

IN THE SUPREME COURT OF FLORIDA

No. SC03-1890

**WILLIAM FREDERICK HAPP,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of William Frederick Happ's motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ____" followed by the appropriate page number(s). The post-conviction record on appeal will be referred to as "ROA ____" followed by the appropriate page number(s) and the Evidentiary Hearing "EH____" followed by the appropriate page number(s). All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Happ was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Happ's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Mr. Happ has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. Given the seriousness of the claims at issue and the stakes involved, William Happ , a death-sentenced inmate on Death Row at Union Correctional Institution, through counsel, urges this Court to permit oral argument on the issues raised in his appeal.

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FACTS AND STATEMENT OF THE CASE

On May 24, 1986, the partially clad body of a woman was found on the bank of the Cross-Florida Barge Canal in northwest Citrus County. The woman's shoulders were covered by a tee shirt pulled up to her underarms and a pair of stretch pants were tied tightly around her neck. She had been beaten and anally raped. The cause of death was strangulation. When last seen, the victim was driving from Ft. Lauderdale to Yankeetown to visit a friend on May 23, 1986. Her abandoned vehicle was found on May 25, 1986 in the rear parking lot of a restaurant on U.S. Highway 19. The window on the driver's side of the car had been shattered. Glass consistent with the glass from the car was found at the canal where the body was found and at the Cumberland Farms store in Crystal River where newspaper carriers saw a small car and heard a woman scream at approximately 2:40 A.M. on the morning of Saturday, May 24, 1986.

Happ's friend Vincent Ambrosino told law enforcement that Happ had been in his home on the night of the victim's abduction and sleeping during the time that the victim was abducted and murdered. At trial, he changed his testimony to agree with

the State's theoretical timetable of events, and testified that he had last seen William Happ walking in the direction of the barge canal at around 11 PM on the evening of May 23, 1986. He testified that he had observed Mr. Happ's red and swollen hand, the following morning. Mr. Happ's former girlfriend testified that Happ had punched in a car window with his fist on a prior occasion. A State expert testified that a shoe print found outside the driver's side of the car was consistent with shoes worn by Mr. Happ. Expert testimony was also provided to establish that fingerprints matching Happ were found in two places on the exterior of the victim's car. Physical evidence (i.e., hair, fiber, and fingerprints) were found inside the vehicle but none that matched William Happ. No eyewitness testimony was provided to establish that Mr. Happ had ever made contact with the victim or was seen inside the victim's car.

Mr. William Happ was charged by indictment dated December 1, 1986, with first degree murder, burglary of a conveyance with the intent to commit a battery, kidnapping and sexual battery likely to cause serious personal injury. (R. -p. 1,2) He pled not guilty. (R. -p. 14)

The first trial was held on January 1989 and ended in a mistrial after the prosecutor violated a motion in limine prohibiting the State from revealing Mr. Happ's prior record. Mr. Happ was retried in July 1989 and found guilty of the charges on July 28, 1989. (R. 2489) On July 31, 1989 the jury recommended a sentence of death

by a vote of nine to three (R. 1380) and the Circuit Court of the Fifth Judicial Circuit, Lake County, entered the judgment of conviction and sentence under consideration. On direct appeal, the Florida Supreme Court ruled that Mr. Happ's jury was erroneously instructed on the aggravating factor of "cold, calculated and premeditated" because it did not apply in Mr. Happ's case, struck the aggravator but affirmed the conviction and sentence. Happ v. State, 596 So. 2d 991 (Fla. 1992). On certiorari to the United States Supreme Court, Mr. Happ's sentence was vacated and remanded because it found that the jury had been given an additional erroneous aggravating circumstance. The United States Supreme Court ruled that the "heinous, atrocious, or cruel" aggravator given in Mr. Happ's case was unconstitutionally vague in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992); Happ v. State, 113 S.Ct. 399 (1992). On remand, the Florida Supreme Court affirmed William Happ's convictions and sentence. Happ v.State, 618 So. 2d 205 (Fla. 1993).

On October 16, 1995 Mr. Happ filed an Amended Motion to Vacate Judgment and Sentence in accordance with Fla.R.Crim.P. 3.850. (ROA.- Vol. I- p. 993) A hearing was held on July 29, 1996, in accordance with Huff v. State, 622 So.2d 982 (Fla. 1992). An evidentiary hearing was conducted on February 20, 1997, on Claim III and the court entered an order denying Defendant's postconviction Motion. (ROA. - Vol. I - pp. 1112, 1113) The Defendant filed a motion for rehearing and motion for

leave to amend that was summarily denied on May 11, 1998. (ROA. -Vol. I - pp.

1228, 1233) Defendant then filed his notice of appeal on May 22, 1998. (ROA. - Vol. I - pp. 1237)

While pending appeal, Defendant filed a Motion to Relinquish Jurisdiction in the Florida Supreme Court and a Motion to Amend Motion to Vacate Judgment and Sentence in the Circuit Court on September 27, 1999. Oral argument was conducted in the Florida Supreme Court on October 5, 1999. (ROA. - Vol. I - p. 1284)

On October 7, 1999, the Florida Supreme Court denied Defendant's Motion to Relinquish Jurisdiction without prejudice to seek post-conviction relief in the trial court during the pendency of the appeal. (ROA. - Vol. I - p. 1285) Defendant's Amended Motion To Vacate Judgment of Conviction and Sentence with Request For Evidentiary Hearing was then filed on August 29, 2000. (ROA. - Vol. I - 1317)

On September 13, 2000, the Florida Supreme Court issued an order remanding Happ's case to the trial court on Mr. Happ's ineffective assistance of counsel claims concerning (1) counsel's alleged failure to investigate the origins of an unknown hair sample found on the victim; (2) counsel's alleged failure to investigate and present mitigating evidence during the penalty phase; (3) counsel's alleged failure to object or otherwise challenge the State's case and (4) appellant's claim that DNA testing will

demonstrate appellant's innocence. Mr. Happ's Judgment and Sentence was affirmed on all other issues and the court precluded re-arguing decided claims contained in the Amended Motion To Vacate Judgment of Conviction and Sentence with Request For Evidentiary Hearing. (ROA. - Vol. I - p. 1325)

A Second Amended Motion To Vacate Judgment of Conviction and Sentence with Request For Evidentiary Hearing was filed on November 8, 2000. (ROA.- Vol. I - pp. 1375,1376)

Prior to issuance of the Court's order on the 3.850 appeal dated September 13, 2000, Mr. Happ had also filed a Petition for Habeas Corpus and a Supplemental Petition for Habeas Corpus that was denied by Order of the Florida Supreme Court in Happ v. Moore, 784 So. 2d 1091 (May 3, 2001).

The trial court conducted a Huff Hearing on March 30, 2001, and the Court reviewed Defendant's 2nd Amended Motion To Vacate Judgment of Conviction and Sentence with Request For Evidentiary Hearing, the State's Responses and considered the Supreme Court's Order of September 13, 2000 in ruling.

The Defendant was granted an Evidentiary Hearing as to several portions contained in **Claim 1**, of the Amended 3.850 Motion dated August 29, 2000, and several portions contained within **Claim 4** and **Claim 18** in the 2nd Amended Motion of November 8, 2000.

On May 23, 2001, the court held a subsequent Huff hearing. The defendant withdrew request for evidentiary hearing as to Claim 4, paragraph 27 and therefore a hearing was denied. The court reversed its prior ruling as to Claim 4, paragraph 28 and denied an evidentiary hearing as to this claim. The court also denied the defendant an evidentiary hearing on Claim 4, paragraphs 87, 97, and 106.

The Defendant's Second Amended Motion To Vacate Judgment of Conviction and Sentence with Request For Evidentiary Hearing filed on November 8, 2000 contained a paragraph #133 that was reserved but not ruled on by the trial court. Defense argued in the 2nd Amended 3.850 that trial counsel was deficient in failing to challenge the State's case based upon a "lack of connection between Mr. Happ and the murder". The trial court never ruled on this claim.

The Defendant's Motion To Produce and Release Evidence for Testing filed on October 24, 2002 was denied by order dated November 15, 2002. In denying the Motion the court stated that "the defense ha[d] propounded no new theories under which the court felt compelled to release the evidence for testing." The Defendant's Motion To Reconsider filed on February 13, 2003 was also denied by order dated March 21, 2003.

An Evidentiary Hearing was held in this case on May 12, 13, and 14, 2003. On September 18, 2003, the trial court issued an Order on Defendant's 3.850 pursuant to

the Florida Supreme Court's Remand Order (of September 13, 2000) denying Mr. Happ relief on all claims. The denial of Defendant's motion to release evidence for testing and denial of the 2nd Amended 3.850 Motion are the basis for this appeal.

SUMMARY OF THE ARGUMENT

Mr. Happ asserts that his conviction and sentence of death are the result of violations of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution for each of the reasons set forth below.

1. The evidentiary court was wrong in denying the claim regarding counsel's ineffective representation in failing to object to leading questions posed to Vincent Ambrosio who had provided alibi testimony for William Happ twice before trial. Counsel's failure to object to the State's leading questions resulted in the witnesses becoming confused about critical dates and times that previously provided a clear alibi defense to Mr. Happ.

2. The evidentiary court was wrong in denying the claim regarding counsel's ineffective representation in failing to call Carlos Quinones to provide alibi testimony. The court erroneously determined that Mr. Quinones' testimony was irrelevant, ignoring a prior order by the trial court deeming his testimony both relevant and material to this case. Although counsel was aware that Mr. Quinones' testimony

established an alibi defense for Mr. Happ during the time of the victim's abduction and murder, and corroborated statements made by a second alibi witness (Ambrosino), counsel did not call Mr. Quinones to testify at trial or offer a reasonable explanation for failing to do so. The evidentiary court erred in failing to use the correct standard to analyze counsel's performance .

3. The evidentiary court was wrong in denying the claim regarding counsel's ineffective representation in failing to compare a negroid hair found beneath the ligature tied around the victim's neck to a medical examiner's assistant to exclude him as the source, and failing to argue the significance of this negroid hair (Happ is a white defendant) to the jury.

4. The evidentiary court erred in denying the claim that counsel was ineffective due to a failure to investigate and present mitigation by providing expert evidence or asking the court to consider evidence in the record in support of non-statutory mitigation based upon Happ's history of drug and alcohol abuse.

5. The evidentiary court erred in denying Defendant's postconviction motion to release a pair of pony shoes belonging to the defendant for testing based upon the State's assertions that the issue had been thoroughly litigated.

The defendant claimed that counsel was ineffective for failing to hire a shoe print expert to challenge the State's case and was granted a hearing. The court's

subsequent denial of defendant's motion to release evidence was error, especially in light of the fact that preliminary analysis indicated that it was impossible for William Happ to have made the print due to size difference. The court further compounded the error by failing to allow the shoe print expert to testify at the evidentiary hearing or counsel to proffer this testimony and evidence.

