (Tompkins V).

Tompkins also filed a second habeas corpus petition in this Court which this Court denied in an unpublished opinion. Tompkins v. Crosby, 895 So. 2d 1068 (Fla. 2005) (Tompkins VI).

In Appellant's last postconviction appeal here this Court recited that Tompkins contended that the State failed to disclose favorable evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) and that three witnesses' testimony were false in violation of Giglio v. United States, 405 U.S. 150 (1972). Tompkins also had filed a motion for DNA testing. This Court concluded that the circuit court did not err in dismissing his petition for lack of jurisdiction (because of the pendency of Tompkins IV in this Court) but permitted him to file his successive postconviction motion nunc pro tunc to February 5, 2003. Tompkins v. State, 894 So. 2d 857 (Fla. 2005) (Tompkins V).

(d) Thereafter Tompkins filed a motion in the circuit court urging that the State failed to disclose material and exculpatory evidence and/or presented misleading evidence and/or defense counsel failed to present exculpatory evidence. (R I, 103-131; see also R I, 139-167).[1]

The State filed its response arguing that Tompkins was time-barred for the failure to present the Junior Davis evidence at an earlier time and argued that the affidavit did not qualify either to support a claim under Brady, *supra*, or Giglio, *supra*, and further that it did not satisfy the standard of newly-

[1] Appellant did not pursue the prior request for DNA testing and that claim has been abandoned.

discovered evidence under Jones v. State, 591 So. 2d 911 (Fla. 1991). (R I, 84-100).

The trial court heard argument presented by the parties on August 29, 2005. (SR I, 24-50). On October 5, 2005 the trial court denied the motion. As to the handwritten lead sheets prepared by Detective Burke the court found no basis for relief since the allegations and arguments were the same as previously considered and rejected. As to the Junior Davis affidavit the court ruled that Davis' name had been known for years – having previously been listed in police reports and elsewhere and thus could have been known to the movant or his attorney. Further, Appellant failed to show that the "new evidence" could not have been discovered by or through the use of due diligence before the expiration of the limitation period. The explanation for the thirteen year delay was inadequate and the alleged new evidence claim was still time-barred. Moreover, there was no reasonable probability of a different outcome when considering the substance of the affidavit. (R I, 6-11).

On January 5, 2006 the trial court entered its Order Denying Rehearing. The trial court distinguished Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) which Appellant relied on; that case had involved several key witnesses who later recanted their testimony because they had been persuaded to lie by the

authorities. Here, in contrast, the Davis affidavit did not "rise to the level of several witnesses recanting their testimony" and was merely some impeaching evidence of Kathy Stevens which did not address Stevens' witnessing the assault on Lisa DeCarr. Even if taken as true, the outcome at trial would not have been different. (R I, 3-4).

Tompkins now appeals.

As the Court noted on direct appeal, the State's primary witnesses in this case included Kathy Stevens, Barbara DeCarr and Kenneth Turco. A brief summary of their testimony and the courts' consideration and disposition of challenges to their testimony now follows:

(1) Kathy Stevens: At trial Stevens testified that she saw Lisa DeCarr struggling with Appellant on the couch. Stevens left the DeCarr residence but did not call the police. She went to the store and ran into Lisa's boyfriend and advised him she wanted to call the police. She told Junior what was going on and he just walked away like it was nothing. Stevens got scared, did not call the police, and went to school. (DAR V2, 252-255). On cross-examination, defense counsel elicited from her that she did not know the boyfriend well at that time and he was drunk at that time. Counsel further elicited from her the admission that she had initially lied to prosecutor Benito but

subsequently decided to tell him the truth and that she had initially lied to Mrs. DeCarr about the victim's whereabouts – before she found out that Lisa was dead. (DAR V2, 260-265).

This Court affirmed the denial of postconviction relief after an evidentiary hearing. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). Thereafter, the federal district court denied habeas relief and rejected Tompkins' claim that there had been a Brady violation in the prosecutor's failure to disclose memoranda of his phone conversations with Stevens and for his assisting her in arranging a visit with her boyfriend in jail on an unrelated charged. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.34-39. Judge Nimmons also rejected an asserted violation of Giglio v. United States, 405 U.S. 150 (1972) finding that "Petitioner has not shown that any of the witnesses gave false testimony, that the State knew the testimony was false, or that the alleged testimony was material, i.e., that there was a reasonable likelihood that the alleged false testimony could have affected the judgment of the jury." Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.55. The Court of Appeals agreed with the district court's disposition of the Brady claims. Tompkins v. Moore, 193 F.3d 1327, at 1331 n1 (11th Cir. 1999). And the court concurred that

Giglio asserted errors with Stevens were "palpably without merit." Id. at 1342, n14.

Thereafter, this Court rejected a claim that the State withheld information on the credibility of Stevens based on post-trial activity – as insufficiently pled, noting that Tompkins failed to allege any basis that Stevens committed perjury at trial. Tompkins v. State, 872 So. 2d 230, 239 (Fla. 2003).

