IN THE SUPREME COURT OF FLORIDA

CASE 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, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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A. Counsel failed to hire a shoe print expert to challenge the State's case that the shoe print alongside the victim's vehicle was similar to William Happ's.

1. Expert Nick Patraco hired by post-conviction counsel found that the print made by the alleged perpetrator was made by a size 13 shoe while the evidence at trial showed that the Defendant, William Happ wears an 11 ½ shoe.

2. Evidence of the discrepancy in shoe size is **newly discovered evidence** and exculpatory for Mr. Happ. The trial judge erroneously refused to allow the available expert to testify regarding the shoes or even allow counsel to proffer this testimony for the record. The trial court's exclusion of this testimony or proffer was error. (emphasis added)

The post conviction court utterly failed to properly examine all the facts and circumstances, therefore, this Court can give absolutely no discretion to facts the court failed to find, and should consider the issue de novo, with no discretion given to the court.

To be sustained, the court's findings must be supported by competent, substantial evidence in the record." Gonzalez v. State, No.SC94154, 9 (Fla.2001). Competent evidence is "[e]vidence that is relevant and is of such character (e.g., not

unfairly prejudicial or based on hearsay) that the court should receive it." Black's Law Dictionary 576-77 (7th ed. 1999). Substantial evidence is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla." Black's Law Dictionary 580 (7th ed. 1999).

Mr. Patraco is an expert crime scene analyst. After reviewing the shoe print evidence and Mr. Happ's conviscated shoes, he concluded that the shoe prints that the State argued were similar to Happ's shoes and made by the murderer in process of exiting the vehicle could not have physically been made by William Happ. Mr. Nacke, defense counsel, testified that no shoe print expert was hired at trial to review this evidence (SR. 716). Therefore, there was no challenge made to the State's theory that Mr. Happ was capable of making or had made the shoe prints. Due to the absence of any physical evidence inside the vehicle linking Mr. Happ to this crime, it was critical for the State to establish somehow by some means that Happ had been inside the victim's vehicle. The State used the shoe print to prepare an exhibit along with the testimony of Detective Strickland to show that the shoe print adjacent to the car was made by the killer when exiting it. (R. 570) In closing arguments the State argued to the jury that the similarity between Mr. Happ's shoes and the prints pointed to him as the murderer and asked them to focus on the shoe print testimony. (R. 926) If a shoe print expert had been hired by Happ's counsel at trial, the discrepancy in

the shoe size would have been immediately identified and counsel could have motioned the court to successfully exclude the shoe prints as irrelevant evidence. Instead, trial counsel for Happ admitted that the shoe prints could have come from Mr. Happ and stated in closing, " A foot print by the driver's door. - - That proof shows that Mr. Happ was at the car at Jones' Restaurant at some time before law enforcement found it on the morning of Monday, the 26th of May, 1986." (Closing Arguments for defense by Mr. Pfister R. 934) He also stated, "No, we are not here saying no it's not his footprint. He could have been there at Jones' Restaurant sometime between the 23rd and 24th and 26th. It doesn't come out proving anything." (Closing Arguments for defense by Mr. Pfister R. 946) Counsel stated that the State had "proved its set of facts" and explained that given set of facts to be "fingerprints and a shoe print" (Closing Arguments for defense by Mr. Pfister - R.950). Counsel's performance was deficient in representing William Happ.

Defendant's 2nd Amended 3.850, Claim 4, paragraph 65 states in part: "By failing to object [to Sgt. Strickland's testimony regarding the foot print] trial counsel [Mr. Pfister] allowed the state to ask questions and receive answers upon total speculation [shoe print testimony] by witness [Sgt. Strickland]". Claim 4, paragraph 71 states in part: " A crime scene expert would have and will testify that the shoe print found next to Ms. Crowley's car does not lead to the conclusion that the print was

placed there by someone exiting the vehicle." Both claims relate to the shoe print evidence and Judge Lockett granted Mr. Happ an evidentiary hearing on these issues. Subsequently, Mr. Patraco was hired to examine the shoes and provide testimony at the evidentiary hearing pursuant to these properly raised post conviction claims. Upon reviewing the evidence, the expert was able to determine that the size of the shoe print was **not similar** to Mr. Happ's because it was a **completely different size**, information that was new to the case. Judge Howard erred in prohibiting the expert from testifying about the shoe print or allowing a proffer because of Judge Lockett's prior rulings on Mr. Happ's claims, and as new evidence admissible in the interests of justice.