The trial court erred in denying the claim that counsel was ineffective in failing to hire forensic crime, orthopedic or medical experts to challenge the State's theory, that the victim was overcome by an assailant casting one bare fist through her car window, murdered, and then tossed into the waters of the barge canal. At trial, there were no experts retained to challenge any aspects of the State's circumstantial case, and the cumulative effect was no adversarial testing.

STANDARD OF REVIEW

All claims contained in this brief are subject to the Strickland Test, adopted as the standard of review in analyzing claims of ineffective assistance of counsel. The United States Supreme Court requires that a defendant show two elements in establishing a claim of ineffective assistance of trial counsel:

"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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687; Cherry v. State, 781 So. 2d 1040,1048 (Fla. 2000); State v. Riechmann, 777 So.2d 342, 349 (Fla. 2000); Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998).

Furthermore, establishment of prejudice is controlled by the following requirement:

"The defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing norms."

Strickland, 466 U.S. at 688.

Under the second prong of the test, "[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." Id. at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine the confidence of the outcome." Id.

The standard of proof for the trial court and the standard of review for this Court in addressing a claim of ineffectiveness of trial counsel was addressed in Stephens v. State, 748 So. 2d 1028 (Fla. 1999), summarized in Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001), and cited in Thomas v. State, 838 So. 2d 535 (Fla.2003):

The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency. The standard of review for a trial court's ruling on an ineffectiveness claim is also two-pronged: The appellate court must defer to the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo.

Thomas, 838 So. 2d 535 (Fla. 2002) at 539.

When evaluating ineffective assistance of counsel claims on appeal, this Court will evaluate whether the alleged errors undermine our confidence in the outcome of the proceedings. Rose v. State, 675 So. 2d 567,574 (Fla. 1996). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. Stephens, 748 So. 2d at 1028,1033. This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. Id.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING RELIEF ON THE CLAIM OF THE RULE 3.850 MOTION REGARDING TRIAL COUNSEL'S INEFFECTIVENESS DUE TO FAILURE TO CHALLENGE THE STATE'S CASE VIA OBJECTION, EFFECTIVE CROSS EXAMINATION AND CALLING AN AVAILABLE ALIBI WITNESS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION .

- A. Counsel was ineffective for failing to object to the State's leading questions and failing to effectively cross-examine defense alibi witness, Vincent Ambrosino.**

The Second Amended Motion To Vacate Judgment of Conviction and Sentence and For Evidentiary Hearing dated November 8, 2000 contains the claim -

A. Failure to Object During Trial And Test The State's Case .

The court granted an Evidentiary Hearing as to Paragraphs 49 and 53, 54, 55, 56 in the trial Court's "First Order Setting Evidentiary Hearing on Certain Paragraphs of the Defendant's Second Amended Motion to Vacate Judgment of Conviction and Sentence and For Evidentiary Hearing. These claims involved witness Vincent Ambrosino's testimony, and trial counsel's ineffective performance in failing to call alibi witness Carlos Quinones.

A deposition was taken on October 25, 1988 of Mr. Happ's friend, Vincent Ambrosino. In that deposition he testified that Happ had stayed overnight at his house

on the evening of Friday, May 23, 1986 to the morning of Saturday, May 24, 1986. This information was the same as provided to officer Thompson in interview of May 24, 1986, just after the murder. Such testimony was very important because it provided an alibi defense for Mr. Happ and contradicted the State's theory that Happ was abducting and killing the victim in the early morning hours of Saturday, May 24.

Although trial counsel was aware of the favorable facts that Ambrosino had provided, he failed to object to leading questions posed by the State when they called Mr. Ambrosino at trial to change his prior sworn testimony regarding the dates that Happ had stayed over at his house.

The following exchange occurred between the Prosecutor, Mr. King and the witness, Vincent Ambrosino at Mr. Happ's trial:

King: Okay. Because his truck had been taken away, did that cause you
You got off work before he got there; is that right?

Ambrosino: Yes

King: And did you later meet up with him after you had already got off
work on **Wednesday**?

Ambrosino: Yes, I met up with him around the corner on 44.

King: Okay. That day, **Wednesday**, what did you all do that afternoon?

Ambrosino: Went to the bowling alley, played pool.

King: Okay. And you and Mr. Happ each went your separate ways that
evening?

Ambrosino: Yes.

King: The next day, **Thursday**, did you see Mr. Happ again on
Thursday?

Ambrosino: Yes.

King: And where did you see him at that day?

Ambrosino: Maybe at my house or at the bowling alley.

King: You don't exactly remember where?

Ambrosino: No, not exactly for sure.

King: Do you remember whether or not that **Thursday** night he actually spent the night at your mother's house with you?

Ambrosino: Yes.

King: He did?

Ambrosino: He spent all night.

King: Okay. And that -

This was after you all had met and been wherever you'd been, you don't really remember but **you know he spent Thursday night with you.**

Ambrosino: Yes

King: As a result of him having spent **Thursday** night with you was there any friction between you and I think it's your stepfather?

Ambrosino: Yes

King: Or was your stepfather at that time. And what was the friction?

Ambrosino: He had to get up in the morning and I had woke him to ask him if my friend could stay the night.

King: You woke him up **Thursday** night and asked him if Mr. Happ could spend the night. He got upset because you woke him up and he was going to have to get up and got to work the next day?

Ambrosino: Yes.

King: The next day would have been Friday and now we're talking about the 21st, Thursday the 22nd, Friday, the 23rd of May, 1986. (R. 648-649)

Counsel have been found to be ineffective for failing to impeach key state witnesses with available evidence or for failing to raise objections Vela v. Estelle, 708 F.2d 594, 961-966 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984). Although Mr. Ambrosino's deposition and prior statements were that William Happ had stayed over night on Friday and not Thursday, the State posed leading questions as reflected by

the record excerpt above without any objection from defense counsel. No other witnesses testified that Mr. Happ had stayed with Vincent Ambrosino on Thursday rather than Friday. Trial counsel should have objected to the prosecutor's misleading questions that suggested that Thursday was the evening Happ had slept over. This is particularly so, in light of the fact that Carlos Quinones had also given sworn deposition testimony corroborating Ambrosino's statements that Happ stayed overnight on Friday, May 23rd and not on Thursday, May 22nd. Even though Ambrosio conceded that he was confused during cross examination questions posed at trial, Happ's defense counsel never attempted to refresh Ambrosino's recollection of the dates or call Mr. Quinones to corroborate Ambrosino's initial alibi testimony and correct the record. As a result of counsel's deficient performance, the State proceeded to elicit unchallenged testimony from Ambrosino that supported the State's timeline theory of how William Happ could have perpetrated the crime. Counsel's failure to object to the State's direct questions and interjection of facts not in evidence specifically that Happ had stayed over on Thursday rather than Friday was deficient performance. The result was testimony from Ambrosino that provided Happ an opportunity to have committed the crime, and accepted by the jury in reaching a verdict of guilty.

B. Counsel was ineffective for failing to call defense alibi witness Carlos Quinones

Defendant's claims that counsel was ineffective in failing to call alibi witness Carlos Quinones in behalf of Mr. Happ are contained within the Second Amended 3.850 Motion dated November 8, 2000 (paragraphs 53, 54, 55, 56) that were granted an evidentiary hearing. The claims contained therein state that defense counsel was aware that Mr. Carlos Quinones, former stepfather of Mr. Ambrosino, would testify as follows :

1. Mr. Happ slept at his home the night of Friday, May 23, 1986
2. He clearly remembered the dates due to an argument that arose with his stepson.
3. He was scheduled to work the next day but did not.
4. He was awake most of the night.
5. He had been subpoenaed by the State and flown to Florida for the second trial and was available but not called to testify.

Counsel failed to call Mr. Quinones as a witness at trial although he could have provided an objective alibi defense for Mr. Happ. The record shows that on two other occasions before trial Ambrosino stated that Happ had spent Friday night at his house. (R. - 2089-93, 2097-98) Mr. Quinones was unequivocal in his deposition testimony given on July 25, 1989 that Happ had slept over on Friday, May 23, 1986. (R. - 1046-55)

Defense counsel, Mr. Nacke, was aware of the favorable testimony that Mr. Quinones could have provided. He testified at the Evidentiary hearing that Mr. Quinones was deposed at the time of trial - on July 25, 1989. (EH. - p. 542)

Mr. Quinones' testimony is that William Happ stayed at his home on the evening of Friday, May 23. When his stepson asked him for permission for the friend to stay over, Mr. Quinones states that he was scheduled to report to work on Saturday, May 24th, 1986. At trial, the State called Fred Stone, Director of Human Resources, Citrus Memorial Hospital, Inverness, Florida who testified that Mr. Carlos Quinones' work schedule varied. He could work on Saturdays and Sundays and might also have week ends off. (R. 258) Mr. Stone testified that the time records showed that Mr. Quinones did not work on Saturday, May 24 or Sunday, May 25th.

Mr. Stone testified that in April Mr. Quinones was off on the 6th and 7th which were a Sunday and Monday and again off on the 13th and 14th Sunday and Monday. On the 18th and 19th he had a paid day off and was off on a Friday and a Saturday. On the 27th he worked four hours on Sunday and then was off the remainder of Sunday and Monday. On the 29th and 30th of April he took paid days off on Tuesday and Wednesday. On May 4th and 5th he was off on Sunday and Monday and on the 11th and 12th Sunday and Monday, and on the 18th and 19th Sunday and Monday.(R. 260)

From the testimony provided by Mr. Stone it was established that ordinarily Mr. Quinones days off would fall on a Sunday and Monday.

Mr. King (Prosecutor)

“So out of the ordinary, Mr. Quinones was off on Saturday, May the 24th of 1986; his normal days off being Sunday and Monday.”

Mr. Stone (Witness)

Except that...it was a day he asked off for with pay” (R. - 260)

Clearly, Mr. Stone’s testimony supports Mr. Quinones’ version of the facts that he had been scheduled to work on that Saturday, May 24, 1986 but then asked for the day off. Mr. Quinones stated that he requested the day off after having been up most of the previous night as a result of a disagreement with his stepson over his overnight guest, William Happ.

