IN THE SUPREME COURT OF FLORIDA

CASE NOS. 74,098 and 74235

WAYNE TOMPKINS,

Petitioner,

v.

RICHARD L. DUGGER, Secretary
Department of Corrections,
State of Florida,

Respondent.

WAYNE TOMPKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

PETITIONER/APPELLANT'S SUPPLEMENTAL APPLICATION FOR STAY OF EXECUTION ON HIS PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL FROM THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF

WAYNE TOMPKINS, a condemned capital inmate against whom a death warrant has been signed and whose execution is presently scheduled for Tuesday, June 6, 1989, at 7:00 a.m., herein respectfully moves the Court for an order granting a stay of execution pending the proper, judicious filing and disposition of his appeal from the denial of his motion for Fla. R. Crim. P. 3.850 relief by the circuit court and his petition for writ of habeas corpus. In light of the substance and complexity of the claims involved, the stakes at issue and the untenable circumstances under which Mr. Tompkins' counsel has been forced to litigate this action, Mr. Tompkins also herein respectfully requests that the Court allow a proper, orderly, and reasonable schedule for the filing of briefs. In support thereof, Mr. Tompkins, through counsel, states as follows:

I. STATUS OF COUNSEL

On March 30, 1989, Governor Martinez signed Mr. Tompkins' death warrant. Simultaneously Governor Martinez signed two other death warrants against Robert Preston and Robert Heiney. At the time those death warrants were signed Mr. Tompkins had until Monday, June 26, 1989, to prepare and file a Rule 3.850 motion to vacate judgment and sentence. However, the signing of the warrant accelerated the due date to May 1, 1989. Due to other more pressing matters, the Office of the Capital Collateral Representative had yet to assign Mr. Tompkins' case to an attorney for purposes of investigating, preparing and filing the Rule 3.850 motion. On Monday, April 3, 1989, Mr. Tompkins' case was assigned to Assistant CCR, Martin J. McClain.

At that time counsel had four weeks to review the record, investigate non-record material, contact material witnesses, confer with Mr. Tompkins, determine what issues were present in the case, draft all necessary state pleadings covering whatever issues existed, and timely file the pleadings. Counsel also had to juggle the schedules of the support staff at CCR in order to insure that the necessary work got done despite the competing demands on CCR's small staff to complete the work going on in parallel warrant cases -- for example Preston and Heiney, and in non-warrant cases. Despite all obstacles counsel did complete and file a timely Rule 3.850 motion and petition for writ of habeas corpus on Monday, May 1, 1989.

Of course these pleadings had to be prepared with the investigation and review of Mr. Tompkins' case still incomplete. Following the filing of the pleadings, investigative work continued as much as practicable in light of the Governor's signing of seven additional warrants during the time leading up to Mr. Tompkins' Rule 3.851 due date. Of those seven warrants Mr. McClain was assigned to represent Ray Koon whose Rule 3.851 filing date is May 31, 1989, and to assist volunteer counsel in

Freddie Williams' case (volunteer counsel had specifically sought the assistance of CCR), in addition to his obligations in non-warrant cases.

On Wednesday, May 10, 1989, a status hearing was held before the Honorable Harry Coe in Mr. Tompkins' case. At that time counsel argued for a stay of execution and the need for an evidentiary hearing. The State stipulated to an evidentiary hearing and Judge Coe apparently believing he did not have authority to enter a stay until after he had held the evidentiary hearing, took the stay question under advisement and set an evidentiary hearing for May 19, 1989.

Counsel worked non-stop trying to finish the investigation before the hearing. Counsel focused exclusively on Mr. Tompkins' case trying to prepare for the evidentiary hearing. At the time of the hearing it was brought to the court's attention that certain material witnesses had not yet been located and thus counsel had not been able to ascertain the information they possessed. Of particular import was Wendy Chancey and the police officer taking her statement on the evening of March 24, 1983. The judge refused to consider a stay of execution to allow reasonable time to locate these witnesses.

Following the circuit court's denial of the Rule 3.850 motion on May 22, 1989, counsel on behalf of Mr. Tompkins prepared a motion for rehearing again urging a stay to allow more time to finish the investigation. This rehearing request was filed May 24th, and supplemented on the morning of May 26th at the time it was orally heard. Counsel advised the court that he now at least knew Wendy Chancey was alive and where she was. He just needed more time to reach her. Judge Coe denied the request saying that all she would say was that she had seen the victim alive on the afternoon of March 24, 1983. Apparently Judge Coe did not believe such testimony would make any difference on his resolution of the Rule 3.850 motion.

During the week of May 22nd in addition to his continuing efforts on behalf of Mr. Tompkins, counsel also had to prepare and file a post-hearing memorandum in State v. Byrd, 13th Jud. Cir. Ct., Case No. 81-10517. This memorandum covered the factual and legal issues arising from a two day evidentiary hearing in March before Judge Lazzara. Counsel also prepared and filed a motion for rehearing in Marek v. Dugger, Case No. 73,278. Due on May 31, 1989, are all state pleadings which are to be filed on behalf of Raymond Koon. Counsel has been attempting to learn about Mr. Koon's case in order to determine what investigation must be conducted. Mr. Koon's case is much lengthier than average because his first conviction was reversed and thus there are two trial transcripts. Counsel's obligations to Mr. Koon are in conflict with his duty to Mr. Tompkins.

In State v. Rose, 6th Jud. Cir. Ct., Case No. 82-08683 CFANO, Judge Schaeffer has ordered counsel to file his reply post-hearing memorandum on June 1, 1989, and indicated no further extensions will be allowed. In Glock v. Dugger, M.D. of Fla. Case No. 89-54-Civ-T-17, Judge Kovachevich ordered counsel to file an overdue memorandum on June 2, 1989.

Counsel will have to prepare these pleadings himself. The staff of CCR is simply overextended. Two other Rule 3.851 dates are May 31, 1989, in cases being handled by CCR. Robert Heiney has pleadings parallel to Mr. Tompkins' due at the same time that this Court has set for Mr. Tompkins' brief. In addition, active litigation is ongoing in yet another CCR warrant case, Sonny Boy Oats. In addition, the office has a number of initial appellate briefs due this week in this Court and the Eleventh Circuit. The staff is spread too thin for counsel to be able to get the necessary assistance from other counsel to do an adequate job on all the pleadings due this week.

The workload is overwhelming. Counsel believes it is his duty as a member of the bar and as an assistant CCR to do his

best for his clients. Anything less than that would be unconscionable. Yet the workload being thrust upon him by virtue of the Governor's warrant signing policies and the budgeting difficulties preventing the employment of an adequate CCR staff seems designed to cause counsel to choose between shirking his duty or leaving his position and seeking out less demanding and stressful employment. In this instance, counsel has chosen to ask this Court for mercy; not for himself but for his client. Counsel can not adequately brief Mr. Tompkins' case by Tuesday, May 30, 1989, and meet all the other obligations pressing upon him this week. Instead, counsel is preparing this supplemental stay application in order to try to point out why this case deserves more work by counsel and more scrutiny by this Court than can occur under warrant. The issues presented in this case are substantial. Mr. Tompkins is innocent and has presented at an evidentiary hearing the available evidence supporting his innocence which the jury did not hear. Some of the evidence was not heard by the jury because of ineffective assistance of trial counsel and some because of discovery violations by the State. To explain which evidence was not disclosed and which was but foolishly not used by counsel requires adequate briefing. Mr. Tompkins' case is factually very complex, as all parties to the Rule 3.850 evidentiary hearing noted. Consideration must be given to the trial testimony, the pretrial depositions, the police reports and other documentary evidence introduced at the hearing, and the testimony from the hearing.

Judge Coe's finding of deficient performance by trial counsel is also an indication that this warrants closer scrutiny. In Bassett v. State, 14 F.L.W. 31 (Fla. 1989), a stay of execution was entered after the circuit court found deficient performance. This was in order to insure adequate briefing by counsel and consideration by this Court. Mr. Tompkins' case is in the identical posture and should receive the same treatment.

Counsel needs more time to adequately brief the issues presented here.

