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IN THE SUPREME COURT OF FLORIDA

NO. SC13-820

RONALD KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Ronald Knight's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Florida Rule of Criminal Procedure 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." - record on direct appeal to this Court;

"PCR." - record on appeal following the postconviction denial;

"PCRT." – transcripts in record on appeal following the postconviction denial;

"EX." - exhibits entered into evidence at the evidentiary hearing.

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Ronald Knight has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Knight, through counsel, accordingly urges that the Court permit oral argument.

PROCEDURAL HISTORY

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, entered the judgment of conviction and sentence of death at issue in this case. Mr. Knight was found guilty of first degree murder, armed robbery, burglary of a dwelling and grand theft auto. Prior to the start of trial, Mr. Knight purportedly waived both his right to counsel and his right to a trial by jury. He also purportedly waived his right to a penalty phase proceeding in which a jury would be convened to consider evidence on any aggravating and mitigating circumstances. At trial Mr. Knight represented himself for a relatively short period of time, from January 8, 1998 when attorney Jose Sosa was discharged and became stand-by counsel until April 15, 1998, when Sosa was retained for purposes of representing Mr. Knight at the penalty phase. The trial court, sitting as the trier of fact, found Mr. Knight guilty of first degree murder, armed robbery, burglary of a dwelling, and grand theft of an automobile. On May 29, 1998, following a sentencing hearing, the court sentenced Mr. Knight to death for the murder conviction, life in prison for the armed robbery conviction, and fifteen and five years, respectively, for the burglary and grand theft convictions.

On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. *See Knight v. State*, 770 So. 2d 663 (Fla. 2000). Mr. Knight timely petitioned the United States Supreme Court for certiorari. This petition was denied

on April 30, 2001. *See Knight v. Florida*, 121 S. Ct. 1743 (2001).

Mr. Knight filed a shell motion to vacate pursuant to Fla. R. Crim. P. 3.851 on September 27, 2001. Thereafter, on June 2, 2004, Knight filed an amended motion to vacate pursuant to Fla. R. Crim. P. 3.851, asserting sixteen claims. Mr. Knight filed a supplemental motion on December 6, 2006, asserting three additional claims, and amending Claim 14. Mr. Knight filed an additional supplement on March 27, 2008, amending Claims 14, 17, 18. Judge Garrison granted an evidentiary hearing on all claims but one, denying Claim 14 regarding Florida's lethal injection statute.

During the course of the proceedings, Mr. Knight made several attempts to replace counsel, all of which the lower court denied. However, CCRC South counsel was taken off the case on February 22, 2010 at Mr. Knight's request and thereafter, Mr. Knight proceeded *pro-se* until November 28, 2011. During that time he filed *pro se* amendments to the Rule 3.851 motion. CCRC South was appointed as "stand-by" counsel during the period of time that Mr. Knight represented himself, over the objection of CCRC South. Eventually, prior to the evidentiary hearing, Mr. Knight requested that CCRC South counsel be re-appointed for purposes of the evidentiary hearing, then subsequently filed another pro se motion again asking that CCRC South be removed from the case.

At a hearing on Knight's renewed *pro se* motion for discharge of CCRC

South on November 28, 2011, during which Judge Colbath re-appointed CCRC South, Mr. Knight voiced his objection and requested that he be allowed, once again, to proceed *pro se*. The lower court ignored his objection and CCRC South remained on the case during the pendency of the subsequent evidentiary hearing.

The evidentiary hearing was held over three time periods: May 1-3, June 21, and August 1-2, 2012. Mr. Knight renewed his motion for appointment of conflict free replacement counsel following the evidentiary hearing, but the lower court denied that request following a hearing and *Nelson* inquiry on October 11, 2012. Following the filing of posthearing memoranda by the parties, the lower court entered an order on February 5, 2013 that denied all relief. A motion for rehearing followed which was also denied. This appeal follows.

STATEMENT OF THE FACTS

At the evidentiary hearing below, Mr. Knight presented the testimony of lay witnesses and expert witnesses. The expert witnesses presented by Mr. Knight at the hearing included Dr. Abbey Strauss, a psychiatrist who had previously testified as a defense expert at Mr. Knight's penalty phase; Dr. Philip Harvey, a licensed psychologist, and Professor of Psychiatry and Director of the Division of Psychology at the University of Miami School of Medicine; and Dr. Jonathan Lipman, a neuropharmacologist retained during the postconviction investigation.

Dr. Strauss testified that Knight suffers from a "strong sense of paranoia"

which could be exacerbated by drug use. PCRT. 811. According to Dr. Strauss, Knight also has indications of "grandiosity," which manifests as unrealistic thinking and an inability to understand consequences. PCRT. 813. Additionally, Dr. Strauss testified that the combination of paranoia and grandiosity could lead to an inability to trust counsel, and poor decision-making with respect to Mr. Knight's waiver of counsel at the guilt phase of his trial and his waiver of a guilt phase and penalty phase jury. PCRT. 814-15.

Dr. Strauss testified that in postconviction he had reviewed for the first time an affidavit from Keith Williams, a friend of Mr. Knight, whose affidavit stated that Knight had been sexually molested at the Okeechobee Boys' School when he was a teenager and had a testicle amputated as a result of the attack. He opined that the affidavit supported and supplemented his opinion at trial that Mr. Knight was suffering from an unspecified paranoid disorder at the time of the crime and that the statutory mental health mitigating factors were present at the time of the offense. PCRT. 819-30.[1]

[1] Although Dr. Strauss testified that he relied on it in forming his opinion, the lower court sustained the State's hearsay objection to the admission of the Williams Affidavit into evidence. Counsel thereafter proffered the affidavit for purposes of this appeal. PCRT. 828-29. CCRC investigator Katt McNish also testified below on proffer that she obtained the affidavit from Mr. Williams while he was incarcerated in federal prison. *See* Proffer of testimony of CCRC South investigator Katt McNish regarding obtaining the affidavit of Keith Williams, stipulated to by the State. PCRT. 1642-45.

Dr. Strauss also opined that the Williams Affidavit was consistent with a report authored by Gregory Otto, a licensed social worker, who had interviewed Knight prior to his trial. PCRT. 820-21. Dr. Strauss testified that he now believed that Knight had a "major mental disorder" and that he would recommend exploring the possibility of a diagnosis of post-traumatic stress disorder (PTSD), given the information contained in the Williams Affidavit. PCRT. 846-47. Dr. Strauss testified that when he tried to interview Mr. Knight in 1998 concerning trauma, Mr. Knight refused to cooperate, which Dr. Strauss attributed to his diagnosed paranoia. He stated that Mr. Knight's lack of cooperation was "not inconsistent with what we see in this type of personality psychopathology cluster" PCRT. 848-49.

