IN THE SUPREME COURT OF FLORIDA
NO. _____

WILLIAM FREDERICK HAPP,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Michael P. Reiter
Florida Bar No. 0320234
Chief Assistant CCRC
OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619
(813) 740-3544

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Happ's first habeas corpus petition in this Court. Art. l, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Happ was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The postconviction record on appeal will be referred to as "PC-PR.___" The amended postconviction motion was filed on October 16, 1995.

The Florida Supreme Court's opinion on Mr. Happ's initial direct appeal will be referred to as Happ I, 596 So.2d 991 (Fla. 1992). The Court's opinion on his appeal of the postconviction decision will be referred to as Happ II. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Happ's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Happ. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Happ is entitled to habeas relief.

PROCEDURAL HISTORY

William Happ was charged by indictment December 2, 1986, with first-degree murder, burglary of a conveyance with the intent to

commit a battery, kidnapping, and sexual battery likely to cause serious personal injury. He pled not guilty.

William Happ's first trial in January 1989 ended in a mistrial because the prosecutor violated a motion in limine prohibiting the State from revealing Happ's prior record. Happ was retried in July 1989 and found guilty of the charges on July 28, 1989 [R 2489]. On July 31, 1989, the jury recommended a sentence of death by a vote of nine to three. Immediately following the jury's recommendation, the judge sentenced Mr. Happ to death.

On direct appeal, the Florida Supreme Court ruled that Happ's jury was erroneously instructed on the aggravating factor of "cold, calculated and premeditated" because it did not apply in Happ's case. The Florida Supreme Court struck that aggravating circumstance but affirmed the convictions and sentences. Happ v. State, 596 So.2d 991 (Fla. 1992). On certiorari to the United States Supreme Court, Happ's sentence was vacated and remanded because the jury was given an additional erroneous aggravating circumstance. The United States Supreme Court ruled that the "heinous, atrocious, or cruel" aggravator given in Mr. Happ's case was unconstitutionally vague in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992); Happ v. State, 113 S.Ct. 399 (1992). Despite the fact that the jury was instructed on two erroneous aggravating circumstances, the Florida Supreme Court affirmed Happ's convictions and sentence, Happ v. State, 618 So.2d 205 (Fla 1993).

Happ's Amended Motion to Vacate Judgment and Sentence was filed October 16, 1995, in accordance with F.R.Crim.P. 3.850 and 3.851 [PC-R. 116-230].

A hearing was held July 29, 1996, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). At that hearing, the court granted an evidentiary hearing on Petitioner's claim III -- Brady violation, and claim XVIII -- failure to investigate mitigation issues [PC-R. 402-459]. However, the court required Petitioner to amend claim XVIII to include specific allegations. The court did not set a date for the amendment to be filed.

An evidentiary hearing was conducted February 20, 1997, [PC- R 1021-1197] on claim III only, as the Petitioner had not filed an amended claim XVIII at the time of the evidentiary hearing. The court entered an order denying Petitioner's motion.[1] The order did not refer specifically to any individual claims of the Petitioner. The State submitted a proposed order to the court because the original order was deficient to sustain appellate review. Petitioner submitted his objections to the proposed order[2] because the proposed order did not reflect the findings of the court's oral pronouncements at the **Huff** hearing.

Subsequently, the court adopted the State's proposed order denying Petitioner's 3.850 motion [PC-R. 928-945].

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[1]This order does not appear to be in the record.

[2]The written objections do not appear in the record.

The Petitioner filed a motion for rehearing and a motion for leave to amend based on new evidence which may lead to proof of actual innocence [PC-R. 946-977]. The court summarily denied the motion May 11, 1998 [PC-R. 978]. Petitioner filed his notice of appeal May 22, 1998 [PC-R. 1014-1015]. On September 27, 1999, Petitioner filed a motion to relinquish. The court denied the motion but entered an order permitting Mr. Happ to file a successor 3.850 motion, contemporaneously with his appeal, which is still pending.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Happ's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Happ's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Happ to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs

v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Happ's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Happ asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

ALTHOUGH APPELLATE COUNSEL RAISED IN ISSUE FOUR OF APPELLANT'S INITIAL BRIEF THE TRIAL COURT'S ERROR OF RESTRICTING PRESENTATION OF CRITICAL EVIDENCE AT TRIAL REGARDING RICHARD MILLER'S ADMISSION ABOUT LYING, APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO INCLUDE OTHER CRUCIAL FACTS, AMOUNTING TO SUBSTANTIAL IMPEACHMENT OF MR. MILLER IN VIOLATION OF MR.

HAPP'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

Appellate Counsel argued at issue IV of Mr. Happ’s Initial Brief that the trial court erred by restricting presentation of a critical witness based upon Richard Miller's acknowledgment of a lie. In so arguing, Appellate Counsel stated in the Appellant's initial Brief the following at pages 55 and 56:

> 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. (R. 2195-6) Lee reassured Miller. (R. 2196) Miller then admitted that he had lied during his testimony at Happ's trial. (R. 2199) He also revealed that Brad King, the prosecutor in Happ's trial, told Miller to lie. (R. 2196) Specifically, King told Miller to answer negatively if he was questioned about asking for a lawyer before speaking to law enforcement officials.(R. 2l91-4, 2l96) 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. (R. 2197).

Appellate Counsel failed to raise or argue to this Court that the trial court erred in denying the defense the ability to call Mr. Lee, because the court failed to consider relevant the fact that Mr. Miller told Mr. Lee that "he was given answers to the questions" and that the reason he didn't want to testify was not because he was sick, but because he was concerned about his own case, as evidenced by the following:

> DIRECT EXAMINATION OF HUGH LEE BY MR. PPISTER

> MR. Pfister: Could you tell me what Richard Miller told you?
>
> MR. Lee: Mr. Miller was worried about whether or not having to testify would bother an appeal if in fact he did one. He'd already testified once. If he did get a new trial due to ineffective assistance or any other way, that basically his previous testimony could be used against him, and he probably had no right of - Fifth Amendment right not to testify.
>
> He brought up the fact that he felt coerced in his plea based on promises made by the office of the State Attorney concerning where he would be housed. I think he wanted to go to Oklahoma and went to Kansas instead, some irrational fear that he was sent there to be killed, be cut or something. He showed me the scars.
>
> And then he went on and he had some of the statutes regarding new trial, and I advised him that didn't apply, only applied to the defendant whether or not, you know, -testimony for new trial didn't apply to him, his statement wouldn't be used against him. He said, **"What if they knew I'd been told to lie or told the answers to the questions?"** And I asked him what he meant. He indicated that he had been told - asked "what if they asked if I asked for an attorney and I said I was told to say just no?" I asked him who told him that. He indicated it was Brad King.
>
> I didn't go any further into the subject. I said it's something that I didn't think would help him but if he wanted to speak to you, I'd let you know he wanted to speak to you to get in touch with you, contact you directly, when he was transferred to Lake County to testify.

(R. 2196-2197) [emphasis added].