(2) Barbara DeCarr: The victim's mother testified that she left the house on the morning of March 24, 1983, that later that morning she sent Tompkins back to her house to get some newspapers for packing and when he returned told her that Lisa was watching television in her robe. Tompkins left his mother's house again and Barbara DeCarr did not see or speak to him again until approximately 3:00 that afternoon. Tompkins told her that Lisa had run away, that the last time he saw her she was going to the store and was wearing jeans and a blouse. Tompkins v. State, 502 So. 2d 415, at 417-418 (Fla. 1986).

After this Court's denial of postconviction relief, U.S. District Judge Nimmons rejected Tompkins' contention that Barbara DeCarr gave misleading testimony that Tompkins was the last person to see the victim alive as meritless. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.50.

In denying relief on Tompkins' last visit to this Court wherein Appellant complained of the State's alleged failure to provide some fourteen documents in violation of Brady, this Court ruled that the March 24, 1983 police report had not been withheld. 872 So. 2d at 230. Additionally, as to the July 28, 1983 police report containing an account of a phone call from Barbara DeCarr, "the record conclusively refutes Tompkins' claim that the July 28 report is material evidence because the report would not have impeached Ms. DeCarr's trial testimony." 872 So. 2d at 241.

(3) Kenneth Turco: Turco testified at trial that Appellant admitted to him in a jail cell that he strangled Lisa when she resisted his sexual advances and buried her under the house. (DAR V3, 309-310). He also testified that he was not promised anything for sentencing on his pending escape charge in exchange for his testimony. (DAR V3, 311).

(4) Additionally, Detective Burke testified at trial that he interviewed Tompkins on June 12, 1984 who informed Burke that he had last seen Lisa DeCarr on the afternoon of March 24, 1983. He said she was wearing a maroon shirt and a pair of blue jeans and was coming out the back door and going to the store. Tompkins did not tell Detective Burke during the interview that Lisa had run away the day she disappeared. (DAR V3, 279, 284).

This Court first denied relief based on an alleged Brady violation in the first round of postconviction litigation after an evidentiary hearing. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989). Judge Nimmons wrote more expansively in rejecting asserted Brady and Giglio violations of an asserted deal between Turco and prosecutor Benito. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.40, 55. The Court of Appeals agreed the Brady and Giglio claims were palpably without merit. 193 F.3d at 1331 n1 and at 1342 n14. This Court recently ruled that "Tompkins fails to allege any basis to establish that Stevens or Turco perjured themselves at his trial." 872 So. 2d at 239.

SUMMARY OF THE ARGUMENT

The lower court correctly denied Appellant's successive and abusive motion for postconviction relief. Tompkins previously presented for the court's consideration of the lead sheets of Detective Burke and the courts have rejected his claim for relief. The presentation of the affidavit of James Davis, Jr. does not constitute proper newly-discovered evidence entitling him to postconviction relief. The evidence is not proper newly-discovered evidence since Mr. Davis was known to Appellant and his counsel at the time of trial and Tompkins has failed to adequately explain the belated presentation of Mr. Davis' affidavit until thirteen years after his first motion for postconviction relief. While the affidavit purports to impeach the portion of Kathy Stevens' testimony concerning their meeting at the convenience store, the evidence does not call into question or contradict the testimony of the State witnesses regarding the commission of the murder of Lisa DeCarr. Davis' affidavit does not contradict Stevens on her seeing Appellant struggle with Lisa at the house; it does not detract from Mrs. DeCarr's testimony about Lisa's disappearance and Tompkins' report of it; and it does not challenge in any way Turco's testimony of Appellant's admissions. Since there is no new evidence, there is no error to add cumulatively. Alternatively,

consideration of all the evidence does not undermine confidence in the outcome.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S THIRD SUCCESSIVE MOTION TO VACATE OSTENSIBLY PREDICATED ON NEWLY-DISCOVERED EVIDENCE – AN AFFIDAVIT BY JAMES DAVIS, JR. – FOR APPELLANT'S FAILURE TO DEMONSTRATE THAT HE COULD NOT HAVE DISCOVERED THIS MATERIAL EARLIER WITH THE EXERCISE OF DUE DILIGENCE AND TO DEMONSTRATE THAT THERE IS A REASONABLE PROBABILITY OF ACQUITTAL ON RETRIAL WITH THIS AFFIDAVIT.

Pursuant to Florida Rule of Criminal Procedure 3.851 (d)(2), a defendant must allege and prove:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively…

Additionally, a defendant must allege and prove that the claim is being raised within one year of when the basis for the claim became available. Swafford v. State, 828 So. 2d 966 (Fla. 2002); Mills v. State, 684 So. 2d 801, 804-805 and n7 (Fla. 1996); Bolender v. State, 658 So. 2d 82 (Fla. 1995).

Here Appellant does not allege that his claims are based on a fundamental change of constitutional law that has been held to be retroactive and his claim that he was not able to discover

the facts – the affidavit of James Davis, Jr. – until receipt of police reports in the last postconviction motion was properly rejected below since Davis has been known to all since trial and with the exercise of due diligence could have been found.

The James Davis, Jr. material does not constitute newly discovered evidence.