Dr. Philip Harvey, a licensed psychologist, and Professor of Psychiatry and Director of the Division of Psychology at the University of Miami School of Medicine also testified at the evidentiary hearing. PCRT. 851-900. He testified that he administered cognitive psychological tests to Knight, including the Wechsler Abbreviated Scale of Intelligence and the RBANS. He testified that he found that Mr. Knight's performance was "pretty much the median of the overall distribution of intelligence." PCRT. 857. Dr. Harvey testified that Mr. Knight's WAIS full scale IQ of 95 "does raise the question of the ability to make complex legal decisions" in the context of Knight's self-representation at the guilt phase of his

trial. PCRT. 857-59. He was aware of Dr. Strauss's diagnosis of Mr. Knight with a paranoid disorder, and he testified that such disorders can co-occur with post-traumatic stress disorder (PTSD). PCRT. 869.

> Many features of posttraumatic stress disorder, if an individual meets the diagnostic criteria, include avoidance and vigilance, which are feature of people with paranoid syndromes, because they try to avoid things that they think are threatening them. And they try hypervigilant . . . And hypervigilance is because people are scanning the environment for threat on a regular basis.

PCRT. 869 -70. He testified that he reviewed the Williams affidavit and he stated that "an experience like this is a prerequisite for post-traumatic stress disorder." PCRT. 870. He testified that in order to diagnose PTSD in an individual like Mr. Knight, the subject would necessarily have to be cooperative with the clinician, and that someone who is guarded or paranoid would not be able to give adequate information to make a diagnosis. PCRT. 873. Dr. Harvey testified that he did not make any diagnoses, including any diagnosis of PTSD, rather he administered performance based psychological testing to determine if there were any signs of cognitive impairment. PCR, 878-79.

Dr. Harvey testified that although Mr. Knight had cooperated during his testing, and denied any past trauma or other psychiatric symptoms, his review of background materials indicated to him that Mr. Knight had "a history of uncooperativeness during assessment." PCRT. 874.

Zebedee Fennell, a former chaplain and counselor at the Okeechobee Boys'

School, testified on proffer about conditions at the school when Ronald Knight was a student there. On proffer, Fennell testified that there was a lawsuit called *Bobby M*. which alleged that the school suffered from some "inadequacies" including overcrowding and violence in 1982-84. PCRT 936. Because of the lawsuit, the school underwent a transition which caused a great deal of upheaval, including beatings and fights between staff and students, which took "several years" to control. PCRT. 941. When a child was disciplined, he was sent to the "adjustment program," which was a prison-like setting with cells, commodes, steel doors with flaps for serving food, and a small window. The lawsuit alleged that children were beaten and hogtied in the adjustment units. PCRT. 944. Mr. Fennell was unable to specifically identify the Defendant as the white student named Ronald Knight he remembered from his time as program administrator for the junior campus at Okeechobee School for Boys. PCRT. 927-28.

Teresa Scott Fowler, Knight's sister, testified that after their parents' separation, she and Knight lived with their mother and their sister Shirley. Knight's mother, Karen Gerheiser, worked nights and would leave the children alone, or in the care of neighbors, the Blackwells, who were alcoholics. PCRT. 953. Ms. Gerheiser remarried several times, and had several boyfriends in between husbands, including a man named Dennis, who lived with Ms. Gerheiser for several years and would not allow Knight to live with the family. Knight was 11 or

12 years old at the time, and would sleep in treehouses in the woods or at friends' houses. PCRT. 956. Dennis threatened to beat Knight up if he ever caught him in the house. PCRT. 959. According to Fowler, Knight suffered from this lack of structure and stability because their mother was more concerned with her boyfriends than her children. PCRT. 959.

Although the State attempted to impeach Fowler with her trial testimony that their childhood was "fine and everything was good" and that they "never went without," Fowler explained that upon reflection over the years, she gained perspective and their deprived childhood became more clear to her. PCRT. 977.

Timothy "Tim" Pearson, one of Knight's co-defendants, testified about Knight's drug use throughout his life and in the days leading up to the crime. He testified that he and Knight began using marijuana together when they were nine years old. PCRT. 987. He stated that their drug use together continued throughout their teenage years, eventually escalating into powder and crack cocaine, "acid," and mushrooms. PCRT. 989. He said that when Knight returned from his sentence at the Okeechobee School for Boys, they used marijuana together on a daily basis. PCRT. 991. He also testified that Knight began using cocaine heavily at age 18. Id. Pearson testified that in the days leading up to the crime, he and Knight used up to an ounce or more of marijuana, up to a half ounce of cocaine, and drank gallons of alcohol. PCRT. 992-93. Pearson testified that he would have testified at Knight's

trial if asked. PCRT. 1005.

On proffer, Pearson testified that Okeechobee Boys' School was a "gladiator school" and had a reputation for having fights, beatings, and rapes just like in prison. PCRT. 1009. Pearson also testified that he knew Mr. Knight suffered a ruptured testicle at Okeechobee, and that Knight had described to him his involvement in several fights at the school, and he said that Mr. Knight would not have told him if he had been sexually molested while at the Okeechobee School for Boys. Id.

Dain Brennault also testified at the evidentiary hearing PCRT. 1026-73. Brennault stated that at the time of his testimony his occupation was tattoo artist. He stated that he knew Mr. Knight in 1993 as a friend and as his mother's boyfriend at that time. Brennault was originally one of Knight's co-defendants and the State's star witness at trial. He confirmed that he, Pearson, and Knight used marijuana daily and cocaine whenever they had the money to buy it. (PCRT, 1027-28; 1031-33).

Brennault testified that he was charged with being an accessory after the fact and ultimately received a five year felony probation for his involvement in exchange for testifying against Knight. He spent fifteen days in jail when he "didn't complete the probation" (PCRT. 1034-35). He testified that he had observed Ronald Knight using cocaine. (PCRT. 1035). Further he testified that he

used cocaine, marijuana and alcohol with Knight and Pearson in the days before the death of Kunkel. Id. He denied using cocaine with Knight and Pearson on the day of the homicide. PCRT. 1039.

Brennault testified that he was required to testify against Ronald Knight as a condition of the plea agreement he reached with the state attorney. PCRT. 1040. He agreed that he also had to give a sworn statement to the state attorney. PCRT. 1041. The lower court sustained the State's objections to questions as to whether Brennault handled the murder weapon, fired it, and as to how much he had to drink on the night of the offense. PCRT. 1044-45).