II. PROCEDURAL HISTORY

Mr. Tompkins filed his Rule 3.850 motion to vacate judgment and sentence on Monday, May 1, 1989. He also filed a petition for a writ of habeas corpus at that time. Both of these pleadings were timely filed under Rule 3.851.

At a status conference on May 10, 1989, the State orally stipulated to the need for an evidentiary hearing. The State also orally agreed that none of the claims presented by Mr. Tompkins were procedurally barred if the failure to raise the issue at trial was the result of ineffective assistance. As a result of the State's stipulation no claims were procedurally barred.

An evidentiary hearing was held beginning on May 19, 1989. At the beginning of the hearing Mr. Tompkins attempted to invoke the rule requiring the sequestration of all witnesses. Mike Benito, the assistant state attorney, was one of the witnesses subpoenaed to testify. He was a material witness regarding arrangements he made to allow Kathy Stevens to visit her incarcerated boyfriend after she changed her story in a way to help the State and regarding his file memoranda which were a substantially verbatim recitals of Kathy Stevens' oral statements to Mr. Benito. The court refused to exclude Mr. Benito and in fact directed him to talk to Kathy Stevens in order to ascertain if Mr. Tompkins' proffer of her testimony was accurate. Thereafter, Mr. Benito was allowed to conduct the proceedings on behalf of the State even though he in fact was called as a witness and did testify.

At the beginning of the evidentiary hearing, Mr. Tompkins attempted to call Kathy Stevens to the witness stand. However, the State objected that it was not fair to the witness and the

court sustained the objection (T. 7-14, 23). The court allowed the defense to proffer those matters she would testify about, and directed Mr. Benito, the prosecuting attorney, to verify the proffer. After the State agreed to the main bases of the proffer the court ruled "I am not allowing this witness [Kathy Stevens] to be called." (T. 23). The court noted Mr. Tompkins' objection to its ruling.

Thereafter eleven witnesses were called to testify including Mr. Tompkins' trial counsel. Additional witnesses would have been called to discuss Mr. Tompkins' history and family background. However, the State complained about the need for additional testimony. At that point the court asked the defense if "the purpose of the four family members remaining is to show the defendant was raised in untenable, undesirable circumstances and the jury should have known that?" (T. 288). Mr. Tompkins' counsel inquired if all parties agreed and stipulated that nonstatutory mitigation existed which should have been presented to the jury. The court noting the prosecutor's silence said to defense counsel, "He is ignoring you now. Well, haven't you made your point?" (T. 290). Counsel responded that his burden at the hearing was to show deficient performance and prejudice. "To that extent, my burden basically with these witnesses is mostly going toward prejudice, showing what was available that was not presented." Judge Coe then responded, "Well, that is my point. You have made that record, in my judgment, beyond any question." (T. 293)(emphasis added). The State then indicated it was not challenging the family and background witnesses credibility. The Court then stated:

> THE COURT: Well, I am accepting them as credible family members and I accept that they, unimpeached, are going to say -- as their affidavit states, to-wit: "It's an unhealthy family situation that the defendant grew up in."

(T. 295). Thereafter the affidavits of the remaining uncalled

family and background witnesses were stipulated into evidence.

When the evidence was closed at 9:30 p.m. on May 19th, closing arguments were scheduled for the morning of May 20. After the arguments of counsel the court denied the Rule 3.850 motion specifically addressing only the discovery violation and the ineffective assistance of counsel claims. The court's oral pronouncement which was later referred to in the signed order denying relief was as follows:

> THE COURT: Well, I will find that the Brady violations, if any, did not undermine the confidence in the outcome of the trial or verdict; that during the trial that the assistance to counsel was effective; that there was investigation and presentation of evidence that was reasonable; and reasonable, competent counsel would have not done it any other way and there was not prejudice.
>
> However, during the penalty phase, I do find that the attorney failed to investigate, prepare and present mitigation evidence. It was a deficient performance. The acts and omissions were specified and fell outside the wide range of professionally competent assistance.
>
> However, I do not think that this deficiency prejudiced the defense, that is, showed that it was a reasonable probability that but for the counsel's errors, the results in the sentencing phase would have been different, given the 12/0 verdict, given the egregious nature of the offense, given the two prior rapes.
>
> I don't think there was a reasonable possibility, given proper investigation, preparation and presentation, that the outcome would have been different, nor do I think this lack undermined any confidence in the outcome.

(T. 470-71).

A written order denying relief was filed Monday, May 22, 1989. A timely motion for rehearing was filed on May 24th. That motion was supplemented on the morning of May 26th at the time of a motions hearing. It was brought to the attention of the court that the previously unavailable witness, Wendy Chancey, had been located. An investigator for Mr. Tompkins was finally able to make contact with Ms. Chancey's mother and brother. Though they

refused to provide the investigator with a phone number for Ms. Chancey without checking with her first, they did indicate she was alive and in Colorado. Ms. Chancey's mother also indicated that if Ms. Chancey had told the police, as she did, that the victim, Lisa DeCarr, was alive and getting into a brown Pinto on the afternoon of March 24th wearing jeans and a maroon blouse, then in fact that had occurred. Wendy "is not a liar and [] whatever she said is true." (State V. Tompkins, Cir. Ct. Supplemental Motion for Stay of Execution, Affidavit, p. 2) (attached hereto).

Judge Coe at the hearing on May 26th concluded that there was no reason for a stay or a rehearing since all Ms. Chancey would testify to was that she had seen the victim alive on the afternoon of March 24th. Apparently, Judge Coe did not believe such testimony would have mattered in a case where the jury was instructed that it had to find beyond a reasonable doubt that the victim died on March 24th and all of the State's evidence, as it conceded, went toward placing the time of death at 9:30 a.m.

In fact, at the evidentiary hearing the following exchange occurred between the parties and the court:

> THE COURT: What is the State's theory? You don't know when she was killed, or she was killed at 9:30?
>
> MR. BENITO: 9:30, ten o'clock when Kathy saw the man on top of her in the house.
>
> THE COURT: Why do you say that? Why couldn't it have been, say, 11:30 or two o'clock or three o'clock?
>
> MR. BENITO: I think he returned shortly thereafter, about an hour or two later, to Barbara and told her that her daughter ran away.
>
> THE COURT: She could have been alive and stuffed in a car. I am not sure all this is relevant, but I am trying to understand if you positively said 9:30 to 10:00.
>
> Why couldn't he have knocked her out unconscious, had her in a trunk and killed her six hours later?

MR. BENITO: Well, that could have happened.

THE COURT: That is what I am saying. So, you are not necessarily saying your theory is 9:30 in the morning. I am just trying to understand your theory. You are not saying, yes, he killed her at 9:30. You are just saying he killed her that day. We don't know when.

MR. BENITO: He either killed her that day or rendered her unconscious.

THE COURT: That day but not 9:30. You are not listening to my question. My question is: Do you without any reservation say she was killed at 9:30 --

MR. BENITO: No, sir.

THE COURT: -- as opposed to 10:30, 11:30, 12:30. You don't know when she was killed. She was just killed that day, or do you even really know that she was killed that day?

MR. BENITO: I think she was.

THE COURT: No, no, no. Don't give me "I think." We have circumstances indicating they were together, and she is missing, and a year later she is found. You really don't know when she was killed.

MR. BENITO: Bathrobe, Judge, the bathrobe. She was in her bathrobe.

THE COURT: She could have had the bathrobe on six months later. He could have taken her, just in theory, he could have taken her off for six months, and she could have been alive and then he killed her and put her under the house, right?

MR. BENITO: He could have done that.

THE COURT: So, you are not saying it's 9:30. You don't know when it was. All you know is he killed her.

MR. BENITO: That is correct.

THE COURT: Well, was there any medical evidence that she was killed within some period of 3/24/83?

MR. BENITO: No, no way to tell that, Judge.

THE COURT: All right. Go ahead. Go ahead. Next question. Next question.

MR. McCLAIN: If I could just point out in the closing argument, Mr. Benito did argue it was basically 9:30 or 10:00. That was

based on Turco's testimony that is when it occurred. She was not knocked out. She was killed at that point in time and Kathy Stevens supposed sighting of seeing some sort of attack going on.

