**IN THE SUPREME COURT OF FLORIDA**

**WILLIAM FREDRICK HAPP,**
**Petitioner,**

**v.** **CASE NO. SC00-1198**

**MICHAEL W. MOORE, Secretary,**
**Florida Department of Corrections,**
**Respondent.**
_____/

**ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT**
**IN AND FOR LAKE COUNTY, FLORIDA**

# RESPONSE TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**

**KENNETH S. NUNNELLEY**
**ASSISTANT ATTORNEY GENERAL**
**Fla. Bar #998818**
**444 Seabreeze Blvd. 5th FL**
**Daytona Beach, FL 32118**
**(904) 238-4990**
**Fax # (904) 226-0457**
**COUNSEL FOR APPELLEE**

## CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

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**RESPONSE TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS**

Comes now the Respondent, by and through counsel, and, in compliance with this Court's order of November 2, 2000, responds as follows to Happ's "Supplemental Petition for Writ of Habeas Corpus", which was filed on or about October 27, 2000.[1] For the reasons set out below, the claim contained in Happ's "Supplemental" petition is not a basis for relief.

**V. THE *"GROSSMAN"* CLAIM**

On pages 1-6 of the "Supplemental" habeas petition, Happ asserts that "appellate counsel was ineffective for failing to raise the issue that the trial court erred by failing to prepare the written [sentencing] order prior to oral pronouncement and to file same concurrently with oral pronouncement." This claim is not a basis for relief because it is not only procedurally barred, but also meritless because it has no basis in fact.

As Happ admits in his petition, no objection was made at trial to the sentencing procedure that the court followed.[2] The pertinent portion of the record is as follows:

THE COURT: Thank you. William Fredrick Happ, do you

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[1]Oral argument is scheduled in this case for December 1, 2000.

[2]Happ disingenuously attempts to argue that trial counsel was not asked if he had an objection to the sentencing procedures followed. Happ's argument is based upon a self-serving reading of the record, as set out above.

> have any legal cause that you may show why sentence should not now be pronounced, to Mr. Pfister or Mr. Happ?
>
> MR. HAPP: No, your Honor.
>
> MR. PFISTER [defense counsel]: No, your Honor.
>
> THE COURT: All right. **I intend to sentence at this time.** Do I hear **any** objection, Mr. King?
>
> MR. KING [State Attorney]: No, sir.
>
> THE COURT: Mr. Pfister?
>
> MR. PFISTER: No, your Honor.

(R1383). When that colloquy is considered in context, it is clear that defense counsel waived **any** objection to the sentencing procedure followed by the trial court. Happ's attempt to describe the court's question as being "whether [defense counsel] had an objection to the court sentencing Mr. Happ at that time, and not the procedures the court utilized"[3] is, at best, disingenuous, because an objection to the Court imposing sentence **at that time** would necessarily be an objection based upon the **procedure** being followed. No objection was raised, and no issue was preserved for review on direct appeal -- appellate counsel cannot be ineffective, as a matter of law, for "failing" to raise an unpreserved issue, and there is no basis for relief

[3]Moreover, trial counsel could have objected on any grounds he wished, regardless of how Happ now reads the transcript.

on this claim. *Parker v. Dugger,* 537 So.2d 969, 971 (Fla. 1989); *Suarez v. Dugger,* 527 So.2d 190, 193 (Fla. 1988).

To the extent that Happ claims that *Gibson v. State,* 661 So.2d 288 (Fla. 1995), and *Landry v. State*, 666 So.2d 121 (Fla. 1996), stand for the proposition that this Court will consider a *Grossman* issue in the absence of a contemporaneous objection by trial counsel, that assertion is the product of an over-reading of those decisions. Both cases were direct appeal decisions, rather than habeas proceedings alleging ineffective assistance on the part of appellate counsel. The fact that this Court reached the issue in *Gibson* (which came years after the appeal in Happ's case) does **not** establish that this Court would not have applied a procedural bar to consideration of this claim had the issue arisen in Happ's case. Likewise, while Chief Justice Wells did comment on the issue in his concurring opinion, *Landry* was not decided on the basis of a *Grossman* claim. Those cases do not stand for the proposition that the procedural rule[4] announced in *Grossman* is not subject to a procedural bar if a claim based on it is not timely raised.

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[4]In *Gibson,* this Court made it clear that *Grossman* set out a **procedural** rule. *Gibson v. State,* 661 So.2d at 293. No decision of this Court stands for the proposition that this procedural rule somehow escapes the application of the well-settled and regularly enforced procedural bar rules.

Appellate counsel cannot have been ineffective for failing to raise this unpreserved claim.

In addition to the foregoing procedural basis for the denial of relief, which is an adequate and independent basis upon which this Court should deny all relief, the claim contained in the "supplemental" petition is not a basis for relief because it has no basis in fact. Despite Happ's efforts to plead an error under *Grossman*, the most that he has done is identify minor differences between the orally pronounced sentence and the written findings required by *Grossman*. Those minor differences do **not** mean that the sentencing court failed to comply with the *Grossman* rule, which this Court has summarized as being: "[p]rior to, or contemporaneously with, orally pronouncing a death sentence, courts now are required to prepare a written order which must be filed concurrent with the pronouncement." *Stewart v. State*, 549 So.2d 171, 176 (Fla. 1989). The record in this case demonstrates that *Grossman* was fully complied with -- the written findings in support of the sentence of death are stamped "filed in open court" and dated July 31, 1989, which is the date of the oral pronouncement, and which is clearly a "concurrent filing" within the meaning of *Grossman*. (R1165).[5]

[5]In pertinent part, the oral pronouncement and the written sentencing findings are the same. It is apparent on the face of

Happ's claim simply has no legal basis.

In the supplemental petition, Happ asserts that the lack of an objection to the imposition of sentence "will be revisited in Petitioner's amended 3.850 motion before the trial court." *Petition*, at 6, n. 1. As this Court is aware, this Court remanded the case to the trial court to allow Happ to amend his Rule 3.850 motion to include specified assertions of ineffective assistance of counsel which were raised for the first time before this Court in the appeal from the denial of Rule 3.850 relief. This "revisited" claim appears, as well as it can be determined from the vague footnote in the supplemental petition, to be outside the scope of this Court's September 13, 2000, remand order. In any event, it well-demonstrates Happ's intent to litigate this case on a piecemeal basis by shuttling from this Court, to the trial court, and back. This Court should not tolerate such tactics, especially in light of the fact that Happ's first *Florida Rule of Criminal Procedure* 3.850 motion was filed on January 17, 1995, and amended on November 8, 1999 and August 29, 2000; was the subject of evidentiary hearings held February 20, 1997 and January 27, 1998; and was the subject of a final order issued on April 23, 1998. (R 928-45). The

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this record that the sentencing court had reflected on Happ's sentence before imposing it -- that is what *Grossman* is designed to require, and its purpose was fulfilled here.

course that this litigation has taken demonstrates the continued truth of the Fifth Circuit Court of Appeals' comment, some 17 years ago, that "[u]nderstandably, most convicted defendants sentenced to death covet delay, if nothing better can be had . . .." *Bass v. Estelle,* 696 F.2d 1154, 1159 (5th Cir. 1983).[6] Happ has had years of delay already, and it appears that the shuttle-litigation approach that is manifesting itself in this proceeding is calculated to further delay this litigation. No further amendments to pleadings that were filed, and determined, long ago should be allowed.

**CONCLUSION**

Happ is not entitled to any relief from this Court on any claim, sub-claim, or issue contained in his habeas petition as originally filed in June of 2000, and supplemented in November, 2000. All relief should be denied.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818

[6]On the same topic, the Eleventh Circuit Court of Appeals said, in a Florida case, "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright,* 714 F.2d 1495, 1506 (11th Cir. 1983).

444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Michael P. Reiter, Chief Assistant CCRC, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619, on this____ day of November, 2000.

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Of Counsel