According to Mr. Quinones, William Happ came over to his home on Friday, May 23, 1986 with his stepson. He stated that he remembered the incident because he was scheduled to work on the next morning and that his failure to report as scheduled made a big issue at his work. (R. - 1050) Mr. Quinones testified in the deposition that the last time he personally saw William Happ was Saturday morning (May 24, 1986). (R. - 1051) When the prosecutor tried to get Mr. Quinones to agree that Mr. Happ had stayed over on a Thursday as opposed to Friday, Mr. Quinones said “No. No,

I'm...I'm set in my"... although he was interrupted by the prosecutor he went on to say that he specifically remembered the exact date because he was "so wound up from the incident itself" (the disagreement with his stepson) "it really bothered me, it triggered me, and I didn't sleep well". I got up early Saturday morning and I was really still upset and I said, well, I ain't going to work". (ROA. p.- 1053)

This testimony corroborates the statements that former stepson Vincent Ambrosino gave when interviewed by law enforcement on February 9, 1987 and in pretrial deposition of October 25, 1988. At trial, Ambrosino admitted that he was confused concerning the dates that Mr. Happ stayed overnight. (R.- p. 2093-97) Therefore, it was critical for Mr. Nacke to have refreshed Ambrosino's recollection or to call Mr. Quinones to provide the correct dates and establish an alibi defense but counsel failed to even attempt to do this in William Happ's behalf.

Vincent Ambrosino slept on the living room couch alongside William Happ who was on the floor. Ambrosino testified that on the night he [Happ] slept there "he [Happ] spent all night". (R. 648-649) Obviously, if William Happ was at the Quinones residence on the evening of Friday, May 23, throughout the night and into the morning of May 24th he could not have abducted the victim and murdered her as the State contends.

Mr. Quinones' testimony in deposition of 1989 was that William Happ had

stayed overnight on **Friday, May 23, 1986** and he reiterated this same testimony at Happ's 2003 evidentiary hearing. (EH. - p. 544) At the evidentiary hearing Mr. Quinones' testimony was consistent with his 1989 deposition. He testified that Mr. Happ stayed at his home on the Friday of Memorial Day Weekend - May 23, 1986 and that originally he was scheduled to work the next morning on Saturday, May 24, 1986. He testified that he had observed no superficial injuries to Mr. Happ's person. (EH. - 375-378) Due to the fact that a stranger was staying in his home overnight with his wife and small children he was awake throughout the night. (EH. - p. 379) He identified William Happ the overnight guest who slept on the floor alongside his stepson (who was on the couch) in the livingroom adjacent to his own bedroom (EH. - p. 387). He recalled Happ arriving between 10:30 to 11:00 PM on the evening of May 23,1986 and staying until the early morning of May 24, 1986. He stated that he had no reason to believe that either William Happ or his stepson had ever left the residence between 11:00 PM (May 23) and 5:45 AM.(May 24, 1986) (EH. - pp. 385, 386, 388) Mr. Quinones testified that he physically saw Mr. Happ in his house asleep at 5:45 A.M. on the floor and his stepson was asleep on the couch on morning of Saturday, May 24, 1986. (EH. - p. 380) Mr. Quinones testified that he got up early as he was supposed to work but due to the fact that he hadn't gotten enough sleep over the night, he was tired and decided not report to work. (EH. - p. 376)

At the time of trial, Mr. Quinones was available and had been flown to Florida from New York as a material witness by the State in this case. He was steadfast in his version of the dates and times of events that had occurred. Mr. Quinones confirmed that he gave a deposition on July 25, 1989 communicating this same information, and was available to testify but was never called by state or defense. (EH. - pp. 377,384)

Mr. Quinones had relevant information regarding Happ's whereabouts during the time of the victim's abduction and murder. Yet, defense counsel could not explain why Quinones was not called as a witness in the case. (EH. - p. 545-546) Failure to call alibi witnesses can support a finding of ineffectiveness of counsel, Majewski v. State, 487 So. 2d 32 (Fla. 1st DCA 1986).

As a result of counsel's ineffective performance in failing to call Mr. Quinones as an alibi witness, the jury was led to believe that Happ's whereabouts were unknown during the time of the victim's abduction and murder. Mr. Happ was prejudiced by counsel's failure to challenge the State's case through the live testimony of Carlos Quinones at trial, as Quinones could have established the correct dates in support of William Happ's defense that he was not the person that committed the murder. Mr. Quinones' testimony could have altered the outcome.

C. The Evidentiary court erred by incorrectly ruling that Quinones' testimony was irrelevant, failing to apply the correct Strickland standard to analyze an ineffective assistance of counsel claim, and failing to provide an objective rationale or record excerpt attachments to refute a properly raised claim.

In page 9 of its' Order Denying Defendant's 3.850 Motion, the evidentiary court erroneously dismissed the entirety of Mr. Quinones testimony provided at evidentiary hearing in one sentence by stating "There is no deficient performance in failing to call witnesses who are [not]relevant, i.e. Quinones." The court's ruling of irrelevancy is refuted by the record and fails to explain or provide a basis as to why the court felt it was irrelevant.

The state filed a Motion For Certification of Materiality of Out of State Witness designating both Vincent Ambrosino and Carlos Quinones as material witnesses and in that motion the State attested that Mr. Quinones' testimony was relevant and that he would testify that Mr. Happ and Mr. Ambrosino were together on May 23, 1986. (ROA. - p. 369-371) An order was entered by the Honorable Jerry T. Lockett on June 26, 1989 granting the State's Petition for payment of witness fees, meals and lodging for witness, Carlos Quinones. (ROA. - p.372- 378) Therefore, the record itself refutes the court's conclusion that Mr. Quinones' testimony is irrelevant.

Mr. Nacke testified at the evidentiary hearing that he could not recall why Mr. Quinones stating " I don't have any actual recollection of why not." He went on to

state “I know there must have been a reason, but I cannot tell you that I remember why”.(EH. - 545-546) Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable and in Downs v. State, 453 So. 2d 1102 (Fla. 1984), the court rejected appellant’s ineffective assistance claim, which included an allegation concerning the failure to call alibi witnesses, but only after “facts developed in the record made clear that the conduct of Downs’ counsel was reasonable under the circumstances.” Id. at 1109. That is not the case here, as counsel offered no explanation and the record does not clearly support defense counsel’s decision not to call Carlos Quinones. There is no dispute that Quinones offered Happ an alibi defense, or that he was available to testify. Counsel offered no reasonable explanation for failing to call him to the stand and therefore the record lacks support for a finding that his conduct could be assumed to be reasonable. Although Mr.Happ was granted an evidentiary hearing, in essence, the trial court summarily dismissed the claim that counsel was ineffective in failing to call Mr.Quinones as an alibi witness by terming his entire testimony as “irrelevant”. Counsel for William Happ did not articulate any reasonable explanation for failing to offer alibi testimony through Quinones at Mr. Happ’s trial, as such, he was ineffective in presenting an available alibi defense that could have altered the outcome of this case.

In Chambers v. State, 613 So. 2d 118 (Fla. 2d DCA 1993), the court found that

failure to call alibi witnesses can be ineffective assistance of counsel and the trial court was required to attach the record that conclusively demonstrates no entitlement or hold an evidentiary hearing so that counsel's tactical decision not to call the witness can be reviewed. In this case, Mr. Happ was granted a hearing on the issue of counsel's failure to call Mr. Quinones as an alibi witness, and at the evidentiary hearing trial counsel could offer no explanation or legitimate tactical reason for not calling Mr. Quinones to testify at trial. Furthermore, the trial court attached no record to refute Mr. Happ's claim of ineffectiveness of counsel based on a failure to call Mr. Quinones as an alibi witness.

In Stringer v. Florida, 757 So. 2d 1226 (Fla. 4th DCA 2000) the court directed the trial court to either attach further excerpts supporting its order denying an evidentiary hearing on the issue of counsel's failure to call the alibi witness or to confirm via an evidentiary hearing why trial counsel failed to call the alleged alibi witness. Thereafter, the court was directed to make a determination, based on a complete review of the trial transcript whether there was a reasonable probability that counsel's performance resulted in prejudice pursuant to the standard announced in Strickland. At an evidentiary hearing where the defendant claims that counsel's performance was deficient in failing to call an alibi witness trial counsel must explain the reasons for not calling the witness and establish that the reasons not to call the

witness was reasonable trial strategy. (Reid v. State, 682 So. 2d 194 (Fla. 4th DCA 1996) Mr. Happ's counsel offered no reasons for failing to call Quinones as an alibi witness at trial. Therefore, the record does not conclusively refute Mr. Happ's allegations of ineffective assistance of counsel. To the contrary, Mr. Quinones deposition of July 25, 1989 contained in the Record on Appeal at Volume VI at pp. 1046-1055 supports Mr. Happ's claim that Mr. Quinones provided alibi testimony for his whereabouts on the evening of the murder (May 23, 1986). The evidentiary hearing record establishes that Mr. Happ's trial counsel was aware of the testimony that Mr. Quinones' could provide at time of trial and that Quinones was available. (EH. - p. 543) Defense counsel could not offer a rationale for failing to call Mr. Quinones to testify even though this testimony provided an alibi for Mr. Happ during the timeframe that the state argued the victim to have been abducted, raped and murdered. (EH. - p. 546)

Jurors instead were left to hear the testimony of Mr. Ambrosino who had initially given two statements identical to his stepfather, Quinones' recollected facts, and who admitted confusion regarding the correct dates as he testified at trial. Jurors never had an opportunity to hear Quinones, the mature homeowner and step-parent testify. Failure to call Mr. Quinones could have affected the outcome of this case. Reid v. State, 682 So. 2d 194 (Fla. 4th DCA 1996). A defendant is entitled to relief on the

basis of ineffective assistance of counsel where there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 688, 691(1984).

In order to assert a facially sufficient claim that counsel was ineffective for failing to call an alibi witness, the appellant must identify the witness, the content of the witness's testimony and assert how he is prejudiced by the omission of the witness's testimony. State v. Pelham, 737 So. 2d 572, 573 (Fla. 1st DCA 1999). Mr. Happ presented a facially sufficient claim that trial counsel was ineffective at trial in failing to call alibi witness Carlos Quinones. The substance of what Quinones' testimony would have been was detailed therein, and the trial court granted an evidentiary hearing.

At the evidentiary hearing, held on May 2003, Mr. Quinones again stated essentially what he had stated in his 1989 deposition. He testified that the defendant, William Happ arrived close to 11:00 PM on the evening of Friday, May 23, 1986 and was seen by him still asleep on the living room floor at 5:45 A.M. on the morning of Saturday, May 24. He testified that he was awake throughout the night in an adjacent bedroom, and heard nobody leave the residence. (EH- 380-385) Since the State theorized that the victim was abducted at approximately 2:45 A.M. on the morning of May 24, 1986 and killed shortly thereafter, Mr. Quinones' alibi testimony, detailed

above, covers the entire time frame during which Mr. Happ's presence would have been to commit the crime.