(T. **87-90**).1

In any event, the circuit court found Wendy Chancey's statements to the police unimportant and not bearing on Mr. Tompkins' guilt or innocence. Judge Coe denied the rehearing and stay request. He signed and filed an order to that effect. Thereafter, Mr. Tompkins filed his notice of appeal.

III. CLAIMS PRESENTED FOR REVIEW

The following list reflects the claims Mr. Tompkins presents to this Court for review on the appeal of the denial of his motion for Rule **3.850** relief. Because of the extremely difficult caseload over this past week, counsel is absolutely unable to prepare a professionally adequate brief on each of the questions presented. However, the claims are pled in Mr. Tompkins' motion to vacate filed in the lower court, and are urged again in the instant appeal by incorporation herein. The factual and legal analysis presented in the Rule **3.850** motion is fully incorporated herein by specific reference and each claim is presented in its entirety for this Court's review.

'Throughout Mr. Benito's trial closing he claimed that the victim died at **9:30** a.m., the morning of March **24, 1983.** This argument was premised upon the two **"key"** witnesses, as Benito described them at the evidentiary hearing, Kenneth Turco, jailhouse informant, and Kathy Stevens (See R. **344-45, 347, 354**). **No** other scenario was presented or argued by the State. According to the State's case, Lisa DeCarr was dead at 9:30 a.m., March **24, 1983,** after being strangled by Mr. Tompkins. According to Judge Coe the fact that Wendy Chancey saw her alive on the afternoon of March **24, 1983** and reported this to the police that same day, was unimportant to the resolution of Mr. Tompkins' guilt.

CLAIM I

THE APPLICATION OF RULE 3.851 TO MR. TOMPKINS' CASE WILL VIOLATE, AND THE PRESENT WARRANT HAS VIOLATED, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

CLAIM II

MR. TOMPKINS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN HIS JURY DID NOT HEAR EXCULPATORY EVIDENCE THAT THERE WERE OTHER SUSPECTS FOR THE CRIME AND OTHER WITNESSES WHO HAD SEEN THE VICTIM ALIVE AFTER THE TIME SHE WAS ALLEGEDLY KILLED BY MR. TOMPKINS, AND THAT THESE OTHER WITNESSES VERIFIED MR. TOMPKINS' VERSION OF WHAT OCCURRED.

CLAIM III

THE PROCEEDINGS AGAINST MR. TOMPKINS WERE RENDERED FUNDAMENTALLY UNFAIR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE MR. TOMPKINS' DEFENSE ATTORNEY WITHDREW HIS REPRESENTATION IN ORDER TO ACCEPT A POSITION WITH THE SAME STATE ATTORNEY'S OFFICE THAT WAS PROSECUTING MR. TOMPKINS FOR THIS OFFENSE, AND THE PROSECUTING ATTORNEY WAS A MATERIAL WITNESS.

CLAIM IV

THE STATE INTENTIONALLY CIRCUMVENTED THE ACCUSED'S RIGHT TO HAVE COUNSEL PRESENT IN A CONFRONTATION BETWEEN THE ACCUSED AND A STATE AGENT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM V

MR. TOMPKINS' CONVICTION AND SENTENCE WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE IT RESULTED FROM AN UNRELIABLE IN COURT IDENTIFICATION.

CLAIM VI

THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. TOMPKINS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VII

WAYNE TOMPKINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM VIII

WAYNE TOMPKINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN COUNSEL FAILED TO OBTAIN THE ASSISTANCE OF A MENTAL HEALTH EXPERT.

CLAIM IX

WAYNE TOMPKINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM X

THE STATE'S KNOWING USE OF FALSE AND MISLEADING TESTIMONY ITS MISLEADING AND INACCURATE CLOSING ARGUMENT VIOLATED MR. TOMPKINS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY PERVERTING THE TRUTH.

CLAIM XI

MR. TOMPKINS CAPITAL CONVICTION AND SENTENCE ARE FUNDAMENTALLY UNFAIR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE OF THE PROSECUTOR'S IMPROPER GOLDEN RULE ARGUMENT TO THE PENALTY JURY.

CLAIM XII

MR. TOMPKINS' SENTENCE OF DEATH, RESTING ON THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR, IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH AND CONTRARY TO MAYNARD V. CARTWRIGHT, 108 S. CT. 1853 (1988), IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS DECISION IN ADAMSON V. RICKETTS, ___ F.2D ___, NO. 84-2069 (9TH CIR. DEC. 22, 1988) (EN BANC), AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

MR. TOMPKINS' SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. TOMPKINS TO PROVE THAT DEATH WAS INAPPROPRIATE CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

CLAIM XIV

DURING THE COURSE OF MR. TOMPKINS' TRIAL, THE PROSECUTION AND THE COURT IMPROPERLY ASSERTED THAT SYMPATHY TOWARDS MR. TOMPKINS WAS AN IMPROPER CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FAILURE TO LITIGATE THIS CLAIM DEPRIVED MR. TOMPKINS OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM XV

MR. TOMPKINS' DEATH SENTENCE RESTED UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVI

MR. TOMPKINS' SENTENCE OF DEATH WAS FOUNDED UPON IMPERMISSIBLE "VICTIM IMPACT'' EVIDENCE, IN VIOLATION OF BOOTH V. MARYLAND, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XVII

MR. TOMPKINS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985) AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. TOMPKINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

CLAIM XVIII

MR. TOMPKINS DEATH SENTENCE IS FUNDAMENTALLY UNRELIABLE BECAUSE THE SENTENCING JURY AND THE COURT RELIED ON MISINFORMATION IN SENTENCING MR. TOMPKINS TO DEATH.

CLAIM XIX

MR. TOMPKINS WAS DENIED HIS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY BECAUSE OF IMPROPER INFLUENCES OF THE JURORS DURING TRIAL.

At the evidentiary hearing two additional issues arose. First, Judge Coe ruled that the rule of sequestration of witnesses could not be used to exclude Mr. Benito even where he was under subpoena and in fact did testify as a material witness. The question on appeal is thus whether Judge Coe abused his discretion under Odom v. State, 403 So. 2d 936 (Fla. 1981), in refusing to allow Mr. Tompkins to invoke the rule.

A second question arising from the hearing concerns Judge Coe's decision not to receive the testimony of Kathy Stevens. Mr. Tompkins made a proffer of the testimony which he wished to elicit from her. This included her concession that she received benefit from her cooperation with Mr. Benito. She was allowed into jail to visit her incarcerated boyfriend who she, a sixteen year old juvenile, could not visit otherwise because she did not have sufficient identification.[2] Judge Coe denied Mr. Tompkins the opportunity to present this evidence. This was error.

Also at issue at this time are those claims presented in Mr. Tompkins' petition for habeas corpus relief filed with this Court. In that pleading, Mr. Tompkins presented claims which were either premised upon fundamental error, change in law or ineffective assistance of appellate counsel. That pleading is fully incorporated by specific reference.

IV. STATEMENT OF THE FACTS

The facts of this case are unusual and complex enough on their own. However, here the facts must be further analyzed in

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[2]Mr. Tompkins to this day has been unable to find out the identity of this boyfriend and what happened to him since Kathy Stevens did not say and the court would not allow inquiry.

light of the issues which include discovery violations and ineffective assistance of counsel. Thus not only are the underlying facts important to know and understand, but it also is essential to know who knew of them and when did they know.

