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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-820

RONALD KNIGHT

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

PAMELA JO BOINDI
Attorney General
Tallahassee, FL

Leslie T. Campbell
Assistant Attorney General
Florida Bar No.: 0066631
1515 N. Flagler Dr.; Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108
E-mail:
Leslie.Campbell@MyFloridaLegal.com
Secondary E-mail:
CapApp@MyFloridaLegal.com

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, Ronald Knight, Defendant below, will be referred to as "Knight" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record will be by "ROA", to the postconviction record will be "PCR", and supplemental materials will be designated by the symbol "S" preceding the type of record referenced, Knight's initial brief will be notated as "IB" followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

Case Number 94-4885 CF A02 - Initially, Knight had been charged with the second-degree murder of Richard Kunkel ("Kunkel") under case number 94-4885 CF A02 and was represented by Jose Sosa in that matter. However, on January 3, 1995, as a result of Knight's intimidation of multiple witnesses to the point where those witnesses would no longer cooperate, the State enter a *nolle prosequi*, before the jury was selected and sworn and before the trial commenced. (PCR.25 1063-68)

Trial and Direct Appeal - Following Knight's conviction in another case of the first-degree murder of Brendan Meehan ("Meehan case"), charges for the Kunkel homicide were re-initiated under case number 97-5175 ("Kunkel case") based upon the May 8, 1997 indictment for first-degree murder of Kunkel,

armed robbery, burglary of a dwelling, and grand theft of Kunkel's automobile (ROA.1 2-4; Indictment). After discharging both his appointed counsel, Ann Perry ("Perry") on October 31, 1997, and Jose Sosa ("Sosa") on January 8, 1998, Knight represented himself at trial and waived his jury. (SROA 1-63) Sosa, who had represented Knight in the 1994 case, was appointed as standby counsel for trial. The non-jury trial was held from March 11, 1998 through March 16, 1998 following which Knight was convicted as charged.

Prior to the commencement of the penalty phase, Knight again opted to waive a jury as finder of fact. Sosa, however, was reappointed as counsel of record. Following the penalty phase, on May 29, 1998, Judge Garrison entered the Judgment and the Sentencing orders and imposed a death sentence upon Knight for first-degree murder. (ROA.4 427-30, 434). In aggravation, the court found: (1) prior violent felony (Knight was previously convicted of first-degree murder and armed robbery with a firearm); (2) felony (robbery); (3) pecuniary gain (merged with felony murder); and (4) cold, calculated, and premeditated ("CCP"). Regarding mitigation, the court gave "considerable weight" to the statutory mitigator of "under the influence of extreme mental or emotional disturbance," noting that two experts had testified that Knight suffered from a paranoid disorder, which was chronic, even though there was no testimony

that Knight was under any particular stress or emotional disturbance at the time of the murder. Judge Garrison also gave "some consideration" to the non-statutory mitigator of Knight's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" being impaired, but not substantially. The court found non-statutory mitigation of: (1) Knight suffered from a broken home and unstable childhood (little weight); (2) Knight has the support and love of family members (little weight); and (3) alleged disparate treatment of co-defendants (little weight). Knight received a life sentence for the armed robbery, fifteen years for the burglary conviction, and five years for the grand theft of an automobile (ROA.4 418, 420-30)

In the direct appeal opinion, this Court found:

> During the guilt phase of his trial, Knight represented himself, assisted by standby counsel, Mr. Sosa. (FN1)
>
> [1] During the penalty phase of the trial, Knight was represented by Mr. Sosa.
>
> The evidence presented during the guilt phase indicated that Knight and two accomplices, Timothy Peirson (Peirson) and Dain Brennault (Brennault),(FN2) agreed that they would go to a gay bar, lure a man away from the bar, and beat and rob him. The three found Richard Kunkel (Kunkel) and invited him to go to a party with them. Kunkel was driving his own car and followed Knight and the others to Miami Subs. After stopping to eat, the three convinced Kunkel to leave his car parked there and ride to the party with them. Knight then drove to a secluded area where they stopped twice and got out of the car to urinate.

[2] Peirson received three years in prison and Brennault received five years' probation. The evidence revealed neither of them knew Knight planned to kill Richard Kunkel.

Before they got back into the car after their second stop, Knight pointed a gun at Kunkel and told him to turn around and take off his jeans. As Kunkel was complying, Knight fired one shot striking Kunkel in the back. Kunkel fell to the ground and began crying for help. Knight then ordered Brennault and Peirson to search Kunkel's pockets. Peirson complied, but Brennault refused. Knight and Peirson then dragged Kunkel's body out of the road. They left Kunkel to die beside a canal where his body was later discovered. Knight threatened to kill Peirson and Brennault if they told anyone about the murder.

Later that night, the three men went back to Miami Subs where they had left Kunkel's car. Knight then stole Kunkel's car and took it for a joy ride to see how fast it would go. Some time later that evening, the three men broke into Kunkel's house and stole various items.(FN3)

[3] Knight took Kunkel's keys and wallet from him after he shot him. He got Kunkel's address from his driver's license.

When Peirson and Brennault were first questioned about the incident by the police, they denied any knowledge of the murder; however, both men later confessed. Knight bragged about the murder to Christopher Holt. Peirson, Brennault, and Holt all testified against Knight during the guilt phase of the trial.

During the penalty phase, the State presented evidence that Knight had previously been convicted of another murder occurring under very similar circumstances. The other aggravating factors presented and relied upon by the trial judge were that the murder occurred while Knight was engaged in the commission of a robbery, the murder was committed for pecuniary gain, and the murder was cold, calculated, and premeditated. The trial court merged the "committed during a robbery" and "for pecuniary gain" aggravators. Knight

> presented some mitigation, the most significant of which was expert witnesses who testified that Knight suffered from a paranoid disorder that was exacerbated by his unstable childhood. The court gave this mitigating factor considerable weight. Knight also presented mitigating evidence that he had the support and love of his mother, brother, and sisters and that the death penalty would be disparate treatment because his cofelons received much lighter sentences. The court gave these factors little weight.

Knight v. State, 770 So.2d 663, 664-65 (Fla. 2000). Knight raised three issues on direct appeal.[1] This Court found no merit to Knight's arguments and affirmed the convictions and sentences. *Id.* at 665.

Knight petitioned the United States Supreme Court for certiorari review on or about March 1, 2001, raising three issues.[2] On April 30, 2001, the Supreme Court denied certiorari.

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[1] **Point I** - The trial court erred by failing to conduct a meaningful *Nelson [v. State*, 274 So.2d 256 (Fla. 4th DCA 1973)] Inquiry in response to Appellant's pre-trial motion to have Appellant's court-appointed counsel dismissed and new counsel appointed; **Point II** - The Appellant cannot be deemed to have knowingly and intelligently waived the right to counsel at trial when the trial court failed to present the entire process of offering counsel and making a through (sic) inquiry of Appellant's ability to make a knowing and intelligent waiver of assistance of counsel prior to the commencement of trial contrary to Rules 3.111 (d)(2), (5), Fla. R. Crim. P.; and **Point III** - Section 921.141(5)(b) Florida Statutes, is unconstitutional on its face and was applied in a vague, overbroad, arbitrary and inconsistent manner as an aggravating factor in support of the trial court's imposition of the death penalty, when the criminal activity cited as an aggravating circumstance occurred after the murder in the case at bar.

[2] Knight raised three issues:

> I - The Supreme Court of Florida erred in holding that the trial court did not violate the Petitioner's

Knight v. Florida, 121 S.Ct. 1743 (2001).

Subsequently, Knight sought state collateral relief. On or about September 27, 2001, Knight filed an unverified, shell postconviction motion, which, on October 1, 2001, was stricken/denied. Knight filed for a rehearing, attached a "Verification" notarized on September 10, 2001, and sought to have his motion reinstated. The State objected, however, on October 30, 2001, the Court granted the rehearing, vacated its October 11, 2001 order, and deemed the Verification filed and accepted on September 27, 2001.

On June 3, 2004, Knight filed his Amended Motion to Vacate Conviction and Sentence with Special Leave to Amend, to which

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> rights to effective assistance of counsel under the Sixth Amendment and Fourteenth Amendment by failing to conduct a meaningful inquiry in response to the Petitioner's pre-trial motion to have Petitioner's court-appointed counsel dismissed and new counsel appointed.
>
> II - The Supreme Court of Florida erred in holding that the trial court did not violate the Petitioner's rights under the Sixth Amendment and Fourteenth Amendment when it determined that the Petitioner's waiver of counsel was knowing and intelligent without conducting the appropriate inquiry.
>
> III - The Supreme Court of Florida erred in holding that Section 921.141(5)(b), Florida Statutes is unconstitutional, when the trial court applied said statute in a vague, over-broad, arbitrary and inconsistent manner as an aggravating factor in support of the trial court's imposition of the death penalty, because the criminal activity cited as an aggravating circumstance occurred after the murder in the case at bar.

the State responded on September 1, 2004. A Case Management/*Huff v. State*, 622 So.2d 982 (Fla. 1983) hearing was held on March 24, 2005 followed by public records litigation and rehearings related to the lethal injection claim. Finally, it was determined that Knight was not entitled to public records or an evidentiary hearing on the lethal injection claim (Claim 13) (PCR.7 1220-21), however, an evidentiary hearing was granted on all other issues.

On or about December 7, 2006, Knight moved to amend his postconviction motion and filed what he entitled as a Supplement to Amended Motion.[3] (PCR.7 1223-1316) On March 28, 2008, Knight filed his Amended Supplement to Amended Motion to Vacate Conviction and Sentence. (PCR.8 1493-160) Following the discharge of Capital Collateral Regional Counsel ("CCRC") as counsel, but appointment of CCRC as standby counsel, (PCR.10 1887-1900) Knight, on April 6, 2010, filed his *pro se* Amended Motion to Vacate Conviction and Sentence. (PCR.11 2104-29) On February 11, 2011, Defendant, Ronald Knight ("Knight"), acting *pro se*, served a Request for Leave to Amend his postconviction motion under Rule 3.851 Fla.R.Crim.P. and attached his Amended Motion to Vacate Conviction and Sentence with Special Request

[3] Claims 17 through 19 were added in a December 2006 amended motion, but were withdrawn and amended by the March 2008 pleading. Now, Claims 17 and 18 of that pleading have been replaced by Knight's April 6, 2010, pro se pleading. (PCR.7 1223-1316)

for Leave to Amend ("February 2001-Motion") which purported to add "Claim 20" to the instant postconviction litigation. (PCR.14 2606). Three months later on May 24, 2011, Knight served a Supplement to Amended Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend. In that motion he added another "Claim 20" addressed to counsel's alleged ineffectiveness for failing to ensure a complete record for trial and appeal. ("May 2011-Motion") (PCR.14 2673-81). CCRC adopted Knight's *pro se* postconviction motions once CCRC was reappointed.[4]

An evidentiary hearing was granted on all of the claims, original, amended, and supplemented, with the exception of Claim 14 (challenge to lethal injection) and Amended Claim 19 (based on the American Bar Association Report on the death penalty).[5] At the evidentiary hearing held on May 1–3, 2012, June 21, 2012, and August 1-2, 2012, Knight presented: Dr. Abby Strauss, Dr. Philip Harvey, Zebedee Fennell, Terry Fowler, Timothy Pearson,

[4] While Knight attempted to remove CCRC as counsel on the first day of the evidentiary hearing, the trial court found CCRC "has performed better than adequate legal services, and have provided services above the standard threshold required by both *Nelson* and the Florida statute that Mr. Knight cites." (PCR.30 731)

[5] Additionally, Knight, through counsel, admitted that Claim 8 (innocent of the death penalty); Claim 12 (death penalty applied in racially biased manner); Claim 13 (Florida's capital sentencing is unconstitutional), and Claim 15 (Knight is insane to be executed) where either legal claims or were premature, thus, no evidence would be presented at the hearing. (PCR.31 756, 760-62)

Dain Brennalt, Ann Perry, Dr. Jonathan Lipman, Phyllis Dames, Rick Hussey, and current prosecutor, Andrew Slater. Knight also testified on his own behalf. The State called former prosecutors, Marc Shiner and Shirley Deluna.

The trial court denied Knight's motion for post conviction relief, and all its amendments/supplements, on February 6, 2013. (PCR.16 3084-3148). On March 25, 2014, Knight filed his initial brief in the instant postconviction appeal case number SC13-820 in the related petition for writ of habeas corpus, case number SC14-567.

SUMMARY OF THE ARGUMENT

Claim I – Penalty phase counsel rendered constitutionally professional representation. Counsel investigated Knight's history, retained experts who had evaluated Knight for a prior murder case, and presented mitigating circumstances to the jury. Knight has failed to show that his new experts have developed any mitigation not discovered by counsel. The trial court's rejection of this claim is supported by competent substantial evidence and comports with *Strickland*.

Claim II – The trial court did not abuse its discretion in re-appointing CCRC for Knight's postconviction case when he asked for counsel and where an evidentiary hearing was scheduled. Knight, and indigent capital defendant, was statutorily entitled to counsel, just not counsel of his choice.

Claim III – The trial court properly found that Knight did not suffer a double jeopardy and rule-speedy trial violation as a result of the State re-filing charges in 1997 after Knight had intimidated witnesses causing a nolle prosequi of the 1994 case based on the same murder. Moreover, Knight was his own counsel in the 1997, thus, any failure to challenge the propriety of the 1997 charges rests with Knight. Even so, Knight failed to prove that counsel representing him briefly in the guilt phase rendered ineffective assistance in not moving for a discharge as such act would be futile. Likewise, any failure to obtain a

record of the 1994 case was ineffective assistance as again Knight was his own counsel and never sought those documents.

Claim IV – The claim that the trial court erred in not holding a Richardson hearing when Knight gave his reasons for discharging guilt phase counsel is procedurally barred and meritless.

Claim V – The trial court's rejection of Knight's claims that his waivers of his guilt and penalty phase juries and his waiver of guilt phase counsel are procedurally bared and meritless.

Claim VI – Florida's lethal injection protocol is constitutional.

