IN THE SUPREME COURT OF FLORIDA

WILLIAM FREDERICK HAPP,

Case No. SC03-1890

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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THE PROCEEDINGS ON REMAND

On September 13, 2000, this Court remanded this case to the Circuit Court for a hearing on four specified claims which were raised for the first time during oral argument on appeal from the denial of Happ's first rule 3.850 motion. One of those claims was the claim asserted at oral argument that "DNA testing" would establish Happ's innocence of the murder of Angela Crawley. The evidence from the evidentiary hearing does not support this assertion, and, in fact, establishes the opposite - - counsel discussed DNA testing with Happ prior to his trial, and Happ stated that such testing "wouldn't be a good idea." A principal basis for this Court's decision to remand this case was based upon an affirmative misrepresentation.

Following the remand order, Happ filed a second amended motion to vacate on November 8, 2000. (SR1598-1671). The State filed a response on December 12, 2000. (SR1672-1923). An evidentiary hearing was held before the Honorable Richard Howard, Circuit Court Judge for the Fifth Judicial Circuit of Florida, in and for Citrus County, on May 12-14, 2003. (SR167-774). An Order denying Happ's Second Amended Motion to Vacate was issued on September 18, 2003. (SR2769-2817). Happ filed a Notice of Appeal on October 13, 2003. (R1-4). An Amended Order

denying Happ's Second Amended Motion to Vacate was issued on November 5, 2003. (R35-46, and SR2818-29).

The Evidentiary Hearing Facts

Douglas Partyka, an investigator with Capital Collateral Regional Counsel (CCRC), was Happ's first witness. (SR193, 194). He interviewed Richard Miller, a witness from Happ's trial.[1] Miller had sent letters to Happ's defense attorneys because "he wanted to tell us the truth about what he had testified to earlier in Happ's case." (SR196, 198). He had not read any of Miller's letters. (SR198, 204).

Paul Kish, a forensic consultant for ten years, specializes in crime scene reconstruction and blood stain pattern interpretation. (SR221, 223). He reviewed the evidence in this case regarding the broken driver's side window, the foot wear patterns located at the crime scene, and "the general handling of the crime scene ... the forensic work that was done by defense counsel ..." (SR230). In order to simulate the broken driver's window, he met with salvage yard personnel (in New York) and indicated "the type of vehicle that we're looking for ... they were able to have a vehicle set up so that we could

[1]Partyka characterized Miller as a "jailhouse snitch." (SR195). Miller was incarcerated in a Kansas prison when Partyka interviewed him. (SR197).

actually go and videotape the breaking of the glass."[2] (SR234, 235). It would have been beneficial to the defense if a trace analyst had been hired to evaluate "hairs, fibers, trace evidence that would have been collected through the vacuumings from the vehicle ... collected from the clothes from the decedent ..." (SR258). A fingerprint expert could have evaluated and verified print evidence, and a serologist could verify "the serological work that was done ..." (SR259). In addition, a forensic pathologist should have been hired to understand "the pathological reports more clearly ... to injuries and other pathological-related issues." (SR260).

On cross-examination, Kish said he was neither a trace analyst nor a forensic chemist. It was very cold and was actively snowing when the glass-breaking “experiment” was videotaped. (SR267). He did not know what effect the cold temperature would have on the glass breaking. (SR268). He did not know if the car window in the victim's car was fully raised at the time it was broken. In addition, he did not know what the result of breaking the glass would have been had the window not been fully raised in the window frame. (SR269, 270).

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[2]The victim's vehicle was a 1983 Oldsmobile Firenza.(SR235). The videotape of the "experiment" was published and played for the court. A 1985 Chevrolet Cavalier was substituted for the Firenza. (SR236, 240, 241, 265).

Richard Miller, currently incarcerated in the Kansas Department of Corrections, communicated with his mother regarding the Happ case.(SR283, 284).[3] He had been in jail with Happ in the Citrus County, Florida, jail after Happ had been charged with the murder in this case. (SR285). Happ was "friendly." (SR297). After he testified as a State witness at Happ's first trial, he returned to the Kansas prison system and was excused from testifying at a subsequent trial. (SR294, 298, 301). He recalled writing two letters to CCRC regarding Happ's case. (SR305). However, he wrote additional letters because "I've been under a lot of stress over those letters, because Carl Laventure ... he's been blackmailing me, having me write you guys letters, having me try to get him help ..." (SR314). Some of the things he said in his 1999 interview with CCRC Investigator Partyka were "made up." (SR320). He felt intimidated by CCRC and another inmate, Carl Laventure. CCRC was "hounding me, hounding me ..." (SR324).

Dr. Peter Lopez is an orthopaedic surgeon specializing in hand surgery. (SR336). If someone was able to "punch a hole through a car window ... I would expect to see injuries ... soft

[3]Under the terms of his plea agreement, Miller was transferred from the Florida Department of Corrections to the Kansas Department of Corrections through an Interstate Compact agreement. (SR289).

tissue injuries ... superficial to deeper lacerations ... possibly significant contusions to the joint ... fractured hand bone ..." (SR340). An obvious injury would appear at some point. (SR341). Swelling of the hand, and possibly lacerations, “would” occur as a result of a punching car window. (SR343, 345).

