IN THE SUPREME COURT OF FLORIDA

WILLIAM FREDERICK HAPP

Petitioner, **CASE NO. SC00-1198**

v.

MICHAEL W. MOORE, ETC.

Respondent,

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

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In his instant habeas petition, Happ complains that his experienced appellate attorney, Christopher Quarles, rendered him ineffective assistance of counsel. To prevail on such a claim, Happ must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Id.* In evaluating such a claim, this Court must determine:

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

(citations omitted) *Freeman v. State,* 25 Fla. L. Weekly S451, 455 (Fla. June 8, 2000).

In reviewing these claims, this Court should keep in mind that it has long recognized that "[o]ne of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal

and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527 . . . (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. *See Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167. *See Freeman*, 25 Fla. L. Weekly at S456.

Appellate counsel is not ineffective for failing to raise claims which were not properly preserved. *Freeman*, 25 Fla. L. Weekly at S456, S457; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). Moreover, the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Id.* Appellate counsel cannot be criticized for failing to raise weak issues. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither will appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless

error. *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990). Likewise, he is not ineffective where he "chose not to argue the issue as a matter of strategy." *Freeman*, 25 Fla. L. Weekly. at S455.

Appellate Counsel is not ineffective for failing to convince the court of the merit of the claims raised. *Freeman*, 25 Fla. L. Weekly. at S456. *See Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984)["[trial counsel] cannot be faulted simply because he did not succeed."]. Neither do collateral counsel's claims that had he been appellate counsel, he would have argued the issues somewhat differently meet the test for ineffective assistance of appellate counsel. *See Card v. Dugger*, 911 F.2d 1496, 1507 (11th Cir. 1990).

It is the defendant's burden to allege "a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman*, 25 Fla. L. Weekly at S455. "'[T]he deficiency must concern an issue which is error affecting the outcome, not simply harmless error.'" *Id.*

CLAIM I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INCLUDE FACTS "AMOUNTING TO SUBSTANTIAL IMPEACHMENT" OF A STATE WITNESS IN ARGUING THE ISSUE RAISED IN THE INITIAL BRIEF REGARDING THE

TESTIMONY OF THAT WITNESS.

Happ complains that his appellate counsel rendered him ineffective assistance by failing to include in the issue he raised on direct appeal information which he characterizes as "crucial facts" that amounted to "substantial impeachment" of State witness, Richard Miller. (Petition at 6-14). He acknowledges that his experienced appellate counsel, Christopher Quarles, raised the issue on direct appeal, arguing that the trial court improperly restricted evidence at trial regarding Mr. Miller's admission that he had lied at the earlier trial proceeding. (Petition at 6). He claims that Counsel Quarles failed "to bring before this Court the statement that Miller was given the answers to the questions," and "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." (emphasis in original) (Petition at 8). He also implies that appellate counsel did not advise this Court that Mr. Lee could have testified that Mr. Miller "didn't want to testify because he was concerned that his testimony would be used against him, and not because he was sick." (Petition at 10).

In the initial brief, at point IV, Counsel Quarles stated in pertinent part:

> 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 . . ..

(Appendix A at 1-2). Thus, the very matters about which Happ complains in his habeas petition were before this Court in the initial brief on direct appeal. (Appendix A at 1-3). Since his underlying premise - that these matters were not included on appeal - is soundly refuted by the initial brief, his claim is without merit, and he is entitled to no relief.

