

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1619

WAYNE TOMPKINS,
Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,
Appellee/Cross-Appellant.

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

CROSS ANSWER/REPLY BRIEF OF CROSS-APPELLEE/APPELLANT

MARTIN MCCLAIN
Special Assistant CCRC
Florida Bar No. 0754773

SUZANNE MYERS
Assistant CCRC
Florida Bar No. 0150177

CAPITAL COLLATERAL
REGIONAL COUNSEL-SOUTH
101 NE 3d Avenue
Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

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

(R. ___) -- Record on Direct appeal;

(PC-R. ___) -- Record on first postconviction appeal;

(PC-R2. ___) -- Record in the instant appeal;

(SPC-R2. ___) -- Supplemental record in the instant appeal;

(T. ___) -- Transcript of hearings below.

Other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

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REPLY TO STATEMENT OF THE CASE AND FACTS

A. Matters relating to Mr. Tompkins' appeal.

In the its Answer Brief, the State quotes this Court's direct appeal opinion as providing a summary of the facts of Mr. Tompkins' case. Of course, this Court's factual recitation in that opinion was gleaned from a trial record that did not contain the exculpatory evidence that had not yet been disclosed by the State and which now serves as the basis of the Mr. Tompkins' attack upon his conviction in the pending appeal.

B. Matters relating to the State's appeal.

As to the matters arising in the State's cross-appeal, the State recitation of the facts overlooks and omits significant procedural and factual matters. Mr. Tompkins filed his Rule 3.850 motion on Monday, April 16, 2001, at 7:35 a.m. (PC-R2. 182).¹ Claim V² of the motion alleged that in another case State v. Holton, collateral counsel had learned that the Hillsborough County State Attorney's Office had a practice of drafting capital sentencing orders on an ex parte

¹ The motion was signed by Todd Scher who was Mr. Tompkins' lead collateral counsel. Martin McClain was also listed as counsel for Mr. Tompkins.

² The claim was identified in the motion as "Claim V" due to a typographical error. It was in fact the fourth claim of the Rule 3.850 motion.

basis in the mid-1980's (PC-R2. 297-99). Mr. Tompkins' Rule 3.850 motion quoted an affidavit from Holton's collateral counsel, Linda McDermott, who stated in pertinent part:

6. Approximately, a few weeks after our initial conversation, the prosecutor again contacted me and informed me that the State had decided to concede error at the penalty phase and would stipulate to a new sentencing proceeding, including a penalty phase hearing before a jury. I was told that the State was conceding error as to Mr. Holton's claim that the State improperly prepared the sentencing order.

7. In the course of our conversation, I was informed that Judge Coe always had the State prepare his sentencing orders.

(PC-R2. 299).³ Accordingly, Mr. Tompkins alleged that Judge Coe followed his standard practice and engaged in ex parte contact during the preparation of the findings in support of a sentence of death in Mr. Tompkins' case. However, Mr. Tompkins asserted he had no basis for asserting this claim until his counsel learned of the State's confession of error in State v. Holton:

Since the basis of this claim is ex parte contact between the State and Judge Coe in the drafting of the findings in support of the death penalty, Mr. Tompkins could not plead this claim until the ex parte contact was revealed.

³ At the time that this resolution of the claim was worked out in Holton, Judge Coe was serving as the elected State Attorney in Hillsborough County and would have been involved in the decision to confess error.

(PC-R2. 302).⁴

On Tuesday, April 17, 2001, at 7:58 a.m., the State filed its Response to Mr. Tompkins Rule 3.850 motion (PC-R2. 350).

As to "Claim V", the State asserted:

The State denies any impropriety in the sentencing procedure employed in this case. The current allegation of error is premised solely on an affidavit from an attorney now employed by CCRC-North, Linda McDermott, asserting that an unidentified prosecutor in a separate case has indicated to McDermott "that Judge Coe always had the State prepare his sentencing orders" (Motion, p. 118). Surely such a vague, unsupported and ambiguous comment cannot compel any further consideration of this claim.

The prosecutor representing the State at the time of the stipulation in State v. Holton, Circuit Court Case No. 86-8931A was Jack Gutman. Mr. Gutman was not with the state attorney's office in 1984 when Tompkins was tried and, for that matter, was still in law school. The stipulation is attached hereto as Ex. A, and clearly there is no indication in the stipulation or in the transcript of the hearing in Holton discussing the stipulation (Ex. B) that this procedure was employed in any other capital case.

⁴ In his Rule 3.850 motion, Mr. Tompkins noted that this Court had denied Holton's challenge to his sentence of death in his direct appeal. See Holton v. State, 573 So.2d 284, 291 (Fla. 1990) ("Holton also claims that the state rather than the trial judge was responsible for preparing the written findings of fact in support of the death penalty. The record, however, does not support this contention."). Thus, Mr. Tompkins alleged that this demonstrated that relief could not be obtain "without the admission by the State that Judge Coe's practice was to have the State ex parte draft the sentencing findings because the Florida Supreme Court said so in Holton v. State." (PC-R2 302 n.61).

There is no allegation anywhere in Tompkins' motion that anyone with personal knowledge of the Tompkins' trial or sentencing can support the assertion that the State prepared the sentencing order in this case. Absent such a contention, there is no basis for an evidentiary hearing.

Tompkins' claim is based on speculation that, because the State prepared the sentencing order in the capital case of Rudolph Holton, tried by Judge Coe after the Tompkins trial, the same impropriety must have occurred herein. Tompkins fails to acknowledge important factual distinctions between Holton and the instant case. For example, the claim for relief in Holton which was agreed to by the state attorney's office was premised on the fact that an unsigned, draft sentencing order had been discovered in the prosecutor's file during postconviction investigation. **No such obvious proof of impropriety has been identified by Tompkins, because no impropriety occurred herein;** this claim is without merit.

(PC-R2. 387-88)(emphasis added).⁵ No where in the State's discussion of "Claim V" did the State assert a lack of diligence on Mr. Tompkins' part (PC-R2. 387-91).

An hour after the State's Response was filed, at 9:00 a.m. on Tuesday, April 17, 2001, the parties appeared before Judge Perry to argue whether an evidentiary hearing was

⁵ Coincidentally, proceedings on the guilt phase issues that remained in Mr. Holton's case were held virtually simultaneous before Judge Perry with the proceedings on Mr. Tompkins' Rule 3.850 motion. A three day evidentiary hearing commenced at 1:00 p.m. on April 18, 2001, in State v. Holton. Mr. McClain was one of the attorneys representing Mr. Holton in those proceedings. See State v. Holton, Case No. SC01-2671.

warranted and/or a stay of execution should issue (T. 134).⁶
Mr. Tompkins' counsel argued that an evidentiary hearing was required on "Claim V". Counsel also noted that based upon the State's response:

At this point in time the State seems to be agreeing that there's nothing in the record that should have alerted Mr. Tompkins collateral counsel, me, in 1989 to this claim.

(T. 164).

During its oral argument in response, the State announced a position completely at odds with the one articulated in the Response filed just an hour earlier:

MS. VOLLRATH: Regarding issue number five, Your Honor, relaying [sic] number four on the sentencing order[,] the State is prepared at this time to say that we will agree to sentencing, to an evidentiary hearing on that issue alone.

(T. 170).

At that point, Mr. Tompkins' counsel expressed concern about "notice" and time to get the necessary witnesses present.⁷ Judge Perry inquired about the availability of witnesses for such an evidentiary hearing. In order to answer

⁶ During the argument on April 17th, Mr. McClain acted as Mr. Tompkins lead counsel due to Mr. Scher's unavailability arising from a simultaneous hearing in another capital case (Greg Mills) under the exigencies of a simultaneous death warrant.

⁷ The case was proceeding under exigencies of a death warrant, with an imminent execution date.

the judge's inquiry, counsel for Mr. Tompkins, who had been surprised by the sudden change in the State's position, explained that he needed to ascertain the scope of evidentiary hearing being proposed and whether the State was raising an diligence argument as to the sentencing order claim:

MR. MCCLAIN: Before you take a recess just also I don't know if the State is not making a diligence argument because that [sic] I have witnesses to the diligence argument if a diligence argument is made in the pleading because I was just made aware and we would need witnesses to that effect.

(T. 171).

After a brief recess, Mr. Tompkins' counsel again asked for delineation of the State's position as to the scope of the evidentiary hearing:

MR. MCCLAIN: Again, Your Honor, hearing this I just need to know if I need to have my diligence witness, key witnesses to dispute diligence [if it] is an issue.

THE COURT: What's your position on that diligence?

MS. VOLLRATH: I'm sorry?

MR. MCCLAIN: I want to have diligence witnesses here so -

MS. VOLLRATH: We are not in a position to state what our position is without having talked to Mr. Hernandez regarding this issue. We don't know if he was aware of any procedures regarding sentencing order of Judge Coe so unless and until we're able to speak with him I can't answer that.

MR. MCCLAIN: Assuming this may have happened?

MS. VOLLRATH: Yes.

MR. MCCLAIN: The judge may have done or had the State draft the sentencing order?

MS. VOLLRATH: He may have, yes.

(T. 173). Thereafter, the evidentiary hearing was scheduled to commence the next day, twenty-four hours later.