ARGUMENT II

THE CIRCUIT JUDGE ERRED IN FINDING THAT MR. HAPP'S COUNSEL WAS EFFECTIVE AT THE GUILT PHASE OF THE TRIAL UNDER SIXTH EIGHTH AND FOURTEENTH AMENDMENT STANDARDS. MR. HAPP'S COUNSEL FAILED TO PROPERLY CHALLENGE THE STATE'S LEADING QUESTIONS VIA OBJECTION, FAILED TO EFFECTIVELY CROSS EXAMINE AND PRESENT AVAILABLE TESTIMONY TO ESTABLISH AN ALIBI DEFENSE DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL .

A. Failure to Challenge the State's Case by Objecting to Leading

Questions
posed to witness, Vincent Ambrosino.

A leading question is defined as a question which suggests the answer. Black's Law Dictionary 897 (7th Ed. 1999) defines a leading question as one which instructs the witness how to answer or puts words in his mouth to be echoed back. Fla. Stat.§90.612(3)(2000), provides that a witness may not be asked a leading question, i.e., one that suggests the answer.

Even a cursory review of the questions posed by the state to its' own witness Mr. Ambrosino reveals that the State suggested the answer to the witness - **"Thursday"**. There is no testimony from defense counsel that he deliberately chose to highlight inconsistencies during cross examination. Merely labeling a decision as strategy does not foreclose ineffective assistance. The United States Supreme Court has mandated that strategic decisions must be reasonable. Strickland v. Washington, 466 U.S. 668(1984). In this case, counsel's decision not to challenge the state during Mr. Ambrosio's testimony was not reasonable. Mr. Ambrosio's original statement to police and deposition provided an alibi for Mr. Happ. Mr. Ambrosio's original statements were corroborated by a deposition that his stepfather, Mr. Quinones gave at the time of trial and repeated at Mr. Happ's evidentiary hearing. (SR. Vol III, 550-553,555, 560) Counsel's failure to challenge the state's

case through objections to leading questions caused witness Ambrosino to become confused and left Mr. Happ's whereabouts questionable during the critical time when the victim was abducted and murdered. Although the trial court was requested in closing arguments to review counsel's ineffective performance in failing to object to the State's leading question in eliciting Mr. Ambrosino's testimony, the court did not address this claim in the Original or Amended Orders denying Mr. Happ post conviction relief.(SR. Vol I. - 22-47, 35-46)

Appellee argues that the appellant did not present evidence at the evidentiary hearing and did not argue counsel's failure to object on the basis of improper leading questions in written closing arguments. As a result, Appellee urges that this court not consider this claim and suggests that such claims were abandoned. (AB 16,17) Appellant is wrong. Counsel specifically asked the court in written closing arguments to refer to record attachments relating to several claims raised in Mr. Happ's 3.850 Motion that could be determined on the basis of a review of the record by the court.

> "An Evidentiary Hearing was held on May 23, 13, 14, 2003, and the Defendant shall address the evidence presented both at the Evidentiary hearing ***and the record***. The Defendant respectfully requests this Court to ***review both*** and find that trial counsel was ineffective in failing to challenge the State by his failure to call an available alibi witness in Mr. Happ's defense, failing to investigate and present mitigating evidence during the penalty phase of case, and failing to object or otherwise challenge the State's case throughout the trial. Counsel's ineffective performance resulted in prejudice to Mr. Happ as evidenced by

> his conviction and death sentence". (emphasis added) (SR. Vol XI. - 1924)

Exhibits A through T covering the relevant portions of the record to be examined by the court were attached to Defendant's Closing Arguments to facilitate the court's ability to review all of the record claims raised. (SR. Vols. 12-15, p. 1985-2768) Therefore, Appellee is incorrect in stating that this claim was abandoned. Although the trial court did not review the record as requested and address this claim in its' final order, this claim is properly before this Court on appeal and can be determined by a review of the record below.