Not only did Appellate Counsel fail to bring before this Court the statement that Miller was given the answers to the questions, but also failed to point out in the initial brief that the trial court denied the defense's request to call Mr. Lee as a witness **prior** to

the court even hearing Mr. Lee's testimony (Appellant's Initial Brief pages 54-57). After Mr. Pfister motioned the court to call Mr. Lee as a witness and provided a proffer of some of Mr. Lee's testimony, the court stated:

> THE COURT: That may be. That's a difficult question.[3] **This testimony is not going to be presented to the jury in any event or to the public. It's going to be taken here in Chambers and done at that with that** - I know your concern, Mr. Lee. I'm going to tell you that the Court rules the attorney/client privilege is waived. You have to answer questions regarding this and you have no responsibility for that.

(R. 2194) [emphasis added].

It was only after the court's ruling did Mr. Lee then provide his testimony about what Richard Miller had told him (R. 2194-2198), which included that Richard Miller was given the answers to the questions.

Appellate Counsel was ineffective for failing to include the relevant portions of Mr. Miller's statement to Mr. Lee, as well as to point out that the trial court entered its ruling prematurely.

The Sixth Amendment's Confrontation Clause was made applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965). It has been further stated that this right is a fundamental right. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2575 (1975):

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[3]Referring to Mr. Lee's claim that the information he was about to testify to was privileged communication.

> The Sixth Amendment includes a compact statement of the rights necessary to a full defense: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."
>
> Because these rights are basic to our adversary system of criminal justice, they are part of the "due process of law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States. The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered **fundamental** to the fair administration of American justice - through the **calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses,** and the orderly introduction of evidence, in short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. at 2532. [emphasis added].

Petitioner was denied the opportunity to call Mr. Lee as a witness to impeach the prior testimony of Mr. Miller in violation of his Sixth and Fourteenth Amendments to the Federal Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Oddly enough, the trial court denied the introduction of Mr. Lee's testimony before he even heard it.

Appellate Counsel raised on direct appeal only the issue of Mr. Miller admitting that he had lied in his original testimony, to which this Court found that claim without merit and required no further consideration. But Petitioner was also denied the opportunity to

call Mr. Lee to impeach Mr. Miller by informing the jury that Mr. Miller had stated that he was given the answers to the questions and he didn't want to testify because he was concerned that his testimony would be used against him, and not because he was sick.[4] This was in violation of Petitioner's constitutional rights and was not raised on direct appeal and should have been.

In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986), the court vacated and remanded the case where the trial court prohibited defendant's inquiry into the possibility that a witness was biased as a result of state's dismissal of his pending public drunkenness charge, and as such violated defendant's rights secured by the confrontation clause. The Court further stated:

> Accordingly, we hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecutions' case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of

[4]"The reason given at trial for Miller's failure to testify was sickness" (R. 1718).

> course, the overall strength of the prosecution's case.

Id. at 684.

In the case at bar, it was critical that Petitioner be permitted to attempt to impeach Mr. Miller, especially in light of the fact that Mr. Miller's testimony was not live testimony, but prior testimony read to the jury. Moreover, utilizing the standard set forth above, Mr. Miller's testimony was: (1) absolutely essential to the state; the testimony was not cumulative; (2) there was very little corroborating evidence - assuming that the testimony was not impeached; (3) cross- examination of Mr. Miller was precluded in the second trial, because he refused to testify[5] and Mr. Lee's testimony amounted to a subsequent inconsistent statement of Mr. Miller; and (4) the strength of the state's case was virtually non-existent without Mr. Miller.

At the time of the trial in this case, prior inconsistent, as well as subsequent inconsistent statements were admissible under Florida law. In State v. Hill, 504 So.2d 407 (2nd DCA 1987), the court stated:

> Use of inconsistent statements is a recognized method of impeaching a witness. Sec. 90.608 (l)(a), Fla. Sta. (1985). Inmost instances, the witness has made the inconsistent statement prior to the time he has testified. However, there are some circumstances in which subsequent inconsistent statements have been

[5]This matter will be further discussed as a separate issue in Claim IV.

admitted for the purpose of impeachment, [citation omitted]. In People v. Collup, 27 Cal.2d 829, 167 p.2d 714 (1946), the prosecution was permitted to introduce at a criminal trial the testimony of Marjorie Nelson who had testified at the defendant's preliminary hearing and who had now left the jurisdiction. Later in the trial, the defendant, Flaten, and her mother testified that Nelson had told them that she had not testified truthfully at the preliminary hearing. On motion of the prosecution, the court struck the testimony of Flaten and her mother, and the defendants were convicted. In reversing the judgments on appeal, the California Supreme Court held that the trial judge had erred in striking the testimony concerning the statements by Nelson which were inconsistent with the testimony she gave at the preliminary hearing. The court rejected the argument that the impeachment testimony could not be introduced because of the failure to lay a proper foundation by first asking Nelson whether she had made such inconsistent statement. The court pointed out that due to Nelson's absence the defendants could not possibly meet the requirement of laying the proper foundation and held that in the interest of justice the impeaching evidence should have been admitted for what it was worth, [citation omitted].

Attacking the credibility of prior testimony which is being introduced at a later hearing by evidence of subsequent contradictory statements seems to have been contemplated by section 90.806(1), Florida Statutes (1985), which provides as follows:

When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for these purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the

> declarant has been afforded an opportunity to deny or explain it.

Id. at 409. [emphasis added].

As these cases indicate, because Mr. Miller was declared unavailable for trial and his prior testimony was read into the record, the defense should have been permitted to present Mr. Lee's testimony that Mr. Miller told him that he was given the answers to the questions, as well as why Mr. Miller didn't want to testify.

Mr. Miller's testimony was crucial to the state. Mr. Miller was permitted to testify by former testimony, thereby prohibiting the defense access to Mr. Miller. The subsequent inconsistent or incongruent statement of Mr. Miller was essential to the defense in order to establish to the jury that Mr. Miller was lying. The Constitution of the United States, the Florida Constitution, and the interests of justice demanded that Mr. Lee be permitted to testify.

Although in hindsight, yet predictable, the prejudice was obvious. During the trial, the jury requested whether Mr. Miller had testified that he had read about the incident in the newspaper. The judge refused to re-read the testimony and instructed the jury to rely upon their memory (R. 1109-10, 2383- 84). Mr. Miller has since provided a recantation of his original testimony and stated, among other things, that he was provided the answers to the questions.[6]

[6]See Petitioner's Motion to Relinquish Jurisdiction in Appeal Case No. 93,121.

The unfortunate sequence of events surrounding Mr. Miller's testimony constructively handcuffed Petitioner's ability to impeach Mr. Miller's testimony: (1) Mr. Miller testified via former testimony - although physically available, (2) the court denied the defense the ability to call Mr. Lee, and (3) the court denied the re-reading of Mr. Miller's testimony regarding his reading about the case in the newspaper. Although the single statement by Miller that he lied about having asked for an attorney was raised on appeal and denied by this Court, Appellate Counsel was obligated to point out to this Court those issues which best showed the trial court's errors, the injustice by those errors, and the legal support for the issues. As shown above, Appellate Counsel failed to adequately raise the proper issues before this Court, which amounted to ineffective assistance of Appellate Counsel.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ERROR CAUSED BY THE STATE ATTORNEY'S DELIBERATE WITHHOLDING OF THE FACT THAT THE STATE CREATED A CONFLICT OF INTEREST BY RETAINING THE SAME EXPERT AS THE DEFENSE.