The facts of the case presented to the jury and considered by this Court on direct appeal were set forth in the Court's opinion affirming Mr. Tompkins' conviction:

> The victim, Lisa DeCarr, aged 15, disappeared from her home in Tampa on March 24, 1983. In June 1984, the victim's skeletal remains were found in a shallow grave under the house along with her pink bathrobe and jewelry. Based upon a ligature (apparently the sash of her bathrobe) that was found tied tightly around her neck bones, the medical examiner determined that Lisa had been strangled to death. In September 1984, Wayne Tompkins, the victim's mother's boyfriend, was charged with the murder.
>
> At trial, the state's three key witnesses testified as follows. Barbara DeCarr, the victim's mother, testified that she left the house on the morning of March 24, 1983, at approximately 9 a.m., leaving Lisa alone in the house. Lisa was dressed in her pink bathrobe. Barbara met Wayne Tompkins at his mother's house a few blocks away. Some time that morning, she sent Tompkins back to her house to get some newspapers for packing. When Tompkins returned, he told Barbara that Lisa was watching television in her robe. Tompkins then left his mother's house again, and Barbara did not see or speak to him again until approximately 3 o'clock that afternoon. At that time, Tompkins told Barbara that Lisa had run away. He said the last time he saw Lisa, she was going to the store and was wearing jeans and a blouse. Barbara returned to the Osborne Street house where she found Lisa's pocketbook and robe missing but not the clothes described by Tompkins. Barbara then called the police.
>
> The state's next witness, Kathy Stevens, a close friend of the victim, testified that she had gone to Lisa DeCarr's house at approximately 9 a.m. on the morning of March 24, 1983. After hearing a loud crash, Stevens opened the front door and saw Lisa on the couch struggling and hitting Tompkins who was on top of her attempting to remove her clothing. Lisa asked her to call the police. At that point, Stevens left the house but did not call the police. When Stevens returned later to retrieve her purse, Tompkins answered the door and told her that Lisa had left with her mother. Stevens also testified

> that Tompkins had made sexual advances towards Lisa on two prior occasions.
>
> Kenneth Turco, the final key state's witness, testified that Tompkins confided details of the murder to him while they were cellmates in June 1985. Turco testified that Tompkins told him that Lisa was on the sofa when he returned to the house to get some newspapers for packing. When Tompkins tried to force himself on her, Lisa kicked him in the groin. Tompkins then strangled her and buried her under the house along with her pocketbook and some clothing (jeans and a top) to make it appear as if she had run away.

Tompkins v. State, 502 So. 2d 415, 417-18 (Fla. 1986).

The State's theory of prosecution based upon the testimony of Kathy Stevens and Kenneth Turco was that Mr. Tompkins killed Lisa DeCarr shortly after 9:00 a.m. on March 24, 1983. In fact, the jury was instructed:

> Now, ordinarily the State is not required to prove the exact time, date and place of the alleged offense; however in this case, by a separate pleading, the exact time, date and place of the alleged offense has been made an issue to be tried. The burden therefore rests upon the State to prove beyond and to the exclusion of every reasonable doubt the exact time, date and place as set out in the Bill of Particulars that I'll read to you at this time.
>
> The time and date when the offense alleged in the Indictment occurred was between 8:30 a.m. and 5:00 p.m. on March 24, 1983. The place where the offense alleged in the Indictment occurred was 1225 East Osborne Avenue, Tampa, or within a three-block radius thereof in the City of Tampa and County of Hillsborough and State of Florida.

(R. 397-98).

However, there was a considerable amount of additional information known to defense counsel but which was never made known to the jury or to this Court. Had the jury known of the exculpatory nature of the evidence, an acquittal would surely have resulted. This information was contained in police reports admitted at the evidentiary hearing as Defendant's Exhibits 6A and 6B. These police reports were compiled when Barbara DeCarr,

the victim's mother, reported the victim missing on March 24, 1983.

According to the police report the "Date/Time Reported" was "24 MAR 83 1730." (Def. Exh. 6A). "Mrs. DeCarr stated her daughter runaway from home for no apparent reason." Id. The report further identified Wendy Chancey as a witness. It included a summary of the interviews of Mrs. DeCarr and Wendy Chancey.

> Interview: Compl. stated she last saw Lisa at the listed residence at the listed time. Compl. stated that everything was fine at home and has had no trouble with Lisa running away or anything. Compl. stated Lisa was having some trouble in school but nothing to cause her to runaway. Compl. checked with Lisa's friends and school for any information as to where she might be with negative results. Compl. stated that one of Lisa's friends told her that Lisa asked about Beach Place, but Compl. checked with Beach Place with negative results. Compl. stated Lisa did not take any of her belongings and gave no indication of wanting to leave.
>
> Interview: Witness [Wendy Chancey] stated she observed Lisa get into the suspect vehicle at 12th St and Osborne and was last scene heading North on 12th St. Witness could give no more information, but can identify the suspect vehicle.

(Def. Exh. 6A). The police report identified the car as a 1973-76 Ford Pinto, brown in color, with tinted windows. The license tag was unknown.

Mr. Hernandez who was Mr. Tompkins' trial attorney had access to Mrs. DeCarr's deposition. At the deposition Mr. Tompkins had been represented by Mr. Castillo who withdrew from the case prior to trial when he accepted employment as an assistant state attorney. In her deposition Mrs. DeCarr acknowledged she was present when Wendy Chancey was interviewed by the police.

> **Q.** Were you there when Wendy was giving the statement?
>
> A. Yes.
>
> **Q.** Do you remember what Wendy said?

A. She said she go into a brown Pinto --

Q. And do you --

A. -- with colored windows.

Q. And do you remember what Wendy said she was wearing?

A. Jeans and a top and a pocket book.

Q. Jeans and a maroon or a red top?

A. Yes.

Q. And her purse.

A. Her purse.

Q. Okay. And Wendy saw her do that?

A. She said she seen Lisa getting into a car.

Q. And that was the afternoon that Lisa disappeared.

A. Yes. She said she seen it from her bus.

(Deposition of Barbara DeCarr, p. 45)(emphasis added). This testimony was not presented to the jury in any fashion.

The description of the clothes Lisa DeCarr was wearing on March 24th matched the description given by Mr. Tompkins to the police. The State had argued at trial that Mr. Tompkins' statement was a lie. The jury did not know that Wendy Chancey's description corroborated Mr. Tompkins' claim.

The prosecutor also argued at the trial that Mr. Tompkins, as Mrs. DeCarr had testified, was the last person to see Lisa DeCarr alive (R. 351). However, the prosecutor, Mr. Benito, testified at the evidentiary hearing:

> THE WITNESS: There is some evidence, Judge, that Wendy Chancey has stated that she would have seen the victim after the victim would have been -- in the State's argument -- murdered the morning of the 23rd.

(T. 232).

Mr. Benito did testify that he had subpoenaed Wendy Chancey to his office on March 13, 1985, several months prior to trial. He had no recollection as to whether he in fact talked to her or

what she might have said (T. 224). He did conclude, however, that Wendy Chancey was an unimportant witness because she was incorrect in her statement to the police:

> Q. You know how significant, obviously, Wendy Chancey was in the case, didn't you, since you subpoenaed her?
>
> A. That is a -- that is your term, how significant she was. I am of the same opinion that I was earlier, that she was a squirrel.
>
> Q. She was important enough to talk to?
>
> A. Yes. If I had the opportunity to talk to her, I would have.
>
> Q. If you have an opportunity to take talk to her and determine personally whether or not she was a squirrel?
>
> A. I don't know if she came in on the subpoena.
>
> Q. So, your conclusion that she was a squirrel is simply based on hearsay?
>
> A. Probably, and also I know she was incorrect in seeing this girl set into this brown Pinto because this girl was dead.
>
> Q. But there is no question that she did indicate that to the police officer?
>
> A. No question about that and Mr. Hernandez knew about that.

(T. 225-26)(emphasis added).

Mr. Benito thus acknowledged that Wendy Chancey's statement to the police was inconsistent with his theory of the case, that it could not be true and Mr. Tompkins be guilty as Kenneth Turco testified. According to Mr. Benito the only possibility was Wendy Chancey was a squirrel who was wrong. MR. BENITO'S TESTIMONY ESTABLISHES THAT THERE WAS NO ADVERSARIAL TESTING OF MR. TOMPKINS' GUILT BECAUSE THE JURY DID NOT KNOW OF THE EXCULPATORY STATEMENT GIVEN BY WENDY CHANCEY TO THE POLICE THE VERY DAY OF THE DISAPPEARANCE, A FULL FOURTEEN MONTHS BEFORE IT WAS EVEN SUSPECTED THAT LISA DeCARR WAS DEAD. The jury never had the opportunity to decide whether it could say beyond a

reasonable doubt that Wendy Chancey was a "squirrel". Counsel's failure to present this information to the jury was classic ineffective assistance. His performance denied Mr. Tompkins an adversarial testing.