ARGUMENT

CLAIM I

PENALTY PHASE COUNSEL RENDERED CONSTITUIONALLY EFFECTIVE ASSISTANCE (restated)

Following an evidentiary hearing on Claim 6 below, the trial court concluded that Knight had failed to carry his burden under *Strickland v. Washington*, 466 U.S. 668 (1984) of establishing that penalty phase counsel, Jose Sosa ("Sosa") rendered both deficient performance in his mitigation investigation, preparation of experts, and penalty phase presentation and that such prejudiced Knight. Here, Knight re-asserts that Sosa was ineffective for failing to adequately investigate and present mitigation of: (1) childhood trauma; (2) substance abuse; and (3) psychological/emotional problems. Contrary to Knight's position, the trial court's rejection of this claim is supported by substantial, competent evidence in the record and the legal conclusions are supported by the law. Relief was denied properly and that ruling should be affirmed.

A. Standard of Review - This Court employs different standards of review depending on whether there was a summary denial of postconviction relief or a denial of relief following an evidentiary hearing.

> This Court accords deference to the postconviction court's factual findings following its denial of a claim after an evidentiary hearing. . . . "As long as the trial court's findings are supported by competent

> substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" . . . The postconviction court's legal conclusions, however, are reviewed *de novo*. . . . When evaluating claims that were summarily denied without a hearing, this Court will affirm "only when the claim is 'legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record.'"

Jackson v. State, 127 So.3d 447, 459-60 (Fla. 2013) (citations omitted). *See Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009); *Arbelaez v. State*, 889 So.2d 25, 32 (Fla. 2005); *Davis v. State*, 875 So.2d 359 (Fla. 2003).

To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-89. This Court has reiterated:

> * * * that to establish a claim of ineffective assistance of trial counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

> reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *Valle*, we further explained:

> In evaluating whether an attorney's conduct is deficient, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" and the defendant "bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternate courses of action have been considered and rejected. Moreover, "[t]o establish prejudice, [a defendant] 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

Id. at 965-66 (citations omitted)(quoting *Brown v. State*, 775 So.2d 616, 628 (Fla. 2000), and *Williams v. Taylor*, 529 U.S. 362, 391 (2000)).

Arbelaez, 889 So.2d at 31-32. In *Davis*, 875 So.2d at 365, this Court explained that the deficiency prong of *Strickland* required the defendant to prove that the "conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards." (*citing Kennedy v. State*, 547 So.2d 912, 913 (Fla. 1989). Prejudice under *Strickland*

requires proof that "the deficiency in counsel's performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Davis*, 875 So.2d 365. *See Valle v. State*, 778 So.2d 906 (Fla. 2001).

At all times, the defendant bears the burden of proving not only that counsel's representation fell below an objective standard of reasonableness and was not the result of a strategic decision, but also that actual and substantial prejudice resulted from the deficiency. *See Orme v. State*, 896 So.2d 725, 731 (Fla. 2005) (Fla. 2005) (quoting *Strickland*, 466 U.S. at 694 that "a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision"); *Gamble v. State*, 877 So.2d 706, 711 (Fla. 2004); *Johnston v. Singletary*, 162 F.3d 630, (11th Cir. 1998); *Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982). When considering a claim of ineffectiveness of counsel, a court "need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla.), *cert. denied*, 479 U.S. 972 (1986).

With respect to performance, "judicial scrutiny must be highly deferential;" "every effort" must "be made to eliminate

the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Davis*, 875 So.2d 365; *Chandler v. United States*, 218 F.3d 1305, 1313 n.12 (11th Cir. 2000). "The test for ineffectiveness is not whether counsel could have done more; perfection is not required." *Id.*, at 1313 n. 12. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ability to create a more favorable strategy years later, does not prove deficiency. *See Patton v. State*, 784 So.2d 380 (Fla. 2000); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). From *Williams v. Taylor*, 529 U.S. 362 (2000), it is clear the focus is on **what** efforts were undertaken and **why** a specific strategy was chosen over another. Additionally, as noted in *Chandler*, 218 F.3d at 1318, "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. *See Strickland*, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")"

It must be noted that under *Strickland*, it is the defendant's burden to come forward with evidence that counsel was deficient and that such prejudiced him.

> *Strickland* specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment." 466 U.S., at 689-690, 104 S.Ct. 2052. The Court of Appeals was required not simply to "give [the] attorneys the benefit of the doubt," 590 F.3d, at 673, but to affirmatively entertain the range of possible "reasons Pinholster's counsel may have had for proceeding as they did," *id.*, at 692 (Kozinski, C.J., dissenting). *See also Richter, supra*, at 1427, 131 S.Ct., at 791 ("*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind").

Cullen v. Pinholster, 131 S.Ct. 1388, 1407 (2011). Moreover, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment)." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). As set out in *Wong v. Belmontes*, 558 U.S. 15, 16-17, (2009), "In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.'

Id., at 688–689, 104 S.Ct. 2052."

With respect to *Strickland* prejudice, *Harrington v. Richter*, 131 S.Ct. 770, 787-88 (2011) provides:

> * * * a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 787-88.

Continuing, the Supreme Court has reasoned:

> The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Although courts may not indulge "*post hoc* rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U.S., at 526-527, 123 S.Ct. 2527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S., at 688, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 790. Also:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. *See Wong v. Belmontes*, 558 U.S. ----, ----, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam) (slip op., at 13); *Strickland*, 466 U.S., at 693, 104 S.Ct. 2052. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. Id., at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.* at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. at 791-92.

B. <u>The Trial Court Ruling</u> – The trial court found Knight had alleged that Sosa failed to investigate completely Knight's mental health, substance abuse, and troubled childhood background and give those materials to his mental health experts so "they could have expressed a more complete view" of Knight's: (1) entire background; (2) substance abuse history; (3) how his paranoid disorder was affected by his substance abuse and opine that both mental health mitigators existed. Knight also asserted his complete history regarding his stay at Eckerd Youth Academy would have yielded additional mitigation and countered the cold, calculated, and premeditated ("CCP") aggravator and he would have received a life sentence. (PCR.16 3114). In rejecting the claim, the trial court found that the statutory mental health mitigation of "under extreme mental or emotional disturbance" was found by the sentencing court and given "considerable weight" and attached the sentencing order to the order denying postconviction relief as Exhibit D. (PCR.16 3144; PCR.17 3194-95) The trial court also found that the sentencing court had given the second statutory mental health mitigator "some consideration" but that Knight's capacity to appreciate/conform his conduct was not "*substantially* impaired." (PCR.16 3114-15) The trial court then reviewed the penalty phase testimony of Knight's mental health experts Dr. Strauss and Susan Lafehr-Hession ("Hession") and his family members:

"his older sister, Theresa Scott (now Theresa Fowler). His mother, Karen Gerheiser ("Gerheiser"), and his brother Michael Knight." (PCR.16 3115-16) Likewise, the trial court set out the testimony presented at the postconviction evidentiary hearing. (PCR.16 3116-21).

Based on the postconviction testimony, the trial court found that "Dr. Strauss testified that even after receiving additional information, his opinion did not change" and "[t]he additional information that Dr. Strauss took into consideration merely solidified his belief that the Defendant suffers from a paranoid disorder." (PCR. 3116-17) The trial court continued:

> Dr. Strauss testified that the Defendant's ability to conform his conduct with the requirements of the law is impaired, but did not elaborate further. (PC EH 5/1/2012 PM Session at 82) He also stated that while it was "said that he was using drugs," there was no "hard evidence" that he knew of and thus, could not testify definitively as to whether the Defendant's ability to conform his behavior to the law was substantially impaired. (PC EH 5/1/2012 PM Session at 83) Dr. Strauss also testified that there was no evidence that the Defendant was suffering from a psychotic event at the time of the murder, has no delusions, no cognitive impairments, and did not report any sexual or physical abuse at the Eckerd Youth Academy. (PC EH 5/1/2012 PM Session at 87, 93, 109)

(PCR.16 3117). The trial court cited Dr. Strauss' testimony where he said he had seen nothing to change his diagnosis of a paranoid disorder. (PCR.16 3117-18)

The trial court found:

> Dr. Strauss was the only doctor to provide a clinical diagnosis during the postconviction proceedings, and that diagnosis remained unchanged from his initial testimony during the penalty phase which was that there was not substantial impairment. Therefore, because the Defendant cannot show an ultimate change in what would be presented to the Court, but rather, a potential difference in some of the data interpreted by the experts, he cannot show prejudice under *Strickland*. Dr. Strauss's testimony from the evidentiary hearing revealed that there would be no change between what he testified to at the penalty phase, and what he would testify to with this new information.

(PCR.16 3118)

With respect to Knight's substance abuse, the trial court noted that co-defendant, Timothy Pearson ("Pearson"), did not testify at Knight's trial "based on advice of counsel" and that this fact "alone prevents a finding of deficient performance as Sosa cannot be faulted for failing to call a witness who would not testify." (PCR.16 3118). The trial court also noted that Pearson reported during the evidentiary hearing that he and Knight were using drug and drinking heavily during the time period of the murder. (PCR.16 3118) However, the trial court also found that Pearson was asked during the investigation of the murder about their drug use on the day of the crime and he denied such use, then tried to excuse the disparity by claiming the question went to his general drug usage. (PCR.16 3118). The trial court also found that Knight had denied drug use when he met with Sosa and his experts and that this information was

"exclusively within" Knight's control. (PCR.16 3318-19).

Turing to Dr. Harvey's testimony, the trial court found that testing done by Dr. Harvey revealed Knight's full scale IQ was 95, that there was no indication of "a traumatic brain injury," and that ultimately, Dr. Harvey made no diagnosis. (PCR.16 3119). Also, the trial court stated:

> Dr. Harvey testified that "the information about substance use, that the other doctor [Dr. Lipman][6] generated, was not something that I assessed on Mr. Knight's part." (PC EH 5/1/2012 PM Session at 129) Further, he stated that, based on the objective data he was "surprised that given the extensive substance abuse history that's being reported by this doctor, that Mr. Knight didn't show greater changes in his cognitive functioning." (PC EH 5/1/2012 PN Session at 129).

(PCR.16 3119)

Knight presented his sister, Theresa Fowler ("Fowler"), at the evidentiary hearing. The trial court found that Fowler contradicted her penalty phase testimony by stating she and Knight were not shown affection and were neglected. The trial court found Fowler "explained the inconsistencies in her

[6] **The trial court found Dr. Lipman was not credible**. "Not only were Dr. Lipman's assertions based upon the testimony of another non-credible witness, yet because he is not licensed to administer tests in Florida, his testing was done as a research endeavor but was presented as though he was making a diagnostic impression." (PCR.16 3120). Also, the trial court found: "During the hearing, the Defendant objected to the use of any information used by Dr. Lipman because he did not complete his evaluation of the Defendant nor did the Defendant believe he could 'offer anything relevant to [his] claim of 3.850.' (PC EH 6/21/2012 AM Session at 47)" (PCR.16 3120).

testimony by stating that she was able to reflect on the past, and that she was now seeing things more clearly than she did when she originally testified" and then asserted that her penalty phase testimony was truthful. (PCR.16 3120). The trial court found that "[a] defense attorney cannot be deemed ineffective for failing to present mitigation evidence that only became available after a family member had time to reflect on her original testimony." (PCR.16 3120-21)

The trial court recounted that Zebedee Fennell ("Fennell") testified as to conditions at Eckerd Youth Academy where Knight had been placed in the early 1980's and, although he recalled Knight's name, there was a question whether or not Fennell recalled the Ronald Knight who is the defendant here, as the Ronald Knight Fennell recalled was an African-American, not a Caucasian. (PCR.16 3121). Also, the trial court gave "little to no weight to" Fennell's testimony as it "was solely related to the conditions at Eckerd at the time the Defendant may or may not have been present." (PCR.16 3121).

The trial court determined:

> With the exception of Pearson's testimony, which significantly differed from the information reviewed by the professionals who testified in the Defendant's original penalty proceeding, there was nothing presented at the evidentiary hearing that was not simply cumulative, the basis of reflection which would not have been available at the time to Sosa, or nothing more that presenting different experts than those at the original hearing. Pearson's testimony of

> extensive drug use was somewhat corroborated by Brennalt,[7] but Brennalt was emphatic that they did not use drugs on the day of the homicide, though they had in the days leading up to it. (PC EH 5/2/2012 PM Session at 19-20) Dr. Harvey's testimony seems to contradict Pearson's testimony in that the objective data does not support the extensive drug use Pearson reported. This Court finds Pearson's testimony to lack credibility and credits the testimony of Brennalt. Pearson indicated that he still views the Defendant as a brother and expressed empathy with the Defendant which undermines his credibility and reveals his motivation for testifying. Further, and perhaps most importantly, this Court finds that Pearson was not available to Sosa in order to testify at the penalty phase based on advice from his counsel.
>
> Ultimately, the aggravators found in this case, the prior violent felony and CCP, were incredibly strong and the Florida Supreme Court upheld the use of these aggravators on direct appeal. The Defendant has no basis to assert a change in the outcome of the penalty phase or change in which aggravators were used when all that was presented was a reiterated diagnosis and new experts, one of which submitted a non-clinical observation not supported by objective data. Therefore, the Defendant cannot show any reasonable probability that the outcome would have been different had Sosa brought forth the additional information supplied at the evidentiary hearing, assuming such evidence would have been available to him at the time. Accordingly, Claim 6 is denied.

(PCR.16 3121-22).