Richard Miller was recalled as a witness. The defense played an audio tape of the interview Miller participated in with Douglas Partyka in 1999. (SR347). Miller stated, "I'm denying any of those voices on that tape are mine ... My voice is not on that tape."(SR348).

Douglas Partyka was recalled as a witness.(SR353). He identified Richard Miller as the person he interviewed and taped in 1999. The audio tape has remained in his possession until presented to the court during this hearing. (SR354).

Richard Miller continued to deny his voice was on the audio tape. (SR359, 368, 369). After reviewing a transcript of the audio tape, he did not remember giving the interview with the CCRC investigators. (SR381). Miller reviewed a letter that he wrote under duress from fellow inmate Carl Laventure. (SR399).[4] He also wrote letters on his own behalf. (SR410). He has a "memory problem." (SR442).

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[4]Carl Laventure assisted other inmates in drafting pleadings. (SR400).

On cross-examination, Miller said he wrote several letters under duress from Laventure. (SR450). He gave truthful testimony at Happ's trial. (SR452).

Nicholas Petraco, a forensic consultant, has primarily worked in the area of trace evidence. (SR478, 483-84). He reviewed the evidence in this case and concluded that "none" of the trace evidence found in the victim's car connected Happ to this murder.(SR487, 494).[5]

Dr. William Schutz, a forensic pathologist, was the Fifth District Medical Examiner (Florida) for approximately thirty years. (SR511, 512, 514). The victim in this case did not exhibit the usual indicators of "being in the water too long." (SR516).[6] He was not aware of any other expert being hired to dispute his findings. (SR517).

On cross-examination, Dr. Schutz said the victim's body was "within the high water mark" when found at the canal.[7] (SR518, 526). She had not been in the water for very long. (SR544).

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[5]A pubic hair found in the victim's clothing was identified as Negroid. (SR494, 495).

[6]The victim was found "on the bank of the Cross-Florida Barge Canal in northwest Citrus County." ***Happ v. State***, 596 So. 2d 991, 992 (Fla. 1992).

[7]Autopsy photographs indicate the victim was located "below the high tide mark." (SR518).

Carlos Quinones met Happ in 1986 when his stepson, Vincent Ambrosino, brought Happ home one night to "stay the night."[8] (SR548, 549). He saw Happ at his house at 11:00 p.m. on this Friday night, and then again at 6:00 a.m. the following morning, when he arose for work. (SR552). He did not notice any injuries on Happ, "he had no superficial wounds ... his appearance was good." (SR553).

On cross-examination, Quinones said he was ordered to return for Happ's trial in July 1989. (SR557). He gave a deposition on July 25, 1989, and would have been available to testify at the trial. (SR558, 559). He did not know what Happ did during the seven hours after arriving at his home; he did not see him again until early the next morning. (SR561-62).

After being placed under oath, Happ invoked the *Nelson* Rule, complaining about the representation of his counsel.[9] (SR574). The trial court took his for request for new counsel under advisement, and ultimately found "no good cause to show there's been any ineffective assistance that's been rendered" (by current counsel), and denied Happ's motion. (SR576, 594-596, 597).

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[8]He recalled it was a three-day weekend in May 1986, but was "not certain" if it was Memorial weekend. (SR550).

[9]*Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

Dr. William Morton is a licensed Psychiatric Pharmacy Practitioner, who is licensed to practice pharmacy in North Carolina, South Carolina, and California. He is a board certified Psychiatric Pharmacy Practitioner in the United States.(SR607). He interviewed Happ regarding his "history of using substances, ... affects (sic) he was looking to get ... effects not looking to get ... reviewed past medical history ... medications he was taking ... use patterns ... family history ... his development ..."(SR621, 622). Happ reported numerous substances that he abused including "alcohol, cocaine, marijuana, nicotine, stimulants ...(PCP) ... infrequent use of ... heroine ... LSD ... occasional use of sedative hypnotic drug ..." (SR622). He was arrested at 11 years of age "for being grossly intoxicated." (SR623). Happ has a "very significant poli-substance use history." (SR634).

On cross-examination, Dr. Morton stated that he has only testified for the defense. (SR642). The substances abused by Happ were self-reported. (SR644-46). He did not ask Happ what, if any, drugs he was using on the day the victim was murdered. (SR650). Dr. Morton was not willing to assume the validity of Happ's conviction for purposes of cross-examination. (R660).

Carl LaVenture, a "jailhouse lawyer" currently incarcerated in the Kansas prison system, assisted Richard Miller in filing

a lawsuit.(SR663, 664, 666).[10] Miller is "a shot caller for different gangs. He put a hit out on me." He never threatened Miller in any way, stating, "You don't threaten Rick Miller," "[n]ot and live to talk about it ..." (SR670-71). Although he does not feel safe walking "amongst the general population ... with Rick's contract against me," Rick Miller has "total freedom." (SR672). LaVenture requested a transfer to another facility. (SR677).

