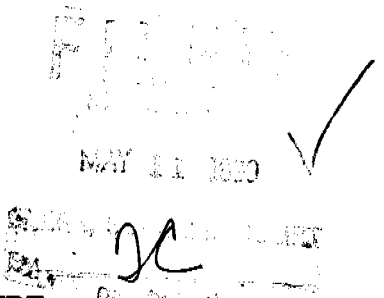
IN THE SUPREME COURT OF FLORIDA

WILLIAM F. HAPP, Appellant,	)	
vs.	)	CASE NO. 74,634
STATE OF FLORIDA, Appellee.	)	



APPEAL FROM THE CIRCUIT COURT
IN AND FOR CITRUS COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The symbol (R) refers to the record on appeal in this cause. The symbol (SR) refers to the supplemental record on appeal.

STATEMENT OF THE CASE

On December 2, 1986, the fall term grand jury, Fifth Circuit, Citrus County, returned an indictment charging William Frederick Happ [Appellant] with the first-degree murder of Angela Crowley on May 24, 1986, in violation of Section 782.04(1)(a), Florida Statutes. The grand jury also indicted Happ on one count of burglary of a conveyance with a battery therein, one count of kidnapping, and one count of sexual battery likely to cause serious personal injury. (R1-2)

Numerous pretrial motions were filed in this cause, only some of which have relevance to the issues raised in this appeal. Happ filed a notice of alibi prior to trial. (R78) Happ also filed a motion to dismiss the indictment or, in the alternative, to declare that death is not a possible penalty based upon the failure of the indictment to allege the applicable aggravating circumstances. (R118-121, 167) Appellant also filed a motion to declare Sections 775.082(1) and 921.141, Florida Statutes, unconstitutional based, inter alia, on the unbridled discretion of the prosecution in its decision to seek the death penalty. (R134-39,160-69) These motions were all denied. (R880,937,941-2,968) The court denied the motion to prohibit voir dire of jurors about their feelings on the death penalty. (R951-3) The court denied Appellant's motion to declare the death penalty unconstitutional based on the trial court's lack of discretion as far as sentencing. (R960) The court denied the motion dealing with an attack on aggravating circumstances as

vague and duplicitous. On June 29, 1988, the trial court rendered an order granting Appellant's previously filed motion to change venue from Citrus County to Lake County. (R197)

On December 1, 1988, Happ filed a motion to suppress any and all statements that he made to Investigator Jerry Thompson and Agent John Burton based upon his previous invocation of his right to counsel. (R244-45) Following a hearing on the motion (R984,996-1015), the trial court denied the motion to suppress. (R755,1013) Appellant subsequently filed a motion to rehear the motion to suppress on January 18, 1989. (R393-414) Defense counsel also sought to exclude any fruits thereof. (R1019,1021-2) The trial court granted rehearing and, after hearing further evidence and argument, denied the motion. (R457-8,1029-A1-41,64-5)

Appellant filed several motions in limine in an attempt to restrict objectionable evidence offered by the state. (R79-82,122-25,148-51) The trial court granted many aspects of these motions. (R192-4) One aspect of the trial court's order in limine prohibited the state from conveying to the jury, either directly or indirectly, Happ's prior criminal record except for proper impeachment purposes. (R192)

The case proceeded to a jury trial before the Honorable John Thurman on January 9, 1989. (R712-A1-457) The prosecutor violated the order in limine during cross-examination of the last defense witness. (R487-9) The trial judge granted Appellant's motion for mistrial, finding that the prosecutor intentionally

provoked the mistrial. Judge Thurman began contempt proceedings against the prosecutor, but that threat subsequently dissipated, and Judge Thurman recused himself pursuant to the state's motion. (R491-535,582-3,678-703) After Thurman's recusal, the case was assigned to Judge Lockett. (R1307) Five days after the mistrial, Appellant filed a motion to dismiss contending that retrial was barred based on double jeopardy. (R586-91,633-9,1309-14) Judge Lockett denied Happ's motion to dismiss following a hearing on February 7, 1989. (R592,631,652-823) Happ then unsuccessfully sought a writ of prohibition in the Fifth District Court of Appeal. (R677,828,844-47) Happ v. Lockett, 543 So.2d 1281 (Fla. 5th DCA 1989).

Prior to the retrial, Judge Lockett reviewed all motions previously heard and adopted most of Judge Thurman's rulings. (R875,878-82,2200-01;SR1-51) Judge Lockett also granted the state's motion in limine to prohibit defense counsel from referring to state witnesses by names such as "snitches" or "squealers." (R1423-4) The case proceeded to a jury trial before the Honorable Jerry T. Lockett on July 24, 1989. (R1036,1406-2497) During jury selection, Appellant objected to the state's use of a peremptory challenge to excuse a black juror. The trial court ultimately accepted the prosecutor's stated reasons for the challenge. (R1576-80)

Prior to the introduction of Richard Miller's prior testimony at the retrial, Appellant objected to the reading of Miller's proffered testimony (taken that morning) concerning his

reasons for refusing to testify at Happ's second trial. The trial court overruled the objection and allowed the reading of Miller's proffer. (R1708-24,1868-1927)

At the conclusion of the state's case-in-chief, Appellant moved for a judgment of acquittal based upon the insufficiency of the evidence as well as an argument dealing with double jeopardy. (R2211-14) After the trial court denied the motion, Appellant presented his case-in-chief. (R2214-2303) Appellant sought to present the testimony of Hugh Lee. Following a proffer, the trial court ruled that the evidence had insufficient probative value and excluded the evidence. (R2191-99) After presenting other evidence, Appellant renewed his motion for judgment of acquittal which the trial court again denied. (R2343) The state presented one witness in rebuttal. (R2346-52) Defense counsel again renewed his motion and the trial court again denied it. During closing argument by defense counsel, the trial court commented on the evidence. (R2414-15)

During deliberations, the jury returned with two questions. (R1109-10,2383-4) The trial court denied defense counsel's request to reread certain testimony or, in the alternative, to answer the question. The trial court instructed the jury that they must rely on their own recollection. (R2484-6) Following further deliberations, the jury returned with a verdict of guilty as charged on all counts. (R1105-8,2486,2490-2)

The trial court conducted a penalty phase on July 31, 1989. (R2498-2593) The trial court excluded probative evidence

that Happ proffered at the penalty phase. (R98-99,2517-19) Following deliberations, the jury returned with the recommendation (9-3) that the trial court sentence Happ to death. (R1140,1380) A sentencing guidelines scoresheet resulted in a recommended life sentence. (R1157) The trial court departed from the guidelines, sentencing Happ to three consecutive life sentences all consecutive to the death sentence that the court imposed for the murder. The trial court rendered written reasons in support of the departure. In the written findings of fact in support of the death sentence, the trial court listed four aggravating circumstances and three mitigating circumstances. (R1149-66,1383-92)

Appellant filed his notice of appeal on September 22, 1989. (R1375) This Court has mandatory jurisdiction. Art. V, s.3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

On Saturday, May 24, 1986, a fisherman found the partially clad body of a woman on the bank of the Cross Florida Barge Canal in northwest Citrus County. (R1733-48, 1762-64) The woman's shoulders were covered by a tee shirt that was pulled up to her underarms. (R1762-4) A pair of stretch pants were tied tightly around her neck. (R1766-70) She wore several gold rings, a necklace, and a watch. (R1770-72) Law enforcement responded to the scene and transported the body to the morgue. (R1744-49,1772)

Police conducted a brief search of the area that was curtailed due to nightfall. (R1772) Police resumed the search the following morning and found a tennis shoe and a pair of women's underwear near the water's edge. (R1778-85) Police found the mate to the shoe on the nearby roadway. (R1775-78,1787-88) Scuffmarks on the heels of the shoes, coupled with abrasions found on the woman's back, led police to the conclusion that her body had been dragged along the bank of the canal. (R1765,1784-86) The fact that they found leaves and sticks on top of the body indicated that it had previously been in the water. (R1765) A subsequent autopsy revealed that the victim had suffered multiple blows to the face and head prior to being strangled to death. The doctor opined that, from the commencement of strangulation, Crowley would have been rendered unconscious within two minutes and dead in another two to three minutes. (R1969-70) The medical examiner testified that the woman had engaged in anal intercourse shortly before or at the time of her

demise. (R1950-70)

Subsequent investigation identified the dead woman as Angela Crowley, a twenty-one-year old white female from Fort Lauderdale. (R1801-04,1835-38,1842-43) Crowley left her apartment between 6:30 and 7:30, Friday night, May 23, 1986. Crowley intended to drive to Citrus County that night to visit her friend Dawn Selders in Yankeetown. (R1801-10,1817,1823-26,1830-39) Selders planned to meet Crowley in Crystal River and lead her to Selders' home. (R1838-39) Crowley phoned Selders about 6:30 shortly before leaving Fort Lauderdale. (R1839) Selders fell asleep later that evening but was awakened by Crowley's phone call at 12:36 Saturday morning. (R1839-40) Crowley reported that she had mistakenly ended up in Wildwood and would be later than previously expected. Crowley said she would call Selders again once she arrived in Crystal River. (R1840-41) When Selders woke up the next morning, she realized that Crowley had never called back. Selders became concerned and phoned Crowley's roommate and, after some discussion, Selders notified the authorities. (R1816,1841) Late Saturday night, Selders identified the body found at the canal as Angela Crowley. (R1841-42,1850-51)

Starting at the turnpike toll plaza in Wildwood where Crowley phoned Selders, Investigator Jerry Thompson of the Citrus County Sheriff's Department, attempted to retrace her route. (R1840,1845-53,1857-8) Thompson asked the toll attendants if they remembered Crowley coming through that night. Thompson

followed State Road 44 into Crystal River, stopping to inquire at various convenience stores and businesses along the way. (R1852-53) Thompson's investigation was not fruitful. He arrived in Crystal River at about the same time that Crowley should have arrived if she did not get lost again. (R1857-9). Thompson began looking for prominent phone booths accessible from the highway. (R1853-54) He found what he was looking for at the Cumberland Farms store in Crystal River. The store was closed at that time of night. Thompson noticed a group of newspaper carriers who were folding their wares in the Sun Market parking lot across the street from the store. (R1854-55) The carriers told Thompson that they had seen an altercation at the Cumberland Farms store on Friday night, May 23, during the early morning hours of May 24. (R1855) The carriers told Thompson that they noticed a small car and heard a woman scream at approximately 2:40 a.m. (R1859)

Barbara Messer, district manager for the St. Petersburg Times circulation department, pulled into the Sun Market on May 24, 1986, at approximately 2:40 a.m. As she got out of her car, the group of paper boys was looking in the direction of the Cumberland Farms Store across the street. (R2253-55) In response to Messer's question, the carriers told her they had heard a girl scream across the street. Messer saw a car parked in the Cumberland Farms parking lot in a position indicating that the car had pulled off the highway. (R2256) She saw a white male between 19 and 23 years of age shuffling around the car. She watched as he appeared to pick up something outside the car near

the open passenger's door and throw it into the car. (R2256-57) He then came around the back of the car as if he were going to the driver's side. (R2257) When he got to the back of the car, he put both hands in the middle of the hatchback, leaned forward, and pushed. He then came back around to the passenger's side, got into the car, and closed the door. (R2257-8) As he was closing the door, the car pulled out of the parking lot and drove away. Messer testified that someone else had to have been driving, as the man would not have been able to slide across the seat and drive away in that short a time. (R2259) Messer described the man as approximatley six feet tall, weighing about 170 pounds, wearing cut-off blue jean shorts, flip-flops, and no shirt. (R2259-60) He appeared to have light brown hair that had been bleached from the sun. (R2260) His hair came down to his collar and he had no facial hair. (R2260-61) Messer testified that the man she saw that night was not Bill Happ.