C. <u>The Merits</u> – The trial court's factual findings are supported by substantial, competent evidence, the correct law was applied, and the legal conclusions are proper and should be affirmed. As an initial point, the trial court made specific

[7] Dain Brennalt.

findings that Pearson and Dr. Lipman[8] were not credible and gave little or no weight to Fennell's testimony about conditions at Eckerd given the fact Fennell could not confirm that the person he recalled was the Ronald Knight in the instant case.[9] This Court defers to the trial court on assessments of credibility, factual findings, and weight of evidence.[10]

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[8] As the trial court determined, Dr. Lipman was not a credible witness. The record, which undercuts the value of the doctor's testimony and calls into question his impartiality, supports the trial court's finding of lack of credibility. Here, Dr. Lipman was unable to complete his evaluation of Knight. (PCR 1219-26, 1234-36). Knight even informed the trial court that he believed Dr. Lipman was unprofessional and that he did not want him called at the evidentiary hearing. (PCR. 1250-53). Moreover, Dr. Lipman chose to reject Knight's sworn testimony that he was not using cocaine on the night of the crime, but chose to believe Pearson who claimed to be under the influence at the time to substantiate Knight's level of intoxication. In fact, Dr. Lipman admitted that he did not know "toxicologically" that Knight ingested cocaine or how much he may have ingested on the night of the crime (PCR 1231-33, 1254-56, 1265-68) Such a decision shows Dr. Lipman's bias and outcome oriented "fact collection." Dr. Lipman's testimony was rejected properly by the trial and not used to support Knight's alleged drug addiction.

[9] This Court will recall that Fennell was recalling an African-American Ronald Knight.

[10] In *Foster v. State*, 132 So.3d 40, 56 (Fla. 2013), this Court reiterated:

> * * * in *Clark v. State*, 35 So.3d 880 (Fla.2010), that "[a]s long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given the evidence by the trial court.'" *Id.* at 886 (*quoting McLin v. State*, 827 So.2d 948, 954 n. 4 (Fla. 2002)); *see also Bell v. State*, 965 So.2d 48, 63 (Fla. 2007)

Mental health experts, Dr. Strauss and Hession testified at Knight's penalty phase along with Knight's mother, sister, and brother. (ROA.12 at 405, 449, 463, 493; ROA.13 at 565). At the 2012 evidentiary hearing Dr. Strauss explained that he had met with Knight in connection with the Meehan case and that he had drafted a report outlining Knight's history. (PCR 797-801, 831-35). Dr. Strauss reported that his opinion has not changed from that reported to the trial court in 1998 even though he has more information and has spoken to Knight's two new experts, Dr. Harvey and Dr. Lipman. (PCR 801, 804-09, 835).

At the penalty phase, Dr. Strauss had reported that Knight: (1) had an undercurrent of a paranoid disorder; (2) had a great deal of family distress & dysfunction; (3) was under the influence of extreme mental/emotional disturbance at the time of the crime; (4) was a very troubled person; (5) had a psychopathological existence; (6) was easily volatile, a emotionally intense man who did not have easy control; (7) had difficulty conforming his conduct to the law due to the way he learned; (8) was not in control of his emotions and his paranoid

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("Questions of credibility are left to the determination of the circuit court, and provided there is competent, substantial evidence to support those credibility assessments, we will defer to that court's decision." (*citing Archer v. State*, 934 So.2d 1187, 1196 (Fla. 2006) ("This Court is highly deferential to a trial court's judgment on the issue of credibility."))).

trait affected his capacity to appreciate the criminality of his conduct and to conform his conduct to the law; (9) had elements of significant distrust and it was difficult to get close to Knight; and (10) has great anger. (PCR 836-42) Dr. Strauss continues to have the general impression that Knight has a paranoia problem, maybe a paranoid personality trait, but that Knight has no Axis I diagnosis based on the DSM-IV Manual. Knight was not suffering from any psychotic events nor was he psychotic at the time of the crime. Knight suffered no hallucinations. Further, the Keith Williams affidavit[11] may have confirmed Dr. Strauss' suspicions about the etiology of Knight's condition and Drs. Harvey and Lipman reinforced Dr. Strauss' original opinion, but as the trial court found, nothing changed Dr. Strauss' original opinion. (PCR 809-10, 840-43; PRC.16 3118). Discussions with Dr. Lipman revealed to Dr. Strauss that Knight has a much more prevalent history of substance abuse problem, but that merely adds to his diagnostic certainty, it does not change it. (PCR 811-12). The fact has not changed that Dr. Strauss does not have enough information to diagnosis a paranoid personality disorder, but there is a strong sense of paranoid traits. (PCR 811-12). Susan Hession also testified at

[11] The suggestion that Knight may have Post-traumatic Stress Disorder was a hypothetical only; Dr. Strauss was making no such diagnosis. (PCR 845). Also, Dr. Harvey made no such diagnosis as will be discussed below, thus, the alleged PTSD mitigation was not proven.

the 1998 penalty phase and spoke of Knight's paranoia (ROA.13 486) Sosa hired Dr. Strauss for the Kunkel case after the doctor had done work for Knight on the Meehan murder. (PCR 816).

For the Kunkel case, Dr. Strauss opined that Knight's ability to conform his conduct to the requirements of the law was "impaired;" the doctor did **not** find that the impairment was substantial. As such, the statutory mitigator was **not** supported. (PCR 816). Dr. Strauss testified that he had **no hard evidence** Knight was using drugs at the time of the crime. (PCR 816-17).

With respect to Knight's time at Eckerd Boys School, Dr. Strauss said he recently reviewed Keith Williams's affidavit which was consistent with Gregory Otto's report and both spoke of violence at the school. (PCR 818, 820-22) However, Knight never reported any sexual or physical abuse at the school even though Knight was injured there and lost a testicle. (PCR 821, 827).

Most important is the fact that, as the trial court found, Dr. Strauss holds the same opinion today as he did in 1998 when he testified in the penalty phase even after having reviewed the new information provided in the collateral litigation. (PCR 828, 843). Such renders Knight's claim of ineffective assistance under *Strickland* meritless as the trial court so concluded.

Dr. Harvey conducted testing on Knight in 2004 to assess cognitive functioning and screen for psychological impairments.

(PCR 853-56, 879). Knight tested in the average range on all tests and had a full scale IQ score of 95. (PCR 856-57, 859, 8779-80). Dr. Harvey found no indication of a traumatic brain injury or adverse impact from substance abuse; he was surprised that Knight's cognitive functioning was not impacted more given the new reports of substance abuse. (PCR 858-59, 863).

Dr. Harvey considered the Williams affidavit and opined that based on it, Knight had been exposed to "extremely substantial traumatic experiences." However, Dr. Harvey had not seen Knight since 2004 and at that time Knight denied that he had ever experienced traumatic life events. In fact he denied them to Dr. Strauss and to Susan Hession (PCR 882-77). In the time-frame before the Williams affidavit and then after, Knight was performing in the average range at school and on the cognitive tests. Hence, there was "no identifiable decline" between the school grades and Dr. Harvey's exams in 2004. Dr. Harvey **did no follow-up** for Post-traumatic Stress Disorder ("PTSD"), and **has not diagnosed** Knight with PTSD, thus, the factor has not been established and may not be factored into a *Strickland* analysis. Likewise, given the trial court's finding that Fennell's testimony was of little weight, there is even less support for a PTSD finding. (PCR 865-69, 881-84). Merely because Knight has found a new doctor who might offer more favorable testimony does not render Sosa's performance

deficient. *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir.) (opining "[m]erely proving that someone--years later--located an expert who will testify favorably is irrelevant unless the petitioner, the eventual expert, counsel or some other person can establish a reasonable likelihood that a similar expert could have been found at the pertinent time by an ordinarily competent attorney using reasonably diligent effort"), *modified on other grounds*, 833 F.2d 250 (11th Cir. 1987).

Terry Fowler ("Fowler"), Knight's sister, testified at the penalty phase and at the evidentiary hearing. She testified consistently with her penalty phase testimony, except with respect to some minor issues. Now, Fowler says that their mother gave Knight no love and had no parenting skills. This contradicts her penalty phase testimony where she reported that everything was good when Knight was growing up except that their father showed more attention to his eldest son, Michael, than to Knight. Fowler testified in the penalty phase that their mother was never really harsh and that she did the best she could as a single parent. During the penalty phase, Fowler had reported that Knight was not abused or neglected. In 2012, Fowler asserted there was neglect and lack of affection. (PCR 971-74) At the 1998 penalty phase, Fowler testified that Knight was never physically or psychologically abused. (PCR 974-80). Given these contradictory accounts, the trial court reasonable found

that Sosa was not deficient as he could not be faulted for the change in testimony some 14 years later. Moreover, the change in testimony would merely negate the established mitigator of having the support/love of family and give further support to the mitigator Judge Garrison found of suffered from a broken home. (ROA 429)

Pearson was found by the trial court to be unavailable to Sosa and to be not credible in his 2012 testimony. These findings are supported by Pearson's testimony that on the advice of counsel he did not testify in Knight's 1998 case. At the evidentiary hearing, Pearson, who sees Knight as a brother and does not want to see Knight executed, now reports Knight had an extensive drug addiction and used drugs on the night of the murder. This was a change to his police statement in which he had averred that he and Knight had not used cocaine on the night of the crime. Dain Brennalt ("Brennalt") confirmed Pearson's account of Knight's drug use in the days leading up to the murder, but reaffirmed his trial account that no cocaine was used on the day of the Kunkel homicide. (PCR1038-39) Pearson asserted that discrepancy in accounts came about as a result of his misunderstanding the question asked about drug usage. As the trial court concluded, Pearson was not credible. (PCR 987, 996-1003). Sosa should not be faulted for not calling an unavailable witness. Even if this Court considers the factor of

drug abuse, such would not change the sentencing dynamics and does not undermine confidence in the sentencing. *Strickland* deficiency and prejudice have not been shown.

Based on the penalty phase testimony, Judge Garrison found in mitigation gave "considerable weight" to the statutory mitigator of "under the influence of extreme mental or emotional disturbance," noting that two (2) experts had testified that Knight suffered from a paranoid disorder, which was chronic, even though there was no testimony that Knight was under any particular stress or emotional disturbance at the time of the murder. Judge Garrison also gave "some consideration" to the non-statutory mitigator of Knight's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" being impaired, but not substantially. As non-statutory mitigation, the sentencing court found the following: (1) Knight suffered from a broken home and unstable childhood (proven but given little weight); (2) Knight has the support and love of family members (proven but given little weight); and (3) alleged disparate treatment of co-defendants (given little weight). (ROA.4 428-30)

In sentencing Knight, Judge Garrison found extreme mental/emotional disturbance during the penalty phase and gave it considerable weight. The fact that Knight has additional evidence in support of the statutory mitigator is of no moment.

See Rutherford v. State, 727 So. 2d 216, 225 (Fla. 1998)(finding additional evidence offered at postconviction evidentiary hearing was cumulative to that presented during penalty phase, thus, claim was denied properly); *Van Poyck v. State*, 694 So.2d 686, 692-94 (Fla. 1997) (finding defendant failed to prove ineffective assistance of counsel where the life-history account argued for in postconviction litigation was, in large measure, presented to the jury); *Woods v. State*, 531 So.2d 79, 82 (Fla. 1988) (reasoning "[t]he jury, however, heard about Woods' [psychological] problems, and the testimony now advanced, while possibly more detailed than that presented at sentencing, is, essentially, just cumulative to the prior testimony. More is not necessarily better."); *Card v. State*, 497 So.2d 1169, 1176-77 (Fla. 1986) (holding that counsel cannot be deemed ineffective for failure to present cumulative evidence).

Moreover, under the *Strickland* prejudice analysis, the reviewing court must consider "'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.' *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009) (quotation marks and brackets omitted). To satisfy the prejudice prong, the 'likelihood of a different result must be substantial, not just conceivable.' *Harrington v. Richter*, --- U.S. ----, 131 S.Ct.

770, 792, 178 L.Ed.2d 624 (2011). 'Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Id.* at 787–88 (quotation marks and citation omitted)." *Pooler v. Secretary, Florida Dept. of Corrections*, 2012 WL 6555012, 17 (11th Cir. 2012). Knight has not satisfied this standard. He has not added any additional mental health mitigation, statutory or not, and there has been little variation in the non-statutory family history or substance abuse.

Knight has not proven that he qualifies for the statutory mitigator of his "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was **substantially** impaired." Dr. Strauss has not changed his opinion that impairments were shown, but they did not rise to the level of "substantial." Judge Garrison had given weight to this mitigator on a non-statutory bases as Knight's ability was merely "impaired." Knight has not established otherwise.

Given Knight's lack of proof of new mitigation Sosa may have overlooked, *Strickland* prejudice has not been shown. The "new" factors, as they are, do not undermine confidence in the sentence; Knight has not shown that he would have received a life sentence had the "new" mitigation testimony been offered. Furthermore, there is strong aggravation in this case, CCP and prior violent felony for Meehan's murder. *See Porter v. State*,

788 So.2d 917, 925 (Fla. 2001) (announcing that the prior violent felony and cold, calculated, and premeditated aggravators are weighty aggravators) For the same reasons this Court found Knight's sentence proportional, it should find that confidence in the verdict has not been undermined and Knight has not carried his burden under *Strickland*. *See generally Ferrell v. State*, 680 So.2d 390 (Fla. 1996) (finding death sentence for first-degree murder proportional where defendant shot his girlfriend in the head and the only aggravator was a prior violent felony conviction); *Gamble v. State*, 659 So.2d 242 (Fla. 1995) (determining that death sentence was proportional where twenty-year-old offender with childhood abuse, neglect, and severe emotional problems, killed his landlord during a robbery); *Duncan v. State*, 619 So.2d 279 (Fla. 1993) (concluding sentence proportionate based on single factor of prior violent felony convictions supported death sentence despite existence numerous nonstatutory mitigating factors); *Hayes v. State*, 581 So.2d 121 (Fla. 1991) (affirming death sentence of eighteen-year-old defendant who volunteered to shoot a cab driver he and his codefendant intended to rob). Relief was denied properly.

CLAIM II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RE-APPOINTING CAPITAL COLLATERAL REGIONAL COUNSEL WHEN KNIGHT ASKED FOR COUNSEL FOR HIS POSTCONVICITON LITIGATION WHERE AN EVIDENTIARY HEARING WAS SCHEDULED (restated)

Knight asserts that the re-appointment of Capital Collateral Regional Counsel – South ("CCRC") after the February 22, 2010 discharge and appointment of CCRC as stand-by counsel was error. The record establishes that through pleadings and oral argument, Knight requested the re-appointment of counsel especially in light of the upcoming evidentiary hearing. It is well settled that an indigent defendant is entitled to counsel, just not counsel of his choosing. The trial court properly resolved Knight's pleadings and re-appointed CCRC. This Court should affirm.