On cross-examination, LaVenture said the only information he had regarding the Happ case came directly from Rick Miller. (SR677). He has been in three different Kansas prisons with Miller from 1998 through February 2002. (SR688). He wrote several letters on Richard Miller's behalf. (SR693). He did not tell other inmates about Miller's involvement with the Happ case. (SR698).

Mark Nacke, who has practiced as a defense attorney for over twenty years, assisted Jeff Pfister in defending William Happ -- this was Mr. Nacke's first death penalty case. (SR710, 711, 712).[11] He did not recall if the defense team filed motions to hire experts in Happ's case. (SR715). The State hired an expert

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[10]LaVenture is currently serving a thirty year sentence and has nine felony convictions. (SR677, 678, 680).

[11]Happ did not call Mr. Pfister as a witness.

on glass, and the defense did not. (SR716). The defense did not hire either a shoe print expert or a trace evidence expert. (SR716, 717). They hired Dr. Harry Krop, a forensic psychologist, although he did not testify at trial. (SR718). Carlos Quinones' stated in his deposition that Happ had been at his house on the night of the murder. (SR722-23). Nacke did not recall why Quinones was not called as a witness in the trial. (SR726). He did not recall if Quinones' stepson, Vincent Ambrosino, was ever a suspect in this crime nor did he recall the circumstances of how Happ's palm print was found on the back of the victim's car. (SR727-28). He was not aware of any confession other than the one made by Happ. (SR728).

On cross-examination, Nacke said he assisted Mr. Pfister with Happ's case and Pfister "definitely had more experience than I did in criminal cases." (SR730, 731). Pfister made the final decisions, but did discuss issues with Nacke. (SR731). After the defense team hired Dr. Krop, a forensic psychologist, Dr. Krop informed them that "he had finished his evaluations and that in his opinion, we should not call him; his testimony would not help us. In fact, would probably harm our case ... he did not want to do a written opinion ... he had some fear that at some point that could be discoverable ..." (SR733-34). Happ was "extremely adamant" that the defense not call his mother as a

witness. (SR735). Nacke and Pfister discussed hiring a glass expert but, "there was no proof that we could determine that this was, in fact, the actual glass from the victim's car." (SR739). He did not feel it was important to hire a pharmacologist as it would not have "impacted any decision in Lake County." (SR741-42). The defense did not hire a shoe print expert because of "the length of time [that] had passed from the actual crime" to the time when Happ's shoes were recovered, and, it was the "same ... pattern on the bottom ... same size ..." "no way it was the same general make ..." It was not a strong match. (SR742). A hair located in the ligature around the victim's neck, was "of an African American ... we argued that strenuously ... it was somebody else ... (SR744).[12] Nacke discussed the possibility of DNA testing with Happ as there were "anal and vaginal swabs ... there were indications of spermatozoa ..."(SR746). Happ "didn't think it would be good to pursue that testing." (SR747). During the trial, Happ found a piece of glass "around his knuckle area ... Mr. Pfister put it in an envelope ... sealed it and put it in the file." (SR748).

[12]It was the State's theory at trial that the hair has been transferred to the victim during her trip to the area where she was murdered. (SR744). In addition, the State also presented testimony that an assistant at the medical examiner's office, an African American male, may have washed the victim's body with a "used sponge" thereby transferring the hair.(SR744-45).

Subsequent to that trial, an Assistant State Attorney, going through the defense's trial file, found the envelope containing the piece of glass. (SR748). A hearing was held on the matter and the envelope was ordered sealed by the Court. (SR749).

On re-direct examination, Nacke said that Happ told his attorneys that the glass was from a window of a home, "it was not car glass." (SR750). It was possible that the Negroid hair could have been microscopically tested against the man that worked for the medical examiner. (SR752). He was not aware that a shoe print used at trial was the wrong shoe print. After a hearing was held in 1997, the correct shoe print was substituted into the court case file.(SR752-53).

On examination by the court, Nacke said he was assigned to examine and cross-examine certain witnesses as well as prepare for a closing argument should the case proceed to a penalty phase. (SR765). He had more responsibility in the penalty phase than Mr. Pfister. (SR766).

An Order denying Happ's Second Amended Motion to Vacate was issued on September 18, 2003. (SR2769-2817). Happ filed a Notice of Appeal on October 13, 2003. (R1-4). An Amended Order denying Happ's Second Amended Motion to Vacate was issued on November 5, 2003. (R35-46 and SR2818-29).

STANDARD OF REVIEW

This Court has stated the standard of review applicable to an ineffective assistance of counsel claim as follows:

> Upon review in this Court, ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review based on the *Strickland* test. *See Stephens v. State,* 748 So.2d 1028, 1032 (Fla. 1999). While we give deference to the trial court's factual findings, we must conduct an independent review of the trial court's legal conclusions. *State v. Riechmann*, 777 So.2d 342, 350 (Fla.2000).

Gudinas v. State, 816 So. 2d 1095 (Fla. 2002).