The evidentiary hearing commenced at 11:00 a.m. on Wednesday, April 18, 2001. Immediately before the hearing commenced, the State filed its Supplemental Response to Claim V of Motion to Vacate (PC-R2. 413). In this Supplemental Response, the State argued that the claim should be summarily denied:

Tompkins' assertion that his death sentence must be vacated because Judge Coe allegedly delegated the responsibility for the drafting of the sentencing order to the state attorney's office does not compel the granting of collateral relief on the eve of his execution. First of all, this claim could and should have been presented earlier. The record on appeal reflects an entry in the case notes of "Set 10/11/85 for order per judge (told [Assistant State Attorney] Benito yesterday on phone)" (direct appeal at R. 486, postconviction appeal at 480), clearly placing any appellate or collateral counsel on notice as to at least the need to investigate this claim. This is particularly true since the claim was being frequently litigated across the state, and even with regard to the same judge that imposed the sentence herein, at the time of the post-conviction investigation in this case. See Holton v. State, 573 So.2d 284, 291 (Fla. 1990); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Spencer v. State, 615 So.2d 688 (Fla. 1993). Since this claim could have been discovered through due diligence and presented in an earlier proceeding, **it is not properly before**

this court and must be summarily rejected as procedurally barred. Buenoano v. State, 708 So.2d 941 (Fla. 1998).

(PC-R2. 414)(bracketed material in original)(bold print added for emphasis).⁸ Despite the submission of this pleading urging the denial of the claim summarily and without an evidentiary hearing, the only thing ASA Vollrath said at the commencement of the evidentiary hearing was "Judge, I would just like to inform the Court, Mr. Benito is here but he indicated to me he had a conflict at noon so if it would be possible to have his testimony first" (T. 180). The State did not withdraw its concession from the previous day that an

⁸ The case progress notation discussed in the Supplemental Response was not typewritten, but instead a handwritten scrawl appearing in the record with an entry date of "9-20-87" (R. 486). The word that the State interpreted as "Set", commenced with a squiggle that bore more of resemblance to an "L" than an "S". The word that the State interpreted as "for", commenced with the same squiggle bearing more of a resemblance to an "L", though this time the State read it as an "f", not an "S". Thereafter, the letter (or squiggle mark) appears to be followed by the letters "on", although the State interpreted these letters as "or". The reference to "10-11-85" did not correspond to any other date entry. The subsequent entries bore the dates of "10-4-85" and "10-18-85." Moreover, the date appearing on the sentencing order containing the findings purportedly made by the judge bore the date of "this 19th day of September, 1985," on the signature block (R. 681). Since the case progress notes were kept in the court clerk's file, the handwritten entries were presumably made by someone with the clerk's office and not by the judge or his secretary.

evidentiary hearing was warranted, nor did the State even mention the Supplemental Response on the record.

The first witness called was Daniel Hernandez, Mr. Tompkins' trial counsel. Mr. Hernandez testified that he "did not have knowledge" of the sentencing order in Mr. Tompkins' case being prepared by the prosecuting attorney, Mike Benito, on behalf of Judge Coe.

The second witness called was Mike Benito, the trial prosecutor who had handled the 1989 post-conviction proceedings. Mr. Benito testified:

Q. And do you recognize that document?

A. Yes.

Q. What is that?

A. That's the sentencing order signed by Judge Coe.

Q. And how did you go about preparing it?

A. Um, Coe asked me, Coe had his secretary call me after the sentencing phase that he needed an order prepared on Mr. Tompkins' case and I prepared the order based on what I felt Judge Coe - Judge Coe had a habit of limiting me as to what I could argue for aggravating circumstances and in this case as others I tried in front of him he more than likely told me that these are the only aggravating circumstances you can argue. I argued those three.

The jury accepted those three aggravating circumstances and made their recommendation and then Judge Coe asked me to prepare the order and I prepared the order and citing the three aggravating circumstances that Judge Coe let me argue.

Q. And so you drafted that order as it is, correct?

A. No, I couldn't say as is [,] whether Judge Coe after I submitted it to him for his signature [,] whether he made any changes in that order I couldn't tell you. This has been 15 years now.

Q. Was there - - when you drafted the order did you write that in long hand?

A. Did I write the order in long hand?

Q. Did you write the order in long hand and give it to his secretary to type or - -

A. I think I probably would have written it on somewhat in long hand and dictated it.

Q. Okay, and the order was sent to Judge Coe, correct?

A. Correct.

Q. And he signed it?

A. Yes, his signature is on the third page.

Q. Do you recall when Judge Coe signed this?

A. No, I don't.

Q. Okay, if I can have a moment. Mr. Benito, in terms of do you have any drafts or any other handwritten notes you may have done in your possession?

A. No, I don't.

Q. Do you know whether or not those items still exist?

A. I don't think they do.

Q. Okay, and if you would have any kind of draft or anything like that in your file back in

1989, would that be something you would disclose to Mr. Tompkins pursuant to his public records request?

A. I would assume so.

Q. And when is the - - prior to your testimony today have you had discussions with representatives from the state in this case?

A. Yes.

Q. And when is the first time that you alerted them to the fact that you had prepared that sentencing order in this case?

A. I don't know, a few days ago. I didn't alert them, they asked me.

(T. 192-94).

The third witness called at the evidentiary hearing was Martin McClain, Mr. Tompkins' collateral counsel in 1989, and co-counsel at the 2001 proceedings. He testified:

Q. Now in his current 3.850 motion there has been alleged and you're aware in terms of a sentencing order claim?

A. Yes, I am.

Q. And could you explain how it is that, that claim arose.

A. Um, well, currently, I am employed in New York with Legal Aid Society and this past fall I had been in touch with Linda McDermott who is doing the Rudolph Holton case and she asked me if would participate in the Holton hearing which is scheduled to start this afternoon and I had agreed to that that and so I taken some time off in March and April from New York to actually come down and help on the Holton hearing when the death warrant was signed on the Wayne Tompkin's case and I actually, you know, it was on a Saturday, March 31st, I was sitting down

and because it was the same judge on both cases and started comparing things and suddenly discovered in the record that the circumstances of Mr. Tompkins' case was identical to Mr. Holton's case when it came to the proceedings at the penalty stage and the judge sentencing and the sentencing order and I realized the State had confessed error last August in the Holton case as to the sentencing order and so that's when I started the investigation and sort of figured things out.

Q. And did you subsequently speak to Ms. McDermott in terms of what had happened in the Holton case?

A. That Saturday the 31st, March 31st I spoke to Linda McDermott regarding her conversation with Jack Gutman when the State agreed to or confessed to error in the Holton case.

Q. Now prior to that Saturday March 31st and of course your representation of Mr. Tompkins, did you ever have any indication that the prosecutor, Mr. Benito, had prepared the sentencing order at Judge Coe's direction on an ex parte basis?

A. No, I have not.

(T. 200-02).⁹

Sharon Vollrath, the Assistant State Attorney
representing the State in the 2001 proceedings below, was

⁹ Mr. McClain indicated that he was not advised in 1989, by either Mike Benito (who was representing the State), or Judge Coe (who was presiding over the Rule 3.850 proceedings) that they had engaged in ex parte "at the time of Mr. Tompkins' trial" (T. 208). Had such a disclosure been, Mr. McClain indicated he would have immediately "filed a motion to disqualify Judge Coe because he would not be able to preside over the proceeding and I would have filed a claim" (T. 208).

called by Mr. Tompkins as the fourth witness, and she testified:

Q. When were you aware that Mr. Benito had told a representative of the state that he had prepared the sentencing order in this case?

A. Yesterday.

Q. So if he said a couple of days ago that would be he told somebody else?

A. The situation that went down is that after your motion was filed on Monday alleging ground five and we began which was the ground that involved this sentencing order and we began making inquiries. I spoke with Mr. Benito Monday afternoon I believe it may have been Tuesday afternoon the days kind of run together but it was post your filing of your motion.

MR. BROWNE: Your Honor, if I may lodge an objection at this point I think her testimony is largely irrelevant. I don't know where they're trying - -

THE COURT: Where are we going?

MR. SCHER: Judge, essentially I want to establish that their response indicates that in fact this did not occur and now of course we know that has happened and I want to establish for the record when in fact the state knew that in terms of their assertion in here that it did not occur.

THE COURT: Well - -

MR. SCHER: And they were in court yesterday and they never bothered to disclose the fact that it occurred.

THE COURT: Well, I think she testified yesterday or testified today that she found [out] Monday, is that correct, Ms. Vollrath, after the claim [was] filed?

MS. VOLLRATH: After the motion was filed I contacted Mr. Benito. Mr. Benito said, the statement to me that and my inquiry to him was do you know, do you know any recollection whether the State prepared the sentencing order. Mr. Benito said, golly, gee, I really don't recall and then he paused and then he said, if I had to guess I would say that the State prepared the order. Yesterday, the attorney general's office faxed Mr. Benito a copy of the sentencing order after I had spoken with Mr. Benito yesterday morning a second conversation not the first one and then I learned from the attorney general's office yesterday that Mr. Benito had said that he believed that it was his product.

BY MR. SCHER:

Q. And prior to receiving Mr. Tompkins' 3.850 motion I believe it was Monday did you have any reason to believe that this had occurred in Mr. Tompkins' case?