Petitioner's trial counsel filed a Motion for Confidential Expert on February 26, 1987, a copy of which was certified to the State Attorney [Appendix A][7] (R. B28). On February 27, 1987, Judge

[7]Anthony Tatti, assistant public defender, now works for the State Attorney who prosecuted Mr. Happ, and also represented Richard Miller (R. 2192) (jailhouse informant who testified against Mr. Happ). Mr. Tatti testified at Mr. Happ's 3.850 evidentiary hearing.

Thurman entered an order appointing Dr. Harry Krop as a confidential expert for the Petitioner, pursuant to Fla.R.Cr.P. 3.216(a)[8] [Appendix B] (R. 29-31), a copy of which was certified to the State Attorney.

Petitioner's trial counsel filed: Notice of Deletion of Witness --Dr. Harry Krop – From Witness List (R. B184) [Appendix C]; and Notice of Invoking Privileges of Dr. Krop's confidentiality (R. 85) [Appendix D] on April 29, 1988. Both documents certified that copies were sent to the State Attorney. Apparently, however, unbeknownst to Petitioner's trial counsel, the State Attorney filed a Petition for Expert Fees for Dr. Harry Krop on April 4, 1989 (R. 836) [Appendix E]. The request specifically states:

> 1. It is the opinion of the State Attorney that the service performed by said aforementioned doctor was in the form of an expert service.
>
> 2. That is [sic] was necessary and expedient in the interest of justice to have the above expert perform said service which was relevant and pertinent to the issues in the above-entitled cause.

The Petition was signed by Bradley E. King, State Attorney and the Order was signed by Judge Jerry T. Lockett (Judge Lockett was appointed after Judge Thurman recused himself). This document does not certify that a copy was forwarded to Petitioner's trial counsel or that a hearing was held upon the petition.

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[8]Fla.R.Cr.P. 3.202, regarding experts for mitigation became effective January 1, 1996.

What is most telling about this conflict of interest, potential Brady violation, and a smacking of prosecutorial misconduct is what Mr. King states at the penalty phase instruction charge conference:

> MR. KING: The other - and I'm really, Your Honor, just building a Record here - I know that Mr. Krop - Dr. Krop examined Mr. Happ sometime ago. That was a confidential evaluation. I don't know the results of that. But I want to make sure that - I would like to see for the Record that Mr. Happ knows that he does have a psychiatrist that can testify about these other aspects concerning extreme duress or whatever.
>
> I don't know whether the psychiatrist could testify and give any evidence in that regard but I know always on collateral attack, even on direct appeal, that is an issue that is raised. And I just - I would like the Court to ask of Mr. Happ, you know, does he want his psychiatrist here to testify or have they at least discussed it between themselves to know that they do not want to present that type of evidence.
>
> MR. Pfister: Your Honor, I appreciate Mr. King worrying about Mr. Happ's effective assistance of counsel, but Mr. - or Dr. Harry Krop - he does testify in a lot of these post relief matters - was originally appointed when the Public Defender's office had the case, specifically Mike Johnson.
>
> I became aware of what interview occurred between Dr. Harry Krop and my client before I was appointed to represent him. I had one opportunity to have Dr. Harry Krop interview him after we were appointed to represent him.
>
> I did confer even as of about two weeks ago - three weeks ago with Dr. Harry Krop over the phone. Time records will show that we had a conversation with him. And we would not elect to pursue these mitigating factors that Mr. King talked about.

(R. 2520-2522).

This conversation took place on July 31, 1989, well after the court and the State agreed to pay for Dr. Krop's service to the State. Mr. King states he knew Dr. Krop had evaluated Mr. Happ. How did he know that? Was it because Dr. Krop told him? Although the State's Response to Discovery lists Dr. Harry Krop, at number 67, as a witness for the State,[9] nothing in the record indicates that Petitioner's trial counsel had knowledge that Dr. Krop had been hired by the State. The petition for payment to Dr. Krop, filed by the State is a pro forma type of document, for which defense counsel would have no reason to search for in the clerk's record to discover; especially since no notice was provided to defense counsel. Listing of an opponent's witness on your own witness list is a common occurrence in criminal litigation practice. However, the mere fact that Dr. Krop was listed on the State's witness List does not automatically mean that the Defense should have been alerted to the fact that the State had also hired Dr. Krop. The trial judge signed the order for payment and he apparently didn't remember. The State Attorney had specific knowledge, by his own admission and previous documentation, that Dr. Krop was a confidential expert for the defendant. It was the obligation of the State, as well as the court, to have brought to the attention of the defendant that the State had

[9]The State's Response to Discovery was filed on March 10, 1988, but is not included in the Index to the Record on Appeal nor does it appear to be part of the Record on Appeal.

hired Dr. Krop and acknowledge the conflict. This practice amounted to a substantial conflict of interest for the defense.

Appendices A through E were part of the record on appeal and clearly established that Dr. Harry Krop was appointed as a confidential expert for the defense, and that the State had also hired Dr. Krop as their expert. Further, the record on appeal also clearly established -- via Mr. King's acknowledgment -- that Mr. King knew that Dr. Krop had been hired by the defense and failed to notify defense that the State had also hired Dr. Krop. Appellate Counsel's performance was deficient for either failing to discover this blatant conflict and raise the issue on appeal or just chose not to raise the issue on appeal. In either case, Appellate Counsel provided ineffective assistance.

The instant case was tried in July, 1989, and the first opinion entered by this Court was in 1992. At that time Appellate Counsel could have utilized existing case law to support the claim of conflict of interest. In Carnival Corporation v. Romero, 710 So.2d 690 (Fla. 5th DCA 1998) the court pointed out:

> Although we have found no Florida cases which consider the disqualification vel non of an expert witness on the ground of privilege and conflict of interest, it follows that such orders should also be reviewable through the certiorari process.

Id. at 692.

The Carnival Court cited as support for its finding the following: Farm Mutual Automobile Insurance Co. v. K.A.W., 575 So.2d

630 (Fla. 1991) (the legal system cannot function fairly or effectively if an attorney has an informational advantage resulting from a conflict of interest); and Roundpoint v. V.N.A., Inc., 207 A.D.2d 123 N.Y.S. 2d 161 (N.Y.Ap.Div. 1995)(courts have inherent power to disqualify expert witnesses to preserve the fairness and integrity of the judicial process).

Although some of these cases are subsequent to the decision entered in the case at bar, they cite support for the conflict of interest proposition with cases that were available prior to the decision by this Court on direct appeal. In Marvin Lumber & Cedar Company v. Norton Company, 113 F.R.D. 588 (D. Minn. 1986), the Court stated:

> The rules governing disqualification are designed to protect against the potential breach of such confidences, even without any predicate showing of actual breach. That is the case with respect to expert witnesses Conforti, 405 A.2d at 489-92, and Miles v. Farrell, 549 F.Supp. 82, 84 (N.D.Ill.1982), just as it is the well-accepted rule with respect to attorney disqualification. The threat or potential threat that confidences may be disclosed is enough, (citations omitted.)