INEFFECTIVE ASSISTANCE OF COUNSEL - - THE LEGAL STANDARD

This Court has clearly stated the legal standard under which a claim of ineffective assistance of counsel is evaluated:

> In order to successfully prove an ineffective assistance of counsel claim a defendant must establish the two prongs defined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
>
> > A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be

> said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

According to *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* court also explained how counsel's actions should be evaluated:

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Gudinas, supra. The Eleventh Circuit has described the *Strickland* analysis in the following terms:

. . . our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny.

Under those rules and presumptions, "the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Rogers v. Zant,* 13 F.3d 384, 386 (11th Cir. 1994). That result is no accident but instead flows from deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have explained:

> The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

Waters v. Thomas, 46 F.2d 1506, 1511-12 (11th Cir. 1995).

SUMMARY OF THE ARGUMENT

The claim that trial counsel "failed to challenge the state's case" does not supply a basis for relief. The "failure to object" component has been abandoned, and, moreover, is meritless because none of the questions involved were improper. The "alibi witness" component fails because trial counsel testified that there was a reason that witness was not called, but that he could not remember what it was because of the passage of time. Contrary to Happ's position, prejudice is not presumed. Moreover, the evidence was irrelevant, as the trial court found. The trial court's denial of relief should be affirmed.

The "unknown hair" claim is not a basis for relief because trial counsel made an informed decision not to have the hair analyzed.[13] So long as the hair remained unidentified, the defense has an argument available to them. Defense counsel made a strategic decision, and that decision does not support an ineffectiveness of counsel claim.

The claim that counsel were ineffective for "failing" to present Happ's drug abuse history as "mitigation" was properly

[13]The hair likely belonged to the Medical Examiner's assistant, and the defense preferred for the hair not to be matched to that person.

rejected because the testimony at the evidentiary hearing was, in the words of the Court, "unpersuasive." Moreover, trial counsel testified that he did not believe that such testimony would have a favorable impact on the jury, especially since the alleged drug use could not be tied to the murder.

The "full and fair hearing" claim (which relates to a pair of shoes in evidence) is time-barred, and was correctly decided by the trial court.

The "failure to use expert witnesses" claim was rejected by the trial court as "wholly without merit." None of the witnesses were shown to have been available at the time of Happ's trial, and the failure to present these witnesses at trial does not establish either deficient performance or prejudice.

With respect to all of the ineffectiveness claims, Happ cannot establish the prejudice prong of *Strickland* in light of his statement to trial counsel that DNA testing "would not be a good idea."

ARGUMENT

I. THE "FAILURE TO CHALLENGE THE STATE'S CASE" CLAIM[14]

A. THE "LEADING QUESTION" COMPONENT

[14]Happ was represented at trial by two attorneys. However, for reasons unknown to the State, Happ only called his second-chair trial attorney to testify at the evidentiary hearing. That was Happ's decision, and he cannot profit from that attorney's faulty memory of a trial that took place in 1989.

On pages 12-15 of his brief, Happ complains that trial counsel was ineffective for not objecting to "improper leading questions" asked by the State. While the trial court granted Happ an evidentiary hearing on this claim, no evidence was presented concerning the "failure to object" claim, and Happ did not argue that claim in his written closing argument. (SR1924-2768). Because no evidence was presented concerning this claim, it has been abandoned, and should not be considered in this proceeding.[15]

Alternatively, none of the questions set out in Happ's brief are leading, and such an objection would have been overruled. To the extent that Happ argues that counsel was in some way ineffective, the record of Happ's capital trial contains extensive cross-examination on this very issue, and there is no question that the jury was well aware that Ambrosino's trial testimony was different from his testimony in deposition. (R2093-95). Happ's claim of ineffective assistance of counsel is nothing more than present counsel's after-the-fact second guessing of trial strategy that is precluded by *Strickland v. Washington,* 466 U.S. 668 (1984). And, to the extent that it is

[15]In his brief, Happ makes much of the court's grant of an evidentiary hearing on this claim. What he does not admit is that he did not avail himself of the opportunity to present evidence when he had the chance.

necessary to further explain counsel's strategy, it is apparent from the record that counsel chose to highlight the inconsistencies in Ambrosino's testimony during cross-examination rather than affording him the opportunity to explain them during direct examination.[16] While present counsel might have handled the examination of the witness differently, that is not the standard by which ineffectiveness claims are decided. *Waters v. Thomas, supra*. In addition to having been abandoned, this claim has no merit.

Finally, in light of Happ's statement to trial counsel that DNA testing "would not be a good idea," Happ cannot establish the prejudice prong of *Strickland*, as he must in order to prevail on his claim of ineffective assistance of counsel. This claim is not a basis for relief.