A. Standard of Review - The standard of review for a trial court's handling of a request for self-representation is abuse of discretion ." *McCray v. State*, 71 So.3d 848, 864 (Fla. 2011) *cert. denied*, 132 S.Ct. 1743 (2012).

B. Trial Court Ruling Reappointing Counsel – On February 22, 2010, Judge Garrison discharged CCRC from Knight's case following extensive colloquies in accord with *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973) and *Faretta v. California*, 422 U.S. 806 (1975). (PCR.28 351-63). Determining there was no cause to find CCRC counsel was rendering ineffective assistance, (PCR.28 320-51)[12] Knight was given the choice to keep CCRC as his

[12] The trial court found:

counsel or precede *pro se*. Knight chose to represent himself and the trial court conducted a *Faretta* hearing and discharged CCRC.[13] (PCR.28 351-63) CCRC was then appointed as stand-by counsel and such was granted. (PCR.11 2134-37, 2158; PCR.15 2821-22).

Shortly before the 2011 re-scheduled evidentiary hearing, on November 4, 2011, Knight sought the re-appointment of CCRC, then, a few days later, tried to withdraw the request for re-

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> Well, I find no reasonable cause that defined that Mr. Hennis or his office is rendering ineffective assistance to you at this time and no reason to remove them or substitute other counsel, so your choices in going forward to the hearing, which is currently scheduled in May, Mr. Knight, as we have been down this road before, is to go through this hearing with Mr. Hennis representing you go or to represent yourself.

(PCR.28 348)

> [13] THE COURT: In any event, I find you are capable of making an intelligent decision to represent yourself, as I have found in the past repeatedly, as I have told you repeatedly in the past, it's probably not a good idea for you to do so, results weren't so good for you the last time as you recall, but it's your choice; if you want to fire Mr. Hennis and proceed on your own, I will allow you to do that.
> I make no other representations as to what we're doing other than the hearing is presently set for May 24th, 2010, so what do you like to do, Mr. Knight?
>
> THE DEFENDANT:
> I would like to discharge Mr. Hennis.
> THE COURT: All right. Mr. Hennis and his office are relieved of representation of Mr. Knight, he is representing himself from here on out.

(PCR.28 363)

appointment and have "conflict free" counsel appointed.[14] (PCR.15 2921-22; Appendix A) However, during the November 28, 2011 hearing on the motion, Knight reaffirmed he wanted counsel, but just not CCRC. (SPCR.5 719-51) Knight informed the trial court "I have no desire to go through the evidentiary hearing without, you know, the assistance of counsel" but that appointment of CCRC would be over his objection. (SPCR.5 726). Again, Knight stated, "As I've made clear, I desire counsel." Knight merely vacillated on accepting CCRC. (SPCR.5 727). The State reminded the trial court that Knight:

> asked for counsel in two pleadings. He asked for CCRC in one pleading; he's asked for private counsel. He has said every which way that he can that he wants counsel.
>
> Now, he is entitled to counsel. He's not entitled to counsel of his choice.
>
> So, I think that the Court and the State -- we also have a choice in this matter. Because, given – if you force him to go to trial without counsel; where I think he has put into the record that he wants counsel; I am more concerned about that potential than forcing him to --
>
> * * *
>
> do this hearing without counsel.

(SPCR.5 730-31) Finding the State's logic persuasive, the trial court re-appointed CCRC as counsel announcing:

> I think it is ambiguous. And Mr. Knight is going back

[14] An unopposed Motion to Supplement the Record has been filed.

> and forth on his desire for whether or not to have CCRC. I've made it clear that it's not going to be private counsel at State expense.
>
> So I think the more prudent was of proceeding is to reappoint CCRC. Find that, in light of what seems to be ambiguity by Mr. –and vacillating by Mr. Knight, have – reappoint CCRC onto the case, until such time that there is an unequivocal desire to change that decision.
>
> So I'll put Mr. Hennis back on your case.

(SPCR.5 734).

This issue arose again on the first day of the evidentiary hearing. (PCR.30) After allowing Knight to once again set forth his complaints against CCRC in a Nelson hearing, the trial court found CCRC "has performed better than adequate legal services, and have provided services above the standard threshold required by both Nelson and the Florida statute that Mr. Knight cites" and refused to remove CCRC as counsel. (PCR.30 731). Knight was offered the option of keeping CCRC or going *pro se*. He chose to "stay with the representation of CCRC." (PCR.30 732)

C. <u>The Merits</u> - Now, Knight complains that he was given CCRC as counsel, claiming that he made an unequivocal request to waive CCRC as counsel. (IB 35-40) However, Knight made an unambiguous request for re-appointment of counsel. (PCR.15 2921-22; SPCR.5 719, 726-27). After seeking the appointment of CCRC in writing (PCR.15 2921-22), Knight served another motion, on November 7, 2011, entitled Motion to Strike Motion to Reappoint

CCRC South as Counsel and Motion to Appoint Substitute Conflict Free Counsel and Request for Hearing. (Appendix A - Motion). In it, Knight admits that "the likelihood of a successful evidentiary hearing * * * without appointed counsel is negligible due to Defendant being unversed in the law, having inadequate resources . . . ." (Motion at 1). Knight avers "**his initial decision to proceed pro se was engineered by this Court rather that arrived at freely by Defendant, thus casting doubt on the validity of Defendant's choice to represent himself**." (Motion at 2)(emphasis added). It was Knight's request that the trial court "**appoint substitute, conflict free counsel to represent him in his post conviction proceedings**." (Motion at 4)(emphasis added) The trial court recognized that the ambiguity and appointed CCRC. As this Court held in McCray, 71 So.3d at 868, "The trial court has the power to terminate a defendant's self-representation if he continues to abuse the court system."

While Knight does not have a Sixth Amendment right to counsel on postconviction, he has a statutory right. Also, this Court has reasoned: "capital defendants who are competent can waive postconviction counsel and postconviction proceedings, reasoning '[i]f the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived.' This Court explained that it

'cannot deny [a death row inmate] his right to control his destiny to whatever extent remains.'" *Trease v. State*, 41 So.3d 119, 123 (Fla.2010) (*quoting Durocher v. Singletary*, 623 So.2d 482, 484 (Fla.1993)). Silvia v. State, 2013 WL 5035694, 1 (Fla. 2013).

Also settled is that an indigent defendant does not have a right to counsel of his choice. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); Morris v. Slappy, 461 U.S. 1 (1983); *Capehart v. State*, 583 So.2d 1009, 1014 (Fla. 1991) (*citing Hardwick v. State*, 521 So.2d 1071, 1074 (Fla. 1988)); *Johnson v. State*, 921 So. 2d 490, 502 (Fla. 2005); *Koon v. State*, 513 So.2d 1253 (Fla. 1987); *Harold v. State*, 450 So.2d 910, 913 (Fla. 5th DCA 1984) (opining "indigent defendant does not have the right to pick and choose the lawyer who will represent him."); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 300 (5th Cir. 1998); *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993)(*citing United States v. Magee*, 741 F.2d 93 (5th Cir. 1984)). Where a "trial court decides that court-appointed counsel is providing adequate representation, the court does not violate an indigent defendant's Sixth Amendment rights if it requires him to keep the original court-appointed lawyer or represent himself." *Weaver v. State*, 894 So.2d 178, 188 (Fla. 2004)

Here, Knight, as death sentenced defendant had moved

successfully to represent himself after the trial court determined CCRC was representing Knight effectively. On the eve of the evidentiary hearing, Knight informed the trial court he wanted counsel, that his earlier waiver was not knowing and intelligent, but that he did not want CCRC. The trial court did not abuse its discretion in appointing CCRC, who had been stand-by counsel during Knight's pro se representation. At no time did Knight assert that he was seeking to waive both counsel and postconviction relief as was done in *Derocher*. As such, having found no deficiency with CCRC, under chapter 27, CCRC was the proper counsel to re-appoint to this indigent death sentenced inmate.

In the November 2011 hearing, Knight was not seeking to waive counsel, as that had been accomplished in February 2010. As such, the cases Knight relies upon explaining the right to waive counsel and suggesting *Faretta* was applied improperly here are not on point.[15] What Knight was attempting was to get counsel, just not CCRC as his counsel. This is stated in no uncertain terms in writing and orally. (PCR.15 2921-22; SPCR.5 719, 726-27). However, what Knight could not have as an indigent defendant, is counsel of his choice in his postconviction litigation where an evidentiary hearing was set.

Likewise, Knight's reference to *Indiana v. Edwards*, 554

[15] *Traylor v. State*, 596 So.2d 957 (Fla. 1992); *Pasha v. State*, 39 So.3d 1259 (Fla. 2010); *Indiana v. Edward*, 554 U.S. 164 (2008).

U.S. 164 (2008) does not further his position as such comes into play where the defendant is attempting to waive his right to counsel. Here, all indications are that Knight wanted counsel reappointed, therefore, Edwards does not come into play. The trial court was well within its discretion to re-appoint CCRC as Knight was seeking counsel for the evidentiary hearing. Knight should not be heard to complain. This Court should affirm.

CLAIM III

THE TRIAL COURT PROPERLY REJECTED KNIGHT'S CLAIMS THAT RULE SPEEDY-TRIAL AND PROHIBITION OF DOUBLE JEOPARY SHOULD HAVE BARRED HIS PROSECUTIION IN CASE NUMBER 97-5175 AS A RESULT OF THE NOLLE PROSEQUI IN CASE NUMBER 94-448 AND PROPERLY REJECTED THE CLAIM THAT COUNSEL IN THE 97-5175 CASE RENDERED INEFFECTIVE ASSISTNCE OF COUNSEL FOR NOT MOVING FOR DISCHARGE (restated)

In Claims 17, 18, and 20(b) Knight submitted: (17) the *nolle prosequi* in case number 94-4884 CF ("1994 case") foreclosed his indictment in case number 97-5175 CF A02 ("1997 case") in violation of rule speedy trial; (18) Sosa and/or Ann Perry, counsel in the 1997 case were ineffective in failing to move for a discharge of the 1997 case in light of ht 1994 case; and (20(b)) 1997 counsel was ineffective in failing to secure records from the 1994 case. The trial court denied relief after an evidentiary hearing where the credibility of witnesses was assessed and factual findings supported by competent, substantial evidence were made. Here, Knight asserts that as a result of the State entering a *nolle prosequi* in his 1994 case,

his prosecution in the 1997 case violated his constitutional speedy trial right and his right to be free from double jeopardy. (IB 63) Additionally, he claims that Sosa rendered ineffective assistance for not moving for a Discharge of the 1997 case or for not informing lead counsel, Ann Perry, that a motion for discharge should be filed. Knight also alleges that the postconviction trial court erred in not granting his *pro se motion* for discharge.

The record supports the trial court's rulings in this case. Knight had not pled or alleged facts supporting a claim of a violation of constitutional speedy trial. His allegation of a rule speedy trial violation was refuted from the record and the evidentiary hearing testimony, and he failed to prove that jeopardy had attached in the 1994 case; thus, he was properly indicted in 1997 for the murder of Kunkle. Furthermore, the fact that rule speedy trial had been waived, and that such was know/considered by counsel, establishes that effective representation was rendered. Moreover, Knight represented himself at trial, thus, he could have raised these claims, but did not, and thus, he has no basis to complain here. The denial of relief should be affirmed.

A. <u>Standard of Review</u> – When raising a claim of ineffective assistance of counsel, the defendant must meet both *Strickland* prongs of deficiency and prejudice. On review, this

Court will afford deference to the trial court's factual findings supported by competent substantial evidence, but review *de novo* legal conclusions. *Jackson*, 127 So.3d at 459-60.

B.1 Trial Court Ruling on Claims of Violation of Double Jeopardy and Rule 3.191 Speedy Trial and Ineffective Assistance of Counsel for Failing to Move for a Discharge Based on the *Nolle Prosequi* of the 1994 case – The trial court found that on January 3, 1995, in Knight's 1994 case stemming from the Kunkle murder, the State had entered a *nolle prosequi*. Review of the January 3, 1995 transcript, the court reporter who prepared it, the former Assistance State Attorney who attended hearing and entered the *nolle prosequi*, and Knight were considered. The trial court found that the testimony of court reporter, Phyllis Dames ("Dames") and former prosecutor, Shirley DeLuna ("DeLuna"), were credible and established that:

> There was not a jury emplaned (sic) to hear the 1994 case prior to the *nolle prosequi* and also finds that the transcript of the January 3, 1995 hearing is complete and accurate. There was no unrecorded and/or un-transcribed portions that would indicate a jury was sworn, a witness was called, or a motion for discharge was made. Therefore, because a jury was not sworn, jeopardy did not attach and the State was permitted to file the charges in the instant case even though the underlying factual scenario was the same as the 1994 case. This Court once again finds the Defendant and any testimony related to these issues is not credible. The crux of the claim, it seems, is that the Defendant argues a jury was sworn in the 1994 case prior to the State entering a *nolle prosequi*,. He previously stated as much under oath. See Exhibit "J" (Transcript of Jun 3, 2011 Hearing at 59-66). Clearly the record

> refutes this claim as a jury was not brought up on the Defendant's case and the fact that a jury pool was assembled in the main jury room is irrelevant to the question of whether jeopardy attached.
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> The Defendant also argues that rule-speedy prevented him from being brought to trial in the instant case. Florida Rule of Criminal Procedure 3.191 governs speedy trial in Florida and it contains an anti-circumvention which prevents the State from entering a *nolle prosequi*, in order to get around the speedy trial time period.[22] The State cannot violate the circumvention prohibition of the speedy trial rule, however, where a defendant has already waived his rights under the rule. *Stewart v. State*, 491 So.2d 271, 272 (Fla. 1986). Once a defendant waives his speedy trial rights, it is waived for all charges that emanate from the same criminal episode. Id. Where a defendant requests of continuance, even if the continuance is sought by the defendant's attorney over his objection, his right to speedy trial pursuant to Florida Rule of Criminal Procedure is waived. * * * Where the State and defense stipulate to a continuance, a defendant's speedy trial rights are waived.
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> [22] The Defendant's challenge is grounded in the rule-speedy pursuant to Florida Rule of Criminal Procedure 3.191 rather than a constitutional guarantee to a speedy trial provided under the Sixth Amendment to the United States Constitution and article I, section 16 of the Florida Constitution. In his written closing argument, the Defendant states that his constitutional right to speedy trial was violated, however, the arguments made in the motion related to a violation of the speedy trial rule. Therefore, this Court will only address the rule-speedy arguments.