A. I had no reason to believe that.

(T. 211-12)(emphasis added).¹⁰

After Ms. Vollrath's testimony, the parties had no further witnesses to present regarding the sentencing order claim. The parties then submitted oral closing arguments. On behalf of Mr. Tompkins, Mr. McClain argued:

Apparently now the State is trying to maintain that this notation, this progress note, should somehow put us on notice of this claim even though Ms. Vollrath herself testified that prior to the

¹⁰ ASA Vollrath's testimony completely undercut the State's assertion in its Supplemental Response that the cryptic case progress notation "clearly plac[ed] any appellate or collateral counsel on notice" (PC-R2. 414). ASA Vollrath, the assigned post-conviction prosecutor testified that she had "had no reason to believe" that Mike Benito had written the sentencing order.

filing of the 3.850 motion on Monday she had no basis for knowing this had occurred and it was only after the 3.850 was filed that she decided that maybe it was a basis for investigation and certainly if the State is not in a position to know the record and know the basis for that claim, it seems to me that the defense should not be in any different position in reading this. It certainly looks like it's just a routine sort of setting something for hearing contacting the different parties and there's a notation in fact of the hearing that occurred and happened on October 11th, it happened on October 4th.

* * *

Moreover this establishes that, um, Judge Coe should have recused himself back in 1989 from presiding over the 3.850 proceeding that was going on in 1989 and ex parte contact with Mike Benito and **during those proceedings it was myself and Mr. Benito and Judge Coe in the courtroom. I was the only person unaware of that ex parte that had occurred.**

Had I known I would have filed a motion to recuse Judge Coe in which case he would have been required to recuse himself and that tainted the entire proceedings and requires they be done over and Mr. Tompkins be put back in the position he would have been in had the disclosure occurred.

Again as I pointed out yesterday, the Florida Supreme Court made it the State is under an obligation to disclose favorable information to a defendant. In this case it was not disclosed.

If its's favorable it creates a claim for relief and, granted, if it's not we have to find out by happenstance because I happened to be involved in the Holton case and started looking. And now they're even saying that Mr. Gutman didn't say what Ms. McDermott told me he said, that doesn't matter. We now know it has happened.

(T. 214-17)(emphasis added).

In the State's closing argument, Assistant Attorney General Dittmar very briefly asserted that whether there was a

lack of diligence of collateral counsel was something that Judge Perry consider:

There are basically several issues which Your Honor has to consider in determining how to resolve this issue.

The first one is whether or not this could have been discovered earlier through due diligence in time raised for the initial post conviction motion and it's our contention that because of the entry in the case progress notes and because of the case law at the time the post conviction came out this was a claim which Mr. McClain was on notice of and could have explored at the time he was exploring potential issues.

But even if this Court determine that it would not been discovered through due diligence then to raise it at this stage in a successive post conviction motion it has to be considered newly discovered evidence as the Florida Supreme Court said in Card.

(T. 219). Ms. Dittmar never actually stated that Mr. Tompkins' collateral counsel was not diligent.

At the conclusion of the oral arguments, Judge Perry took a brief recess. When he returned, he announced that he was granting relief on the claim:

There are no oral findings by Judge Coe, that show that he independently found any aggravating or mitigating circumstances. And while Mr. Benito may have been aware that Judge Coe would not let him argue certain things there is no, you know, nothing that would indicate to me that the judge ever indicated what the mitigating circumstances were.

It was apparently an ex parte communication I think both the statements by Mr. Benito and his recollection and Mr. Hernandez would indicate that. And I think the law requires that the careful balancing and weighing of those circumstances and

they weren't done in this case. So I think he's entitled to a new sentencing hearing.

(T. 224). Judge Perry indicated his written order would issues within a couple of days.

On April 20, 2001, Judge Perry issued a written order in which he stated:

During the April 17, 2001 hearing, the State conceded that an evidentiary hearing was necessary on this claim. On April 18, 2001, the Court conducted an evidentiary hearing on this claim. Based upon the testimony of the witnesses and the argument of counsel, the Court finds that Defendant is entitled to relief with regard to this claim.

After the evidentiary hearing, the Court finds that the former State Attorney, Mike Benito, admitted to drafting the sentencing order for the Defendant. The Court finds that Mr. Benito drafted the order after being contacted by the judge or the judge's office. Additionally, the Court finds that the sentence of the Defendant was pronounced immediately after the jury had provided its recommendation. (See Transcript of Sentencing, attached).

Florida Statutes require the sentencing judge independently weigh the aggravating and mitigating circumstances. Fla. State 921.141 (1985). It is impermissible for a judge to request that any party draft any sentencing order which requires the weighing of aggravating and mitigating circumstances. See Card v. state, 652 So.2d 344 (Fla. 1995) and Spencer v. State, 615 So.2d 688 (Fla. 1993).

The Court finds that testimony demonstrates that there was an ex parte communication between the sentencing judge and the State in this case. The Court finds that the limitation of argument that the Court imposed for the State in arguing aggravating circumstances is not a sufficient "weighing" by the trial judge. The Court finds that the failure to independently weigh aggravating and mitigating

circumstances in this case entitles Defendant to relief.

(PC-R2. 441-42).

On May 7, 2001, Mr. Tompkins filed for a rehearing of the guilt phase claims that Judge Perry denied (PC-R2. 677). The State did not respond to that motion, nor did it file a rehearing of its own (SPC-R2. 8). On June 12, 2001, Judge Perry heard the parties with reference to Mr. Tompkins' motion for rehearing (SPC-R2. 4). No discussion of the sentencing order claim occurred during that proceeding.

On June 15, 2001, the motion for rehearing was denied. On June 25, 2001, Mr. Tompkins mailed his notice of appeal. On June 27, 2001, Mr. Tompkins filed his Motion to Stay Resentencing Proceedings Pending Appeal. In this motion, he asserted:

Based upon discussions with opposing counsel, Assistant State Attorney Shirley Williams, the State intends on proceeding with Mr. Tompkins' resentencing at this time. Mr. Tompkins' counsel informed the State of his appeal to the Florida Supreme Court regarding the denial of the guilt phase issues arising out of the second Rule 3.850 motion filed during the recent death warrant. The State's position, however, has apparently remained unchanged despite the pending appeal. Thus, in light of the State's position, Mr. Tompkins must request that the resentencing proceedings be stayed pending the appeal he has taken to the Florida Supreme Court.

(PC-R2. 806).

Also filed on June 27, 2001, was Mr. Tompkins Motion to Appear Telephonically (PC-R2. 810). On June 25th Mr. Tompkins counsel had received "via fax a notice of hearing in above-entitled case, setting a 'Case Review" status for the morning of June 28, 2001." The motion to appear telephonically explained Mr. Tompkins' counsel actions after receiving this notice of hearing:

The undersigned contacted opposing counsel, Assistant State Attorney Shirley Williams, about the scope of the hearing, informing her that Mr. Tompkins has appealed the Court's denial of the guilt-phase issues in the case, thus depriving the Court of jurisdiction over the case. The State's position is apparently that Mr. Tompkins' resentencing must proceed notwithstanding the lack of jurisdiction and the pending appeal on the guilt phase issues.

(PC-R2. 810-11).

On June 28, 2001, the parties appeared for a telephonic hearing on the Motion to Stay Resentencing Proceedings Pending Appeal. Mr. Tompkins counsel explained:

Well, Your Honor, I had filed that motion. I received notice of today's hearing from the State and spoke with Ms. Williams and she indicated that the State wanted to proceed with the resentencing despite the fact we have an appeal of the Court's order denying the guilt phase issue and I filed that motion to stay sentencing proceedings.

(SPC-R2. 33). When Judge Perry asked the State for its position, ASA Williams responded:

Judge, my concern that in speaking with the A.G.'s office they're not certain that the 90 day requirement for retrial on the rehearing is toll by, by anything and they're just, Your Honor, uncertain

about that so if we're going to put it off then I would want a waiver of the 90 days requirement for retrial.

(SPC-R2. 33-34). Thereupon, Judge Perry asked Mr. Tompkins' counsel "if there is a problem of the 90 days rule a waiver of time period?" Counsel responded, "No" (SPC-R2 34). Accordingly, Judge Perry granted the motion staying the resentencing (PC-R2. 820).

However on July 6, 2001, the State elected to file a Notice of Cross-Appeal after all.

SUMMARY OF THE ARGUMENTS

In his Initial Brief, Mr. Tompkins set forth his Summary of the Arguments for the four argument raised in support of his appeal. He will not unnecessarily repeat them here. Mr. Tompkins does set forth his summary of his argument as to the issue raised by the State in its cross-appeal.

Mr. Tompkins raised a challenge to the ex parte contact between the State and the his sentencing judge in connection with the preparation of the findings in support of his death sentence as soon as his collateral counsel reasonably learned that the trial prosecutor and the sentencing judge breached their obligations under due process to refrain from ex parte communications. The delay between the misconduct and the

issue being presented in court occurred because of the State and the sentencing judge breached their ethical duties and failed to disclose their misconduct to Mr. Tompkins or his counsel.

The circuit court found that the State on an ex parte basis did prepare the sentencing order that imposed a death sentence upon Mr. Tompkins. In light of the ex parte contact, the circuit concluded that the sentencing judge failed to engage in an independent weighing of the aggravating and mitigating circumstances required under the law to support a sentence of death. The circuit court concluded that under the controlling law, Mr. Tompkins' sentence of death had to be vacated and a re-sentencing order. Competent and substantial evidence supports the circuit court's factual determinations, and the circuit court correctly applied the case law.