As noted in the lower court's order denying relief, Tompkins' current motion, filed on March 18, 2005 is successive. He previously filed a Motion to Vacate Judgment and Sentence which the trial court denied on May 22, 1989. This Court affirmed. Tompkins v. Dugger, 549 So. 2d 1370 (Fla. 1989), cert. den., 493 U.S. 1093 (1990). Tompkins returned to the trial court on another Motion to Vacate and on April 20, 2001 the trial court entered its Order Denying in Part and Granting in Part Defendant's Motion to Vacate Judgment. On appeal, this Court affirmed the portion of the trial court's order denying Tompkins' motion for postconviction relief and reversed the portion of the trial court's order granting a new penalty phase. Tompkins v. State, 872 So. 2d 230 (Fla. 2003).

In the lower court's order denying Tompkins' latest and third postconviction motion, the trial court initially determined:

> As to handwritten lead sheets prepared by Detective Burke, the Court finds that the Defendant is not entitled to relief.

> Defendant's allegations regarding this new Brady material were the same as Defendant's previous Brady allegations and argument, which had been addressed and rejected in trial, and by numerous courts on appeal and through post-conviction proceedings. As such, Defendant is not entitled to relief with regard to the handwritten lead sheets prepared by Detective Burke.

R I, 6-11; also R I, 51-56. The lower court was correct. In the previous appeal, this Court had ruled:

> Finally, we conclude that as to Burke's lead sheets, prejudice is conclusively refuted by the record. Tompkins contends that the lead sheets show that Burke spoke with Lisa's boyfriend, Junior Davis, and had Tompkins known this he would have ascertained whether Davis told police about meeting Stevens at the corner store on the day of Lisa's disappearance. Tompkins also asserts that the lead sheets indicate the true identity of a Bob McKelvin, who allegedly attempted to solicit Lisa. However, the record shows that defense counsel was aware of both Junior Davis and Bob McKelvin during trial. Defense counsel asked Stevens on cross-examination about her encounter with Davis at the corner store. Defense counsel also questioned both Detective Burke and Barbara DeCarr about McKelvin. Detective Burke testified that he could not recall hearing the name McKelvin but he was aware of a neighbor who made sexual advances towards Lisa. Barbara DeCarr testified that McKelvin did proposition her daughter.

872 So. 2d at 241.

Turning to the affidavit of James Davis (Junior) the lower court found that Davis was known to the defendant as far back as

1989 and yet the affidavit was not completed until 2002, almost thirteen years later. (Actually, Davis was known to Tompkins at the time before and during trial.) Davis' name was listed in the police reports and was or could have been known to the movant or his attorney. The explanation offered for the delay – that the name Davis was a common name – was inadequate to avoid the time bar. (R I, 8-9; R I, 53-54).

(1) Newly - Discovered Evidence

This Court has repeatedly articulated the standard in considering newly-discovered evidence claims. In order for a conviction to be set aside on the basis of newly-discovered evidence, two requirements must be met. First, to be considered newly-discovered the evidence must have been unknown by the trial court, by the party or by counsel at the time of trial and it must appear that defendant or his counsel could not have known of it by the use of diligence. Second, the newly-discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998); see also T. Johnson v. State, 804 So. 2d 1218 (Fla. 2001); State v. Reichmann, 777 So. 2d 342 (Fla. 2000); Glock v. Moore, 776 So. 2d 243, 250-51 (Fla. 2001); Sireci v. State, 773 So 2d 34, 43 (Fla. 2000); Robinson v. State, 770 So. 2d 1167 (Fla. 2000); Sims v. State, 754 So. 2d

657, 660 (Fla. 2000); Archer v. State, 2006 Fla. LEXIS 1403 (Fla. June 29, 2006).

The trial court was eminently correct that the defense had been aware of Junior Davis before and at the time of trial. In the pre-trial deposition of Detective Burke, which trial defense counsel Hernandez had, the witness stated he had interviewed Junior Davis but he could not help with any information surrounding Lisa's disappearance and that the last time he had seen Lisa was the weekend before her disappearance. (Deposition, pp.97-98, Appendix 26 to 3.850 motion in first 3.850 appeal, FSC # 74,235). A police report furnished to trial defense counsel in discovery gave this same information and listed a phone number for Davis:

> 1200 hrs., 21 Jun 84
>
> INTERVIEWED JUNIOR DAVIS, who is the ex—boyfriend of LISA DeCARR. JUNIOR DAVIS has a home phone of 677—6915 and is out in the Gibsonton area.
>
> JUNIOR DAVIS stated that he could help the u/signed with no information as to the events surrounding LISA disappearance. He stated that he was accused by BARBARA after she disappeared of harboring LISA and that he had talked to her several times trying to convince her that LISA was not with him. He stated that he even invited BARBARA inside the house to check for LISA on one occasion.
>
> He further stated that LISA never said anything to him about being raped by WAYNE but that he knew that LISA did not like

> WAYNE because of the way WAYNE was. He stated that the last time he saw LISA was the weekend before her disapperance [sic]. He stated further that the whole family is in one big mess and there always seems to be fighting and drinking going on at the house.

DAR V5, 530. Notably, the affidavit of Davis now relied on does not contradict Burke's account at all. Since Tompkins and his collateral counsel were urging at the first postconviction proceeding in 1989 that Stevens (and others) should not be believed, they could have investigated and sought out Mr. Davis at that time, and thereafter during the appeal from the denial of postconviction relief.