However, the problems in this case do not end with Wendy Chancey, they just begin. Another police reported dated July 9, 1984, prepared after the body had been located indicated:

> 1430 hours, 9 July 1984, interviewed GLADYS STALEY, who is the mother of the suspect in this offense, WAYNE TOMPKINS. Her address is 14108 Tyco Drive, Brooksville, Florida. She stated that she had gone to Pasco County Jail where she had visited WAYNE on Sunday before 9 July 1984, and that at that time, WAYNE had been crying and telling her that he did not kill LISA. She stated she is not certain that it was the day LISA disappeared but she thinks it was the day, that she saw LISA at approx. 1430 hours, wearing a red shirt and blue-jeans. She further states that she thought that this day was the same day that BARBARA had taken JAMIE to the clinic. She stated after visiting her son that her son could furnish no additional information and kept telling her that he did not kill LISA.

Gladys Staley was Mr. Tompkins' mother. According to Barbara DeCarr's testimony she, Mrs. DeCarr, was at Gladys Staley's house from 9 a.m. to 3 p.m. on March 24, 1983, the day Lisa DeCarr disappeared. Mrs. Staley was not called by either side to testify at Mr. Tompkins' trial. She was not even deposed pretrial. However, as she has explained in her affidavit which was admitted as Def. Exh. 18 at the evidentiary hearing:

> The day that Lisa disappeared, she was at my house about 2:30 in the afternoon - she had stayed home from school because she didn't feel well. Lisa was wearing blue jean short shorts and a reddish-pink halter top. I scolded Lisa about her outfit because it was cold and rainy that day, and I told her to go home and put on some warmer clothes before she even got sicker. This was the last time I ever saw Lisa.
>
> Lisa talked about her boyfriend all the time and she told me he was planning to give her a ring. The last time I saw Lisa, she didn't have any engagement ring on. If her boyfriend had given her a ring, I'm sure that she would have been showing it off to me because she talked to me about getting

married and getting away from Barbara as soon as she could.[3]

The weather bureau confirmed Mrs. Staley's description of the weather that day. It was rainy, in fact stormy with hail reported at the airport. The high temperature was 71°F at 1:00 p.m., although by 4:00 p.m. it was down to 63°F, considerably below normal for that time of year (T. 411-12).

Mr. Hernandez testified at the evidentiary hearing he had talked to Mrs. Staley before the trial:

> Q. Now, did you check with Mrs. Staley to determine whether she agreed with Mrs. DeCarr as to the events of that day?
>
> A. I'm sure I did. I'm sure I had a lot of conversations with respect to the case with Mrs. Staley, along with potentially using her as a witness in the penalty phase.
>
> . . .
>
> Q. Do you recall her ever --
>
> A. I don't recall anything significant that she told me that I would -- if your question is to determine whether I wanted to use her as a witness, I don't recall her telling me anything significant that would have useful.

(T. 96-97).[4]

There were other police reports casting doubt upon the State's claim that Lisa DeCarr died the morning of March 24, 1983. Though the defense was aware of these reports, the jury and this Court on direct appeal were never apprised of them. A police report authored by Detective Gullo dated September 2, 1983

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[3]The significant of the ring is that Mrs. DeCarr identified the body by virtue of the ring found with it. According to Mrs. DeCarr it was an engagement ring Lisa received on her fifteenth birthday, September 26, 1982. However, both Mrs. Staley and Kathy Stevens say that is not true. They did not know of an engagement ring being given to Lisa six months before her disappearance. Neither recalled an engagement ring although Kathy Stevens described other rings Lisa wore; in particular, one she wore on her right index finger all the time.

[4]Significantly, Judge Coe found that trial counsel had inadequately investigated Mr. Tompkins' family background and that he had not talked to the family members, including Gladys Staley, enough to learn all the relevant information they had.

stated that Lisa had been sighted six months after her alleged disappearance:

> I received a phone call from Mrs. DeCarr who stated that she was told by friends of Lisa that they had seen Lisa on East 7th Avenue at about 46th Street. Lisa was standing in the Jewel "T" parking lot speaking with two or three other W/F's. The informants told Mrs. DeCarr that Lisa might be living in a trailer park which is across the street. Mrs. DeCarr told the informants that they should call the police the next time they see her. Mrs. DeCarr was advised that they didn't want to get involved with the police. I advised Mrs. DeCarr that I would take a photo of Lisa to the trailer park and attempt to find out if anyone had any information.

(Def. Exh. 6B).

The theory that Lisa DeCarr had run away was further supported by a police report dated June 22, 1983, that stated:

> [Mrs. DeCarr] stated that they continue to search for LISA the next couple of days and that the only information that they had was a neighbor said that they had seen LISA getting into a green car, somewhere in the area of 15th and Osbourne.

(Def. Exh. 6B).

The jury was not apprised of the myriad of inconsistencies between Barbara DeCarr's deposition and her testimony. For example, her claim that she knew Mr. Tompkins was the last person to see Lisa alive was simply not true and her deposition regarding Wendy Chancey's statements proved it, but counsel failed to use the deposition to impeach her. He also failed to use Detective Burke or Detective Burke's deposition to impeach her. Barbara DeCarr said Lisa had never run away before. Detective Burke's deposition indicated Lisa had a history of running away. Many more inconsistencies exist between Barbara DeCarr's testimony and her deposition and Detective Burke's deposition. However, counsel needs more time to present them and establish counsel's failure to impeach Mrs. DeCarr.

Besides the wealth of exculpatory evidence that defense counsel had which he did not present to the jury or to this

Court, there was even more exculpatory evidence that the police and the assistant state attorney had, which defense counsel was not provided. The prosecution's failure to disclose violated Rule 3.220 and the fourteenth amendment.

One of the pivotal witnesses in the case was Kathy Stevens a/k/a Sample a/k/a Mamore. She testified that she saw Mr. Tompkins on top of Lisa DeCarr, apparently attacking her at approximately 9:30 a.m. on March 24, 1983. She testified that Lisa screamed for her, Kathy, to call the police, but that she, Kathy, ignored Lisa's plea. She later lied for Lisa who she believed had run away from home and claimed that she, Kathy, had received a phone call from Lisa in New York. Kathy told Mrs. DeCarr that she received the phone call on April 25, 1983. This latter claim was verified by a police report dated April 26, 1983, which is contained in Def. Exh. 6B. Kathy also testified that she never told anyone the truth about Lisa's disappearance until after Mr. Benito had personally called her early in March of 1985, two years after the event. After her first conversation with Mr. Benito, she sat up all night talking to her pillow and decided to call Mr. Benito back and change her story. According to her testimony, she received no benefit from the State.

Mr. Benito prepared file memoranda regarding these two phone conversations with Kathy Stevens. These memoranda were "substantially verbatim recital[s] of [] oral statement[s] made by a person" (Rule 3.220(a)(ii)) "known to the prosecutor to have information which may be relevant to the offense charged." (Rule 3.220(a)(i)). As such, these memoranda under Rule 3.220 had to be disclosed to the defense. However, it is undisputed that they were not given to the defense (T. 222).

The memorandum dated March 13, 1985, was introduced at the evidentiary hearing as Def. Exh. 5. It provided:

M E M O R A N D U M

TO: FILE

FROM: MICHAEL L. BENITO

RE: WAYNE TOMPKINS

CASE NO.: 84-10538

CHARGE: FIRST DEGREE MURDER

SUBJ.: KATHY STEVENS

DATE: MARCH 13, 1985

On March 12, 1985, witness Kathy Stevens called me and advised me that on the morning that the victim Lisa DeCarr disappeared that Kathy went to Lisa's house around 6:30 a.m. She said she knocked on the door but nobody answered so she then went to Lisa's bedroom window and knocked on it and Lisa opened the window and let Kathy in. Kathy stated Lisa was wearing her pink nightgown and pink robe at that time and that Lisa told her that she had explained things to her mother but did not elaborate as to what she had explained. Lisa asked Kathy to come back later around 11:00 or 12:00 that she was going off somewhere with her mother. At 8:00 a.m. Kathy returned because she had left her purse in Lisa's bedroom. When she knocked on the door she heard Lisa and Wayne fighting and she heard the sound of a dish breaking against the door. She then opened the door and observed Wayne on top of Lisa on the couch trying to take her clothes off. Wayne looked at Kathy and told her to get out and don't come back. Kathy stated she was scared and left but that she returned later around 11:00 or 12:00 and knocked on the door and Wayne answered and said that Lisa had left with her mother. Kathy then sent a friend of her's named Kim Lisinbee over to Lisa's house to check on Lisa and Kim reported back that Lisa had apparently disappeared. Apparent from the testimony of Kathy that Wayne was lying when he advised Kathy at 11 or 12:00 that Lisa had left with her mother because in fact Lisa's mother Barbara DeCarr had left Lisa at home in bed and had went to Wayne's mother's house to help her pack.