In three areas of Appellee's Brief counsel has argued that Mr. Happ's statement to trial counsel that DNA testing "would not be a good idea" as evidence that Mr. Happ cannot establish the prejudice prong under Strickland to prevail on an ineffective assistance of counsel claim. (AB- 16,18,21) Any statements that Mr. Happ made to trial counsel regarding his views on early DNA testing in 1986-87 and whether or not he believed this testing reliable in his case are not relevant to review of this appeal. There are no DNA evidence issues before this Court. The State failed to point out that victim DNA evidence was tested extensively by the State at the time of his trial but proved inclusive. Mr. Happ hoped that modern advancements in DNA and re-testing of available DNA in 2000 could effectively be accomplished and that

those results would exonerate him. Happ filed several motions following the Supreme Court's remand toward this end.

Fairfax Identity Laboratories stated " Unfortunately, there was not enough male DNA present on any of the items to generate a DNA profile. Had there been more material remaining, developing a male profile from material such as we tested might well have succeeded." (SR. - Vol 11- 1923 L) Similarly, the FDLE Laboratory in testing Item Q. 30 - Victim's Sweat pants concluded that "There were no chemical indications of the possible presence of semen or saliva." (SR. - Vol. 11 - 1923 O) Independent re-testing of male DNA, analysis of the victim's clothing for new DNA or trace evidence, and analysis of the vehicle sweepings was undertaken with Mr. Happ's full cooperation. These efforts were unsuccessful in identifying the perpetrator. The defense in closing arguments clearly conceded that Issue 29, Order #1, 4/16/01, Claim 4, Paragraphs 92, 99, 104, 105 of Mr. Happ's Second Amended 3.850 relating to DNA testing to establish innocence were rendered moot as a result of insufficient quantities or no DNA evidence available for testing. (SR. Vol. 11 - 1946) Therefore, the State's references to DNA testing to infer Mr. Happ's guilt before this Court is inappropriate. While evidence of DNA is lacking to exonerate Mr. Happ, it is equally lacking to incriminate or convict him of this crime.

B. Defense counsel was ineffective for failing to impeach witnesses Vincent Ambrosino via the testimony of Mr. Carlos Quinones who could have susinctly testified to facts inconsistent with the state's theory of the crime.

Appellee claims that counsel's decision not to impeach was a strategic decision and not deficient performance (AB 17). However, merely labeling a decision as strategy does not foreclose ineffective assistance. The United States Supreme Court has mandated that strategic decisions must be reasonable. Strickland, 466 U.S. at 461. In this case, counsel's decision not to present Carlos Quinones testimony was not reasonable. Mr. Quinones should have been called to establish the actual dates that Mr. Happ stayed overnight at his residence, and clarify the confused testimony given by Mr. Ambrosino. Noteably, Mr. Quinones' testimony would have been inconsistent with the State's theory of Mr. Happ being the perpetrator. Thus, counsel's decision not to use Mr. Quinones' testimony to impeach Mr. Ambrosino was not reasonable. Had the jury heard testimony that Mr. Happ had retired for the evening in the Quinones household and been observed in the early morning still asleep in the same location, there is a reasonable probably that a different verdict would have been rendered. Counsel's failure to present alibi evidence through Mr. Quinones' testimony undermines confidence in the outcome; counsel was ineffective. Strickland, 466 U.S. at 461.

