IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1366

THOMAS KNIGHT, N/K/A
ASKARI ABDULLAH MUHAMMAD

Petitioner,

vs.

JAMES V. CROSBY, JR., Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols “RSR.” and “RST.” will refer to the record on appeal and transcript of proceedings from Defendant’s direct appeal from his resentencing.

STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief. *Knight v. State*, No. SC03-631. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE CONCERNING DELAY.

Defendant first asserts that his appellate counsel was ineffective for failing to claim that his sentences should be vacated because of the delay in the resentencing. However, this claim should be denied.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

> time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Here, appellate counsel did raise a claim that his sentences should be vacated because of the delay. Initial Brief of Appellant, Florida Supreme Court Case No. 87,783, at 96-99. This Court rejected this claim. *Knight v. State*, 746 So. 2d

423, 437 (Fla. 1998). Since this claim was raised, appellate counsel cannot be deemed ineffective for failing to raise. The claim should be denied.

Moreover, Defendant's assertion that counsel should have raised different grounds in support of this argument does not change that result. In *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992), this Court held:

> Using different grounds to reargue the same issue is also improper. *E.g., Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 111 S. Ct. 2879 (1991). Breedlove's appellate counsel raised the propriety of the prosecutor's argument and comments in both phases of trial and questioned applying the heinous, atrocious, or cruel aggravator to Breedlove, and this Court fully considered these issues. Therefore, that current counsel argues other grounds or facts than appellate counsel did does not save issues 1, 2, and 4 from being barred procedurally. Allegations of counsel's ineffectiveness cannot circumvent the rule that habeas corpus proceedings are not a second appeal. *E.g., Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991). The allegations of ineffectiveness in issues 1 and 4, therefore, do not preclude a procedural bar of those issues. *E.g., Johnston v. Dugger*, 583 So. 2d 657 (Fla. 1991).

As this is precisely what Defendant is attempting to do in this issue, the claim is procedurally barred and should be denied.

Even if the claim was cognizable in this proceeding, Defendant would still be entitled to no relief. Appellate counsel is not ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111;

Breedlove, 595 So. 2d at 11. While Defendant moved to have trial court enforce the mandate of the federal court, Defendant did not base that motion on any of the grounds asserted here. (RSR. 1108-12) Instead, Defendant's argument was that because his new expert and investigator had not been paid in a timely manner Florida could not comply with *Lockett v. Ohio*, 438 U.S. 586 (1978). However, to preserve an issue for appellate it is necessary that the grounds asserted on appeal for the claim be the same grounds that were presented to the trial court. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As that is not true regarding this claim, appellate counsel cannot be deemed ineffective for failing to raise this unpreserved issue. The claim should be denied.

Even if the issue was preserved, Defendant would still be entitled to no relief. The record reflects that Defendant was mainly responsible for the delay in the resentencing.

On May 25, 1990, the trial court appointed the Public Defender to represent Defendant at resentencing. (RSR. 6) On June 12, 1990, when the trial court attempted to hold a report hearing to determine status of the previously set trial date of September 24, 1990, Defendant objected, claiming that the State courts did not have jurisdiction because the federal district

court had not formally entered an order granting habeas in response to the Eleventh Circuit's opinion. (RSR. 1579-85) When the trial court insisted that it did have jurisdiction and planned to proceed with trial, Defendant asserted that he could not be ready for a September 1990 trial because he needed to review Defendant's prior file, to have Defendant's mental status reevaluated and to consult with Defendant. (RSR. 1585-86) Defense counsel insisted that he should not be required to travel to the prison to consult with Defendant and that Defendant should be returned to the county. (RSR. 1586) The State asserted that Defendant should not be placed in the county jail for an extended period of time because of his prior escape and his prior murder of a corrections officer and suggested that some other arrangement might be possible that would allow counsel to consult with Defendant without traveling. (RSR. 1586-89) The trial court reset the matter to consider the issue with corrections officials present. (RSR. 1589-90)

On June 20, 1990, the Public Defender certified a conflict of interest, and Lee Weissenborn was appointed to represent Defendant. (RSR. 660-61) On July 16, 1990, the federal district court entered its order granting Defendant a conditional writ of habeas corpus regarding his sentence. (RSR. 1110) On August 23, 1990, Defendant moved for a continuance, claiming that he

needed several months to prepare for the resentencing. (RSR. 662) The trial court granted Defendant's motion and reset the trial date for February 12, 1991. (RSR. 1597-98)

On January 23, 1991, Defendant moved for a determination of his competence to stand trial. (RSR. 677-79) On February 20, 1991, the State noted that Defendant had resisted discovery and asserted that Defendant did have to provide discovery. (RSR. 668-69) On March 5, 1991, experts reported that Defendant had refused to be evaluated for competency. (RSR. 699-701) However, Dr. Jacobson reported that based on the behavior he observed from Defendant, his review of Defendant's medical records and his interview with a corrections officer, he saw no grounds to question Defendant's competence. *Id.* On March 14, 1991, the trial court declared Defendant competent based on his refusal to be examined. (RSR. 6) The trial court also ordered Defendant to provide discovery by March 26, 1991. *Id.*

On March 26, 1991, Defendant again moved for a determination of his competence, claiming that female experts needed to be appointed for Defendant to cooperate. (RSR. 708-27) The State suggested Dr. Eileen Fennel to evaluate Defendant but noted that she would be unable to conduct her evaluation before the end of April. (RSR. 1610) Defendant asserted that he had not decided whom he would suggest and requested more time to provide a name.

(RSR. 1610) The trial court then appointed Dr. Fennel and Dr. Dorita Marina to evaluate Defendant's competence. (RSR. 728-29) Because defense counsel was not available, Dr. Fennel's evaluation was delayed until the end of May 1991. (RSR. 1616) Moreover, Dr. Marina, whom Defendant had suggested, refused to conduct her evaluation unless she was paid four times the approved rate for evaluations plus her expenses. (RSR. 730-31, 1623-24) The trial court agreed to order the payment of fee Dr. Marina requested but allowed the county attorney to contest the fee after the evaluation. (RSR. 1624-25, 734) As a result, the resentencing was continued until August 5, 1991. (RSR. 1618-19)

Dr. Marina conducted her evaluation of Defendant on May 17, 1991. (RSR. 758) Dr. Fennel interviewed Defendant on July 5, 1991, and August 21, 1991. However, by August 23, 1991, neither doctor had submitted a report. (RSR. 1627-32) The trial court then ordered that the reports be filed by August 30, 1991. (RSR. 1632) On August 27, 1991, Dr. Marina wrote her report, which did not discuss the issue of competence. (RSR. 758-61) On September 9, 1991, Dr. Fennel also wrote her report, finding Defendant competent. On September 13, 1991, the trial court held a hearing regarding these reports. (RSR. 1634-36) Defendant refused to stipulate the reports, and the trial court decided to have Defendant evaluated by another expert. (RSR.

1636-41) The trial court agreed to hold a competency hearing at the prison after the next expert had evaluated Defendant. (RSR. 1641-43) Because of difficulties with the new expert and with having the hearing at the prison, the competency hearing was not held until November 1, 1991. (RSR. 1649-71)

The trial court held a two day competency hearing, considered the testimony of numerous experts and numerous reports and Defendant's misbehavior during the competency hearing. After considering this testimony and argument by Defendant, the trial court found that Defendant was competent. (RSR. 1989-96) He found that any lack of cooperation with counsel or antics in the courtroom were the result of volitional acts of Defendant. (RSR. 1995-96) It warned Defendant that misbehavior in the courtroom would result in the case proceeding in his absence. *Id.*

Defendant then requested that the matter not be set for trial for several months. (RSR. 1998-99) The parties then agreed to a firm trial date of March 2, 1992. (RSR. 1999-2000)

On September 26, 1991, Defendant filed an objection to being required to provide reciprocal discovery, claiming that since he had not requested discovery since the Eleventh Circuit had ordered a resentencing, he was not required to provide discovery. (RSR. 738-40) The trial court overruled this

objection. (RSR. 737) On October 28, 1991, Defendant filed a petition for writ of prohibition regarding the order on discovery. This Court denied that petition on January 13, 1992. *Knight v. State*, 595 So. 2d 557 (Fla. 1992).

On February 19, 1992, Defendant again moved for a continuance, claiming that he was not ready for trial because his writ of prohibition had just been denied. (RSR. 35-36) The State also moved for a continuance because Defendant had not provided discovery during the pendency of the prohibition proceeding and the State would need time to depose the witnesses, especially expert witnesses, when Defendant did provide a witness list. (RSR. 23-24) The trial court granted a joint continuance and reset the trial for June 1992. (RSR. 1786-88)

In May 1992, the State moved to compel Defendant to provide reports, notes and test results from his experts. (RSR. 767) The trial was reset until August 1992. (RSR. 1792) In July 1992, Defendant moved to have an investigator provided. (RSR. 763-64) At a hearing on July 9, 1992, the State indicated that it had still not received the reports from the experts, and the trial court ordered their disclosure. (RSR. 1792-94) Because neither side was prepared, the trial court reset the trial date until January 11, 1993. (RSR. 1794-96)

On November 20, 1992, Defendant filed a motion to preclude the State from seeking the death penalty because the county was not promptly and appropriately paying the cost of the defense. (RSR. 769-81) In this motion, Defendant admitted that he had been aware of a problem with payments for at least several months. *Id.* Defendant sought time to seek discovery of public records regarding the county's payment history and an evidentiary hearing to be held after discovery was complete on this issue. *Id.* He also sought a continuance of the January 1993 trial date until this issue was resolved. *Id.* In addition to precluding the imposition of a death sentence, Defendant also sought assessment of the costs against the State. *Id.*

At the hearing on the motion, Defendant asserted that he had anecdotal evidence regarding problems with the payment of bills in this and other cases that had caused some experts and attorneys to be reluctant to take cases from Dade County. (RSR. 2104-09) Defendant asserted that he was seeking to have the statute that required the counties to pay the cost of defense declared unconstitutional and to have the trial court require the State pay such expenses. (RSR. 2104-09) He claimed that he was not asking the court to strike the death penalty and that he would still being raising the claim even if the bills were promptly and appropriately paid. (RSR. 2109-10)

The State responded that an evidentiary hearing on the merits of the statute was inappropriate in this matter and that specific problems with payment should be addressed with the county. (RSR. 2111-12) Defendant insisted that he was not seeking a remedy of payment regarding any specific payment problems with the county and instead wanted to challenge the constitutionally of the statutes requiring the county to pay. (RSR. 2112) The trial court granted an evidentiary hearing because it raised a constitutional claim. (RSR. 2112)

The State sought a bill of particulars regarding what alleged payment problems had occurred in which cases. (RSR. 2112-14) The trial court granted the motion and gave Defendant until December 11, 1992, to comply. (RSR. 2112-14) On December 11, 1992, Defendant provided the bill of particulars that listed numerous witnesses, many of whom were not in Miami, and requested a 2 to 3 day hearing on his motion. (RSR. 2119-21, 786-96) Because of the pendency of this motion, the trial court reset the resentencing until March 1993. (RSR. 2122) However, the court did not set a date for the hearing. (RSR. 2121-22)

On June 15, 1993, the State noted that the evidentiary hearing had yet to be set because the trial court had been out of town. (RSR. 2137) The trial court then set the evidentiary hearing for July 7, 1993. (RSR. 2137-38) When the hearing had

still not be held on September 2, 1993, the trial court set the hearing for September 29, 1993. (RSR. 2146-47)

On September 30, 1993 and October 1, 1993, the hearing was held. (RSR. 815-907) On December 10, 1993, the trial court entered its order on this issue. (RSR. 908-20) This order noted that Defendant's investigator and Dr. McClane had not been paid. (RSR. 908-11) The order then recited at length problems that attorneys and experts had encountered with payment in other cases. (RSR. 912-15) The order then found §939.08, Fla. Stat. unconstitutional as applied to capital defendants and ordered that the outstanding bills in this matter be paid forthwith. (RSR. 915-20) The trial court then continued the matter until 45 days after the payment of the bills. (RSR. 920)

On December 20, 1993, the county moved to intervene on the grounds that it had understood that the issue in this matter was limited to the ability to impose a sentence on one defendant, that it was a necessary party to any discussion of a systematic alternation of the payment statutes, and that such matters should not be handled in individual criminal cases. (RSR. 928-1106) It contended that the trial court should only have resolved the payment issues regarding this case and referred the systemwide claim to the Chief Judge. *Id.* On February 2, 1994, the trial court heard the county's motion, granted it leave to

intervene and denied rehearing. (RSR. 2491-95) Defendant then requested the trial court enter a life sentence because he had not be resentenced in a reasonable amount of time. (RSR. 2495-99) The trial court did not rule on that request and instead set a trial date of May 9, 1994. (RSR. 2500-06) On appeal, the trial court's order was vacated because the cost due in this case were paid. *Metropolitan Dade County v. Knight*, 640 So. 2d 90 (Fla. 3d DCA 1994).

On April 14, 1994, Defendant again moved for a continuance claiming that the bills were still unpaid, despite the county's representation that they had been paid. (RSR. 1116-18) At the hearing on the motion, the trial court denied the motion without prejudice. (RSR. 2551-52) On April 29, 1994, Defendant filed a renewed motion for continuance, acknowledging that the bills had been paid. (RSR. 1121-24) However, he asserted that Dr. McClane had refused to do further work on the case until the bill was paid and that Defendant had only recently attempted to obtain other experts. (RSR. 1121-24) The trial court again denied the motion because Defendant was insisting on being resentenced expeditiously. (RSR. 2557-58) The State asserted that the trial court might cause the case to be reversed if it insisted on proceeding with trial when the defense was not prepared. (RSR. 2558) The trial court then decided not to

consider the motion at that time. (RSR. 2559) At the second hearing on the motion, the trial court granted a defense continuance until July 11, 1994. (RSR. 2563-65)

On June 17, 1994, the trial court continued the matter on its own motion until October 24, 1994. (RSR. 9) On June 22, 1994, the trial date was reset until October 31, 1994. (RSR. 11)

On June 29, 1994, the State moved to compel because Defendant had not complied with reciprocal discovery. (RSR. 2574-76) The trial court granted the State's motion and ordered Defendant to be examined by the State's experts as well. (RSR. 2574-76) Defendant subsequently moved to rehear the order, which was denied. (RSR. 2580-85) Defendant also asked that the State be required to provide him with a copy of the transcript of the 1975 trial. (RSR. 2584) The trial court instructed Defendant to get the transcript from the court reporter. (RSR. 2584) On August 24, 1994, the State again moved to compel discovery because Defendant had yet to comply with his discovery obligations. (RSR. 1133) At the hearing on the motion, Defendant first asserted that he had complied with the motion to compel but later admitted that he had not provided all of the reports of the experts listed because he had not determined whether to call the experts or not. (RSR. 2589-96) As such, the

trial court again granted the motion. (RSR. 2589-96)

On October 14, 1994, the trial court reset the matter until February 13, 1995, because the judge was leaving the bench. (RSR. 2600-01, 2605-06) On November 16, 1994, the matter was reset at the request of Defendant until March 20, 1995. (RSR. 2605-09) At that time, Defendant noted that he would probably be requesting a new competency hearing. (RSR. 2605-09) In 1995, Defendant was again granted a continuance until October 1995. (RSR. 11)

On November 30, 1995, the State indicated that Defendant had been unable to find his copy of the original trial transcript. (RSR. 1574-75) As such, the State had provided Defendant with a copy. *Id.*

Since the record shows that Defendant caused the delay, he was not entitled to complain about it on appeal. *Keen v. State*, 775 So. 2d 263, 277 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997). As such, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the claim was not procedurally barred, the underlying issue had been preserved and Defendant had not

invited the error, Defendant would still be entitled to no relief. The record reflects that Defendant's assertions that he was prejudiced by the delay between the issuance of the writ of habeas corpus and the commencement of the resentencing proceeding are without merit. While Defendant asserts that the State was able to impeach his experts because of this delay, this is untrue. Most of Defendant's experts had evaluated him before the resentencing proceeding was ever ordered.[1] One of his experts evaluated him shortly after the resentencing was ordered.[2] Only one of Defendant's experts (Dr. Toomer) first evaluated him in 1994, well after the resentencing was ordered. (RSR. 1537-38) As such, the State's cross examination was not based on the delay between the resentencing being ordered and it being conducted, and it does not show that Defendant was prejudiced by the delay.

Moreover, Dr. Corwin testified that he recalled Defendant, had his report and was able to testify about Defendant because he recalled him. (RSR. 2682-84) There was no evidence in the trial record that the notes were lost during the time the

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[1] Dr. Wells evaluated Defendant in 1971, Dr. Fisher saw Defendant in 1979 and 1989, Dr. Carbonell saw Defendant in 1989, and Dr. Rothenberg and Dr. Corwin both saw Defendant in 1974. (RSR. 1529-34, 1535-37, 1538-40)

[2] Dr. McClaine examined Defendant in 1991. (RSR. 1534)

resentencing was pending. As such, this assertion does not show that Defendant was prejudiced by this delay.

Defendant also asserts that the delay prevented him from receiving an accurate determination of his competency. However, this is not possible. The issue of competency focuses on whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him," at the time of trial. *Dusky v. United States*, 362 U.S. 402 (1960). Because the determination is of the Defendant's mental state at the time of trial, it does not matter when the trial is held. As such, the delay in the resentencing proceeding does not show that Defendant was denied a proper competency determination.

Since Defendant did not show that he was prejudiced by the delay, the claim is without merit. *Scott v. State*, 581 So. 2d 887, 891 (Fla. 1991)("Further, the accused bears the burden of proving the prejudice and, if the threshold requirement of proof of actual prejudice is not met, the inquiry ends there."). Appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

The cases relied upon by Defendant do not compel a different result. In *Scott*, the delay had caused evidence of the defendant's alibi, a witness who implicated a different suspect and other evidence to be lost. In *Jones v. State*, 740 So. 2d 520 (Fla. 1999), evidence regarding the defendant's mental state at the time of trial was lost because of the delay in the post conviction proceedings, and the record did not reflect the defendant had caused the delay. In *Peede v. State*, 748 So. 2d 253 (Fla. 1999), the Court granted no relief because the matter was pending for six years on a motion for post conviction relief with no activity reflected in the record. The Court merely noted the delay and averred that the State should see that capital post conviction cases are handled promptly. *Id.* at 255 n.4. In *Bogue v. Fennelly*, 705 So. 2d 575 (Fla. 1997), the Court refused to consider a claim that a defendant had a constitutional speedy trial right regarding a sentencing hearing because the issue was premature.

Here, no evidence was shown to have been lost because of the delay. There was no long period of time during which nothing happened. Moreover, the record reflects that Defendant caused the delay, despite efforts by the State to move the case. As such, *Scott*, *Jones*, *Peede* and *Bogue* do not support Defendant's claim. It should be denied.

II. THE CLAIM REGARDING THE ALLEGEDLY MISSING PORTIONS OF THE TRANSCRIPT SHOULD BE DENIED.

Defendant next asserts that his sentences should be reversed because his copy of the record is missing pages and sidebar conferences were unrecorded. Defendant also asserts that his appellate counsel was ineffective for failing to ensure that the record is complete. However, these claims are procedurally barred and without merit.

To the extent that Defendant is asserting that he is entitled to relief because the transcript is incomplete, this claim is procedurally barred. This Court has held that a claim that the record is incomplete is a claim that could have and should have been raised on direct appeal and is procedurally barred in a post conviction proceeding. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000).

To the extent that Defendant is asserting that his appellate counsel was ineffective for failing to ensure that the record was complete, the claim is without merit. This Court has held that for a claim that appellate counsel was ineffective for failing to ensure the record was complete to be meritorious, a defendant must show that an error went uncorrected because the record was incomplete. *Cummings-el v. State*, 863 So. 2d 246, 254-55 (Fla. 2003); *Thompson*, 759 So. 2d at 660; *Ferguson v.*

Singletary, 632 So. 2d 53, 58 (Fla. 1993); *see also Turner v. Dugger*, 614 So. 2d 1075, 1079-80 (Fla. 1992).

Here, Defendant has not demonstrated that any error went uncorrected because the bench conferences were not transcribed. Moreover, pages 1200-24 and 1249 exist in both the record on appeal and transcript of proceedings from the resentencing.[3] On these pages, Mr. Lott, Mr. Daniels, Ms. Thompson and Ms. Lesher were questioned individually concerning their exposure to pretrial publicity in this case and indicated that they would set aside any information gained from that exposure and decide the matter solely on the evidence presented in court. (RST. 1200-04, 1208-24) Mr. Montalvo was questioned individually concerning his exposure to pretrial publicity.[4] (RST. 1249) Sgt. Costell Guyton, a corrections officer, also testified that

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[3] Pages 1200-24 in the record on appeal are portions of Defendant's motion to bar imposition of the death penalty because Defendant is insane. Page 1249 in the record on appeal is a Court Exhibit of a newspaper article concerning the resentencing. Defendant does not differentiate between the record on appeal and transcript of proceedings despite the fact that they are separately paginated. However, given Defendant's description of the content of the pages, it appears that he is speaking of the transcript of proceedings and not the record on appeal.

[4] None of the individuals questioned in these pages sat on the jury as Mr. Lott and Mr. Montalvo were excused peremptorily by the State, Ms. Lesher was excused peremptorily by the defense and Ms. Thompson was excused for cause. (RSR. 1286-87)

he had seen Defendant in the jail, while being transported to court and while in court, and that Defendant's behavior outside of court was normal. (RST. 1204-08) Defendant has not alleged any meritorious claim based on these pages of the transcript that went uncorrected. As such, this claim is without merit and should be denied.

III. THE CLAIMS REGARDING THE CONDUCT OF VOIR DIRE SHOULD BE DENIED.

Defendant next asserts that the manner in which voir dire was conducted was improper. He also appears to assert that the trial court improperly denied a motion to strike the venire. Finally, Defendant asserts that his appellate counsel was ineffective for failing to raise this issue.

Issues regarding the manner in which voir dire is conducted and the denial of motions to strike the venire are issues that could have and should have been raised on direct appeal. *See Chandler v. State*, 848 So. 2d 1031, 1034-35 (Fla. 2003). Issues that could have and should have been raised on direct appeal are procedurally barred in post conviction proceedings. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). As such, this claim is procedurally barred to the extent that Defendant is asserting the substantive claims.

Moreover, the claims are unpreserved and without merit. As such, appellate counsel cannot be deemed ineffective for failing to raise them. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant initially seems to contend that the manner in which voir dire was conducted allowed members of the venire to hear about the information other members of the venire had heard

through the pretrial publicity. In support of this assertion, Defendant states that questioning about pretrial publicity was conducted by having the veniremembers indicate if they had been exposed to the pretrial publicity and then questioning all those exposed in a group. However, the record reflects that this is not how the questioning occurred and that counsel never objected to the manner in which the trial court conducted voir dire on the issue of pretrial publicity.

Prior to trial, Defendant moved to have individual voir dire on the veniremembers' beliefs about the death penalty. (RSR. 926) The trial court denied this requested. (RST. 18-19) However, the trial court informed the parties that it intended to conduct voir dire by explaining the nature of the resentencing proceeding to the entire venire, reading the venire a brief factual synopsis of the case, inquiring if any veniremember knew anything about the case and then questioning those veniremembers who did know about the case **individually**. (RST. 18-19, 131-32) While Defendant objected to the text of the factual synopsis the State had prepared in anticipation of this procedure, he did not object to proceeding in this manner. (RST. 131-47)

During voir dire, the trial court proceeded to read the factual synopsis to the venire and to have the veniremembers

indicate if they knew anything by raising their hands. (RST. 385-90) The trial court then excused those veniremembers who knew nothing about the case. (RST. 390-92) The trial court had the bailiff escort all but one of the veniremembers who indicated that they had been exposed to pretrial publicity out of the courtroom. (RST. 392-93) It then questioned the one veniremember who remained in the courtroom about the nature and extent of the exposure and the effect of that exposure on the veniremember's ability to be fair. (RST. 393-99) After that veniremember was questioned, she left the courtroom, the parties discussed challenges to the veniremember and then the next exposed veniremember was brought into the courtroom. (RST. 399-401) The trial court then repeated the process of individual questioning and having the new veniremember leave the courtroom before another veniremember entered until all the affected veniremembers had been individually questioned. (RST. 401-67, 471-531) When a second venire panel was called, the trial court repeated the same procedure. (RST. 1160-64, 1178-1204, 1208-1311)

As can be seem from the foregoing, Defendant never requested individual voir dire on the issue of pretrial publicity and did not object to the manner in which the trial court proposed to handle the issue. Since Defendant did not raise the claim at

trial that he claims should have been raised on appeal, this issue was not preserved. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Appellate counsel cannot deemed ineffective for failing to raise this unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, the decision of whether to grant individual voir dire rests in the discretion of the trial judge. *San Martin v. State*, 705 So. 2d 1337, 1343-44 (Fla. 1997). To show that the trial court abused its discretion, a defendant must show that the manner in which voir dire was conducted resulted in a partial jury. *Id.*; *see also Gorby v. State*, 819 So. 2d 664, 685-86 (Fla. 2002). Here, Defendant asserts that the procedure the trial court used resulted in a partial jury because Ms. Collier heard Ms. Suarez and Mr. Petersen's statements about the publicity and Mr. Coachman heard Ms. Orlandi and Ms. Chalfant's statements. However, this did not happen because Ms. Collier was not in the courtroom when Ms. Suarez and Mr. Petersen spoke and Mr. Coachman was not in the courtroom when Ms. Orlandi and Ms. Chalfant spoke. Since these events never occurred, they do not show that the trial court abused its discretion in the manner in which it conducted individual voir dire concerning

pretrial publicity. As the claim that the trial court abused its discretion in the manner in which it conducted voir dire concerning pretrial publicity was not an abuse of discretion, appellate counsel cannot be deemed ineffective for failing to claim otherwise. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied. *See State v. Knight*, 866 So. 2d 1195, 1210 (Fla. 2003).

Defendant also relies upon a statement by Mr. Painter. However, Mr. Painter's statement did not concern pretrial publicity. Instead, Mr. Painter's comment concerned his personal views about the death penalty based on the instructions the trial court had given at the beginning of voir dire concerning the nature of a resentencing proceeding and the need to accept that Defendant was guilty. (RST. 544-46, 639-41)

However, in order for the statement of one veniremember to taint the panel, the veniremember must mention facts that would not otherwise be presented to the jury. *Pender v. State*, 530 So. 2d 391 (Fla. 1st DCA 1988); *Wilding v. State*, 427 So. 2d 1069 (Fla. 2d DCA 1983); *Kelly v. State*, 371 So. 2d 162 (Fla. 1st DCA 1979). A veniremember's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel. *Brower v. State*, 727 So. 2d 1026,

1027 (Fla. 4th DCA 1999); *State v. Taylor*, 324 S.W.2d 643 (Mo. 1959); *see also Stone v. State*, 208 So. 2d 676 (Fla. 3d DCA 1968); *Lunday v. State*, 298 P. 1054 (Okla. Crim. App. 1931). As Defendant acknowledged when he moved to strike the panel, Mr. Painter's comments were an expression of his opinion. (RST. 690-91) As such, the trial court did not abuse its discretion in refusing to strike the panel based upon it. Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

The cases relied upon by Defendant do not compel a different result. In *Kessler v. State*, 752 So. 2d 545 (Fla. 1999), *Bolin v. State*, 736 So. 2d 1160 (Fla. 1999), and *Boggs v. State*, 667 So. 2d 765 (Fla. 1996) the trial courts did not question the veniremembers who had been exposed to pretrial publicity about the nature and extent of the exposure and refused to allow individual question on these issues. Here, the trial court did question those veniremembers who had been exposed to pretrial publicity about the nature and extent of the exposure and did so individually. As such, *Kessler*, *Bolin* and *Boggs* are inapplicable to this matter. *Reilly v. State*, 557 So. 2d 1365

(Fla. 1990), has nothing to do with the manner in which voir dire should be conducted. Instead, the issue was whether the trial court had properly denied a cause challenge to a veniremember who had become aware of inadmissible information from the pretrial publicity. Here, the issue is not whether a cause challenge should have been granted against an unnamed veniremember. As such, *Reilly* is inapplicable. The claim should be denied.

IV. THE CLAIM REGARDING THE METHOD OF EXECUTION SHOULD BE DENIED.

Defendant next asserts that execution by electrocution or lethal injection is unconstitutional. However, this claim should be denied because it is procedurally barred and without merit.

This Court has held that challenges to the constitutionality of the method of execution are procedurally barred in post conviction proceedings. *See Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). As this is the claim that Defendant is raising, this claim is procedurally barred and should be denied.

Even if the claim was not procedurally barred, Defendant would still be entitled to no relief. As this Court stated in *Griffin v. State*, 866 So. 2d 1, 17 (Fla. 2003):

> Additionally, this Court has repeatedly rejected claims that electrocution is unconstitutional. *See, e.g., Provenzano v. Moore*, 744 So. 2d 413, 415 (Fla. 1999); *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997); *Medina v. State*, 690 So. 2d 1241, 1244 (Fla. 1997). We have also rejected claims that lethal injection is unconstitutional and that the application of the amended statute violates the Ex Post Facto Clause. *See Bryan v. State*, 753 So. 2d 1244, 1253 (Fla. 2000) (stating that lethal injection is "generally viewed as a more humane method of execution"); *Sims v. State*, 754 So. 2d 657, 664 (Fla. 2000) (finding no ex post facto violation).

As such, this claim is without merit and should be denied. Moreover, to the extent that Defendant is asserting that his

appellate counsel was ineffective for failing to raise this claim, it should be denied because counsel is not ineffective for failing to raise a nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

V. THE CLAIM REGARDING JURY INTERVIEWS SHOULD BE DENIED.

Defendant finally asserts that the bar rule prohibiting him from interviewing jurors is unconstitutional. However, this claim should be denied because it is procedurally barred and without merit.

This Court has repeatedly held that this claim could have and should have been raised on direct appeal. *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999); *Ragsdale v. State*, 720 So. 2d 203, 204-05 n.1 & 2 (Fla. 1998). As such, it is procedurally barred and should be denied.

Even if the claim was not procedurally barred, it should still be denied. This Court has held that before a litigant is entitled to interview jurors, the litigant must show that some juror was not qualified or that some jury misconduct occurred. *Griffin v. State*, 866 So. 2d 1, 20-21 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2001); *Kearse v. State*, 770 So. 2d 1119, 1127-28 (Fla. 2000); *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992). Here, Defendant does not allege that any juror was not qualified or that any misconduct occurred.[5] Instead, Defendant

[5] When issues arose during trial pertaining to jury misconduct, the trial court did conduct interviews with the affected jurors and excused most of them. An issue concerning

seeks to interview the jurors in the hope of discovering some misconduct. However, this Court has held that this is inappropriate. *Griffin v. State*, 866 So. 2d 1, 21 (Fla. 2003). As such, this claim is without merit and should be denied.

Moreover, to the extent that Defendant is asserting that his appellate counsel was ineffective for failing to raise this claim, it should be denied because counsel is not ineffective for failing to raise a nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

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this matter was raised on direct appeal. As argued in the brief in case no. SC03-631, the trial court properly summarily denied the post conviction claim of juror misconduct.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Heidi E. Brewer, 2006 Atapha Nene, Tallahassee, Florida 32301, this 2nd day of August, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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