The police found Crowley's car Sunday morning, May 25, parked at Jones' Restaurant on U.S. 19 approximately six-tenths of a mile south of the Cumberland Farms store. (R1856-57) A waitress noticed the car when she arrived for work at 3:30 a.m. Sunday. It had not been there on Saturday afternoon. (R1427-30) The keys were still in the ignition. (R1861-2) The window on the driver's side was completely broken out. Police found a large amount of broken glass inside the car but very little outside. (R2111) This led Sergeant Strickland to believe that the window had been broken at another location. Sergeant Strickland went to

the Cumberland Farms store and found broken glass near the phone booth. (R2014-16) Police also found a small amount of glass in the vicinity where Crowley's body was found. (R2019-24) The broken glass collected from inside the car, from the store, from the restaurant parking lot, and from the barge canal were consistent with having originated from Crowley's car window. All of the samples had the same greenish tint, all were float glass, all were tempered, all had the same thickness, and all displayed the same dispersion and density. While all of the glass samples could have come from the same source, there was no way to prove that theory. (R2067-74)

Sergeant Strickland noticed a shoe print in the lime rock of the restaurant's parking lot next to Crowley's car. (R1932,2006-8) Its location and surrounding circumstances led Strickland to believe that the print could have been made by someone getting out of Crowley's car. (R2006-11) A crime lab analyst who testified for the state could only conclude that the print could have been made by a shoe that was obtained from the Appellant approximately five months after the crime. (R2103-6,2111-20)

Crime lab analysts thoroughly examined Crowley's car. (R2127-35) They found no fingerprints inside the car. (R2129-31) This could have been due to the types of surgaces found in cars' interiors. (R2130-1) On the outside of the right door post, they found a latent that matched Appellant's left middle finger. (R2132-34,2147-51,2160-71) Another latent found on the outside

of the driver's door matched Appellant's left thumb. A latent palm print lifted from the outer surface of the back window of Crowley's hatchback matched Appellant's palm print. (R2136-43,2171) This print was covered by the dust from the Jones' Restaurant parking lot. (R2139-41) The FBI fingerprint specialist examined fourteen other latent prints lifted in this case and eleven photographs of other latent impressions. The specialist compared these and several other prints found to the full case prints of Crowley and Appellant. Although the prints found were of a good quality, the specialist determined that none of these other prints matched either Crowley or Happ. (R2172-74)

Bill Happ came to Crystal River and moved in with Edna Peckham, his great aunt and her husband around the middle of March, 1986. (R2266-67) Peckham had moved to Crystal River in 1980 with her husband, who suffered from Alzheimer's disease and cancer and eventually died in 1987. (R2266-68) Mr. Peckham had suffered a stroke in 1981 which left him bedridden and unable to talk. (R2269) Mrs. Peckham testified that on Friday, May 23, 1986, Bill Happ came home for dinner around 5 or 6 p.m. and stayed home all that night. (R2269-70) As usual, Mrs. Peckham repeatedly checked on her husband throughout the night. She would have noticed if Bill had left during the night. (R2271) Peckham remembered that weekend because it was the first weekend after she had taken the truck away from Bill Happ. Bill was no longer working, so Mrs. Peckham decided to sell the truck.

(R2272) On May 22, 1986, Mrs. Peckham took the truck to be serviced and kept the receipt to show potential buyers. (R2272-75) Without a truck, Bill Happ only stayed out late one night (a Saturday) before leaving the Peckham home and returning to Pennsylvania on May 30, 1986. (R2275-79) Mrs. Peckham's phone bill revealed that Bill Happ phoned Pennsylvania from the Peckham home at 8:12 a.m. on Saturday, May 24, 1986. (R2278-81,2295)

Vincent Ambrosino also lived in Crystal River with his mother. (R2079-80) Ambrosino began working at McDonald's on May 21, 1986. (R2082) Ambrosino met Bill Happ in April at a local bowling alley. They became friends and saw each other daily. (R2082-3) Happ was unable to pick up Ambrosino following his first day of work. Edna Peckham had taken the truck away from Bill, so Happ appeared on foot. (R2083-4) They spent that Wednesday afternoon playing pool at the bowling alley, before going their separate ways that night. (R2383-4) They also saw each other on Thursday. At trial, Ambrosino testified that Happ spent Thursday night at Vince's house in spite of Vince's step-father's objections. (R2084-6) Vince was very unsure which night Happ spent at his house. On three other occasions, vince testified that Happ spent Friday night at his house. (R2089-93,2097-8) On Friday, May 23, 1986, Happ and Ambrosino again went to the bowling alley. They left the alley at approximately 11:00 that night. (R2086) Vince last saw Happ heading towards his aunt's home. (R2086-7) Vince saw Bill the next morning, Saturday, May 24, at approximately 9:00. (R2087-8) Ambrosino

thought that Happ's right hand looked swollen that morning. (R2088) Happ explained that, during his walk home the previous evening, he became angry with his aunt for taking his truck away. He lost his temper and punched a tree. (R2088-9) On those three occasions, Vince also indicated that he saw Happ on Sunday morning with a swollen right hand. (R2089-93,2097-8)

Police first suspected that Happ might have had something to do with the murder in August, 1986. (R2099-2100) Investigator Thompson visited Happ in Santa Clara County, California, where they obtained a pair of tennis shoes from Happ. (R2103-6) Investigator Thompson eventually returned to California on October 10, 1986. (R2205-6) Thompson showed Happ the photographs of Crowley and her car. (R2206) In response to a question, Happ told Thompson that the car did not look familiar. Happ also told Thompson that there was no reason that his fingerprints would be inside Crowley's car. (R2209-10)

Happ was eventually arrested and charged with the murder of Angela Crowley, he was housed in the Citrus County Jail after his transfer from California. (R2076-7) Tony Domino booked Happ at the Citrus County jail on February 3, 1987. (R2076) Happ shared a cell with Richard Miller. (R1876-78,2077-8)

Miller, a man doing sixty years in prison for eight felony convictions (including two violent sexual batteries), refused to be deposed on two previous ocassions before finally agreeing on the morning of Happ's first trial. (R1883-8,1907-8,1915-18) In exchange for his testimony, Miller received a

written contract, signed by the prosecutor in Happ's case, guaranteeing him protection in addition to a transfer out of state closer to his ailing family. (R1891,1899,1918-22) Miller initially read about Happ's case in the newspaper. (R1891) Miller's mother contacted the Federal Bureau of Investigation and arranged for Miller to provide information in another unrelated case. (R1892) In a meeting with Investigator Jerry Thompson on that unrelated case, Miller, in response to a question, alleged that he could provide information about Happ's case. (R1894) Miller admitted that he suffered from dyslexia, a learning disability that affected his ability to read, see, and hear. (R1888,1910)

Miller testified that he befriended Happ in jail and they began to talk about their respective cases. Happ allegedly told Miller that he abducted a woman in a parking lot in Citrus County. Miller was unable to tell the jury what type of parking lot or what time of day this occurred. (R1878-9) Miller said that Happ "snuck up on the car and choked her out, put her in the car she was getting in." (R1879) Miller did not know if the woman was dead at that point. (R1880) Happ mentioned some broken glass but never told Miller how that happened. (R1880) Happ then told Miller that he took the woman to the Cross Florida Barge Canal where he had anal intercourse and engaged in fellatio with the woman. (R1880-1) Happ told Miller that throughout the episode, he nibbled on her neck. (R1881) Miller testified that Happ beat the woman repeatedly but was unable to say how or where

this occurred. (R1881) He also testified that Happ strangled the woman to death with an article of clothing, but was unable to be more specific. (R1881) Miller claimed that Happ related that the woman defecated as he strangled her. Miller also claimed that Happ threw the woman's body into the canal. (R1882)

Miller's testimony revealed many inconsistencies. He could not recall the first tidbit of information that he provided police on Happ's case. (R1900) Initially Miller testified that Happ told him about the crime in a series of six to seven discussions over a period of three weeks. (R1901) At the deposition taken the morning of his testimony, Miller indicated that Happ told him everything over a forty-eight hour period. (R1902) Miller did not tell police about the broken glass until a few days before he testified. (R1904,1907-8) Miller testified that Happ confided that he bit the victim on the neck. At his deposition just hours before his testimony, Miller swore under oath that Happ did not specify where he bit the woman. (R1909-13) Miller also failed to mention the victim's defecation until a few days before his testimony. (R1922-23)

Investigator George Simpson collected evidence at the autopsy. (R2219-20) These included Crowley's fingernail scrapings, clothing, Crowley's head and pubic hair as well as pubic combings. (R2219-21) Investigator Simpson also vacuumed evidence from Crowley's car and from the pick-up truck that Happ drove. (R2222-23)

A senior crime lab analyst for the Florida Department

of Law Enforcement examined this and other evidence in the case. (R2226-9) In a tennis shoe found near the body, FDLE found hair characteristic of caucasian head hair and caucasian body hair. The FDLE concluded that this hair did not come from either Happ or Crowley. (R2230) The FDLE also found several caucasian head hairs from Crowley's tee shirt that did not match Happ's. (R2231) A hair found sandwiched between Crowley's neck and the stirrup pants tied tightly around her neck was characteristic of a negroid pubic hair. (R2210,2232-3) Another hair found in Crowley's stirrup pants was characteristic of a negroid body hair. (R2235) Two caucasian head hair fragments from the same source did not belong to Happ. (R2235) In the vacuum sweepings from Crowley's car, the FDLE found numerous hairs characteristic of caucasian head hair and a single hair characteristic of caucasian pubic hair. None of these matched Happ's. (R2236) Several other caucasian head hairs were found in debris from a paper towel and from a brush. None of these belonged to Happ. (R2236-7) In fact, of all the evidence that the FDLE examined, they found no hairs that came from Bill Happ. (R2237) The lab technician explained that the likelihood of a person leaving hair at the scene of a crime increased dramatically if that person was involved in a struggle. (R2242)

PENALTY PHASE

During his stint in the county jail while awaiting trial, Happ participated in adult education classes with great

success. Happ posed no discipline problem while incarcerated. He was a good student, particularly in math, and tutored other inmates in an effort to help them with their studies. (R2542-44)

Bill Happ came from a family that included two brothers and three sisters. Bill was the youngest of the clan that included four children, some by a different father. (R2546-49) Bill's mother was married a total of four times. She had a problem with alcohol and was not home much of the time. She worked at a convelascent hospital during the day and a bar at night. (R2549) She divorced Bill's father when Bill was only four. There was never much money or food in the house. (R2549) His mother was constantly fighting with the various men with whom she became involved including Bill's father. The arguments frequently degenerated into physical bouts. (R2549) Bill's mother was even jailed at one point and all of the children were put in a shelter. (R2550) The children bounced around among various relatives' homes. (R2550)

For a short period after his parents' divorce, Bill saw his father every two weeks. Eventually, Bill's mother no longer allowed Bill to see his father. (R2551) For several years, Bill had to sneak visits to see his father. (R2551) Nina, Bill's half sister, was largely responsible for raising Bill and his siblings. Nina was a very rowdy person. She ran with a motorcycle gang named Dirty Lie and had done some time in jail. Nina had a severe problem with alcohol which literally caused her to go crazy. After one drinking incident, it took six policemen

to subdue her. (R2551) When Nina wanted to keep the younger children out of the house, she would balance knives on top of the door so that they would fall on anyone attempting to enter. (R2552) The situation became so intolerable that Bill's youngest sister left home when she was only thirteen. (R2552)

Undoubtedly due to his home life, Bill quit high school. He was a very good athlete as a young man. (R2552-3) After quitting school, Bill became a hard worker and a jack of all trades. He did some landscaping and construction work, including wallpapering and painting. He also worked as a brick layer. (R2553) He began using drugs in his early teens. (R2553) He began by experimenting with marijuana and alcohol and eventually developed a severe problem with PCP. (R2553) Bill's half sister, Sharon, was responsible for Bill's initial use of drugs. Sharon was not a good influence. She had been in and out of jail since she was fifteen years old. (R2554) Bill became an admirer of Sharon's boyfriend who initiated Bill's criminal problems in California. (R2554-55)

While Bill was living with his great aunt in Crystal River, he was a great help to the old woman. He worked when he could find it and helped his aunt with chores around the house. He was invaluable in helping to care for his invalid uncle. He frequently stayed with his uncle when his aunt went to church. (R2559-61)

Happ had several felony convictions in California arising from two incidents in which Happ abducted an individual

to facilitate an armed robbery. (R2473-83,2530-40)

SUMMARY OF ARGUMENTS

POINT I: At his first trial, the prosecutor violated the court's order in limine and the judge granted Appellant's motion for mistrial. The judge stated that the prosecutor intended to provoke the mistrial. Following a recusal, the successor trial judge denied Happ's motion to dismiss which was based on double jeopardy grounds. Appellant contends on appeal that the first trial judge's finding was a final order which the successor judge could not revisit. Alternatively, Happ contends that the successor judge's findings are clearly erroneous.

POINT II: The trial court rebuffed Happ's attempts to exclude statements and evidence obtained from him while in custody in California. Happ argues that Florida police should not have initiated contact with Happ, since they were aware that Happ had previously invoked his Sixth Amendment right to counsel in the California criminal proceedings.

POINT III: During deliberations, the jury returned with two questions. Defense counsel asked the judge to either answer the question or to reread the pertinent testimony to the jury. The trial court denied both requests which Happ now contends was reversible error.

POINT IV: During the trial, Happ asked to present the testimony of a lawyer who visited Richard Miller, a jailhouse snitch and key state witness, after Miller testified at Happ's trial. Miller admitted to the lawyer that, at the prosecutor's behest, he had lied during his testimony. Happ contends that it was

error for the trial court to exclude this evidence.

POINT V: The state used one of its peremptory challenges to excuse one of the few black jurors in the venire. Happ contends that the state failed to meet its burden of proving that its two articulated reasons were nonracial.

POINT VI: Richard Miller, a key state witness, refused to testify at Happ's retrial. Happ objected to the reading of Miller's proffered testimony which detailed his reasons for refusing to testify. The trial court allowed this testimony to be read over Happ's objection. Happ contends that the irrelevant testimony evoked sympathy with the jury and tended to give undue weight to the evidence.

POINT VII: Happ sought to introduce evidence that the state was willing to plea bargain prior to trial such that Happ would escape the death penalty in exchange for four consecutive life sentences. The trial court ruled this evidence to be inadmissible.

POINT VIII: Happ contends that fundamental error occurred where the trial judge commented on the evidence during defense counsel's closing argument. The trial judge stated that there was no evidence that Richard Miller was in Citrus County in May, 1986. This went to the heart of Happ's defense which attempted to show that Miller was the actual culprit.

