IN THE SUPREME COURT OF FLORIDA

NO. SC00-1198

WILLIAM FREDERICK HAPP,

Petitioner,

v.

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

Respondent.

PETITIONER'S REPLY TO

RESPONSE TO 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

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.

In it's response brief, Respondent states: "the very matters about which Happ complains in his habeas petition were before this Court in the initial brief on direct appeal." The Respondent was referring to the following statement made in Appellant's initial brief on direct appeal:

> 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. . . . He also revealed that Brad King, the prosecutor in Happ's trial, told Miller to lie . . . to answer negatively if he was questioned about asking for a lawyer . . .

(Page 4 of Respondent's response)[1]. Respondent misses the point. Although Mr. Happ's appellate counsel typed these particular facts in his initial brief, he did not argue in the brief that the trial court erred by denying Mr. Happ the ability to call Mr. Lee to impeach Mr. Miller as to why he refused to testify or that he was given the answers to the questions. In Point IV of Mr.

[1]This same quote was included in Petitioner's initial habeas brief at page 7.

Happ's initial brief on direct appeal at page 55-57, Appellate counsel clearly argued **only** "If Lee had testified, the jury would have heard Miller's admission that he lied under oath." [emphasis added]. Therefore, Respondent is inaccurate that Petitioner's argument is refuted by the initial brief.

Respondent also argues at page 5 of their Response to the Petition for Habeas Corpus that the record shows that the trial judge's ruling prior to Mr. Lee testifying only related to the attorney/client privilege. However, after Mr. Pfister indicated to the court what Mr. Lee would testify to, and before Mr. Lee testified, the trial court stated: "...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..." It is inconceivable that Respondent could interpret that statement to refer to the attorney/client privilege rather than to what Mr. Pfister had just told the court Mr. Lee would testify to. Although, the trial court reiterated his ruling after Mr. Lee testified, it only referred to the testimony regarding Mr. Miller having previously lied about asking for an attorney. The trial court made no reference to the other aspects of Mr. Lee's testimony.

> THE COURT: The Court's specific ruling is that whatever was said to Mr. Lee with regard to having lied, perhaps Miller having lied previously as to whether or not he requested an attorney before he spoke to the State Attorney and whether or not the State

> Attorney told him to lie about that is not sufficiently relevant or material to be of any probative value for the jury, and I'm going to disallow his testimony. But the Record is preserved.

(R. 2199). Whether the trial court ruled before he heard Mr. Lee's testimony or after is not the primary point raised in the original habeas[2]; rather, the trial court erred by failing to allow defense to call Mr. Lee.

Further, Respondent suggests at page 6 of its response, that Petitioner's claims are no more than a substitute for the claims raised by appellate counsel, which falls short of meeting the standard for ineffective assistance. This argument could be raised by Respondent in every claim of ineffective assistance of counsel. If Respondent's argument were accurate -- which it is not -- there could be no claim for relief when appellate counsel is ineffective.

Finally, Respondent states at pages 6 and 7 of its response that the circumstantial evidence against Happ was substantial and any error was harmless. This argument belies Bradley King's own statement. A hearing was held February 7, 1989, on a motion to dismiss. Mr. King testified to the following:

---

[2]The fact of the trial court's ruling prior to hearing Mr. Lee's testimony was shown merely to establish the trial court's state of mind.

EXAMINATION OF MR. KING BY MR. PFISTER

Q. Did you believe you had to put on at least a jailhouse informant in order to get past a judgment of acquittal?

A. I didn't believe that I had to. **I know it would have been a much closer question if I didn't.**

Q. Didn't you argue that to the Judge on your defense to my motion for acquittal?

A. I argued to the judge that, since I had in fact put him on and the standard for judgment of acquittal is he had to take everything in the light most favorable to the State, **he had to believe Richard Miller**, and we never get to the issue of whether there is a circumstantially-founded case to go to the jury. That's what I argued to Judge Thurman.

(PR.808-809)[emphasis added].