According to this memorandum, Kathy said she saw Mr. Tompkins attacking Lisa at 8:00 a.m. However, at trial the story had changed; the time of this alleged event was 9:30 a.m. This change was necessary to fit Kathy's story with Mrs. DeCarr's testimony that she left home at 9 a.m. and Lisa was alive and alone.

Nowhere in her statement does Kathy indicate that Lisa begged her to call the police. That was a detail that was added

later to embellish the story. The defense attorney needed to know that such a change had occurred in order to cross-examine Kathy.

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

In her March 8, 1983, statement, Kathy discussed an alleged incident between Lisa and Mr. Tompkins on Halloween, 1982. According to Mr. Benito's file memorandum Kathy said, after Lisa hit him, Mr. Tompkins told Lisa "if you ever hit me again, I will kill you." Def. Exh. 4, p. 2. At trial Kathy testified "he said 'I'm going to kill you.'" (R. 247). Mr. Benito argued in his closing argument to the jury:

> October, 1982, this man says "I'll kill you" to Lisa, and five months later he did. Is that evidence of an intentional, premeditated killing? Without question. Five months before this murder, the defendant threatened to kill her. The thought is already in his mind. The thought is in his mind five months before he actually killed her.

(R. 347).

Defense counsel never knew, because the State in violation of Rule 3.220 did not disclose that Kathy Stevens original statement indicated that it was after Lisa had hit Mr. Tompkins that he said "if you ever hit me again, I will kill you." The change in Kathy's story allowed the prosecutor to argue that Mr. Tompkins had been planning the murder for five months. This was simply not true even according to Kathy Stevens.

Another change in her testimony from her original statement to Mr. Benito was at trial she claimed a third person was at the house watching Mr. Tompkins attack Lisa DeCarr. No mention was

made of this to Mr. Benito. There is no obvious reason for the change; it just goes to the reliability of Kathy Stevens. Her story was not true and thus subject to the inconsistencies associated with fabrications.

The defense also did not know that when Kathy Stevens called Mr. Benito on March 12, 1985, two years after the victim's disappearance to first say she saw the victim being attacked by Mr. Tompkins, she, Kathy Stevens, had a boyfriend in jail that she could not get in to see because she did not have valid identification. After providing Mr. Benito with her story, which was very helpful to his case, he arranged for her to visit her boyfriend. She thus received benefit for her testimony. Since the defense did not know this, Mr. Benito was able to argue that Kathy Stevens had no motive to lie. At the evidentiary hearing, Judge Coe refused to permit Kathy Stevens to testify regarding this fact and other exculpatory evidence she possessed. Judge Coe did not consider this undisputed fact when ruling on the question of whether a new trial was necessary under Roman v. State, 528 So. 2d 1167 (Fla. 1988). Certainly benefit a witness receives for testimony must be disclosed under Rule 3.220(a)(2) and United States v. Bagley, 105 S. Ct. 3375 (1985). This is to insure an adversarial testing of the defendant's guilt and a testing of a witness' credibility.

Kathy Stevens was a psychologically troubled seventeen year old. In fact that was how she knew Lisa DeCarr because they were in a special class together for psychologically troubled students. The jury did not know this. The jury also did not know that after she testified, Kathy Stevens out in the hallway said, "I fixed his ass. Now my name will be in the newspaper too." Def. Exh. B. para. 28.

Additional discovery material was established to have been undisclosed. The State had school records regarding the victim and Kathy Stevens (Defendant's Exhibit 3). The defense was not

provided with these records but was merely told that the records showed that the girls had been suspended from school on March 23rd, the day before the victim's disappearance. However, the school records in fact showed that classmates of the victim claimed to have received phone calls from her sometime around April 21, 1983, saying she was pregnant and in New York. Since the jury was instructed it had to find that the victim died on March 24th between 8:30 a.m. and 5:00 p.m., evidence that she was still alive in April was highly exculpatory evidence which the defense did not have and had no means of obtaining without a release. Notations contained in Lisa's school file stated:

> March 23rd - caught smoking off campus - suspended [illegible] - parent arrives
>
> 25th - Mom says child ran away yesterday (24th). Thinks child may be presnant.
>
> 3/29 - No word from Lisa. Authority feels okay. No report.
>
> 4/5 No contact
>
> 4/19 - Visited home vacated
>
> 4/20 Message, ph. Mom moved last week
>
> 4/21 - students said child call from N.Y. Is pregnant

(Def. Exh. 3)(emphasis in original). Thus, according to the school records "students" -- plural -- heard from Lisa and reported she was pregnant. This was even before Kathy's "made-up" phone call of April 25th. Even Lisa's mother at the time of her disappearance suspected that Lisa was pregnant. However, even though these school records appeared in the police file and the state attorney's file, they were not provided to the defense attorney.

Still more discoverable material was shown in this case to have been kept from the defense. The police and the state attorney had in their files a copy of the Missing Children's Help Center's file on the victim (Def. Exh. 2). According to a notation in that file, the police officer who had investigated

the missing persons report regarding the victim stated the victim's mother was wrong when she claimed that she had told the police all along that Mr. Tompkins was the last person to see the victim alive. In fact this was her testimony at trial. "Det. Gullo insisted that she did not tell him this." (Def. Exh. 2, p. 4)(emphasis in original). The defense did not have access to Detective Gullo's claim that the victim's mother was wrong when she claimed that she had told the police that Mr. Tompkins was the last person to see the victim alive. Clearly, Detective Gullo, could have been called to establish that the victim's mother was wrong in her testimony, had the defense known he would say the mother was wrong. This statement by Detective Gullo which was in the state attorney's file should have been disclosed to the defense under Rule 3.220 and Bagley, supra.

At the evidentiary hearing Mr. Benito testified that Kathy Stevens and Kenneth Turco were the two most important witnesses to his case. At trial Mr. Turco's credibility was very much at issue since he had criminal charges pending against him which were nolle prossed in exchange for his testimony, and since he had access to the depositions and police reports before coming forward with his story. However, the prosecutor never disclosed that the charges pending against Mr. Turco at the time of trial, to which Mr. Turco had pled guilty, would be nolle prossed within two weeks of Mr. Tompkins' conviction.

There was a wealth of undisclosed exculpatory evidence in this case. The failure to comply with Rule 3.220 and Bagley, supra, cannot be found to be harmless beyond a reasonable doubt under Roman, supra.

Judge Coe did find deficient performance at the penalty phase. He found as a matter of fact trial counsel failed to investigate, and uncover nonstatutory mitigation. Counsel failed to discover the wealth of mitigation available in Mr. Tompkins' background -- mitigating evidence which establishes reason for

sympathizing with Mr. Tompkins -- mitigating evidence without which no individualized consideration could occur. Had counsel adequately prepared and discharged his sixth amendment duties, overwhelming mitigating evidence which would have precluded a sentence of death in this case would have been uncovered. The evidence was not hard to find, it cried out for presentation.

Mr. Tompkins was sentenced to die by a judge and jury who never knew that he grew up under appalling conditions and suffered a lifetime of abuse, rejection and abandonment. His mother was an alcoholic who viciously battered her children, and grossly neglected them emotionally as well as physically. Gladys Staley gave birth to her son Wayne Tompkins, the fifth of thirteen children, while living in the small Kentucky town of London, on March 12, 1957. Wayne's chances in life were immediately impaired due to his mother's long term alcoholism, which included heavy consumption during the critical stages of Wayne's fetal development (Def. Exh. 18).