(PCR.15 3135).

The trial court reviewed Perry's evidentiary hearing testimony where she recognized principles of the speedy trial rule which allowed the State to enter a *nolle prosequi* and re-file charges later if the defendant had waived speedy

previously, noted she would have talked to Sosa about the disposition of the 1994 case, and that she had notes regarding a double jeopardy claim, but would not file a inappropriate motion. (PCR.16 3136-37). The trial court also cited Perry's testimony that she wrote a note to the file indicating Robby Brennalt had "talked with the Defendant in Kunkle case the same day charges were dropped," and as a result was aware that the charges in the Kunkle homicide were dropped previously and she assumed she spoke to Sosa to discover the circumstances of the prior case. (PCR.16 3137-38).

The trial court found Perry's testimony credible and that:

> It reflects that she and Sosa knew about any potential double jeopardy or speedy trial violation grounds, but chose not to pursue them.23 This Court further finds that based on Perry's extensive criminal defense experience, especially in light of her experience with death penalty case, that no motion was filed because it would have been meritless.
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> The docket history for the 1994 case indicates that on August 26, 1994, the parties stipulated to a continuance of the October 28, 1994 calendar call. Exhibit "k" (Docket History). The record of the 1994 case also reflects that at calendar call on October 28, 1994, DeLuna and Sosa requested a continuance which was attributable to the Defendant. Exhibit "E" (Transcript of October 28, 1994). The arrest record filed on May 12, 1994 and the Defendant was charged with a felony, giving the State 175 days to bring him to trial. Exhibit "K" (Docket History) The first stipulated continuance occurred on August 26, 1994, well within the 175 day period. Because the Defendant made a timely waiver of the speedy trial rule and an additional continuance was attributed to the Defendant, he waived his speedy trial rights and because the instant case arose out of the same events,

> this waiver carried over to the instant case. A later objection to a State requested continuance that was denied would not alter this status, especially in light of the fact that the Defendant was pressuring and intimidating witnesses to prevent them from testifying. See Fla. R. Crim. P. 3.191(l)(6). More importantly, the Defendant discharged his attorney's in the instant case, and could have cured any failure of his attorneys to file for discharge by filing a motion for himself and in the 1994 case, a written demand for speedy does not appear to have been filed.
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> [23] Because Sosa was counsel of record in the 1994 case, it is clear he knew of the disposition of that case.

(PCR.16 3138-39)

The trial court rejected Knight's interpretation of "Defendant and Bondsman Discharged as to this Case" notation stamped on the 1994 case Docket History as meaning Sosa had moved orally for a discharge. Instead, the trial court found: "It is clear from the record, however, that this instead reflects the fact that the Defendant was released because his case was dropped and had no additional cases that would keep him in custody. (PCR.16 3139). Again, the trial court credited DeLuna's testimony, along with Assistant State Attorney Andrew Slater, former prosecutor, Marc Shiner, and Brennalt:

> That the *nolle prosequi* entered in the 1994 case was done so based on unavailability of witnesses due to intimidation by the Defendant rather than the State's desire to avoid application of the speedy trial rule. Further, and more importantly, a continuation was attributed to the Defendant in the 1994 case. Therefore, the speedy trial time had not expired because it had been waived.

(PCR.16 3139-40)

With respect to the claim of ineffective assistance of counsel, the trial court found that Knight presented no evidence at the six-day evidentiary hearing regarding the allegation that counsel was ineffective for not having challenged Knight's competency and as such, the trial court found that issue waived and denied as speculative. (PCR.16 3140). The ineffectiveness claim was denied as the trial court had found that there was no speedy trial or double jeopardy violation, thus, neither Perry nor Sosa could be deemed ineffective for not moving for a discharge. (PCR.16 3140)

Additionally, the trial court reasoned: "the Defendant acted as his own lawyer in this case and therefore cannot claim ineffective assistance of counsel on these grounds as his firing of Sosa would have enabled him to file his own motion for discharge to remedy the supposed inadequate representation provided by Sosa." (PCR.16 3140) The trial court also reasoned: "Further, as to Sosa, he requested continuances in the 1994 case in part based upon the lack of ability to find and interview witnesses because the Defendant intimidated them in order to prevent them from testifying." (PCR.16 3140)

B.2 – <u>The Trial Court Ruling on the Claim Counsel was Ineffective for Failing to Ensure Access to a Complete Record for the 1994 Case</u> – The allegation that counsel was ineffective for failing to ensure a complete record of the 1994 was prepared

for use in the 1997 case was rejected by the trial court as there was no authority that a discharged counsel was required to ensure the preparation of a complete record in a prior, but related case. (PCr.16 3144) Continuing, the trial court found:

> * * *the Defendant acted as his own counsel and could have clearly requested the files pertaining to the 1994 case if he was not receiving those files from Sosa or the State. Therefore, any deficiency in the performance of Sosa or Perry with regard to providing files or ensuring a complete record, was cured when the Defendant discharged them and elected to represent himself. He had ample opportunity to obtain the transcripts and records of the 1994 case.

(PCR.16 3144).

The trial court reviewed Knight's January 8, 1998 argument related to his discharge of Sosa and where Knight reported having asked for certain items from Perry and Sosa. (PCR.17 3305-09). The trial court determined that Judge Garrison:

> . . .then ordered Sosa to turn over "whatever depositions and documentation and discovery materials you have" to the Defendant and further to ensure that Perry was "not holding anything back" as well as have Shiner provide his discovery material and files. Exhibit "I" (Transcript of January 8, 1998 Hearing at 31) Throughout the Defendant's long, rambling soliloquy, he did not once specifically mention that he was seeking the files from the 1994 case and was not provided with such. The Court ordered Perry, Sosa, and Shiner to turn over all files that they had related to the Defendant's case. If those files did not contain what the Defendant was seeking, he was free to file any motion of letter alerting the Court to this fact. The Defendant has shown throughout the course of this litigation that he is not loathe to file various pleadings, petitions, objections, and demands if he feels it fits the contours of his case. The testimony that he expected the Court to understand

> what records he was seeking is belied by the fact that he has previously asked for clarification as to this Court's rulings, that he has previously filed specific and targeted arguments as it related to his case, and that he has never shied away from speaking out in court during the proceedings in this case.
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> Further, the record reflects, and Perry's testimony at the evidentiary hearing confirms, that she was aware of the 1994 case during her representation of the Defendant in the instant case. In fact, Sosa's representation of the defendant was the precise reason Perry brought him on as co-counsel in the instant case. (PC EH 5/3/2012 AM Session at 15) Additionally, these materials, and the fact that the 1994 case was dropped and later re-filed, do not constitute *Brady* material, nor is there any case law that this Court can locate that requires a prosecutor to inform the defense that a case was previously dropped and re-filed. Finally, as this Court has previously found that there was no violation of rule-speedy or double jeopardy with regards to the re-filing of the charges between the 1994 case and the instant case, there can be no ineffective assistance of counsel for failing to pursue a fruitless claim. *Evans v. State*, 946 So.2d 1, 11 (Fla. 2006). Accordingly, Claim 20(b) is denied.

(PCR.16 3146-47)

C.1 Merits on Claim of Speedy Trial and Double Jeopardy Violates and Ineffectiveness of Counsel for Failing to Move for a Discharge – Knight argues that his Motion for Discharge filed during the pendency of his postconviction litigation should have been granted and that his constitutional right to a speedy trial and to be free from double jeopardy were violated and that counsel was deficient in failing to move for discharge of the 1997 case. The trial court properly denied the Motion for Discharge, but addressed the claims following an evidentiary

hearing. Additionally, Knight never pled a constitutional speedy trial violation; instead he included such in his post-hearing memorandum. The propriety of the trial court's finding that the claim was untimely will be addressed below. With respect to the claims of rule-speedy trial and double jeopardy violations along with the allegation of ineffective assistance of counsel, the trial court has addressed those claims and its rulings rejecting Knight's allegations after an evidentiary hearing. The trial court's findings are supported by competent, substantial evidence and the law. This Court should affirm the denial of relief.

The trial court determined that the Motion for discharge was misplaced and given that had Knight had been convicted, the appropriate manner to address his speedy trial and double jeopardy claims was on collateral review. (PCR.15 2950-51) This is a proper ruling. *See State v. Nelson*, 26 So.3d 570, 576 (Fla. 2010) (noting that "[a]s with other rights that constitute a personal privilege, a defendant may waive his or her right to a speedy trial" and finding waiver where defendant failed to file a notice of expiration of speedy trial after earlier moving for a continuance) *State v. Florida*, 894 So.2d 941, 944-45 (Fla. 2005) (noting "defendant's double jeopardy claim was properly raised in a motion for postconviction relief. See *Lippman v. State*, 633 So.2d 1061, 1064-65 (Fla. 1994) (holding

that a double jeopardy claim raises a question of fundamental error which is not procedurally barred when raised initially in rule 3.850 proceedings).") Knight's citation of *Town of Manalapan v. Rechler*, 674 So.2d 789 (Fla. 4th DCA 1996) to suggest a discharge of Knight's conviction was merely ministerial is misplaced. Knight's conviction and sentence were final and the appropriate method of review was postconviction relief.

The trial court properly found Knight's allegation of a constitutional speedy trial claim to be untimely as it was raised for the first time in Knight's Post-hearing Memorandum. (PCR.16 3135 n.22). In *Deparvine v. State*, --- So.3d ----, 2014 WL 1640219 (Fla. Apr. 24, 2014), this Court found the defendant's claim raised for the first time in his post-hearing closing argument was denied properly as insufficiently pled. See *Darling v. State*, 966 So.2d 366, 379 (Fla. 2007) (holding that trial court properly summarily denied claim that was only raised in written closing argument after the conclusion of the evidentiary hearing). As such, the trial court limited its review to the rule-speedy issue.[16]

[16] Moreover, the trial court made factual findings that the basis for the *nolle prosequi* was due to Knight's intimidation of the witnesses. Even if this Court considers the constitutional speedy trial allegation, Knight does not have clean hands and should not be permitted to benefit from his witness intimidation causing the *nolle prosequi* at the outset. Constitutional speedy

Throughout Knight's brief on this issue, he asserts that his speedy trial time had not run at the time the *nolle prosequi* was entered and that the State somehow deprived him of transcripts which supported his claim. The fact that the speedy trial time had not run before the *nolle prosequi* was entered supports the trial court's rejection of this claim. *See Stewart v. State*, 491 So.2d 271, 272 (Fla. 1986) (recognizing "when a defendant requests a continuance prior to the expiration of the applicable speedy trial time period for the crime with which he is charged, the defendant waives his speedy trial right as to all charges which emanate from the same criminal episode.") Knight points to portions of hearings were he was seeking public records and transcription of the hearings from the 1994 case and other issues during hearing on his postconviction litigation stemming from the 1997 case conviction and death sentence. He also points to the hearing on his 2011 motion for discharge of

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trial "is measured by tests of reasonableness and prejudice, not a specific number of days." *Szembruch v. State*, 910 So.2d 372, 375 (Fla. 5th DCA 2005). The four factors that are to be weighed and considered are: (1) length of the delay, (2) who is more responsible for the delay (State or defendant), (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Doggett v. United States*, 505 U.S. 647, 651 (1992). First and foremost and what should render the claim meritless is the fact that Knight intimidated the witnesses causing them to be unavailable. Second, it was approximately four years from the first arrest to the trial and Knight has not alleged that he was deprived of evidence or witnesses. Third, he did not make this claim until 2012 in his closing argument.

the 1997 case, and all but disregards the evidentiary hearing on this claim where witnesses were placed under oath and explained what transpired during the pendency of the 1994 case. Furthermore, Knight was present in court when the *nolle prosequi* was entered and certainly was aware of the 1994 case so that he could have raised this issue in 1998 when he discharged Sosa and preceded *pro se*. As the trial court found, Knight did not request the records of the 1994 case while his 1997 case was pending pre-trial.[17]

Turning to the pith of Knight's complaint, he desires a court to find that he should have never been tried for Meehan's murder and that this decision should be based on his word and a stamped noted in the court file regardless of the transcription of the hearings where continuances were requested by the defense and a *nolle prosequi* was entered by the State prior to the expiration of rule speedy trial period for the 1994 case. The trial court's factual findings following an evidentiary hearing

[17] It was not until the public records litigation in the capital postconviction case that requests were made for transcripts from the 1994 case. While initially, the court reporting service responded to a public records request that transcripts did not exist and that the case was purged, after Knight filed a Motion to reconstruct the record of the 1994 case, efforts were made to try and located a retired, and now deceased, court reporter's notes. As this Court is aware, a court reporter's notes are not transcripts, but the notes from which transcripts are made. Amy Borman, counsel for the Court Administration, advised the trial court of how the Court reporting Department went into storage and was able to find some of the notes and have then transcribed. (PCR.29 748-49).

rejecting the rule-speedy, double jeopardy, and ineffectiveness claims are supported by the record, and should be affirmed.

The record evidence and testimony show that it was Knight who caused witness intimidation to the point that the witnesses would hide from counsel for the State and defense and would not cooperate with the prosecution. (PCR 1289-95) As a result, the defense had moved for a continuance and later the witness problems caused the State to decide to *nolle prosse* the 1994 case. (PCR 1296) This was done on January 3, 1995 before the potential jurors were brought to the courtroom, *voir dire* conducted and a jury sworn in the 1994 case. (PCR 1289-98) As such, the State was not barred from bringing first-degree murder charges at a later date. Further, Deluna, the former prosecutor on the 1994 case, testified that no jury had been called to the courtroom before she entered the *nolle prosse*, thus, there is no double jeopardy violation. Knight even admitted at the June 3, 2011 hearing that the venire panel was sworn in the jury assembly room on January 3, 1995, prior to being transported to the individual judge for further questioning, that no *voir dire* had been conducted, and his jury had not been selected and sworn. (PCR.29 483-91).