Even Bradley King acknowledged that a judgment of acquittal was a close call without Mr. Miller's testimony, never mind beyond a reasonable doubt. The only reasonable conclusion raised by the circumstantial evidence listed by Respondent -- without Mr. Miller's testimony -- is that Mr. Happ touched the victim's car. There was **absolutely no** evidence directly associating Mr. Happ with the murder. However, there was evidence tending to show that someone else may have committed the offense: hairs found on body (not Mr. Happ's); hairs found in victim's car (not Mr. Happ's); fingerprints in the victim's car (not Mr. Happ's).

Respondent continually cites to Freeman v. State, 25 Fla. L. Weekly S451 (Fla. June 8,2000), for legal propositions in a

vacuum. The facts in the Freeman case are substantially distinguishable from the case at bar. In Freeman this Court found that the issues raised in the defendant's habeas were either procedurally barred because they were raised in a 3.850 motion, without merit, or were not raised on direct appeal and did not amount to severe error. In the instant case, appellate counsel did raise as an issue that the trial court erred for disallowing Mr. Lee's testimony; however, appellate counsel failed to argue the entire factual basis for the error. This failure was a severe error. The testimony of Mr. Lee, proffered by defense counsel, was sufficient to preserve the issue on appeal. That testimony was crucial to impeach Mr. Miller. By denying Mr. Lee the ability to testify, the trial court committed a fundamental error of confrontation.

In Courtney v. State, 476 So.2d 301 (Fla. 1st DCA 1985), the court found the trial court erred by excluding the proffered testimony of a crucial witness where the only other evidence against the defendant was circumstantial.

> Defense counsel asked to proffer the objected-to testimony of the three impeachment witnesses, Brown, Adams, and Boyd. The trial judge allowed counsel to make the proffer to the court reporter, but the judge excused himself. The proffer of Adams' testimony was that Richards told him on the 15th that he saw nothing.
>
> We conclude that the trial court committed reversible error in excluding the testimony of Adams. In his cross-examination of

> Richards, the defense counsel specified the time, place, persons present and the words said in the prior inconsistent statement. An adequate predicate was laid and the trial court should have overruled the objection. Rowe v State, 128 Fla. 394, 174 So.2d 820 (1937). We reject the State's harmless error argument since Richards provided the only eyewitness testimony against the defendant. The remainder of the prosecution evidence was circumstantial and the defense produced two exculpatory witnesses. Thus, Richards' credibility was crucial. Fogel v. Mirmelli, 413 So.2d 1204, 1207 (Fla. 3d DCA 1982).

Id. at 301-302.

In Lee v. State,729 So.2d 975 (Fla. 1st DCA 1999), the court found that denying the admissibility of proffered impeachment evidence violated the confrontation clause and that the proffer preserved the issue for appeal.

> McNeil's excluded testimony contradicting Kyles went to a central issue. The trial court's ruling that such testimony would be impeachment on a collateral issue was error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Thus, a determination must be made as to whether the error was "harmless."
>
> A defendant has a constitutional right to confront witnesses. U.S. Const. Amend. VI. Constitutional errors, with rare exception are subject to harmless error analysis. [citation omitted]. "The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or, alternatively, that there is no reasonable possibility that the error contributed to the conviction."

Id. at 978.

* * * *

> To meet its burden under DiGuilio, the State argues that the issue was not preserved for appeal, and that Kyles never testified that McNeil confessed the murder to him. Both arguments are without merit. Lee made a proffer of McNeil's testimony. In so doing, the preservation requirements of section 90.104(1)(b),(3), Florida Statutes (1997) are met. Additionally, a review of the transcript reveals Kyles did testify that McNeil told him he committed the murder. The State has failed to meet its burden of proof, and it cannot be said that, beyond a reasonable doubt, the erroneously excluded testimony did not affect the verdict. Thus, we find the trial court committed harmful error by preventing McNeil from impeaching Kyles, and this issue was properly preserved for appellate review.

Id. at 978-979.

As shown by the cases cited above, the rule of admissibility of impeachment evidence and proffer were as valid in 1989 as it is today. The exclusion of Mr. Lee's testimony amounted to substantial harmful error and appellate counsel was ineffective for failing to raise the factual matters to support the claim, for the following reasons:

(1) Mr. Miller's testimony was crucial for the state, as admitted by Bradley King;

(2) The testimony of Mr. Miller was provided by reading prior testimony, thereby preventing the jury from seeing and hearing Mr. Miller testify;

(3) The defense proffered Mr. Lee's testimony to impeach Mr. Miller;

(4) The jury was concerned about the credibility of Mr. Miller, as evidenced by their question: whether Mr. Miller could have read about the case in the newspaper or did he actually read about the case in the newspaper.