C. Counsel was ineffective for failing to call alibi witness - Carlos Quinones

Trial counsel acknowledged that Mr. Quinones gave a deposition at the time of Mr. Happ's trial. Counsel could not give a reason for failing to call Mr. Quinones to testify. He speculated that his testimony must not have been as positive at trial as his deposition. (SR. 732) While such an explanation may be plausible in cases where a deposition is given weeks or months prior to trial, Mr. Quinones testified that he gave his deposition on the first day of William Happ's trial - July 25, 1989. Therefore, it is not reasonable to conclude that Mr. Quinones' testimony changed. In fact, the record contradicts this contention as Mr. Quinones' testimony at the evidentiary hearing in 2003 mirrored the deposition testimony that he gave on July 25, 1989. (SR. 555-560) Contrary to appellees position at page 20 of his answer brief, counsel did not have a specific reason for failing to call Mr. Quinones, and offered no reasonable strategic basis for failing to do so. Although the lead counsel was Mr. Pfister, co-counsel testified that any decisions made in the case would have been discussed with him. (SR. 551) Mr. Nacke testified that he had reviewed the deposition given by Carlos Quinones a day after the second trial began. However, he had no recollection of having sat down with Mr. Pfister, lead counsel and of going over the contents of the deposition. (SR.725)

The court asked Mr. Nacke what his responsibilities were as part of the defense

team for Mr. Happ and he testified that he had responsibilities in **both** the guilt and penalty phases of the trial. Mr. Nacke testified that he had a little more responsibility than Mr. Pfister in the penalty phase but that the two **shared responsibility in guilt phase**. (Emphasis added) (SR. 585,586)

Had the jury heard testimony that Mr. Happ retired for the evening in the Quinones household and was observed in the early morning still asleep in the same spot, there is a reasonable probably that a different verdict would have been rendered. Counsel's failure to present alibi evidence through Mr. Quinones' testimony undermines confidence in the outcome; counsel was ineffective. Strickland, 466 U.S. at 461.

Mr. Quinones testified that he was placed under oath and gave a deposition in this case that it was the Memorial Day Weekend in 1986 when William Happ stayed in his residence overnight on Friday, May 23. (SR. 551). He testified that he saw William Happ retire in his home between 10:30 PM to 11:00 PM on the Friday night (May 23, 1986) and then saw him at 5:30 A.M. to 5:45 AM. the next morning (May 24, 1986) still asleep on the living room next to his stepson. (SR. 552,554) He testified that he had reviewed time cards for the memorial day week end that permitted him to confirm with certainty that he had last seen Mr. Happ asleep on his living room floor on the the morning of May 24, 1986. (SR. 555) Mr. Quinones testified that the

living room where Mr. Happ slept is adjacent to his bedroom(SR. 562) After arguing with his wife about his stepson's friend sleeping over, he testified that the issue kept him up all night. (SR 554) Under these circumstances, he testified that he had no reason to believe that Mr. Happ or his stepson had left the house during the night. (SR. 561) Mr. Quinones testified that he was flown in and gave this same information in a deposition, flown out of town, and never told anything more about this case. (SR. 553).

Mr. Happ did not have a vehicle in his possession on the night of the victim's abduction and murder. There is no evidence that he had ever met the victim. Happ was unaware of her route or travel schedule. He had no way of knowing that she would be traveling through Citrus County. Although there is evidence of a struggle, there is no DNA, fingerprint or trace evidence that links Mr. Happ to the **interior** of the victim's car, to the actual crime scene, or to the victim. Fingerprints linking Mr. Happ to the crime were found on the outside of the victim's abandoned vehicle located in a public parking lot two days following the abduction and murder. Mr. Quinones testimony was relevant to prove that Mr. Happ was at a different place at the time of the murder and counsel was ineffective in failing to present this evidence at Mr. Happ's trial for the jury to consider.

D. Trial court erred in referring to Mr. Quinones' testimony as irrelevant.

The State certified Mr. Quinones as a material witness in the William Happ case. A material witness is defined as one who possesses information"going to some fact affecting the merits of the cause and about which no other witness might testify." Wingate v. Mach, 117 Fla. 104, 157 So. 421, 422 (1934, State ex rel. Slora v. Wessell, 403 So. 2d 496 (Fla. 4th DCA 1981).

The State claims that the court was correct in finding that Mr. Quinones testimony was irrelevant to the issue of guilt and correctly denied relief because Happ's whereabouts are unaccounted for at the time of the murder. In supporting this contention the State asserts that even if Mr. Happ had stayed in the Quinones home on the evening of the murder, Friday, May 23, 1986, Happ still could have exited the residence after 11:00 PM unobserved and walked into town, abducted the victim between 2:35 and 2:45 PM from the Cumberland Food Stores, sexually battered, strangled her, and abandoned her car after the murder. The distances between the Quinones residence, the Jones Restaurant (where the victim's car was abandoned), and the barge canal (where the victim's body was found) logically defies such a scenario.

In Dixon v. State of Florida, 227 So. 2d 740 (Fla. 4th DCA 1969) the court held that evidence of alibi is admissible for the jury's consideration and evaluation when

it **falls short of complete proof of absolute impossibility of the accused presence at the alleged time and place of the act**. Cf. Footnote 3., 1 Wigmore on Evidence, 3rd Ed.,s136,p.571. In Howard v. State, 869 So. 2d 725 (Fla. 2d DCA 2004) the defendant's mother provided alibi testimony that on the night of the robbery, the defendant was asleep in a sofa in her apartment. Obviously, the mother slept in another room and this testimony was accepted as relevant alibi testimony in the case.

Mr. Quinones gave similar alibi testimony that he observed William Happ retire for the night, in a room adjacent to his. He also testified at the evidentiary hearing that he was unable to sleep most of the night and did not hear anyone leave the residence. At 5:45 A.M. he observed Happ asleep on his living room floor during the time that he was making a phone call to work and Happ was still there when he went back into his bedroom that morning. As a matter of due process, the State must "prove every element of a crime beyond a reasonable doubt". Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991). 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. Watson v. State, 200 So. 2d 270 (Fla. 2d DCA 1967). Mr. Quinones' testimony raises a reasonable doubt as to Mr. Happ's whereabouts at the time the victim was abducted and murdered.

All evidence, including expert testimony, is subject to the requirements of Fla.

Stat. §90.401, §90.402, and §90.403, which address relevancy and reliability. Fla. Stat. § 90.401 defines relevant evidence as evidence that is both probative and material: Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, Fla. Stat. (2000). All relevant evidence is admissible, unless specifically excluded: §90.402 Admissibility of relevant evidence.-All relevant evidence is admissible, except as provided by law. § 90.402, Fla. Stat. (2000). Relevant evidence is excluded *inter alia* if it is unreliable under the balancing test in Fla. Stat. §90.403: Evidence may be excluded on grounds of prejudice or confusion.--Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or a needless presentation of cumulative evidence. §90.403, Fla. Stat. (2000). A trial court's ruling on a §90.403 issue will be upheld on appeal absent an abuse of discretion. Mansfield v. State, 758 So.2d 636, 648 (Fla.2000) ("We review a trial court's ruling on a § 90.403 objection on an abuse of discretion standard.").

Mr. Quinones testimony concerning Mr. Happ's whereabouts tends to prove that he was elsewhere at the time that the crime was committed. When a defendant raises an alibi defense, he is not required to prove the alibi beyond a reasonable doubt. Flowers v. State, 152 Fla. 649, 12 So. 2d 772 (1942) Where evidence tends in any way, even indirectly to prove a defendant's innocence, it is error to deny its'

admission. Watts v. State, 354 So. 2d 145 (Fla. 2d 1978). Mr. Quinones' testimony tends to prove Mr. Happ innocent and is therefore admissible.