Defense counsel testified at the evidentiary hearing that it was his first death penalty case (EH - p. 532), and that most of the case against Mr. Happ was circumstantial. (EH. - p. 533) He testified that he was aware that Mr. Quinones' deposition testimony placed Happ at the residence overnight on Friday May 23, 1986 (EH. - p. 543) but could not recall discussing Mr. Quinones' deposition with co-counsel. (EH.- p. 545) Counsel testified that while there must have been a reason for not calling Mr. Quinones he could not remember it. (EH. - p. 546) Therefore, no reasonable strategy for the defense failing to call Mr. Quinones to the stand was given by defense counsel.

Mr. Quinones' testimony could raise reasonable doubt in the minds of the jury as to whether or not William Happ committed this crime and could have affected the outcome of this case. Quinones' credibility should have been accessed in light of the circumstantial evidence against Mr. Happ. The jury is the sole judge as to whether such alibi testimony raises a reasonable doubt that the accused (WilliamHapp) could have committed the offense. Jones v. State, 128 So. 2d 754 (Fla. App.1961), Grizzard v. State, 139 So. 2d 161 (Fla. 2d DCA1962). Counsel's failure to call Mr. Quinones to provide alibi testimony without a reasonable strategy for failing to do so was

ineffective assistance of counsel. Mr. Happ was prejudiced by counsel failure to present alibi testimony, as such testimony could have raised a reasonable doubt concerning his guilt and altered the outcome.

In the instant case, Judge Lockett granted Mr. Happ an evidentiary hearing on his claim that counsel was ineffective for failing to call Mr. Quinones as an alibi witness. Under oath, Mr. Quinones testified that Mr. Happ slept over in his home on the evening that the murder was committed. He testified that he had provided this same testimony during a sworn deposition at the time of Happ's trial in July, 1989. Defense counsel acknowledged that he was aware of the contents of Quinones' deposition and agreed that jurors could have accepted it as an alibi. (EH. - p. 543) However, he offered no explanation for failure his to call Quinones at trial. (EH.- 546) Instead of ruling on Mr. Happ's properly raised claim of ineffectiveness of trial counsel for failing to call an available alibi witness (Carlos Quinones), Judge Howard ruled that Quinones' testimony was "irrelevant" without explanation or attachment in support of this finding.

When "denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the

prisoner is entitled to no relief shall be attached to the order." Williams v. Florida, 642 So. 2d 67,69(1st DCA 1994).

Florida Rules of Criminal Procedures 3.851(f)(5)(D) states the following procedure to be followed after an Evidentiary hearing is held:

“Within 30 days of receipt the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law as to each claim, and attaching or referencing such portions of the record to allow for meaningful appellate review.”

The court did not follow these procedures in reviewing Mr. Happ’s claim that counsel was ineffective for failing to call Mr. Quinones as an alibi witness. Failure to investigate and summon alibi witnesses can constitute ineffective assistance. Young v. State, 511 So. 2d 735 (Fla. 2d DCA 1987). Counsel offered no reason whatsoever for not calling Mr. Quinones at trial so the trial court, in essence, has erred in summarily denied Mr. Happ’s claim regarding the testimony of Quinones without the benefit of record establishing a reasonable, strategic rationale by trial counsel for failing to call this witness. Dismissing Mr. Quinones’ by describing his alibi testimony in one word “irrelevant” without providing rationale, analysis or supporting documentation is improper. In addition, the trial judge ignored a prior judicial order finding that Mr. Quinones was a material witnesses with relevant testimony to provide in this case. Therefore, the court’s determination that Quinones’ testimony is irrelevant is refuted by the record.

The determination of ineffectiveness pursuant to Strickland is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby. Strickland 466 U.S. 694(1984); Rutherford v. State, 727 So. 2d 216, 219-220 (Fla. 1998). Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement...both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. *Id.* At 698. The trial court should have reviewed Mr. Happ's claim of ineffectiveness of counsel in failing to call an alibi witness (Mr. Quinones) in accordance with the standards established in Strickland but did not do so. Referring to Mr. Quinones' alibi testimony as irrelevant to dismiss the Defendant's claim of ineffective performance by trial counsel is inappropriate. While a trial court has broad discretion in determining the relevance of evidence and such determinations will not be disturbed absent an abuse of discretion. Hardwick v. State, 521 So. 2d 1071,1073 (Fla. 1988), when a defendant raises an alibi defense, the defendant is not required to prove the alibi beyond a reasonable doubt. Hudson v. State, 381 So. 2d 344 (Fla. 3d DCA 1980). "The proof of an alibi is sufficient if it raises a reasonable doubt in the minds of the jury that the defendant was present at the time and place of the commission of the crime charged" Flowers v. State, 12 So. 2d 772, 776(Fla. 1943) Watson v. State, 200 So. 2d 270 (Fla. 2d DCA 1967).

Relevant evidence is evidence which tends to prove or disprove a material fact. Curry v. State, 839 So. 2d 877 (Fla.3rd DCA2003) The State argued that Mr. Happ abducted the victim from the Cumberland Foods Store at 2:45 A.M. on May 24, 1986. Mr. Quinones testified that he physically saw William Happ at his home between 10:30 PM and 11:00 PM .on the night of Friday, May 23, 1986 and Happ retired there for the evening. He testified that he was awake most of the night and did not hear anyone leave the residence. Most importantly he testified that Mr. Happ was still sleeping on the living room floor at 5:45 A.M. next to his stepson when he came out of his bedroom on the morning of Saturday, May 24, 1986. There is no dispute in the record that William Happ was traveling on foot without benefit of any vehicle on May 23, 1986. Mr. Quinones testified that he actually saw Mr. Happ at 5:45 A.M. still asleep on his living room floor on Saturday, May 24, 1986. Based upon Mr. Quinones' testimony a reasonable conclusion could be reached that William Happ remained at the Quinones home throughout the night from 11:00 PM on Friday, May 23, 1986 through 5:45 A.M. on the morning of Saturday, May 24th. The victim was alive at 12:26 A.M. on the morning of May 24, 1986 as telephone records of her friend reflected her call for directions. The state relied heavily on the testimony of Barbara Messer to place the time of the victim's abduction by a white male at 2:45 A.M. on the morning of Saturday, May 24, 1986. However, her testimony is somewhat inconsistent with the

State's theorized version of how the victim was abducted by her killer.

Ms. Messer described a view of the driver's side and rear of a vehicle at the Cumberland Foods Store. She testified that the male she saw was on the passengers side of the car, bent down and may have thrown something into the car, walked to the rear of the car and pushed down on the trunk. She testified that he then got into the passenger's side and "just as the door was closing the car pulled out". Furthermore, according to her testimony the passenger did not have an opportunity to slide across to drive so the original driver remained behind the wheel. She did not testify and no witness testified to witnessing the driver's side window being broken with a bare fist. She did not hear any altercation and was unable to identify either the victim or Mr. Happ as the people she saw. The record does not contain any testimony from a witness seeing the victim or Mr. Happ arguing or in the presence of each other.(ROA. p.-2252-2266). Clearly, in the absence of eye witness testimony that Mr. Happ was ever seen with the victim, and without any physical evidence linking Mr. Happ to the actual crime, Mr. Quinones testimony is relevant to proving Happ's whereabouts at the time of the victim's abduction and murder and to his defense of innocence.

An appellate court's review of a trial court's order denying an ineffective assistance claim requires consideration of the entire record that was before the trial court. A plenary review of all of the facts and evidence in the record is essential to an

independent review of the mixed questions of fact and law on the issues of whether counsel rendered ineffective assistance in his or her representation and whether such conduct undermines our confidence in the outcome of the proceeding either as to the guilt phase or penalty phase. Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

A review of the record in this case will reveal that there were no witnesses to identify Mr. Happ in the abduction of this victim. No physical evidence was found to connect William Happ to this random victim, or to the area where the body was discovered, or to the interior of her vehicle. The State relied upon prints found on the outside of her abandoned vehicle found two days following her disappearance, the non-specific testimony of a jailhouse informant and a shoe print claimed to be similar to Mr. Happ's tennis shoes to secure a conviction. Clearly alibi testimony in Mr. Happ's behalf could have affected the outcome and counsel's failure to adequately present it undermines the confidence of the verdict.

ARGUMENT II

MR. HAPP'S COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN THE GUILT PHASE OF THE TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE TRIAL COURT ERRED IN HOLDING THAT COUNSEL'S FAILURE TO INVESTIGATE AN UNKNOWN NEGROID HAIR SAMPLE AND ARGUE ITS' EXCULPATORY VALUE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Investigator Jerry Thompson testified that he was present during the autopsy of the victim and that he observed a black hair removed from underneath the sweat pants that were tightly tied around her neck. He testified that the hair was collected by investigator George Simpson and placed through the chain of evidence process for expert analysis. (R. - p. 762-763) Investigator George Simpson testified that a black hair was found underneath the stretch pants that were tied twice, very tightly around the victim's neck. (R. - p. 620) He confirmed the location of the hair as being under the pants near the check area. (R. - p. 773)

Ms. Mary Hensley, an FDLE expert, testified that the hair removed from the face and located under the pants was characteristic of an African American pubic hair. (R. - p. 784) Dr. William Schutz , the medical examiner that performed the autopsy, testified at trial that the pants were tightly wound around the victim's neck and

removed before any type of wiping of the body was done for preparation. (R. -546)

He testified that evidentiary samples from the body like pubic hair combings, pulls of scalp hair, loose hair or fibers outside the body were collected to get a known hair sample of an assailant that might be on the body. (R. 547-548). In its order, the court quoted trial counsel, Mr. Nacke, as testifying “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 ”. (EH- p. 564, L. 2-6) However, counsel’s assertion is not supported by the trial record. A review of the Closing arguments offered by Co-Counsel, Mr. Pfister, reveals that he merely argued a lack of evidence linking Mr. Happ to the crime. He never mentioned the African American pubic hair found on the victim as physical evidence of an alternate theory that the victim had actually been killed by an African American assailant. (R.- 931-960) It is significant that the hair involved was a pubic hair and the victim had been raped. The State offered theories that the pubic hair had gotten on the victim’s sweat pants at a public restroom or that it was transferred via use of a used sponge by an assistant at the medical examiner’s office. (EH. - p. 564, L. 15)

Although counsel acknowledged that the negroid hair had evidentiary significance and could have been microscopically compared against the medical examiner assistant’s hair, no comparison was done or requested by defense. Mr. Nacke testified that he

was unsure if Co-Counsel Pfister had argued anything about it [the pubic hair] in his closing.(EH. - 971,972) A review of the closing arguments reveals that he did not. Counsel's failure to easily rule out the medical examiner's assistant as the source of the pubic hair via a hair comparison allowed the State to offer an un rebutted theory that the hair sample was transferred onto the body. Therefore, counsel's failure to conduct such a comparison was unreasonable. Furthermore, counsel's failure to alert the jury via closing arguments to the presence of this pubic hair; implicating a perpetrator of another race and thereby excluding Mr. Happ, was also unreasonable. Especially in light of the testimony provided by that State's medical examiner Dr. Schutz that the pants were tightly wound around the victim's neck and removed before any type of wiping of the body was done for preparation. (R. -546) Counsel's failure to challenge that State's theories regarding the source of the pubic hair in closing arguments minimized the importance of this critical piece of evidence. The jury was left with the Prosecutor's Closing statements stating:

“Blame it on somebody. You know, how far will they go to try to blame it on somebody? They bring in a laboratory analyst to say that a negroid pubic hair was found on the clothing. They go that far. Blame it on anybody.” (R. - 968) You know, if they can get you down that one dead end street, that's where they want you to go. Down a dead end street to anybody but him. That's where they want you to be. Don't go down that dead end street either. The stupid defendant dead end street.”
(R. 968)

In Hoffman v. State, 800 So. 2d 174 (Fla. 2001), the issue of whether or not Hoffman was in fact at the crime scene was an important issue for the jury to resolve, as it is in this case. This Court stated that “any evidence tending to either prove or disprove this fact would be highly probative. Hair evidence found in the victim’s clutched hand could tend to prove recent contact between the victim and a person present [at the crime scene] at the time of her death. With the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have strenuously argued that the victim was clutching the hair of her assailant, but that assailant was not Hoffman”. Id. at 180. In Hoffman the analysis not only excluded the defendant but the victim as the source of the hair. Id. at 180. The Court held that the evidence in Hoffman placed the case in a different light as to undermine the confidence of the verdict. Id. at 179. Similarly, counsel had a negroid hair as evidence found between the victim and the tightly wound ligature at her neck. Mr. Happ and the victim were both Caucasians, therefore, counsel should have made a strenuous argument to the jury that the hair belonged to the actual perpetrator but a review of closing arguments reveals that he did not. (ROA. - p. 2580) The State’s evidence against Mr. Happ is circumstantial, and the negroid hair evidence was evidence consistent with a reasonable hypothesis of innocence. Counsel’s failure in arguing the significance of the negroid

hair evidence in this case falls outside the range of professional acceptable performance and undermines the fairness and confidence of the verdict requiring reversal. Owen v. State, 432 So. 2d 579 (Fla. 2d DCA 1983).

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING WILLIAM HAPP'S CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THE TRIAL COURT ERRED IN HOLDING THAT COUNSEL'S FAILURE TO EFFECTIVELY INVESTIGATE AND PRESENT MITIGATION REGARDING HAPP'S DRUG ABUSE HISTORY WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Dr. Alexander Morton, testified at the evidentiary hearing in behalf of the Defendant, William Happ. Dr. Morton has dual appointments in the College of Pharmacy and the College of Medicine and works in the Department of Psychiatry and Behavioral Sciences at the Medical University of South Carolina in Charleston. (EH. - p. 426). In addition to holding a license to practice pharmacy in South Carolina, he testified to be uniquely qualified as board certified as a Psychiatric Pharmacy Practitioner in the United States. (EH. - p. 427) In explaining his area of expertise, Dr. Morton testified that he practices primarily in the area of clinical psychopharmacology

which is the applied application of understanding how medicines affect the brain as far as thinking behavior and feelings. (EH. - p. 429) In addition to teaching pharmacy, medical and medical residents, Dr. Morton testified that he supervises third and fourth year psychiatric residents. (EH. - p. 431)

Dr. Morton met with William Happ and reviewed his past medical history, medications and use patterns. Dr. Morton determined that Mr. Happ has a substance abuse history involving numerous substances, i.e. alcohol, cocaine, marijuana, nicotine, methamphetamines, phencyclidine (PCP), heroin, LSD and sedative hypnotic drugs. (EH. - p. 442) Dr. Morton testified that records revealed Mr. Happ had been arrested at age eleven for gross intoxication and that he had suffered from alcohol induced blackouts. (EH. - p. 443) Dr. Morton testified that Mr. Happ's particular drug of choice was phencyclidine (PCP) a substance that is very unpredictable in humans and can cause hallucinations even days after use. (EH. - p. 447) Additionally, Dr. Morton testified that Mr. Happ abused LSD, a drug that generally alters perception and can cause a negative flashback any time after use. (EH. - p. 449) He testified that violence is associated with cocaine both at use and withdrawal stage. (EH. - p. 452) Dr. Morton opined that William Happ met the criteria for dependency to cocaine, alcohol, phencyclidine and marijuana dependent syndrome, as well as stimulant abuse and due to the numerous substances would also meet the criteria as a poli-substance

abuser. (EH. - p. 454,455) Dr. Morton testified that he looked at contributing factors, and by reviewing Mr. Happ's family history he concluded that there were genetic factors that would lend Mr. Happ to be one at high risk for addiction and a for development of a substance dependency disorder. (EH. - p. 455) In describing his role, Dr. Morton testified that he has provided similar information in death penalty cases in a team setting where he has worked alongside a psychiatrist evaluating from a psychiatric disorder point a view, a social work, psychologist, neuro-psychologist and neurologist. (EH. - p. 456-457) There is evidence in the trial record to support Mr. Happ's reported history of drug abuse. Specifically, Mr. Happ's sister, Teresa Goadin, testified that she became aware that he was introduced to drug use by an older sister and that he abusing illegal drugs as a young teenager. She described the drugs he used as marijuana, alcohol abuse and that then escalating to PCP - Phencyclidine. (R. - 1087-1095).

Although Mr. Nacke is an experienced trial counsel today, at the time Mr. Happ was tried for murder this was his first death penalty case. (EH. - p. 532). In addition, counsel testified that it might even have been Mr. Pfister's (Lead Counsel) first death penalty case as a defense attorney. (EH. - p.532). There was no testimony or evidence to support the fact that a full investigation of Mr. Happ's drug usage was undertaken for mitigation purposes, discussed or dismissed by trial counsel. A

history of drug and alcohol abuse and addiction is valid non-statutory mitigation and the defendant does not have to be under the influence of the drugs or alcohol at the time of the murder for this mitigating circumstances to be weighed. Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998). In Lucas v. State, 568 So. 2d 18 (Fla. 1990), the court stated “the defense must share the burden and identify for the court the specific non-statutory mitigating circumstances it is attempting to establish.” Id. At 24. Although trial counsel was aware of Mr. Happ’s history of substance abuse from information received from family, counsel failed to provide expert testimony to the court or even request that the court take note of the testimony detailing a long history of substance abuse. Therefore, no drug or alcohol abuse at all was considered as mitigating circumstances. At sentencing, Mr. Happ did not have a significant criminal history and death was imposed based upon three aggravators and three mitigators. There can be no question that additional mitigation could have meant the difference between life and death. Therefore, Counsel’s failure to present such mitigation or at the very least request that testimony in the record corroborating a history of drug and alcohol abuse be considered non-statutory mitigation in behalf of Mr. Happ was ineffective assistance of counsel. Ragsdale v. Florida, 720 So. 2d 203 (Fla. 1998) Mr. Happ was prejudiced by counsel’s failure to present available mitigation evidence for the jury to consider in his behalf. Hildwin v. Dugger, 654 So. 2d (Fla. 1995).

ARGUMENT IV

MR. HAPP WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. The trial court erred in Denying Defendant's post-conviction motion to Release a Pair Defendant, William Happ's shoes for testing by experts.

On September 13, 2000, this Court issued an order remanding Mr. Happ's case to the trial court on ineffective assistance of counsel claims. Claim (3) of the remand was based upon "counsel's alleged failure to object or otherwise challenge the State's case".

The case against the Defendant, William Happ , was heavily based upon circumstantial evidence. At trial, the State presented testimony from an expert, Ernest Hamm, to establish that the shoe print made adjacent to the victim's vehicle was made by a shoe similar to William . Detective Strickland's testimony concerning the shoe print was offered for the purpose of establishing that the shoe print was placed alongside the vehicle as the perpetrator of the crime exited the vehicle. Counsel for Mr. Happ was deficient in failing to object to Detective Strickland's testimony and in failing to hire a shoe expert to challenge the state's theories of similarities.

Post-conviction defense counsel hired an expert, Dale Nute, who discovered immediately upon a cursory examination of the evidence that the State had used the wrong shoe print to support an affidavit for a search of Mr. Happ's residence . The wrong shoe print was also used in the trial exhibit that was used to by the State to support the theory that Mr. Happ's shoes could have made the print in the process of exiting the victim's vehicle after committing the murder. The defense discovered the error and brought it to the Prosecutor's attention. The State filed a motion with the court on March 11, 1997, State's Notice of Discovery of Inaccurate Trial Testimony and Request for Hearing. (ROA.- p. 1124)

On August 18, 1997, a hearing occurred before the Honorable Judge Jerry T. Lockett on the Notice relating to the shoe print evidence. The purpose of the hearing, however, was not for the purpose of challenging the evidence against Mr. Happ but to substitute the inaccurate shoe print photos used in the trial exhibit with the accurate ones and to simply correct the court record. The court asked defense expert Dale Nute if he had compared known standards [pony tennis shoes] to the photographs of the shoe print adjacent to the victim's car to determine whether or not his shoes had made the print. Dale Nute responded "no" he had not. When asked by the State if the shoe print could have been made by a Pony tennis shoe, he responded that he could not make that comparison so I can't give you an opinion. (ROA. - pp.

1195,1196) At the conclusion of this hearing shoe print photos were substituted in evidence.

On October 24, 2002, the Defendant filed a Motion to Produce and Release the Shoes for Testing by experts and requested release of evidence (Mr. Happ's tennis shoes). The motion was filed pursuant to the Supreme Court's remand order on the basis of (3) "counsel's alleged failure to object or otherwise challenge the State's case." It was not related to the proceedings of the August 1997 hearing. (ROA. - p. 1537)

A Motion Hearing was set before the Honorable Richard Howard on November 8, 2003. At that hearing, Defendant's counsel informed the court that the request to release the shoes for testing was not related to the issues raised in the August 1997 hearing. Those issues being: 1) Inaccurate Evidence- substitution of shoe print photo or 2) A possible Brady violation based upon the Prosecutor's failure to timely inform the Defendant when the discrepancy in the evidence was first noted. The August , 1997, postconviction hearing related specifically to the shoe print exhibit that was used at trial and was initiated by the State's motion to substitute evidence and maintain the shoe print theories propounded by the State at trial. Due to the limited purpose of the hearing, there was no independent examination, testing of the shoes or comparison of the shoe print evidence used at trial to casts of Mr. Happ's shoe

prints. This hearing was for the narrow purpose of substituting evidence and correcting the record.