In Roundpoint, 207 A.D.2d at 126, the Court stated:

> To resolve the issue of whether a claimed conflict of interest disqualifies an expert, courts have used a two-step analysis, first seeking to determine if it was objectively reasonable for the party claiming to have initially retained the expert to conclude that a confidential relationship existed between them, and then, secondly, to ascertain if any confidential or privileged information was disclosed by said party to the expert (see,

> Wang Labs, v. Toshiba Corp., 762 F.Supp. 1246, 1248; Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F.Supp. 334, 337; Shadow Traffic Network v. Superior Ct. [Metro Traffic Control], 24 Cal.App.4th 1067, 29 Cal.Rptr.2d 693). Affirmative answers to both inquiries requires disqualification while negative responses to either inquiry will likely result in a finding that disqualification would not be appropriate.

There is no question that the first step was satisfied because the trial court specifically entered an order appointing a Confidential Expert. Certainly there can be no argument regarding the second step of the analysis, because Petitioner's Counsel specifically informed the court -- after Mr. King informed the court (R. 2521) -- that Dr. Krop interviewed Mr. Happ (R. 2521). There can be no greater form of confidentiality than that of an accused murderer confiding in a psychotherapist regarding the accused's deepest mental conditions and his life experiences for potential mitigation.

The only difference between the cases cited and the case at bar is that in the cited cases, the proponent for the disqualification was fortunate enough to have discovered the conflict before the expert was permitted to testify. Unfortunately, in this case this conflict was not divulged by the State to defense counsel in order for defense counsel to enter a motion to disqualify. To further add salt to the wound, the Petitioner's Appellate Counsel also failed to discover and raise the issue of conflict of interest to this Court.

This omission on the part of Appellate Counsel further diminished the rights of the Petitioner.

It must be noted that defense counsel provided notice that they did not intend to call Dr. Krop prior to the first trial, which ended in a mistrial, and did not call Dr. Krop in the second trial. The State didn't call Dr. Krop either. However, calling or not calling Dr. Krop as a witness at that point was moot. The conflict had already occurred. Petitioner was entitled, by rule and court order, to a conflict-free and confidential expert. At the point where the State also hired Dr. Krop and confidential information by the defense was divulged, there is no way of knowing whether the opinions or advice given to the defense by Dr. Krop was tainted because of the conflict. Further, because the State failed to divulge that they had retained Dr. Krop, the defense was precluded from motioning the court to appoint a different conflict-free expert.

The cases cited above clearly establish that a conflict of interest regarding experts is no less devastating than a conflict of interest of attorneys. This Court in Guzman v. State, 644 So.2d 996 (Fla. 1994), stated:

> "We can think of few instances where a conflict of interest is more prejudicial than when one client is called to testify against another. As seen by the facts set forth earlier in this opinion, Boyne was a key witness against Guzman. The state contends that Boyne's waiver of the attorney/client privilege was sufficient to cure any prejudice that might have been caused by the public defender's representation of both Boyne and Guzman. While such a waiver

> might have cured any conflict the public defender had insofar as the representation of Boyne was concerned, that waiver does not waive Guzman's right to conflict free counsel."

Id. at 998, [emphasis added].

The type of conflict caused by the State Attorney -- hiring the defense's confidential expert and not informing the defense -- should be one of the **few instances** this Court was thinking about.

Although Guzman was decided after the opinion was entered in the case at bar, the Court in Guzman cited Babb v. Edwards, 412 So.2d 859 (Fla. 1982) for its support, which was available for Appellate Counsel to review, had he read the record more carefully. Appellate Counsel's failure to raise this fundamental error amounted to ineffective assistance of appellate counsel.

CLAIM III

ALTHOUGH APPELLATE COUNSEL FILED A MOTION FOR REHEARING, APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO POINT OUT IN THE MOTION FOR REHEARING THAT THE COURT RELIED UPON INACCURATE FACTS.

In its opinion affirming the trial court in Happ v. State, 596 So.2d 991 (Fla. 1992), this Court stated:

> A shoe print found outside the driver's side of the car was later found to match one of Happ's shoes.

Id. at 992.

****

> At the second trial, a friend of Happ's testified that he had seen Happ walking down U.S. Highway 19 toward the barge canal at 11:00

> p.m. on May 23, and that he saw Happ the next morning with a swollen right hand. Happ's former girlfriend testified that Happ told her he broke a car window with his fist.

Id. at 992.

These statements by the Court are not only inaccurate, but are taken out of context.

STATEMENT ONE:

> "a shoe print was found outside the driver's side of the car was later found to match one of Happ's shoes,"

is only accurate if the Court was referring to the same brand and class of shoe. However, Mr. Hamm, a Florida Department of Law Enforcement analyst, testified to the following:

DIRECT EXAMINATION OF MR. HAMM BY MR. KING.

MR. KING: From your comparison of those two photographs, were you able to arrive at any conclusions with respect to the tennis shoe that you had having actually made the print that was in the parking lot?

MR. HAMM: The questioned bears a pattern type of a central design of an octagon-type, six-sided figure in a central, what we call turning point or pivot area, of the footwear, and then surrounded by circular designs.

The "X" that I placed on the chart with the red line is showing this pivot point.

If you go to the test impression of the known, you'll see that the circles around the pivot print are present but the inner design is considerably different. There is no pivot point, no six-sided figure at that point.

However, this was caused by an excessive amount of wear by the time the track could have been made to the time this track was made.

The shoe did exhibit considerable amount of wear in this area so while they are the same in their class characteristics, I could only form the opinion they could have made it **if there was a time element between the time that this suspect footwear track was made and the time that I made the known footwear track.**

(R. 2119-2120).

****

MR. KING: You can't say for an absolute certainty that this Pony shoe that we have here today is the Pony shoe that made the track in the parking lot that you have as your questioned photograph; is that right?

MR. HAMM: No, I cannot. My only opinion is it could have made it at one time.

(R. 2119-2120).

Basically, the expert could only say that the shoe obtained by Mr. Happ could not be excluded. But it was also clear by Mr. Hamm's testimony that if the wear on Mr. Happ's shoe existed at the time of the offense, Mr. Happ's shoe could not have made the imprint found in the parking lot. Therefore, the court's statement that the shoe matched is inaccurate.

STATEMENT TWO:

> "a friend of Happ's testified that he had seen Happ walking down U.S. Highway 19 toward the barge canal at 11:00 p.m. on May 23..."

In juxtaposition to this Court's statement, the following was the statement of facts by the State in their Answer Brief at page 2 and 3:

> A friend of Happ's testified that he last saw Happ Friday night at 11:00 p.m. (R. 2086). Happ was walking home down Highway 19 toward the barge canal (R. 2087).

The similarity of the Court's statement of facts and that of the State in their Answer Brief are remarkable and both inaccurate. However, the actual testimony of Mr. Ambrosino (Mr. Happ's friend) is substantially different, as demonstrated as follows:

> DIRECT EXAMINATION OF MR. AMBROSINO BY MR. KING
>
> MR. KING: You and Mr. Happ I assume got up, you're at your mother's house. Do you remember what you did that day?
>
> MR. AMBROSINO: Went to the bowling alley and about ll:00 - ll:00 o'clock or so, we started walking home.