Moreover, in his direct appeal brief, Counsel Quarles articulated the context of the ruling by the trial court which collateral counsel characterizes as a ruling on the merits of the issue made **prior** to hearing the evidence relevant thereto. It is apparent from the initial brief, and the record on appeal, that the ruling the trial judge made prior to hearing Mr. Lee's testimony regarding what Mr. Miller allegedly told him was that the attorney/client privilege did not apply and/or had been waived. (Appendix A at 1). The judge did not rule on whether Mr. Lee could testify to what Mr. Miller allegedly told him in regard to the subject matters until after Mr. Lee testified. (Appendix B at 9). Neither was this component of the issue preserved for appeal. Trial counsel did not object to the

manner in which the trial court heard, and ruled on, the matter. In fact, he expressed his satisfaction with the procedure used, commenting that the proffer made outside the courtroom was sufficient. (Appendix B at 9). *Cf. Freeman*, 25 Fla. L. Weekly at S456 [no deficiency in failing to raise issue where defense counsel responded "yes" to judge's inquiry whether the instruction was "satisfactory."]. Since there was no complaint that the court prematurely ruled on whether Mr. Miller's alleged statements to Mr. Lee would be admitted, appellate counsel cannot be ineffective. *Freeman*, 25 Fla. L. Weekly at S456; *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). This is especially true where, as here, there is not even a contention that this component was fundamental error.

Moreover, Collateral Counsel's complaint that Appellate Counsel did not "point out to this Court those issues which best showed the trial court's errors," amounts to nothing more than a thinly veiled assertion that had he been appellate counsel, he would have argued the issues somewhat differently. Such falls far short of meeting the standard for ineffective assistance. *See Card v. Dugger*, 911 F.2d at 1507. It cannot be said that a reasonable appellate attorney would not have chosen to raise the issue in the manner raised by Counsel Quarles. Second guessing appellate counsel's choice of issues, or presentation of them,

does not meet the *Strickland* standard. *See Shere v. State*, 742 So. 2d 215, 219 n.9 (Fla. 1999). Neither is appellate counsel "ineffective for failing to convince the Court to rule in appellant's favor." *Freeman*, 25 Fla. L. Weekly at S456.

To the extent that the matters complained-of herein were raised on direct appeal as part of Point IV, same are procedurally barred because this claim has already been decided adversely to Happ. Moreover, since there is no merit to any of Happ's contentions, he cannot possibly show prejudice. Neither can he show deficient performance when Appellate Counsel actually did what Happ now complains was not done. Thus, he has utterly failed to carry his burden to meet either prong of the ineffective assistance of counsel standard.

Further, any deficiency in Counsel Quarles' performance in regard to the instant issue was harmless. Counsel cannot be deemed ineffective for failing to raise a claim which would be harmless error. *Freeman*, 25 Fla. L. Weekly at S455; *Duest*, 555 So. 2d at 853. The circumstantial evidence against Happ was substantial. It included that the window of the victim's car had been broken out, and "a friend of Happ's" saw him the following morning "with a swollen right hand." *Happ*, 596 So. 2d at 992. This friend had seen Happ headed toward the area from which the victim's body was recovered very late the evening

before her early morning murder. *Id.* Another witness, Happ's former girlfriend, testified that once "he told her he broke a car window with his fist." *Id.* Glass from the victim's car window was consistent with glass found at the scene of the abduction and at the place where the body was found. *Id.* Happ's shoe print was found outside the driver's side of the victim's car, and his fingerprints were "found on the exterior of the car."[1] *Id.* Mr. Miller testified that Happ confessed the victim's abduction, sexual battery, and murder to him. According to Appellate Counsel, Mr. Miller had "little credibility," (Appendix A, at 3), and therefore, the value of the subject information - which would have gone strictly to credibility - would have been marginal, at best. Moreover, since this Court found no merit to the issue as raised on direct appeal, there is no reason to believe that the slightly different slant put on the information by Collateral Counsel

[1]In addition, Happ's palm print was found on the back area of the car, and defense witness Barbara Messer testified that the man she saw entering the car at the Cumberland Farms Store where the victim was abducted placed his palms on the back of the vehicle. (Appendix E at 13, 14-15, 20-21). She also testified that she saw this same man "shuffling around" the car on the passenger side. (Appendix E at 13). Happ's middle finger print was found on the passenger's side of the victim's car. (Appendix F at 2, 6-7). Ms. Messer testified that Happ fit the description of the young man she saw at the victim's car "[e]xcept for the hair," which was shorter. (Appendix E at 20).

would have transformed the meritless issue into one which would compel a grant of relief to Happ. Thus, any error in Appellate Counsel's direct appeal presentation of the instant issue was harmless and did not approach the level of ineffective assistance.