REPLY ARGUMENTS

ARGUMENT I

A. STANDARD OF REVIEW.

In his Initial Brief, Mr. Tompkins set forth the set of review of review applicable in Rule 3.850 cases in which a successor motion to vacate has been summarily denied without an evidentiary hearing. In the State's Answer Brief, there is no discussion of the applicable standard of review. The

argument seems to assume that evidentiary development occurred and that deference is due to resolution of evidentiary disputes. However, the law is well settled that "[u]nder rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." Gaskin v. State, 737 So.2d 509, 517 (Fla. 1999); Hamwi v. State, 805 So.2d 101 (Fla 4th DCA 2002).

The rule is the same for a second postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant,¹¹ is that such claims warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." Card v. State, 652 So. 2d 344, 346 (Fla. 1995); Swafford v. State, 679 So.2d 736 (Fla. 1996); Roberts v. State, 678 So.2d 1232 (Fla. 1996); Scott v. State, 657 So.2d 1129 (Fla. 1995).

¹¹In order to raise a claim in a second or successive postconviction motion, the defendant must demonstrate that the facts upon which the claim is predicated were unknown and could not have been discovered through the exercise of due diligence. See Fla. R. Crim. P. 3.850 (b)(1). The Supreme Court has explained that "[d]iligence . . . depends on whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate.... [I]t does not depend . . . upon whether those efforts could have been successful." Williams v. Taylor, 529 U.S. 420, 435 (2000).

Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). The State in its Answer Brief fails to recognize that the factual allegations contained in the motion must be accepted as true. As it did at the Huff hearing, the State continues to challenge the merit of Mr. Tompkins' factual allegations, as well as the issue of diligence, arguing that Mr. Tompkins received an evidentiary hearing in 1989 on Brady and Giglio issues, and thus "[a]ll these claims have previously been raised" and that Mr. Tompkins "could have made these [Chapter 119] requests years ago" (PC-R2. 166).

However, application of the correct standard of review leads to the inescapable conclusion that there is nothing in the record to conclusively refute the fact that the state failed to disclose numerous notes and reports. The newly disclosed notes and reports relate to credibility, impeachment and investigation, all of which would have affected the result.

B. DILIGENCE.

Refusing to accept Mr. Tompkins factual allegation, the State's position is that Mr. Tompkins could have sought the documents pertaining to the Jesse Ladon Albach investigation 1989. However, Mr. Tompkins' motion specifically alleged that all of the police reports and information pled in the motion to vacate had not been disclosed either prior to trial or during his first Rule 3.850 proceedings (PC-R2. 214, 216, 217, 220-27).

Instead of accepting the factual allegations set forth by Mr. Tompkins, the State relies upon a document that was not part of the record, but included with other new attachments appended to the State's Objection to Defendant's Demand for Additional Records. The attachment specifically relied upon in the Answer Brief was a typed public records request dated April 19, 1989, from Mr. Tompkins' collateral counsel with a handwritten notation scrawled across the face of the letter indicating "earlier in the month Paul Harvill copied everything to my knowledge that we have in our office with regard to Wayne Tompkins" (PC-R2. 1010). The State's reliance upon a document that was not previously part of the record amounts to a concession that an evidentiary hearing is required. McClain v. State, 629 So.2d 320 (Fla. 1st DCA 1993)("We consider the state's admitted inability to refute

allegations without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims");

Gholston v. State, 648 So.2d 192 (Fla. 1st DCA 1994)(same).¹²

Moreover, the State conceded in circuit court hearing on Mr. Tompkins' motion for rehearing that "the reports that counsel is referencing are reports regarding Lisa Albock. The Albock reports were not provided in discovery because the case was regarding victim Lisa DeCarr"¹³ (SPC-R2. At 18).

Inexplicable, the State argues that it was under no obligation to disclose the Albach records, because the Albach case was a different case, while alleging that Mr. Tompkins' collateral

¹² The State's reliance on a copy of a public records request that contains a handwritten notation suggesting that there was additional oral contact hardly supports the State's position and does not refute Mr. Tompkins' factual allegation that he was diligent in 1989 in his efforts to obtain all available public records. Obviously, testimony explaining the public records and the handwritten notation is warranted.

¹³ The State seemingly concedes that the police reports in the Jesse Albach files that included statements regarding Lisa DeCarr were suppressed and not disclosed to Mr. Tompkins' trial counsel. Given that these statements include reports from Barbara DeCarr indicating that Lisa was alive and with Jesse Albach in Hyde Park area in July of 1983, four months after the date on she was supposedly murdered (SPC-R2. 59), the reports were favorable to the defense.

counsel failed to ask for the Albach file, and thus was not diligent.¹⁴

In its brief, the State argues that Mr. Tompkins could have sought the documents pertaining to the Jesse Ladon Albach investigation. The State overlooks how the Albach records were received by Mr. Tompkins in 2001. The Lisa DeCarr Tampa Police Department file was commingled with the Albach file. There is no question that Mr. Tompkins was being investigated as a suspect in both cases. Therefore, any request for any and all records pertaining to Mr. Tompkins should have generated the Albach records as well as the DeCarr records.

Mr. Tompkins was, as he alleged, diligent. Mr. Tompkins' set forth in his motion to vacate the April, 2001, comments Det. Burke made to undersigned counsel "that Jessie Albach and Lisa DeCarr were killed by the same individual" (PC-R2. 219). Det. Burke further indicated that "no charges had ever been filed in the Albach case because he just could not prove that Wayne committed that murder" (PC-R2. 219).

The United States Supreme has explained repeated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, 527 U.S. at

¹⁴ In fact, the State's contention is nothing more than a factual allegation that cannot legally refute Mr. Tompkins' allegation that he asked for everything and he was diligent.

280, and that the prosecuting attorney has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler, 527 U.S. at 281. In fact, the Supreme Court found that defense attorneys should be able to presume that prosecutors have complied with their constitutional obligation to disclose favorable evidence:

The presumption, well established by "'tradition and experience,'" "that prosecutors have fully "'discharged their official duties'" United States v. Mezzanatto, 513 U.S. 196, 210 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

Strickler, 527 U.S. at 287.

The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993). "The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones v. State, 709 So.2d 512, 520 (Fla. 1998).

Here, the State did not comply with its obligation to disclose favorable evidence to the defense. Collateral

counsel has been diligent in his efforts to pursue Mr. Tompkins' constitutional claims. However, collateral counsel cannot present claims that the State does not disclose.¹⁵

At a minimum, Mr. Tompkins' factual allegations of diligence warrant an evidentiary hearing.

C. ELEMENTS OF A BRADY VIOLATION.

In Strickler v. Greene, 527 U.S. at, 287-288, the Supreme Court specifically delineated the "three components of a true Brady violation." They are: 1) "The evidence at issue must be favorable to the accused;" 2) "that evidence must have been

¹⁵ With regard to the July 28, 1983 police report authored by Detective Gullo, the State argues that collateral counsel was on notice of Detective Gullo in 1989. That fact that counsel was aware that Detective Gullo had done work in the case, does relieve the State of its obligation to disclose reports that Detective Gullo did that were favorable to the defense. There can be no question that the Brady material that this Court identified in Young v. State, 739 So.2d 553 (Fla. 1999), concerned a witness known to the defense. The same applies to the Brady material in a number of cases. Cardona v. State, ___ So.2d ___ (Fla. July 11, 2002); State v. Huggins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001). Brady violations were nonetheless found because the State failed to disclose statements these witnesses had made that was favorable to the accused. While collateral counsel was obviously aware of Detective Gullo's participation, because in fact counsel had received numerous reports by Gullo, this does not change the fact that collateral counsel never received the July 28, 1983 report regardless of his efforts to obtain every report by Detective Gullo, and that the July 28th report includes information that was very favorable to the defense, i.e. Barbara DeCarr had reported that Lisa DeCarr was alive and living with Jesse Albach in the Hyde Park area.

suppressed by the State, either willfully or inadvertently;" and 3) "prejudice must have ensued."

1. Favorable and undisclosed.

The police reports that were identified in Mr. Tompkins Rule 3.850 motion and in his Initial Brief were clearly not disclosed to trial counsel as the State admitted in proceedings below on Mr. Tompkins' motion for rehearing. Even the contention in its brief before this Court that police reports were in the Jesse Albach file, is a concession that the reports were undisclosed. In any event, Mr. Tompkins' factual allegation that the reports in question were not disclosed must at this juncture be accepted as true.

With regard to the June 8, 1984 police report, the State wants to ignore the favorable evidence contained therein and instead focus on the portion of the report detailing Maureen Sweeney's claim that Mr. Tompkins raped her. However, the State neglects to point out that Mr. Tompkins was never charged with raping Maureen Sweeney. Besides focusing on an allegation that law enforcement ultimately discarded, the State asserts that statements regarding what Maureen Sweeney and Mike Willis reported regarding what they heard about the circumstances of Lisa's disappearance would be inadmissible hearsay. First, the report indicates that the information

reported from Sweeney and Willis was gained from Barbara DeCarr and Mr. Tompkins. Second, the information includes an account of how Lisa's brother, Billy tried to find her after she stormed out of the house and disappeared. Third, the information provides information on where Junior Davis lived and describes his efforts to look for Lisa, suggesting that he may be an important witness to contact, and providing clues on how to find him.