"Jeopardy attaches when the jury is impaneled and sworn." *Turner v. State*, 37 So.3d 212, 221 (Fla. 2010). *See State v. Gaines*, 770 So.2d 1221, 1225 (Fla. 2000). Knight is unable to

show a double jeopardy violation as the trial court credited the testimony of DeLuna and her report that a jury was never brought to Judge Mount's courtroom, questioned, or sworn for the 1994 case before the *nolle prosequi* was entered. Additionally, the trial court credited the testimony of the court reporter who transcribed the January 3, 1995 hearing and noted it was a complete reproduction of that hearing. Just as important is the trial court's finding that "[t]here were no unrecorded and/or un-transcribed portions that would indicate a jury was sworn, a witness was called, or a motion for discharge was made. (PCR.16 3135). Furthermore, the trial court, who heard Knight's arguments over the years and witnessed him testify, found Knight was not credible when he made representations about the same facts. *See Jackson*, 127 So.3d at 459-60 (deferring to trial court' credibility findings).

Likewise, Knight is unable to show counsel was deficient in not moving for a discharge. As Deluna testified, Sosa was first informed of the *nolle prosse* when it was announced in open court. (PCR 1297-98). By that time the *nolle prosse* had been entered and there was nothing to discharge. Moreover, given the continuance charged to the defense in the 1994 case, Sosa had no legal basis to seek a discharge when the State indicted Knight in 1997. Counsel cannot be found ineffective for failing to pursue a course of action that counsel would-or should-have

known was futile. *See Teffeteller v. Dugger*, 734 So.2d 1009, 1020 (Fla. 1999).

"The principle is well established that the right to a speedy trial is waived when the defendant or his attorney request a continuance. In fact, "[a] waiver of a defendant's right to a speedy trial results where his attorney and the State's attorney agree upon or stipulate to a continuance of the trial, or when his attorney consents to or acquiesces in a delay sought by the State." *State v. Kelly*, 322 So.2d 581, 583 (Fla. 1st DCA 1975). The acts of an attorney on behalf of a client will be binding on the client even though done without consulting him and even against the client's wishes." *State v. Kruger*, 615 So.2d 757, 759 (Fla. 4th DCA), *review denied*, 624 So.2d 266 (Fla. 1993). *See also McKenzie v. State*, 29 So.3d 272, 282 (Fla. 2010). Knight's cited cases[18] do not address the situation presented here, namely, that there was a defense continuance, there was no subsequent demand for speedy trial, and the State entered a *nolle prosequi* before the expiration of the rule-speedy trial period, and thus, are distinguishable.

Based on this evidence, the trial court rejected the claims of rule-speedy trial violation and double jeopardy. However, and fatal to Knight's claim, is the fact the he was his own

[18] *State v. Williams*, 791 So.2d 1088 (Fla. 2001); *State v. Agee*, 622 So.2d 473 (Fla. 1993); *Nolet v. State*, 920 So.2d 1214 (Fla. 1st DCA 2006); *State v. Clifton*, 905 So.2d 172 (Fla. 5th DCA 2005)

counsel from January 1998 some three months before the guilt phase commenced on March 11, 1998. At no time during that period did Knight move for a discharge. As such, he has no grounds to assert a *Strickland* claim ineffective assistance of counsel as he could have raised the double jeopardy claim as well as the Rule-speedy trial claim at that time. Recently, this Court reiterated in *McKenzie v. State*, --- So.3d ----, 2014 WL 1491501 *14 (Fla. Apr. 17, 2014) that:

> "[A] defendant who represents himself has the entire responsibility for his own defense, even if he has standby counsel. Such a defendant cannot thereafter complain that the quality of his defense was a denial of 'effective assistance of counsel.'" [*Behr v. Bell*, 665 So.2d 1055, 1056–57 (Fla. 1996)] (*quoting Faretta*, 422 U.S. at 835 n. 46, 95 S.Ct. 2525).

Given this, Knight may not obtain relief based on his challenge to the representation he received from Sosa on the double jeopardy issue.

The representation Sosa provided respecting the speedy trial issue in informed by this Court's decision in *Dennis v. State*, 109 So.3d 680 (Fla. 2012) where this Court explained:

> Dennis did not sufficiently allege either deficiency or prejudice. Specifically, given that Dennis did not allege that trial counsel could have been prepared for this capital trial involving two victims by the initial trial date or within the speedy trial period, Dennis did not sufficiently allege that trial counsel's decisions were outside the range of reasonable professional performance. Moreover, Dennis did not include any allegations regarding how he was prejudiced by trial counsel's decisions. He vaguely implied that there was prejudice because a continuance

> was not charged to the State (and Dennis was not released) as a result of the State's failure to provide a copy of a police report that was not in existence during the speedy trial period. However, before a defendant may have a continuance charged to the State based upon a discovery violation, the defendant must demonstrate that the discovery violation prejudiced his ability to prepare for trial in a manner that could not be corrected within the speedy trial period. *State v. Guzman*, 697 So.2d 1263, 1264 (Fla. 3d DCA 1997). Here, Dennis did not allege that, but for the lack of access to this police report, Dennis could have been prepared for trial within the speedy trial period.

Dennis, 109 So.3d at 691.

As Deluna explained this was a murder case where Sosa was continuing to investigate and attempt to find witnesses. As such, it was reasonable for Sosa to take multiple continuances. As a result, Knight did not, as the trial court concluded, establish a rule-speedy trial violation or ineffective assistance in the 1997 case stemming from Sosa's representation.

C.2 Merits Addressed to Claim Sosa's Effectiveness in Informing Co-counsel of the 1984 Case and not Moving for Discharge of the 1997 Case - Knight maintains that Sosa should have informed Perry of the 1994 case and when Perry failed to move for a discharge of the 1997 charges, he should have done so himself. (IB 41-42). Also, Knight submits that Sosa was ineffective under *Strickland* in not ensuring that a complete record of the 1994 case was included for appellate purposes. This claim fails as the evidentiary hearing reveals that Perry

and Sosa were aware of the results of the 1994 case, contemplated the impact of the *nolle prosse* on the 1997 case, and chose not to make any motions. Equally important however, and fatal to Knight's claim, is the fact that Knight was his own counsel and could have moved the trial court for an order to have the hearings from the 1994 case transcribed and to have the clerk provide copies of the court file, but did not seek such record until years into his postconviction litigation.

Again, although Knight was *pro se* from January 8, 1998 through his conviction, he did nothing to secure the records from the 1994 case. The trial court found that Knight did not make a claim for the 1994 records. This is supported by the record even where Knight's complaints about trial counsel and request for discovery made to Judge Garrison are considered (SROA at 9, 16-17, 24; ROA.7 1063-65) as Knight failed to make a specific request for court records from the 1994 case or transcripts from hearings. Moreover, Knight has not pointed to a rule or case law that has defined the court records and transcripts from a *nolle prossed* case against the defendant as "discovery" for a subsequent prosecution of the same underlying crime. Nonetheless, Knight and Sosa would know of the information.

In fact, as the trial court found, Perry's file and notes revealed that she was aware of the 1994 case, and considered

possible motions, but would not file a meritless pleading. It was Perry's testimony that she could not recall whether she had the 1994 case records before her 10/31/97 discharge and later recalled that she had chosen Sosa as her second-chair counsel because he had represented Knight in the 1994 case on the Kunkel homicide. (PCR1153-54, 1157-58) With her memory refreshed with her hand written notes, Perry testified that she considered possible motions to file in Knight's case and that she would have talked with Sosa about such motions, but that she would not bring a baseless motion to the court. (PCR 1167). Perry agreed that where speedy trial had been waived by the defense and the State had *nolle prossed* the case, there was no bar to the State's re-filing the charges on either double jeopardy or speedy trial grounds. (PCR 1167-68) Based on Perry's standard practice, she would have talked to Sosa and found out the circumstances for the initial termination of the 1994 charges. Her notes reflect that she considered a motion on a possible double jeopardy claim and would have filed such if she had thought there was any validity to the matter. (PCR 1174-75). The trial court's credibility assessment and factual findings are supported by this testimony.

There is nothing in *Strickland* which requires counsel to have obtained the 1994 case records, especially in light of the fact Sosa was intimately familiar with the 1994 case having

represented Knight in the matter. Furthermore, Perry and Sosa spoke about the 1994 case and Perry considered the validity of any defenses that arose from the early termination of that case. These transcripts are now a matter of record and were considered by the trial court before denying relief here, yet Knight has not pointed to a valid defense based on those records. In fact, the records, as discussed above, destroy Knight's alleged speedy trial and double jeopardy claims and support the trial court denial of relief here. As noted above, Knight testified at the June 3, 2011 hearing that the venire panel was sworn in the jury assembly room on January 3, 1995, prior to being transported to the individual judge for further questioning. (PCR.29 483-91). DeLuna testified that the jury was not brought to the courtroom before she *nolle prossed* the case. As such, neither deficient performance nor prejudice has been established from defense counsel's alleged failure to obtain the records from the 1994 case. Relief was denied properly and this Court should affirm.

CLAIM IV

THE CLAIM OF TRIAL COURT ERROR FOR NOT HAVING CONDUCTED A *RICHARDSON* HEARING IS PROCEDURALLY BARRED (restated)

It is Knight's position that he was denied "due process when the trial court failed to hold a hearing on a discovery violation pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971)." (IB 63) He asserts that he was not provided the

multiple statements given by Dain Brennalt, transcripts for the 1994 case, and the report of the investigator from the Medical Examiner's office (IB 64, 66-67). Knight sets out his accounting of what he would have done with these documents and his assessment of what they showed. (IB 68-79) He ends with an assertion that he was denied public records during the postconviction litigation. (IB 79-80) Taking his last claim first, Knight has not identified in this claim any specific document that he did not receive in public records, thus, the claim is legally insufficient and may be denied. With respect to the claim of trial court error in not conducting a *Richardson* hearing when Sosa and Perry were discharged, the matter is procedurally barred.

A. <u>Standard of Review</u> – Claims of trial court error are procedurally barred on postconviction review as they could have been raised on direct appeal. *See Baker v. State*, 878 So.2d 1236, 1242 (Fla. 2004). "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So.2d 488, 489 (Fla. 1992). *See also Spencer v. State*, 842 So.2d 52, 60-61 (Fla. 2003). "A circuit court's ruling on a public records request filed pursuant to a [postconviction] motion will be sustained on review absent an abuse of discretion." *State v. Coney*, 845 So.2d 120, 137 (Fla.2003)

B. <u>Trial Court Ruling</u> – The trial court rejected this claim as being procedurally barred and stated:

> the Defendant claims that he was never provided with transcripts or portions of the record of the 1994 case at the time Ann Perry was discharged, including a statement made by Brennalt. During the evidentiary hearing, Knight testified that he requested these files to investigate the 1994 case and its relation to the charges in the instant action. This claim asserts trial court error and could have, or should have been raised on direct appeal. Therefore, it is procedurally barred in postconviction relief. Nevertheless, it became apparent during the course of the evidentiary hearing that the records sought by the defendant were actually transcripts of proceedings. See (PC EH 8/2/2012 PM Session at 282) The Defendant indicated that it was the failure of Perry and later Sosa, to obtain these transcripts that ultimately caused him to discharge his lawyers from the case. Once his lawyers were discharged, nothing prevented the Defendant from specifically requesting these records. He testified that:
>
> > Q. Okay. And I take it that you would rely upon the record, including the letters, which would establish as to whether or not you ever asked for transcripts of Judge Garrison of these hearings, from the 1994 portion of the Kunkle homicide, correct? Whatever the record says, you acknowledge would * * * would reflect what you requested, or what you failed to request, correct?
> >
> > A. Yes and no, only because it doesn't - - I didn't specifically mention the '94 case. I referred to it as the case that I was initially brought up on before that was nol prossed and recharged again. The Court - - the Court was aware, as well as the State - - you were aware that that what I was referring to was - - that was the only case that was nol prossed before it, as we discussed at the beginning of this.

> Q. Well, you would acknowledge at least, Mr. Knight, that what you requested in contained within the record, correct?
>
> A. You mean the records I was requesting then?
>
> Q. Yes, the record - - the record in this case –
>
> A. Well, they were not contained --
> Q -- indicates what you've requested either through Counsel or on your own, correct?
>
> A. Yes, sir.
>
> (PC EH 8,2/2012 PM Session at 291-92) This court therefore finds that even if this claim were cognizable in a motion for postconviction relief, the records sought by the Defendant were transcripts that were equally available to both the State and defense. Once his lawyers were fired, the Defendant had equal access to these transcripts and therefore, no Richardson violation occurred and a hearing was not required. Accordingly, Claim 20 (a) is denied.

(PCR.16 3142-45)

C. <u>Merits</u> – In moving to discharge counsel before trial, Knight made allegations that he was not getting discovery. Here Knight merely challenges the trial court's alleged error, in not conducting a *Richardson* hearing. As such, the claim is procedurally barred as it could have been raised on direct appeal. Claims of trial court error are not cognizable on postconviction review. *See Baker v. State*, 878 So.2d 1236, 1242 (Fla. 2004) (explaining that postconviction review is the exclusive remedy for raising collateral attacks to a conviction and is not available to review ordinary trial court errors

cognizable on direct appeal); *State v. Coney*, 845 So.2d 120, 137 (Fla. 2003) (noting "[t]o the extent Coney's claims on this point are claims of trial court error, such claims generally are not cognizable in a rule 3.850 motion."); *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2001) ("A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion....").

Nonetheless, the trial record reflects and the postconviction court found that Judge Garrison: "ordered Sosa to turn over 'whatever depositions and documentation and discovery materials you have' to the Defendant and further to ensure that Perry was 'not holding anything back' as well as have Shiner provide his discovery material and files." (PCR.16 3146) Also, the evidentiary hearing testimony reflects that the prosecutor, Marc Shiner, did a complete resubmission of the discovery materials after Knight was permitted to waive counsel.[19] (PCR.33 1194). Knight has not shown that he did not have those discovery materials.