The only explanation advanced by Tompkins for his thirteen year delay is that it was difficult to locate Mr. Davis. This is clearly inadequate especially given the fact that the pre-trial police report given in discovery to trial defense counsel provided a phone number for Davis. Tompkins argues that he could only successfully discover Davis when he obtained Detective Burke's lead sheets and the Detective Milana report of the Sweeney-Willis interviews in 2001. The contention is specious. Burke's lead sheets add nothing to what was already known. Nor does the Milana report add much, a mere notation of

Davis, a boyfriend of approximately seventeen years of age of 40th Street and Buffalo.[2]

Turning to the second prong of the Jones newly-discovered evidence test, i.e., that the evidence must be of such a nature that it would probably produce an acquittal on retrial, the Junior Davis affidavit fails on that score. Davis offers no evidence to refute the testimony of Stevens of what she saw at the DeCarr residence – nor could he since he was not present. Davis at most could testify as to his disagreement with Stevens about seeing her at the convenience store. Davis does not refute any testimony of Barbara DeCarr who had testified about leaving Lisa at home and Tompkins reporting to her that Lisa had run away. Davis does not refute the testimony of Kenneth Turco who testified regarding Appellant's admission of killing Lisa when she resisted his advances and burying her under the house. Davis does not refute the testimony of Dr. Diggs and Barbara

[2] The Milana report of June 8, 1984 in which he interviewed Sweeney (apparently yet another rape victim at knifepoint of Wayne Tompkins) also contains the notation that Junior told Sweeney that Lisa "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." (Supp. V2, p.45, FSC # SC01-1619). This is consistent with the Detective Burke interview with Junior Davis on June 21, 1984 – which trial defense counsel had – that he could help "with no information as to the events surrounding Lisa disappearance" and that "the whole family is in one big mess" (DAR V5, 530) and also with the June 5, 1984 Detective Bird report – which trial defense counsel also had – that Mrs. DeCarr stated when she told boyfriend that Lisa was missing he did not seem to be concerned (DAR V5, 563).

DeCarr that Lisa's body was buried under the house wearing her robe. Davis does not even contradict anything Detective Burke stated. In summary, the Davis affidavit does not offer or suggest anything to indicate that consideration of his current views would probably result in acquittal on retrial. This Court has acknowledged that in some circumstances recantation of trial testimony can constitute newly-discovered evidence – see Archer, *supra*, but in the instant case Tompkins cannot even rely on the "benefit" of recanted testimony since there is no witness who has recanted his (their) trial testimony. See also Robinson v. State, 865 So. 2d 1259, 1263 (Fla. 2004)(after noting that prior Brady and Giglio claims had been rejected as procedurally barred and meritless, the appellant "has failed to present any new law or fact in this new round of postconviction proceedings that warrants a reconsideration of our previous opinion."); Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994)(affirming summary denial of claim based on newly discovered evidence since supporting affidavits constitute at best impeachment evidence and does not satisfy the standard requiring that evidence would probably produce an acquittal on retrial); see also Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998)(same); Walton v. State, 847 So. 2d 438 (Fla. 2003)(Walton's Brady claim cannot succeed since evidence known by a defendant cannot violate the precepts

of Brady and not shown to be material, i.e., it did not put the whole case in such a light as to undermine confidence in the verdict; the corollary newly-discovered evidence claim fails as accomplice was available at time of trial and his recantation was simply a new version from a witness/participant who had presented multiple stories since the crime); Foster v. State, 810 So. 2d 910, 915 n5 (Fla. 2002)(the allegation of newly-discovered evidence is not properly presented since Foster knew of ex parte meeting with jury venire at time of trial; his counsel could have attempted to discover what went on at that meeting through due diligence and filed a timely pre-trial motion); Lugo v. State, 845 So. 2d 74 (Fla. 2003)(No Brady violation and no entitlement to new trial on grounds of newly-discovered evidence where information related to extortion victim's indictment on federal Medicare fraud charges would not have changed verdict and where defendant had been aware during trial of victim's possible involvement in Medicare fraud); Johnson v. State, 804 So. 2d 1218, 1223 (Fla. 2001)(Illegible copy of police notes and police investigation of a co-suspect is not newly-discovered evidence nor is it withheld Brady evidence. The fact that the police might have investigated the possibility of a co-suspect does not establish a reasonable probability that the outcome would be different had Johnson presented this

information at trial and cannot satisfy either the Brady or Jones standards).

(2) Any suggestion that the Davis affidavit indicates a violation of either Brady v. Maryland, 373 U.S. 83 (1963) or Giglio v. United States, 405 U.S. 150 (1972) is frivolous. This Court previously in Tompkins v. State, 872 So. 2d 230 (Fla. 2003)(Tompkins IV) cited Strickler v. Greene, 527 U.S. 263 (1999) as enunciating the three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. Tompkins IV at 238-239. See also Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002); Way v. State, 760 So. 2d 903, 910 (Fla. 2000). Under the prejudice prong, the defendant must show that the suppressed evidence is material, i.e., that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. Id. at 239.