Brennault testified that he did not recall testifying at Tim Pearson's December 19, 1997 bond hearing. PCRT. 1047. On cross-examination he testified that neither ASA Andy Slater, ASA Marc Shiner or ASA Shirley DeLuna ever threatened, forced, coerced or intimidated him in any way to testify against Knight. (PCRT. 1057-58). Brennault was asked on re-direct if he had always told the absolute truth in all his prior statements and he answered "Hundred percent." (PCRT. 1060). However, his testimony was contradictory in that he claimed that none of his numerous pre-trial statements interviews and depositions he gave in any way contradicted his trial testimony, a proposition that is demonstrably false.[2]

[2] Mr. Knight contended in several *pro se* pleadings, and in his testimony on proffer at the evidentiary hearing that when representing himself at trial, the State engaged in a discovery violation when it failed to provide him the 1994 nolle

Brennault gave several statements to the police and prosecutors, including a sworn statement on March 20, 1997 where he admitted at the "didn't tell the truth to the full extent" when he gave a statement to Detective Scott Smith. (PCRT. 1071). Conveniently, Brennault claimed at the evidentiary hearing that he didn't know what he meant by that because "it was 20 years ago." (PCRT. 1063). However, the statement speaks for itself: Brennault admitted that he had lied to detectives. Additionally, in a pre-trial deposition on February 4, 1998, Brennault was asked by Mr. Knight, "which one of the statements that you gave shows your complete recollection of what happened," and he responded, "I don't know which one does." Although Brennault claimed lack of memory at the evidentiary hearing, his testimony shows that he gave different statements at different times and could not remember which one was true.

Regarding whether there was pressure from the State to testify in a particular

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prosse case files, all the statements and depositions, and a crime scene report authored by medical examiner investigator Wayne Arbaczawsky. (PCRT. 1566; 1575-76; 1582-83; 1594-1599; 1613) Some of the documents Mr. Knight testified that he did not receive supported an alternate account of the crime in which Mr. Knight was not the shooter, an account that he testified about at his trial. If Knight had obtained the items prior to trial, he could have impeached the State's theory and key witness Dain Brennault's testimony. Brennault testified a March 20, 1997 SAO deposition that he, Knight and Pearson all handled the murder weapon at a Loxahatchee initial stop and further that Pearson fired the gun twice. That afterwards they made a second stop where Kunkel was killed and his body was dumped, which contradicts his trial testimony. The missing documents were also mentioned by Mr. Knight in a post-evidentiary hearing concerning his *pro se* motion to discharge CCRC South referenced herein.

way, Brennault testified that the State never asked him to testify that there were not two stops after Miami Subs. (PCRT. 1063). Brennault also testified that the State did not ask him to testify that Pearson didn't fire the gun at the first stop because the first stop was at Miami Subs, so there was no gunshot at the first stop. (PCRT. 1063). In response to the question as to whether he had ever testified that there were two stops after Miami Subs, he stated "That's really hard for me to remember. It's over twenty years ago." (PCRT. 1063). After reviewing his March 20, 1997 sworn statement to the state attorney, at page 16, Brennault continued to insist that his prior statements had all been "a hundred percent" truthful. PCRT. 1066.[3] The March 20, 1997 and February 4, 1998 depositions of Dain Brennault were marked for identification as Exhibits 10 and 11 and later admitted into evidence. (PCRT. 1069; 1074).

On proffer, when Brennault was confronted with his statement in the March 20, 1997 sworn statement that "I didn't tell the truth to the full extent on my [Detective] Scott Smith tape," he replied during his evidentiary hearing testimony that he did not remember what he meant. PCRT. 1069. He also testified that he did not recall what he meant when he responded "I don't know which one" to Mr.

[3] In the March 20, 1997 statement Brennault describes two stops in Loxahatchee. At the first stop he describes, Pearson, Brennault and Knight all handling the gun and Brennault describes Tim Pearson firing the gun twice into the air. He denies firing the gun himself . Statement at 37-38.

Knight's question at the pre-trial deposition on February 4, 1998, "Which one of your statements that you gave shows your complete recollection of what happened that night?" PCRT. 1071.

Attorney Ann Perry testified at the evidentiary hearing. PCRT. 1092-1180. She testified that she represented Knight as trial counsel beginning in June 1997 until Knight discharged her in October 1997, prior to the trial. She testified that she did not think she ever tried to obtain the records from the 1994 nolle pros of the instant case, or if she knew that the 1994 case was nolle prossed in 1995. PCRT. 1154. Further, she could not recall whether she considered challenging the 1997 indictment based on the 1994 nolle pros. PCRT. 1157. However, she admitted that if she had had the records from the 1994 case, they would have assisted her in deciding whether to challenge the indictment. PCRT. 1158. She testified that although she had no independent recollection, her notes indicated that she filing a motion concerning a double jeopardy issue, but she never filed a motion concerning the issue. PCRT. 1170-75. Ms. Perry testified that a possible reason for failing to file such a motion could have been the failure to acquire the records of the 1994 nolle pros. PCRT. 1178-79. She stated that she did not remember if she discussed the 1994 nolle pros with Jose Sosa and she agreed that if she had not done so, it would have been a necessary part of a complete investigation to acquire the records (and transcripts) associated with the 1994 nolle pros. PCRT. 1180.

Mr. Shiner prosecuted the instant case. His testimony is found at PCRT. 1181-1204. Shiner testified that if there was a complete record of the 1994 nolle prosse case in his files he would have turned it over to Anne Perry or Mr. Knight. PCRT. 1198-99. He further testified that his recollection was that at a subsequent hearing he gave "everything he had" to Mr. Knight in open court. Id. Shiner also testified that he had provided Jose Sosa with discovery during the two months that he served as counsel. PCRT. 1194. He denied threatening any of the witnesses in the case or being aware of any inappropriate conduct on the part of any law enforcement officer in relation to the witnesses in the case. PCRT. 1188.

Dr. Jonathan Lipman, a neuropharmacologist retained during the postconviction investigation, testified at the evidentiary hearing about his interviews with Mr. Knight and Mr. Knight's co-defendant, Timothy Pearson, concerning Mr. Knight's substance abuse history. He stated that in his 2012 interview Knight had disclosed a greater extent of drug use than he had previously, which was consistent with Pearson's account of their drug use in the days prior to the crime. PCRT. 1230. In Dr. Lipman's opinion, Knight had minimized his drug use when he described it to Dr. Lipman in 2006. PCRT 1232. Because self-reporting is "questionable," Dr. Lipman also interviewed Pearson to get a collateral account of Knight's drug use. PCRT. 1230. Although Dr. Lipman attempted to administer a personality assessment questionnaire, Knight refused to cooperate.

PCRT. 1227. Dr. Lipman also testified that according to Pearson, Knight had been on a four-day alcohol and cocaine binge before the crime, and that he displayed many more symptoms than Knight had originally described, including illusions, hallucinations, and "delusional nuances." PCRT. 1254.