POINT IX: The trial court granted the state's motion in limine and prohibited defense counsel from referring to Richard Miller as a "snitch" or any other pejorative term. Defense counsel was

limited to calling Miller a "jailhouse informant." This denied Happ his constitutional right to effective assistance of counsel, especially in a case as close as this one.

POINT X: Happ attacks the trial court's written findings of fact that the murder was cold, calculated, and premeditated, and that the murder was especially heinous, atrocious or cruel. The evidence simply does not support either of these findings.

POINT XI: In light of only two valid aggravating circumstances and three mitigating circumstances, Happ contends that the death sentence in this case is disproportionate, especially in light of Happ's character, background, and three consecutive life sentences.

POINT XII: Happ urges reversal based upon various errors that cumulatively denied him a fair trial.

POINT XIII: Appellant urges that the Florida Capital Sentencing Statute is unconstitutional for a variety of reasons.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT THEREBY SUBJECTING HIM TO DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 9, OF THE FLORIDA CONSTITUTION.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a criminal defendant from repeated prosecution for the same offense. United States v. Dinitz, 424 U.S. 600, 606 (1976). Article I, Section 9 of the Florida Constitution states that no person shall twice be put in jeopardy for the same offense. It has been determined that a criminal defendant must be afforded a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949). The prohibition against double jeopardy is a substantive right provided for in both the federal and state constitutions.

Double jeopardy is generally not a bar to a subsequent prosecution when a mistrial has been granted in the original trial on the defendant's own motion or with his consent or where circumstances clearly required a mistrial in the interest of justice. Fuente v. State, 549 So.2d 652 (Fla. 1989); McClendon v. State, 74 So.2d 656 (Fla. 1954); State v. Iglesias, 374 So.2d 1060 (Fla. 3d DCA 1979).

Prior to the decision in Oregon v. Kennedy, 456 U.S. 667 (1982), double jeopardy would preclude a second prosecution

in Florida when the mistrial resulted in judicial or prosecutorial overreaching. State v. Kirk, 362 So.2d 352 (Fla. 1st DCA 1978). Oregon v. Kennedy, supra, held that a criminal defendant may invoke the bar of double jeopardy only if the conduct giving rise to the successful motion for mistrial was prosecutorial or judicial misconduct intended to provoke the defendant into moving for a mistrial. In reaching this result, the Court specifically rejected the more general test of "overreaching" due to the lack of standards for its application. To provoke a mistrial intentionally would allow a prosecutor "to shop for a more favorable trier of fact, or to correct deficiencies in [his] case, or to obtain an unwarranted preview of the defendant's evidence." Oregon v. Kennedy, 456 U.S. 667, 686 (1982) (Stevens, J., concurring) (footnote omitted).

Prior to Happ's first trial and pursuant to a defense motion (R79-82), in January, 1989, the trial judge, Judge Thurman, rendered an order in limine which provided, inter alia, that:

> Unless the defense mentions, refers to or attempts to convey to the jury the following described statements or facts, the State and all witnesses in the case shall not mention, refer to, interrogate concerning or attempt to convey to the jury, in any manner whatsoever, either by testimony, inference, directly or indirectly, [the Defendant's prior criminal conviction record except for proper impeachment purposes] without first obtaining permission of the Court, outside of the presence and hearing of the jury.

(R192) The prosecutor expressly indicated his understanding of

the order, and his intent to proffer any such evidence outside the presence of the jury. (R498-99) During Appellant's case-in-chief, Edna Peckham, Happ's great aunt, testified, inter alia, that Happ was at home at the time of the murder. (R470-85) On cross-examination, the prosecutor pointed out to Ms. Peckham that she failed to mention Happ's alibi during a visit from law enforcement officials.

> Q. So you knew in January of 1987 Bill had been charged and was being extradited from California for that murder; correct?
>
> A. But they were only back there one time after that, and I told them then --
>
> Q. That you didn't know.
>
> A. -- that Bill didn't -- couldn't do anything like that.
>
> Q. I understand.
>
> A. They had -- they told me that something happened in Crystal River they thought he was mixed up in.
>
> Q. You said you knew he couldn't do anything like that.
>
> A. Yes, sir.
>
> Q. Do you know that he's committed armed robbery?
>
> MR. PFISTER (defense counsel): Objection, Your Honor.
>
> THE COURT: Approach the Bench.
>
> (Thereupon the following proceedings were held at the bench.)
>
> THE COURT: What's your objection?
>
> MR. PFISTER: Your Honor, out of the

> complete blue, Mr. King has gone out and said Mr. Happ is guilty of armed robbery or committed armed robbery. That's absolutely not invited at all. He's gone around and simply brought out the fact that Mr. Happ has been convicted of a crime. He's brought out the fact that Mr. Happ has been convicted of a crime. Absolute error for the state, Your Honor. I'd move for mistrial at this point. Absolute error. Prosecutorial misconduct.
>
> THE COURT: Mr. King.
>
> MR. KING: (Prosecutor) Your Honor, it's clear that she injected that into the cross-examination.
>
> THE COURT: It's clear I think you want a mistrial and you did it deliberate. I declare a mistrial.

(R487-89) (emphasis added).

The following day, the trial court rendered an order ordering the prosecutor to show cause why he should not be adjudged guilty of contempt in light of his contemptuous conduct in violating the trial court's order in limine (prohibiting questioning concerning prior criminal record in the presence of the jury without prior approval of the court). (R491) The threat of contempt subsequently dissipated and Judge Thurman recused himself. (R492-535,582-83,678-703) Five days after the mistrial, Appellant filed a motion to dismiss contending that retrial was barred on the grounds of double jeopardy. (R586-91,633-39,1309-14) After Thurman's recusal, the case was subsequently assigned to Judge Lockett. (R1307) Judge Lockett denied Happ's motion to dismiss following a hearing on February 7, 1989. (R592,631,752-

823) Judge Lockett's order stated:

> 1. Reasonable attorneys and reasonable trial court judges could disagree as to the propriety of the question concerning the defendant's prior criminal conviction being propounded to the defense witness in the context in which it was presented.
>
> 2. Given the conclusion contained in paragraph #1, the court cannot find that by asking the question the state attorney intentionally engaged in conduct designed to provoke a mistrial or that his conduct rose to the level of gross negligence sufficient to provoke a mistrial.
>
> Accordingly, it is ORDERED AND ADJUDGED that the defense Motion to Dismiss is hereby denied. This court specifically finds that a retrial of the defendant is not barred by the concept of double jeopardy. (R631)

Happ then unsuccessfully sought a writ of prohibition in the Fifth District Court of Appeal. (R677,828,844-47) Happ v. Lockett, 543 So.2d 1281 (Fla. 5th DCA 1989) The District Court saw the determinative issue as the finality of the statement by the predecessor judge (Thurman), that the action by the prosecutor was a deliberate effort to obtain a mistrial. The District Court concluded that retrial would be barred if the successor judge (Lockett) is bound by that finding. See Oregon v. Kennedy, 456 U.S. 667 (1982); Duncan v. State, 525 So.2d 938 (Fla. 3d DCA 1988). The District Court did agree with Happ's contention that Judge Lockett erred in concluding that it was "reasonable" for the prosecutor to pose the question which triggered the mistrial originally. Happ v. Lockett, 543 So.2d 1281, 1283 (Fla. 5th DCA 1989) The District Court concluded that

the question was clearly improper. Judge Thurman's determination of that issue was final and could not be revisited by Judge Lockett. However, the Fifth District concluded that Judge Thurman's finding that the prosecutor intentionally caused a mistrial could not be elevated to the status of a final order with greater stature or dimension that an interlocutory order. Id. The Fifth District further concluded that Judge Lockett's determination that the question by the state attorney in the first trial was not intentionally designed to provoke a mistrial and was an issue that was properly before Judge Lockett. The Court concluded that:

> Although it appears that Judge Thurman may have made a different legal determination had this matter been presented to him, we cannot find that Judge Lockett's denial of the motion to dismiss lacks record support. The trial prosecutor testified at the evidentiary hearing held on the motion to dismiss that his offending question was motivated by his conception of the law of impeachment rather than an intent to provoke a mistrial. That testimony apparently was credited by Judge Lockett, which was his prerogative.

Happ v. Lockett, 543 So.2d at 1283-84.

Prior to the start of his retrial, Happ renewed his motion to dismiss which the trial court again denied. (R1421) Happ again renewed his objection when making his judgment of acquittal and when renewing it. (R2211-12,2343) The retrial resulted in Happ's conviction of murder, burglary, kidnapping, and sexual battery and subsequent death sentence.

Florida follows the general proposition that a successor judge may not review and reverse on the merits and on the same facts the final orders and discretionary rulings of his predecessor, absent special circumstances such as mistake or fraud upon the court. Groover v. Walker, 88 So.2d 312 (Fla. 1956). A successor judge may not reverse or modify his predecessor's final orders or discretionary rulings where the facts remain unchanged. Lawyers Co-operative Pub. Co. v. Williams, 5 So.2d 871 (Fla. 1942). The Fifth District held that:

> In the instant case, Judge Thurman's observation that the prosecutor intentionally caused a mistrial, even if considered a finding of fact, cannot be elevated to the status of a final order with greater stature or dimension than an interlocutory order. Judge Thurman's finding, if it was such, was not necessary in order to support his grant of a mistrial and it was never reduced to a final order of dismissal of the charges against Happ, since Judge Thurman left the case before such dismissal was sought by the defense.

Happ v. Lockett, 543 So.2d 1281, 1283 (Fla. 5th DCA 1989). The Fifth District decided that they could not find that Judge Lockett's denial of the motion to dismiss lacked record support, although Judge Thurman probably would have made a different legal determination. The Fifth District concluded that it was Judge Lockett's prerogative to give credit to the prosecutor's testimony at the evidentiary hearing held on the motion to dismiss.

Appellant disagrees with the Fifth District's

conclusions on this issue. Emerson Elec. Co. v. General Elec. Co., 846 F.2d 1324 (11th Cir. 1988), is an illustrative case. Following a bench trial on a breach of contract, the trial judge took the case under submission. Before making any findings of fact or issuing any rulings, the original trial judge recused himself and the case was reassigned. The successor judge entered judgment in favor of Emerson on the basis of the trial transcript. GE contended on appeal that the judgment required the trial judge to resolve an issue of credibility without having the opportunity to observe the demeanor of witnesses. The Eleventh Circuit agreed that the successor of the recused judge could not make the required credibility determination. Unlike that case, Happ's original trial judge made a finding of fact that the prosecutor's misconduct was intended to goad the defense into moving for a mistrial. Judge Thurman resolved the issue of credibility. Under the cited authorities, Judge Lockett should not have been permitted to disturb that finding of fact.

Happ's situation can also be analogized to the one presented in City of Miami Beach v. Chadderton, 306 So.2d 558 (Fla. 3d DCA 1975). The recalcitrant plaintiff failed to produce information requested by the defendant despite several admonitions from the trial judge. The trial judge eventually rendered an order stating that the cause shall be dismissed with prejudice if the plaintiff failed to produce the requested information within one month. After the original judge was transferred to a different division, the successor judge found

the provision for automatic dismissal to be inequitable, and set that order aside. Although the suit was never formally dismissed, the Third District agreed that the successor judge had no authority to set aside the trial court's order. Judge Thurman's order finding that the prosecutor acted in bad faith is very similar to the trial court's order in City of Miami, supra. As such, Judge Lockett was without authority to set that order aside.

A similar problem was presented in Rex Oil, LTD. v. M/V Jacinth, 873 F.2d 82 (5th Cir. 1989). There, the predecessor judge made oral findings and indicated that he planned to enter judgement in favor of Rex. Before he was able to reduce his findings and conclusions to writing, the predecessor judge died. The successor judge entered final judgment as the predecessor judge had indicated he would. On appeal, one party described the predecessor judge's declarations as a "sketchy pronouncement of Judge Sterling's feelings about the case," while the other party called them "extensive findings of fact and conclusions of law." Rex Oil, LTD, 873 F.2d at 87. The Fifth Circuit held that the predecessor judge's oral reasoning was sufficient without need for a final, written order. Rex Oil LTD, 873 F.2d at 88. Likewise, Judge Thurman's oral reasoning was sufficient without need for a final, written order.

In Happ v. Lockett, 543 So.2d 1281, 1283 (Fla. 5th DCA 1989), the District Court stated:

> We agree with the petitioner that Judge Lockett erred in concluding that

> it was "reasonable" for the prosecutor to pose the question which triggered the mistrial originally. The question was clearly improper and Judge Thurman so held at the time. That determination was final and could not be revisited by Judge Lockett. (emphasis added)

However, the District Court curiously held that Judge Lockett could revisit Judge Thurman's determination that the state attorney asked the question with the intent of provoking a mistrial. Appellant fails to see the difference between Judge Thurman's final determination that the question was improper and Judge Thurman's final determination that the prosecutor intended to provoke the mistrial. The Fifth District is not consistent on this point. Appellant contends that Judge Thurman's finding that the prosecutor intentionally provoked a mistrial was just as final as his finding that the question was improper.