B. - C. THE "ALIBI WITNESS" COMPONENT

On pages 16-34 of his brief, Happ argues that trial counsel was ineffective for failing to call "alibi witness Carlos Quinones." During the evidentiary hearing, trial counsel testified that he was well aware of Quinones' deposition testimony, and that he would have been called **if his testimony**

[16]Happ's claim, on page 15 of his brief, that the State presented "unchallenged testimony from Ambrosino" is simply incorrect.

had been as positive at trial as his deposition. (R732). Counsel testified that there was a reason for not calling Quinones, but that he could not remember what it was. Because counsel's performance is presumed reasonable, the fact that counsel does not remember the reason for a decision made during the course of a lengthy trial does **not** establish deficient performance on the part of counsel. *Gudinas, supra; Downs v. State*, 453 So. 2d 1102 (Fla. 1984).[17]

Moreover, as the trial court found in denying relief on this claim, Quinones' testimony was irrelevant. (R43). Despite Happ's protestations, the testimony was that Quinones had absolutely no idea what Happ did between the time that Happ arrived at Quinones' home at 11:00 P.M. and when Quinones next saw him at 6:00 A.M. the following morning. (R552). Miss Crawley was abducted, sexually battered, and strangled during the early morning hours of May 24, 1986, and, assuming for the sake of argument that Happ stayed at Quinones' home on May 23, 1986, and left the following morning, that does not supply Happ with an alibi because the time of the murder is wholly unaccounted for

[17]Happ argues that he wins on this claim because trial counsel did not remember the reason that Quinones was not called to testify. That position flies in the face of the presumption of competency established by *Strickland*, and is wholly inconsistent with long-settled law. A faulty memory of 14-year-old events does not give the defendant a windfall.

in Quinones's testimony. Because Happ's whereabouts are unaccounted for at the time of the murder, the testimony is irrelevant to the issue of guilt. The trial court correctly denied relief.

To the extent that Happ argues that the fact that Quinones was brought to Florida as a material witness by the State establishes that his testimony was "relevant," he has cited no authority for that proposition. Relevancy is established at the time of the testimony, not when a witness is determined to be "material" for purpose of compelling their appearance from another state. Likewise, to the extent that Happ argues that the trial court's order is an insufficient "summary denial" of relief, that claim has no legal basis. The court did not summarily deny relief on this claim, and the suggestion that the rules applicable to a summary denial were not followed is spurious.

One of Happ's trial attorneys testified that he had no specific memory of **why** Quinones was not called to testify beyond stating that there was in fact a specific reason. Happ did not call his other trial attorney (who was lead counsel) in an effort to prove his case. The state of the record is that there is no basis upon which counsel can be deemed ineffective, and,

because that is so, there is no basis for relief. As the Eleventh Circuit has held:

> For performance to be deficient, it must be established that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, when reviewing counsel's decisions, "the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*) (*quoting Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)), *cert. denied* 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001). Furthermore, "[t]he burden of persuasion is on a petitioner to prove, by a preponderance of competence evidence, that counsel's performance was unreasonable." *Id*. (*citing Strickland*, 104 S.Ct. at 2064). This burden of persuasion, though not insurmountable, is a heavy one. *See id.* at 1314 (*citing Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305 (1986)).
>
> "'Judicial scrutiny of counsel's performance must be highly deferential,'" and courts "must avoid second-guessing counsel's performance." *Id.* at 1314 (*quoting Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065). "Courts must 'indulge [the] strong presumption' that counsel's performance was reasonable and that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Id*. (*quoting Strickland,* 466 U.S. at 689-90, 104 S.Ct. at 2065-66). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" *Id*. (*quoting Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).
>
> If the record is incomplete or unclear about counsel's actions, then it is presumed that counsel exercised reasonable professional judgment. *See id.* at 1314-15 n. 15. Thus, the presumption afforded counsel's

> performance "is not ... that the particular defense lawyer in reality focused on and, then, deliberately decided to do or not to do a specific act." *Id*. Rather, the presumption is "that what the particular defense lawyer did at trial – for example, what witnesses he presented or did not present – were acts that some reasonable lawyer might do." *Id.* (emphasis added).
>
> Moreover, "[t]he reasonableness of a counsel's performance is an objective inquiry." *Id*. at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." *Id*. To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." *Id*. at 1315 n. 16.

Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001). The trial court properly concluded that counsel cannot be deemed ineffective for not calling an irrelevant witness, and that finding should not be disturbed.

Finally, given that Happ admitted his guilt when he told trial counsel that DNA testing would “not be a good idea,” Happ cannot satisfy the prejudice prong of *Strickland*, either. This claim was properly decided by the trial court, and that decision should be affirmed in all respects.

II. THE “UNKNOWN HAIR” CLAIM

On pages 34-38 of his brief, Happ argues that trial counsel was ineffective for not “investigating” the origin of “an unknown Negroid hair sample” found in the ligature around the victim’s neck. The collateral proceeding trial court rejected

this claim, finding that Happ had failed to establish either deficient performance or prejudice.