Appellate counsel's failure to protect Mr. Happ's constitutional right to confrontation severely affected the outcome of his case.

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.

In its response to Petitioner's claim of conflict of interest, Respondent speculate at page 11 that: "Moreover, most likely, the State's motion requesting payment to Dr. Krop in connection with the instant case was a ministerial duty required in order to facilitate the prompt payment of the defense's expert. It carries no implication that the services being paid for were rendered to the State."[3]

The Respondent has given no examples within this state where the State Attorney requests payment for a defense expert, especially since the certificate of service **excludes** defense

[3]The state's speculation is inaccurate, as Dr. Krop has since informed our office that he was in-fact hired by the state in this case.

counsel and asserts to the court that the expert services were necessa

Respondent ignores the language of the request by Bradley King for payment to Dr. Krop:

> 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.

(Appendix E of Petitioner's petition).

There is no indication in the request that Mr. King was making the request because defense counsel failed to do so or that the request was some type of ministerial function. To the contrary, Mr. King specifically states that the expert services of Dr. Krop were necessary, and the State Attorney signed it.

Respondent further argues, at page 10 of its response, that because Dr. Krop was not called to testify and there has been no showing that Dr. Krop ever discussed any confidential information with the state, no prejudice has been shown. What Respondent fails to acknowledge is that this conflict was apparently unknown to defense counsel and was only available through the appellate record. However, actual prejudice is not necessary to be shown at this point, only that potential prejudice existed.

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.)

The record is clear that the threat or potential threat that confidences may have been disclosed existed.

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.

At page 17 of its response to the above issue for rehearing, Respondent argues the following: “Moreover, none of the issues decided on direct appeal depended on a harmless error analysis of the evidence of guilt. Thus, although the evidence indicating that Happ had previously broken a car window with his fist was recounted in this Court’s statement of the facts, it was not critical to a resolution of any of the issues pending before this Court.”

To the extent that Respondent is accurate -- that none of the issues decided on direct appeal depended on a harmless error

analysis of the evidence of guilt –- it is only because Appellate Counsel failed to point out to this Court the error of the facts upon which it relied. Had this Court been informed of the incorrect facts, there is a reasonable probability that this Court's ruling would have been different.

Further, there was some question of "harmless error analysis" by Justice Barkett and Justice Kogan in their concurring/dissenting opinion.

> I would find that police were thereafter prohibited from initiating questioning of Happ as to any offense and thus his statement was inadmissible. **However, in light of the physical evidence at trial** as well as the nature of the statement itself, I would find its admission was harmless beyond a reasonable doubt.

Happ v. State, 596 So.2d 991 (Fla. 1992) [emphasis added].

It is only common sense that it is the accepted facts that drives the legal issues in any given case. If the facts are changed, it is very likely that the result of the legal issues would also change. Other than Mr. Miller's testimony, all of the facts in Mr. Happ's case were circumstantial. Therefore, if by correcting inaccurate facts the remaining evidence furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain a conviction. Davis v. State, 90 So.2d 629 (Fla. 1956); Egberongbe v. State, 2000 WL 718160 (Fla. 1st DCA 2000).

Without a specific statement by the court, there is obviously no way to determine how much emphasis the court has placed upon particular facts in determining the analysis of a given legal issue. However, in the instant case, there is some hint of the relevance placed on the facts by Justice Barkett's and Justice Kogan's statement: "in light of the physical evidence at trial." When reviewing the accurate facts at trial, only mere suspicion can be shown:

(1) Mr. Happ's fingerprints were found on the outside of the victim's car;

(2) A footprint consistent with Mr. Happ's shoe was found in the dirt outside the victim's car;

(3) Mr. Happ was seen walking in the direction of his home, which was in the approximate direction of where the victim's body was found, at least 3-1/2 hours before the victim could have even been in the area;

(4) Mr. Happ's former girlfriend testified that he stated to her that he broke a car window, up to two years before they met;

(5) Mr. Ambrosino testified that he saw Mr. Happ the next morning with a swollen and red hand the next morning[4];

[4]The Respondent correctly points out that Mr. Ambrosino did in fact testify that he had seen Mr. Happ's hand red and swollen. Petitioner was incorrect in the initial petition.