At the hearing to release evidence, postconviction counsel advised the court that important evidence in the case against Mr. Happ involved a pair of sneakers that had been retrieved from him in California and informed that court that an expert had been retained to testify about the shoe print found adjacent to the victim's car found in Crystal River. The name of the expert was provided as Mr. Nick Patracco, a retired New York City Police Officer. The court was advised that Mr. Patracco had looked at the evidence and, based upon his expertise, requested that the shoes be released to him for further testing. The testing involved would focus on the print and post-conviction counsel stated that Mr. Patracco would be available for deposition by the State and provide testimony at the evidentiary hearing.

The issue is whether or not defense counsel Pfister was ineffective in representing William Happ by failing to hire a shoe print expert for the defense to challenge the State's theory that the print adjacent to the victim's vehicle was made by an exiting murderer, and sufficiently similar to tennis shoe print to establish his guilt. Counsel informed that Mr. Patracco would be was expected to testify at evidentiary hearing that it was "physically impossible" for the shoe print alongside the car to be Mr. Happ's due to the size difference.

In considering the motion, postconviction counsel informed the court that Judge Lockett had already granted the Defendant an Evidentiary hearing on Claim 4 - paragraph 65 that encompassed a challenge to the State's shoe print evidence. Claim 65 reads as follows:

“By failing to object [to Sgt. Strickland's testimony regarding the footprint]trial counsel [Mr. Pfister] allowed the state to ask questions and receive answers upon total speculation [shoe print testimony] by a witness [Sgt. Strickland] who was not qualified as an expert. That state was attempting to put Mr. Happ INSIDE the vehicle. This was the only witness [Sgt. Strickland] the state had which, by speculation, attempted to do just that. There were no fingerprints, fibers or witnesses that placed Mr. Happ inside the vehicle. The jury was permitted to consider the testimony of Sgt. Strickland in placing Mr. Happ inside the vehicle”.

In order to establish that trial counsel was ineffective in failing to hire a shoe print expert, and properly challenge the State's case via the testimony of Sgt. Strickland, counsel requested the release of the shoes for testing. Although a hearing was held pertaining to the shoe print evidence itself, the court has never decided if counsel was deficient in failing to hire a defense shoe print expert. The State was in error when it argued that the shoe print evidence was thoroughly litigated when the record clearly refutes this assertion. At the hearing of August 18, 1997 the defendant's

expert testified that he had not done comparisons, and no defense expert testimony was offered at trial challenging the State's theories.

In addition, in the 2nd Amended 3.850 filed on November 8, 2000 Claim 4, paragraph 71, the defendant challenged the conclusions propounded by the State at trial relating to the shoe print evidence and asserted that those conclusions would be challenged via testimony of a crime scene expert at evidentiary hearing. Judge Lockett granted a hearing on this paragraph in his order dated April 16, 2001, therefore, it was error for Judge Howard to deny defendant's request to release evidence for testing by the expert. (ROA. - p. 1374, 1375)

The court denied the Defendant's Motion To Produce and Release Evidence for Testing by Order dated November 15, 2002. In denying the Motion the court stated that "the defense ha[d] propounded no new theories under which the court felt compelled to release the evidence for testing." The Defendant filed a Motion To Reconsider on February 13, 2003. Counsel represented to the court that expert Patracco would testify that comparing Mr. Happ's shoe print to the shoe print in evidence would reveal that it was physically impossible for that print to belong to William Happ due to an obvious size difference. Certainly, this is new information that should have resulted in the evidence being released for testing. Mr. Patracco's expected testimony would have established that the shoe print was, in fact, extremely dissimilar

to any that William Happ could have left behind. However, the court denied the Motion for Reconsideration during hearing on March 21, 2003.

The trial court erred in failing to release tennis shoe for testing by defense expert and in denying defendant the ability to put forth any testimony relating to the shoe print. The court had a sufficient basis for granting defendant's request based upon:

- 1) The Supreme Court's Order of September 13, 2000 remanding for counsel's failure to object or otherwise challenge the State's Case .
- 2) Judge Lockett's specific grant of an Evidentiary Hearing on April 16, 2001 in the First Order Setting Evidentiary Hearing On Certain Paragraphs Of Defendant's Post-Conviction Claims - **Claim 4** - paragraphs 65 and 71 of the 2nd Amended Motion.
- 3) **Defendant's Post-Conviction - Claim 4** - paragraph 133 of the 2nd Amended Motion.
- 4) Post -conviction counsel's representations to the court that expert testimony provided by Mr. Patracco would be offered that it was physically impossible for the shoe print made alongside the victim's care to have been William .

Mr. Happ's assertion that trial counsel was ineffective in the guilt phase of the trial in failing to hire a shoe print expert to testify that the tennis shoe print could not have come from William Happ due to the difference in size is a valid claim. The court denied Defendant's Motion to Release the shoes for testing first agreeing with that

State that the shoe issue had been “thoroughly litigated” and upon motion for reconsideration stating that “no new theories” had been propounded by defendant to compel release of the shoes for testing or comparison. In effect, the court erroneously denied Mr. Happ the ability to fully present evidence in connection with a previously granted claim in his 2nd Amended 3.850 Motion without attaching any documentation from the record to conclusively refute his entitlement. Where there has been no evidentiary hearing, the allegations in support of the motion for post-conviction relief must be taken as true unless they are conclusively rebutted by the record. Harich v. State, 484 So. 2d 1239 (Fla. 1986); Montgomery v. State, 615 So. 2d 226, 228 (Fla. 5th DCA 1993).

B. The trial court erred in refusing to allow Defendant’s expert witness to testify or counsel to proffer evidence that trial counsel should have presented to challenge the shoeprint evidence offered by the State against William Happ at trial.

In Happ v Moore, 784 So. 2d 1097, (Fla. 2001) in correcting the factual scenario contained in Happ 596 So. 2d 991 (Fla. 1992) at 992, this Court stated as follows:

“The crime lab analyst who examined the shoe print found at the scene of the crime was unable to say with certainty that Happ’s

tennis shoe made the track impression of the shoe print. His opinion was simply that shoe could have made the impression. The reason that 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.”

The State’s crime scene analyst was never challenged at trial regarding his opinion. Counsel for the Defendant did not have an expert compare the shoe print to a print of Mr. Happ’s shoes to determine if they were the same size. Although other issues arose and were fully litigated regarding the particular print used in evidence, no direct challenge to the print itself was ever undertaken. Trial counsel was ineffective in failing to attack the State’s circumstantial case that relied heavily upon the shoe print.

Detective Strickland testified that this shoe print just outside the driver’s side door belonged to the perpetrator of the crime.

Mr. Ambrosino was asked the type of shoes that Mr. Happ was wearing when he last saw him and replied “sneakers”. At the evidentiary hearing postconviction Counsel advised the court that expert testimony would be presented regarding the shoe print and would establish that Mr. Happ’s shoe size is a size 11 ½ shoe and the shoe print used by the State is a size 13 shoe.

If trial counsel had consulted experts to review the shoe print evidence and make this determination, the State would not have been able to utilize this irrelevant evidence against Mr. Happ to prove that he had been inside of the victim’s vehicle. In fact, Mr.

Happ could have used this information to establish his innocence. The postconviction court denied counsel's request to call a shoe print expert or proffer such testimony.

In doing so the court agreed with the State that the shoe issue had been fully litigated.

In Order#1, dated April 16, 2001 the trial court granted defendant Claim - 4 (Issue #71) contained in Defendant's 3.850 motion an Evidentiary Hearing. The issue raised stated:

"Counsel was ineffective for failing to call a crime scene expert to testify that the shoe print does not lead to conclusion that it was placed by someone exiting the vehicle."

Therefore, the trial court was on notice that the Defendant was challenging the shoe print testimony and even granted hearing time for the Defendant to challenge the State's shoe print testimony. Additionally, Issue III. as remanded by this Court for determination is whether the Defendant's trial counsel was ineffective for failing to object or otherwise challenge the State's case.

Defendant's trial counsel did not hire any experts at trial and or object to the State witnesses' testimony regarding the shoe print. Detective Strickland testified that in his mind the shoe print was left by somebody getting out of the car for the purpose of establishing that the perpetrator wore a pony shoe like those of Mr. Happ. (R. - 570) The reality is that the State was able to take a size 13 shoe print and argue its'

similarity to the print that Mr. Happ's size 11 ½ would make without objection or challenge by defense counsel. At Mr. Happ's evidentiary hearing, Mr. Paul Kish a forensic expert testified that in his professional opinion several issues required expert examination and that a foot wear comparison expert was required. (EH. - p. 84, 86) No footwear experts or objections to the State's theories were raised. Trial counsel provided ineffective assistance in challenging this aspect of the State's case against Mr. Happ. Clearly, Judge Howard's failure to allow the Defendant's expert witness to testify at the evidentiary or proffer testimony to challenge the shoe print evidence against William Happ was error.

Post-conviction Counsel filed a Motion with the court to have the shoes released for testing so that evidence could be placed in the record challenging the State's theory regarding the shoe print evidence. Counsel requested approval to have Mr. Dale Nute, an expert who had done some preliminary work related to the shoe print evidence and Mr. Nicholas Patracco work on the case. Counsel represented to the court that it was expected that Mr. Patracco would be able to testify that the size of the shoe print used by the State as an exhibit and claimed to belong to the perpetrator of the crime could not have physically come from William Happ. If counsel for Mr. Happ had hired an expert to conduct even a cursory review of the shoe print evidence, the State's use of the entire exhibit could have been successfully challenged as irrelevant and unduly

prejudicial. Or at the very least, expert testimony could have been provided to raise reasonable doubt with the jury as to William Happ's guilt. While Mr. Happ's partial prints were lifted off the victim's abandoned vehicle in a public parking lot two days following her disappearance, there was no physical evidence to link Happ to the interior of the car. The shoe print evidence that the State argued was similar to Mr. Happ's shoes was the only evidence offered against him to place him inside the vehicle. Testimony that the shoe size did not match Mr. Happ was exculpatory based on the State's theory of how the crime was committed and could have affected the jury's decision in this circumstantial case.

The trial court erred in denying the Defendant's request to offer evidence disputing the State's assertion that the shoe print was similar to one that would have been left behind by Mr. Happ. The Defendant had raised issues relating to the shoe evidence within the Defendant's 2nd Amended 3.850 Motion in paragraphs 65 and 71 specifically challenging Detective Strickland's testimony relating to the shoe print evidence, and generally in paragraph 133 addressing trial counsel's failure in to challenge the State's case as it related to Mr. Happ's nexus to the crime.

To be entitled to an evidentiary hearing in connection with a claim of ineffective assistance of trial counsel, the defendant must allege specific facts which are not

conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant. Roberts v. State, 568 So. 2d 1255 (Fla. 1990). Mr. Happ argued that trial counsel was deficient in failing to hire a crime scene expert and that a crime scene expert would dispute the trial testimony given at trial relating to the shoe print.