Happ has utterly failed to carry his burden to allege, much less prove, a serious omission or deficient act by his Appellate Counsel in regard to the instant issue. As a result, he is entitled to no relief. *See Freeman*, 25 Fla. L. Weekly at S455.

CLAIM II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE AS FUNDAMENTAL ERROR A CLAIM OF CONFLICT OF INTEREST WHERE THE STATE AND THE DEFENSE ALLEGEDLY RETAINED THE SAME EXPERT.

Happ complains that Appellate Counsel Quarles rendered deficient performance "for either failing to discover this blatant conflict and raise the issue on appeal or just chose not to raise the issue on appeal." (Petition at 18-19). The "blatant conflict" is an alleged employment of Happ's confidential expert, Dr. Harry Krop, by the State in the instant case. (Petition at 18). Happ admits that Dr. Krop did not testify in his case, and does not articulate any prejudice which he suffered from the alleged conflict.

This claim is procedurally barred because Happ has not alleged that his trial counsel raised the issue of an alleged conflict of interest relating to Dr. Krop. Moreover, appellate counsel cannot be deemed ineffective for failing to raise unpreserved issues. *Parker v. Dugger*, 537 So. 2d 969, 971 (Fla. 1989)[failure to preserve issue at trial constitutes procedural bar in habeas petition]; *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988).

Thus, in order to prevail on this claim, Happ must show that the alleged conflict was of such a magnitude as to constitute

fundamental error. This, he cannot do.

In *Sanders v. State*, 707 So. 2d 664 (Fla. 1998), the State called the defense's confidential expert to testify on its behalf at trial. This occurred after the defense had provided the doctor "with numerous documents regarding Sanders and communicated information to Dr. Merin about Sanders' case." 707 So. 2d at 668-69. Thereafter, the State listed Dr. Merin as a witness, and defense counsel moved to strike him. *Id.* This Court held that it was reversible error to permit the mental state expert to testify for the State, and against the defendant, under these circumstances. *Id.*

Such circumstances are not present in Happ's case. Dr. Krop was listed as a potential witness for the State in this case,[2] and Happ's defense counsel made no motion to strike the doctor therefrom. Nonetheless, Dr. Krop was not called at trial, and there is nothing to indicate that the doctor ever discussed any

[2]It is noteworthy that Collateral Counsel claims that the State listed Dr. Krop as its witness on its Response to Discovery which he alleges was filed on March 10, 1988, but was not included in the record. (Petition at 17). Collateral Counsel attached several documents which **are** included in the record to his petition as appendices, yet failed to attach this document, which he seeks to use to support his instant claim, despite knowing that it was not included in the record before this Court.

confidential information regarding Happ with the State.[3] 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. It is Happ's burden to establish a fundamental error of such a magnitude that Appellate Counsel's performance is both deficient and prejudicial to him in order to merit relief in this habeas petition. Clearly, he has not carried his burden.

In *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994), this Court held that the State could not elicit details of the crime from the defendant's mental state expert in the absence of a defense waiver. However, where the mental health expert had testified on behalf of the State in this forbidden manner, this Court applied harmless error analysis.[4] 636 So. 2d at 1308. Applying

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[3] Collateral Counsel implies that the prosecutor must have talked to Dr. Krop about Happ's case because "he knew Dr. Krop had evaluated Mr. Happ." (Petition at 17). However, in the first paragraph of this claim, Collateral Counsel tells this Court that the order appointing Dr. Krop as Happ's confidential expert "was certified to the State Attorney." (Petition at 15). Clearly, the prosecutor had every legitimate reason to know that Dr. Krop had evaluated Happ since, as Happ admits, he knew that the doctor had been appointed for that purpose.