Dr. Lipman also stated that given his "underlying paranoid diathesis," Knight is more vulnerable to the adverse psychotoxic effects of cocaine, including paranoia and fearfulness. Dr. Lipman opined that Knight would have met the statutory mitigator of being unable to conform his conduct to the requirements of the law, because the combination of cocaine and alcohol "rather massively increases impulsivity." PCRT. 1254-64. Dr. Lipman also testified that he agreed that Mr. Knight met the criteria for the presence of the severe mental or emotional disturbance statutory mitigating factor. PCRT. 1256.

Ms. Shirley Deluna was the assistant state attorney who prosecuted Mr. Knight's 1994 nolle pros case. She testified at the evidentiary hearing below. PCRT. 1282-1324. She testified that wrote a memo to the file about the nolle pros, which was introduced as Exhibit 21 for Identification. She identified her signature on the document, and opined that it was probably kept in the state attorney file. The memo was offered into evidence, but the State's hearsay objection was sustained. PCRT. 1301-06. She testified that she did not know if the Jan. 3, 1995 transcript is complete but she remembers it being very short. She came in, nolle

prossed the case, and that was it. They didn't announce their appearances but the judge knew them both very well. PCRT. 1307-09. She planned to re-file the case but left the office in 2003. She wasn't involved after it was re-filed and Mr. Knight was indicted for first degree murder based on the same facts. She did not recall if anyone at the SAO ever ordered the transcripts before. If the docket shows that a PD filed a speedy demand on June 8, 1994 she wouldn't disagree with that. PCRT. 1316-18.

Ms. Phyllis Dames testified that she recently retired from her job as a court reporter. PCRT. 1339-52. She testified that she transcribed the January 3, 1995 nol pros hearing before Judge Mounts, introduced below as Exhibit 12, on May 3, 2007. PCRT. 1343-48. She further testified that she has been unable to find the original notes that she did the transcription from. PCRT. 1348-50.

Mr. Rick Hussey testified that he had recently retired as manager of (Palm Beach County) Court Reporting Services, then he was a digital court reporter. He testified about his duties. He described the internal accounting system in court reporting services where "orange cards" gave a chronological order of what happened in a case. He testified that once an order came in for a transcript, Court Reporting Services would copy the request, staple the card to it, and give it to the court reporter. PCRT. 1352-56.

Hussey testified that in the case at issue, case number is 94-4885CFA02, Mr.

Knight's nolle prossed case, transcripts were first requested May 8, 2007, with the next request on Sept. 17, 2007 by CCRC. PCRT. 1363-67. He testified that one transcript was done by court reporter Barry Crane. He further testified that Court Reporting Services sent a "10-year letter" to CCRC authored and sent by Marty Brooks indicating that they couldn't complete the request because records/transcripts had been destroyed, thus the 5/12/94, 6/16/94, 7/14/94, 8/26/94, and 10/28/94 transcripts were not available to be produced to CCRC. PCRT. 1369-70. He further testified that the next request for transcripts in Mr. Knight's case was in June 2008. Hussey confirmed that he signed a letter "taking their word for it that they had checked everything." Two transcripts were done, for the 12/30/94 and 1/3/95 hearings. Defense Ex. 5 was offered in evidence (Rick Hussey letter dated 10/3/07), which was admitted into evidence without objection. PCRT. 1370-76.

Hussey testified that there was no way for him to independently verify that a transcript was accurate. He said he was unable to tell whether the notes on the transcripts discussed during the hearing still exist. The testified that although he believed they did a thorough search, a transcript may have been overlooked, like the one they thought didn't exist but it actually did. PCRT. 1407-10. Mr. Hussey also identified Ex. 6 for ID, another Marty Brooks transcript; Hussey signed off on it on 7/18/08. The dates on the front of the transcript and the affidavit at the end are

different. On the front it says 6/2/04 and he signed off on 7/15/08. The orange card 7/17/08 entry says that the hearing was on 6/10/94 [sic]. Mr. Hussey testified that this was probably a scrivener's error, that they put the current year on it (2004) instead of 1994. PCRT. 1411-14.

Mr. Hussey testified that when he signed off on a transcript that had originally been done by someone else, (even someone deceased like Martin Brooks) he took the reporter's representation that it was a true and correct copy of the transcript. PCRT. 1403-07.

Andrew Slater was an assistant state attorney involved in both the capital prosecution of Mr. Knight and in the instant post conviction case. His testimony is found at PCRT. 1438-76. He testified that the 1996 transcript request related to the 1994 case appears to have been made by him. PCRT. 1444. He testified that he did not recall why he requested the transcript, but it was probably to ensure that speedy trial had been waived so he could re-file or indict Mr. Knight in the instant case. He talked to Assistant State Attorney DeLuna, who told him that Sosa had waived speedies several times. He went to the clerk's office looking for defense continuances and that's probably why he requested the transcript, but he was unable to say for sure. PCRT. 1444-46. He didn't care if the State requested a continuance, all he cared about was whether Sosa did, and he did, because in his opinion that would mean Mr. Knight waived speedy trial. Mr. Slater testified that

he did not recall if he requested any other transcripts. He wasn't lead counsel on the 1997 case, Marc Shiner was. Slater would have turned over discovery but if he requested a transcript from the 1994 case he wouldn't have turned it over to Mr. Knight because he didn't have to. PCRT. 1446-48.

Slater testified that because there were a lot of the same witnesses in the Kunkel and Meehan cases, some of the files were co-mingled. He testified that the co-mingling probably happened while he was prosecuting the Meehan case because he referred to the Kunkel file. PCRT. 1449-51. He testified that the co-mingling happened sometime after May 1995 when he started working on the Meehan case. He testified that when he got CCRC's requests for discovery years later, he and the Assistant Attorney General went through the files and turned them over. He told his paralegal to copy every document in both cases just to be safe, and he turned it all over to the repository. PCRT. 1451-54. Slater testified that he was not counsel of record on the 1994 case that was nol prossed, but he knew that parts of the 1994 file existed in 1995 because he looked at it for Meehan. Some of those documents may have ended up in the Meehan boxes but he copied everything from both cases and sent it to the repository. PCRT. 1454-57. Slater testified that he doesn't know if anyone else other than him co-mingled the files. He took some of the 1994 Kunkel materials and put them in the Meehan file, then Shiner took over the 1997 case and took it to trial. Slater testified that he wasn't involved again

until he was assigned to the postconviction case. PCRT. 1468-70.