In finding that trial counsel were not ineffective, the trial court held:

> Appellant/Defendant Happ has failed to produce any evidence with respect to his claim that Trial Counsel was at all deficient or ineffective in his allegations of failure to investigate an unknown hair sample. To the contrary, the Defendant's Trial Counsel, Mark Nacke, testified that he and lead counsel, Jeff Pfister were aware of the "unknown hair" and that it was most likely caused by transference from an employee at the medical examiner's office. As part of their trial strategy, Defense Counsel chose not to have the "unknown hair" tested in that its likely origin was the medical examiner's assistant and not an unknown, unidentified assailant. Quoting trial counsel, Mr. Nacke, "It is my recollection that we argued strenuously that that's definite evidence that it was somebody else, that how could the hair have gotten there but for being there at the time the crime was committed." [citation omitted].
>
> Further, the trial lawyers were searching for any African American with which to make a comparison and had none, except for the assistant at the medical examiner's office. [citation omitted]. While the defense argued the alleged unknown hair sample, the State rebutted with (2) theories at trial: 1) Expert testimony relating to transference as if the hair had gotten on her sweat pants at a public restroom; or 2) the hair was transferred via a used sponge at the medical examiner's office. [citation omitted].
>
> Clearly, to this Court, the claim that trial counsel was ineffective for failing to investigate the origin of an unknown hair found on the victim is wholly unsupported. Everything in the record supports their diligence in investigating this issue.
>
> In further support thereof, is the defense's own witness, Nicholas Petraco, who stated there were **no**

Negroid or African American hairs found in the sweepings of the victim's car.

(R37). Competent substantial evidence supports the findings of the trial court, and there is no basis for relief based upon this claim.

To the extent that further discussion of this issue is necessary, the defense made a strategic decision not to have the unknown hair compared to the individual at the medical examiner's office. Such an informed strategic decision does not support an ineffectiveness claim. *Gudinas, supra; Rose v. State*, 675 So. 2d 567 (Fla. 1996). Given that that person was the only African American known for hair comparison purposes, and given that he clearly was not and had never been a suspect, the last thing the defense wanted to do was prove that the unknown hair was in no way connected to Miss Crawley's killer. If the hair remained unknown, the defense had something to argue to the jury - - however, if the hair was matched to the medical examiner's assistant, the defense had nothing at all.[18] Trial counsel's strategic decisions were neither deficient nor prejudicial, and

[18]In light of the hearing testimony that **no** Negroid hairs were found in the sweepings from the victim's car, there is nothing to have been gained by having the hair examined, anyway.

the trial court's denial of relief should be affirmed in all respects.[19]

III. THE "PRESENTATION OF MITIGATION" CLAIM

On pages 38-41 of his brief, Happ argues that trial counsel were ineffective for not presenting Happ's drug abuse history as mitigation. The collateral proceeding trial court found that counsel were not ineffective for not presenting such testimony.

In resolving this issue against Happ, the trial court stated:

> Appellant called Alexander Martin who was qualified as an expert within the field of psychopharmacology and addictions and the general effects of drugs on the human brain. [citation omitted]. Happ self-reported significant poli-substance usage during Martin's first interview on March 21, 2000. [citation omitted].
>
> This witnesses' testimony is totally unpersuasive because he does not make a diagnosis. [citation omitted]. There was no independent corroboration of Happ's self-reported cocaine usage. [citation omitted]. This witness did not ask Happ what drugs he was using May 23, 1986, the date of the murder. [citation omitted]. Nor did he ask him if he [Happ] was under the influence of cocaine and cocaine psychosis when he murdered Angela Crowly. [citation omitted].

(R39). The collateral proceeding trial court's findings are supported by competent substantial evidence, and should not be disturbed.

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[19]As with the other issues, Happ's statement that DNA testing "would not be a good idea" makes it impossible for him to establish the prejudice prong of *Strickland.*

To the extent that further discussion of this claim is necessary, trial counsel Mark Nacke (who has practiced criminal law for years in Lake County, Florida) testified that he did not feel that drug-use testimony would have a favorable impact on a Lake County jury, especially since the alleged drug use could not be tied to the murder. (R741-42). Decisions as to which witnesses to call are the quintessential example of strategic decisions which, under the *Strickland* standard, are virtually unchallengeable. *Gudinas, supra; Rose, supra.* Moreover, Morton was unaware that the trial testimony demonstrated that Happ had only used marijuana and beer in the four-to-six week period prior to Miss Crawley's murder - - in the face of that testimony, theoretical testimony about the effect of cocaine usage has no mitigating value and would have done nothing but suggest to the jury that Happ is a drug user, a fact that could hardly work to his benefit.[20] In addition, Morton's bias is evident, given that he did not even ask Happ what drugs he was using at the time of the murder, and is unwilling to even assume

[20]Moreover, Happ did not establish that testimony of this sort would have been available at the time of his capital trial. *Horsley v. Alabama,* 43 F. 3d 1486 (11th Cir. 1995); *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) (holding that a sufficient post-conviction relief motion must allege that the "uncalled witness" was available at trial - - if such an allegation is necessary to sufficiently **plead** a motion, there must also be proof of that fact at the evidentiary hearing).

that Happ's conviction is valid. (R655-56; 660). Happ has not carried his burden of proving deficient performance or prejudice, and, because that is so, is not entitled to relief under *Strickland.*[21]

IV. THE "FULL AND FAIR HEARING" CLAIM

On pages 42-56 of his brief, Happ argues at length that the trial court erred in various ways when it refused to expand the scope of the hearing beyond this Court's mandate on remand. Specifically, Happ raises various claims concerning the trial court's denial of his motion for release of the defendant's shoes for examination. This claim is not addressed in the trial court's final written order, and that is entirely proper. There is no basis for relief.