The rule of judicial comity, i.e., that judges of coordinate jurisdiction sitting in the same court and the same case should not overrule the decisions of each other, applies to the propriety of transfers between two courts. Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3d Cir. 1982). In United States v. Rouleau, 673 F.Supp.57 (D.Mass. 1987), a pretrial detention order was found to meet the criteria of finality, such that, a successor judge had no authority to revoke it. Rules relating to the relationship between successor and predecessor judges have special importance when the credibility of witnesses is central to the determination of the issue. Home Placement Service v. Providence Journal Co., 819 F.2d 1199 (1st Cir. 1987).

This Court has long recognized the importance of giving great deference to a trial court's ruling, since the court is in the best position to personally observe subtle nuances at trial that may not be apparent on the face of a transcript. Randolph v. State, Case No. 74,083 (Fla. May 3, 1990). Judge Thurman was in the best position to determine that the prosecutor asked the question with the intent to provoke the mistrial.

Even if Judge Thurman's order was not a final order, it was an explicit finding of fact made by one in the best position to determine the issue. Judge Lockett's finding that the prosecutor did not intent to provoke a motion for mistrial is clearly erroneous. In Oregon v. Kennedy, 456 U.S. 667 (1982), the Supreme Court said that the determination of the prosecutor's intent is a finding of fact for the court. Id. at 675. Thus, the standard of appellate review is a determination of whether the finding of the trial court is clearly erroneous. It appears that Florida has accepted the standards set forth in Oregon v. Kennedy, supra. Keene v. State, 504 So.2d 396 (Fla. 1987) and Bell v. State, 413 So.2d 1292 (Fla. 5th DCA 1982).

The court must infer the existence or non-existence of such intent from the objective facts and circumstances of each case. Oregon v. Kennedy, 456 U.S. 667, 680 (1982) (Powell, J., concurring). In Duncan v. State, 525 So.2d 938 (Fla. 3d DCA 1988), the appellate court reviewed the relevant facts and circumstances and concluded that they demonstrated a prosecutorial intent to goad Duncan into moving for a mistrial.

The District Court reached this conclusion despite a finding to the contrary by the trial judge. The Duncan prosecutor had suffered an adverse ruling regarding the inadmissibility of some evidence. This adverse ruling came almost at the end of trial, with the state having only one additional witness to present. Like the Duncan prosecutor, Happ's prosecutor violated a order in limine near the very end of trial. Happ's trial was virtually complete with only the state's rebuttal evidence remaining. (R774-5)

A second consideration in Duncan and other cases dealing with this issue, is the advantage that the prosecutor gained through the mistrial. Duncan, 525 So.2d at 942. Defense counsel pointed out that he was ready to argue the case to the jury that day and, in support thereof, filed his sealed closing argument with the trial court. (R1247) Defense counsel pointed out that the prosecutor wanted to delay closing argument until the next day. (R709-12, 779-81)

Most important was the live testimony of Richard Miller. When done effectively, the cross-examination of a jailhouse snitch, can be devastating. The jury at the first trial saw and heard Richard Miller give his "purchased" testimony. They saw Miller squirm when defense counsel conducted an effective cross-examination of Miller. Its effectiveness is apparent even on the face of a cold record. However, as this Court is well aware, the jury and the other trial participants are in the best position to judge the credibility of testifying

witnesses. Randolph v. State, supra.

Florida Standard Jury Instructions (Crim.) 2.04 deals with the issue of how the jury should weigh the credibility of a witness. Richard Miller's testimony looses credibility points on each of the ten considerations listed in this standard jury instruction. While the second jury that convicted Happ heard Miller's testimony read, they did not get to see Miller squirm in the witness box. This was a distinct advantage for the prosecution gained as a result of the mistrial.

Additionally, the prosecution was obviously surprised by defense counsel's introduction of Edna Peckham's telephone bill at the mistrial. (R474-5,774,795-8) In fact, the prosecutor admitted at the hearing on the motion to dismiss that he considered objecting to the evidence, contending that the evidence violated the rules of discovery, and asking for a Richardson[1] inquiry. (R799) Upon closer examination, the prosecutor admitted that the phone bill was evidently obtained from evidence that the state possessed. (R807) However, the prosecutor testified that he made a tactical decision not to object, based on his conclusion that the phone bill did not reveal who made the call from the house. Additionally, the prosecutor concluded that the call could have been made from another location and charged to that number. (R799)

The prosecutor admitted at the hearing on the motion to

[1] Richardson v. State, 246 So.2d 771 (Fla. 1971)

dismiss that evidence indicating that Happ placed the phone call that morning at his great aunt's house would severely have damaged the credibility of Vince Ambrosino. (R796) At the retrial, the prosecutor severely lessened the potential damage of the phone bill evidence. The state established that the number called was not that of Happ's girlfriend in Pennsylvania. (R1982,2278-80,2297) The state also focused on Mrs. Peckham's possible confusion about who actually made the call. (R2428-9)

The evidence clearly supports the original trial judge's finding that the prosecutor deliberately violated the order in limine with the intent of goading the defense into moving for a mistrial. The trial was almost over and was going badly for the state. The state had been surprised by the introduction of exculpatory evidence. The jury had seen Richard Miller's testimony destroyed through effective cross-examination. Most importantly, the trial judge who was an eyewitness to the prosecutor's offense, made a clear and immediate finding that the transgression was done to provoke a mistrial.

> THE COURT: It's clear I think you want a mistrial and you did it deliberate. I declare a mistrial.

(R489) The trial judge was there and he made a finding of fact. As counsel argued below, "Nothing beats being there." Judge Thurman was physically present observing the ebb and flow of the fortunes of the trial. He saw the pauses, the body language, and the facial expressions of the participants and witnesses. Against that background, this Court must review Judge Thurman's

final determination that the prosecutor's intent was a deliberate attempt to goad the defendant to move for a mistrial. Judge Lockett's finding to the contrary is clearly erroneous. Happ's retrial is barred as a result of double jeopardy constraints. Amends. V, XIV, U.S. Const; Art. I, s.9, Fla. Const.

POINT II

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ADMITTING EVIDENCE OF HAPP'S STATEMENTS TO POLICE AND THE FRUITS THEREOF.

Prior to trial, Happ filed a motion to suppress any and all statements he allegedly made to Investigator Jerry Thompson and Agent John Burton while incarcerated in the Santa Clara, California jail. (R244-45) The motion alleged that Thompson and Burton initiated the questioning even though they knew that Happ had invoked his right to counsel and was represented by a lawyer in the unrelated California offense. The trial court heard evidence and argument on December 16, 1988. (R984,996-1015) There is no dispute that Happ did not request an audience with Investigator Thompson and Agent Burton. Thompson and Burton initiated the contact by travelling to California to visit Happ after they developed him as a suspect. (R997-98,1004) The interview occurred on October 10, 1986, prior to Happ's indictment on December 2, 1986. (R1005) Thompson and Burton were aware that Happ was represented by counsel in California on robbery and kidnapping charges in that state. (R999) After Burton advised Happ of his Miranda[2] rights, Happ signed a written waiver and agreed to talk to them. (R999-1003) Thompson admitted that he did not specifically inform Happ that he could talk to

[2]Miranda v. Arizona, 284 U.S. 436 (1966)

his California lawyer before answering any questions. (1004) Thompson and Burton then proceeded to interrogate Happ about Angela Crowley's murder. (R1003) After hearing argument from both sides, Judge Thurman denied the motion to suppress, finding that Happ expressly waived his rights and voluntarily talked to the police. (R1005-15)

On January 18, 1989, the trial court agreed to revisit the motion to suppress based on Arizona v. Roberson, 486 U.S. ___, 100 L.Ed.2d 704 (1988). (R394-414,1016,1018-19) Defense counsel also sought to exclude any evidence that was discovered as a result of Happ's conversation with Investigator Thompson including any evidence obtained from Jean Pinko and Vince Ambrosino. (R1019,1021-22) On January 19, 1989, Judge Thurman held a hearing on Happ's motion for rehearing on the motion to suppress. (R1029-A,1-65) At the hearing, Happ testified that he was arrested by the FBI in Pennsylvania and informed of his rights. Based upon information received from an FBI agent at the time of his arrest, Happ knew that he was a suspect of Crowley's murder in Florida. (R1029-A15) Although Happ initially made some statements after his Pennsylvania arrest, once they arrived at the FBI building, Happ requested a lawyer and remained silent. (R1029-A19-21) Happ's testimony that he invoked his rights in Pennsylvania was contradicted by an FBI agent who helped arrest Happ. (R712-A192-9) Once Happ was extradited to California, the court appointed a lawyer to represent him on the California charges pursuant to his request. (R1029-A12-13,15,32-3) Happ

admitted that he never asked for a lawyer to represent him specifically on the Florida charge, explaining that he had not yet been formally charged. (R1029-A15) Happ thought that he requested a lawyer and invoked his right to remain silent as he was booked into the Santa Clara County Jail. (R1029-A30-32)

Investigator Thompson and Agent John Burton came to California to discuss the Florida murder with Happ. (R1029-A12-14) Happ had been to court in California that morning but was unsure if his case had been disposed of at that time. Happ admitted that Thompson and Burton informed him of his rights which he waived and agreed to discuss the Florida case. (R1029-A34-35) When they subsequently returned with an indictment and a warrant for his arrest, Happ invoked his right to silence and requested a lawyer. (R1029-A34-35) After hearing further argument on the motion, the trial court denied the motion to suppress Happ's statements as well as the fruits thereof. (R456-7,2081-2,1029-A35-41,63-65)

In his written order, the trial court found that Happ's statement was freely and voluntarily given without coercion or duress following a knowing waiver of his rights under the Fifth Amendment. (R456) The trial court further found that Happ never invoked his Fifth Amendment rights prior to giving his statements to Thompson and Burton. This finding was based on the trial court's conclusion that Happ testified falsely about invoking his rights in Pennsylvania following his arrest. (R456) Based on the testimony of Agent Pitman of the Federal Bureau of Investigation

on this issue combined with Happ's uncertainty on the issue, the trial court found that Happ never invoked his Fifth Amendment rights in California. (R456-7) In addressing the legal issues involved, the trial court stated:

> The defendant asks this Court to read together the cases of Arizona v. Robinson, 43 CLR 3085 (1988) (sic) and Michigan v. Jackson, 106 S.Ct. 1404 (1986), to hold that once a defendant invokes his Sixth Amendment right to counsel on a pending criminal charge that he is then represented by that counsel as to an unrelated investigation that law enforcement officials are conducting, which has not resulted in adversarial proceedings. This Court is unwilling to extend Michigan v. Jackson, to hold that once an attorney is appointed at a Defendant's request in an adverserial proceeding, law enforcement cannot question the Defendant about other unrelated crimes even after the Defendant makes an informed waiver of his Fifth Amendment right.

(R457) The trial court concluded that, in light of this ruling, it need not address the question of suppressing the fruits of Happ's statements. (R457) During the trial, defense counsel objected to the testimony of Jean Pinko and Vince Ambrosino based upon the contention that it was the fruit of the poisonous tree. (R1978-81,2081-2) Appellant also objected to the testimony of Investigator Thompson who related incriminating statements made by Happ. (R2200-10) The trial court overruled the objections and allowed the testimony in evidence based on the previous denial of Happ's motion to suppress. Judge Lockett stood by Judge Thurman's ruling on this issue, despite some articulated doubt as

to the Florida case law. (SR37-8)

The right of an accused to the assistance of counsel is the hallmark of our Constitution. Gideon v. Wainwright, 372 U.S. 335 (1963). In Escobedo v. Illinois, 378 U.S. 478 (1964), the United States Supreme Court held that the constitutional right to counsel is applicable prior to indictment where an accused is subjected to police interrogation. From these cases evolved Miranda v. Arizona, 384 U.S. 436 (1966) which laid down the principle that as a constitutional prerequisite to the admissibility of a statement of an accused, the accused must, in the absence of a clear, intelligent waiver of his constitutional rights involved, be warned prior to questioning that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. Miranda was further defined in Edwards v. Arizona, 451 U.S. 477 (1981) wherein the Supreme Court stated:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with police.

Edwards, supra at 484. (emphasis added)

In Miller v. State, 403 So.2d 1017 (Fla. 5th DCA 1981) the defendant sought to suppress a confession which was given to a police officer who knew that the defendant was represented by counsel on other, unrelated charges. On appeal, the defendant argued that the Fifth District should adopt the New York rule that once a defendant invokes a right to counsel, he may not be questioned even as to matters unrelated to the charges for which he is represented. The Fifth District, first noting that Florida has rejected the New York rule, held:

> A request for counsel for an unrelated charge does not require that interrogation cease if adequate Miranda warnings have been given. Stone v. State, 378 So.2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980)

403 So.2d at 1019. In a footnote to this holding the court noted:

> 4. The right to waive counsel once requested has been limited by the U.S. Supreme Court in Edwards v. State of Arizona, __U.S.__, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), to circumstances where the accused voluntarily initiates the conversation, and to that extent the decisions of Jackson and Stone may now be limited. However, in the case before us the totality of the circumstances makes it clear that the defendant did not request counsel in this case; that he was aware of his right to counsel, and that he initiated the conversation by asking to speak to the investigator whom he knew.

Id. (emphasis added).