To support summary denial of a Rule 3.850 claim without hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Diaz v. Dugger, 719 So. 2d 865, 867 (Fla. 1998), citing Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So. 2d 616, 628 (Fla. 2000) and Asay v. State, 769 So. 2d 974, 989 (Fla. 2000).

In denying the Defendant's Motion to Produce and Release Evidence for Testing the court found that the impressions found adjacent or in the vicinity of the victim's car had been "extensively tested" and that the defendant had propounded "no new theories" compelling the court to release the evidence for additional testing or comparison". The court stated it had reviewed the hearing transcript of August 18, 1997 and the Florida Supreme Court's decision Happ v. State, 596 So. 2d 991 (Fla. 1992). The court, however, failed to review the transcript of the November 8, 2003 Status Conference where postconviction counsel initially argued the Motion for the

Release of Evidence for testing. At that hearing, the court was informed that expert Patraco would testify at the evidentiary hearing that the shoe prints could never have been made by William Happ due to the size difference.

The court did not attach record excerpts to support the conclusion that the shoes were extensively tested or why it failed to consider newly discovered expert testimony from Nick Patraco successfully challenging critical circumstantial evidence linking Mr. Happ to the offense. The court did not set forth a clear rationale for explaining why the motion and record conclusively refute Mr. Happ's claim's relating to counsel's ineffectiveness in failing to challenge the shoe print evidence. The court merely adopted the State's rationale that the shoe print evidence had been extensively litigated. There is no basis or objective rationale as to why the court disagreed with or rejected the substance claims that had arguably been granted evidentiary hearing by prior order. No specific parts of the record were attached to refute this claim.

The court dismissed Mr. Happ's claim that counsel was ineffective infailing to challenge the State's case via the shoe print evidence by denying his motion to release the shoes for testing and denying him the ability to present or proffer expert testimony on this issue at the evidentiary hearing. Without an evidentiary hearing, Mr. Happ was unable to present Mr. Patraco's testimony that he could not have physically left the shoe print adjacent to the victim's vehicle, or make inquiry of trial counsel regarding

the reasonableness of his decisions not to hire shoe print expert as would be required by Valle v. State, 778 So. 2d 960, 965 (Fla. 2001) and Shere v. State, 742 So. 2d 215, 220 (Fla. 1999).

Without an evidentiary hearing, Mr. Happ was unable to present expert testimony showing the deficiency and prejudice from counsel's actions.

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING RELIEF ON THE CLAIM OF THE RULE 3.850 MOTION REGARDING TRIAL COUNSEL'S INEFFECTIVENESS IN FAILING TO CHALLENGE THE STATE'S CASE BY EMPLOYING AND USING EXPERT WITNESSES FOR THE DEFENSE.

- A. Defense counsel was ineffective for failing to hire a forensic expert to refute testimony offered by the State's experts to establish a circumstantial case against Mr. Happ.**

Forensic Crime Expert

The State's theory of the case rested upon the murderer accidentally coming across the victim while she sat behind the wheel of her vehicle, and gaining control

of her vehicle by punching his fist through her closed driver's side window. (ROA. - pp. 2369, 2370,2372)

Mr. Paul Kish, a forensic consultant from Corning, New York and criminal justice adjunct instructor at Omar College testified at the evidentiary hearing that he has been doing this type of work since 1993. (EH. - p. 51). He stated that he possesses an Associate of Applied Science Degree in Criminal Justice, a Bachelor's of Science Degree in Criminal Justice, a Master's of Science Degree in Education. (EH. - p. 51) In addition, he has college credits in human anatomy, physiology, physics, and mathematics. (EH. - p. 51) Mr. Kish advised that he is on retainer for both public defender and prosecutor's office and estimates that 70% of his forensic consulting work is defense oriented while 30% is for the prosecution. (EH.- 52) He has been previously qualified as an expert to testify in courts in Florida, New York, Pennsylvania, Indiana, California, Delaware and Minnesota. (EH. - p. 52,53)

Mr. Kish testified that his work involves visiting the actual crime scene and assist in reconstructing the event. (EH. - p. 53) His work includes reviewing the forensic evidence collected, documentation, preservation of crime scene, and analysis of physical evidence after collection by law enforcement. (EH. - p. 54). Following his review, Mr. Kish testified that he offers consulting advice regarding potential experts needed in addition to his services to deal with case specific issues. (EH. - p. 54) The court found Mr. Kish qualified as an expert witness stating that his "life professional experience will assist me as the trier of fact in making the correct determination." (EH.

- p. 59)

Mr. Kish conducted an experiment that was videotaped for presentation to the court and introduced at the evidentiary hearing as Defendant's Exhibit No. 3-B. In conducting the experiment, Mr. Kish testified that he went to a salvage yard and obtained a print out of vehicles with the same size, shape and dimension of the victim's 1983 Olds Firenza.(EH. - p. 65) Mr. Kish testified that other models of vehicles use the same type of glass that was in victim's car. While the exact model was unavailable, the comparable vehicle according to the manufacturer's printed data that Mr. Kish he used was a 1985 Chevrolet Cavalier. According the published literature Mr. Kish testified that the overall window dimensions of the 1985 Chevrolet Cavelier were interchangeable with the victim's 1983 GM Olds Firenza. The State stipulated that both are General Motors products. (EH. - p. 66) Mr. Kish proceeded to conduct the experiment on a 1985 Chevrolet Cavalier of similar size and dimension to the victim's car with interchangeable window dimensions. (EH. - p. 65)

The videotape shows a yard attendant breaking the drivers side window with a hammer as he faces the vehicle. (EH. - p. 72) The first time that the attendant struck the window with the hammer it did not break. (EH. - p. 72) After the glass is broken, the glass from the shattered window is not inside the vehicle but outside of it. (EH. - p. 73) Mr. Kish explained that the preponderance of the glass is found outside the car

with very little glass falling onto the interior driver's seat when the attendant faced the window during his attempt to break it. (EH. - p. 74) The crime scene photographs in this case reveal a significant amount of glass located inside the vehicle in the driver's seat. Therefore, Mr. Kish's testimony concerning the location of the shattered glass following the experiment and the observable difficulty in breaking the tempered glass window of an automobile barehanded conflicts with the theory offered by the State through its' witnesses. His opinion challenged the State's theory based upon his experience as a crime scene expert and posed a credibility evaluation for the jury to make.

The videotape experiment could have offered a demonstrative aid to the jury to challenge the State's assertion at trial that the automobile window was easily broken with one blow from a bare fist. The videotape offered relevant evidence to illustrate the difficulty of breaking a car window with one blow and that the distribution of glass should be found outside the vehicle rather than inside the vehicle.(EH. - p. 84) The experiment was conducted upon window glass of a vehicle identified by manufacturer's print out as containing the same size, shape and dimension as the victim's vehicle. Therefore, there is substantial similarity between the victim's vehicle and the test vehicle to establish the relevancy of the experiment. It is not necessary for the conditions of the experiment to be exactly identical to the incident about which the

experiment is conducted. Ford Motor Co. v. Cochran, 205 So. 2d 551, 553 (Fla. 2d DCA) 1967, cert den. 211 So. 2d 212 (Fla. 1968). Admission of such evidence does not depend on perfect identity between the actual and experimental conditions. Ordinarily, dissimilarities affect the weight of the evidence and not its admissibility. Randall v. Warnaco, Inc., 677 F.2d 1226, 1233-34 (8th Cir. 1982), Champeau v. Fruehauf Corp., 814 F.2d 1271 (8th Cir. 1987). The videotape demonstration illustrated the resiliency of an automobile window as opposed to the State's theory that the perpetrator punched the window in with one quick blow to overcome the victim.

The trial court erred in holding that this evidence is either irrelevant or inadmissible at trial, citing Fyre v. United States, 293 F.1013 (D.C. Cir. 1923). Frye stands for the rule that expert opinion based upon a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. This Court's standard of review when considering a trial court's ruling on a Frye issue is de novo, rather than abuse of discretion. Murray v. State, 838 So. 2d 1073,1077(Fla. 2002); Brim v. State, 695, So. 2d 268 (Fla. 1997). "Any doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction." Ramirez v. State, 810 So. 2d 836 (Fla. 2001)

Mr. Kish was accepted as a qualified crime scene consultant. (EH. - p. 58)

At the outset, it is important to note that Mr. Kish's testimony did not involve any dispute over the validity of an experimental or novel scientific technique. The experiment involved demonstrating the force required to break through a car window and recording the location of the broken glass. Establishing that the perpetrator broke the auto window glass of the victim's car to carjack her with his bare hands was critical to the State's theory of how this crime was committed and essential in specifically linking William Happ to this offense.

Forensic crime consulting was a specialty area in existence at the time of Happ's trial, yet counsel did not employ such an expert. (EH. - p. 90) It is not required that the expert testifying for the Defendant be the same individual that would have testified in his behalf at trial. Horsely v. Alabama, 45 F.3d. 1486, 1488 (11th Cir. 1995). Based upon his knowledge and experience as a forensic consultant, Mr. Kish testified that there were several issues that should have been examined by forensic experts in behalf of Mr. Happ. (EH. - p. 84) To prove that Happ was prejudiced by trial counsel's failure to investigate and produce a certain kind of expert witness, he is required to demonstrate a reasonable likelihood that an ordinary competent attorney conducting an investigation would have found an expert similar to one that was eventually produced in behalf of Mr. Happ at the evidentiary hearing. (Id. at 1488) Counsel's failure to hire an expert with Kish's expertise to challenge the State's theories and

demonstrate the improbability of Happ being able to break the window with his bare fist to the trial court was ineffective assistance by Happ's then inexperienced trial counsel.

- B. Defense counsel was ineffective for failing to hire an orthopedic surgeon as an expert to refute testimony offered by the State's experts to establish a circumstantial case against Mr. Happ and by failing to call a witness who could testify to facts inconsistent with the state's theory of the crime.**

Orthopedic Surgeon

It is not required that the expert testifying for the Defendant at postconviction be the same individual that would have testified in his behalf at trial. Horsely v. Alabama, 45 F.3d. 1486, 1488 (11th Cir. 1995). To prove that Mr. Happ was prejudiced by trial counsel's failure to investigate and produce a certain kind of expert witness, he is required to demonstrate a reasonable likelihood that an ordinary competent attorney conducting an investigation would have found an expert similar to one that was eventually produced in behalf of Mr. Happ at the evidentiary hearing. (Id. at 1488). Orthopedic Surgery is a specialty medical practice area that was established in Florida at the time Mr. Happ was tried for murder, therefore, similar experts were available for defense counsel to have consulted. No orthopedic physician was consulted to provide testimony in Mr. Happ's case.