Ronald Knight, the Defendant in the instant case, testified in his own behalf at the evidentiary hearing. PCRT. 1482-1641. On proffer, Mr. Knight testified that he was dissatisfied with Anne Perry because he asked her to get the records on the 1994 nolle pros and she didn't get them. He thought they couldn't indict him for it. PCRT. 1490-97. He further testified that he wasn't satisfied with what Ann Perry said she'd done during the discharge hearing because she didn't address whether or why she failed to obtain any of the 1994 records or hearing transcripts. She only told the judge in general terms what she had done to date on the case. The judge was satisfied with her response and told Mr. Knight that he would have to keep Perry or represent himself. PCRT. 1499-1503.

Knight further testified that in a 12/3/97 letter to Judge Garrison, he wrote that he was unhappy with Sosa because Sosa told him he didn't have the time to put into the case. Mr. Knight testified that all he wanted was the 1994 records. At a hearing on 1/8/98 he told Judge Garrison about his issues with Sosa and how he was upset that he hadn't gotten the 1994 records for him. PCRT. 1516-26. He assumed he would have the 1994 records provided to him in time for the trial date but after talking to Sosa he realized that wasn't true. PCRT. 1536-37.

Mr. Knight testified that he thought Judge Garrison would colloquy Perry or Sosa about the 1994 records but he never did. PCRT. 1552-57. He agreed that the

record reflects that Judge Garrison ordered Sosa and Shiner to give him all the discovery. Garrison asked Shiner if he was holding anything back, Shiner said no. After that, he got boxes of records from Sosa. He still did not have all the records and he wrote another letter to the Judge in Feb. 1998, saying that he was still having discovery problems with the State. PCRT. 1558-63. He testified that he never received a transcript of Dain Brennault's bond hearing from Dec. 1997, listed as item 44 on Shiner's supplemental discovery list. He also testified that he did not recall getting any reports from the Medical Examiner or Medical Examiner investigator. PCRT. 1566-67. In February 2007 he wrote to the judge again about discovery problems. He complained that the State was still adding witnesses and no depositions, statements, or tapes were provided to him. He always asked for a hearing in the letters. PCRT. 1572-76.

Mr. Knight testified that Judge Garrison conducted a *Nelson* hearing following his request to discharge counsel, with Ann Perry present, on Oct. 31, 1997. Mr. Knight testified that he complained during the colloquy about not getting the 1994 records but the Judge failed to ask trial counsel about that, stating that he only asked her about what motions she had filed, thus the Judge never asked Perry anything on the record about the 1994 records. PCRT. 1591-94 . Mr. Knight testified that he recalled receiving only one record or statement by Dain Brennault pre-trial, a March 20, 1997 deposition. PCRT. 1598-99.

Mr. Knight testified that he was never advised by counsel or the court that he could have moved for a change of venue out of Palm Beach County instead of waiving the guilt phase jury, if he didn't think he would get a fair jury trial. He also testified that he was not told the jury had to be unanimous to find him guilty. He waived the jury because he didn't think he'd get a fair trial because of the media coverage of the Kunkel and Meehan cases. PCRT. 1602-06.

He also testified that although his concerns about discovery were never resolved, they had little to do with the decision to waive the guilt phase and penalty phase juries. He testified that when he waived the penalty phase jury, he didn't know that if six jurors recommended life, that would mean a life sentence for him. He also testified that he didn't know that if the jury recommended life, the judge could give him either life or death. Mr. Knight said he did not know that he could waive his guilt phase jury and still have a jury at the penalty phase. PCRT. 1605-10.

SUMMARY OF THE ARGUMENTS

Argument I: Trial counsel failed to properly investigate and present a case in mitigation at the penalty phase after being reappointed.

Argument II: The reappointment of CCRC on November 28, 2011 over Mr. Knight's objection was a violation of his right to self-representation.

Argument III: The Nolle Prosse and discharge of the 1994 second degree murder charges in the Kunkel case in January 1995 should have barred Mr. Knight's trial in the instant case; and if trial counsel Jose Sosa failed to move for a discharge while representing Mr. Knight, that inaction was prejudicial deficient performance pursuant to *Strickland* and attributable to co-counsel Anne Perry.

Argument IV: There was a *Richardson* violation when the State failed to provide Mr. Knight with all required discovery prior to the guilt phase of his trial subsequent to his dismissal of Jose Sosa as guilt phase counsel.

Argument V: Mr. Knight's alleged waivers of a guilt phase jury and a penalty phase jury along with his waiver of counsel at the guilt phase were not knowing, intelligent and voluntary.

Argument VI: Florida's Lethal Injection Procedures violate the Eighth amendment.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

ARGUMENT I

PENALTY PHASE COUNSEL JOSE SOSA WAS INEFFECTIVE WHERE HE FAILED TO ADEQUATELY INVESTIGATE AND PRESENT READILY AVAILABLE EVIDENCE IN MITIGATION

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 688 (citation omitted). Defense counsel discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In

Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id.* at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Mr. Knight testified below at the evidentiary hearing on proffer that after he discharged trial counsel Anne Perry, he and Jose Sosa did not have on-going meetings. Rather, they "only met briefly, once or – once or twice." PCRT. 1634. Given that Perry was discharged on October 31, 1997 and that Sosa was discharged as guilt phase counsel on January 8, 1998 before being re-appointed as counsel for the penalty phase on April 15-16, 1998, there was little opportunity for the investigation and presentation of an adequately developed case in mitigation. See PCR. 581-601; 603-634. Sosa was stand-by counsel as late as April 26, 1998. PCRT. 1582-83. He used the same experts that had been used in the Meehan case, Dr. Strauss and social worker Hession. R. 400-407.

Dr. Strauss's testimony at the penalty phase was offered in support of the two mental health statutory mitigating circumstances. R. 499-501. He testified that he had interviewed Mr. Knight "about four, four and a half, five hours" only over the week before the penalty phase. R. 496, 502. He had previously evaluated Knight in the Meehan case in 1995. R. 497. He noted at the penalty phase that it was outrageous that Mr. Knight had more than referrals as a child and juvenile to

HRS. R. 506. Dr. Strauss testified at the evidentiary hearing that Mr. Knight had himself always denied the existence of trauma or childhood abuse. Judge Garrison found aspects of both statutory mitigators. R. 427-30.

Dr. Strauss did not re-examine Mr. Knight prior to his appearance at the evidentiary hearing. He did review a substantial amount of background materials provided by CCRC. This included an affidavit provided by Keith Williams, who knew Mr. Knight as a young man while incarcerated along with him at the Okeechobee School for boys as a young man. Witness Fennel, who had served in many roles at the school including during Mr. Knight's residence there provided insight during his proffered testimony that would have proven valuable to the finder of fact at trial and supported the Williams affidavit and aspects of Pearson's testimony. PCRT, 927-944. At trial Dr. Strauss testified that he believed that the paranoid disorder he had diagnosed in Mr. Knight supported his finding of statutory mental health mitigation when questioned by trial counsel for the penalty phase, Jose Sosa, and the state attorney. He also testified that the two murders that Mr. Knight was convicted of were based in homophobia directly related to the paranoia: "I think the homophobia or the focus on the picking of victims being homosexual is directly related to the paranoia. I think an incident in '83 when he had his testicle amputated when he was at the Okeechobee School, I believe that was the point at which the focus was put on homosexuality and homosexuals. . . I

think that is the crux of why – this is how – why Ronnie Knight's paranoia is focused on homosexuals." R. 26.