The Fifth District had an opportunity to reconsider the Miller rationale in Lofton v. State, 471 So.2d 665 (Fla. 5th DCA 1985), review denied, 480 So.2d 1294 (Fla. 1985). In Lofton, the defendant was being held in the county jail on burglary charges. Suspecting that he was involved in a sexual battery which was currently under investigation, an investigator from the state attorney's office interviewed Lofton. After reading Lofton his Miranda rights and ascertaining that he understood them, Lofton signed a written waiver of those rights and proceeded to give a statement in which he admitted that he had engaged in sexual intercourse with the victim although he maintained that the act was consensual. In reaffirming its Miller holding, the Fifth District noted that it was clear that Lofton was not represented by counsel in the sexual battery case and in fact had not yet been charged in the case. The court noted that Lofton was informed of his right to counsel as well as his right not to speak to the investigator and he waived those rights. Therefore the court affirmed Lofton's conviction. Judge Dauksch dissented in part on the grounds that the subsequent interview of Lofton was done by the state attorney, through his investigator without first contacting Lofton's lawyer. For this inexcusable, unethical behavior, Judge Dauksch would have suppressed the statement.

In Arizona v. Roberson, 486 U.S. __, 100 L.Ed.2d 704 (1988) the United States Supreme Court specifically disapproved this Court's decision in Lofton. In Roberson the defendant had

been arrested for burglary and after being given his Miranda warnings replied that he wanted a lawyer. All questioning ceased. Three days later, while the defendant was still in custody, a second officer interrogated Roberson about a previous burglary. The second officer, who was not aware that the suspect had earlier requested counsel, advised the suspect of his rights and obtained an incriminating statement concerning the previous burglary. In the prosecution for that offense, the trial court suppressed the statement on the grounds that the second interrogation was done in violation of Edwards v. Arizona. This ruling was affirmed on appeal and certiorari was taken to the United States Supreme Court. In a 6 to 2 decision, the United States Supreme Court affirmed the suppression of the statement and held that police are forbidden to initiate the interrogation of a suspect as to a second, unrelated offense without providing counsel where the suspect has previously invoked his right to counsel. In so ruling, the United States Supreme Court noted that certiorari was granted to resolve a conflict between various state decisions, and noted in footnote 3 that Florida was one of those states which had previously held that interrogation on an unrelated matter was proper even if the accused is represented by counsel on other charges, citing the Fifth District's decision in Lofton.

Michigan v. Jackson, 475 U.S. 65 (1986), dealt with a defendant, formally charged with a crime, invoking his Sixth Amendment right to counsel at arraignment. Although Jackson

never invoked his Fifth Amendment right to counsel by cutting off questioning with police in a custodial setting, the trial court appointed counsel at arraignment pursuant to his request. Before he had an opportunity to consult with counsel, police officers visited Jackson in jail. After a proper Miranda advisement, Jackson waived his rights, and gave a confession. The United States Supreme Court held that police violated Jackson's right to counsel under the Sixth Amendment. Jackson's waiver of that right was invalid.

Although the trial court declined to read Roberson and Jackson in conjunction with each other, the Third District Court of Appeal has shown no such hesitance. In Trody v. State, 15 FLW D618 (Fla. 3d DCA March 6, 1990), the defendant was arrested and charged with two counts of burglary and two counts of grand theft. At the time of his arrest, Trody expressed a willingness to talk to police. The detectives did not avail themselves of that offer. The day after his arrest, trody was appointed counsel. Later that day, Trody was charged with two additional burglaries. Trody was again appointed counsel on the new charges at a bond hearing the next day. Several days later, the detectives initiated contact with Trody in jail, charging him with two additional counts of burglary and grand theft. Trody signed a waiver of his constitutional rights and told the detectives that he had committed other burglaries. The detectives again chose not to talk to him at that time. One month later, Trody appeared in court on the latest charges and

again invoked his written right to an attorney at that appearance. The next day, the detectives again initiated contact with Trody at the jail. Trody again signed a waiver and, following interrogation, Trody confessed. As a result of this information, Trody was convicted of 19 additional counts of burglary and 20 additional counsts of grand theft.

In spite of Trody's written waiver of his rights, the Third District applied the Edwards bright-line rule in concluding that Trody's waiver of counsel was involuntary. The court relied on Michigan v. Jackson, supra and Arizona v. Roberson, supra.

Inasmuch as Thompson and Burton admitted that they were the ones who initiated the contact with Appellant and that such contact was initiated without first contacting Appellant's attorney, a clear violation of Arizona v. Roberson, and Michigan v. Jackson is evident. The instant situation is on all fours with Trody and Lofton, supra. Since the United States Supreme Court has specifically overruled Lofton, this Court must apply the Roberson and Jackson rationales and find that the statement given by Appellant was done so in violation of his Sixth Amendment right. Appellant is entitled to a reversal of his conviction with instructions to discharge him.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO ANSWER A SIMPLE QUESTION ASKED BY THE JURY DURING DELIBERATIONS THEREBY DENYING HAPP HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

After hearing all the evidence and instructions, the jury retired to deliberate its verdict at 9:40 a.m. (R2468) The trial court reconvened proceedings at 11:30 a.m. and advised counsel that the jury had two questions that were reduced to writing. (R1109-10,2383-84) The first question asked:

> Did Mr. Miller say he read in the newspaper about Mr. Happ and this murder?
> Or
> Did Mr. Fister (sic) say Mr. Miller could have read it in the paper?

(R1110) The trial court responded:

> My inclination is simply to advise the jury they are going to have to rely on their own recollection of the testimony.
>
> MR. PFISTER: Your Honor, I have no objection to Mr. Miller's testimony being reread to the jury.
>
> THE COURT: I will not do that. I understand you request that. You can state that on the Record, but I will not do that.
>
> MR. PFISTER: I request that, Your Honor, and object if it's not done.
>
> THE COURT: I will not do that. Anything, Mr. King?
>
> MR. KING (prosecutor): (shaking head).

(R2484-85) Neither the prosecutor nor defense counsel had any objection to the trial court's method of handling the second question. (R2485) The jury returned to the courtroom and the trial court told the jury that he could not answer the questions and would not have any testimony read back to them. The trial court told the jury that they would have to rely on their own individual and collective recollections about the testimony. (R2485-86) Following further deliberations, the jury returned at 3:00 that afternoon with a verdict of guilty as charged on all counts. (R1105-08,2486,2490-92)

Rule 3.410, Florida Rules of Criminal Procedure, states:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

It is clearly within the trial court's discretion to have the court reporter read back testimony of witnesses upon request of the jury. DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978). However, the trial court's discretion must be properly exercised. Rodriquez v. State, 15 FLW D857 (Fla. 3d DCA April 3, 1990). Happ contends on appeal that the trial court abused its discretion in refusing to grant the jury's and defense counsel's

request by either providing the simple answer to their question, or by rereading the pertinent portion of Miller's testimony. The simple answer is revealed in defense counsel's cross-examination of Miller:

> Q. . . . You've read about Mr. Happ's case in the newspaper; haven't you?
>
> A. Yes, sir, I have.

(R1891) Defense counsel's closing argument, in part, focused on the likelihood that Richard Miller was the perpetrator in Angela Crowley's case. See Point VIII, infra. Defense counsel pointed out this very testimony during summation in pointing the finger at Miller:

> He read about the case in the newspapers. He got the deal he wanted to have.

(R2415) The jury was obviously wrestling with Miller's credibility and, if the trial court had answered their question, probably would have reached a different result.

Appellant points out that the evidence in this case is far from overwhelming. Without Richard Miller (a jailhouse snitch), the state's case could not have survived a motion for judgment of acquittal. If the jury doubted Miller's testimony, an acquittal would have followed. It is therefore clear that Miller's credibility was absolutely critical. As evidenced by their question, the jury was obviously attempting to resolve Miller's credibility problem.

Appellant recognizes that it is within the trial

court's sound judicial discretion to deny or grant a jury's request to read back testimony that the jury requests. Jenkins v. State, 317 So.2d 114 (Fla. 3d DCA 1975). Generally, the better course of action is to allow reading of testimony where requested. United States v. Holmes, 863 F.2d 4 (2d Cir. 1988). The trial court's discretion is based upon a limited, twofold rational: First, that requests to read testimony may slow the trial where the requested testimony is lengthy; second, that reading only a portion of the testimony may cause a jury to give that portion undue emphasis. United States v. Rabb, 453 F.2d 1012, 1013-14 (3d Cir. 1971). Rabb holds that a trial judge abuses his discretion where the refusal to read requested testimony is not supported by one of these reasons. Id. Neither rationale applies here. Miller's testimony was not lengthy. The part that the jury requested consisted of one question and one answer. (R1891) As noted throughout this brief, Miller's credibility was pivotal to the case. The jury's question went directly to Miller's credibility. The jury could not have overemphasized this decisive issue. See also United States v. Zarintash, 736 F.2d 66 (3d Cir. 1984).

There are many cases that hold that the trial court did not abuse its discretion in situations where the court read back testimony as well as where the court refused such requests. See e.g. Haliburton v. State, 15 FLW S193 (Fla. April 5, 1990); DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976). Appellant will point

out factors that distinguish those cases from the instant case. The DeCastro jury requested the testimony of three eye-witnesses' descriptions of the robber and his facial markings. The trial court properly ruled that reading back all of the testimony was impractical, as was having the court reporter search the entire record for those portions. The Simmons trial court did not abuse its discretion where the typewritten copy of the testimony specifically requested by the jury was unavailable and the court reporter, due to fatigue, was physically incapable of reading the seven hours of testimony back to the jury. In Jenkins v. State, 317 So.2d 114 (Fla. 3d DCA 1975), the trial court did not abuse its discretion, since the requested testimony was cumulative and immaterial to the issue of guilt. In Haliburton, the trial court did read the testimony specifically requested by the jury.

More recently, this Court dealt with this issue in Kelley v. State, 486 So.2d 578 (Fla. 1986). The jury inquired whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxey trial, and if he had anything to gain by his testimony." Id. at 583. This Court stated:

> The trial court, while aware that Sweet's testimony during cross-examination established the existence of such immunity declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and to make a judgment as to his motivation.

Id. The trial court in the instant case did not have to make

such an interpretation. The question propounded by the jury was subject to a simple answer. The Kelley trial court offered to read back portions (designated by the jury) of Sweet's testimony. This Court found no abuse in such a reasonable solution.

In contrast,the judge in Happ's trial refused to read back the single question and answer in Miller's testimony. This clearly constitutes an abuse of discretion. If the trial court did not want to answer the question outright (since it involved matters of fact, Kelley, 486 So.2d at 583), the judge could have easily read back the short portion of Miller's testimony that would have answered the jury's simple but crucial question. The trial court's failure to do so denied Happ his constitutional right to due process of law and to a fair trial. Amend. V, VI, XIV, U.S. Const; Art. I, ss.9 and 16, Fla. Const.

POINT IV

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH MENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN RESTRICTING PRESENTATION OF CRITICAL EVIDENCE AT THE GUILT PHASE.

On the morning that the state presented their last witness during their case-in-chief, counsel met in chambers with the trial court. Defense counsel informed the court that Hugh Lee, an assistant public defender in Sumter County, called last night to report that he had some information regarding Richard John Miller, the jailhouse informant. (R2191-4) Mr. Lee indicated in chambers that he had discussed the matter with others and was now of the opinion that Miller's statements to him fell under the attorney-client privilege. (R2193-4) The trial court ruled that the privilege had been waived and ordered Hugh Lee to testify in chambers.

On Monday afternoon, July 24, 1989, Captain Edwards of the Citrus County jail, called Hugh Lee to report that Richard Miller wanted to speak to an assistant public defender. Although the public defender's office did not represent Miller, Lee went to the jail pursuant to the request. Miller told Lee that he was worried that his testimony at Happ's trial might come back to haunt him in the event that Miller somehow received a new trial. (R2195-6) Lee reassured Miller. (R2196) Miller then admitted that he had lied during his testimony at Happ's trial. (R2199)

He also revealed that Brad King, the prosecutor in Happ's trial, told Miller to lie. (R2196) Specifically, King told Miller to answer negatively if he was questioned about asking for a lawyer before speaking to law enforcement officials. (R2191-4,2196) Lee told Miller that he did not believe this information would have any relevance to his case. Miller asked Lee to pass on the information to Happ's defense attorney. (R2197)

The trial court ruled that Lee's testimony was not sufficiently relevant or material to be of any probative value to the jury. The trial court refused to allow Appellant to present Lee's testimony to the jury, but assured him that the record had been preserved for purposes of appeal. (R2199) Appellant contends that the trial court's ruling resulted in a denial of his constitutional rights to Due Process and to a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I, ss. 9, 16, and 22, Fla. Const. Happ's death penalty is therefore constitutionally infirm. Amends. VIII and XIV, U.S. Const.; Art. I, s. 17, Fla. Const.

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of facts to the judge so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974).

Appellant reminds this Court that Richard Miller's testimony was absolutely critical to the state's case. Miller's

testimony provided the only confession allegedly made by Happ. Miller's testimony provided the only details of the crimes charged. Without Miller, the state had no case. As such, Richard Miller's credibility was of paramount importance. Hugh Lee's testimony, if allowed by the trial court, would have destroyed what little credibility Richard Miller had. If Lee had testified, the jury would have heard Miller's admission that he lied under oath. The subject matter of the lie is of no import. A bald admission that one has committed perjury is evidence of paramount importance when the case turns on that witness' credibility. The jury also would have heard that the prosecutor suborned perjury, a charge that the prosecutor never denied. The trial court's ruling that the evidence was not relevant or material has no basis in fact or law. The court's ruling was an abuse of discretion and denied Happ his constitutional right to a fair trial.