Gladys was married at the age of fifteen and immediately started having children. Thus Wayne's mother was never provided the opportunity to develop much beyond that of a child. When she was thrown into the demanding life of parenthood, her perceptions of what a parent should be were greatly distorted. Gladys had a myriad of personal problems including alcoholism and mental instability. She herself was a victim of a marriage riddled with extensive neglect and poverty. Thurman Tompkins deprived his wife of virtually all contact with the world outside of their log cabin seated deep in the foothills of Eastern Kentucky and overrun by the many young and ever-demanding children. Thurman refused to let his wife attend religious ceremonies, answer the door of their home, or grocery shop, thus distorting even further his wife's pathetic understanding of the responsibilities of adulthood and parenting (Def. Exh. 18).

While still an infant, Wayne's family moved to Florida in an attempt to fight mass poverty and starvation stemming from his father's inability to secure an income capable of providing for the endless needs of an ever-growing family. However, the employment opportunities available to Thurman failed to provide his family the ticket leading them out of poverty. Wayne's mother quickly grew weary of her dismal life and the daily struggles involved in stretching her few available pennies. Subsequently, her alcohol consumption accelerated at an alarming rate while she dreamed of a happier life, free of children, her husband, and financial woes. Simultaneously, the compassion for her children vanished and she began viciously abusing them for even the most minor infractions. Wayne's sister, for example, was punished for dirtying her diaper by being placed in an activated washing machine (Def. Exh. **12,** 13 and **18).**

In an attempt to escape from the poverty and escalating misery of her life, Gladys began to further neglect her children by leaving them alone for long periods of time and pursuing extra-marital affairs. On one occasion Wayne's mother forced his ten year old sister to accompany her to a bar for a night of drinking, dancing, and ultimately a hotel room while she had sex with an extremely intoxicated partner. On a separate occasion, two of Wayne's sisters, in a brave attempt to rescue the family from total degradation, entered a bar and begged their mother to return home after a lengthy absence. Gladys refused to heed their cry for sympathy and insisted that her daughters dance for a barroom of drunk men who tossed them money (Def. Exh. **12,** 13 and **17).**

Thurman Tompkins became disgusted with his wife's behavior and insisted that she either adjust her lifestyle or permanently remove herself from the family. Gladys chose the latter and the suffering and neglect of the children extended to the point that all acceptable role models became absent from the home. Wayne's

father was forced to work seven days a week and hire a babysitter in a desperate attempt to compensate for his wife's absence. Wayne's mother fell even deeper into the world of decadence by hooking up with her devious and conniving sister, Linda Walker (Daisy), who pulled Gladys even further from her suffering children. In the never ending quest for the high life, Gladys and her sister abused alcohol on a daily basis while searching for available men to satisfy their lustful intentions (Def. Exh. 14 and 18).

Thurman could no longer cope with the humiliation and to prevent himself from totally breaking down he decided to leave his wife and head for Kentucky. His plans included taking Wayne and his sisters Rose and Carman with him. Gladys under extreme pressure from Daisy could not bear the idea of this happening and attempted to prevent Thurman from leaving. This resulted in a wild car chase across Tampa and a gun being drawn with the intentions of killing Thurman. This horrendous scene left Wayne and his sisters fearing for their lives (Def. Exh. 13, 17 and 18).

The extensive absence and abuse by both parents resulted in Wayne and his two sisters being placed in foster care. Despite the absence of both parents, the chronic abuse, psychological terrorism, and rejection, Wayne was capable of displaying love and care for his mother. Somehow Wayne retained the ability to love his mother and forgive her for continually walking out on him. During the legal proceeding designed to remove Wayne and his siblings from their natural parents, the most horrifying scenarios continued to present themselves. While hearing the judge order his mother to sacrifice custody of her children, Wayne became hysterical and clutched his mother for dear life. It progressed to the point that Wayne had to be violently removed from his mother by the authorities. At one point, Wayne's mother even kidnapped him and tried to hide out and prevent Wayne from

being taken away. However, the police discovered her hideout, surrounded the house and, once again, violently tore Wayne from the grasp of his mother's outstretched arms (Def. Exh. 14, 17 and 18).

After being removed from his mother, Wayne continued to fantasize about life with his mother and vowed to escape from his foster home and one day reunite himself with her. Upon Wayne's placement in a foster home, his life continued its downward spiral to the point of total despair. It has been documented by numerous sources that Wayne was abused, both physically and sexually, by his foster parents. Wayne's foster parents, Mr. and Mrs. Calhoun, would provide their natural children with the best possible care while depriving Wayne of even the most basic of necessities. Often Wayne would be sent to his bedroom and denied the opportunity to eat while the Calhoun's other children were provided with lavish meals and treats such as ice cream. On other occasions, Mr. Calhoun would violently beat Wayne with his fists and whip him for insignificant infractions. It is clear that Mr. Calhoun sexually abused both young girls and boys. Unfortunately, the attempt by the state to raise Wayne's life above past experiences with abuse, neglect, violence, and alcoholism, resulted in his being raped by a male foster parent (Def. Exh. 10, 13 and 17).

Wayne's older sisters who were lucky enough to escape the horrors of being placed in a foster home began to realize that Wayne was again a victim. They attempted to have Wayne legally removed from the Calhoun's home. However, when the decision was about to be made, Gladys refused to take the necessary actions required to free Wayne. Her second husband, Mr. Staley, had grown to love Wayne as a son and was very anxious to be given the opportunity to spend unlimited hours with him. Therefore, Gladys' decision left him puzzled. This decision also left Wayne prey to further abuse (Def. Exh. 12, 13 and 17).

At the young age of sixteen, Wayne had already been exposed to more violence and abuse than most people ever see. Following a final beating and sexual attack from his foster parent, Wayne ran away in his never ending attempt to locate tranquility. With the help of family members, Wayne was able to find success in the roofing industry. It appeared as if Wayne would finally lift himself above his past (Def. Exh. 16 and 17).

While on a roofing assignment in Ft. Pierce, Wayne was the unfortunate victim of a terrible accident. During a phone conversation, lightening struck the telephone line and, following a tremendous explosion and a brilliant flash of light, Wayne was hurled across the room. The impact of the lightening strike left Wayne unconscious. He was rushed to the hospital and treated. Following this incident Wayne appeared to lose his ability to concentrate on his work. On numerous occasions Wayne just backed himself right off the roof of two story structures. Wayne was hospitalized for one of these falls (Def. Exh. 14 and 20).

At one point Wayne moved to Texas and worked as a hired hand in a traveling carnival. There he met a woman who became his wife and brought him the joy of a son. After their return to Florida, Wayne's wife, like his mother, grew bored of her life and ended Wayne's progress toward stability. The loss of his son was a terrible blow that left Wayne once again staggering through life in search for happiness (Def. Exh. 13 and 17).

Once again Wayne returned to the roofing business and eventually met up with an older woman who, he hoped, would provide him the satisfaction and happiness he found through his previous marriage. His newly discovered mate, Barbara DeCarr, who was a single mother of five children, appeared to offer Wayne a resting place and end his life long venture for a happy family life. This, Wayne perceived, was the perfect opportunity to participate in the type of family he never had. Wayne hoped to provide Barbara's children with the stable father figure that

they obviously lacked. However, Wayne's determination to overcome the crushing defeats of his past had worn thin and he found himself lodged in a mad world of alcohol and drug abuse. Barbara DeCarr encouraged Wayne's drug-saturated lifestyle and she offered him no escape and in fact mentally and sexually tormented him even further (Def. Exh. 13, 16, **17** and **18).**

Barbara used Wayne when she was financially on the skids and then viciously attacked and rejected him when she was able to find another man capable of offering the pleasures of life which she could not find in Wayne. He was never able to fully shake himself free of the pain he felt from the loss of his mother as a child and the loss of his own son after living through and escaping the horrors of the sexual abuse from his foster father. So Wayne jumped at the opportunity to love Barbara's children as his own. Unfortunately, Wayne found it necessary to consume unbelieveable amounts of alcohol and drugs to combat Barbara's sexual perversion and promiscuity. It never became clear to Wayne that, through his use of intoxicants to help him cope with his fight for a loving family, he was destroying his ability to reason (Def. Exh. **12, 13, 16** and **17).**

The jury should have heard that Wayne's life has been full of sexual and physical abuse, head injuries, and strong potential for brain damage. Yet the defense attorney failed to present this evidence to the jury. He also failed to present a mental health expert with this information and have him discuss Wayne's mental deficits. The jury when asked to weigh the value of Wayne's life needed to know his background. Thus, powerful mitigating and explanatory evidence was available. Such evidence would have permitted the capital sentencer to see, understand and sympathize with Mr. Tompkins because of the abuse, rejection and hostility of his home and institutional environments that shaped him during the critical of his formative years. This sort of "humanizing" evidence would have clearly shown that there was

Wayne Tompkins worth saving.