Tompkins has failed to satisfy the burden of demonstrating a Brady violation since even if the Davis affidavit is deemed

favorable to him there has been no suppression or withholding of evidence by the State. Davis' affidavit does not assert that State authorities had the information which he now shares nor does he contradict what Detective Burke mentioned in his conversation with Davis. Tompkins also fails to satisfy the third Brady prong that prejudice has ensued. Davis' assertion of not meeting Stevens at the convenience store cannot reasonably be taken to put the whole case in such a light as to undermine confidence in the verdict. See Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000); Strickler v. Greene, 527 U.S. 263, 290 (1999); Archer v. State, 2006 Fla. LEXIS 1403 (Fla. June 29, 2006); Pardo v. State, 2006 Fla. LEXIS 1404 (Fla. June 29, 2006).

(3) In that same opinion this Court noted in footnote 9 that to establish a violation of Giglio v. United States, 405 U.S. 150 (1972) a defendant must show that (1) the testimony was false; (2) the prosecutor knew of the false testimony; and (3) the testimony was material. Id. at 237.

See also Guzman v. State, 868 So. 2d 498 (Fla. 2003) that to establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Id. at 505. Under Giglio, where the prosecutor knowingly uses perjured

testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 506. See also Guzman v. State, 2006 Fla. LEXIS 1398 (Fla. June 29, 2006). Unlike the instant case, the defendant there satisfied the first two prongs of Giglio, i.e., the testimony given was false and the prosecutor knew the testimony was false.

Of course, a Giglio violation of the prosecutor's knowing use of perjured testimony is not established merely because one witness offers testimony that is different to that of another. See, e.g., United States v. Michael, 17 F.3d 1383 (11th Cir. 1994)(fact that government agent's testimony regarding defendant's participation at drug transaction was contrary to other agent's testimony at pre-trial detention hearing did not amount to showing that prosecutor knowingly presented false testimony); United States v. Lopez, 985 F.2d 520 (11th Cir. 1993)(fact that witness and another co-conspirator remembered incidents and participants differently and told different stories was insufficient to establish government's knowledge); Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2000)(perjured testimony claim without merit where allegation based on minor inconsistencies in a civil lawsuit conducted after the criminal

trial); United States v. Bailey, 123 F.3d 1381, 1395-96 (11th Cir. 1997)("Instead of showing perjury, we conclude that Bailey has demonstrated nothing more than a memory lapse, unintentional error, or oversight by Agent Hudson."); United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991)("We recognize, however, that it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.").

Similarly, the Davis affidavit cannot establish a Giglio violation of the State's knowing use of false testimony since the affidavit does not show that anyone committed perjury or that the prosecutor knowingly used perjured testimony or that such perjury was material, i.e., that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury, especially since Davis has no testimony to offer about the circumstances of the crime. At most, Davis offers a recollection at odds with Stevens about seeing him at the convenience store after she had been to the DeCarr house. No witness has come forward to recant their trial testimony and allege that he (or they) testified falsely and that the prosecutor knew it.

(4) Lastly, the Davis affidavit does not demonstrate that trial counsel rendered ineffective assistance of counsel under

the seminal decision of Strickland v. Washington, 466 U.S. 668 (1984). This Court previously ruled that counsel was not ineffective in making a strategic decision not to use Wendy Chancey as a witness and to use hearsay testimony of other witnesses. Tompkins, 549 So. 2d at 1372-1373. See also Tompkins v. Moore, 193 F.3d at 1334. Trial counsel was neither deficient nor did prejudice result from his not producing Mr. Davis to assert his disagreement with Stevens on seeing her at the convenience store.

Moreover, trial counsel cannot be deemed ineffective in failing to pursue Junior Davis as a witness. In addition to having Detective Burke's police report and taking his deposition which elicited that Davis had no information about Lisa's disappearance or death, trial counsel also had a police report from Detective Bird of June 5, 1984 that Barbara DeCarr stated that when she told the boyfriend that Lisa was missing he did not seem to be concerned. (DAR V5, 563).

There is neither deficiency nor resulting prejudice.

Finally, in order to use such inconsequential testimony as the federal courts noted:

> …if trial counsel had called Wendy Chancey or any other witness to testify at the guilt stage, under Florida law he would have forfeited his right to both open and close the arguments before the jury.

193 F.3d at 1334-1335. That option would not have been prudent since counsel already had elicited from Stevens on cross-examination that she had lied to Barbara DeCarr and prosecutor Benito. (DAR V2, 264-265), and what is now submitted via Davis is insignificant.

The trial court has correctly determined that Appellant's recent presentation of Junior Davis' affidavit does not constitute valid newly-discovered evidence to warrant consideration of this time-barred claim. Since Mr. Davis' affidavit does not constitute newly-discovered evidence (he was known to trial counsel and Appellant through discovery and the testimony of Detective Burke and Barbara DeCarr), there is no need to do further cumulative analysis. As stated in Roberts v. State, 840 So. 2d 962, 972 (Fla. 2002):

> However, claims of cumulative error are properly denied where individual claims have been found without merit or procedurally barred. See Rose v. State, 774 So. 2d 629, 637 (Fla. 2000); Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999).