MR. KING: This is 11:00 o'clock in the evening now?

MR. AMBROSINO: Yes, p.m.

MR. KING: Had you considered Mr. Happ's spending the night at your house again on Friday night?

MR. AMBROSINO: I considered it but I didn't want to up - I didn't want to have any more friction with my stepdad.

MR. KING: You didn't ask him to spend the night Friday night?

MR. AMBROSINO: No.

MR. KING: Friday night. May the 23rd, where was the last place that you saw Mr. Happ?

MR. AMBROSINO: On Holiday Drive and 44.

MR. KING: And could you on the map again point out to us where that location is? Can you find it?

How about right here (indicating)?

MR. AMBROSINO: Okay.

MR. KING: Would that be just a little bit to the left of the dot, the dot then would be Manatee Lanes; right? That's the bowling alley?

MR. AMBROSINO: That's right.

MR. KING: Right in that area (indicating)?

MR. AMBROSINO: Yes.

MR. KING: Which way was Mr. Happ headed when you last saw him?

MR. AMBROSINO: Toward this direction, toward his house.

> MR. KING: Okay. Do you know where he lives or where he was living at that time?
>
> MR. AMBROSIONO: He lived down Highway 19. It was down around back in the woods.
>
> MR. KING: Okay. Would it have been up towards the barge canal?
>
> MR. AMBROSINO: Yes, down toward that way (indicating), but not as far as the barge canal.

(R. 2087) [emphasis added].

Mr. Ambrosino specifically stated that he had last seen Mr. Happ on Holiday Drive and 44; not walking down Highway 19 (R. 2086). Further, Mr. Ambrosino testified that Mr. Happ was headed towards his house, which happened to be in the direction of the barge canal, but was not as far. The statement that Mr. Happ was walking down Highway 19 towards the barge canal was purely speculative and not specifically testified to by Mr. Ambrosino. That type of conclusion is tantamount to saying that if a crime was committed in Maine and John Doe lived in New York, he, therefore, was headed for Maine because he was seen traveling north on 1-95 from Jacksonville, Fla.

STATEMENT THREE:

> "that he saw Happ the next morning with a swollen right hand."

Again, in juxtaposition to this statement by the Court, the State's Answer Brief at page 3 states: "He saw Happ the next morning around 9:am. Happ's right hand was swollen..." Yet, the actual

testimony of Mr. Ambrosino stated: "I believe his right hand was swollen" (R. 2088). Mr. Ambrosino's belief that Mr. Happ's hand was swollen was not established as to whether he actually saw a swollen hand or just assumed it because: "He told me he hit a tree." (R. 2088).

STATEMENT FOUR:

> "Happ's former girlfriend testified that Happ told her he broke a car window with his fist."

Again, the State's Answer Brief (at page 3), appears to be the origin of this statement: "Happ's prior girlfriend, who lived in Pennsylvania, testified that Happ told her he had broken a car window with his fist." This statement is perhaps the most misleading of all, because the context implies that Mr. Happ told his former girlfriend that he broke the victim's (Ms. Crawley) car window. This statement totally misstates Jean Pinko's (Happ's former girlfriend) testimony:

> DIRECT EXAMINATION OF JEAN PINKO BY MR. KING
>
> MR. KING: Okay. During the part of your relationship, did you ever have a conversation with him about him breaking a car window with his fist?
>
> MS. PINKO: Yes.
>
> MR. KING: And that occurred in Pittsburgh, Pennsylvania?
>
> MS. PINKO: Yes.
>
> MR. KING: Okay. And I think, if I remember right, you had asked him about how he got a cut on his hand.

MS. PINKO: Yes.

MR. KING: And he told you that he did it breaking a car window with his fits; -

MS. PINKO: Yes.

MR. KING: - is that right?

MS. PINKO: (Nodding head.)

MR. KING: Okay. Did there come a time early in 1986 that Mr. Happ left Pennsylvania and came to Florida?

MS. PINKO: Yes

(R. 1984-1985).

****

CROSS-EXAMINATION BY MR. PFISTER

MR. PPISTER: Now, this thing about Bill, you know, breaking a window with his hand, getting a cut on it, do you know when this conversation happened?

MS. PINKO: It was a long time - it was like about maybe a year - half a year after we started going together.

MR. PFISTER: It could have been a year - two years - half a year - whatever, way before '86?

MS: PINKO: Yes.

(R. 1988).

There is absolutely no doubt that the broken car window Ms. Pinko testified about was not the victim's car, but a car in Pennsylvania up to two years before Mr. Happ came to Florida. Even the State Attorney, Bradley King, acknowledged in their Notice of Intent to Use Other Crimes, wrongs, or Acts (R. 74) [Appendix F] that

Ms. Pinko's testimony referred to an incident in Pennsylvania and not in Florida.

In his motion for rehearing Appellate Counsel did not point out to this Court that the facts relied upon by this Court were inaccurate. It is clear that the facts stated by this Court in support of affirmance painted a picture of events substantially different than what was actually testified to at trial. The facts understood by this Court gave rise to a possible circumstantial case, while the facts as they really existed, gave rise to an insufficient circumstantial case. It was the responsibility of Appellate Counsel to correct the record. This performance was deficient, as well as prejudicial.

In Williamson v. Dugger, 651 So.2d 84 (Fla. 1995), this Court stated:

> The standard for reviewing claims of ineffective assistance of appellate counsel in Florida's habeas corpus proceedings parallels the requirements of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
> Petitioner must show l) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

Id. at 86.

It obviously cannot be overlooked that the State's case included a jailhouse informant who testified against Mr. Happ. Although Appellate Counsel raised in Issue IV -- beginning on page 55 of the Appellant's Initial Brief -- that the court erred in restricting the presentation of evidence that Richard Miller had admitted to lying during his former testimony,[10] Appellate Counsel failed to raise in the appeal the other statements made by Miller and told to Attorney Lee:

> DIRECT EXAMINATION OF HUGH LEE BY MR. PFISTER
>
> MR. PFISTER: Could you tell me what Richard Miller told you?
>
> MR. LEE: Mr. Miller was worried about whether or not having to testify would bother an appeal if in fact he did one. He'd already testified once. If he did get a new trial due to ineffective assistance or any other way, that basically his previous testimony could be used against him, and he probably had no right of - Fifth Amendment right not to testify.
>
> He brought up the fact that he felt coerced in his plea based on promises made by the office of the State Attorney concerning where he would be housed. I think he wanted to go to Oklahoma and went to Kansas instead, some irrational fear that he was sent there to be killed, be cut or something. He showed me the scars.
>
> And then he went on and he had some of the statutes regarding new trial, and I advised him that didn't apply, only applied to the defendant whether or not, you know, - testimony for new trial didn't apply to him, his statement wouldn't be used against him. He

[10]This issue is also dealt with as a separate claim of ineffective assistance of appellate counsel.

said, **"what if they knew I'd been told to lie or told the answers to the questions?"**

And I asked him what he meant. He indicated that he had been told - asked "what if they asked if I asked for an attorney and I said I was told to say just no?" I asked him who told him that. He indicated it was Brad King.