POINT V

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE STATE FAILED TO STATE VALID, NON-RACIAL REASONS FOR STRIKING VENIREMAN JONES.

The prosecutor used his fourth peremptory challenge to excuse Mr. Jones. (R1576-77) Defense counsel immediately objected and pointed out that Jones was the only black person seated in the jury box. Defense counsel cited inter alia, State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 18 (Fla. 1988). Defense counsel pointed out that Mr. Jones had not demonstrated any opposition to the death penalty. The prosecutor responded that Jones taught psychology at Lake-Sumter Community College and was also Catholic. (R1577-78) The prosecutor expressed his personal belief that psychologists and psychiatrists are more liberal than other professions and that Catholics are inclined to vote against the death penalty. The trial court responded to the dialogue:

> THE COURT: The Court's finding is as follows:
>
> Number one, that the caselaw so far is clear in the State of Florida that Neal (sic) and Slappy do not apply when the defendant is not black.
>
> MR. KING (PROSECUTOR): That has changed, Judge.
>
> MR. PFISTER (DEFENSE COUNSEL): It just changed.
>
> THE COURT: Okay. I'm wrong.
>
> Two, I think the State has sufficiently explained its reasons for

striking Mr. Jones.

MR. PFISTER: Your Honor, I would also modify my objection to include the objection Mr. Jones is being struck because of his religion, being Catholic. That is not a recognizable minority or subset at this point, Your Honor. It might be in the future. He's being struck because of his religion being Catholic.

THE COURT: I understand your objection. Where were we? I believe Mr. King just struck Mr. Jones.

MR. KING: Yes, sir.

(R1578-79) Evidently, the prosecutor had second thoughts about his improvident use of a peremptory challenge:

MR. KING: Your Honor, I would ask you to, out of the presence of the rest of the venire, find out where Mr. Jones can be contacted. I want to do some research, if I may, I'd like to go back and read the cases and, if there is any question in my mind, I may offer Mr. Pfister the chance to put Mr. Jones back on the jury panel if I can get a chance to do that.

(R1580) The trial court pointed out that such a procedure would disturb the order of the jury. The prosecutor decided to let his strike stand and defense counsel objected once again. (R1580-81)

This Court established the procedure for determining whether peremptory challenges have been improperly utilized in a discriminatory manner. First, the defense "must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that the peremptory challenges are being

exercised solely on the basis of race." State v. Neil, 457 So.2d 481, 486 (Fla. 1984). If the trial court decides that "there is a substantial likelihood that peremptory challenges are being exercised solely on the basis of race," Neil, 457 So.2d at 486, then the burden shifts to the state to provide a "'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for the state's use of its peremptory challenges." State v. Slappy, 522 So.2d 18, 22 (Fla. 1988).

In deciding whether the state has met its burden and has not merely provided reasons as a pretext for discriminatory conduct, the trial court must look for certain acts signaling the misuse of challenges, such as:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel has questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to jurors who were not challenged.

Slappy, 522 So.2d at 22. Slappy also extended the principles of Neil by holding that "broad leeway" must be accorded to the objecting party, and that any doubts as to the existence of a "likelihood" of impermissible bias must be resolved in the objecting party's favor. Slappy, 522 So.2d at 21-22. Whenever this burden of persuasion has been met, the burden of proof then rests upon the state to demonstrate "that the proffered reasons

are, first, neutral and reasonable and, second, not a pretext." Id. at 22.

Although the trial court was unaware of this Court's decision in Kibler v. State, 546 So.2d 710 (Fla. 1989), both attorneys pointed out to the court that Neil and Slappy do apply to a white defendant. (R1578) The trial court then stated a perfunctory acceptance of the reasons volunteered by the prosecutor immediately after defense counsel's objection. (R1577-78) Although the trial court did not expressly find that there was a strong likelihood that the challenge had been exercised solely on the basis of race, the court impliedly made such a finding, since it examined the reasons for the challenge. See Foster v. State, 15 FLW D554 (Fla. 3d DCA February 27, 1990). The fact that Happ's jury contained one black (R1377-78,1381-83) is not fatal to this claim involving the Equal Protection Clause. Slappy, 522 So.2d at 21. Nevertheless, that fact as well as the fact that Happ and the victim are white may have some relevance in this Court's resolution of this claim. Kibler v. State, 546 So.2d 710, 712, (Fla. 1989).

Appellant submits that the reasons volunteered by the prosecutor in this case failed to meet the state's burden of proving that the reasons were neutral, reasonable, and not pretextual. While a juror's occupation often provides a reasonable basis for the exercise of a peremptory challenge, it may not suffice when offered in the context of a Slappy inquiry, unless the occupation is shown to have some relationship to the

case at hand. Knight v. State, 15 FLW D854 (Fla. 1st DCA April 3, 1990). The Knight court had difficulty understand how a juror's occupation as a cook had any relationship to a prosecution for burglary of a dwelling. Likewise, Appellant can see no relationship between Mr. Jones' occupation as a teacher and any of the crimes charged. The Fourth District Court of Appeal held that a similar reason did not constitute a legitimate, race-neutral explanation.

> We do not gainsay that a black juror's occupation may provide a reasonable basis for the exercise of a peremptory challenge, but that reason will not be sufficient in the face of Neil and Slappy without at least some showing of its relationship to the case at hand. Reed v. State, 14 FLW 298 (Fla. 1989) Goff's employment as a practical nurse was completely unrelated to the facts of the case. Indeed, the state failed to question Goff regarding the effect her employment might have upon her ability to fulfill jury duty. Thus, the utter failure to question Goff in those areas asserted as the grounds or the challenge at the very least renders the state's explanation suspect.

Mayes v. State, 550 So.2d 496, 198 (Fla. 4th DCA 1989). The prosecutor in the instant case also failed to question Jones regarding the effect his employment might have upon his ability to fulfill his jury duty. The state's reasons is therefore suspect. Appellant also finds it interesting that the prosecutor accepted Mr. Copeland as an alternate juror, even though Mr. Copeland was a retired teacher who, in the past, had the trial judge as a pupil. (R1656,1691-92) The prosecutor attempted to

label Jones a liberal by calling him a psychologist. (R1577-78) Appellant submits that the fact that Jones taught psychology at a community college does not make him a psychologist in the true sense of the word.

Likewise, Jones' Catholicism is not a good reason to strike Jones. Jones, like most of the other potential jurors, had no personal opposition to the imposition of the death penalty in appropriate cases. (R1474-77) Jones, like most of the prospective jurors with religious affiliations, was under the mistaken impression that his church took no official position on the issue of capital punishment. (R1546-49) Of course, venireman Jones was mistaken about his church's position on capital punishment. It is well known that the Roman Catholic church is opposed to the imposition of the death penalty under any circumstances. The Death Penalty: The Religious Community Calls for Abolition, National Interreligious Task Force on Criminal Justice, New York, New York. Most of the other jurors' churches also favor abolition including, American Baptist Churches of the South, Episcopal Church, General Association of General Baptist, Lutheran Church in American, Presbyterian, United Church of Christ, and United Methodist Church. Id. It is therefore clear that most of the jurors were affiliated with churches opposed to capital punishment. However, most, like Jones, were ignorant of their church's stance. The second reason stated by the prosecutor dealing with Jones' religion is therefore unsubstantiated and irrelevant. Clearly, Jones expressed no

personal opposition to capital punishment and was unaware that his church took a contrary position. Voir dire revealed no impediment to Jones voting for the death penalty. There was no indication that Jones would be fair or partial. Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988) As must be evident to this Court, even devout Catholics can put aside their personal religious beliefs, promise to follow the law, and abide by that oath. This reason cited by the state appears to be a pretext. The state failed to meet its burden of proving that its reasons for challenging one of the few blacks in the venire were valid nonracial reasons. In light of this conclusion, Happ is entitled to a new trial. Amends. Vi, VI, VIII, and XIV, U.S. Const., Art. I, ss. 9, 16 and 17, Fla. Const.

POINT VI

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS THE TRIAL COURT ERRED IN READING IRRELEVANT, INFLAMMATORY, AND PREJUDICIAL TESTIMONY OF RICHARD MILLER THEREBY GIVING THE JURY THE IMPRESSION THAT HIS TESTIMONY WAS ENTITLED TO MORE WEIGHT AND CREATED SYMPATHY.

The key state witness against William Happ was Richard Miller, an eight-time loser who was serving sixty years for a variety of sexual offenses. (R1883-88) Miller first testified at Happ's mistrial in January. After completing jury selection in the second trial, the prosecutor informed defense counsel and the court that he had received information indicating that Richard Miller would refuse to testify during Happ's retrial. (R1708-17) There was much discussion about Miller's unavailability, so that his prior testimony could be read to the jury. (R1708-17) The state wanted to present the testimony of Mr. Kicklighter, the assistant state attorney who discussed the issue with Richard Miller. The prosecutor argued that Kicklighter's testimony, while hearsay, would be admissible since the testimony proved Miller's state of mind, an exception to the hearsay rule. Defense counsel objected. The trial court ultimately decided that both attorneys could question Miller concerning his refusal to testify. (R1716) This procedure was done outside the presence of the jury. (R1717-21)

The questioning revealed that Miller was mentally and

physically unable to testify. He related that he had been stabbed and gang-raped while in prison. The attack resulted in over 300 stitches, the majority of them internal. (R1717-18) Miller was scheduled to start physical therapy and psychological counseling. He testified that he was in constant pain and had suffered a nervous breakdown. (R1718-19) In light of the fact that he still had 23 more years to serve, a six-month contempt sentence could not persuade him to testify. (R1719) Miller ultimately refused to answer any more questions during the proffer. (R1720) The trial court found Miller unavailable to testify and ruled that his prior testimony could be read to the jury. (R1721)

The trial court then stated:

> Now we reach the second hurdle: that is, whether or not Mr. Pfister [defense counsel] has a right on behalf of his client to go through this process that we just went through in front of the jury.
>
> MR. PFISTER: I think it's almost reversed, Your Honor. I was wanting to just have it put on and I could have them whatever conclusion could be drawn for why he wasn't here could be drawn by anybody.
>
> I think Mr. King [prosecutor] was the one who wanted Mr. Kicklighter to come and say, you know, why. I didn't want to.

(R1721) The prosecutor then suggested that the court reporter transcribe the proffer of Miller's refusal to testify so that it could be read to the jury prior to the reading of his trial testimony. (R1722) Defense counsel indicated some opposition to

that procedure. Following more discussion about the impropriety of Kicklighter testifying, the trial court stated:

> I think a fair compromise, and here's how we are going to proceed. We will ask Madam Clerk [sic] to transcribe Mr. Miller's testimony today. When it's time for Mr. Miller's testimony to be read and presented to the jury, we will present what was said here today, we will present what he said at the earlier trial. And Mr. Kicklighter will not testify.
>
> MR. KING: That's fine.
>
> THE COURT: I not [sic] your objection.

(R1723-24) When it came time to read Miller's testimony to the jury, the prosecutor stated:

> MR. KING: Okay. I just want to make clear that we all agree on how it's going to be done.
> I'll have Mr. Black read Mr. Miller's part for me. Start with a small transcript from this morning, and then just go directly on direct examination, and then Mr. Pfister can pick up his cross.
>
> MR. PFISTER: I have a continuing objection, Your Honor, to putting on the preamble.

(R1868) The prosecutor subsequently read to the jury both the preamble dealing with Miller's refusal to testify and Miller's testimony at Happ's previous trial. (R1871-1927)

Appellant contends on appeal that the trial court erred in overruling his timely objection and allowing the jury to hear the irrelevant, prejudicial, and inflammatory testimony of Richard Miller dealing with his refusal to testify. All relevant

evidence is admissible in Florida, except as provided by law. s.90.402, Fla. Stat. (1989). Relevant evidence is evidence tending to prove or disprove a material fact. s.90.401, Fla. Stat. (1989). Section 90.403, Florida Statutes (1989) states:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. . .

Appellant fails to see any relevance in the fact that Richard Miller had been stabbed and gang-raped in prison since Happ's first trial. The jury heard intimate details of the injuries that Miller suffered. The attack caused a nervous breakdown and severe trauma. (R1717-20) Transporting Miller to court that morning resulted in the delay of his physical therapy and psychological counseling. In addition to having no relevance, the above information undoubtedly evoked great sympathy on the part of the jury. It also gave undue weight to Miller's testimony. The fact that he came to court that morning under such adverse conditions gave Miller's testimony greater weight. The fact that a witness may have traveled many long and hard miles to testify is similarly irrelevant and highly prejudicial.

An even greater danger stems from the conclusions that the jury could easily have drawn from Miller's preliminary testimony. As a result of that evidence, the jury was apprised that, after testifying against Happ at a previous proceeding,

Richard Miller was brutally attacked and nearly killed while incarcerated. The jury could easily have concluded that Happ played some part in arranging the attack on Miller. It is clear to this Court that Happ played no part in the attack, but that fact was never clarified to the jury. Threats made against a witness or evidence of danger to that witness are inadmissible unless it is directly attributable to the defendant. Duke v. State, 106 Fla. 205, 142 So.886 (1932). It is the state's burden to link evidence of the danger to the defendant. Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1963).