See also Hutchinson v. State, 882 So. 2d 943 (Fla. 2004)(since trial court did not abuse discretion on any of three alleged errors, there are not errors to consider cumulatively); Griffin v. State, 866 So. 2d 1 (Fla. 2004)(where individual claims of error alleged are either procedurally barred or without merit, a claim of cumulative error must fail).

In Roberts v. State, 840 So. 2d 962 (Fla. 2003) this Court explained that the case law requires cumulative analysis of newly-discovered evidence:

> In determining whether newly discovered evidence warrants setting aside a conviction, a trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial to determine whether the evidence would probably produce a different result on retrial. See Lightbourne v. State, 742 So. 2d 238, 247 (Fla. 1999); Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Lightbourne, 742 So. 2d at 247. However, claims of cumulative error are properly denied where individual claims have been found without merit or procedurally barred. See Rose v. State, 774 So. 2d 629, 637 (Fla. 2000); Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999).

Id. at 972. See also Hutchinson v. State, 882 So. 2d 943 (Fla. 2004)(since trial court did not abuse discretion on any of three alleged errors, there are no errors to consider cumulatively); Griffin v. State, 866 So. 2d 1 (Fla. 2004)(where individual claims of error alleged are either procedurally barred or without merit, a claim of cumulative error must fail).

Appellee would respectfully submit that since the individual claims have been found to be without merit – as

Roberts, Hutchinson and Griffin teach – any claim of cumulative error must fail.

However, as explained below, even if this Court were to again engage in a cumulative analysis, Tompkins is not entitled to any relief.

Cumulative analysis:

1. Evidence impeaching Kathy Stevens:

Appellant repeats the complaints previously raised in earlier collateral challenges that prosecutor Benito did not disclose his file memoranda of conversations with Kathy Stevens. This Court found no Brady violation in Tompkins II. Federal district court Judge Nimmons discussed in detail Tompkins' challenge to the Benito file memoranda and the Missing Children Help Center file on Lisa DeCarr, as well as the visit to the boyfriend in jail. None of the claims merited relief. Trial defense counsel had cross-examined Kathy Stevens and elicited from her that she had initially lied to prosecutor Benito and thus had access to the information. Moreover, the Missing Children Help Center file could have been discovered with due diligence. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at 34-44. Similarly, the alleged failure to disclose school records could not be deemed violative of Brady since trial counsel's deposition of Detective Burke revealed the notation in

question. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.41-42.

When Tompkins appealed that ruling, the Court of Appeals deemed the arguments too insubstantial to merit discussion. Tompkins v. Moore, 193 F.3d 1327, 1331 n1 (11th Cir. 1999).

Adding these meritless claims to the insignificant fact that James Davis, Jr. disagrees with Stevens about having seen her at the convenience store that morning does nothing to undermine confidence in the outcome.

2. Evidence impeaching Barbara DeCarr:

After this Court's denial of Tompkins' first postconviction motion, District Judge Nimmons ruled that assertions characterizing Mrs. DeCarr's testimony as misleading was "meritless." Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.49-50.

Tompkins subsequently returned to this Court asserting challenges to the failure to provide police reports and other documents. This Court ruled "the March 24, 1983, police report was not withheld by the State." 872 So. 2d at 239. Additionally, this Court rejected the contention that a July 28, 1983 report contained an account of a phone call from Barbara DeCarr that contradicted her trial testimony. The Court ruled: "the record conclusively refutes Tompkins' claim that the July

28 report is material evidence because the report would not have impeached Ms. DeCarr's trial testimony." 872 So. 2d at 241.

Again, this Court also rejected the argument that the information related to police by Maureen Sweeny in the June 8, 1984 police report supported Wendy Chancey's version of the events and supported the defense theory that Lisa ran away and "the record in this case conclusively demonstrates that the documents are not material because they cannot '*reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict*.'" 872 So. 2d at 240.

Nothing in the Junior Davis affidavit detracts from Mrs. DeCarr's testimony.

3. Evidence impeaching Kenneth Turco:

As did this Court, Judge Nimmons previously rejected the claim of a deal pertaining to Turco and prosecutor Benito. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.55.

The district court added:

> Petitioner has not shown that any of the witnesses gave false testimony, that the State knew the testimony was false, or that the alleged testimony was material, i.e., that there was a reasonable likelihood that the alleged false testimony could have affected the judgment of the jury.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.55.