At the evidentiary hearing, Dr. Pat Fleming who the State stipulated was a qualified expert in clinical psychology testified regarding the results of her testing and evaluation of Mr. Tompkins:

> A. Well, the Wechsler Adult Intelligence Scale showed a verbal IQ of 86, performance IQ of 76 and a full scale IQ of 79, and this would place Mr. Tompkins in the borderline range of mental functioning.
>
> He had particular difficulty on some subtests. One was in the normal range. He showed difficulty on those tests that had abstract reasoning and judgment. He was -- he was just in the low range of overall mental ability.
>
> Q. What were you able to tell from the Halsted-Raitan?
>
> A. The Halsted-Raitan gave an index, an impairment index, of .57 which places on this particular battery, on those people that are known, in a range consistent of those people that are known to have brain damage.
>
> He showed on this test, on the fourth battery, he was deficient in the brain damaged range on four of the tests. He showed particular difficulty in the test for judgment and reasoning, the ability to apply facts to everyday circumstances.
>
> He showed difficulty in fine motor skills, in quickness of response, on tasks that require coordination and, again, some reasoning ability.
>
> He did not show deficits in basic sensory perceptual areas, like finger discrimination. He was, on the basic sensory, his basically sensory intact, on the trail-making test, which was another test, he was deficient again in Part B which requires the ability to make judgments and to organize facts.
>
> Let's see. He showed some left hemisphere damage. He is right-handed and yet he didn't show the expected strength on the right hand.
>
> The information suggests that he's significantly and seriously impaired in higher levels of brain functioning. He becomes confused easily.
>
> He is impaired in his difficulty to deal with tasks that require to have him keep more than one element at one time. He was

particularly -- the greatest deficit was on the category test which is probably the most sensitive test of brain damage in the battery.

(T. 327-29).

A. He had trauma in the loss of his father. His mother was gone a great deal. He was reared by his older sisters. They had deprived -- they were, according to many of the affidavits, there was neglect.

He was placed in a foster home where there was a question of the abuse at that time. He -- he really yearned for his father and finally found the father, I think it was, in 1982. He finally located his father and the father shortly, I think within six months, was shot and killed, and so he had that continual loss.

None of the affidavits of the early background information indicates violence. I hadn't -- the people that I talked to and the affidavits indicate that Mr. Tompkins was not aggressive, acting out, belligerent. He was a child that was more the victim rather than the aggressor.

He was described in one affidavit as more of a wimp in school. He was the one that was kind of teased and put down.

He, despite this long history of what you would suspect of the brain damage throughout the years, and who could document what happened when, he did not have a history of violence.

He had -- he still has a great attachment to his mother.

He tends to personify. He doesn't blame. He views his father, mother and father, as doing the best they could. He thinks a great deal of his sisters and his other siblings. He tends to see everything in the best of all lights.

If when -- he tends to blame himself rather than other people. We call those internalizers, and who tend to focus on their own problems rather than externalizers who always blame other people.

I would say that the loss of the father, the closeness and the fixation on the mother, the separation which was traumatic in the foster home, and the separation from the family were all very significant factors.

His relationship with Mrs. DeCarr, I felt, was very similar to a relationship with his mother in terms of filling those same needs.

She was, I think eighteen years older than he, had a family, and he talked just in very positive terms about the family. He saw himself as a father.

He had lost his own son through separation. The mother of his child, they lived together for a period of time and she left.

Now, according to the affidavits, she left with another man. He sees her in very positive terms and still grieves about the loss of that son, and I think this new family took the place of that son in some way.

Q. In terms of a mental illness, do you find one present?

A. Yes, sir, substance abuse disorder. He did at the time, and we haven't talked about that. He began drinking early. He told me that he started out with beer and finally ended up drinking beer and hard liquor daily in quantity.

He had joined a carnival and worked with a carnival for about five years, and he was into drugs at that time and used everything except needles. He said he used hallucinogens on a regular basis, used LSD. He used, tried inhalants, glue sniffing, paint, but on just a one-time basis, smoked marijuana.

So, that would be a substance abuse disorder, organic brain syndrome, and Axis Z of the LSM-III, a personality disorder of dependent personality.

Q. In the course of your evaluation, did you find anything to establish that Mr. Tompkins committed the murder?

A. No. I would like to share what he did tell me when I first went in to evaluate him and he came. He said that he would cooperate and that he would do what he could to -- what I needed to know, but if I were there to try to get him to confess to a crime he didn't commit that he wanted to quit right then.

He, at all times, was very emphatic that he had not killed Lisa. He gave me a number of reasons why he said it wasn't possible and nothing changed that. He didn't change.

He was -- he has a -- he is very good at details. He gives you details. He misses the big picture sometimes, but he remembers details and actually he didn't change the details of his report, and I was

with him a long time.

(T. **350-34).**

Despite finding deficient performance in the failure to uncover and present this substantial nonstatutory mitigation, the circuit judge found no proof of prejudice. His ruling was simply in error. Bassett v. State, ___ So. 2d ___, **14** F.L.W. **31** (Fla. **1989).** "[T]he inability to gauge the effect of this omission undermined the court's confidence in the outcome of the penalty proceeding," and thus requires a reversal. State v. Michael, **530** So. 2d **929, 930** (Fla. **1988).** See also Harris v. Dugger, ___ F.2d ___, slip op. at **16** (11th Cir., May **16, 1989).**

V. A STAY OF EXECUTION IS REQUIRED

Mr. Tompkins presented nineteen issues in his Rule **3.850** Motion. An evidentiary hearing was conceded by the State. That evidentiary hearing concluded on May 20, **1989.** Counsel was not allowed to file post-hearing memoranda. The court issued its order denying relief on May 22, **1989.**

The transcript from the proceedings in the court below is four hundred seventy **(470)** pages in length. There were twenty-one defense exhibits introduced at the hearing and one State's exhibit. The trial transcript and court record are over six hundred **(600)** pages.

The findings made by the circuit court are in many respects erroneous, contrary to law and fact, and antithetical to the evidence presented. Mr. Tompkins has attempted to present a thumbnail sketch of the relevant facts which underscore the circuit court's errors. However, the constraints of time and the imminence of his execution prevent full, considered, and professionally adequate briefing and analysis. Again, Mr. Tompkins would respectfully request that this Court stay his execution, to allow for complete briefing and judicious consideration.

This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Marek v. Dusser, No. 73,175 (Fla. Nov. 8, 1988); Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dusser, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 4, 1985); Bush v. State, Nos. 68,617 and 68,619 (Fla. April 21, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986); Mason v. State, No. 67,101 (Fla. June 12, 1986). See also Roman v. State, So. 2d , No. 72.159 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986), cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Tompkins presents are no less substantial than those involved in *any* of those cases. A stay is proper.

Moreover, a stay is warranted in order to provide Mr. Tompkins with the effective representation to which he is entitled. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988). See also, State ex rel. Escambia County v. Behr, 354 So. 2d 974 (1st DCA 1978), affirmed Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980). Counsel simply cannot prepare a brief and a reply to the State's habeas response under the present circumstances.

As stated, it is precisely the types of issues presented that need to be fully and properly briefed before they can be properly adjudicated.

WHEREFORE counsel requests a stay of execution, and all other relief which the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded by ~~U.S. MAIL~~/FEDERAL EXPRESS to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, **1313** Tampa Street, Tampa, Florida **33602**, this 30th day of May, **1989**.

_____
Attorney