Turning to Knight's claim he was denied public records during the process of the postconviction litigation when the Kunkle and Meehan files were co-mingled. Here, Knight does not

[19] Marc Shiner testified: "I can tell you that I handed all the discovery -- again, I recopied my entire file and gave it to Mr. Knight in open court, at Judge Garrison's request, made a complete duplicate copy of everything." (PCR.33 1194)

identify any records his was not provided, thus, rending his claim conclusory and meritless. *See Carroll v. State*, 815 So.2d 601, 609, n. 8 (Fla. 2002) (finding defendant's claim conclusory and insufficiently pled where defendant did not identify public records not received). The denial of relief should be affirmed.

CLAIM V

THE TRIAL COURT'S DENIAL OF THE CLAIM THAT KNIGHT'S WAIVERS[20] OF THE JURY FOR THE GUILT AND PENALTY PHASES AND WAIVER OF GUILT PHASE COUNSEL ARE PROPER (restated)

Here, Knight asserts that his waivers of his guilt phase jury, guilt phase counsel, and penalty phase jury were not knowing, intelligent, and voluntary. Contrary to Knight's position, following an evidentiary hearing, the trial court determined that Knight was not credible, relied on record evidence and credible testimony to determine that all of Knight's waivers were knowing, intelligent, and voluntary. The trial court's findings are supported by competent, substantial evidence and the denial of relief should be affirmed.

A. Standard of Review – An effective waiver of a constitutional right must be knowing, voluntary, and intelligent. *Brady v. United States*, 397 U.S. 742 (1970). This

[20] In his 2004 amended motion for postconviction relief, Knight claimed his waivers of counsel and juries were not knowing, intelligent, and voluntary. See Claim 2 (waiver of guilt phase jury); Claim 3 (waiver of guilt phase counsel); Claim 4 (waiver of penalty phase jury).

Court has stated that the voluntariness of a waiver of a jury is similar to that of determining the validity of a plea. *See, e.g., Lamadline v. State*, 303 So.2d 17, 20 (Fla. 1974) (*citing Boykin v. Alabama,* 395 U.S. 238 (1969)). Review of a trial court's decision regarding the waiver of an advisory jury is for an abuse of discretion. *See Muhammad v. State*, 782 So.2d 343, 361 (Fla. 2001). A defendant may waive the right to a jury trial, provided that the waiver appears on the record. *Tucker v. State*, 559 So.2d 218 (Fla.1990).

B.1 <u>The Trial Court Ruling on Waiver of Guilt Phase Jury</u> – In rejecting Knight's evidentiary hearing claim that his waiver of the guilt phase jury was not knowing, intelligent, and voluntary, the trial court found that Knight "requested, on his own accord, a bench trial and executed a written jury trial waiver." (PCR.16 3098, 3150-52; ROA 326-27, 338) Continuing, the trial court stated: "not only does the Defendant's letter evidence his intent to proceed without a jury at the guilt phase, his written waiver memorializes that fact." (PCR.16 3098). The trial court concluded that Knight had "ample colloquy" with Judge Garrison regarding the waiver of the guilt phase jury and he had his counsel, Sosa, "to discuss his decision" as supported by the trial transcripts attached (Exhibit B and C of the court's postconviction order) (PCR.16 3099, 3153-91). Given Knight's hand written letter, written

waiver, and trial transcript evidence, the trial court rejected Knight's allegation that he was never informed by counsel Ann Perry ("Perry") and Sosa or the trial court that the jury's verdict had to be unanimous was neither persuasive nor credible. (PCR.16 3101)

Continuing, the trial court found:

> Throughout his motion for postconviction relief, the Defendant points toward his experience from the Meehan case as informing his decision making process in the instant case. In doing so, however, he fails to point out that he had a jury in that case, and that jury would have been instructed that a unanimous verdict was necessary, and he would have been present for that instruction. Because he had experienced this immediately prior to the instant case, his testimony and argument are not credible. A defendant cannot use prior experiences as a shield while avoiding a reciprocal application of those experiences as a sword. Additionally, the idea to waive jury for the guilt phase arose after the Defendant discharged Perry from the case. (PC EH 8/1/2012 PM Session at 154).

(PCR.16 2101-02). The trial court quoted from Knight's evidentiary hearing direct examination where he admitted discussing the jury waiver with Sosa, that the decision was made given his Meehan case experience, that he feared not getting an impartial jury, and that the decision had nothing to do with discovery claims. (PCR.16 3102; PCR. 1605-08)

In resolving this claim, the trial court also considered Dr. Strauss' testimony regarding Knight's paranoid disorder giving raising the question as to Knight's motivation to waive his jury. The trial court found:

> Despite this testimony, Dr. Strauss only was able to indicate that it "may" have impacted this decision. (PC EH 5/1/2012 AM Session at 81) Further, the Defendant testified that his request for a bench trial was in part related to the fact that he did not realize he could move for a change of venue based on the amount of negative press in the community. (PC EH 8/2/2012 AM Session at 273) In fact, Perry testified that she investigated whether a chance (sic) of venue was possible. (PC EH 5/3/2012 AM Session at 28-29) This strategic decision is precisely the reason it is beneficial to be represented by counsel. The Defendant knowingly, intelligently and voluntarily waived counsel for the guilt phase and therefore this strategic error, if that indeed is what it is, can only be ascribed to the Defendant himself.
>
> Ultimately, this Court is convinced that his decision to waive a jury at the guilt phase was knowingly, intelligently and voluntarily made. It appears the decision was strategic because he "thought [his] best opportunity, or chance, was to have * * * the Judge himself preside over the case." (PC EH 8/2/2012 AM Session at 278) This Court finds that this testimony is credible and consistent with the Defendant's motivations and actions during the entirety of the case, rather than based on a misunderstanding of the jury's role of the selection process. Any argument or testimony as to his lack of knowledge as it relates to the jury and its function is inherently not credible based on the Defendant's foundation and knowledge from prior cases. Accordingly, Claim 2 is denied.

(PCR.16 3103)

B.2 <u>The Trial Court Ruling on Waiver of Guilt Phase Counsel</u> – In denying relief, the trial court cited to this Court's extensive analysis of this claim on direct appeal. See *Knight*, 770 So.2d at 665-68 (PCR.16 3104-08). Based on this, the trial court ruled the direct appeal finding by this Court:

> . . .precludes this Court from finding an insufficient

> waiver. Nevertheless, at the evidentiary hearing, the Defendant testified that it was his decision to fire Perry and later Sosa. (PC EH 8/2/2012 PM Session at 286) He stated that the reasons for which he discharged his lawyers were that he was not receiving discovery that he wanted,[19] their relationships had deteriorated, and overall they were not seeking to do the things he wanted them to do. (PC EH 8/2/2012 PM Session at 285-89) Therefore, while this claim was also procedurally barred because it was raised an rejected by the Florida Supreme Court on direct appeal, it is also meritless and conclusively refuted from the record. It is clear that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel and had clear and calculated reasons to do so. Even with the benefit of an evidentiary hearing, the totality of the testimony only further strengthens the record that the Defendant made a knowing, intelligent, and voluntary waiver of his trial phase counsel. Accordingly, Claim 3 is denied.
>
> _____
> 19 Clearly, Perry was seeking discovery and preparing for the case. She filed numerous discovery requests and conducted depositions. It is clear that she was still investigating the case when she was fired by the Defendant.

(PCR.16 3108)

B.3 <u>Trial Court Ruling on Waiver of Penalty Phase Jury</u> – Respecting the waiver of the penalty phase jury, the trial found that prior to the start of trial Judge Garrison had a colloquy with Knight informing him that should he be found guilty, he would be entitled to a 12-member jury to make a sentencing recommendation and Knight acknowledged that. (PCR.16 3109, 3184-87). Following Knight conviction, the trial court found that the matter of a penalty phase jury was raised and that the prosecutor, Marc Shiner ("Shiner"), "with the Defendant present,

stated '[t]he only other issue, if the Defendant wants a jury, to be a panel for that purpose, or whether he wants an attorney for that phase.' (T 369)." (PCR.16 3109-10) Again, quoting the trial transcript, the postconviction court recognized that Knight was offered the opportunity to impanel a penalty phase jury and time to consider his options. The record also indicates that Knight had discussed the matter with Sosa, but declined the offer of a penalty phase jury. (PCR.16 3110; ROA 369-70). The trial court found it "clear from the record" that Knight "considered whether to empanel a jury," but that an postconviction evidentiary hearing was held on the claim. (PCR.16 at 3110).

The trial court set out Knight's evidentiary hearing testimony where he knew the trial court could override a life recommendation, but thought his chances were better with the judge alone. Knight's testimony that he did not realize he could have a penalty phase jury was found "not credible" given the Judge Garrison on-the-record "inquiry to determine whether [Knight] wished to empanel a jury to consider the penalty phase, and explicitly stated that he could empanel a jury to vote prior to the penalty phase." (PCR.16 3111). It was the postconviction court's conclusion that Knight's postconviction testimony "is nothing more than revisionist testimony aimed at obtaining postconviction relief." (PCR.16 3111) The trial court also

determined:

> The Defendant's first answer belies any assertion that he did not know the function of the jury under Florida's death penalty scheme and his experience with a prior death penalty case evinces that fact. It is clear that the Defendant waived a penalty phase jury because he believed his best chance, again, rested solely with the Court making a decision. He was given the opportunity to discuss this decision with, Sosa, and indicated he had discussed and decided to proceed without a jury. Based on these contradictions between the pleadings, testimony, and prior experiences, this Court finds the Defense, this Court finds the Defendant's testimony not credible as it relates to what he did or did not understand at the time he effectuated the waiver. The only portion of the Defendant's testimony that this Court has found credible were his assertions that he went to penalty phase without a jury because he felt he stood a better chance at not receiving the death penalty. Regardless, this Court further finds that the discussion between the Court, the Defendant, and Mr. Sosa held over the course of the case, including after the guilt phase concluded, evidence a knowing, voluntary, and intelligent waiver of his right to a jury during this phase. Accordingly, Claim 4 is denied.

(PCR. 3111)

C.1 <u>Merits of Ruling on Waiver of Guilt Phase Jury</u> - Knight alleges that he did not voluntarily, knowingly, and intelligently waive his right to a guilt phase jury because he labored under the mistaken belief, formed during the Meehan case, that he could not participate in the jury selection if he was represented by counsel and his misconceptions about his right to an acquittal absent a unanimous verdict. An evidentiary hearing was granted on this issue, however, the

trial record refutes the claim as well as the postconviction testimony. The trial court made factual and credibility[21] findings supported by competent substantial evidence and required the denial of relief. This Court should affirm.

On February 18, 1998, Knight sent a letter to Judge Garrison. The letter announced Knight's desired to waive his jury. (ROA.3 326-27; PCR.16 3149-51) The issue was addressed in court on the 18th and 20th of 1998. (PCR.16 3153-91) On February 20th, after conferring with Sosa, who was standby counsel by this time, Knight executed a written waiver of his jury and advised Judge Garrison that he knew he was entitled to a jury for both the guilt and penalty phases, but that he had decided to waive the jury. (ROA.3 338; PCR.16 3184-87). Knight averred:

> THE COURT: Now you have conferred with Mr. Sosa previously here today and executed a waiver of your right to a jury trial; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You understand perfectly well that you are entitled to a trial to try this case in front of a jury of 12 people to consider your guilt or innocence?

[21] Knight suggests that this Court should review his testimony and that of Dr. Strauss *de novo*. He offers no case law supporting such a review. In fact, it is well settled that this Court defers to the credibility and factual finding of the trial court who viewed the witnesses as they gave their testimony. "Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses. *See Cox v. State*, 966 So.2d 337, 357–58 (Fla. 2007)." *Lebron v. State,* 135 So.2d 1040, 1052 (Fla. 2014).

THE DEFENDANT: Yes, sir.

THE COURT: In the event that they were to find you guilty of this offense, a capital offense, you would be entitled to have a jury of those 12 people consider aggravating and mitigating factors in your case to determine whether or not they would recommend life sentence or a death sentence?

THE DEFENDANT: Yes, sir.

THE COURT: And you decided to waive that right and have me try the case?

THE DEFENDANT: Yes, sir.

(PCR.16 3186-87). This alone supports the rejection of this claim. *See State v. Upton*, 658 So.2d 86, 87 (Fla. 1995) (opining "[w]hen the record contains a written waiver signed by the defendant, the waiver will be upheld"). *See also Tucker v. State*, 559 So.2d 218, 220 (Fla. 1990) (noting better practice for waiver of jury is to have on-the-record colloquy with defendant and obtain a written waiver). In this case we have both another waiver and on-the-record colloquy. The denial of relief should be affirmed.

The evidentiary hearing testimony adds more support. There, Knight stated he waived the jury in part because of the quickness of the Meehan jury's decision:

I did not feel, in receiving a jury trial in the instant case would be beneficial because of – again, there was TV coverage continuously while I was in the county jail, and I – only came to the conclusion that the same result would be reached in such a brief period of time, without any – basically, without any

> deliberations by the jury at all. I felt the chances would be better by – to at least have the impartiality of the Judge himself hear the case.

(PCR 1602-03). Continuing, Knight revealed that given the media coverage, he did not believe he would get an impartial result, "therefore, waived jury in favor of the presiding Judge to hear the case." (PCR 1606). Such shows that Knight had a jury in the Meehan case and knew its decision had to be unanimous. Also, the evidentiary hearing and trial record show that Knight is not credible when he argues that he was not informed by counsel as to the right to a jury. This supports the trial court determination that Knight was not credible. *See Jackson*, 127 So.3d at 459-60 (deferring to trial court' credibility findings); *Pagan*, 29 So.3d at 949 (same)

Knight also presented Dr. Strauss who had testified in the Kunkel case penalty phase on his behalf. On collateral review, Dr. Strauss noted that he found Knight to have paranoid traits and indications of grandiosity. These factors Dr. Strauss noted "**may**" raise questions regarding Knight's motivation to waive counsel and the jury. (PCR 813-15). However, Dr. Strauss **did not opine** that these factors caused Knight to act as he did. Also, the factors did not preclude Knight from making a knowing, intelligent, or voluntary waiver, and certainly did not render him incompetent to make those decisions. Given that record, Dr. Strauss, as the trial court concluded, does not support Knight's

instant claim.