Subsequently, the Court of Appeals agreed that asserted Giglio errors related to Stevens and Turco were "palpably without merit." 193 F.3d at 1342 n14. And in a later visit to this Court, this Court ruled that Tompkins failed to allege any basis that Turco perjured himself at this trial. Tompkins v. State, 872 So. 2d at 239. Obviously, the Junior Davis affidavit does not change anything respecting Turco.[3]

As to the claim that trial counsel was ineffective in failing to use Appellant's mother Gladys Staley as a witness to show that Lisa had been seen at a time subsequent to her disappearance, Judge Nimmons' order adequately disposed of that contention and the Junior Davis affidavit does not call for revisiting the issue. Judge Nimmons explained that the officer completing a report relative to Staley stated that Staley was not certain that the date she allegedly saw Lisa DeCarr at her house at approximately 2:30 p.m. was the date Lisa disappeared. Trial counsel was not ineffective for failing to call a witness

[3] No lengthy rejoinder is needed here to Appellant's attempt to reconsider his previously-rejected argument on witness Turco. Appellant previously in this Court relied on Mr. Episcopo's observations in the case of State v. Holton. Mr. Episcopo's questions and answers in a general hypothetical do nothing to call into question prosecutor Benito's testimony at the 1989 evidentiary hearing in Tompkins' case. (1 PCR II, EH 235). There is no need to revisit and alter this Court's most recent proclamation that Tompkins "fails to allege any basis to establish that Stevens or Turco perjured themselves at his trial." Id.

to testify who was not sure of the date she last saw Lisa. Moreover, since Barbara DeCarr was apparently at Staley's home from 9:00 a.m. until 3:00 p.m., if Lisa had visited there at 2:30 p.m. on the date of her disappearance, Barbara DeCarr would presumably also have seen her. Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at p.66 and fn22; DAR V2, 209. The Junior Davis affidavit adds nothing to this.

As to the claim that Tompkins was not given lead sheets of Detective Burke, this Court has concluded that prejudice is conclusively refuted by the record since trial defense counsel was aware of both Junior Davis and Bob McKelvin. 872 So. 2d at 241. This Court also rejected the contention that the list of questions for Detective Burke and documents in the Albach file warranted relief since they did not contain information favorable to Tompkins. 872 So. 2d at 239-240. The complaint about dental records testimony was decisively rejected by the district court and the Court of Appeals. 193 F.3d at 1339-1342.

Appellant again complains about police records lead sheets of undisclosed other suspects; Tompkins notes Bob McKelvin as a possible suspect, and police reports mentioned that Lisa DeCarr and Jessie Albach were friends, that W. H. Graham had problems at the Naked City night club. This Court previously rejected

these Brady claims in Tompkins IV. This Court noted that trial counsel was aware of McKelvin, 872 So. 2d at 241, and:

> The Albach documents contain statements regarding Lisa DeCarr and provide information about a W.H. Graham, a person who Tompkins apparently claims is another likely suspect. However, other than the fact that Jessie and Lisa were friends, there is no indication in these reports that Lisa ever had contact with W.H. Graham. Further, the statements about Lisa are general--that Lisa was missing and was friends with Jessie. Thus, these files do not provide the same type of information that this Court concluded was favorable to the defendant in Rogers.

Id. at 240.

The new discovery of Junior Davis adds nothing that would alter the Court's prior disposition of these matters.

Appellant repeats his assertion from his previous postconviction motion alluding to a list of questions to be asked of Detective Burke during trial. This Court rejected the claim then:

> The few answers indicated on the question sheet are irrelevant to Burke's substantive testimony. Contrary to Tompkins' assertions, the alleged nondisclosure of the list of questions in this case is not analogous to the situation presented in Rogers v. State, 782 So. 2d 373, 384 (Fla. 2001), where this Court held that a cassette tape, which revealed coaching by the prosecutor and conflicting accounts of the witness's testimony, was favorable to the defendant. Unlike the tape at issue in Rogers, the list of questions in this case

> does not show any attempt by the prosecutor to direct Burke's testimony. Nor does the list indicate any testimony contrary to that presented at trial.

Tompkins IV, at 239.

Tompkins' alleged recent discovery of Junior Davis adds nothing to merit reconsideration or altering the court's resolution.

Tompkins regurgitates his claim that the medical examiner at trial presented "false testimony" about dental records. The district court addressed this issue and concluded:

> While Dr. Diggs' initial testimony regarding an identification from dental records may have been vague, it was not false or misleading. … No one, including the medical examiner, testified that the dental records shown to the jury were compared to previous dental records to establish Lisa DeCarr's identity.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582, at p.53.

The Eleventh Circuit Court of Appeals opinion was more expansive in rejecting this claim. Tompkins v. Moore, 193 F.3d 1327, 1339-1342 (11th Cir. 1999).

This Court thereafter acknowledged the federal courts' determination that the false testimony of the medical examiner contention was meritless. Tompkins, 872 So. 2d at 237.

The Court of Appeals opined:

> … Tompkins has failed to meet the threshold requirement that he show false testimony was used.

193 F.3d at 1340.

> There was no false testimony about the existence of pre-mortem dental x-rays or records.
>
> Even if there had been false testimony on the subject, and even if the State had known it was false, Tompkins' Giglio claim would still fail on the materiality element, because he has not shown that the testimony in question could have had an effect on the verdict.

193 F.3d at 1341.

After summarizing the district court's discussion of the overwhelming evidence, the Court of Appeals added:

> There is simply no doubt that it was Lisa DeCarr whose skeletal remains were found in that shallow grave. With all due respect to the advocacy obligations of Tompkins' present counsel, their argument in brief that "there was very little evidence of the identity of the deceased" is preposterous.