Dr. Strauss had no independent validation for his findings at trial. Yet he further testified at the penalty phase that Mr. Knight's mental illness impacted his ability to make willful choices, especially given his traumatic childhood experiences based on his social services record R. 21: "This mental illness is so severe, and so pervasive and so all-consuming that for Ronnie to have the window of opportunity to make a right choice or a lawful choice or a healthy choice, I think rarely presents itself in any paranoid life…" Id.

Dr. Strauss did not change his diagnostic impression by the time he testified at the evidentiary hearing, but he acknowledged in his testimony that there was substantially more confirmation of his diagnostic impressions provided as a result of the postconviction investigation. This included a confirmation of childhood trauma from several different sources and additional information about the extent and duration of substance abuse, including an informal consultation with Dr. Lipman, who interviewed Mr. Knight in 2006 and 2012.

The testimony from Mr. Knight's sister was never heard by the finder of fact at trial. At trial Dr. Strauss did not have any third party confirmation of his suspicions about the sexual abuse and adolescent trauma that Mr. Knight suffered at the Okeechobee Boys School, information that testified was confirmed by the

affidavit of Mr. Knight's former friend and resident at Okeechobee, Keith Williams, along with the interview of Timothy Pearson conducted by Dr. Lipman that detailed the extreme nature of his joint substance abuse with Mr. Knight. This information in Lipman's interview was confirmed by the evidentiary hearing testimony of Mr. Pearson.

Timothy Pearson's proffered testimony at the hearing also supported Dr. Strauss's beliefs about the presence of childhood trauma: "Okeechobee Boys' School was a "gladiator school" and nobody wanted to get sent there. There were fights, beatings, rape, just like prison. RK got a ruptured testicle there. He got into several fights there. He wouldn't have told anyone if he'd been sexually molested. Ronald Knight was run over by a truck about 6 months after he got out of Okeechobee. Ronald Knight got under the hood of the truck, a car rear-ended it and he was thrown from the front. The truck ran over him and they had to push it off his head." (PCRT. 1009).

The testimonial evidence from Timothy Pearson, Mr. Knight's sister and Mr. Knight himself concerning substance abuse at the time of the offense should also have been investigated by penalty phase counsel, and presented to Dr. Strauss and heard by the finder of fact at trial. See PCRT. 953-1010; 1482-1641(Knight). Likewise, the expert testimony from Drs. Lipman and Harvey should have been heard. PCRT. 1230-1256; 851-900; the richly detailed additional information

provided by Pearson and Knight provided additional support for Dr. Strauss's diagnostic impression at trial of the presence of a serious psychiatric paranoid disorder and supports the presence of a serious substance abuse disorder as well. This information, if properly investigated and presented, would have provided additional support for Dr. Strauss's opinions in support of statutory mitigation:

> I think the focus of Ronnie's paranoia, the focus of his hate and his rage and who he blames for his life's miseries are homosexuals, and I think that idea entered in as opposed to a religious idea or some other idea that would have captured him in his adolescence, because that's where the focus of your hate and rage develops in the determining paranoid personality. I think it had to do with the 1983 – whatever happened at Okeechobee that ended up in having his testicle amputated.

R. 30-31.

Dr. Harvey's testimony at the evidentiary hearing below demonstrated the problem that defense counsel faces when preparing for a penalty phase at the last minute, as was done in this case, where Sosa simply fell back upon using the same experts that had been used by attorney Greg Lerman in the penalty phase of the Meehan trial. Sosa did not move for their appointment until after the penalty phase. R. 412. To the extent that Mr. Knight was uncooperative in assisting in the preparation of a penalty phase case it was almost entirely related to his own psychiatric paranoid disorder:

> So in order to diagnose posttraumatic stress disorder, you need to have someone who provides you a reliable report of their symptomology. An individual who is guarded, or unwilling to offer information

> because they're suspicious, would never be able to give you information that would substantiate that diagnosis, The complication is that if someone is guarded, suspicious, and doesn't trust your intentions, if they don't give you an accurate report of their true symptomology, it's very difficult to generate a diagnosis like PTSD, which is very non observational in most cases.

PCRT. 873. Even though Mr. Knight's psychiatric disorder affected his degree of cooperation, he did not refuse to be seen by Dr. Strauss at Jose Sosa's request a few days before the penalty phase. Here Mr. Knight "had a right – indeed a constitutionally protected right – to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer. *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). In Knight's capital penalty phase proceedings, substantial mitigating evidence went undiscovered and was thus not provided to the testifying experts or presented for the consideration of the sentencing judge, to the considerable prejudice of Mr. Knight.

Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) (reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his

family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase.). The conclusions in *Wiggins* are based on the principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. 123 S. Ct. at 2538. In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). *See id*. at 2536-7. Under the ABA Guidelines, trial counsel in a capital case "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and

Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989)." *Id*. at 2537.

Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. *See id*. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. *See* Commentary on Guideline 11.4.1(c).

In Knight's capital penalty phase proceedings, substantial mitigation evidence never reached the Court. The evidence that was presented provided only limited insight into the "particularized characteristics of the individual defendant" *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion).

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*,

466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. See *Kyles v. Whitley*, 115 S. Ct. 1555 (1995) (discussing identity between *Strickland* prejudice standard and *Brady* materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. As demonstrated herein, Knight was prejudiced by Sosa's numerous failings as penalty phase counsel.

The finder of fact at trial knew much less about the history of Knight's childhood trauma, substance abuse issues and psychological and emotional problems than was developed in postconviction. Had trial counsel properly investigated and presented the available evidence, the sentencing judge would have had a greater appreciation for the aspects of his conduct and character and there is, at the very least, a reasonable probability that the result of the penalty phase would have been different. *Strickland*, 466 U.S. 668, 694 (1988).