The testimony was admitted over defense counsel's timely objection. The testimony had no relevance, it was inflammatory, and it was highly prejudicial. It tended to evoke sympathy with the jury which undoubtedly attached undue weight to Miller's testimony. The greater danger arises from the very reasonable (but incorrect) conclusion that William Happ was somehow connected to the prison attack on Richard Miller. The trial court's ruling denied Happ his right to a fair trial. The resulting death sentence is constitutionally infirm. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, ss.9, 16, and 17, Fla. Const.

POINT VII

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN RESTRICTING HAPP'S PRESENTATION OF EVIDENCE AT THE PENALTY PHASE.

During a discussion in chambers prior to the commencement of the penalty phase, defense counsel stated that he wanted to present evidence that Happ turned down a plea negotiated prior to trial that would have resulted in four consecutive life terms. (R98-99,2517-18) Defense counsel proposed the offer to the state during the summer of 1988 and the state agreed. Although Happ came to court to enter the plea, he decided at the last minute to turn down the offer. (R2518) The trial court announced that defense counsel could not present any evidence or offer any argument dealing with those plea negotiations, but stated that the record was preserved on that point. (R2518-19) Appellant contends that the trial court's ruling resulted in a denial of his constitutional rights to due process and to a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I, ss. 9, 16, and 22, Fla. Const. Happ's death penalty is therefore constitutionally infirm. Amends. VIII and XIV, U.S. Const; Art. I, s. 17, Fla. Const.

A trial judge should exercise the broadest latitude in admitting evidence during the sentencing portion of a capital case. Messer v. State, 330 So.2d 137 (Fla. 1976). There should

not be a narrow application or interpretation of the rules of evidence at the penalty hearing, whether in regard to relevance or as to any other matter except illegally seized evidence. Alford v. State, 322 So.2d 533 (Fla. 1975). This Court should be especially wary of the exclusion of any evidence that a capital defendant proffers as nonstatutory mitigating evidence. Any limitation on the consideration of mitigating evidence renders a death sentencing procedure to be constitutionally infirm. See Hitchcock v. Dugger, 481 U.S. 393 (1987). In Skipper v. South Carolina, 476 U.S. 1 (1986), the United States Supreme Court held that, in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. See also Eddings v. Oklahoma, 455 U.S. 104 (1982) (evidence of sixteen-year-old defendant's troubled family history and emotional disturbance.)

At a sentencing hearing, the trial court must entertain submissions and evidence which are relevant to the sentence. If the trial court refuses to allow a defendant to present matters in mitigation, this may be cause for resentencing. Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983). This Court has long recognized that the criminal justice system's treatment of equally culpable co-defendant's in capital cases is a proper consideration for both the judge and the jury. See e.g. McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Slater v. State, 316 So.2d 539 (Fla. 1975). The evidence proffered by Happ can be analogized to this type of evidence. While no co-

defendant was involved in Happ's case, it is pertinent that the state was willing to accept a sentence less than death in this very case. Death sentences are reserved only for the most aggravated and unmitigated murders. The fact that the state was willing to settle for a sentence less than death is a valid consideration for the jury. The proffered evidence was relevant and admissible. The trial court's ruling deprived Happ of his constitutional rights. Happ's death sentence is therefore unconstitutional. Amends. VIII and XIV, U.S. Const; Art. I, s. 17, Fla. Const.

POINT VIII

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, FUNDAMENTAL ERROR OCCURRED WHEN THE TRIAL JUDGE COMMENTED ON THE EVIDENCE AND LIMITED DEFENSE COUNSEL'S CLOSING ARGUMENTS.

During closing argument at the guilt phase, defense counsel pointed out to the jury that most of the state's case rested on circumstantial evidence. (R2409) Defense counsel then approached his highest hurdle, the testimony of Richard Miller, the jailhouse snitch, who provided the only testimony that linked Happ to the crimes. (R2410-14) Defense counsel argued his theory that the evidence was just as consistent with the hypothesis that Richard Miller kidnapped, raped, and killed Angela Crowley. During his testimony, Miller admitted, inter alia two sexual battery convictions, a kidnapping conviction, and an armed burglary conviction. (R1885-87) Defense counsel concluded cross-examination by accusing Miller of blaming Happ for his own crimes against Angela Crowley. (R1923-24) During closing argument, defense counsel reminded the jury of this portion of Miller's testimony:

> How did he get all those details? Didn't he say he read about the case in the newspaper? Isn't that what he said?
>
> Let's look at his crimes. The State says they are dissimilar. 86-699, this occurred on October 28, 1986, sexual battery involving force likely to cause serious personal injury. Sort of ring a bell with one of the charges in this case?
>
> Armed robbery, possession of a

firearm by a convicted felon, also burglary with a battery, sound similar to you folks?

Also the next case, 86-874, sexual battery with serious personal injury. Ring a bell?

Kidnapping. Does that ring a bell?

* * *

One of these crimes was having forced the victim to have anal intercourse. Do you recall that testimony that he was giving? That was part of his crime.

* * *

His first crime, 86-669, happened October 28th of '86. The second one, 86-674 happened November 19 of '86.

The question may be: Where was Mr. Miller on May 23, 1986, [the date of Crowley's rape and murder] ladies and gentlemen.

Were any of his fingerprints, were any of his saliva taken to eliminate him? Did the State show you that? He's over there in Citrus County. He wasn't locked up then.

MR. KING (prosecutor): I'm going to object. There is no fact in evidence that he was in Citrus County.

MR. PFISTER (defense counsel): Your Honor, that's not evidence. I've got a right to argue what the evidence is.

MR. KING: There is no fact that you can argue that, Your Honor.

MR. PFISTER: He was there in October or November, Your Honor.

MR. KING: That's six months later, Your Honor.

MR. PFISTER: The state could have proved it.

THE COURT: I think the best we can do

> with that, ladies and gentlemen, is to say there obviously has been no testimony in this case that Mr. Miller was in Citrus County in May of 1986. That he was there in October, you can take for whatever evidentiary value you see fit. [emphasis added]

(R2412-15) Defense counsel obviously felt foreclosed in pursuing this line of argument. He made one last comment about Miller's admitted confusion about past dates. He also mentioned that Miller had suffered a mental breakdown, that he read about Happ's case in the newspaper, and that he obtained a deal with the state in exchange for his testimony. Defense counsel then proceeded to argue the evidence relating to Happ's alibi. (R2415)

Section 90.106, Florida Statutes (1987), provides:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

Ehrhardt comments on the cited statute:

> During a jury trial, the judge occupies a dominant position. Any remarks and comments that the judge makes are listened to closely by the jury and are given great weight. Because of the credibility that the comments are given and because they would likely overshadow the testimony of the witnesses themselves and of counsel, Section 90.106 recognizes that a judge is prohibited from commenting on the weight of the evidence, or the credibility of the witness, and from summing up the evidence to the jury. If such comment and summing up were permitted, impartiality of the trial would be destroyed.

Ehrhardt, Florida Evidence, s.106.1, p.22. A trial court should

scrupulously avoid commenting on the evidence. Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976). Such a comment on the evidence, if critical to the case, can constitute fundamental error. Carr v. State, 136 So.2d 28 (Fla. 3d DCA 1962)

In Beckham v. State, 209 So.2d 687 (Fla. 2d DCA 1968), the trial court commented that a gun was "found at the scene of the crime" in overruling an objection and admitting the gun into evidence. The trial court later attempted to correct the harm by reading a curative instruction. While the District Court recognized that the trial court attempted to correct the error, they still reversed for a new trial citing Robinson v. State, 161 So.2d 578, 579 (Fla. 3d DCA 1964):

> . . . Where there is simply a doubt, as here that an accused has been prejudiced by a remark of the court, we must grant him a new trial.

In Carr v. State, 136 So.2d 28 (Fla. 3d DCA 1962), the trial court (during an abortion trial) referred to the defendant's act as being "an abortion" rather than referring to the event "as an alleged abortion." The District Court held that these remarks amounted to fundamental error that deprived the defendant of a fair trial. The District Court remanded for a new trial despite the fact that there was no objection below.

Given the facts of this case, the trial court's comment that there was obviously no evidence that Mr. Miller was in Citrus County in May of 1986 constitutes fundamental error. Appellant will not reiterate how critical Miller's credibility

was in this case. That point is made repeatedly elsewhere in this brief. Appellant points out that Happ's theory of defense was grounded on the contention that Miller was lying. On Miller's cross-examination, defense counsel accused Miller of blaming Crowley's rape and murder on Happ when, in fact, Miller was the actual culprit. (R1923-4) It was not disputed that Miller was in Citrus County in October and November of 1986. He committed two sexual batteries in the county during those two months. It is a reasonable argument from the evidence that he could have also abducted, raped, and killed Angela Crowley in Citrus County in May of 1986.

One of Miller's convictions was a sexual battery involving attempted anal intercourse. That offense occurred in Citrus County. (R1885-6) According to the state's evidence, Angela Crowley was also raped anally in Citrus County. The state thought that anal intercourse was so unusual that they unsuccessfully attempted to offer evidence that Happ attempted anal intercourse with his girlfriend in an attempt to prove that Happ was the culprit of the crimes against Crowley. s.90.404(2), Fla. Stat. (1987); (R280,712,A410-22) Defense counsel's argument that Miller could have been the real culprit is a reasonable inference from the evidence and the lack thereof.

The state offered no evidence that Miller was not in Citrus County in May, 1986. They offered no evidence that Miller was incarcerated during May, 1986. If he had been in jail then, he probably would not have been free to commit his Citrus County

crimes in October and November, 1986. It is therefore very reasonable for defense counsel to argue that he was. The fact that Crowley was raped in Citrus County during that month could be construed as evidence that Miller could very well have been the culprit, and therefore, present in the county at that time. Defense counsel's argument was certainly a reasonable inference and valid argument from the evidence or the lack thereof. The trial court's bold and unsolicited assertion that no evidence existed to support defense counsel's argument denied Happ his right to a fair trial. Amends. V, VI, and XIV, U.S. Const.; Art. I, ss. 9 and 16, Fla. Const. Since the comment destroyed Happ's theory of defense, the error goes to the heart of the case resulting in fundamental error.

POINT IX

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO REFER TO THE KEY STATE WITNESS AS A "SNITCH" OR "SQUEALER."

Prior to the commencement of trial, the prosecutor referred to a previous discussion in chambers and then formally made an oral motion in limine to prohibit defense counsel from referring to state witnesses by names such as "snitches" or "squealers." (R1423) The prosecutor argued that these pejorative terms reflected poorly on the character of such a witness. The prosecutor argued and the trial court agreed that defense counsel would be limited to calling these witnesses "informants" or "jailhouse informants." (R1423-4) Defense counsel refused to stipulate to the state's request but did abide by the trial court's ruling. (R1423-4)

A trial court should permit wide latitude in arguments to the jury. Thomas v. State, 326 So.2d 413 (Fla. 1975). A lawyer's ability to express himself is his stock in trade. The trial court should not presume that jurors are led astray to wrongful verdicts by impassioned eloquence. Johnson v. State, 348 So.2d 646 (Fla. 3d DCA 1977).

The evidence that convicted Bill Happ cannot be called overwhelming. Without the testimony of Richard Miller, "a jailhouse snitch", the state's case could not have proceeded

beyond a motion for judgment of acquittal. See Point XII, infra. Appellant submits that defense counsel should have been allowed to refer to Richard Miller for what he was: a snitch, a fink, a stool, a rat, a squealer, and a weasel. These pejorative terms are all fair inferences from the evidence, and defense counsel should have felt free to employ them. A lawyer may legitimately comment on the credibility of a witness as long as the lawyer confines his arguments to those facts which are established by the record or which may be reasonably inferred. Gale v. State, 483 So.2d 53 (Fla. 1st DCA 1986). Defense counsel's use of any of these appropriate labels would have been justified as a "zealous representation of the . . . case." United States v. Ramirez, 608 F.2d 1261, 1268 (9th Cir. 1979). In a case as close as this one, the trial court's limitation of defense counsel's representation could well have been the turning point in the trial. The trial court's ruling deprived Happ of his constitutional rights to effective assistance of counsel, to due process of law, and to a fair trial. Amend. V, VI, and XIV, U.S. Const. The resulting death sentence is therefore unconstitutional. Amend. VIII, U.S. Const.

POINT X

IN CONTRAVENTION OF HAPP'S CONSTITUTIONAL RIGHTS, THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND, ALSO IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

A. The Evidence Does Not Support the Trial Court's Finding That the Murder Was Committed in a Cold, Calculated, and Premeditated Manner.

In finding this aggravating circumstance, the trial court wrote:

> The victim died after being abducted, beaten and strangled. This is an aggravating circumstance within the purview of Section 921.141(5)(i), Florida Statutes.