Moreover, this Court has specifically held:

withheld information, even if not itself admissible, can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence. [Citations omitted] While the actual police reports may not be admitted as substantive evidence, they can still serve as the basis for Rogers' Brady claim to the extent he could have investigated and used the information contained in the reports.

Rogers v. State, 782 So.2d at 383 n. 11.

Further in Kyles v. Whitley, the United States Supreme Court recognized that evidence that impeached the police investigation could establish a Brady violation:

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. . . . [the evidence's] disclosure would have revealed a remarkably uncritical attitude on the part of the police.

* * *

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.

514 U.S. 419, 445-6. (citations omitted).

Here, the undisclosed evidence would have not only been of value just on its face, but the synergistic effect of the nondisclosures considered together would have exposed law enforcement's investigation techniques to substantial attack and the results of that investigation as unreliable.

2. Prejudice.

As to the finally component of "a true Brady violation," prejudice is present when "the cumulative effect of the suppression of the materials [] undermines confidence in the outcome of the trial." Rogers v. State, 782 So.2d 373 (Fla. 2001). As the United States Supreme Court explained in Kyles v. Whitley, 514 U.S. at 436, "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, **not item by item.**" (emphasis added).

The State asserts that no newly discovered evidence would entitle Mr. Tompkins to relief, because "nothing changes the fact that appellant assaulted and killed Lisa DeCarr and buried her under the house" (Answer Brief of Appellee at 19). Seemingly, the State is asserting that it does not matter how it goes about getting a conviction, whether it be through perjured testimony or presentation of false information.¹⁶ Kathy Stevens was the only direct witness to the events of March 23, 1983, the day of Lisa DeCarr's disappearance, and Kenneth Turco was the only source of a confession by Mr. Tompkins. Any information which tends to impeach their testimony and credibility is material.

¹⁶ The United States Supreme Court in Kyles v. Whitley 514 U.S. at 435-6 cautioned that in showing materiality, petitioners:

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 an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

The State fails to see the significance of lead sheets indicating police contact with Junior Davis.¹⁷ Whether or not the police spoke to Junior Davis, who was Lisa's boyfriend, is relevant to verifying or discrediting Kathy Stevens account of the events of March 23, 1983. Had Kathy Stevens actually spoken to Junior Davis on March 23, 1984 as she indicated in her trial testimony, Junior Davis would have reported the information to the police.

In State v. Huggins, 788 So.2d 238, 244 (Fla. 2001), this Court analyzed a Brady claim and stated:

The State presented a purely circumstantial case against Huggins. As Angel was its key prosecutorial witness who established crucial details in the State's theory of the case, her credibility was critical.

Likewise, here the undisclosed impeachment evidence of Kathy Stevens was extremely important given her role in obtaining the conviction.

Finally, the State does not address Mr. Tompkins' claim regarding the trial court's failure to conduct a cumulative analysis of the evidence turned over for the first time in 2001 in conjunction with his previous Brady claims. Rather, the State discards the previously asserted newly discovered

¹⁷ The State seems to think that Mr. Tompkins is suggesting that Junior Davis was a possible suspect. This is incorrect.

evidence claims on the basis that the claims have already been ruled on. Either, the State does not understand the requirement of conducting a cumulative analysis or cannot assert any cases to the contrary.

The issue for this Court is not whether this Court is convinced by the undisclosed information, but whether the cumulative effect of the nondisclosures casts the case in a new light undermining in the reliability of the outcome of proceeding where the defense didn't have access to the undisclosed exculpatory information. See Light v. State, 796 So. 2d 610, 617 (Fla. 2nd DCA 2001) ("the judge is not examining simple whether he or she believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such a reasonable jury may have believed it").

In reviewing the materiality of the nondisclosures, this Court must review the net effect of the suppressed evidence and determine "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000). Further, "[i]n applying these elements, the evidence must be considered in the context of the entire record." Occhicone v. State, 768 So. 2d at 1041.

When that is done, this Court must conclude that an evidentiary hearing is required.

ARGUMENT II

The State continues to argue that Mr. Tompkins' request for DNA testing is untimely and therefore procedurally barred. As Mr. Tompkins pointed out in his initial brief, both the State and the trial court have confused newly discovered evidence with newly developed technology. Furthermore, the State continues to argue a procedural bar under Ziegler v. State, 654 So. 2d 1162 (Fla. 1995). However, the State's assertions of untimeliness are now moot given the enactment of Fla. Stat. §925.11 (2001) as well as this Court's adoption of Fla. R. Crim. P. 3.853 to allow DNA testing upon request. Therefore, the pivotal issue becomes whether mitochondrial DNA testing would prove or disprove any material issues in the case.

Mr. Tompkins has repeatedly argued that the identity of the victim is not the only issue to be resolved by DNA testing. Obviously, if the DNA testing of the bone, hair or other organic material established that the decedent was not Lisa DeCarr, Mr. Tompkins would be exonerated. But, if DNA from someone other than Wayne Tompkins was found present along with material possessing the DNA of Lisa DeCarr, that would

identify an assailant other than Wayne Tompkins and would exonerate him as well. The State and the trial court have only focused on the identity of the victim.

The trial court, in a conclusory statement, determined that DNA testing would not determine Mr. Tompkins' innocence because due to the location of the body, any evidence would be contaminated. The trial court cited no causes for contamination and ignored the fact that the Tampa Police Department sent evidence to the FBI Lab for testing.

According to the FBI Lab report, several hairs discovered with DeCarr's body and forwarded for a comparison "are suitable for possible future comparison" (PC-R2. 32). Evidently the FBI did not see a contamination issue.

Relying on the trial court's determination that the evidence from the victim's body was contaminated, the State cites this Court's recent decision in King v. State, 808 So. 2d 1237 (Fla. 2002). Although the State believes the contamination aspect in King is the same as in Mr. Tompkins case, this is clearly not so. There, numerous rescue workers and law enforcement were active at the scene. In Mr. Tompkins case, due to the fact that the body was found in a very small crawl space under the house, a very limited number of law enforcement officers actually had access to the body at the

scene. Based on the reports and testimony of Florida Law Enforcement agents, the excavation of the body was meticulous and time consuming. Additionally, there is no evidence of how the body got under the house. Unlike in King, where it was evident that the victim crawled through the house and was then dragged from the house by rescue workers, in Mr. Tompkins case the body could have been carried to its location, lessening the possibility of contamination. Finally, in King the hair in question was too small a fragment for any comparison or determination of origin. That is not the case here, where the FBI has reported that the hair samples are suitable for future comparison.

Moreover, the new statute had not yet been passed when Mr. Tompkins' request was pending before the circuit court. The court rule was not in effect. Mr. Tompkins had no basis to know what showing he would have to make under those provisions to obtain DNA testing. If this Court were to determine that Mr. Tompkins' showing in support of DNA testing were in some way inadequate, this Court should nonetheless remand to permit Mr. Tompkins' an opportunity to make the requisite showing

ARGUMENT III

Both the State and the trial court assert that Mr. Tompkins failed to present any evidence of bad faith which would entitle him to relief on this issue. Mr. Tompkins has detailed the actions of the State which constitute bad faith. The State has made numerous misleading statements to the court and to the Governor's office regarding the existence of testable evidence. Detective Black's testimony established that his name and PIN number were forged by some unknown person. Based on the misrepresentations and testimony of Detective Black and Sharon Vollrath, it is clear that the State and the Tampa Police Department have failed to adequately preserve crucial evidence from a capital trial, particularly in a case in which the State has been aware of ongoing postconviction proceedings since 1989. Not only has the State been aware and participated in the postconviction proceedings, the State is aware that Mr. Tompkins has continually asserted his innocence and disputed the identity of the victim.

The State attempts to paint its actions regarding the missing evidence as diligent and helpful, when their actions were anything but helpful. From the onset of the 2001 postconviction proceedings, the State has prevented Mr. Tompkins from inspecting the evidence and has misled the trial

court. While the State indicates that it volunteered the information that the evidence was missing at the April 11, 2001 hearing, it did not volunteer any information until after the court had already ruled on the motion for DNA testing. Like wise, the State did not accurately represent what was written on the property logs, and failed to be concerned about the forged name and PIN on the property logs. The Tampa Police Department refused to allow access to evidence in their possession, denying that there was any evidence still at the police department, yet counsel for the police department viewed the evidence the same day Mr. Tompkins was told it didn't exist. In its response, the State has failed to address any of these individual claims of bad faith. The State only makes guesses as to what has happened to the evidence and cannot point to any destruction order or established destruction procedure which would legitimize the fact that the evidence allegedly no longer exists.

Furthermore, the State suggests that Mr. Tompkins is acknowledging that he cannot meet the bad faith requirement of Arizona v. Youngblood, 488 U.S. 51 (1988). This is not accurate. Mr Tompkins asserts he has shown bad faith on the State's part in preserving crucial physical evidence. Mr. Tompkins only urges in the alternative that this Court

reconsider its employ of the Youngblood standard in light of advances in scientific testing and the evolving law pertaining to the availability of DNA testing.