(6) The victim's car was found in fact on Monday, May 26, 1988[5], more than two days from the estimated time of death.

The facts shown at trial, without Mr. Miller's testimony, fail to determine that Mr. Happ's conduct of being near the vehicle was connected to the deceased. It is only within the context of testimony that Mr. Happ broke the victim's car window does a somewhat questionable circumstantial inference provide some connection.

Florida Rules of Appellate Procedure 9.330(a) -- Motion for Rehearing -- was created for the specific purpose of pointing out to the Court facts which they may have relied upon that were inaccurate. Because Appellate Counsel could not determine the relevance or weight that this Court placed upon the facts in determining the legal issues, Counsel was ineffective for failing to alert this Court through the Motion for Rehearing.

In it's response, Respondent misapprehends the reason Petitioner included the issue of preclusion of Mr. Lee's testimony impeaching Mr. Miller in this claim. Because this Court found the issue of preclusion of Mr. Lee's testimony to be without merit -- and no other explanation -- it could not be determined whether this Court's ruling was merely a legal conclusion or because this Court found that the evidence without Mr. Miller would have been sufficient to sustain the conviction

[5]This Court stated incorrectly in it's opinion that the car was found on May 25, 1988. See addendum A.

based upon the facts as the Court believed them to be. If the reasoning of the Court was the latter, than the Court may very well have reconsidered the issue of preclusion in light of the accurate facts had Appellate Counsel pointed them out to the Court.

CLAIM IV

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 their response to the Petitioner's initial habeas, Respondent basically argues that since 90.804 (1) (b) of the rules of evidence and Stano v. State, 473 So.2d 1282 (Fla. 1985) permitted the court to allow Mr. Miller's former testimony to be read to the jury, Appellate Counsel was not ineffective for failing to raise the issue of error.

Rules of law and its application are not absolute. It is the obligation of the court to apply the rules according to the specific facts in any given case. In Escobar v. State, 699 So.2d 988 (Fla. 1997), this Court stated:

> We agree, as an abstract rule of law, that evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as "being relevant to consciousness of guilt which may be inferred from such circumstances." [citation omitted]. However, in applying this principle to a particular case, there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest

> and the crime(s) for which the defendant is being tried in that specific case.
>
> * * * *
>
> This last statement in Borders that "[t]he interpretation to be gleaned from an act of flight should be made with a sensitivity to the fact of the particular case," 693 F.2d at 1325, is of particular import in the application of the rule of law.

Id. at 995-996.

The same sensitivity to particular facts for admissibility of flight should also be applied when declaring a vital witness unavailable inapposite of the Constitutional right to confrontation, especially when the witness is physically present. Just because there is a rule of law authorizing the court to declare a witness unavailable, it doesn't mean that the court shouldn't consider the consequences to the defendant in doing so.

The jury in this case had already been selected, and the trial was about to begin. Mr. Miller was being called as the state's next witness when the state informed the court that he didn't want to testify. Mr. Miller took the stand to inform the court that he didn't want to testify because he didn't feel well. [Respondent's Appendix C at 10-13]. Inasmuch as Mr. Miller was ready, willing, and able to testify about his illness, there would have been no inconvenience to Mr. Miller for the state to have begun asking questions regarding his knowledge of the case. If at that time Mr. Miller refused to testify, even after order

of the court, then and only then should the court have entertained the question of unavailability pursuant to 90.804 (1)(b). However, it is the contention of Petitioner, that 90.804(1)(b) did not apply. Florida Rules of Criminal Procedure 3.604(b) did apply, and Appellate Counsel should have argued that issue to this Court.

The right to confront ones accusers in fundamental. Any deviance from that right should be viewed with a magnifying glass. Given the enormity of the impact of Mr. Miller's statements, Mr. Happ was effectively denied the opportunity to defend himself.

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 ***REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS*** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on ***August 2, 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:

Judy Taylor Rush
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118