I didn't go any further into the subject. I said it's something that I didn't think would help him but if he wanted to speak to you, I'd let you know he wanted to speak to you to get in touch with you, contact you directly, when he was transferred to Lake County to testify.

(R. 2196-2197) [emphasis added].

****

CROSS EXAMINATION OF MR. LEE BY MR. KING

MR. KING: Hugh, when you were talking to Richard Miller, was it your impression that he was concerned that in his testimony in this trial that he'd been asked about his own cases and that that testimony may be used against him?

MR. LEE: He was concerned that his testimony would be used against him, testimony at this trial.

I advised him testimony of the last trial would be there, and I said unless it changes. He said well, I was - and that's when the statement came up what was true or wasn't true.

MR. KING: What he was talking to you about was trying to get himself a new trial.

MR. LEE: Basically.

MR. KING: He thought you could get him an appeal and get a new trial.

MR. LEE: Yes.

> MR. KING: If he did that, he was concerned that the statements he made in this trial could be used against him in his own trial.
>
> MR. LEE: That was his concern, yes.
>
> MR. KING: Based on that, he said, well, what if I lied in this trial, would they throw out that testimony so it couldn't be used against me in my own new trial?
>
> MR. LEE: He said what if they found out I lied before.

(R. 2197-2198).

In the initial brief Appellate Counsel argued that Miller stated that he lied and was told to do so by Brad King. This is an issue which obviously should have been and was raised by Appellate Counsel. The trial court found that the statement that Miller had lied about asking for a lawyer was not material and denied Mr. Happ's trial counsel permission to call Mr. Miller or Mr. Lee to impeach Mr. Miller's testimony. This Court's opinion found Issue IV without merit and not worthy of discussion.

However, Appellate counsel did not raise on appeal that the trial court failed to consider the statement by Mr. Lee that Mr. Miller told him that he "was told the answers to the questions," or that the real reason why Mr. Miller did not want to testify was because his testimony could be used against him, rather than the alleged medical situation. These statements were material and relevant to impeach the preamble testimony and his former testimony which were both read into evidence. This was extremely important since Mr. King argued to

the jury that the only way Mr. Miller could have known about the victim defecating at time of death was if the killer told him (R. 2363-2364). Yet Mr. Miller has indicated, through Mr. Lee, that he was given the answers to the questions.

Not only was Appellate Counsel deficient for failing to alert this Court in his motion for rehearing that the facts upon which this Court relied were inaccurate, but Mr. Happ was also substantially prejudiced by failing to appeal the trial court's error of denying trial counsel the opportunity to have Mr. Lee testify to impeach Mr. Miller's preamble testimony, as well as his former testimony. Such failure substantially prejudiced Mr. Happ, because this Court summarily dismissed the issue of the trial court's denial of Mr. Lee being permitted to testify, without having the benefit of considering whether Mr. Miller's testimony could have been challenged by his own statements. This failure by Appellate Counsel left Mr. Miller's testimony unchallenged on the record; therefore, leaving this Court no other alternative but to provide credence to Mr. Miller's testimony. This was evidenced by this Court's statement as to why Mr. Miller did not testify:

> Counsel for both the State and Happ had an opportunity to examine the witness prior to the second trial. This examination revealed that the witness was mentally and physically unable to testify, having been stabbed and gang-raped and suffering a nervous breakdown while in prison. The witness was at the time scheduled to start physical therapy and psychological counseling.

Happ, 596 at 996.

Had Appellate Counsel sufficiently argued the trial court's error of denying Mr. Lee the ability to testify to impeach Mr. Miller's preamble and former testimony, as well as pointing out to this Court that the facts upon which they relied were inaccurate, this Court would have had a substantially different picture as to the lack of a fair trial.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE FUNDAMENTAL ERROR OF THE TRIAL COURT PERMITTING THE PRIOR TESTIMONY OF RICHARD MILLER TO BE READ INTO EVIDENCE AND FINDING RICHARD MILLER WAS UNAVAILABLE TO TESTIFY IN SPITE OF THE FACT THAT RICHARD MILLER WAS PHYSICALLY AVAILABLE, IN VIOLATION OF MR. HAPP'S CONSTITUTIONAL RIGHT OF CONFRONTATION AND IN VIOLATION OF FLORIDA RULES OF CRIMINAL PROCEDURE.

On appeal, Appellate Counsel argued in Issue VI of Appellant's Initial Brief at pages 65-69, that the trial court had erred by allowing into evidence the preamble of Mr. Miller's testimony explaining why he was unavailable. This Court acknowledged that: "The issue relates to the appropriateness of the preamble explaining why the witness was unavailable, **not the unavailability of the witness**." Happ v. State, 596 So.2d 991, 995 (Fla. 1992)[emphasis added].

Appellate Counsel was ineffective for failing to raise the issue that Mr. Miller was present to testify and that the court erred by finding Mr. Miller unavailable. Such a finding by the trial court

amounted to fundamental error in violation of Constitutional Confrontational rights, as well as in violation of Florida Rules of Criminal Procedure.

A. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS TO CONSTITUTIONAL ISSUE.

As previously noted above, the Sixth Amendment's Confrontation Clause was made applicable to the States through the Fourteenth Amendment. Pointer, 380 U.S. 400 (1965).

In State v. Delva, 575 So.2d 643 (Fla. 1991), this Court expressed what constitutes fundamental error:

> To justify not imposing the contemporaneous objection rule, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481 (Fla. 1960). In other words, **"fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict."** Steward v. State, 420 So.2d 862, 863 (Fla. 1982), cert denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983).

Id. at 644 [emphasis added].

The trial in the instant case began on July 24, 1989 (R. 1036, 1406-2497). On July 25, 1989, Mr. King informed the court that Mr. Miller would not testify (R. 1708-1711). A discussion ensued between the attorneys and the court, which indicates that Mr. Pfister (defense counsel) in fact did object to the admission of Mr. Miller's former testimony:

> MR. KING: ...It's basically two prongs: First, I want you to rule that I can read his

> testimony and also rule that I can - if Mr. Pfister needs to depose Mr. Kicklighter, he's here - put Mr. Kicklighter on simply to testify on why Mr. Miller isn't here, and then read his testimony to the jury.
>
> MR. PFISTER: Your Honor, I'll attack or I'll address the second prong first concerning the testimony of Mr. Kicklighter.
>
> If the testimony of Richard Miller is being read into the Record, I don't think we need investigator Kicklighter. We're reading into the Record now the testimony of Barbara Messer who we can't find up in Tennessee - Kentucky and also the testimony of one of the State's witnesses who has mental health problems or neurological problems, Mr. Jones suffered. I don't think we're going into why those people can't show; they're just not here. I don't see the necessity of explaining why he's not here.
>
> I concede, Your Honor, that 90.804, sub 1, sub b, allows the Court to make a ruling along those lines.
>
> And the State did provide a recent case, Supreme Court case, of Stano versus State for my perusal, Your Honor. However, I think the Court should have a personal, you know, evaluation or contact with Mr. Miller to determine what his real position is even if the Court is going to rule in favor of using the old trial testimony. Your Honor, I don't think Mr. Kicklighter should be able to testify concerning why it's necessary when there's no necessity to testify as to Ms. Messer or Mr. Jones.