APPELLEE/CROSS APPELLANT'S APPEAL

ARGUMENT V¹⁸

A. Standard of review.

In its cross-appeal, the State argues that Mr. Tompkins should not have been granted a new sentencing hearing. In its argument, the State never identifies the applicable standard of review as to the portion of the circuit court's order vacating Mr. Tompkins' sentence of death. See Rule 9.210(b)(5), Fla. R. App. Pro. The applicable standard of review for factual resolutions of Rule 3.850 claims following an evidentiary hearing requires that deference be afforded the circuit court's determinations:

We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based upon competent, substantial evidence is an important principle of appellate review. In many instances, the trial court is in a superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses." Shaw v. Shaw,

¹⁸ In the Answer Brief of Appellee/Cross-Appellant, this is delineated as Issue V.

334 So.2d 13, 16 (Fla. 1976) When sitting as the trier of fact, the trial judge has the "superior vantage point to see and hear the witnesses and judge their credibility." Guzman v. State, 721 So.2d 1155 (Fla. 1998), cert. denied, 119 S.Ct. (1999). Appellate courts do not have this same opportunity.

Stephens v. State, 748 So.2d 1028, 1034 (Fla. 1999).

When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. Johnson v. State, 660 So.2d 637 (Fla. 1995), cert. denied, 116 S.Ct. 1550 (1996). Under that standard, we will not alter a trial court's factual findings if the record contains competent, substantial evidence to support those findings.

Steinhorst v. State, 695 So.2d 1245, 1248 (Fla. 1997). See State v. Mills, 788 So.2d 249 (Fla. 2001); State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000).

Here, the State stipulated that an evidentiary hearing was required to resolve Mr. Tompkins' claim that the State drafted sentencing order as a result of undisclosed ex parte contact with Judge Coe (T. 170).¹⁹ An evidentiary hearing was

¹⁹ Its written Response and Supplemental Response notwithstanding, the State orally conceded that an evidentiary hearing was warranted. During her testimony, ASA Vollrath explained that she was unaware that the sentencing order had been written by the State until after the Rule 3.850 motion was filed on April 16, 2001, and the trial prosecutor had been provided an opportunity to refresh his recollection and recalled that he wrote the order. In her testimony, ASA Vollrath acknowledged that in fact, "I did not participate in the drafting of that response, but the attorney general's office drafted that response" (T. 210).

conducted in order to permit proper resolution of the factual issues raised by Mr. Tompkins' claim. Following the presentation of live witnesses, Judge Perry made factual determinations and granted Rule 3.850 sentencing relief. This Court must defer to those determinations.

B. Judge Perry's Factual Determinations.

Judge Perry announced that he was granting relief on the claim by stating:

There are no oral findings by Judge Coe, that show that he independently found any aggravating or mitigating circumstances. And while Mr. Benito may have been aware that Judge Coe would not let him argue certain things there is no, you know, nothing that would indicate to me that the judge ever indicated what the mitigating circumstances were.

It was apparently an ex parte communication I think both the statements by Mr. Benito and his recollection and Mr. Hernandez would indicate that. And I think the law requires that the careful balancing and weighing of those circumstances and they weren't done in this case. So I think he's entitled to a new sentencing hearing.

(T. 224). Judge Perry indicated a written order would issues within a couple of days. Two days later, the written order issued, and it stated:

During the April 17, 2001 hearing, the State conceded that an evidentiary hearing was necessary on this claim. On April 18, 2001, the Court conducted an evidentiary hearing on this claim. Based upon the testimony of the witnesses and the argument of counsel, the Court finds that Defendant is entitled to relief with regard to this claim.

After the evidentiary hearing, the Court finds that the former State Attorney, Mike Benito, admitted to drafting the sentencing order for the Defendant. The Court finds that Mr. Benito drafted the order after being contacted by the judge or the judge's office. Additionally, the Court finds that the sentence of the Defendant was pronounced immediately after the jury had provided its recommendation. (See Transcript of Sentencing, attached).

Florida Statutes require the sentencing judge independently weigh the aggravating and mitigating circumstances. Fla. State 921.141 (1985). It is impermissible for a judge to request that any party draft any sentencing order which requires the weighing of aggravating and mitigating circumstances. See Card v. state, 652 So.2d 344 (Fla. 1995) and Spencer v. State, 615 So.2d 688 (Fla. 1993).

The Court finds that testimony demonstrates that there was an ex parte communication between the sentencing judge and the State in this case. The Court finds that the limitation of argument that the Court imposed for the State in arguing aggravating circumstances is not a sufficient "weighing" by the trial judge. The Court finds that the failure to independently weigh aggravating and mitigating circumstances in this case entitles Defendant to relief.

(PC-R2. 441-42).

Nowhere in its brief does the State set forth the factual determinations made by Judge Perry and then apply the appropriate standard of review to those findings.

C. The State's Diligence Argument.

The State asserts, "[s]ince the claim could have been discovered through the exercise of due diligence, it is not proper to present [it] in a successive motion for post-

conviction relief." Answer Brief at 46. This argument is premised upon the contention that "there was sufficient information for collateral counsel to pursue leads and discover the information now urged." Answer Brief at 48.

However, the question of whether collateral counsel had "sufficient information" "to pursue leads and discover the information now urged" is a factual one. Proper resolution of this issue requires consideration of the testimony of the witnesses at the evidentiary hearing. Judge Perry heard those witnesses testify live. After hearing the testimony and listening to the arguments of counsel, including the State's tepid request that he consider "whether or not this could have been discovered earlier through due diligence" (T. 219), Judge Perry found in favor of Mr. Tompkins.

1. Evidence regarding collateral counsel's conduct.

In its brief, the State argues that Mr. Tompkins did not exercise diligence in discovering the fact that the trial court engaged in ex parte communications with the State regarding the drafting of the sentencing order. The State points to an entry in the case progress notes and collateral counsel's knowledge of litigation of this type of issue in other cases in which Judge Coe presided to suggest that Mr. Tompkins' counsel did not exercise due diligence.

The entry in the progress notes on which the State relies reflects the following: "set 10/11/85 for order per judge (told [assistant state attorney] Benito yesterday on phone)" (PC-R1. 480). According to the State, this entry all by itself should have alerted collateral counsel to the ex parte contact and prompted investigation. However, Martin McClain, Mr. Tompkins' collateral counsel, testified that the entry was at best ambiguous reflecting that something had been set for October 11, 1985, and that the clerk's office notified ASA Benito (PC-R2. 203). Mr. McClain pointed out that such a communication between the clerk's office and a party was ministerial and common, that it did not indicate that an improper ex parte communication had occurred. Therefore, counsel had no reason to suspect improper conduct that violated the well-established rules against ex parte communication.

The reasonableness of collateral counsel's explanation is borne out by the testimony of ASA Vollrath, testimony completely ignored by the State in its brief. Ms. Vollrath was representing the State in the 2001 proceedings below, and was called as Mr. Tompkins' fourth witness. She testified as follows:

Q. When were you aware that Mr. Benito had told a representative of the state that he had prepared the sentencing order in this case?

A. Yesterday.

Q. So if he said a couple of days ago that would be he told somebody else?

A. The situation that went down is that after your motion was filed on Monday alleging ground five and we began which was the ground that involved this sentencing order and we began making inquiries. I spoke with Mr. Benito Monday afternoon I believe it may have been Tuesday afternoon the days kind of run together but it was post your filing of your motion.

[Objection omitted]

MS. VOLLRATH: After the motion was filed I contacted Mr. Benito. Mr. Benito said, the statement to me that and my inquiry to him was do you know, do you know any recollection whether the State prepared the sentencing order. Mr. Benito said, golly, gee, I really don't recall and then he paused and then he said, if I had to guess I would say that the State prepared the order. Yesterday, the attorney general's office faxed Mr. Benito a copy of the sentencing order after I had spoken with Mr. Benito yesterday morning a second conversation not the first one and then I learned from the attorney general's office yesterday that Mr. Benito had said that he believed that it was his product.

BY MR. SCHER:

Q. And prior to receiving Mr. Tompkins' 3.850 motion I believe it was Monday did you have any reason to believe that this had occurred in Mr. Tompkins' case?

A. I had no reason to believe that.

(T. 211-12)(emphasis added). This testimony completely negated any argument that the cryptic case progress notation

"clearly plac[ed] any appellate or collateral counsel on notice" (PC-R2. 414). ASA Vollrath, the assigned post-conviction prosecutor testified that she had "had no reason to believe" that Mike Benito had written the sentencing order.

In collateral counsel's closing argument before Judge Perry, he specifically relied upon ASA Vollrath's testimony as disposing of the State's argument that the case progress note should have alerted counsel to the claim. Since it did not alert the assigned prosecutor to the claim, collateral counsel argued the defense should not be held to higher standard and to have divine that improper ex parte occurred from such a cryptic notation:

And certainly if the State is not in a position to know the record and know the basis for that claim, it seems to me that the defense should not be in any different position in reading this.

(T. 215).