In his last appearance before this Court, the "shoe issue" was discussed at length:

> In claim three of the petition, Happ argues that appellate counsel failed to point out in the motion for rehearing that this Court had relied on inaccurate facts. He claims that, contrary to the facts stated in the majority opinion, (1) the record does not indicate that the shoe found outside the victim's car matched Happ's shoe . . .

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[21]As the trial court pointed out in its order, Happ did not call his lead trial defense attorney to testify. (R40). Happ has failed to carry his burden of proof with respect to this claim. Moreover, he cannot establish prejudice in light of the testimony that Happ told trial counsel that it would not be good to pursue DNA testing.

To properly analyze Happ's claim, we consider each statement in turn.

Statement One: This Court's opinion on direct appeal states: "A shoe print found outside the driver's side of the car was later found to match one of Happ's shoes." Happ, 596 So.2d at 992. The crime lab analyst who examined the shoe print found at the scene of the crime, however, was unable to say with certainty that Happ's tennis shoe made the track impression of the shoe print. His opinion was simply that Happ's shoe could have made the impression. The reason he could not be certain was because the shoe print did not contain enough individual characteristics to differentiate it from any other tennis shoe of the same make and design. Thus, Happ is correct that the factual statement in our opinion was inaccurate. . . .

The facts, once corrected, reveal that the shoe print found at the scene of the crime was consistent with shoes worn by Happ, that Happ was last seen walking in the direction of the barge canal around 11 p.m. on the night in question, and that the next morning Happ's right hand was red and swollen. Finally, Happ's former girlfriend established that Happ had punched in a car window with his fist on a prior occasion, a fact similar to what the State alleged happened in the instant case. Thus, the corrected facts do not significantly alter the events believed to have occurred in this case. Indeed, none of these facts were relied upon by this Court in resolving the legal claims raised by Happ on direct appeal. Finally, none of these facts affect Miller's testimony or his allegedly questionable credibility. [FN10] Accordingly, we find this claim to be without merit as Happ has failed to demonstrate that his "appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance" or that counsel's omission "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." *Wilson,* 474 So.2d at 1163; *see also Rutherford; Freeman.*

Happ v. Moore, 784 So. 2d 1091 (Fla. 2001). What Happ has not revealed in his brief is that, at the hearing following the discovery of the error involving the shoes, **his counsel stated to the trial court that Happ had until February of 1998 to raise a claim concerning the shoes.** (R474). No such claim was ever raised, and the time for doing so passed more than six years ago. Happ cannot claim that he did not know of the possibility of a claim based upon the shoes, and had the ability to timely raise such a claim. Despite the hyperbole of Happ's brief, this claim is time-barred, and the trial court correctly refused to allow a proffer concerning a claim that was unavailable to Happ for any purpose. The trial court properly refused to exceed this Court's mandate. *Way v. State*, 760 So. 2d 903, 915 (Fla. 2000). There is no error, and the trial court should be affirmed in all respects.

V. THE "FAILURE TO USE EXPERT WITNESSES" CLAIM[22]

On pages 56-70 of his brief, Happ argues that trial counsel were ineffective because they did not hire a "forensic crime expert," an orthopedic surgeon, and a forensic pathologist. The collateral proceeding trial court properly concluded that this

[22]Happ did not establish that any of these witnesses would have been available at the time of his capital trial. *Horsley, supra; Nelson, supra.*

claim is “wholly without merit.” (R40). That finding is supported by competent substantial evidence, and should not be disturbed.

A. The testimony of the “forensic crime expert” was inadmissible and irrelevant.

Happ’s “forensic crime expert,” Paul Kish, testified about an “experiment” he conducted into the breaking of automobile window glass. Kish conducted his experiment during a snowstorm at a junk yard in New York - - the sum total of this evidence consisted of a videotape showing an individual breaking a car window with a hammer. There was no attempt to measure the force required to break the window, nor was there any way to determine how hard the individual swung the hammer. Moreover, there is nothing in the record to reveal whether the window to the victim’s car was completely raised when it was broken, or whether it was partially open. Happ’s “expert” did not know what effect the position of the window would have on his experiment. Happ’s “expert” made no attempt to assess the effect of cold temperature on the brittleness of the glass, and, in fact, did not even know what the temperature was during his experiment. (SR267-68). The most that Happ’s experiment showed is that it is possible to break a car window with a hammer - - a fact that is certainly within the realm of common knowledge and requires no expert testimony. Despite the pretensions of Happ’s brief, this

"experiment" is not a scientific experiment at all - - there was no science whatsoever. To the extent that Happ suggests that the trial court erred in finding that the "testing technique and methodology would not have survived a challenge" under *Frye*, he has suggested nothing to support his position. No "scientific principle" has been identified, and the "experiment" proves nothing of relevance to the case since it did not even attempt to demonstrate the amount of force necessary to break a car window. It does not contradict the State's theory that Happ broke the window with his fist, and, because that is so, Happ has demonstrated neither deficient performance on the part of trial counsel, nor prejudice as a result thereof. He has not carried his burden under ***Strickland.***[23]

B. The trial court correctly found that trial counsel were not ineffective for not calling an orthopedic surgeon as a witness.