(R. 1711-12).

It appears obvious that Mr. Pfister was not willing to have Mr. Miller's testimony read into the record, but acknowledges that the Court could make that ruling based upon 90.804 and Stano v. State, 473 So.2d 1282 (Fla. 1985). If Mr. Pfister wasn't objecting to the admission of Mr. Miller's testimony, why would he have stated: "...if

the Court is going to rule in favor of using the old trial testimony?" Admittedly, Mr. Pfister was not as clear as he could be in making his objection, however, there was no doubt that he did object.

The issue of the right of confrontation was throughly discussed by this Court in Conner v. State, 748 So.2d 950 (Fla. 2000). The cases cited by this Court in support were decided prior to the case at bar: Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)(Affording defendants a right to confront their accusers thus acts as a safeguard of the reliability of criminal proceedings.); California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)(Through confrontation and cross-examination, defendants have the means of testing the accuracy of witnesses' testimony). In Ohio v. Roberts, 448 U.S. 56, 64, 100 S.Ct. 2531, 65 L.Ed2d 597 (1980)(quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038):

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the "accuracy of the truth-determining process." It is indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Of course, the right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-

> finding process," and requires that the competing interest be closely examined.

(emphasis supplied) (citations omitted).

Undersigned counsel acknowledges that there are few, if any, rules that are absolute. This Court has permitted uncooperating witnesses, such as in Stano, to be declared unavailable and have their prior testimony read into the record. However, in Conner, this Court recognized the right of confrontation serves a threefold purpose because it:

> (1) insures that the witness will give his statements under oath-thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 955. As pointed out previously, Van Arsdale also listed the concerns a court must consider regarding harmless error in denial of confrontation:

> These factors include the importance of the witness' testimony in the prosecutions' case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684.

When reviewing the factors to be considered by a trial court listed in Conner and Van Arsdale, there is a substantial difference between the facts in Stano, as compared to the facts in the instant case. In Stano it is clear that the parents of the victim were technically not accusers of Mr. Stano. Their testimony was not substantive regarding the crime, because one of the arguments by counsel was the *corpus delicti* of the case. Neither parent testified to any matter of substance regarding the offense.[11] The state's case obviously did not rest upon the testimony of the parents.

In the instant case, Mr. Miller was the most crucial of witnesses for the State. He was the **only** witness of the State that presented testimony of a direct connection between the offense and the Petitioner -- the alleged confession. In the case at bar the jury was unable to see Mr. Miller testify, thereby denying the jury and the Petitioner from having the jury make the most important decision of the case: **Is Mr. Miller telling the truth?** If the jury were to determine that Mr. Miller was not telling the truth, Mr. Happ most certainly would have been acquitted.

The trial court should have considered all of the factors listed in Van Arsdale, Craig, Green, and Roberts before declaring Mr. Miller unavailable. Although Mr. Miller was cross-examined in the first trial, the present jury did not have the opportunity to see Mr.

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[11]See Case No. 83-590-CF-A, Eighteenth Judicial Circuit, testimony of Edith Scharf and John Scharf.

Miller testify. Although Mr. Miller stated that he could not testify (R. 1717-1720), he was never tested by the court to determine if he would maintain that position. Mr. Miller was given the easy way out by testifying in person that he couldn't testify because "I'm not mentally or physically able to so," (R. 1717) without first being ordered to do so by the court. It is inconceivable that a person who physically takes the stand to testify why he can't (or won't) testify can be declared unavailable to testify. Mr. Miller proved his own physical and mental ability to testify, by physically appearing and testifying that he couldn't testify.

But even assuming at that point in the trial, the trial court did not commit fundamental constitutional error, the same could not be said once the court was informed that Mr. Miller was now talking to Mr. Lee. It is important to note that Mr. Miller testified to his ailments on July 25, 1989, as follows:

> EXAMINATION OF MR. MILLER BY MR. KING
>
> MR. KING: When they came to get you and bring you back to Florida, what part of the prison were you in?
>
> MR. MILLER: I was in the medical ward.
>
> MR. KING: While you were there, were you undergoing physical therapy as a result of the attack on you?
>
> MR. MILLER: I was to start physical therapy on Saturday.
>
> MR. KING: And you were also to receive some counseling as well; is that correct?

MR. MILLER: Psychological counseling.

MR. KING: As a result of you being removed from that penitentiary, you haven't had any medical attention or counseling attention since then.

MR. MILLER: That's true. I've been in pain ever since I've been here. They just came and got me, and that was it.

(R. 1718).

This examination took place on July 25, 1989. Yet, one day before Mr. Miller testified that he was too physically and mentally unable to testify, Mr. Miller spoke to Mr. Lee and told him that he didn't want to testify because he had previously lied and was concerned for his case.

EXAMINATION OF MR. LEE BY MR. PPISTER

MR. PFISTER: Could you tell me what Richard Miller told you?

MR. LEE: Mr. Miller was worried about whether or not having to testify would bother an appeal if in fact he did one. He'd already testified once. If he did get a new trial due to ineffective assistance or any other way, that basically his previous testimony could be used against him, and he probably had no right of - Fifth Amendment right not to testify.

He brought up the fact that he felt coerced in his plea based on promises made by the office of the State Attorney concerning where he would be housed. I think he wanted to go to Oklahoma and went to Kansas instead, some irrational fear that he was sent there to be killed, be cut or something. He showed me scars.

And then he went on and he had some of the statutes regarding new trial, and I advised him that didn't apply, only applied to the defendant whether or not, you know, - testimony for new trial didn't apply to him, his

statement wouldn't be used against him. He said, "What if they knew I'd been told to lie or told the answers to the questions?" And I asked him what he meant. He indicated that he had been told - he asked, "what if they asked if I asked for an attorney and I said I was told to say just no?" I asked him who told him that. He indicated it was Brad King.

I didn't go any further into the subject. I said it's something that I didn't think would help him but if he wanted to speak to you, I'd let you know he wanted to speak to you to get in touch with you, contact you directly, when he was transferred to Lake County to testify.

(R. 2196-2197).

****

CROSS-EXAMINATION OF LEE BY MR. KING

MR. KING: Hugh, when you were talking to Richard Miller, was it your impression that he was concerned that in his testimony in this trial that he'd been asked about his own cases and that that testimony may be used against him?

MR. LEE: He was concerned that his testimony would be used against him, testimony at this trial.

I advised him testimony of the last trial would be there, and I said unless it changes. He said well, I was - and that's when the statement came up what was true or wasn't true.

MR. KING: What he was talking to you about was trying to get himself a new trial.

MR. LEE: Basically.

MR. KING: He thought you could get him an appeal and get a new trial.

MR. LEE: Yes.