With regard to the State's assertion that Mr. McClain, the 1989 collateral counsel, had knowledge of Nibert v. State, 508 So. 2d 1 (Fla. 1987) and Holton v. State, 573 So. 2d 284 (Fla. 1990), and that therefore, should have known that Judge Coe was delegating the drafting of the sentencing orders. Answer Brief at 48 ("both [cases] involved Judge Coe and the issue of his delegating the drafting of the sentencing order"). The State neglects to report that Mr. McClain

testified that he was quite aware of the actual holding by this Court in those cases and that the holdings did not provide a basis for believing that Judge Coe had ever requested the State to draft the sentencing order via ex parte communication.

Mr. McClain's explained that in Holton this Court had specifically stated that there was no evidence of ex parte communication contained in the record (PC-R2. 206-7). In fact, this Court had explained, "Holton also claims that the state rather than the trial judge was responsible for preparing the written findings of fact in support of the death penalty. The record, however, does not support this contention." Holton at 291. The issue in Holton was not one of ex parte communication, but rather whether the court's written findings imposing the death sentence were prepared by the State. The Court concluded that record did not support such a contention. Holton.

In Nibert v. State, 508 So. 2d 1, 3-4 (Fla. 1987), the relevant issue was the State's drafting of the sentencing order after the court "conducted the weighing process necessary to satisfy the requirements of section 921.141, Florida Statutes (1985)." While addressing that issue, this Court observed "that defense counsel did not object when the

court instructed the state attorney to reduce his findings to writing." Nibert, 508 So.2d at 4. Clearly, there was no ex parte communication. Neither case found any ex parte contact had occurred. In neither case did this Court grant sentencing relief on this issue,²⁰ therefore Mr. Tompkins was not on notice of any impropriety by Judge Coe. In fact, the two opinions would suggest that no ex parte contact had occurred between Judge Coe and the State.²¹

There was evidence supporting Mr. Tompkins' position that collateral counsel was diligent. Steinhorst. Clearly, there was competent and substantial evidence to support a determination that collateral counsel was diligent. Judge Perry's factual resolution is amply supported by competent, substantial evidence. **2. Neither the State nor Judge Coe disclosed the evidence.**

The State's argument completely the fact that neither the trial prosecutor, Mike Benito, nor Judge Coe disclosed the ex parte communication they shared. Mr. McClain testified, it is

²⁰ In Nibert, a resentencing was ordered, but on other grounds.

²¹ It was when the State stipulated to sentencing relief in 2001 in Rudolph Holton's case, that counsel learned that contrary to the opinions in Nibert and Holton, Judge Coe had a standard practice of directing the State through ex parte contact to write capital sentencing orders.

not collateral counsel's duty to assume that judges and prosecutors violate their ethical obligations (PC-R2. 207). See Porter v. Singletary, 49 F. 2d 1483 (11th Cir. Ct. App. 1995). The fact is that both Judge Coe and Assistant State Attorney Benito had an ethical obligation to disclose the improper ex parte communication regarding the drafting of the sentencing order. See Strickler v. Greene, 119 S.Ct. At 1949 ("the non-disclosure and the open file policy -- are both fairly characterized as conduct attributable to the State that impeded trial counsel's access to factual basis for making a Brady claim."). Neither the State, nor Judge Coe ever notified Mr. Tompkins' counsel that Judge Coe's standard practice was to have the State prepare the findings in support of the death sentence.

This Court has held in a capital post-conviction proceeding that, "the State is obligated to disclose any document in its possession which is exculpatory. This obligation exists regardless of whether a particular document is work product or exempt from chapter 119 discovery." Johnson (Terrell) v. Butterworth, 713 So. 2d 985, 986 (Fla. 1998)(citations omitted). In Johnson, the Court found that the State's obligation to disclose favorable evidence was not extinguished by either a conviction or a sentence of death.

It makes no difference that a capital defendant is litigating his case in post-conviction, "the State is under a continuing obligation to disclose any exculpatory evidence." Id. at 987; see also Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996)(finding that Brady obligation continues in post-conviction).

This obligation arises under Brady v. Maryland, 373 U.S. 83 (1963). As this Court recently explained, "Under Brady, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment. See Brady, 373 U.S. at 86 (suppression of confession is violation Fourteenth Amendment)." Rogers v. State, 782 So.2d 373, 376 (Fla. 2001). Similarly, the United States Supreme Court made clear in Kyles v. Whitley, 514 U.S. 419 (1995), that due process requires the prosecutor to fulfill his obligation of knowing what material, favorable and exculpatory evidence is in the State's possession and disclosing that evidence to defense counsel:

Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Kyles, 514 U.S. at 439. See Strickler v. Greene, 527 U.S. 263 (1999). In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf." Kyles, 514 U.S. at 437; Rogers v. State.

In Strickler v. Greene, the United States Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." 527 U.S. 263, 281 (1999), quoting Berger v. United States, 295 U.S. 78, 88 (1935). The Court also repeated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, 527 U.S. at 280, and that the prosecuting attorney has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Strickler, 527 U.S. at 281. The Supreme Court concluded that defense attorneys should be able to presume that prosecutors have complied with their constitutional obligation to disclose favorable evidence:

The presumption, well established by "'tradition and experience,'" "that prosecutors have fully "'discharged their official duties'" United States v. Mezzanatto, 513 U.S. 196, 210 (1995), is inconsistent with the novel suggestion that conscientious defense counsel have a procedural

obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.

Strickler, 527 U.S. at 287.

Here, the State did not comply with its obligation to disclose favorable evidence to the defense. Had either the State or Judge Coe disclosed the fact that the sentencing order had been written by State and provided to the judge on an ex parte basis, Mr. Tompkins' counsel would presented the claim and sought to disqualify Judge Coe from the 1989 proceedings:

Moreover this establishes that, um, Judge Coe should have recused himself back in 1989 from presiding over the 3.850 proceeding that was going on in 1989 and ex parte contact with Mike Benito and **during those proceedings it was myself and Mr. Benito and Judge Coe in the courtroom. I was the only person unaware of that ex parte that had occurred.**

Had I known I would have filed a motion to recuse Judge Coe in which case he would have been required to recuse himself and that tainted the entire proceedings and requires they be done over and Mr. Tompkins be put back in the position he would have been in had the disclosure occurred.

(T. 216-17)(emphasis added).

3. Conclusion as to Diligence.

In State v. Holton, Cir. Ct. No. 86-8931A (13th Jud. Cir., Hillsborough County), the State confessed error had occurred when it authored the findings in support of the death sentence without the defense's knowledge. On August 3, 2000, the State

entered into a joint stipulation with Mr. Holton that sentencing relief was required. At Mr. Tompkins evidentiary hearing, Mr. McClain detailed how and when he came about this new information:

Um, well, currently I am employed in New York with the Legal Aid Society and this past fall I had been in touch with Linda McDermott who is doing the Rudolph Holton case and she had asked me if I would participate in the Holton hearing which is scheduled to start this afternoon and I had agreed to do that and so I had taken some time off in March and April from New York to actually come down and help on the Holton hearing when the death warrant was signed on the Wayne Tompkins' case and so actually, you know, it was on Saturday March 31st I was sitting down and because it was the same judge on both cases and started comparing things and suddenly discovered in the record that the circumstances of Mr. Tompkins' case was identical to Mr. Holton's case when it came to the proceedings at the penalty stage and the judge sentencing and the sentencing order and I realized that the State had confessed error last August in the Holton case as to the sentencing order and so that's when I started investigation and sort of figured things out.

(PC-R2. 201).

In Mr. Holton's case, the presiding judge was Judge Coe, the same judge who presided at Mr. Tompkins trial. In Holton's case, Judge Coe immediately imposed a sentence of death as soon as the jury returned the death recommendation. In Mr. Tompkins' case, Judge Coe followed the same procedure (R. 457-58). In Mr. Holton's case, the findings in support of the death sentence were not read at the time of the sentencing

and were not filed with the clerk until six weeks later. In Mr. Tompkins' case, Judge Coe followed the same procedure; the findings in support of the death sentence were filed with the clerk four weeks after the death sentence was announced (R. 678). And in fact, even though Mike Benito had prosecuted Mr. Tompkins' case, Joe Episcopo appeared as the State's representative at the hearing on Mr. Tompkins' motion for a new trial on October 4, 1985. This was two weeks before the clerk's office filed the findings in support of the death sentence. Mr. Episcopo's involvement is significant because he was the prosecutor who handled Mr. Holton's case.

Aware of that relief had been stipulated to in Holton because of his own involvement in that case, Mr. McClain launched a timely investigation of the Tompkins' record. He confirmed his understanding of the State's position in Holton with Linda McDermott:

That Saturday the 31st, March 31st [2001] I spoke with Linda McDermott regarding her conversation with Jack Gutman when the State agreed to or confessed error in the Holton case.

(PC-R2. 201-2).

Other than the one statement to Ms. McDermott, the State never advised Mr. Tompkins' counsel that Judge Coe's standard practice was to have the State prepare the findings in support of the death sentence. See Strickler, 119 S.Ct at 1951.

Since the basis of this claim is ex parte contact between the State and Judge Coe in the drafting of the findings in support of the death penalty, Mr. Tompkins could not plead this claim until the ex parte contact was revealed. Undersigned counsel learned of Linda McDermott's conversation with the prosecutor in Holton through happenstance. However, having learned that the State confessed error on the claim in Holton because of Judge Coe's standard practice, counsel immediately and timely raised the issue on behalf of Mr. Tompkins. Mr. Tompkins and his counsel exercised due diligence.