Happ next argues that trial counsel were ineffective for not hiring an orthopaedic surgeon to testify about the likely result to an individual from breaking a car window with one's fist.[24] The trial court correctly found that Happ had not established

[23]Happ did not establish that this testimony would have been available at the time of trial. *See* note 20, *supra*.

[24]Whether expert testimony is actually appropriate on this issue is debatable.

either prong of *Strickland* with respect to this claim. The trial court stated:

> Dr. Lopez's testimony that a punch-type injury by a human hand to an automobile driver's side window would likely result in a swollen hand would have corroborated Ambrosino's [FN] original trial testimony that Happ had a swollen right hand the day after the killing of Angela Crowly. Dr. Lopez never examined Happ's hand.
>
> > [FN] Ambrosino testified at the trial that he saw Happ's hand the day following the murder and testified as to it being red and swollen.[25]

(R43). Lopez's testimony that punching a car window would probably cause some injury is also within the realm of common knowledge - - it does not require a doctor to inform the jurors that punching a car window will hurt. And, more significantly to this case, Lopez's testimony is consistent with and corroborative of Ambrosino's testimony that Happ had an injury to his hand the day following the murder. Trial counsel can hardly be faulted for not bolstering the State's case against their client.[26]

Related to the "orthopedic surgeon" claim is Happ's claim that his employer (who is now deceased) should also have been

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[25]Happ told Ambrosino that he had hurt his hand by punching a tree. (R2088 from trial).

[26]Since Lopez never examined Happ, his testimony is not directly tied to any fact in issue.

called to testify that he observed no injuries to Happ's hands.[27] (R2613). This position is inconsistent with the testimony of Lopez, which corroborates Ambrosino's testimony that Happ's hand was red and swollen the day after the murder. Trial counsel can hardly be faulted for not presenting testimony that is consistent with the State's case. In light of Happ's confession to Richard Miller, and Happ's statements that DNA testing would not be a good idea, Happ cannot demonstrate prejudice under *Strickland*, and is not entitled to relief.[28] The trial court should be affirmed in all respects.

C. The failure to hire a forensic pathologist.[29]

The final claim contained in Happ's brief is his claim that "defense counsel was ineffective for failing to hire a forensic pathologist to challenge the State's theorized series of events." This claim was not argued in Happ's post-hearing

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[27]Davis actually said, "No. Of course, like I say, he'd come in to work and I would leave." (R2613).

[28]The "hand injury" testimony is highly speculative at best. **If** Happ had presented testimony showing some residual injury to his hand, that evidence would have been probative. The fact that he was able to work with a sore hand suggests only that he was not seriously injured, not that he did not kill Angela Crowley.

[29]Happ did not present the testimony of a pathologist other than Dr. Schutz, who testified at trial. Dr. Schutz's testimony from trial remains unchallenged, and Happ has failed to carry his burden of proof.

memorandum of law, and is consequently not addressed in the trial court's order denying relief. Moreover, the claim contained in Happ's brief was not contained in his Rule 3.850 motion, and, consequently, is not available to Happ for the first time on appeal. *Doyle v. State*, 526 So. 2d 909 (Fla. 1988). In addition to being unavailable to Happ, this claim, which is based on a false premise, is meritless.

Dr. William Schutz was the Medical Examiner for the Fifth District of Florida for nearly 30 years. Dr. Schutz testified that the victim's body was located in the Barge Canal "within the high water mark," and had not been in the water very long. (R518, 526, 544). Happ's assertion that Dr. Schutz "found nothing to suggest that the victim had been in the water" is based upon a misleading and out-of-context representation of the testimony.

To the extent that Happ argues that the heinous, atrocious, or cruel aggravator was improperly found, that claim was not raised in the trial court, and is clearly outside the scope of this Court's order relinquishing the case for an evidentiary hearing. *Way, supra*. On direct appeal, this Court held that "there is no question" that the heinousness aggravator was established beyond a reasonable doubt. *Happ,* 596 So. 2d at 997. The heinousness aggravator is not an issue in this proceeding,

and the portion of Happ's brief relating to the applicability of that aggravating circumstance should be stricken.

CONCLUSION

WHEREFORE, based upon the foregoing, the denial of post-conviction relief should be affirmed in all respects.

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 **Carol C. Rodriguez**, Esquire, and **Robert T. Strain**, Esquire, CCRC-Middle, 3801 Corporex Park

Drive, Suite 210, Tampa, Florida 33619-1136 this ___ day of September, 2004.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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