> MR. KING: If he did that, he was concerned that the statements he made in this trial could be used against him in his own trial.
>
> MR. LEE: That was his concern, yes.
>
> MR. KING: Based on that, he said, well, what if I lied in this trial, would they throw out that testimony so it couldn't be used against me in my own new trial?
>
> MR. LEE: He said what if they found out I lied before.

(R. 2197-2198).

Once the trial court heard Mr. Lee's testimony, Appellate Counsel should have argued that the trial court certainly should have changed his position as to Mr. Miller's alleged reason for not testifying and should have then declared that Mr. Miller was in fact available and allowed the defense to call Mr. Miller, as well as Mr. Lee. Appellate Counsel should also have argued in the alternative that the trial court committed fundamental error for denying defense counsel the ability to call Mr. Lee to impeach Mr. Miller's preamble testimony regarding his reason for not testifying, as well as impeaching Mr. Miller's former testimony.

The trial court committed fundamental error on three separate occasions: (1) when the trial court first declared Mr. Miller's former testimony admissible, (2) when the trial court failed to subsequently declare Mr. Miller available, and (3) disallowing the defense from calling Mr. Lee to testify. Appellate Counsel was ineffective for failing to raise these issues on appeal.

B. INEFFECTIVE ASSISTANCE OF COUNSEL - RULES OF CRIMINAL PROCEDURE.

During the trial, Mr. King argued to the court that Mr. Miller's former testimony should be read to the jury because Mr. Miller should be declared unavailable. Mr. King cited Stano v. State, 473 So.2d at 1986, as support of this argument.

In Stano, this Court found that the trial court did not err by finding the parents of the victim unavailable for purposes of reading their prior testimony because, although they were in the courtroom, they refused to testify. Id. at 1286. This ruling was based upon Subsection 90.804(1) (b), Florida Statutes (1983).

In the instant case, this Court stated in its opinion of affirmance, the following:

> In his sixth claim, Happ asserts that the jailhouse informant's testimony regarding his unavailability to testify at trial should not have been presented to the jury. The issue relates to the appropriateness of the preamble explaining why the witness was unavailable, not the unavailability of the witness. Counsel for both the State and Happ had an opportunity to examine the witness prior to the second trial. This examination revealed that the witness was mentally and physically unable to testify, having been stabbed and gang-raped and suffering a nervous breakdown while in prison. The witness was at the time scheduled to start physical therapy and psychological counseling. The trial court found that the witness was unavailable to testify and ruled that his testimony at the first trial could be read to the jury, including Miller's explanation of why he could not be present to testify. Given this record, we find that the trial court did not abuse its discretion allowing this evidence to be

> presented in this manner under these circumstance.

Happ, 596 at 905.

In Stano this Court specifically referred to the rules of evidence. Subsection 90.804 (l) (b), Florida Statutes (1983) regarding unavailability for admission of former testimony. That section reads as follows:

> **90.804. Hearsay exceptions; declarant unavailable**
> **(1) Definition of unavailability. -**
> "Unavailability as a witness" means that the declarant:
>
> (b) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

Further, this Court in Happ spoke of the "unavailability" of the witness, albeit, acknowledging that the status of Miller's unavailability was not raised as an issue in the appeal. This is precisely the basis for this habeas on ineffective assistance of Appellate Counsel.

However, Section 90.804, of the evidence code was not the proper law for application in the instant case nor was it the proper law in the Stano case. Florida Rules of Evidence are general statutory law. Florida Rules of Criminal Procedure, in criminal cases, are the specific codified rules that overrule the evidence code when there would be an incongruent result between the two. The controlling rule as to admission of former testimony is Fla.R.Crim.P. 3.604(b), which reads as follows:

> **Rule 3.640. Effect of Granting New Trial**
> **(b) Witnesses and Former Testimony at New Trial.** The testimony given during the former trial may not be read in evidence at the new trial unless it is that of a witness who at the time of the new trial is absent from the state, mentally incompetent to be a witness, physically unable to appear and testify, or dead, in which event the evidence of such witness on the former trial may be read in evidence at the new trial as the same was taken and transcribed by the court reporter. Before the introduction of the evidence of an absent witness, the party introducing the evidence must show due diligence in attempting to procure the attendance of witnesses at the trial and must show that the witness is not absent by consent or connivance of that party.

Rules of evidence are general statutes covering a general class of cases, such as: criminal, civil, family, probate, etc. while criminal rules of procedure pertain to a specific class of cases: criminal. In Shells v. Jack, 560 So.2d 361 (Fla. 2nd DCA 1990), the court held:

> We need not rely, however, only on a strict versus liberal construction argument in order to agree with the trial judge that the specific professional malpractice two-year limitation of section 95.11(4)(a) applies and that the more general products liability limitation of section 95.11(3) does not apply. The rules of construction governing the interpretation of general statutory provisions are equally applicable to statutes of limitations. Therefore, the second applicable rule of statutory construction is that where a general law that applies to numerous classes of cases conflicts with the law that applies only to a particular class, the latter, or more specific law, generally controls even when, in regard to statutes of limitations, the general provision provides for a longer period than the more specific

> provision. This court has repeatedly followed the general rule that a more specific statute covering a particular subject controls over another statute covering the same subject in more general terms.

The undersigned could find but one case that considered both Florida Rules of Evidence 90.804 and Fla.R.Crim.P. 3.640 simultaneously, State v. Hill, 504 So.2d 407 (Fla. 2nd DCA 1987). However, the circumstances in that case did not cause the rule of evidence to be in conflict with the rule of procedure. The witness was nowhere to be found; therefore, the two statutes were not incongruent. However, in the case at bar the circumstance did cause the two statutes to be in conflict. Mr. Miller was not mentally incompetent, dead, absent from the state, nor physically unable to appear. None of the circumstances under Fla.R.Crim.P. 3.640(b) existed which would have allowed the court to admit the prior testimony at Mr. Happ's new trial. Being that Fla.R.Crim.P. 3.640(b) applied because it was more specific to the circumstances of the case, the trial court should not have applied Rule 90.804. Appellate Counsel was ineffective for failing to raise the issue of conflict between the two statutes amounting to error by the court for admitting Mr. Miller's former testimony.

But even if Rule 90.804 did apply, Appellate Counsel was ineffective for failing to raise the issue that the trial court had failed to apply Rule 90.804 appropriately. Although Mr. Miller stated to Mr. King that he would not testify -- even if ordered to do

so -- the undersigned could find nowhere within the record where the court ordered Mr. Miller to testify as required by Rule 90.804 (1)(b):

> (b) persists in refusing to testify concerning the subject matter of the declarant's statement **despite an order of the court to do so;** [emphasis added].

Until Mr. Miller was actually in fact ordered to testify, it was only speculation that he would not testify if called to the stand. There is a major difference between someone saying they would not testify if ordered to do so and refusing to testify after being ordered to do so. Habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Happ respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ***PETITION FOR WRIT OF HABEAS CORPUS*** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on ***June 1, 2000***.

Michael P. Reiter
Florida Bar No. 0320234
Chief Assistant CCRC
OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619

(813) 740-3544

COUNSEL FOR PETITIONER

Copies furnished to:

Kenneth Nunnelly
Assistant Attorney General
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118