ARGUMENT II

THE RE-APPOINTMENT OF CCRC SOUTH, OVER MR. KNIGHT'S OBJECTION, ON NOVEMBER 28, 2011, WAS ERROR AND AS A RESULT THEREOF, CCRC SOUTH HAD NO RIGHT OR DUTY TO APPEAR ON BEHALF OF PETITIONER DURING HIS EVIDENTIARY HEARING OR IN THE INSTANT APPEAL

The lower tribunal, prior to the November 28, 2011 hearing, had conducted hearings within the rubric of *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 l. Ed. 562 (1975), and *Nelson v. State*, 247 So. 2d 256 (Fla. 4th DCA 1986) and thereafter found that Mr. Knight was competent to waive the representation of CCRC South. S*ee McDonald v. State*, 952 So. 2d 484, 493-94 (Fla. 2006). Judge Garrison discharged CCRC South from the representation of Mr. Knight on February 22, 2010 and after a request from Mr. Knight for stand-by counsel, appointed CCRC South as stand-by counsel over the objection of CCRC South. PCR. 2821.

However, at a November 28, 2011 hearing on a new motion to discharge CCRC South, after having requested the re-appointment of CCRC South for purposes of the then scheduled evidentiary hearing in the instant case, Mr. Knight made an unequivocal request to waive CCRC Counsel and to thereafter represent himself. The lower court ignored his request and over Mr. Knight's record objection, kept CCRC South on the case for purposes of the subsequent evidentiary hearing proceedings. See Supp. PCR. 717-751 & PCR. 2945. Undersigned counsel

was well aware that CCRC South was going to be retained on the case based on a similar incident at the *Huff* hearing. PCR. 2770.

This Court has recognized in *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993) and more recently reaffirmed in *James v. State*, 974 So. 2d 365 (Fla. 2008), that capital death-sentenced defendants have a constitutionally protected right to waive post conviction representation under *Faretta v. California*, 422 U.S. 806 (1975). See *James v. State*, 974 So. 2d at 366. In fact that right to waive has been incorporated into Fla. R. Crim. P. 3.851(i) in circumstances where "a prisoner seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel."

In *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla. 1993) this Court was confronted with the issue of whether a capital defendant could waive the appointment of post conviction counsel . . . we concluded that "if the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived," Id., we explained that "competent defendants have a constitutional right to refuse professional counsel, or not, if they so choose." *Faretta v. California*, 422 U.S. 806 (1975).

Under *Traylor (v. State*), 596 So. 2d at 968, it is the Court's duty – not the defendant's – to offer and renew waiver of counsel at any "critical" stage of proceedings. Mr. Knight did indicate in the hearing that he wanted counsel other

than CCRC South. Yet in the proceedings before the Circuit Court Mr. Knight ultimately invoked a waiver of collateral post conviction representation pursuant to *Durocher v. Singletary* and *James v. State* when he objected to the re-appointment of CCRC South after the court made clear that it was not going to appoint substitute counsel following a renewed *Nelson* inquiry. In proceedings conducted before the Circuit Court on November 28, 2011 the Circuit Court provided Mr. Knight a *Durocher/James* hearing at which time Mr. Lambrix unequivocally asserted a waiver of collateral post-conviction representation. (Supp. Rec. 722-735).

While CCRC South is both ethically and legally bound to respect Mr. Knight's waiver of collateral post conviction representation, CCRC South was in no position to reject the lower court's re-appointment order. See *Sanchez-Velasco v. Secretary, Florida DOC*, 287 F. 3d 1015 (11th Cir. 2002). In an abundance of caution, counsel is filing this initial brief to make sure Mr. Lambrix's rights are protected. But assuming that Mr. Knight is competent, then he has a clearly protected constitutional right to discharge CCRC South and to assert his right to self-representation. As noted *supra*, this Court has consistently recognized that the waiver of the statutorily created right to collateral post conviction representation is analogous to the waiver of the right to legal representation at trial under *Faretta v. California*, 422 U.S. 806 (1975). See *Durocher v. Singletary*, 623 So. 2d at 483

(specifically recognizing waiver of post conviction counsel analogous to *Faretta* waiver); *James v. State*, 974 So. 2d at 366.

In *Pasha v. State*, 39 So. 3d 1259 (Fla. 2010), relying upon *Tenis v. State*, 997 So. 2d 375, 377-78 (Fla. 2008), this Court has recognized that if the lower court improperly denies a *Faretta* waiver and forces legal counsel upon the defendant against his expressed will, then full relief is entitled and all proceedings conducted before the lower court must be summarily vacated and the case remanded back to the trial court. That is what should happen in this case, going back to February 2010 when CCRC South was first removed from the case as counsel of record by Judge Garrison.

In *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379 (2008), the United States Supreme Court modified *Faretta* to allow denial of a defendant's waiver of legal representation in certain circumstances if it can be established that the defendant is not competent to proceed on his own. Mr. Knight's circumstances may be one of those cases. See Testimony of psychiatrist Abbey Strauss, M.D., regarding the presence of a paranoid disorder as statutory mitigation. (PCRT. 814-15).

The presumption of competency is overcome where, as here, there are reasonable grounds to question the defendant's competency. Once it is established that cause does exist to question the defendant's competency then the court must

conduct a competency hearing pursuant to Fla. R. Crim. P. 3.111(d)(3), 3.210(a) & (b) and *Indiana v. Edwards*. As this Court recognized in *Tingle v. State*, 536 So. 2d 202, 204 (Fla. 1980), the failure to conduct a competency hearing is itself *per se* reversible error. See also *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla. 1993); *Minerva v. Singletary*, 830 F. Supp. 1426, 1429 (M.D. Fla. 1993).

Mr. Knight maintains that the actions of the lower court imposed a limitation on his due process right to prove his claims. *See Strickler v. Greene*, 527 U.S. 263, 281 n.20, 289 (1999); *Lightborne v. State*, 549 So. 2d 1364 (Fla. 1989); *Scott v. State*, 657 So. 2d 1132 (Fla. 1995); *Henry v. State*; *Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1994); and *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001).

Mr. Knight should have been allowed to discharge counsel and to represent himself pursuant to *Durocher* at the November 28, 2011 hearing.[4] The actions of the lower court in preventing Mr. Knight from successfully asserting his right to self representation and in refusing to recognize the existence of a conflict between counsel and client requiring withdrawal of counsel present both federal and state constitutional issues and are predicated on the violation of Appellant's protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the

[4] Mr. Knight also filed a motion to discharge CCRC South subsequent to the three part evidentiary hearing. The motion was heard and denied on October 10, 2012. See PCRT. 1658-1697. The same issues involved in the pre-hearing motions to discharge CCRC South appear therein.

United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law.