(R1166) Initially, Appellant contends that the trial court's "written finding" regarding this aggravating circumstance is completely insufficient on its face. No reasons were articulated by the trial court to support this finding and therefore, it cannot stand. Rhodes v. State, 547 So.2d 1201 (Fla. 1989). A finding of this aggravating circumstance cannot be based upon pure speculation as to the events leading up to the crimes. Hamilton v. State, 457 So.2d 630 (Fla. 1989). The state presented absolutely no evidence to illustrate any prior calculation or prearranged plan or design. Schafer v. State, 537 So.2d 988 (Fla. 1989). The only evidence relating to the details of the murder came from Richard Miller, the jailhouse snitch. There was no evidence that Happ knew the victim. In fact, it

appeared to be a chance encounter. Amoros v. State, 531 So.2d 1256 (Fla. 1988). The state failed to prove that Appellant had a conscious intention of killing the victim prior to the abduction. Hamblen v. State, 527 So.2d 800 (Fla. 1988). Rape may have been his only intent. Nor did the state prove that Appellant planned to leave no witnesses. Remeta v. State, 522 So.2d 825 (Fla. 1988). Nor did Happ procure a weapon prior to Crowley's abduction. Huff v. State, 495 So.2d 145 (Fla. 1986). The state has failed to prove this aggravating circumstance beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).

B. The Trial Court Erred in Finding That the Murder was Especially Heinous, Atrocious, or Cruel.

In finding this circumstance, the trial court wrote:

> The victim died as a result of strangulation. The death accorded the victim was not instantaneous, but rather slow and agonizing. Such a death is especially evil, wicked, atrocious or cruel. This is an aggravating circumstance within the purview of s. 921.141(5)(h), Florida Statutes.

(R1166)

This Court has defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322

So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only apply to crimes especially heinous, atrocious, and cruel.

The state has failed to prove this aggravating circumstance beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The only evidence of details of the murder came from Richard Miller. Happ allegedly told Miller that he abducted a woman when he "snuck up on the car and choked her out, put her in the car she was getting in." (R1879) Miller was unsure if the woman was even alive following this abduction. (R1880) Happ then took the woman to the barge canal where he engaged in various sexual activity, beat the woman, and strangled her with an article of clothing. (R1880-82)

The medical examiner testified that the bruises on Crowley's face were inflicted prior to her death. (R1960-61) He also concluded that Crowley died as a result of strangulation. (R1968-69) He also concluded that Crowley would have been comatose after two minutes of strangulation and dead within four or five minutes. (R1969-70)

In support of his finding of this aggravating circumstance, the trial court relied solely on the fact that Crowley was strangled. (R1166) Appellant points out that the evidence, even if viewed in the light most favorable to the state, supports the conclusion that Crowley was unconscious shortly after she was surprised by her assailant. (R1879-82)

There is no proof offered by the state that she regained consciousness at any point during her abduction. The evidence presented by the state is just as consistent with the theory that Crowley remained unconscious, and therefore unaware, throughout the attack. The bruises on her head and the ligature tied tightly around her neck support this conclusion. Rhodes v. State, 547 So.2d 1201 (Fla. 1989) and Herzog v. State, 439 So.2d 1372 (Fla. 1983). Therefore, the murder was not "unnecessarily torturous to the victim" as required by State v. Dixon, supra, and Tedder, supra. Amends. V, VI, VIII, and XIV, U.S. Const.

POINT XI

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING HAPP'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

For the purpose of this argument, Appellant accepts the conclusion that the evidence, considered in the light most favorable to the state, establishes the first-degree murder of Angela Crowley. But see Point XII, infra. The jury recommended a death sentence by a nine to three vote. (R1140) The trial court found four aggravating circumstances to be applicable: (1) that Happ had three prior felony convictions involving threat of violence [Section 921.141(5)(b), Fla. Stat.]; (2) the murder was committed during the course of a felony [Section 921.141(5)(d), Fla. Stat.]; (3) the murder was especially heinous, atrocious, or cruel [Section 921.141(5)(h), Fla. Stat.]; and (4) that the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [Section 921.141(5)(i), Fla. Stat.] (R1162,1165-66) Under the current law of this state, two of the aggravating circumstances are, in all likelihood, supported by the evidence. However, Appellant strenuously contests the trial court's finding that the murder was especially heinous, atrocious or cruel, and that the crime was cold, calculated, and premeditated. See Point X, supra.

Two valid aggravating circumstances must be weighed against the three mitigating circumstances found by the trial

court: (1) Happ's age (24) at the time of the offense; (2) Happ's miserable childhood; and (3) Happ provided educational assistance to other inmates since his arrest. (R1165-66) The trial court erroneously concluded that the aggravating circumstances "legally" outweighed the mitigating circumstances and "do so even though the defendant's age at the time of the crime was taken into account as a mitigating factor." (R1166) Appellant is not quite sure what the trial court had in mind with this last comment, but Appellant does take issue with the trial court's conclusion. On the spectrum of murder cases that this Court reviews, this case simply does not qualify as one warranting imposition of the death sentence.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court again recognized its duty to review the circumstances of every Florida capital case. Procedural fairness and substantive proportionality insures that the death penalty is administered even-handedly in Florida. Id. at 811. In light of three mitigating circumstances, only two valid aggravating circumstances, and considering the circumstances of this case against the background of Bill Happ's character and record, proportionality review must result in a reduction of Happ's death sentence to one of life imprisonment with a minimum mandatory 25 years without possibility of parole. See e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Wilson v. State, 493 So.2d 1019 (Fla. 1986), Ross v. State; 474 So.2d 1170 (Fla. 1985) Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d

337 (Fla. 1984); Mendendez v. State, 419 So.2d 312 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981); and Halliwell v. State, 323 So.2d 557 (Fla. 1975). In considering a reduction of Happ's sentence, this Court should also note that the trial court sentenced Happ to three terms of life to run consecutively to each other and to the death sentence. (R1149-56) While Bill Happ may deserve to spend the rest of his life in prison, he simply does not deserve to die. Amends. V, VI, VIII and XIV, U.S. Const; Art. I, ss. 9, 16, and 17, Fla. Const.

POINT XII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS THAT OCCURRED BELOW.

Due Process Clauses of the United States and the Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that he was denied his right to a fair trial and is entitled to a new trial based upon the cumulative error of the points presented in this argument. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979). The following issues which, either considered alone, in combination with another, or in combination with other points presented in this brief have the cumulative effect of denying Happ his constitutional right to a fair trial. In presenting these points, Appellant is also mindful of the growing application of the doctrine of procedural barr in our state and federal court systems.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal made at the close of the state's case-in-chief, renewed following the defense case-in-chief, and renewed once again following the state's rebuttal. (R2211-14,2343,2352) As defense counsel argued below, without the testimony of Richard Miller, the state's case was entirely circumstantial. Where the state fails to meet its burden of

proving each and every necessary element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury and a judgment of acquittal should be granted. Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981). Appellant submits that Richard Miller's testimony is incredible and not worthy of belief. This Court should reject Miller's testimony as incompetent. Without Miller, the state's case falls.

During the guilt phase, the trial court allowed the state to introduce several photographs of the victim after her death. Defense counsel objected to three of these photographs as inflammatory and unnecessary. The trial court overruled the objection and allowed the evidence. (R1767-70; SR56-58) The initial test for the admissibility of photographic as well as physical evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981). However, even "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice." s.90.403, Fla. Stat. (1987). When a photograph is relevant, it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. Alford v. State, 307 So.2d 433 (Fla. 1975). The Second District Court of Appeal recently ruled that a trial court erred in introducing an autopsy photograph of the victim's head. The court pointed out that the evidence was prejudicial and unnecessary. The danger of unfair prejudice far outweighed the probative value. Hoffert v. State, 15 FLW D921 (Fla. 2d DCA April 11, 1990).

During summation at the guilt phase, the prosecutor discussed Happ's alibi. The prosecutor argued that Happ's great aunt testified that she had called the telephone number listed on her phone bill in the past, but she did not call it the morning after the murder. (R2428) The prosecutor was attempting to cast doubt on the conclusion that Happ was the only one that could have made that call, thereby providing an alibi. The prosecutor then said, "But no explanation as to why William Happ -- ." (R2428) At that point, defense counsel objected and, before counsel could state his grounds, the trial court stated:

> THE COURT: Let me start by telling you -- because I'm about out of this business -- from this end I'm sick and tired of defense attorneys trying to use this comment on a defendant's silence every time a prosecutor makes some remark.
>
> Now, go ahead and make your argument. You know what my ruling is going to be.

(R2429) Defense counsel then moved for a mistrial alleging that the prosecutor had commented on Happ's right to remain silent. Calling the argument absurd, the trial court denied the motion without requiring argument from the state. This Court is well aware that the state is prevented from commenting on a defendant's failure to testify. Calloway v. Wainwright, 409 U.S. 59 (1968). The comment may be inadvertent or even subtle, but if the comment is subject to an interpretation that brings it within the rule, it is so construed, regardless of susceptibility to a differing construction. David v. State, 369 So.2d 943 (Fla.

1979). This type of error is subject to the harmless error doctrine. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

At several points during closing argument, the prosecutor made objectionable and improper comments. At one point, he accused defense counsel of engaging in trickery during the cross-examination of Richard Miller. (R2364-5) Comments on defense technique and how defense lawyers operate have been held to be both improper and unethical. Wilson v. State, 371 So.2d 126 (Fla. 1st DCA 1978). Appellant moved in limine in an attempt to prevent such action by the prosecutor. (R122) The prosecutor also subsequently misstated a defense argument about blaming the crime on Vince Ambrosino. (R2426-7) After a timely and specific objection by defense counsel, the trial court instructed the jury that the lawyers' argument was not evidence.

The errors complained of in this point, either alone, in combination with each other, or in combination with other points contained in this brief, justify granting a new trial. Their cumulative effect denied Happ a fair trial. Amend. V, VI, and XIV, U.S. Const; Art. I, ss. 9 and 16, Fla. Const.

POINT XIII

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies Due Process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute, thus detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The failure to provide the defendant with notice of aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of Due Process of Law. See Gardner v. Florida, 430 U.S. 349 (1977). Appellant sought at trial to dismiss the indictment on these grounds. (R118-21,157-9,167)

The Florida Standard Jury Instructions, as well as comments made by the prosecutor and the trial court, diminished the responsibility of the jury's role in the sentencing process contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellant sought to prohibit such comment by pretrial motion. (R123) Appellant recognizes that this Court has previously ruled that Caldwell is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988).

The exclusion of jurors who hold objections to the death penalty is unconstitutional. This results in a denial of Appellant's constitutional right to a fair trial. Prior to trial, defense counsel sought to prevent such an exclusion but was rebuffed. (R128-33,149-151) Appellant incorporates his argument below by reference.

Section 921.141, Florida Statutes (1987), is unconstitutional on its face and as applied based upon the arbitrary and capricious manner in which various prosecutors decide to seek the ultimate sanction in any given case. Appellant attacked the statute's constitutionality on this basis by pretrial motion. (R134-39) The United States District Court, Central District of Illinois, recently vacated a death sentence and declared the Illinois death statute to be unconstitutional based upon this contention. United States of America, ex. rel. Charles Silegy v. Howard Peters III, et. al, Case No. 88-2390 (April 29, 1989).

The state in this case agreed to the imposition of four consecutive life sentences if Happ pleaded guilty to the crimes as charged. (R98-9,2517-19) Happ's refusal of the state's offer and subsequent exercise of his constitutional right to a jury trial ultimately resulted in the imposition of the death penalty. This result violates his constitutional rights. Happ sought to dismiss the indictment or, in the alternative, to declare the death penalty unconstitutional on these grounds prior to trial. (R157-9)

The death penalty in Florida is imposed in an arbitrary and capricious manner based on factors which should play no part in the consideration of sentence. The State of Florida is unable to justify the death penalty as the least restrictive means available to further its goals where a fundamental right, human life, is involved. Rowe v. Wade, 410 U.S. 113 (1973). The punishment serves no purpose and its imposition is inconsistent and arbitrary. (R160-1)

The Florida statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the finding of such evidence by the jury and the court. In thereby violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial" impairment of ones ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and "extreme" to describe the level of duress. ss.921.141(6)(b)(e)(f), Fla. Stat. (1987).

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the

aggravating circumstances listed in the statute. See Godfrey v. Georgia, 445 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J., Concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views of capital punishment which unfairly

results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating. Defense counsel objected to this particular circumstance on these grounds during the charge conference. (R2505-6)

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987) (dissenting opinion of Brennan, Marshall, Blackman and Stevens,

J.J.)

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

The death penalty as applied in Florida leads to inconsistent, arbitrary, and capricious results. In King v. State, 514 So.2d 354 (Fla. 1987), this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having previously approved it on King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). See also Proffitt v. State, 510 So.2d 896 (Fla. 1987); Proffitt v. State, 372 So.2d 1111 (Fla. 1979); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 315 So.2d 461 (Fla. 1975).

CONCLUSION

Based upon the cases, authorities, and policies cited herein, Appellant requests that this Honorable Court grant the following relief:

As to Point I, vacate Happ's convictions and sentences and remand for discharge;

As to Points II-VI, VIII-IX, and XII, reverse and remand for a new trial;

As to Point VII, remand for the imposition of a life sentence or, in the alternative, a new penalty phase;

As to Points X-XI, remand for the imposition of a life sentence; and,

As to Point XIII, remand for the imposition of a life sentence, or in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to William F. Happ, #117027, P.O. Box 747, Starke, Fla. 32091 on this 7th day of May, 1990.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER