IN THE SUPREME COURT OF FLORIDA

JOHNNY SHANE KORMONDY,

Petitioner,

v. CASE NO. SC06-210

JAMES R. McDONOUGH, Jr., Secretary, Department of Corrections, State of Florida,

Respondent.
_____/

RESPONSE TO KORMONDY'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the undersigned Assistant Attorney General, and hereby responds to Kormondy's Petition for Writ of Habeas Corpus filed in the above styled case. Respondent respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, JOHNNY SHANE KORMONDY, raises three claims in his petition for writ of habeas corpus. References to Petitioner will be to Kormondy or Petitioner, and references to Respondent will be to the State or Respondent.

References to the original trial record will be to "TR" followed by the appropriate volume and page number. References to Kormondy's second penalty phase proceeding will be to "2PP" followed by the appropriate volume and page number. References to the four-volume supplemental record from Kormondy's second penalty phase proceeding will be "2PP-S" followed by the appropriate volume and page number. References to the record from Kormondy's post-conviction proceedings will be to "PCR" followed by the appropriate volume and page number. References to the three-volume transcript of testimony from Kormondy's post-conviction evidentiary hearing will be to "PCR-T" followed by the appropriate volume and page number. References to the instant habeas petition will be to "Pet." followed by the appropriate page.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Johnny Shane Kormondy, born May 20, 1972, was 21 years old at the time he, along with two co-defendants, murdered Gary McAdams. The relevant facts concerning the murder are recited in this Court's opinion on direct appeal from Kormondy's original trial:

> … The victim Gary McAdams was murdered, with a single gunshot wound to the back of his head, in the early morning of July 11, 1993. He and his wife, Cecilia McAdams, had returned home from Mrs. McAdams' twenty-year high-school reunion. They heard a knock at the door. When Mr. McAdams opened the door, Curtis Buffkin was there holding a gun. He forced himself into the house. He ordered the couple to get on the kitchen floor and keep their heads down. James Hazen and Johnny Kormondy then entered the house. They both had socks on their hands. The three intruders took personal valuables from the couple. The blinds were closed and the phone cords disconnected.
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> At this point, one of the intruders took Mrs. McAdams to a bedroom in the back. He forced her to remove her dress. He then forced her to perform oral sex on him. She was being held at gun point.
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> Another of the intruders then entered the room. He was described as having sandy-colored hair that hung down to the collarbone. This intruder proceeded to rape Mrs. McAdams while the first intruder again forced her to perform oral sex on him.
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> She was taken back to the kitchen, naked, and placed with her husband. Subsequently, one of the

> intruders took Mrs. McAdams to the bedroom and raped her. While he was raping her, a gunshot was fired in the front of the house. Mrs. McAdams heard someone yell for "Bubba" or "Buff" and the man stopped raping her and ran from the bedroom. Mrs. McAdams then left the bedroom and was going towards the front of the house when she heard a gunshot come from the bedroom. When she arrived at the kitchen, she found her husband on the floor with blood coming from the back of his head. The medical examiner testified that Mr. McAdams' death was caused by a contact gunshot wound. This means that the barrel of the gun was held to Mr. McAdams' head.

Kormondy v. State, 703 So.2d 454 (Fla. 1997).

The three co-defendants were tried separately. Buffkin was offered a plea deal in return for his testimony against Hazen and Kormondy. After a jury trial, Kormondy was convicted of first-degree murder, three counts of sexual battery with the use of a deadly weapon or physical force, burglary of a dwelling with an assault or while armed, and robbery while armed.

The jury recommended Kormondy be sentenced to death by a vote of 8-4. Prior to imposing Kormondy's sentence, the trial judge held Kormondy in contempt of court for refusing to testify, with use immunity, against Hazen.

The trial court found five aggravating factors: (1) the defendant was previously convicted of a felony involving the threat of violence to the person; (2) the capital felony was

committed while the defendant was engaged, or was an accomplice, in the commission of or an attempt to commit or flight after committing or attempting to commit a burglary; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the capital felony was committed for pecuniary gain; and (5) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court found no statutory mitigators had been established. The trial court considered Kormondy's deprivation as a child as non-statutory mitigation. The court found that Kormondy had suffered deprivation, trauma, and loss of paternal comfort and companionship in his early years. The trial judge noted his consideration of these factors was tempered by his conclusion that Kormondy is more a product of his failure to choose a positive and productive lifestyle than a victim of family dysfunction. Nonetheless, the trial judge gave these factors moderate weight. The trial judge also found that Kormondy had a personality disorder (moderate weight), Kormondy was well-behaved at trial (little weight), Kormondy had been a

good employee in the past (moderate weight), and Kormondy was drinking alcohol before the murder (little weight). The trial judge considered, but gave no weight to, Kormondy's drug addiction. He also considered, but gave no weight to, Kormondy's learning disability and lack of education, the fact Kormondy had a wife and child, that co-defendant Buffkin received disparate treatment, and Kormondy's suggestion he cooperated with law enforcement. The court found specifically that Kormondy was the actual shooter. Kormondy v. State, 703 So.2d 454, 457-458 (Fla. 1997).

Kormondy raised six issues in his direct appeal. Kormondy argued the trial judge erred in allowing Deputy Cotton to testify what witness Willie Long told him about Kormondy's admissions to Long.

At trial, Long testified that, shortly after Mr. McAdams' murder, Kormondy spoke with him concerning the murder. According to Long, Kormondy said on one occasion that "the only way they would catch the guy that shot Mr. McAdams was if they were walking right behind us." On another occasion, Kormondy admitted to shooting Mr. McAdams in the back of the head. Long reported Kormondy's confession to a friend and the pair decided

to go to the police. Eventually, Deputies Cotton and Hall interviewed Long about Kormondy's admissions.

Long could not recall, however, what he told the deputies about whose gun Kormondy used to murder Mr. McAdams. While he could not specifically remember whether he told the deputies that Kormondy admitted to using the victim's gun, Long told the jury his memory of his conversations with Kormondy was much fresher at the time he talked to the deputies than it was at the time of trial.

The prosecution called Deputy Cotton to testify specifically about what Long told him about whose gun Kormondy used to kill Mr. McAdams. Over the objection of trial counsel, Deputy Cotton testified that Long reported that Kormondy admitted to using Mr. McAdams' gun to shoot him.

This Court agreed with Kormondy that Deputy Cotton's testimony was inadmissible hearsay. However, this Court found the error to be harmless beyond a reasonable doubt. Kormondy v. State, 703 So.2d 454, 459 (Fla. 1997).

Kormondy next argued the trial judge erred in denying his motion for a judgment of acquittal to the charge of premeditated murder. Kormondy alleged the court should have granted the

motion because the State failed to rebut Kormondy's reasonable hypothesis that the gun went off accidentally as he pressed it to the back of Mr. McAdams' head.

This Court agreed. This Court noted that Long testified that Kormondy mentioned something about the gun going off accidentally. Further, Kormondy told the police that Buffkin had been the actual shooter but that Buffkin said he did not mean for the gun to go off.

This Court found that outside of Kormondy's statements, the evidence of premeditation was circumstantial. This Court pointed to the fact the victim's own gun was used in the shooting. This fact indicated both unfamiliarity with the murder weapon and a lack of any plan to use Buffkin's pistol to kill Mr. McAdams. This Court also observed the victims and the defendants did not know each other prior to the murder.

Additionally, this Court pointed to evidence the McAdams' cooperated during their ordeal and the defendants disabled the McAdams' phone lines upon entering the home. This Court found this evidence implied the defendants were not provoked by a fear that, if left alive, the McAdams' would call the police immediately after the trio's departure. This Court also noted

that while a single gunshot can be evidence of premeditation, it does not always support such a finding. This Court observed that while the State presented evidence that an accidental firing was unlikely if Mr. McAdams' gun was in good working order, the State failed to present testimony the gun was in good working order at the time of the murder.[1]

This Court concluded that, while the evidence was consistent with an unlawful killing, the evidence did not support a finding of premeditation. Because the evidence did support a conviction for felony first-degree murder, however, this Court affirmed Kormondy's conviction for first-degree murder. Kormondy v. State, 703 So.2d at 460.

Kormondy also raised four issues as to the penalty phase; (1) the trial court erred in admitting bad character evidence in the form of unconvicted crimes or nonstatutory aggravating circumstances; (2) the trial court erred in its treatment of aggravating circumstances; (3) the trial court erred in its treatment of mitigation; and (4) Kormondy's death sentence was disproportionate.

[1] The defendants took Mr. McAdams' gun from the scene.

As to his first claim, Kormondy alleged the trial court erred when the State was permitted to elicit testimony during cross-examination of defense witness Kevin Beck, Buffkin's trial defense counsel, that Buffkin told him that Kormondy stated he would kill Ms. McAdams and Willie Long if he ever got out of prison. This Court agreed with Kormondy and ruled Kormondy's intent to kill witnesses in the future was not relevant to prove any statutory aggravator.

This Court found this evidence, instead, constituted evidence of future dangerousness and, as such, was impermissible non-statutory aggravation. Finding reversible error in allowing the State to elicit this testimony, this Court reversed Kormondy's sentence of death and ordered a new penalty phase before a new jury.

In May 1999, a new penalty phase was conducted before a new jury. A new trial judge presided over the proceedings.

At resentencing, several witnesses testified on behalf of the State, including the victim's friends, family, neighbors, and members of law enforcement. The defense did not put on any witnesses, relying instead on cross-examination to attack the

credibility of each witness. The jury recommended Kormondy be sentenced to death, once again, by a vote of 8-4.

The trial court found two aggravating factors: (1) Kormondy had previously been convicted of a prior violent felony, and (2) the murder was committed in the course of a burglary. Kormondy v. State, 845 So.2d 41, 48 (Fla. 2003). The trial court found no statutory or non-statutory mitigation. On July 7, 1999, the trial court followed the jury's recommendation and sentenced Kormondy to death. Id.

On direct appeal, Kormondy raised seven issues: (1) whether the death penalty is constitutional and whether this sentence was proportional in this case given that (a) the codefendants, Curtis Buffkin and James Hazen, were given life sentences, and (b) the death was caused by an accidental firing of the weapon; (2) whether the resentencing trial and order violated this Court's mandate from the first appeal, violated principles of law protecting the accused from having questions of ultimate fact relitigated against him, and violated Kormondy's rights by finding aggravators not tried or argued; (3) whether the trial court reversibly erred in its mitigation findings because the trial court defied this court's mandate, committed legal and

factual errors, and contradicted itself; (4) whether the trial court erred by allowing the State to present irrelevant, cumulative, and unduly prejudicial collateral crime and nonstatutory aggravating evidence about Kormondy's capture by a canine unit more than a week after the crime took place; (5) whether Kormondy was denied his right to cross-examine and confront state witness Cecilia McAdams concerning her ability to identify and distinguish the perpetrators; (6) whether the introduction of compound victim impact evidence, much of which was inadmissible, was fundamental error that undermined the reliability of the jury's recommendation; and (7) whether the imposition of death in the absence of notice of the aggravators sought or found, or of jury findings of the aggravators and death eligibility, offends due process and the protection against cruel and unusual punishment.

This Court rejected each of Kormondy's claims and affirmed his sentence to death. Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003). On July 23, 2003, Kormondy filed a petition for certiorari review in the United States Supreme Court. The Court denied review on October 14, 2003. Kormondy v. Florida, 540 U.S. 950 (2003).

On August 30, 2004, Kormondy filed a motion for post-conviction relief. On June 20, 2005, after an evidentiary hearing, his motion was denied. Kormondy appealed and filed his initial brief on February 6, 2006. On the same day, Kormondy filed the instant petition.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

A habeas petition is the proper vehicle to raise claims of ineffective assistance of appellate counsel. *See* Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). The standard of review applicable to claims of ineffective assistance of appellate counsel mirrors the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), for analyzing claims of ineffective assistance of trial counsel. Valle v. Moore, 837 So.2d 905, 907 (Fla. 2002); Jones v. State, 794 So.2d 579,586 (Fla. 2001).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine, (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and (2) whether the

performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002).

The Petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). It is not enough to show an omission or act by appellate counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

A petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. *See* Medina v. Dugger, 586 So.2d 317 (Fla. 1991). An exception is made only when appellate counsel fails to raise a claim which, although not preserved for appeal, constitutes fundamental error. Kilgore v. State, 688 So.2d 895,898 (Fla. 1997). Fundamental error is error that "reaches down into the validity of the trial itself to the extent a verdict of guilty could not have been obtained without the assistance of the

alleged error." State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991)(quoting Brown v. State, 124 So.2d 481 (Fla. 1960)).

Likewise, appellate counsel is not ineffective for failing to raise a claim that likely would have been rejected on appeal. Downs v. State, 740 So.2d 506, 517 n. 18. *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same). This Court has also ruled that appellate counsel cannot be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal." Atkins v. Dugger, *supra*, 541 So.2d at 1166-67.

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. Scott v. Dugger, 604 So.2d 465, 469-470 (Fla. 1992).

RESPONSE TO SPECIFIC CLAIMS

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO SUFFICIENTLY ARGUE TO THE COURT THAT THE TRIAL COURT'S ORDER FAILS TO CONSIDER RECORD MITIGATION IN VIOLATION OF FARR v. STATE

In this claim, Kormondy alleges appellate counsel was ineffective for failing to raise a Farr issue on direct appeal. In Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993), this Court ruled that mitigating evidence must be considered and weighed when contained anywhere in the record to the extent it is believable and uncontroverted, even when a defendant argues in favor of the death penalty or asks the court not to consider mitigating evidence.

This claim should be denied because this claim was raised on direct appeal and decided adversely to Kormondy. It is improper to relitigate issues, in a habeas petition, asserting slightly different arguments than those presented on direct appeal. Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001) ("This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue."); Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992) (ruling that habeas corpus is not a second appeal and cannot be used to litigate or

relitigate issues which could have been or were raised on direct appeal).

On appeal from his second penalty phase, Kormondy alleged the trial court erred when it failed to consider mitigation that was in the record and wholly unrebutted. (2PP Initial Brief at page 52,55). While not quoting specifically to Farr, appellate counsel presented the substance of the same claim Kormondy presents in the instant petition.

This Court rejected Kormondy's claim. This Court noted the record established the trial judge considered mitigation in the record, specifically one statutory mitigator, that Kormondy's participation was minor, and four non-statutory mitigators, including: (1) Kormondy should receive life since Hazen and Buffkin were given life sentences; (2) the killing was accidental; (3) Kormondy cooperated with law enforcement; and (4) Kormondy displayed good conduct during the penalty phase. This Court also found specifically that the trial judge considered each of the non-statutory mitigating factors argued by the defense and outlined his reasons for rejecting each of the proposed mitigators. Kormondy v. State, 845 So.2d 41,51 (Fla. 2003).

Habeas proceedings are not intended to be a vehicle to quibble with the manner in which appellate counsel presented a claim and appellate counsel cannot be deemed ineffective for failing to prevail on an issue raised and rejected on direct appeal. Spencer v. State, 842 So.2d 52, 74 (Fla. 2003)(noting that appellate counsel cannot be deemed ineffective for failing to prevail on a claim raised and rejected on appeal); Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.").

Appellate counsel raised a nearly identical claim to the one Kormondy presents here. This claim should be denied.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT MRS. MCADAMS' PRIOR DEPOSITION TESTIMONY ON DIRECT APPEAL IN ORDER TO ESTABLISH THE TRIAL COURT ERRED BY NOT ALLOWING PETITION TO CONFRONT MS. MCADAMS

Kormondy apparently alleges that appellate counsel was ineffective for failing to supplement the record on appeal with Ms. McAdams' deposition testimony.[2] On direct appeal, Kormondy

[2] It is unclear whether Kormondy is alleging appellate counsel was ineffective for failing to supplement the record with the deposition of Ms. McAdams or that appellate counsel was ineffective for failing to quote from it. Kormondy couches his

claimed he was denied his constitutional right to cross-examine a witness. Kormondy alleged he was abruptly, and improperly, cut off while attempting to impeach Mrs. McAdams, by questioning her about a prior inconsistent deposition statement. At issue was the identity of the assailant who last took her to the bedroom and raped her.

This Court noted that after Mrs. McAdams testified she was able to identify the people who attacked her, trial counsel began an inquiry into statements made at her deposition. Before she could answer the question, the State made an objection. The trial court sustained the objection. This Court found that trial counsel made no proffer of the particular part of Ms. McAdams' deposition trial counsel wished to explore nor did he explain to the trial judge what he sought to elicit from Ms. McAdams. Kormondy v. State, 845 So.2d 41, 52 (Fla. 2003).

Accordingly, this Court found that Kormondy failed to demonstrate an abuse of discretion because it could not "be determined from the record that the defendant was deprived of his opportunity to cross-examine or impeach the witness". Kormondy v. State, 845 So.2d 41, 53 (Fla. 2003). At the heart

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claim in terms of the failure of appellate counsel to "present" the claim.

of this Court's decision was a determination the issue had not been properly preserved for appeal.[3]

This Court may deny relief on at least three grounds. First, appellate counsel, ordinarily, has no duty to go beyond the record on appeal. The record on appeal is the record presented to the trial court. Smith v. State, 31 Fla.L.Weekly S159 (Fla. March 9, 2006); Rutherford v. Moore, 774 So.2d 637, 646 (2000) (noting the appellate record is limited to the record presented to the trial court). Trial counsel made no proffer of the deposition or any part of it in order to make it a part of the trial record. Accordingly, appellate counsel cannot be ineffective for failing to "present" the deposition to this Court. Smith v. State, 31 Fla.L.Weekly S159 (Fla. March 9, 2006).

Second, absent fundamental error, a petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. Kilgore v. State, 688 So.2d 895,898 (Fla. 1997); Medina v. Dugger, 586 So.2d 317 (Fla. 1991). Kormondy does not allege the trial

[3] A proffer of excluded evidence or testimony not only allows for thorough appellate review but also gives a trial judge an opportunity to reconsider his decision if the proffer demonstrates grounds for admissibility.

court's decision to sustain the State's objection was fundamental error nor does he claim this Court would have reversed Kormondy's conviction and ordered a new trial if appellate counsel presented the deposition. Instead, Kormondy merely claims this Court would have been better informed of trial counsel's unstated intent or direction during his questioning of Ms. McAdams at trial. (Pet. page 14).[4] As Kormondy has failed to demonstrate fundamental error, appellate counsel cannot be deemed ineffective for failing to present this unpreserved error to this Court.

Finally, this Court may deny this claim because, despite trial counsel's failure to preserve the issue, appellate counsel argued this issue on direct appeal. Kormondy v. State, 845 So.2d 41, 52 (Fla. 2003). The fact counsel was ultimately unsuccessful is not grounds for an ineffective assistance of counsel claim.

Habeas proceedings are not intended to be a vehicle to quibble with the manner in which appellate counsel presented a claim and appellate counsel cannot be deemed ineffective for

[4] Without explanation or case law in support of his position, Kormondy alleges the failure to present Ms. McAdams' deposition to this Court on direct appeal "prejudiced the Petitioner". (Pet., 14).

failing to prevail on an issue raised and rejected on direct appeal. Spencer v. State, 842 So.2d 52, 74 (Fla. 2003) (noting that appellate counsel cannot be deemed ineffective for failing to prevail on a claim raised and rejected on appeal); Swafford v. Dugger, 569 So.2d 1264, 1266 (Fla. 1990) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance."). This Court should deny Kormondy's second habeas claim.

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT PETITIONER'S WAIVER OF MITIGATION WAS INVALID BECAUSE THE TRIAL COURT FAILED TO INQUIRE OF TRIAL COUNSEL WHAT INVESTIGATION FOR MITIGATION WAS DONE AND WHAT MITIGATION WAS AVAILABLE IN VIOLATION OF KOON v. DUGGER

Kormondy alleges the trial court erred when it failed to question trial counsel, in accord with this Court's decision in Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993), once counsel announced rest without presenting any witnesses in mitigation. Kormondy claims that appellate counsel was ineffective for failing to present a Koon claim on direct appeal.

In Koon, this Court determined that when a defendant refuses to permit the presentation of mitigating evidence in the penalty phase, against his counsel's advice, counsel must inform

the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. Koon v. Dugger, 619 So.2d at 250.

The purpose of a Koon inquiry is to ensure a defendant understands the importance of presenting evidence in mitigation and has discussed these issues with counsel, but nonetheless knowingly, intelligently and voluntarily wishes to waive his right to present mitigation. Mora v. State, 814 So.2d 322, 333 (Fla. 2002). This inquiry also serves to create a trial record that adequately reflects the defendant's knowing waiver of his right to present evidence in mitigation. Spann v. State, 857 So.2d 845, 853 (Fla. 2003).

This Court should deny this claim for two reasons. First, Kormondy raised a variation of this claim in his motion for post-conviction relief. While claims of ineffective assistance by appellate counsel are cognizable in habeas petitions, using a

different argument to re-litigate an issue raised in post-conviction proceedings is not appropriate. Fotopoulous v. State, 838 So.2d 1122, 1134 (Fla. 2002).

In his motion for post-conviction relief, Kormondy alleged his waiver of mitigation was invalid because trial counsel failed to investigate potential mitigating evidence. Kormondy claimed trial counsel failed to investigate available evidence in mitigation and had he done so, Kormondy would not have waived his right to present mitigation testimony. (PCR Vol III 393). Kormondy presented the same facts and made the same arguments as he does in the instant habeas petition (PCR Vol. III, 393-397). The trial court denied this claim and Kormondy has raised this as a claim of error on appeal from the denial of his motion for post-conviction relief. (PCR Vol. VI 971-972).

While couched loosely, here, in the guise of an ineffective assistance of appellate counsel claim, Kormondy's argument really presents an ineffective assistance of trial counsel claim, a claim not cognizable in these habeas proceedings or on direct appeal.[5] Because an ineffective assistance of trial

[5] For instance, Kormondy quotes extensively from a pre-trial hearing at which counsel requests a continuance to allow him to prepare more thoroughly for the penalty phase. (Pet., pages 16-

counsel claim is not cognizable on direct appeal, appellate counsel may not be deemed ineffective for failing to raise a meritless claim. Bryant v. State, 901 So.2d 810, 826 (Fla. 2005).

Second, presuming an inquiry was necessary, this Court may deny this claim because the record reveals the Defendant was examined, twice, outside the presence of the jury, to ensure the defendant's waiver of his right to present mitigation was knowing and voluntary. (2PP Vol. III 23-27) (2PP Vol. V 483-88).[6] Kormondy's trial counsel offered to inquire on both occasions.

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17). Additionally, Kormondy faults the trial court for not inquiring whether trial counsel's announcement to waive mitigation was a matter of strategy or because of the Defendants refusal to allow the presentation of evidence in mitigation. Pet, page 17).

[6] Koon seems to be limited to situations in which a client waives his right to present mitigation against the wishes of counsel. There was no indication in the trial record that Kormondy's waiver of his right to put on testimony in mitigation was against counsel's advice. During the evidentiary hearing, trial counsel testified he encouraged Kormondy to put on mitigation evidence. However, given the "bad" evidence that would come in with the "good", Kormondy and his trial counsel decided jointly as a matter of strategy not to put on mitigation evidence. (PCR-T, Vol. II 268, 270).

Immediately before jury selection in his second penalty phase proceeding began, Kormondy waived his right to present certain evidence in mitigation. (2PP Vol. III 20-21). The following colloquy took place:

> **Mr. Arnold:** Mr. Kormondy, have we discussed the fact that tactically it would be beneficial to you to announce to the State that you would not present evidence of testimony or argument dealing with the fact that you have no prior criminal history because, in fact, you do have a prior criminal history.
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> **Mr. Kormondy:** Yes
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> **Mr. Arnold**: And do you understand that the State, of course, could come back in and impeach us or impeach you if you so testified that you had no prior criminal history? We've discussed that?
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> **Mr. Kormondy**: Yes
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> **Mr. Arnold**: And you agree to the waiver of that particular mitigator?
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> **Mr. Kormondy**: Right, Yes.
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> **Mr. Arnold**: The next matter is that during the guilt phase trial , there was testimony taken by the lawyers who represented you at that time dealing with the fact that you may have previously been under some sort of extreme mental or emotional disturbance or that you may have been, if not addicted to, at least abusing crack cocaine or other drugs or alcohol, and in fact there was testimony by a psychologist with regards to those matters; and do you understand

that those avenues of defense are available to you at this time?

Mr. Kormondy: Yeah.

Mr. Arnold: The same thing goes with the mitigator I announced to the Court and to the State dealing with your lack of capacity to conform to the laws of our state or to the laws of the United States. Do you understand that you have the right to present testimony that you simply don't have the ability to follow the law and because of some other pressing problem, mentally or emotionally or whatever, do you understand that?

Mr. Kormondy: Yes.

Mr. Arnold: And have we discussed those and have you agreed to waiver those as mitigators?

Mr. Kormondy: Yes, sir.

Mr. Arnold: And there was some testimony previously, and you have the availability of that testimony now to present testimony that you either had mental problems associated with your childhood upbringing or that you were either abused and that doesn't mean you were beaten, it could mean that you were either beaten, or sexually, or mentally or any other way abused by parents or a figurehead or persons of authority over you. Do you understand that you still have that avenue of defense available to you at this time?

Mr. Kormondy: Yes.

Mr. Arnold: And have we discussed that avenue of defense and all those various matters?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: And are you satisfied that it is in your best interest not to present testimony, evidence or argument pertaining to those mitigators?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: There was another mitigator that I mentioned and it had to do with whether or not the victim in this particular case, the decedent, Mr. Gary McAdams, in any way participated or consented to the offense, and of course, you are not claiming that in any way whatever, are you?

Mr. Kormondy: No.

Mr. Arnold: And you would waive that mitigator?

Mr. Kormondy: Yes

Mr. Arnold: Judge, I believe I had covered those mitigators. Are you satisfied, Mr. Edgar?

Mr. Edgar: Yes, your honor. I just wanted to make sure they discussed it to the defendant's satisfaction. I know Mr. Arnold is an experienced attorney and he is fully capable of advising his clients. I just wanted to make sure the defendant understood and that he had that opportunity and what effect that would have by not doing that, what effect it might possibly have, it could make a difference in this matter and that he should be aware of that for his own reasons and advice of counsel, he is choosing not to do that.

> **The Court**: Mr. Kormondy, you heard your lawyer announce to the Court the various mitigators that you're waiving; have you discussed each of those at length with him and arrived at the conclusion it would not be in your best interest to present these.
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> **Mr. Kormondy**: Yes, Sir.
>
> **The Court**: You're satisfied that your lawyer has adequately represented you and represented things to you in regard to those mitigators so that you can make an intelligent decision with regard to not wanting the introduction of those into evidence?
>
> **Mr. Kormondy**: Yes Sir.

(2PP Vol. III 222-27; PCR Vol V 898-906).

At the conclusion of the State's case, the defense immediately announced rest. At the request of the prosecutor, another colloquy between trial counsel and Kormondy was placed into the record. This colloquy occurred as follows:

> **Mr. Arnold**: Mr. Kormondy, have I discussed with you the statutory mitigating circumstances, that the defendant has no significant criminal history of a prior criminal activity and we have previously announced that we would not deal with that and the State likewise agreed they would not deal with that?
>
> **Mr. Kormondy**: Yes, sir.
>
> **Mr. Arnold**: Did we do that as a part of the strategy proceedings in this case?
>
> **Mr. Kormondy**: Yes, sir.

Mr. Arnold: With regards to the second statutory mitigating circumstance, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Did I discuss with you any---not only medically diagnosed problems, but any problems you have thought about dealing with mental or emotional disturbance, and did we rule out any evidence or argument pertaining to whether or not you were under the influence of extreme mental or emotional disturbance?

Mr. Kormondy: Yes, Sir

Mr. Arnold: And did we agree that as part of our strategy, that it may be in our best interest not to present that testimony so that we did not open the door for the State to put evidence in on some other matters?

Mr. Kormondy: Yes, sir.

Mr. Arnold: With regards to the statutory mitigator that the victim was a participant in the defendant's conduct or consented to the act, we have agreed that it is not true and that we would not use it as a statutory mitigator?

Mr. Kormondy: Yes, Sir.

Mr. Arnold: With regards to the mitigator that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, we are going to argue that. May not request it as a jury instruction, but I may argue that if the evidence, if I believe that the evidence is present?

Mr. Kormondy: Right.

Mr. Arnold: Agree?

Mr. Kormondy: Right.

Mr. Arnold: Okay, with regards to the next mitigator, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Again, in conjunction with the emotional disturbance and that sort of thing, have we discussed that in detail and agreed that we would not present any evidence or attempt to put any evidence or argument pertaining to that mitigator into the record?

Mr. Kormondy: Yes.

Mr. Arnold: And that likewise is in your best interest not to do so?

Mr. Kormondy: Right

Mr. Arnold: The age of the defendant at the time of the crime. If its requested, the Judge usually puts that into the jury instructions, although we've not really brought that up as an issue; is that correct?

Mr. Kormondy: Yes, sir.

Mr. Arnold: There are a number of nonstatutory mitigators, and under no pretense do I attempt to tell you each and every one of them, okay.

Mr. Kormondy: Okay

Mr. Arnold: Because they can be most anything that someone can think of. Let me cover a few, if I may. With regards to family background or employment background or military service, we've not presented any evidence on those matters, correct?

Mr. Kormondy: Correct

Mr. Arnold: Do you desire to put in any evidence or argument pertaining to those three items?

Mr. Kormondy: No

Mr. Arnold: Okay. With regards to mental problems, which do not reach the level of extreme mental anguish or mental emotional defect, do you wish to present any testimony, argument, or evidence, pertaining to mental problems of any nature, whatever?

Mr. Kormondy: No

Mr. Arnold: And we have discussed that fully and completely?

Mr. Kormondy: Right

Mr. Arnold: With regards to abuse of the defendant by parents, either physically, mentally, or sexually, we have agreed that there would be no testimony, evidence, or argument pertaining to that nonstatutory mitigator, is that correct?

Mr. Kormondy: Yes, sir.

Mr. Arnold: And we have discussed that in detail?

Mr. Kormondy: Right.

Mr. Arnold: I believe that previously there was some testimony dealing with that and you discussed that with me and asked me not to present any evidence to the court, did you not?

Mr. Kormondy: Right

Mr. Arnold: Okay. With regards to contribution to the community or society or charitable or humanitarian acts or deeds, we have no evidence pertaining to those, correct?

Mr. Kormondy: Correct

Mr. Arnold: With regards to the quality of being a caring parent, I understand that you have a child but we've not presented any evidence dealing with that, correct?

Mr. Kormondy: Correct

Mr. Arnold: And it's not your desire to present any evidence dealing with those items?

Mr. Kormondy: (Shakes head negatively)

Mr. Arnold: The same thing goes with regular church attendance or religious devotion, such as that?

Mr. Kormondy: Correct.

Mr. Arnold: We've talked about it, discussed it, you've agreed not to present it. I have discussed with the State Attorney and we will present to the Judge shortly jury instructions which include the non-statutory mitigators. One, being that you cooperated fully with law enforcement after your arrest, another being the two co-defendants are serving life in prison, another being you had no intent that Gary McAdams die as a result of these crimes that we talked about, and fourth, I'm asking the Court to present and be that you exhibited good behavior and good conduct during the course of this trial. Are there any other nonstatutory mitigators that you think I should present to the Court?

Mr. Kormondy: (Shakes head negatively)

(2PP Vol. V 483-489).

These on-the-record inquiries satisfied the intent and purpose of this Court's requirement, in Koon, that a trial judge inquire of the defendant to ensure a waiver of his right to present evidence in mitigation is knowing, intelligent and voluntary. Chandler v. State, 702 So.2d 186, 199 (Fla. 1997) (noting the primary reason for requiring this procedure was to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence). While Kormondy claims, now, the inquiries were not sufficiently specific, there is no requirement that each explicit detail be explored on the record. Waterhouse v. State, 792 So. 2d 1176, 1184 (Fla. 2001)(Koon requirements were met when defendant made it "abundantly clear" he was waiving mitigation); Chandler v. State, 702 So. 2d at 200 n.19 (as long as it was demonstrated that waiver was made knowingly, intelligently, and voluntarily, defense counsel was not required to go into explicit detail about what the favorable mitigation evidence would be).

The inquiries between trial counsel and Kormondy established that counsel had considered each statutory mitigator and discussed each fully with his client. The inquiries also demonstrated that trial counsel was aware of, and had considered, non-statutory mitigators typically presented, including those that had already been presented at Kormondy's original trial.

The record establishes that counsel explored and discussed available mitigation fully with his client. The record is also abundantly clear that Kormondy knowingly, intelligently, and voluntarily waived his right to present mitigation evidence.

Appellate counsel is not ineffective for failing to argue an issue on direct appeal that has little likelihood of success. The record reflects that counsel was aware of potential mitigation, discussed it fully with his client, and considered the pros and cons of presenting such evidence. The record also shows Kormondy voluntarily waived his right to present evidence in mitigation. This Court should deny this claim.

CONCLUSION

Kormondy has failed to demonstrate entitlement to relief. The Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

CHARLES J. CRIST JR.
ATTORNEY GENERAL

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MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
PHONE: (850) 414-3583
FAX: (850) 487-0997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Michael Reiter, Esq., 4543 Hedgewood Drive, Tallahassee, Florida this 16th day of June 2006.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

_____
MEREDITH CHARBULA
Assistant Attorney General