In urging this court to uphold the lower court's decision that counsel was not ineffective for failing to call alibi witness Carlos Quinones and that his testimony was irrelevant, the appellee states that "Mr. Happ admitted his guilt"when he told trial counsel that DNA testing would "not be a good idea". (AP21) Contrary to the Appellee's assertions, Mr. Nacke never testified that Mr. Happ admitted his guilt to anyone. Furthermore, trial Counsel never testified that conversations with Mr. Happ concerning DNA evidence had any bearing on his decision not to call Mr. Quinones as an alibi witness. Counsel did not recall discussing Mr. Quinones testimony with co-counsel. There is no evidence that counsel ever consulted Mr. Happ regarding Mr. Quiniones alibi testimony and no evidence that Happ instructed counsel not to call Mr. Quinones to establish an alibi defense.

Mr. Nacke represented Mr. Happ in both Guilt and Penalty phases of his trial and testified that he was familiar with all aspects of the case (SR.585,586) and that lead counsel would have discussed all decisions made with him. (SR. 551) In Downs v. State, 453 So. 2d 1102 (Fla. 1984), this court has held that strategic choices made through investigation of law and facts relevant to plausible options are virtually unchallengeable. But the Downs court rejected counsel's decision not to call alibi

witnesses only after "facts developed in the record ma[de] it clear that the conduct of Down's counsel was reasonable under the circumstances. Id at 1109. In this case there are no facts in the record that support counsel's decision not to call Mr. Quinones as an alibi witness. Counsel for Happ did not recall even discussing the contents of the Mr. Quinones' deposition with co-counsel, therefore no reasonable strategic choice could have been made to forgo presentation or can be inferred from the record. (SR. 725) While an attorney's tactical and strategic decisions are entitled to deference, those decisions must originate from a basis of information, not ignorance. Even after "(a)mak[ing]every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulg[ing] a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement[,] "Blanco v.Wainwright, 507 So. 2d 1377, 1381(Fla. 1987), the evidence compels the conclusion that counsel's performance was deficient. The trial court erred in finding Mr. Quinones testimony irrelevant in this case and in failing to find counsel ineffective for not presenting it to the jury who should have determined the weight to accord it.

There were no eye witnesses to the crime and the State did not introduce overwhelming evidence against William Happ. Mr. Quinones testimony in his

deposition and given at the evidentiary hearing was unrebutted and corroborated by the initial statements and testimony of witness, Vincent Ambrosino. Under these circumstances, counsel's decision not to call Quinones cannot be considered reasonable strategy. Mr. Quinones had relevant testimony regarding Mr. Happ's whereabouts that the jury never heard or considered. To demonstrate ineffective assistance of counsel, Mr. Happ must demonstrate that "1) counsel's performance was deficient and 2) there is a reasonable probability that the outcome of the proceeding would have been different." Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324 (Fla. 1994)(citing Strickland v. Washington, 466 U.S. 668,687(1984)). The record in this case clearly demonstrates a deficient performance as nothing in the record demonstrates that counsel made an informed decision not to call Mr. Quinones. Wiggins v. Smith, 123 S.Ct. 2527 (2003). Due to the fact that Mr. Happ's case was primarily circumstantial, there is a reasonable probability that Mr. Quinones testimony would have been accepted by jurors and resulted in a different outcome. The trial judge ruled that Mr. Quinones testimony was irrelevant and normally such rulings will not be disturbed absent an abuse of discretion. Eliakam v. State, 29 Fla. L. Wkly D603(Fla. App. 4DCA 2004) However, a trial court abuses its' discretion when the action is unreasonable or where no reasonable person would have taken the view adopted by the court. Spann v. State, 28 Fla. L. Wkly S293 (Fla. 2003). Ruling

that Mr. Quinones testimony was irrelevant is an example of unreasonable action by the trial court and a clear abuse of discretion.

ARGUMENT AS TO REMAINING CLAIMS

William Happ relies on argument presented in his initial appeal regarding these issues.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Happ's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand this case for a new trial or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of _____, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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