[4] This Court found the error harmless at to guilt, but could not say that it was harmless beyond a reasonable doubt in terms

that analysis to Happ's case results in the inevitable conclusion that any error in regard to the employment of Dr. Krop was harmless, since he did not testify and there has been no indication, or even an allegation, of divulgence of confidential information which benefited the State and/or worked a detriment to Happ.[5]

Having utterly failed to carry his burden to establish ineffective assistance of appellate counsel on this claim, Happ is entitled to no relief.

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of the penalty. 636 So. 2d at 1308.

[5]The most alleged is that the State knew Dr. Krop had evaluated him. *See* Petition at 17; note, *supra*, at 10 n.3.

CLAIM III

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO POINT OUT IN THE MOTION FOR REHEARING THAT THIS COURT RELIED UPON ALLEGEDLY INACCURATE FACTS.

Happ complains that Appellate Counsel Quarles rendered deficient performance for failing to point out "inaccurate" facts taken "out of context" by this Court on direct appeal. (Petition at 23). Collateral Counsel identifies four statements which he claims fall into this category. (Petition at 23, 25, 27, 28).

First, Happ complains that this Court inaccurately stated the facts below in saying that "a shoe print . . . found outside the driver's side of the car was later found to match one of Happ's shoes." (Petition at 23). He says that this "is only accurate if the Court was referring to the same brand and class of shoe." (Petition at 23). He claims that the evidence established only "that the shoe obtained by Mr. Happ could not be excluded." (Petition at 24). He then posits 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." (Petition at 25). Thus, by implication, he contends that the evidence did not establish that Mr. Happ's shoeprint was found outside the driver's door of the victim's car at the place where it was found abandoned subsequent to the murder.

The record on direct appeal is clear that Happ did not contest that the shoeprint at issue was his. In his closing argument, defense counsel conceded that the State had proved that "[a] footprint by the driver's door . . . shows that Mr. Happ was at the car at Jones' Restaurant at some time before law enforcement found it . . .." (Appendix D at 4). Later, counsel reiterated: "No, we are not here saying no, it's not his footprint. He could have been there at Jones' Restaurant . . .." (Appendix D at 16). Thus, to do as Collateral Counsel claims that Appellate Counsel should have done and told this Court, on rehearing, that the statement that the shoeprint found outside the car matched Happ's shoeprint was false, Counsel Quarles would have had to take a position contrary to that taken by trial counsel. Moreover, the expert's testimony at trial well supports the factual recitation made by this Court in its opinion. Mr. Hamm testified that Happ's shoes could have made it the shoeprint found by the car. (Appendix E at 1-2). Thus, the contention Happ claims counsel Quarles should have made would have been inappropriate.

The second statement which Collateral Counsel quarrels with is that "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...." (Petition at 25). According to Happ "the

actual testimony of Mr. Ambrosino (Mr. Happ's friend) is substantially different . . .." (Petition at 25). However, the discrepancy he alleges is that at the time Happ was actually on "Holiday Drive and 44; not walking down Highway 19." (Petition at 27). Happ admits that the testimony of this friend placed him walking toward the place where the victim was murdered. (Petition at 27).

Even if true, Happ has shown no prejudice from the alleged misidentification of the street on which he was traveling, and he cannot do so. The critical factor is that Happ was last seen walking toward the barge canal where he subsequently raped and brutally murdered Ms. Crowley. There being absolutely no prejudice flowing from the alleged mis-statement of fact, Appellate Counsel had no reason to raise the matter on rehearing, and same can not be a basis for a finding of ineffective assistance of counsel.