D. State Concedes Ex Parte Contact Occurred And Was Improper.

The State concedes that the record below supports a finding that there was an ex parte contact between Judge Coe and Prosecutor Benito. The State even acknowledges that the procedure conducted by Judge Coe was wrong, "It is clearly inconsistent with what is now understood to be the proper manner of preparing sentencing orders, as explained in cases such as Card v. State, 625 So. 2d 344 (Fla. 1995), Spencer v. State, 615 So. 2d 688 (Fla. 1993) and State v. Reichman, 777 So.2d 342 (Fla. 2000)." Answer Brief at 50.

The State suggests that "we must temper today's condemnation" of the ex parte communication "with the

acknowledgment that Tompkins' trial occurred seventeen years ago in 1985." Answer Brief at 50. This suggestion overlooks that fact that ex parte communication had been improper in 1985 and has been ruled improper throughout the intervening years. This Court while reprimanding a judge for engaging in improper ex parte communication in 1985 stated:

Except under limited circumstances, no party should be allowed the advantage of presenting matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: Clayton, 504 So.2d 394, 395 (Fla. 1987).

In Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990), during a jury trial in a criminal case, the presiding judge called an Assistant Attorney General in order to discuss the proceedings ex parte. On appeal, the 1st DCA held:

Ex parte communication between a trial judge and assistant attorney general concerning a pending criminal case is totally inappropriate and will mandate reversal if: 1) The defense has requested that the trial judge recuse himself or has requested a mistrial which is denied; 2) where the defendant can demonstrate that there was prejudice as a result of the improper communication; **or 3) the judge is sitting as the trier of fact.**

Love, 569 So.2d at 810 (emphasis added).

Moreover, the State stipulated that Rudolph Holton was entitled to a re-sentencing because the State on an ex parte basis prepared the sentencing order for Judge Coe's signature. The confession of error in State v. Holton concerned a sentencing proceeding in 1986, one year after Mr. Tompkins death sentence was imposed. Surely to draw a line as the State proposes between the actions of the State and Judge Coe in 1985 and the same actions in 1986, could only be described as arbitrary and capricious, and violative of the Eighth Amendment.

E. State Contests Judge Perry's Factual Finding That Independent Weighing Did Not Occur.

The State also argues that the ex parte contact was remedied because Judge Coe did conduct an independent weighing of aggravating and mitigating circumstances contrary to the specific findings of Judge Perry. However, not one single witness testified that Judge Coe conducted an independent weighing after receiving on an ex parte basis the State's proposed findings of fact in support of the death sentence. Moreover, Judge Perry specifically found that there was a "failure to independently weigh aggravating and mitigating circumstances" (PC-R2. 442).

This very specific factual determination is supported by competent and substantial evidence. Mr. Benito testified that

after Judge Coe had imposed the death sentence, Mr. Benito was contacted ex parte and asked to write the findings in support of the death sentence and submit them to Judge Coe. Without any direction other than his memory of what aggravating circumstances he had been permitted to argue at the charge conference, Mr. Benito drafted the findings and submitted them to Judge Coe.

The error entitling Mr. Tompkins to sentencing relief arises from the ex parte contact delegating the duty of weighing the aggravating and mitigating circumstances. This Court held in Spencer v. State, 615 So. 2d 688 (Fla. 1993) that:

It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role. This Court has stated that there is nothing 'more dangerous and destructive than a one-sided communication between a judge and a single litigant.' Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992).

Spencer, 615 So. 2d at 691. In State v. Reichman, this Court further explained:

In Spencer, we reversed the defendant's conviction and remanded based on reversible error occurring in both the jury selection process and the sentencing portion of the penalty phase. Our decision was predicated in part on the trial judge's error of formulating his decision prior to giving the

defendant an opportunity to be heard and in part on an improper ex parte communication. n13.

n13 The State argues that Spencer does not apply to this case because in Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994), we held that our decision in Spencer, as far as it pertained to the procedure to be followed by the trial judges (i.e., giving defendants an opportunity to be heard before formulating the sentencing decision), was a change in procedure and should not be applied retroactively. However, it is clear that our bar on retroactive application as discussed in Armstrong does not apply to the portion of the opinion dealing with ex parte communication.

Reichman, 777 So. 2d 342, 352 (Fla. 2000).

In State v. Riechmann, this Court recognized that when a State's representative drafted the findings in support of a death sentence on an ex parte basis, two legal principles were implicated. First, Florida law requires the sentencing judge to independently weigh the aggravating and mitigating circumstances. Section 921.141, Fla. Stat. (1985).²² Second,

²² The statute requires the following:

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH -- Notwithstanding the recommendation of a majority of the jury, **the court**, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing **its** findings upon which the sentence is based as to the facts:

(a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating

Florida law precludes ex parte communications concerning a pending matter. Canon 3B (7) of Florida's Code of Judicial Conduct.²³ In Riechmann, the Florida Supreme Court affirmed

circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082

(Fla. Stat. 921.141(3))(emphasis added). From this language, it is clear that the sentencing court alone is to perform the weighing of the aggravating and mitigating circumstances before making **its** findings regarding the imposition of a death sentence.

²³ Canon 3B (7) of Florida's Code of Judicial Conduct states:

A judge should accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communications, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex

the finding that reversible error occurred when Judge Solomon had the State draft the findings in support of a death sentence on an ex parte basis:

In the present case, the trial court's order reflects that the evidentiary hearing judge considered these factors in concluding that Riechmann was denied an independent weighing of the aggravating and mitigating circumstances. Specifically, the judge found: "Unlike the cases distinguished in Patterson, the record contains no oral findings independently made by the trial judge, which satisfies the weighing process required by Section 921.141(3), nor did defense counsel know that the State had prepared a sentencing order to which he failed to object." Order at 50. The record supports the trial judge's findings.

In this case, there is no evidence in the record that the trial judge specifically determined the aggravating or mitigating circumstances that applied or weighed the evidence before delegating the authority to write the order. In fact, at the evidentiary hearing, the prosecutor testified that the judge asked him to prepare the order, but that the judge did not give him any specifics as to what he had or had not found.

Riechmann, 777 So.2d at 352.

The circumstances in Mr. Tompkins' are indistinguishable. Judge Perry has found that there was a "failure to independently weigh aggravating and mitigating circumstances" (PC-R2. 442). In Mr. Tompkins' case, there is no evidence that the defense was given notice. Mr. Tompkins' trial

parte communications and allows an opportunity to respond.

Canon 3B (7)(a)(i-ii) (1995) (emphasis added).

counsel testified that prior to the 2001 evidentiary hearing he had no information that Mike Benito had drafted the sentencing order (PC-R2. 183).

Notwithstanding the State's misconception of the law, the lower court specifically found that Judge Coe's limitation of argument imposed on the State in arguing specific aggravating circumstances did not constitute a sufficient independent weighing of aggravators and mitigators. This is evident from the sentencing order that Judge Coe signed. For example, it states:

2. The capital felony was committed while the defendant was engaged in an attempt to commit rape. State witness, Kathy Stevens, testified that on the morning of Lisa DeCarr disappeared that she observed the defendant on top of Lisa on the living couch at Lisa's home. She testified further that Lisa was struggling and screaming for help as the defendant fondled her and pulled at her bathrobe. Kathy Stevens also described an incident occurring months earlier during which the defendant in Stevens' presence forcefully attempted to have sexual intercourse with Lisa DeCarr who struggled and fought with the defendant at that time as well. Stevens' testimony demonstrated clear indications that the defendant was attempting to rape Lisa DeCarr prior to his killing her and those indications were further confirmed by the testimony of Kenneth Turco.

(R. 679). The written findings by the State contain findings of fact not made by Judge Coe, the sentencing judge obligated to independent determine the facts.

Here as in Riechamann, there were no oral findings made at the sentencing and the written findings were prepared by the State, according to Judge Coe's standard practice. Judge Coe did not engage in the independent weighing required by the statute and then reduce the results of his independent weighing to writing. Judge Perry's factual determinations are supported by the evidence and should be affirmed.

CONCLUSION

As to the guilt phase issues raised in Mr. Tompkins' appeal, Mr. Tompkins respectfully requests that this Court:

- 1) remand for an evidentiary hearing on Mr. Tompkins claim that the State withheld exculpatory evidence, 2) remand to permit Mr. Tompkins to obtain DNA testing of the evidence, 3) remand for an evidentiary hearing on Mr. Tompkins' claim that the State violated his due process rights by destroying physical evidence that through DNA testing could have exonerate Mr. Tompkins, and 4) remand for full compliance with Chapter 119.

As to the State's cross-appeal, Mr. Tompkins respectfully asks this Court to affirm that portion of the circuit court's vacating his sentence of death and granting Mr. Tompkins a re-sentencing.

I HEREBY CERTIFY that a true copy of the foregoing Reply/Cross-answer Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 13, 2002.

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Special Assistant CCRC

SUZANNE MYERS
Florida Bar No. 0150177
Assistant CCRC

CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Petitioner

Copies furnished to:

Robert Landry
Assistant Attorney General
Office of the Attorney General
2002 N. Lois Avenue
Westwood Building, 7th Floor
Tampa, FL 33607-2366

STATEMENT OF FONT

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

MARTIN J. MCCLAIN