193 F.3d at 1342.

Tompkins' present assertion of his recent discovery of Junior Davis adds nothing and does not render his prior claim less preposterous.[4]

[4] Appellant does not enlighten us in this proceeding whether he continues to rely on the ridiculous assertion in the 1989 round of collateral litigation in the Jerry Behring affidavit that "Lisa is still alive." Tompkins II. (PCR 1, Vol. 7, R.1026).

Tompkins now (again) alludes to a police report indicating that Barbara DeCarr told police she last saw Lisa at 1:30 or 2:00 p.m. on March 24, 1983. Tompkins last presented this argument in Tompkins IV, the appeal from denial of successive postconviction motion. This Court determined that the record conclusively refutes that a Brady violation occurred:

> We also agree with the trial court's conclusion that the March 24, 1983, police report was not withheld by the State. As the trial court noted, "during argument, defense counsel conceded that he had obtained a copy of . . . [the March 24] report in 1989, however, he was unable to read it." Because defense counsel knew of the report and could have requested a legible copy, a Brady violation is conclusively refuted.

872 So. 2d at 239.

Appellant's claim of having recently found Junior Davis adds nothing meriting reconsideration of this previously considered and rejected claim.

Appellant is merely attempting an untimely and improper rehearing when his claim has previously been rejected on an ineffective assistance of counsel challenge and a Brady violation. Moreover, as District Judge Nimmons found in denying federal habeas corpus relief:

> Petitioner claims that Barbara DeCarr gave misleading testimony when "she alleged that Mr. Tompkins was the last person to see the victim alive." (R 210-11). The fact is

> that, as a cursory reading of that portion of her testimony relied upon by Petitioner reveals, Barbara DeCarr did not testify that Petitioner was the last person to see the victim alive. She did not testify to that either during the excerpt relied upon by Petitioner (R 210-11) or at any other portion of her testimony.

Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.49-50.

Appellant repeats his contention advanced in Tompkins IV that he had received a "legible" copy of the March 24, 1983 report – he had obtained a copy of it but was unable to read it. As the Court will recall this Court rejected this Brady claim:

> Because defense counsel knew of the report and could have requested a legible copy, a Brady violation is conclusively refuted.

872 So. 2d at 239.

But Tompkins perseveres. He argues that this March 24, 1983 report in which Barbara DeCarr is listed as complainant demonstrates that "Barbara told the police officer on March 24th that she, Barbara saw Lisa at 1:30 to 2:00 pm. on that date." (Brief, p.10 at fn 12). Appellee will repeat that this Court has rejected this precise contention and thus the law of the case doctrine and res judicata precludes its relitigation. See State v. McBride, 848 So. 2d 287 (Fla. 2003).

In addition to the fact that there is no Brady violation and the fact that law of the case doctrine and res judicata precludes further review, Appellee adds that substantively this

police report adds nothing to Tompkins' continued attempt to impeach Barbara DeCarr because in her deposition on March 5, 1985 (found at Appendix 27 in the first postconviction appeal, FSC Case Nos. 74,098, 74,235) DeCarr testified that following Tompkins' report to her that Lisa had run away she flagged down a police woman and provided a picture of Lisa along with her date of birth and signed the paper. He – meaning Wayne Tompkins – "gave all the information." (Deposition, p.28). Later at pages 40-41 of the deposition when asked whether she told police at that time that Lisa's purse was missing, Mrs. DeCarr answered "No, sir. I didn't tell the police anything. Wayne did all the talking." Thus, it is clear that Barbara DeCarr did not tell police that she saw Lisa at 1:30 to 2:00 p.m.[5] No further wooden stakes are required for this vampire heart.

Appellant attempts to re-present the claim that trial counsel was ineffective in failing to use Wendy Chancey. This Court in denying Appellant's first postconviction motion observed that a strategic decision was made not to call this witness and to try to present the testimony to the extent permitted by the trial judge through hearsay testimony. Tompkins II, at 1372. The federal courts similarly rejected the

[5] Not only did collateral counsel have this March 24, 1983 report in 1989, but also trial counsel had been furnished the report in discovery prior to trial. (DAR V5, 541-542).

claim. See Tompkins v. Singletary, 1998 U.S. Dist. LEXIS 22582 at pp.58-66; Tompkins v. Moore, 193 F.3d 1327, 1334-1335 (11th Cir. 1999)(noting that trial counsel believed Chancey would not be a good witness, a defense investigator noted she had no recollection of having seen Lisa on the day in question and could not even identify a photo of Lisa; there was no evidence that at the time of trial Chancey remembered anything about the events on the day in question or even remembered Lisa DeCarr; and her testimony as to statements in the police reports would have been inadmissible).

In summary, the Junior Davis affidavit cannot support a claim for relief by Tompkins, either under a theory of newly-discovered evidence or a Brady violation or a Giglio violation or an ineffective counsel claim pursuant to Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

Based on the foregoing arguments and authorities, the order of the lower court denying relief should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Martin J. McClain, Special Assistant Capital Collateral Regional Counsel, CCRC-South, 141 N.E. 30th Street, Wilton Manors, Florida 33334, and Neal Dupree, CCRC-South, 101 NE 3rd Ave., Suite 400, Fort Lauderdale, Florida 33301, this _____ day of July, 2006.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

ROBERT J. LANDRY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0134101
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE