IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-277

WAYNE TOMPKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of a post-conviction motion. The following symbols will be used to designate references to the record in this appeal:

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

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

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

“3PC-R.” -- record on third 3.850 appeal to this Court;

“4PC-R.” --record on this 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Tompkins has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. State, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002); Wright v. State, 857 So. 2d 861 (Fla. 2003).

In each one of these cases, this Court granted oral argument even though the appeal arose from the denial of a successive motion for post-conviction relief. In opposing oral argument Appellee makes no effort to distinguish these cases. To deny Mr. Tompkins an oral argument here while granting oral argument to similarly situated individuals, could only be characterized as arbitrary and capricious. As such, it would constitute a violation of due process. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Tompkins, through counsel, accordingly urges that the Court permit oral argument.

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REPLY TO THE STATE'S STATEMENT OF THE CASE

In reply to the Statement of the Case and Facts contained in the Answer Brief, Mr. Tompkins notes that Appellee has refused to accept the factual allegations contained in Mr. Tompkins' current motion to vacate.[1] Appellee has failed to acknowledge in its Answer Brief, just as the circuit court failed to acknowledge in its order summarily denying Mr. Tompkins' motion to vacate, that Junior Davis was not listed as a witness in the State's discovery responses (see R. 504-05, 591, 600). The failure to list Mr. Davis' name was in fact a representation by the State that Mr. Davis was not a witness who possessed "information that may be relevant to any offense charged or any defense thereto." Fla. R. Crim. Pro. 3.220.

Mr. Davis was mentioned in one police report that was included in the discovery provided to trial counsel on October 23, 1984 (R. 504-07, 530).[2] This report indicated that Mr. Davis

[1]In his Initial Brief, Mr. Tompkins erroneously stated: "Trial commenced September 16, 1983, and a jury found Mr. Tompkins guilty (R. 401)." In fact, Lisa DeCarr was reported missing on March 24, 1983 (R. 397-98). Mr. Tompkins was indicted for her murder on September 26, 1984 (R. 489). Trial commenced on September 16, 1985 (R. 656).

[2]Again, the fact that a police report was provided showing that an interview of Mr. Davis had occurred underscores the obvious implication when the State did not list Mr. Davis as a witness under Rule 3.200, *i.e.* he possessed no "information that may be relevant to any offense charged or any defense thereto."

was interviewed on June 24, 1984, but that Mr. Davis was not in possession of any useful information.[3]

Neither the State in its Answer Brief, nor the circuit court in its order denying an evidentiary hearing, addressed the fact that Mr. Davis' name was specifically not listed by the State as a witness who possessed "information that may be relevant to any offense charged or any defense thereto." However, the record is crystal clear on this point.

Moreover, the State first disclosed the name of Kathy Stevens on March 7, 1985 (R. 600).[4] Even after the disclosure of Kathy Stevens as a witness with material information, the State did not disclose the name of Junior Davis under Rule 3.220. Prior to March of 1985, Ms. Stevens had told others that Lisa DeCarr had run away to New York and that Lisa had called Kathy from New York to tell her she was pregnant.[5] In fact during her

[3]Based upon this disclosure, it was reasonable for collateral counsel to rely on the "presumption that the prosecutor would fully perform his duty to disclose all exculpatory evidence." Strickler v. Greene, 527 U.S. 263, 284 (1999). Nothing had been provided to indicate that Mr. Davis, who was not listed as a witness at trial, possessed any information.

[4]Mr. Tompkins was appointed a series of attorneys to represent him on the murder charge. However, each subsequently withdrew until Mr. Daniel Hernandez was appointed on April 17, 1985 (R. 601).

[5]This was reflected in the school records that were in the State's possession, but which were not provided to the defense.

trial testimony, Ms. Stevens acknowledged that she had told Lisa's mother a couple of weeks after March 24, 1983, that Lisa "had left for New York" (R. 257).

As was revealed during the post-conviction proceedings in 1989, Mr. Benito contacted Ms. Stevens on March 7, 1985. At that time, she stuck with her story that Lisa had runaway. It was not until the next week that Ms. Stevens for the first time indicated to law enforcement that she had witnessed Lisa being attacked on the morning of March 24, 1983.[6]

When she testified at Mr. Tompkins' trial in September of 1985, she related that after witnessing Lisa being attacked and asking her to call for help:

These records were previously pled as undisclosed exculpatory evidence withheld from the defense in violation of due process.

[6]At the time of her testimony, Kathy Stevens indicated that she was 17 years old (R. 242). Two and a half years before, she had attended school with Lisa DeCarr. Kathy and Lisa met in classes for emotionally troubled students. School records show that on March 23, 1983, the day before Lisa disappeared, Kathy and Lisa were suspended from school for smoking under a tree on campus. Marijuana was found in Kathy's purse. These school records were previously pled as favorable evidence in the prosecutor's possession that was not disclosed to Mr. Tompkins' trial counsel.

As was also previously pled, the prosecutor's memorandum recording Ms. Stevens' contact with him in March of 1985 was not disclosed to the defense. Nor was the fact that Ms. Stevens only changed her story and claimed to have witnessed Lisa being assaulted when Mr. Benito agreed to arrange for her to visit her boyfriend who was then incarcerated (1PC-R. 20-21).

> Q. Did you leave when Lisa told you to call the police?
>
> A. Yes, I did.
>
> Q. Where did you go after you left?
>
> A. I went up to the store, and I ran into her boyfriend.
>
> Q. Whose boyfriend?
>
> A. Lisa's.
>
> Q. He was at the store?
>
> A. Yes, he was.
>
> Q. Did you advise him that you wanted to call the police?
>
> A. Yes, I did.
>
> Q. Why didn't you call the police?
>
> A. I guess it was a little bit of being scared and not knowing what to expect when they got there, so I just told Junior, you know, what was going on, and he just walked away like it was nothing. So, I just got scared and I went to school.

(R. 254-55).

The circuit court in denying an evidentiary hearing on Junior Davis' affidavit asserting that this event did not occur, said:

> As Counsel for Defendant indicated at the hearing on August 29, 2005, the name of Junior Davis was known to Defendant as far back as 1989, and yet the affidavit was not completed until 2002, nearly 13 years later. (See Transcript August 29, 2005, pp. 6, line 25, and pp. 7, line 1 -6, attached). The name

> Junior Davis was listed in the police reports and as such was or could have been known to the movant or his attorney. See Richardson v. State, 546 So. 2d 1037 (Fla. 1989). Furthermore, Defendant has failed to show that this new evidence could not have been discovered by or through the use of "due diligence" before the expiration of the limitation period, **nor did Defendant explain why it took 13 years to locate Junior Davis other than to say that Junior Davis was a common name**, and as such his request for the Court to consider the affidavit and the alleged newly discovered evidence is time-barred. See Jones v. State, 591 So. 2d 911 (Fla. 1991).

(4PC-R. 53)(emphasis added).

In fact, Mr. Tompkins' collateral counsel alleged more than "that Junior Davis was a common name." In the current motion to vacate, Mr. Tompkins alleged:

> Undersigned counsel had previously attempted to locate [Junior Davis] in 1989, even though Mr. Davis was not listed as a witness at trial. He was mentioned in one police report that was included in the discovery provided to trial counsel and that appears in the record. There was no indication in the police reports disclosed in 1989 that Mr. Davis was in possession of any useful information. In the report first disclosed in 1989 "Detective Burke stated he interviewed Junior Davis who said he could provide no information as to the events surrounding Lisa's disappearance [R. 530]. In 1989 while Mr. Tompkins' case was under warrant, Mr. Tompkins' counsel was advised that Mr. Davis was not at the list phone number. Mr. Tompkins' counsel could not locate Mr. Davis and had no indication that Mr. Davis possessed any relevant or useful information.

(4PC-R. 156).

During the 2005 Huff hearing on the motion to vacate, Mr. Tompkins' collateral counsel explained that efforts were made to find Mr. Davis in 1989:

> In any event, um, as is alleged in the 3.850 in 1989 when this case was first handled by CCR and specifically myself and my investigators, we looked for Mr. Davis because his name showed up. He had not been listed as a witness at the time of the trial but obviously Kathy Steven mentioned him in her testimony.
>
> We tried calling a phone number that appeared in a police report for him. We were told that, um, Mr. Davis was not at the phone number. That is specifically pled in the 3.850.
>
> * * *
>
> In 1989 we didn't have any of the other information regarding Mr. Davis. We just knew that Kathy Stevens said she had talked to him and there was no indication that he had said anything inconsistent with what Kathy Stevens had to say.

(4PC-R. 17-18).

During the 2005 Huff hearing, Mr. Tompkins' collateral counsel explained that the police reports first disclosed in 2001 significantly altered the picture as to Junior Davis and what he knew or might know:

> In 2001, information was disclosed that had not been previously disclosed regarding a Maureen Sweeney and her boyfriend Mike Willis I believe his name is in which they had given statements to the police that actually ended up in the Jessie Albauch file indicating that, um, they had been told that actually Lisa had a fight with her mother Barbara DeCarr over Wayne Tompkins moving back into the house. This fight occurred in the afternoon on the day of her

> disappearance on March 24th and that she ran out of the house at that point in time and ran away.
>
> This appeared in Maureen Sweeney's statement that was given to law enforcement and Mike Willis' as well. They also indicated in their statements that after Lisa disappeared they had also talked to Junior Davis - - James Davis, Jr. about the situation.
>
> In addition in 2001, there was also a lead sheet from Detective Burke indicating that he had talked to Mr. Davis and that Mr. Davis had no significant information which again, um, would seem to conflict with Kathy Stevens' claim that she saw the sexual assault going on. That she went and she told Mr. Davis and Mr. Davis said, don't worry about it.

(4PC-R. 16-17).[7] Given that now specific information was provided that indicated that Mr. Davis had spoken with Ms. Sweeney and Mr. Willis and made statements that seemed incompatible with Ms. Stevens' testimony, collateral counsel renewed his efforts to find Mr. Davis:

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[7]The police report regarding Detective Milana's interview of Maureen Sweeney and Mike Willis on June 8, 1984, included Sweeney's statement that after Lisa disappeared:

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

(2PC-R. 45-46)(emphasis added). The feelings about Lisa attributed to "Junior" in this report clearly contradict Kathy Stevens' testimony that when she told "Junior" that Mr. Tompkins was assaulting Lisa, "he just walked away like it was nothing" (R. 254).

> In 2001 when we received the lead sheets and the supplemental police reports concerning the information of an interview by Detective Burke of Mr. Davis and of Maureen Sweeney and Mike Willis' statements, we then again tried to contact him and then of course between 1989 and 2001, the techniques for locating witnesses had changed substantially through the use of computers and even then in 2001 we had great difficulty.
>
> Part of the problem is James Davis is actually a fairly common name and you can locate many James Davis' but trying to figure out the right one is sometimes confusing. We had a long list of James Davises that we got under warrant. We were going through them. We were not able to find the correct James Davis while we were under warrant.
>
> Finally a year later in April of 2002, another repeated, computer run turned up a James Davis, Sr., who we contacted and he was the father of James Davis, Jr. And we were able to locate him. As soon as we located him in April of 2002, we went and talked to him and we obtained the affidavit and I submitted it to Your Honor and of course at that time there was an appeal pending with the issue of jurisdiction and at this point basically my reading of the Florida Supreme Court opinion is that this is basically nunc pro tunc to that date so the question is whether or not there has been diligence alleged to get us to April of 2002.
>
> Of course what Mr. Davis has to say, um, is consistent with the undisclosed information that was in the possession of the State and it was the State that had not turned that information over until 2001.

(4PC-R. 19-20).

ARGUMENT IN REPLY

I. DILIGENCE.

A. Introduction.

The State argues that the Junior Davis affidavit "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." Answer Brief at 16.[8] In making this argument, the State overlooks both law and fact.

B. The Law.

Mr. Tompkins has presented in his motion to vacate a Brady claim, *i.e,* that the State failed to disclose evidence in its possession that was favorable to him. Contrary to the State's assertion in its Answer Brief, the fact that the defense is aware of a name, does not mean that the State has complied with its obligation under Brady. The United States Supreme Court recently explained in Banks v. Dretke, 124 S.Ct. 1256,

[8]Throughout the Answer Brief, the State refuses to recognize that Mr. Tompkins' claim is one premised upon Brady v. Maryland, 373 U.S. 83 (1963). Perhaps, this is because the circuit court relied upon the newly discovered evidence standard in Jones v. State, 591 So. 2d 911 (Fla. 1991). See 4PC-R. 54. The circuit court conducted no Brady analysis, and gave absolutely no cumulative consideration to the previously presented undisclosed exculpatory evidence in its order denying relief without the benefit of an evidentiary hearing. In fact at one point, the State asserts "[a]ny 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." Answer Brief at 27. As explained *infra*, the State is clearly wrong in this regard.

1263 (2004): “When police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.” Thus, a rule “declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” Id. at 1275. Under Banks, the burden is on the State to “set the record straight,” not upon the defense to intuit that the State is holding information back.

In fact, this Court has frequently been presented with Brady claims where the name of a particular witness had been listed by the State in pre-trial discovery, but nevertheless found that a Brady violation had occurred because information regarding statements made by that witness or about that witness had not been disclosed to the defense. In Mordenti v. State, 894 So. 2d 161 (Fla. 2004), this Court vacated a conviction and ordered a new trial in a case where the defense not only had the name of a witness (Gail Milligan), but had deposed the witness and cross-examined her on the witness stand at trial. This Court did not find that because trial counsel had the witness’ name, his failure to learn of the undisclosed favorable evidence, to investigate it, and present it, meant Mr. Mordenti

was barred on a want of diligence from presenting his Brady claim once he learned of the withheld evidence.

Similarly in Cardona v. State, 826 So.2d 968 (Fla. 2002), this Court vacated a conviction and ordered a new trial in a case where the defense not only had the name of a witness (Olivia Gonzalez-Mendoza), but had deposed the witness and cross-examined her on the witness stand at trial. As in Mordenti, this Court did not find that because trial counsel had the witness' name, his failure to learn of the undisclosed favorable evidence, to investigate it, and present it, meant Ms. Cardona could not present her Brady claim, once the Brady material was discovered.[9] Similarly, this Court also ordered a new trial in Hoffman v. State, 800 So. 2d 174 (Fla. 2001). There, the defense learned that hair had been found in the victim's hand, but was not provided with a report indicating that the hair did not originate from Mr. Hoffman. In granting a new trial, this Court stated:

[9]In fact, this Court has ordered new trials in a number of cases in which the State had disclosed the name of a witness to the defense, but failed to provide the defense with favorable evidence regarding that witness or statements made by the witness. Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Huggins, 788 So.2d 238 (Fla. 2001); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

> The State's additional argument is that defense counsel Harris elicited information at trial from a serologist about the hairs. The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory. In failing to do so, the State committed a Brady violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Hoffman, 800 So. 2d at 179.

Thus, the question of when is a criminal defendant held to know of the basis for a Brady claim cannot turn on when he knew the name of the witness (Mordenti and Cardona) or the existence of a piece of evidence (Hoffman). It must turn upon when the State has "set the record straight," as explained in Banks.

Here, the State did not disclose any information regarding Maureen Sweeney and Mike Willis until 2001. It was in their statements that Mr. Tompkins was advised for the first time of Mr. Davis' statements to them regarding Lisa's disappearance:

> JUNIOR, (Lisa' steady boyfriend) came to their house on Rio Vistat and **asked if they had seen her**. MIKE saw him much later at CHURCH'S CHICKEN and **asked if he had heard anything from LISA at which time he advised**

that she had hurt him really bad and that she had never called him, never tried to get in touch with him and therefore he was finished with the family. (2PC-R. 45-46)(emphasis added). Thus, the State did not comply with its obligation under Brady, as explained in Banks until it disclosed the existence of these statements which the State had in its possession all along. Once these statements were disclosed, Mr. Tompkins was first placed in a position to have a basis for believing that Mr. Davis possessed favorable information.[10]

C. The Facts.

Besides ignoring the law, the State ignores Mr. Tompkins' factual allegations when it asserts "Tompkins has failed to adequately explain the belated presentation of Mr. Davis' affidavit until thirteen years after his first motion." Answer Brief at 16. Mr. Tompkins explained in his motion and during his argument at the Huff hearing his factual allegations regarding his discovery of previously undisclosed statements

[10]Prior to the disclosure of the Sweeney and Willis statements, Mr. Tompkins' collateral counsel had only a police report disclosed to trial counsel indicating he possessed no "information that may be relevant to any offense charged or any defense thereto" (R. 530), and the testimony of Kathy Stephens that she had run into "Junior" after Lisa had asked to call the police, but that he did not seem concerned (R. 254).

attributed to Mr. Davis and his efforts to locate Mr. Davis and verify those statements.

According to well established law, factual allegations contained in a motion to vacate are to be accepted as true unless conclusively rebutted by the record. Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). The same standard applies to successive motions. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989)(As to a successive postconviction motion, allegations of previous unavailability of new facts, as well as diligence of the movant, are to be accepted as true and warrant evidentiary development so long as not conclusively refuted by the record).

In 1989 on the basis of the mention of his name in a police report with the indication that he possessed no relevant information and on the basis of the mention of his name during Kathy Stevens' testimony, collateral counsel did seek to locate Mr. Davis. As was explained in the motion to vacate:

> Undersigned counsel had previously attempted to locate [Junior Davis] in 1989, even though Mr. Davis was not listed as a witness at trial. He was mentioned in one police report that was included in the discovery provided to trial counsel and that appears in the record. There was no indication in the police reports disclosed in 1989 that Mr. Davis was in possession of any useful information. In the report first disclosed in 1989 "Detective Burke stated he interviewed Junior Davis who said he could provide no information as to the events surrounding Lisa's disappearance [R. 530]. In 1989 while Mr. Tompkins' case was under warrant,

> Mr. Tompkins' counsel was advised that Mr. Davis was not at the list phone number. Mr. Tompkins' counsel could not locate Mr. Davis and had no indication that Mr. Davis possessed any relevant or useful information.

(4PC-R. 156).

In Roberts v. State, 678 So. 2d 1232 (Fla. 1996), a witness (Rhonda Haines) who had testified at Mr. Roberts' trial, but who could not located at the time of his first motion to vacate in 1989, was located in 1996 during the pendency of a death warrant. In 1996, Ms. Haines gave an affidavit in which she swore that due to prosecutorial promises and threats, she testified falsely at Mr. Roberts' trial. Mr. Roberts asserted in his motion to vacate in 1996 that he had sought to locate Ms. Haines in 1989. He had at one point located a phone number for the person he believed was Ms. Haines' mother, but when the number was called, Ms. Haines' mother refused to provide any information regarding Ms. Haines or her whereabouts. On the basis of the factual allegations as to Mr. Roberts' efforts to locate Ms. Haines, a witness who had in fact testified at Mr. Roberts' trial regarding statements supposedly made by Mr. Roberts that Mr. Roberts knew he did not make, this Court ordered an evidentiary hearing on a successive Rule 3.850 motion.

This Court in Swafford v. State, 679 So. 2d 736 (Fla. 1996), was presented with circumstances similar to those here. In a successive motion to vacate, Mr. Swafford presented an affidavit from a witness whose name had not been disclosed at trial, but whose name was contained in a police report disclosed during collateral proceedings. As this Court explained:

> Swafford maintains that Lestz's affidavit is newly discovered evidence because despite due diligence, collateral counsel was unable to locate Lestz until an investigating service obtained his address in April 1994. According to Swafford, none of the material disclosed by the State contained a current address for Lestz or information sufficient to determine his current address.

Swafford v. State, 679 So. 2d at 739 n. 4. This Court accepted Mr. Swafford's factual allegations as to diligence as true and ordered an evidentiary hearing.

For the same reasons here, the factual allegations asserted in the motion to vacate and reiterated during the Huff hearing are facially sufficient. Accepting them as true as is required at this point, diligence is established.

II. MR. TOMPKINS' CLAIM.

In his motion to vacate, Mr. Tompkins alleged that "either the State failed to disclose evidence which was material and exculpatory in nature and/or presented misleading evidence and/or defense counsel unreasonably failed to discover and

present exculpatory evidence." (4PC-R. 154).[11] As explained in the motion, the State failed to disclose a police report regarding the interview of Maureen Sweeney and Mike Willis and their statements regarding Mr. Davis. In this report, the following appeared:

[11]Mr. Tompkins pled the claim in the alternative because this Court has indicated that cumulative consideration of evidence the jury did not hear, either because of a Brady violation or because of ineffective assistance of counsel, is warranted in determining whether a constitutionally adequate adversarial testing occurred. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

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

(2PC-R. 45-46)(emphasis added).

These statements regarding conversations Sweeney and Willis had with Davis suggest that Davis knew nothing about Kathy Stevens and her claim to have told him on the day of Lisa's disappearance that she was being attacked and asking for someone to call the police. These statements were not disclosed to Mr. Tompkins' trial counsel, nor to his collateral counsel prior to 2001. This Court considered Mr. Tompkins' Brady claim premised upon the undisclosed statements of Sweeney and Willis that was set forth in a police report as follows:

> SWEENY 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 [SWEENY], it was very unusual for LISA to be outside without her makeup and supposedly she had been outside and then come 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. SWEENY advised that she had been told that WAYNE had gotten up to chase LISA to try and catch her but she was gone, by the time he got outside. SWEENY

> advised that LISA had left her purse containing her makeup, etc. on the table.

Tompkins v. State, 872 So. 2d at 241 n. 15. The preceding paragraph in the police report had been the one concerning the conversations Sweeney and Willis had with Mr. Davis. This Court denied relief saying:

> Therefore, the only part of the June 8, 1984, report that is even conceivably favorable to Tompkins is a statement made by Sweeny's fiance, Mike Glen Willis, that includes an account of the events on the day Lisa disappeared that is inconsistent with Barbara DeCarr's trial testimony. However, this one piece of undisclosed inconsistent information, even taken together with any other favorable evidence the State may have failed to disclose to Tompkins, does not rise to the level necessary to undermine our confidence in the verdict in this case.

Tompkins v. State, 872 So. 2d at 241 (footnote omitted). In denying relief, this Court did not specifically address the preceding paragraph of the police report and the information contained therein.

However of course, statements by Willis or Sweeney regarding statements made by Mr. Davis would not be admissible. Absent proof of what in fact Mr. Davis would say, this Court disregarded the statements attributed to him, just as this Court disregarded the statements of Wendy Chancey that she saw Lisa DeCarr on the afternoon of March 24th, long after the State

argued she was murdered, get into car not far from her home. Tompkins v. State, 872 So. 2d at 240.[12]

As pled in the current motion to vacate, Mr. Davis was located within a year of the disclosure of the police report detailing the interview of Maureen Sweeney and Mike Willis. Thereupon, Mr. Davis provided an affidavit stating in pertinent part that he had been Lisa Decarr's boyfriend in March of 1983 (4PC-R. 165). He reported that, "[t]he story of Kathy running into me at the store the day Lisa disappeared is not true. If anyone had told me that Wayne was attacking Lisa and she was screaming for someone to call the police, I would have gone directly there." (4PC-R. 166). He elaborated, "If I thought there was anyway I could have helped [Lisa], I would have, especially if she were in trouble. This is why what Kathy said is not true. I never saw Kathy on the morning that Lisa disappeared, nor did Kathy ever tell me that she had just seen Lisa being attacked by Wayne. In fact, the first time I heard

[12]A two-page police report, listing Barbara DeCarr as the "Complainant" and Wendy Chancey as the "Witness", indicated that "she last saw Lisa at the listed residence at the listed time. Compl. stated that everything was fine at home and has no trouble with Lisa running away or anything. Compl. stated Lisa was having some trouble in school but nothing to cause her to runaway" (according to page two). The first page revealed the time that Lisa was last seen was "24 March 83 1330-1400."

of anything having possibly happened to Lisa was when I heard on the radio she was missing." (4PC-R. 166).

The sworn testimony provided by Mr. Davis was not previously available before because the State did not disclose what Maureen Sweeney and Mike Willis had reported.[13] Mr. Davis' sworn statement confirms what Willis and Sweeney reported to the police. It provides the proof of how Mr. Tompkins was prejudiced by the State's failure to disclose the police report containing the statements of Willis and Sweeney.

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[13]The State argues repeatedly that "Tompkins has failed to adequately explain the belated presentation of Mr. Davis' affidavit until thirteen years after his first motion for postconviction relief." Answer Brief at 16. It's a sleight of hand maneuver. THE STATE DID NOT DISCLOSE THE POLICE REPORT FOR NEARLY SEVENTEEN YEARS. The State is merely trying to obfuscate the fact that it withheld the information that actually suggested that Mr. Davis had something helpful to say.

Again, the United States Supreme Court has made it crystal clear that the State cannot escape the ramifications from its own failure to honor a criminal defendant's rights under Brady, by arguing that it was relieved of its obligation by the defense's failure to figure out that favorable evidence existed, even though as here, the State had specifically disclosed its interview of Junior Davis, reported he had no information, and did not list him as a witness who possessed material information. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S.Ct. 1263. Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 1275. The State here is trying to do precisely what Banks describes as untenable. The delay here is the product of the State's failure to disclose.

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). This Court has recognized that previously denied Brady claims must be reheard and evaluated cumulatively when new Brady evidence is discovered. In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the 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 the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the**

materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted).[14]

In addition, this Court has repeatedly recognized that the prejudice prong of an ineffective assistance of counsel claim must be evaluated cumulatively with any Brady evidence. Evidence that the State failed to disclose and evidence that counsel was ineffective should be considered cumulatively in determining whether the jury's failure to know of the unpresented exculpatory evidence undermines confidence in the guilty verdict. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Given what this Court said while previously denying Mr. Tompkins' claims under Brady, *i.e.* without more, prejudice

[14]In denying, Mr. Tompkins' motion for rehearing, the circuit court read Lightbourne as requiring cumulative consideration only when the new evidence involves several recanting witnesses. Accordingly, the circuit court stated: "The new evidence does not, however, rise to the level of several witnesses recanting their testimony, as in Lightbourne, as the Defendant appears to argue." (4PC-R. 4). The circuit court clearly misread Lightbourne, and just as clearly did not recognize that Mr. Tompkins had presented a Brady claim and did not conduct any cumulatively analysis of all of the undisclosed, but favorable information that did not reach the jury.