Knight's motivation for waiving his jury, especially his evidentiary hearing revisionist testimony, does not undermine the on-the-record and written waivers given in 1998 after consultation with Sosa. More important, it supports the trial court's denial of relief. This Court should affirm the trial court finding that Knight's protestations of a non-voluntary waiver not credible and affirm the denial of relief.

C.2 Merits of Ruling on Waiver of Guilt Phase Counsel - Knight asserts that his waiver of counsel for the guilt phase was not knowing, intelligent, and voluntary due to confusion stemming from the Meehan murder trial.[22] On direct appeal, this Court rejected Knight's claim that his waiver of guilt phase counsel was not knowing and voluntary after considering the *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973) and *Faretta v. California*, 422 U.S. 806 (1975) hearings conducted below and the multiple colloquies the trial court had with Knight and counsel. *Knight*, 770 So.2d at 665-70.

Knight should not have been granted an evidentiary hearing on this claim as he is not entitled to a second appeal. *Medina*

[22] As noted above, Knight also presented Dr. Strauss, in support of the claim of lack of a knowing intelligent, and voluntary waiver. However again, Dr. Strauss did not opine that Knight's paranoid traits precluded him from making a valid waiver, only that they "may" raise questions at to Knight motivation to waive the jury/counsel; the paranoid traits did not render Knight incompetent to waive. (PCR 813-15).

v. State, 573 So. 2d 293, 295 (Fla. 1990); *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995). Given this Court's resolution of this matter, as well as the extensive inquiry into Knight's waiver of counsel shown on the record, the matter was found properly to be procedurally barred.

However, the trial court also considered the evidentiary hearing testimony and found that even with the opportunity of an evidentiary hearing, Knight did not established that his waiver after extensive colloquies was not knowing, intelligent, and voluntary. In fact, on cross examination, Knight made numerous representations, and agreed that it was his decision to discharge Perry and later Sosa. His stated reasons at trial and in the evidentiary hearing were that they did not get discovery,[23] therefore, counsel was not prepared and/or counsel sought continuances. (PCR 1616-19) As the trial court found, Perry was still working up the case on October 31, 1997, having been appointed just some four months before on June 13, 1997. Perry was continuing to receive discovery and request additional discovery. Also, she was taking depositions and having her

[23] The trial record indicates that Knight was seeking discovery, not specifically the transcripts and court documents from the 1994 case as was discussed in Claim IV above. Knight's after-the-fact attempt to re-write history and put a new spin on his trial reasons for discharging counsel should not be countenanced. This is especially true where Knight, even when he was *pro se*, never requested transcripts or records of the 1994 case. (PCR 1611-17).

investigator looking the case when Knight fired her. (PCR.16 3108, n.19; 1093-95, 1102-04, 1106-08, 1112-15, 1122-23)

C.3 Merits of Ruling on Waiver of Penalty Phase Jury[24] - It is Knight's claim that he did not knowingly, intelligently, and voluntarily waive his penalty phase jury. "A defendant may waive the advisory jury in the penalty phase of a capital case, provided the waiver is voluntary and intelligent." *Grim v. State*, 971 So.2d 85, 101 (Fla. 2007). Knight failed to prove his claim as he was advised in the guilt and before the start of the penalty phase that he had the right to a penalty phase jury recommendation, yet as the trial court found, Knight knowingly and voluntarily waived that right. Nothing in the evidentiary hearing called that conclusion into question. Relief was denied properly.

Here, the trial court found that during the colloquy for the waiver of the guilt phase jury (PCR.16 3153-91; PCR.17 3208-30, 3302-36) and then again during the colloquy for the waiver of the penalty phase jury, Knight was asked for his position on having a jury decide his case. (ROA.11 369). On February 20,

[24] An evidentiary hearing was granted on this claim, however, it should have been found procedurally barred as it was a matter which could have been raised on direct appeal. "Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack." *Muhammad v. State*, 603 So. 2d 488, 489 (Fla. 1992); *Spencer v. State*, 842 So. 2d 52, 60-61 (Fla. 2003); *Vining v. State*, 827 So. 2d 201, 218 (Fla. 2002); *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983).

1998, Knight averred:

> THE COURT: Now you have conferred with Mr. Sosa previously here today and executed a waiver of your right to a jury trial; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You understand perfectly well that you are entitled to a trial to try this case in front of a jury of 12 people to consider your guilt or innocence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: In the event that they were to find you guilty of this offense, a capital offense, you would be entitled to have a jury of those 12 people consider aggravating and mitigating factors in your case to determine whether or not they would recommend life sentence or a death sentence?
>
> THE DEFENDANR: Yes, sir.
>
> THE COURT: And you decided to waive the right and have me try the case?
>
> THE DEFENDANT: Yes, sir.

(PCR.16 3184-87) Prior to the commencement of the penalty phase, the matter was revisited with the following exchange:

> THE COURT: … Mr. Knight, if you would step up again. We had discussed previously both your decision to represent yourself as well as your decision to have the case tried by the Court as opposed to a jury. It was not appropriate then to discuss your options since, of course, we did not know the outcome of the trial itself.
>
> But now that there is going to be a Phase II part of the trial to consider the imposition of the death penalty, was it your intention

to waive the jury to cover that as well?

THE DEFENDANT: Yes.

THE COURT: Or did you want a jury impaneled to consider that?

THE DEFENDANT: No.

THE COURT: Did you also discuss that with Mr. Sosa to have the jury --

THE DEFENDANT: Yes.

THE COURT: We can impanel a jury to consider that; if you want to think about that for a while, it's up to you.

THE DEFENDANT: No.

THE COURT: You want the Court to consider that?

THE DEFENDANT: Yes, sir.

(ROA.11 369-70).

As the trial court concluded, this record refutes Knight's claim that he did not confer with Sosa regarding the waiver of the penalty phase jury and it rebuts his claim that the waiver was not knowing, intelligent, and voluntary. Moreover, Knight's postconviction testimony that he did not know that it took only six jurors to recommend a life sentence or that he did not know that the sentencing judge could override a death recommendation, but feared that the judge might be able to override the life recommendation and impose a death sentence is not credible. (PCR 1607-08) In fact, it is belied by the fact that he had been

prosecuted through the penalty phase in the Meehan case where he would have heard the standard capital jury instruction that only six members were required to give a life recommendation. Knight received a unanimous jury recommendation for death in the Meehan case, and it was Judge Rogers who overrode the unanimous death recommendation and imposed a life sentence. Knight's reference to this fact, but assertion that he feared the override would be to impose a death sentence is evidence of how Knight is willing to twist the record to his purpose and an attempt to re-write history. As the trial court made credibility determinations, noting the discrepancies between the trial and evidentiary hearing assertions, the trial court found nothing in Knight's postconviction testimony credible as it relates to what he did or did not understand at the time of the waiver. (PCR.16 3111). This Court should defer to the trial court and agree that Knight is not credible when he feigns ignorance of the penalty phase process or claims that he did not knowingly, intelligently, and voluntarily waive his penalty phase jury. See Winkles v. State, 21 So.3d 19, 23 (Fla. 2009)(finding "competent, substantial evidence supports the postconviction court's finding that the defense made a reasonable strategic decision to waive a penalty-phase jury based on the belief that the sentencing judge would be more receptive to the available mitigation than a jury would be"). The denial of collateral relief should be affirmed.

CLAIM VI

FLORIDA'S LETHAL INJECTION PROTOCOLS ARE CONSTITUTIONAL (RESTATED)

Although Knight advises this Court that his request for public records related to the May 2011 protocols was denied, he now challenges the 2013 protocols for Florida's lethal injection. Here, Knight asserts that the 2013 protocols along with the procedures remaining from the 2007 protocols render §922.105, Fla. Stat. unconstitutional. Knight maintains that the administration of the three-drug cocktail using a new first drug, midazolam hydrochloride, the assessment of consciousness, and the employment of an executioner with no medical training, create a substantial risk of harm and are in violation of the Eighth Amendment, the Due Process Clause, and the Equal Protection Clause. However, Knight's challenge below was against the 2007 protocols alone. The trial court rejected the challenge relying on *Baze v. Rees*, 553 U.S. 35 (2008); *Reynolds v. State*, 99 So.3d 459 (Fla. 2012); *Valle v. State*, 70 So.3d 530 (Fla. 2011). Knight has not offered any argument that was not raised and rejected by this Court in its recent reviews of Florida's lethal injection protocols. Relief must be denied.

A. Standard of Review – Pure questions of law are reviewed *de novo*. *See Keck v. Eminisor*, 104 So.3d 359, 363 (Fla. 2012) (explaining that standard of review for pure questions of law is

de novo)

B. <u>The Trial Court Ruling</u> – The trial court found Knight's challenge to the 2008 lethal injection protocol to be a purely legal claim where Knight asserted that the protocol violated the Eighth Amendment and that there were alternatives which possess a lesser risk of unnecessary pain and suffering. (PCR.16 3131). Relying upon *Baze*, *Reynolds*, and *Valle*, the trial court found the protocol was constitutional.

C. <u>Merits</u>[25] – In order to show an Eight Amendment violation arising from the lethal injection protocol:

> the defendant must demonstrate that 'the conditions presenting the risk must be 'sure or very likely to cause serious illness or needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Id.* at 562 (*quoting Baze v. Rees*, 553 U.S. 35, 49–50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion) (*quoting Helling v. McKinney*, 509 U.S. 25, 34–35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993))).

Deparvine v. State, --- So.3d ----, 2014 WL 1640219, 39 Fla. L. Weekly S279 (Fla. Apr. 24, 2014).

Knight has done nothing more than assert that the remnants of the 2007 and 2012 protocols along with the 2013 protocol together "create a recipe for disaster" given how the process calls for the administration of the drugs, who does the

[25] The evidentiary hearing was concluded in August 2012, post-hearing memos were filed in December 2012, and the Order on the motion was rendered in February 2013. Knight did not challenge the 2012 protocol although such were in force in September 2012, and the 2013 protocol was not issued until after the trial court had ruled on the motion.

administration and consciousness test, and the fact that no medical training is required, the executioner may be less than 18 years old, and midazolam is "a new, untested anesthetic of questionable efficacy undoubtedly create a substantial risk of harm." Knight suggests that Florida fails to follow is written protocol also establishes violations of the Eighth Amendment, Due Process, and Equal Protection rights.

This Court has rejected repeatedly such conclusory allegations and found Florida's lethal injection statute and protocol are constitutional. *See Deparvine v. State*, --- So.3d ----, 2014 WL 1640219, 39 Fla. L. Weekly S279 (Fla. Apr. 24, 2014); *Henry v. State*, 134 So.3d 938 (Fla. 2014) *Howell v. State*, 133 So.3d 511 (Fla. 2014), *cert. denied*, 134 S.Ct. 1376; *Muhammad v. State*, 132 So.3d 176, (Fla. 2013), *cert. denied*, 134 S.Ct. 894 (2014); *Kimbrough v. State*, 125 So.3d 752 (Fla.), *cert. denied*, 134 S.Ct. 632 (2013); *Mann v. State*, 112 So.3d 1158 (Fla. 2013); *Pardo v. State*, 108 So.3d 558, (Fla. 2012), *cert. denied*, 133 S.Ct. 815 (2012); Reynolds v. State, 99 So.3d 459, 486 (Fla. 2012); *Valle v. State*, 70 So.3d 530, 546 (Fla. 2011); Ventura v. State, 2 So.3d 194 (Fla. 2009); *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla. 2008), *cert. denied*, 129 S.Ct. 1305 (2009); *Power v. State*, 992 So.2d 218, 220-21 (Fla. 2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla. 2008). See also, *Baze v. Rees*, 553 U.S. 35, 120 (2008) (Justice GINSBURG

concurring) (likening Florida's lethal injection procedures to those of Kentucky and finding Kentucky's procedures constitutional). Knight has offered nothing to call into question the constitutionality of the statute or protocol.

This Court reasoned in *Tompkins*:

> As this Court stated in *Schwab v. State*, 969 So.2d 318 (Fla. 2007), "Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional." *Id*. at 325. Moreover, there have been two developments since we issued our opinion in *Lightbourne* that support our conclusion that Florida's lethal injection protocol does not constitute cruel and unusual punishment under the Eighth Amendment. The first development was the decision of the Supreme Court of the United States in *Baze v. Rees*, ---U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), finding this same method of execution, consisting of lethal injection through the same three-drug combination under similar protocols, to be constitutional. Moreover, we have rejected contentions that *Baze* set a different or higher standard for lethal injection claims than *Lightbourne*. *See, e.g., Henyard*, 992 So.2d at 129 (rejecting Henyard's argument that *Baze* sheds new light on this Court's decisions because the standard for reviewing Eighth Amendment challenges was changed and noting that "[w]e have previously concluded in *Lightbourne* and *Schwab* that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in *Baze*"). **The second development was the performance of two executions in Florida, those of Mark Dean Schwab and Richard Henyard, with no subsequent allegations of any newly discovered problems with Florida's lethal injection process, such as the problems giving rise to the investigations following the Diaz execution.**

Tompkins, 994 So.2d at 1081-82 (emphasis supplied). As this Court will recall, since the institution of the 2013 protocol,

there have been several executions. See, *Henry*, 134 So.3d at 938; *Howell*, 133 So.3d at 511; *Muhammad*, 132 So.3d at 176. Relief must be denied.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic-mail to William Hennis, Esq. at hennisw@ccsr.state.fl.us and Nicole Noel, Esq. at noeln@ccsr.state.fl.us this 9th day of June, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

_/S/ Leslie T. Campbell__
LESLIE T. CAMPBELL
Assistant Attorney General
Florida Bar No. 0066631
1515 N. Flagler Dr.; Ste. 900
Telephone: (561) 837-5000
Facsimile: (561) 837-5108
E-mail:
Leslie.Campbell@MyFloridaLegal.com
Secondary E-mail:
CapApp@MyFloridaLegal.com

COUNSEL FOR APPELLEE