The third statement of which Collateral Counsel complains is that this Court stated "that he [Mr. Ambrosino] saw Happ the next morning around 9:am (sic). Happ's right hand was swollen...." (Petition at 27). Happ complains that it was not established "'whether he actually saw a swollen hand or just assumed it because: "He told me he hit a tree.'" (Petition at 27-28). Collateral Counsel blatantly misrepresents the record;

it states in pertinent part:

> [Mr. King]: When you saw him [Happ] there that morning, did you notice any injuries to either one of his hands?
>
> [Mr. Ambrosino]: I believe his right hand was swollen. He told me he hit a tree. . . ..
>
> . . .
>
> [Mr. King]: And **did you actually see his hand** red and **swollen**?
>
> [Mr. Ambrosino]: **Yes**, he showed it to me.

(emphasis added) (Appendix E at 3-4). Appellate Counsel can hardly be ineffective for failing to lie to this Court on rehearing.

Collateral Counsel's fourth complained-of statement made by this Court is that: "'Happ's former girlfriend testified that Happ told her he broke a car window with his fist.'" (Petition at 28). Happ claims that "the context implies that Mr. Happ told his former girlfriend that he broke the victim's (Ms. Crawley (sic)) car window." (Petition at 28). Thus, Happ contends that "[t]his statement totally misstates Jean Pinko's . . . testimony," as "[t]here is absolutely no doubt that the broken car window . . . was not the victim's car, but a car in Pennsylvania up to two years before . . .." (Petition at 28, 29).

Happ is correct; the record does indeed make it clear that

the broken window Ms. Pinko mentioned was not the instant victim's car. The State did not even so much as imply to the contrary. At trial, on direct examination, Ms. Pinko was asked about a conversation she had with Happ when they lived in Pennsylvania in which he explained a cut on his hand by telling her he had broken a car window with his fist. (Appendix E at 5). The prosecutor goes on to ask about Happ's subsequent move to Florida and elicited testimony from Ms. Pinko that she broke off her then long-distance relationship with Happ about a week prior to the murder. (Appendix E at 5-7). On cross, it was again made clear that the incident Happ reported to Ms. Pinko was "way before '86." (Appendix E at 8).

Likewise, during the State's closing argument, the prosecutor made it clear that Ms. Pinko's car window breaking testimony did not refer to the instant victim's car window. He argued in pertinent part: Ms. "Pinko . . . testified and said William Happ has told me in the past he has broken car windows with his bare fist." (Appendix E at 24-25). Thus, it was clear in the trial court that Ms. Pinko was testifying about an incident which occurred prior to Ms. Crowley's murder.

Although the matter is less clear in the State's answer brief on direct appeal and in this Court's opinion, the State submits that it is sufficiently clear that the car window

breaking testimony did not refer to Ms. Crowley's car. Had this Court been under the misapprehension that the car window breaking incident Ms. Pinko testified to was the instant victim's car, this Court would not have described it as evidence that Happ had broken "a" car window, but would have said that the evidence established that he broke "the victim's" car window. *See Happ*, 596 So. 2d at 992.

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 legal issues pending before this Court. Clearly, that evidence, admitted below as similar fact evidence, was relevant to the issues before the jury and the trial judge.[6] Thus, Appellate Counsel did not render deficient performance in failing to point out on rehearing that this Court could have written its statement of the facts to more clearly indicate that

[6] The State sought and secured an order permitting Ms. Pinko to testify pursuant to Florida Statutes 90.404(2). (Appendix E at 26-31). Judge Thurman ruled that "although she could talk about him breaking a window with his fist, she was not to mention that it was during the course of a burglary to an automobile." (Appendix E at 32). The prosecutor was permitted to lead the witness to prevent a comment in violation of the trial court's ruling. (Appendix E at 33).

Ms. Pinko was referring to Happ's having broken a car window with his fist prior to his commission of the instant crimes. Neither has, or can, he show any prejudice. Having failed to establish either required element of an ineffective assistance of appellate counsel claim, much less both, Happ is entitled to no relief.

Finally, Collateral Counsel again raises the claim that Appellate Counsel should have complained 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 . . .." (Petition at 33). He says that this was "extremely important" because the State "argued to the jury that the only way Mr. Miller could have known about the victim defecating at time (sic) of death was if the killer told him . . .." (Petition at 33). In light of this argument, he says, Happ should have been permitted to ask Mr. Lee about Miller's claim "that he was given the answers to the questions." (Petition at 33).

There are several problems with this claim, the most obvious being that the testimony Mr. Lee appears to have been able to give is that Mr. Miller claimed that the State told him how to

respond when asked if he requested an attorney before giving his statement. (Appendix B 6-7). Certainly, Happ did not proffer any testimony from Mr. Lee to the effect that Mr. Miller told him that he was told that the victim had defecated while Happ was strangling her to death with her stretch pants, much less that he was told to include that information in his testimony at trial. Neither did trial counsel preserve this alleged issue below, since there was no objection to the State's reference during closing to this testimony. (Appendix E at 34). Happ has not alleged, and certainly has not established, that such was fundamental error. Appellate Counsel cannot be ineffective for failing to raise an issue which is unpreserved. *Freeman,* 25 Fla. L. Weekly at S457; *Suarez*, 527 So. 2d at 193.

CLAIM IV

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR REGARDING THE TRIAL COURT'S FINDING THAT WITNESS MILLER WAS UNAVAILABLE OR IN PERMITTING THE READING OF MR. MILLER'S PRIOR TESTIMONY INTO EVIDENCE AT HAPP'S SECOND TRIAL.

Happ complains that Appellate Counsel Quarles should have raised, as fundamental error, that the trial court erred in declaring State Witness Miller unavailable to testify at the second trial and in permitting Mr. Miller's testimony from the prior trial to be read into evidence in the subsequent one.[7] (Petition at 35). He acknowledges that Counsel Quarles challenged the trial court's decision to explain to the jury why Mr. Miller would not testify in person on direct appeal, and

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[7] In his petition, Happ first claims that the issue of Mr. Miller's availability was preserved by an objection. (Petition at 36). However, the record he quotes does not support that position. Clearly, Trial Counsel Pfister did not object to the finding of unavailability or the reading of the prior testimony. In fact, he used the fact that he and the State had previously stipulated to reading the prior testimony of two other witnesses without telling the jury why it was being done to support his sole objection which was that an explanation be given as to why Mr. Miller's prior testimony was being read in lieu of live testimony. *See* Appendix C at 4-5. Perhaps recognizing that this claim of preservation is wholly without merit, Collateral Counsel proceeds to assert the issue in terms of fundamental error. Since there was no objection, or other preservation of the claim now made, Appellate Counsel cannot be deemed ineffective. *Freeman*, 25 Fla. L. Weekly at S456; *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990).

that this Court found no error. (Petition at 35). *See Happ*, 596 So. 2d at 996.

Collateral Counsel's disagreement with the issue as presented by Appellate Counsel does not constitute a basis for a finding of ineffectiveness. That he would have argued the issue of Mr. Miller's testimony, or lack thereof, somewhat differently falls far short of meeting the standard for ineffective assistance. *See Card v. Dugger*, 911 F.2d at 1507. It cannot be said that a reasonable appellate attorney would not have chosen to raise the only issue that was preserved by trial counsel, i.e., the appropriateness of the preamble, rather than advancing a claim that the discretionary ruling of witness unavailability was an error of fundamental magnitude. It is Appellate Counsel's job to winnow out the issues and raise those he feels have the greatest chance of success. *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). It cannot be said to be unreasonable to raise the preserved component of an issue and not risk diluting its strength with allegations of fundamental error in regard to a ruling discretionary to the trial court. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Second guessing Appellate Counsel's choice of issues, or presentation of them, does not meet the *Strickland* standard. *See Shere v. State*, 742 So. 2d 215, 219 n.9 (Fla. 1999). Neither is Counsel

Quarles ineffective for failing to convince this Court to rule in Happ's favor. *See Freeman*, 25 Fla. L. Weekly at S456.

Moreover, since there is no merit to Happ's claims, he cannot demonstrate prejudice. Collateral Counsel "acknowledges that . . . [t]his Court has permitted uncooperating witnesses . . . to be declared unavailable and have their prior testimony read into the record." (Petition at 38). At the second trial, Mr. Miller told the court that he would not testify and that no order would compel him to do so. (Appendix C at 10-13). Thereafter, he refused to answer any questions about "what happened to you with the mental breakdown." (Appendix C at 13). Further, as this Court explained on direct appeal, "[t]his 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." *Happ*, 596 So. 2d at 996. Indeed, Mr. Miller had been scheduled to start both "physical therapy and psychological counseling" when taken from prison and transported to Happ's second trial. *Id.* Mr. Miller testified that he had received no medical or counseling attention since being taken from the prison and that he had "been in pain ever since I've been here." (Appendix C at 11). Indeed, it is apparent that Mr. Miller was having great difficulty relating these matters to the court. *See* Appendix C

at 11-13). Happ has presented nothing to show that the trial court abused his discretion in ruling that Mr. Miller was unavailable for trial.

In *Stano v. State*, 473 So. 2d 1282, 1286 (Fla. 1985), *cert. denied*, 474 U.S. 1093 (1986) witnesses from the first trial stated outside of court that "they would not testify again . . . regardless of fines or imprisonment." The State asked the court to find them unavailable for the second trial and permit their testimony from the first trial to be read. *Id.* Despite the physical presence of the witnesses in court, the court declared them unavailable, and this Court upheld that discretionary ruling against Stano's challenge, made on essentially the same basis as that in the instant case. This Court stated in pertinent part:

> At the hearing immediately prior to trial the parents adamantly refused to testify and persisted in that refusal even when told by the court that their continued refusal could subject them to fines or imprisonment. The requirements of subsection 90.804(1)(b) have been met here. We see no purpose that would have been served in this instant in, as Stano argues, calling these people at trial to have them reiterate their refusal to testify or in actually fining or imprisoning them. The state made an adequate showing of unavailability, and we find no abuse of discretion in the trial court's rulings. . . .

(citations omitted) 473 So. 2d at 1286.

In the instant case, at the hearing immediately prior to the

second trial, Mr. Miller adamantly refused to testify and persisted in that refusal even when told that his continued refusal could subject him to jail time. Mr. Miller responded that that meant nothing to him as he had "23 more years to go in prison." (Appendix C at 12). There would have been no purpose in calling Mr. Miller at trial to have him reiterate his refusal; neither would a fine, or an additional jail sentence, have compelled the testimony. As in *Stano*, the State made an adequate showing of unavailability, and Happ has failed to show an abuse of discretion in the trial court's rulings. Clearly, under *Stano*, he can not do so, and his instant claim is without merit.

Appellate Counsel is not ineffective for failing to raise meritless issues. *Freeman*, 15 Fla. L. Weekly at S456. Thus, Happ has utterly failed to carry his burden to meet either prong

of the ineffective assistance of counsel standard.[8]

[8] Happ also claims that Counsel Quarles was ineffective because he did not raise an alleged conflict in Fla. Stat. 90.804 and Florida Rule of Criminal Procedure 3.604(b). (Petition at 46-48). This issue was not preserved for review in the trial court as it was not presented there by objection, or in any other manner. Happ did not assert in his instant petition that the failure to raise this alleged conflict or to claim that the trial court applied Fla. Stat. §90.804 inappropriately was fundamental error, and therefore, he has not alleged, much less established, a basis on which he could be entitled to relief. Moreover, his claims of a conflict and of inappropriate application of 90.804 are without merit.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court deny the petition for writ of habeas corpus.

Respectfully submitted,

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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, CCRC - Middle, 3801 Corprex Park Dr., Suite 210, Tampa, FL 33619, on this _____ day of July, 2000.

Of Counsel