Moreover in its Answer Brief, the State does not address Lightbourne besides merely referring without comment to the circuit court's denial of the rehearing. Answer Brief at 10.

was not demonstrated, the matter must be revisited in light of Kyles and Lightbourne, in order for the requisite cumulative analysis to be conducted. A cumulative analysis requires noting each piece of undisclosed favorable information that the State possessed and considering how that evidence cumulatively and synergistically could have effected not just the jury, but the manner in which the defense approached the case. Certainly, the failure to disclose the names of the witnesses with material information, *i.e.* Maureen Sweeney and Mike Willis, along with their statements to the police, impacted the manner in which defense counsel would have investigated and presented his case. Scipio v. State, 31 Fla. L. Weekly S114, 2006 Fla. LEXIS 261 (Fla. February 16, 2006). In State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court noted that "the question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the factfinder but rather upon its impact on the defendant's ability to prepare for trial." The issue is how could Mr. Tompkins' counsel at trial use the suppressed evidence. Kyles, 514 U.S. at 446 ("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the

investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.").

Further, as the United States Supreme Court explained:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply insufficient evidentiary basis to convict.

Kyles, 514 U.S. at 434-35. In fact, the Supreme Court in Kyles specifically noted, "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." Id. at 445.

The State tries to get around this clear language from the United States Supreme Court by asserting: "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." Answer Brief at 16. Mr. Davis' affidavit does indicate that a significant portion of Kathy Stevens' testimony was false, *i.e.* that portion that she said she told Mr. Davis what she had just witnessed, and that given

his reaction, she decided to ignore Lisa's plea that she call the police.

But, this must be evaluated cumulatively with the previously presented undisclosed impeachment evidence of Ms. Stevens. The prosecutor wrote a memorandum detailing her statement to him in March of 1983 which had major inconsistencies from the story she told at trial. Moreover, as was established at the evidentiary hearing in 1989, a seventeen year old Ms Stevens first told the prosecutor what she had told others, that Lisa had runaway. It was only after the prosecutor promised to arrange for her to be able to visit her boyfriend in jail did she change her story and say she had witnessed Lisa being attacked and heard her call for help.

Moreover, previous Brady material that was in the State's

possession but that was not disclosed has been presented as to both Lisa's mother, Barbara DeCarr[15] and as to the jailhouse

[15]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)(Exh. 10). Further, Mike Benito in 1989 stipulated to the accuracy of Det. Gullo's representations (PC-R. 301).

Detective Gullo's log of his conversations with Barbara about these sightings shows that Barbara was never able to

informant, Kenneth Turco.[16] Though this Court did not find that

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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.

As the trial prosecutor explained, "Apparently, the mother didn't know she [Lisa] was suspended, Judge, and that is one of the reasons Kathy thought she ran away, because she didn't want the mother to find out she was suspended" (PC-R 52). However, the school records reveal that there was a March 24th phone conference with Barbara DeCarr "who called to inform that Lisa had left." The records also show that on March 25th, "mom says child ran away yesterday (24th). Thinks child may be pregnant." Similarly, records from the Missing Child organization indicated that Barbara contacted the organization on March 29, 1983, and reported Lisa as missing saying, "She may be on drugs and she may be pregnant." Barbara DeCarr did not mention to 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.

[16]In 1989, Mike Benito testified that he took over Turco's prosecution two weeks after Wayne Tompkins' sentence of death. He explained, "I walked down to court. I was about to offer Mr. Turco a negotiation. I got in here and I looked at Mr. Turco and I said, 'This guy showed a lot of guts coming forward as a jailhouse informant to testify as to what Mr. Tompkins told

Mr. Tompkins had show sufficient prejudice then, all of the undisclosed, favorable evidence that the State had in its files, must now be evaluated cumulatively. Its synergistic effect must consider, as well as its effect upon defense counsel had it been disclosed. When the proper cumulative analysis is conducted, a new trial is warranted.

Based upon the factual allegations, at this juncture an evidentiary hearing is required in order to permit Mr. Tompkins to present the proof in support of his factual allegations.

CONCLUSION

In light of the foregoing arguments and those presented in the Initial Brief, Mr. Tompkins requests that this Court remand to the circuit court for a full and fair evidentiary hearing, so that he may be grant Mr. Tompkins a new trial when he been afforded an opportunity to prove his claims.

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

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

Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607, on September 11, 2006.

CERTIFICATE OF COMPLIANCE

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

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