The State theorized that William Happ broke through the driver's side tempered

glass window of the victim's car with a bare clenched fist. At the evidentiary hearing Dr. Peter Lopez , a Board Certified Orthopedic Surgeon with a sub-specialty in hand surgery testified for Mr. Happ. (EH. - p. 166) Dr. Lopez was accepted by the court as an expert and testified that he sees punch type injuries of this nature in high frequency. (EH. - p. 170) Significantly, in response to the scenario proposed by the State at trial involving the breaking of the victim's window, Dr. Lopez testified as follows:

“With regard to someone punching a tempered glass on a car window, first I would think it would nearly be impossible with someone with bare hands to break through that. It is difficult to align your hand in such a fashion to get a small concentrated force such as you could get with a hammer to break the glass. The hand is built in a different area. The surface area is wider and its hard to get a concentrated force to break a window”. (EH. - p. 169)

Dr. Lopez described the state's scenario where someone is able to punch a hole bare fisted through a car window and shatter the glass as an “unlikely scenario”. (EH. - p. 170) Should such an event be possible, Dr. Lopez testified that deeper lacerations and contusions would be present and possibly even a fractured hand bone. (EH. - p. 170)

John Davis, Employer

At Mr. Happ's evidentiary hearing, in lieu of live testimony the court admitted

the deposition of his deceased employer Mr. Davis, dated September 29, 1987. (EH. - p. 15) Mr. Happ was employed by Mr. Davis as a wallpaper hanger. To perform his work Mr. Happ had to maintain manual dexterity in both hands. Mr. Happ reported on the work day following the murder, and Mr. Davis' swore that he observed no unusual scars or marks or cuts about his person or injuries to his hands. When he resigned, Mr. Happ provided a forwarding address and contact telephone number. (EH . - p. 17 - See: Defense's Evidentiary Exhibit #1 - Deposition of John Davis, September 29, 1987) counsel did not employ an orthopedic surgeon to review the State's proposed facts or to examine Mr. Happ. An orthopedic surgeon would have testified like Dr. Lopez concerning the improbability of the State's version of events. Counsel should have known that such testimony was especially significant in light of the fact that a deposition of Mr. Happ's employer had been conducted and counsel was aware that he had demonstrated ability to continue performing his duties as a wallpaper hanger immediately following the victim's murder.

There were no witnesses to identify Mr. Happ or physical evidence to establish that he has ever come in contact with the victim in this case. Therefore, the State's version of the facts are based entirely on supposition. Defense counsel failed to challenge the State's theory by failing to provide expert testimony from an Orthopedic Physician to established that the State's scenario was unlikely and if accomplished at

all was susceptible significant injuries. Such testimony would have aided the jury in distinguishing between the type of injuries that would have been expected to occur under the State's theory as opposed to the slight swelling and maybe cut described by Mr. Ambrosino to Mr. Happ's right hand. (ROA- pp. 651- 652) The injuries to Mr. Happ were so insignificant that they never interrupted his ability to hang wall paper and went undetected by Mr. Happ's employer, John Davis.

At Mr. Happ's evidentiary hearing Dr. Lopez, Orthopedic expert, testified with regard to someone punching a tempered glass on a car window, first it would nearly be impossible with someone with bare hands to break through that. It is difficult to align your hand in such a fashion to get a small concentrated force such as you could get with a hammer to break the glass. The hand is built in a different area. The surface is wider and it's hard to get a concentrated force to break a window. (EH. - p. 170)

In response to inquiry about a scenario where an individual punches through a tempered glass window Dr. Lopez, Orthopedic expert responded that in the "unlikely scenario that someone was able to then punch a hole through a car window, such as to shatter it, the tempered glass" ... he [I] would expect to see injuries ranging from superficial lacerations, possibly significant contusion to the joint, and possibly a fractured metacarpal.(EH. - p. 170) Counsel's failure to easily challenge the

probability of the State's scenario using expert testimony by an orthopedic doctor at the time of Mr. Happ's trial constituted ineffective assistance of counsel. If Mr. Happ's jury had heard testimony from an orthopedic expert discounting the probability of the facts proposed by the State at trial to establish Mr. Happ's initial encounter with the victim, it is reasonable that they would have concluded that reasonable doubt existed in the case and rendered a different verdict. This is especially so in view of the fact that Mr. Quinones provided alibi testimony and also testified that he had observed no injuries to Mr. Happ on the early morning of May 24th corroborating employer John Davis' deposition noting no observable injuries.

C. Defense counsel was ineffective for failing to hire a forensic pathologist to challenge the State's theorized series of events or vigorously cross examine the medical examiner, thereby boosting the jailhouse informant's credibility and allowing unestablished inflammatory facts to reach the jury during consideration of heinous, atrocious and cruel elements in aggravation.

In establishing their theory of the case as to how the victim was killed, the State argued in closing arguments that Richard Miller's testimony "is absolutely consistent with the truth of where he was and the truth of what happened to Angela Crowley, the medical, unrebutted truth of what happened to her." (ROA. - p. 2363) The prosecutor stated that Mr. Miller's version is exactly what was contained in Dr. Schutz's testimony establishing that the perpetrator "strangled her and threw her into

the barge”. (ROA. - p. 2363) The medical examiner, Dr. Schutz, testified at the evidentiary hearing that he could not state that Ms. Crowley’s body was ever below the high tide mark as contended by the State and also testified that the body had been moved. (EH. - 343, 351-352) Dr. Schutz testified that there was no medical evidence of the victim having been in the barge canal itself (EH. - p. 340) He testified that there were no observable indicators on the victim’s body to support a conclusion that the body had been in the water as described as rubbing from rocks or evidence of crab bites on body or physical manifestations like wet hair or wrinkled skin. (EH. - p. 341)

If the body had been floating in the water as theorized by the State, he stated that abrasions of the skin on the forehead and knees would have been noted as opposed to those noted on the small of the back and left calf. (EH. - p. 356) Dr. Schutz found nothing to suggest that the victim had been in the water. (EH. - p. 353)

Dr. Schutz testified that it was common practice in such cases for forensic pathologists to be hired by counsel to review his work as the medical examiner. (EH. - p. 341) There is no evidence that Mr. Happ’s counsel ever hired a forensic pathologist. Trial counsel did not challenge the State’s contention that the perpetrator had thrown the victim into the barge canal. At the evidentiary hearing, Dr. Schutz testified about the beating to her face and post mortem ant bites, and he stated that he didn’t find anything that would suggest that the victim was in the water at the time of

the crime. (EH. - p. 353) Yet, Richard Miller the jailhouse informant testified under oath during trial that Happ told him that after killing the victim he had dropped the her into the canal. (Vol. II - R. p. - 316) If counsel had hired a forensic pathologist to review the case he could have disputed the State's version of the facts through the testimony of such an expert or been prepared to efficiently cross examine Dr. Schutz to obtain the same testimony elicited from the medical examiner at evidentiary directly contradicting Mr. Miller's version of the facts.

Mr. Miller testified at trial that William Happ told him that while in the process of strangling the victim "she was letting gas off and shitting."(Vol. II - R. p. -316) In bolstering Mr. Miller's credibility in closing argument, the State asked the jury "how would this man (Richard Miller) know that choking somebody to death can give rise to them becoming incontinent and losing their bowels? That's exactly what he told you happened, and that's exactly what Dr. Schutz told you medically is very probable to have occurred". (R.- p. 916) The State then argued that if , in fact, the defecation occurred by the canal it would be absolutely consistent for it to have been washed away by the tide. (R.- p. 967) Unfortunately, such a scenario could only have been consistent with part of the story told by Miller and not the entire facts that he testified to under oath. If strangulation occurred by the canal waters edge at the foot of the embankment, and was washed away by the tide, as the State suggested in closing, it

is inconsistent with Mr. Miller's testimony that Happ confessed to strangling the victim first and then throwing her body into the canal. Furthermore, any assertions that the washing away of defecating substance occurred was disputed by the medical examiner himself who testified at evidentiary hearing that he could not conclude that this victim had ever been in the water. Counsel had the opportunity at trial to challenge the State's theory of the murder and to attack the credibility of Mr. Miller's testimony through thorough cross examination the forensic testimony provided by Dr. Schutz or a defense forensic expert. Counsel's failure in hiring an expert as a consultant to review the evidence and assist counsel in preparing for cross examination to challenge the State's version of the facts was ineffective assistance of counsel as evidenced by Dr. Schutz evidentiary hearing testimony.

As a result of counsel's deficient performance, the jury was left with the State's un rebutted presumption that the body had been deliberately thrown down an embankment into the barge canal waterway in accessing the facts to support a finding of heinous, atrocious and cruel. Consideration of the State's presumptions to establish (HAC) as an aggravator without forensic evidence establishing that the victim was ever floating in the water by the jury was improper. Defense counsel failed to engage experts to independently review the forensic evidence in order to prepare questions to medical examiner and thereby dispute the State's presumptions to ensure

that the jury apply this circumstances “only in torturous murders - - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.” Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Nothing done to a victim after his or her death or unconsciousness, including that which would otherwise qualify as heinous, atrocious or cruel can be used to support this circumstance. Herzog v. State, 439 So. 2d 1372 (Fla. 1983); Jackson v. State, 451 So. 2d 458 (Fla. 1984); Jones v. State, 569 So. 2d 1234 (Fla.1990); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998). Therefore, the jury finding of heinous, atrocious and cruel circumstances was based upon facts that were not proven and should never have been considered during deliberation.

CONCLUSION AND RELIEF SOUGHT

A breakdown in the adversarial system occurred in this case. Counsel failed to establish an alibi defense in behalf of the defendant, failed to ask the court to consider available non-statutory mitigation contained in the record, and hired no experts to challenge any aspect of the State's case that consisted primarily of circumstantial evidence.

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967). Mr. Happ's counsel did hold the prosecution to its burden of proof beyond a reasonable by zealous advocacy in challenging the State's case.

Based on the foregoing, the lower court improperly denied Rule 3.850 relief to William Happ. This Court should order that his conviction and sentence be vacated and remand the case for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **Initial Brief of Appellant** has been furnished by U.S. Mail, first class postage prepaid, to: Kenneth Nunnerly, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd.5th Floor, Daytona Beach, Fl. 32118-3951, Rock E. Hooker Assistant State Attorney, 19 N.W. Pine Avenue, Tavares, Florida 34475, Richard A. Howard, Circuit Court Judge, 110 N. Apopka Avenue, Inverness, Florida 34450-4231, and William Happ, DOC# 11727, Union Correctional Institution,7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of May, 2004.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY pursuant to Fla. R.App. P. 9.210 that the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font.

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