ARGUMENT III

WHERE THE STATE FAILED TO DISCLOSE THAT THE PROSECUTION OF 97-5175 CF A02 WAS BARRED AS A RESULT OF CHARGES THAT THE STATE NOLLE-PROSEQUI IN 94-4885 CF, MR. KNIGHT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED; IN ADDITION, THEN TRIAL COUNSEL'S FAILURE TO FILE A MOTION FOR DISCHARGE OR TO ARGUE A CASE FOR DISCHARGE WAS DEFICIENT PERFORMANCE BASED ON ACTUAL OR IMPUTED PERSONAL KNOWLEDGE OF CHARGES VOIDED IN 1995 THAT OPERATED TO PREJUDICE MR. KNIGHT

The charges in the instant case were filed in violation of Knight's constitutional right to a speedy trial and his right to be free from double jeopardy. The lower court made findings of fact that Mr. Knight's speedy trial time had not run at the time nol prosse was entered by the State on January 5, 2005. The factual determinations made below are now the law of the case. The State conceded below that the new charge of first degree murder in Case No. 97-5175 was based on the same occurrence as the original nol prossed charge of second degree murder in Case No. 94-4885 CF A02 and that it was filed long after the initial speedy trial period had to have run.

At the evidentiary hearing, trial counsel Anne Perry testified that she did not

recall if she or co-counsel Jose Sosa tried to get records from the clerk's office, court reporters, or elsewhere regarding the 1994 nolle pros case. She testified that she did not recall if she reviewed the Meehan transcripts and that she did not recall if she knew that the 1994 case was nolle prossed on 1-3-95. She stated that she did not think she ever got the records on the nolle pros. (PCRT. 1154-1180).

Ms. Perry also testified that the notes in her trial attorney file have a entry reading "double jeopardy?" Her interpretation of that entry was that it meant that she wasn't sure about it; she testified that she may have been unsure because she didn't have the records on the 1994 case being nolle pros. She did not recall if she talked to Sosa, Mr. Knight's counsel in 1994-1995, about the nolle pros. She testified that if she didn't talk to Sosa, she would have had to get the records to properly investigate the issue, which she did not do. (PCRT. 1170-1179).

Mr. Knight's motion below pled that this state action was a violation of Fla. R. Crim. P. 3.191(o), which prohibits the state from circumventing the remedial provisions of the speedy trial rule by acting to enter a nolle prosse and then later refilling charges after the speedy trial period has expired. *See State v. Williams*, 791 So. 2d 1088, 1091 (Fla. 2001).

Sosa served as co-counsel with Anne Perry at the guilt phase until she was discharged by Mr. Knight. Thereafter Sosa continued as sole counsel until January 8, 1998 when he was discharged and then assigned to be stand-by counsel. He was

re-hired by Mr. Knight on April 15, 1998 as sole penalty phase counsel. Mr. Sosa was ineffective when he both failed to notify Ms. Perry about the need to file a motion for discharge related to the re-indictment on the 1994 charges, and when he failed to do so on his own.

Mr. Sosa unavailable to testify below as he was deceased years before the proceedings in 2012. As noted *supra*, Anne Perry testified that she did not recall any discussion about the nol prosse/speedy trial issue. Her failure to investigate the 1994 case and to determine what to do thereafter was also deficient performance. The prejudice to Mr. Knight from counsel's failure to file for discharge in the instant circumstances is self-evident where he was subsequently tried for his life and sentenced to death.

In a December 13, 2011 Order, the lower court incorrectly exercised discretion when it denied Mr. Knight's motion for discharge pursuant to Fla. R. Crim. P. 3.191(o). PCR. 2950-51. The lower court should have ministerially granted the motion. See *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996), citing *Solomon v. Sanitarians' Registration Board*, 155 So. 2d 353 (Fla. 1963) ("A duty or act is defined as ministerial when there is no room for the exercise of discretion and the performance being required is directed by law").

The lower court made a determination concerning the factual issues concerning the speedy trial issue. That determination evinces that the State was

prohibited from indicting Mr. Knight for first degree murder in the instant case in 1997 when it had previously entered a nol pros based on the same facts and circumstances in January 1995, therefore the latter indictment in the instant case that was filed by the State was a nullity. Absent a valid charging document in this case, the trial court and the subsequent post conviction court lacked subject matter jurisdiction and jurisdiction over the defendant to proceed, resulting in an illegal sentence. See *State v. Anderson*, 537 So. 2d 1373, 1374 (Fla. 1989).

Any exercise of discretion by the trial court or postconviction court must be within the bounds of the law and for some legal reason. *Ellard v. Godwin*, 77 So. 2d 617, 619 (Fla. 1955). The postconviction court's failure to enter discharge was an abuse of discretion where the lower court made a finding of fact that Mr. Knight's speedy trial time had not run when the state nol prossed his case. Because the judgments are void they must be reversed. See *McCoy v. U.S.*, 266 F. 3d 1245 (11th Cir. 2001). This Court should enter an order directing the circuit court (1) to void the proceedings below; (2) to enter an order discharging Palm Beach Co. Case No. 97-5175CF.

The original charges in the instant case below related to the death of Richard Kunkel, under case number 94-4885CF A02. The charges included second-degree murder with a firearm, burglary of a dwelling while armed, grand theft auto and possession of a firearm by a convicted felon and were filed against Mr. Knight on

May 12, 1994. These charges were ultimately nol prossed by the state before The Honorable Marvin Mounts, Circuit Court Judge, Palm Beach County, on January 3, 1995.

On May 8, 1997, seventeen months after Mr. Knight was sentenced to life on December 8, 1995 in the Brendan Meehan murder case, and twenty-eight months after the original charges in the Kunkel case were nol prossed, the Palm Beach County Grand Jury indicted Mr. Knight on new charges related to the death of Richard Kunkel, this time under case number 97-5175 CF A02. These new charges were first-degree murder, armed robbery, burglary of a dwelling and grand theft of an automobile-hate crime. The collateral attack below was directed to the convictions and death sentence which resulted from these charges.[5]

Mr. Knight has pled below that his convictions and death sentence in Case

[5]A document provided to counsel on September 6, 2006, by the Palm Beach County Clerk of Circuit Court concerning case number 94-4885CF A02, dated February 1, 2000, indicated that the court file in that case had a purge date of January 3, 2000. This was well before CCRC became counsel. A post-trial Order To Transcribe Proceedings dated June 23, 1998 in the instant case, 97-5175 CFA02, did not include any request to transcribe any portion of the prior proceedings under 94-4885CF A02. The mandate issued following direct appeal of Mr. Knight's case on December 13, 2000. During the public records process post conviction counsel requested copies or transcriptions of any existing hearings reported by court reporters in Case No. 94-4885, but those documents were produced piecemeal, mostly in June 2011, despite representations that they did not exist. See PCR. 2825. The state habeas petition being filed today includes argument that direct appeal counsel was ineffective for failure to ensure that there was a complete record on direct appeal.

No. 97-5175 are void as a matter of law because the State was divested of jurisdiction to refile the charges in 94-4885 CF as a result of estoppel, lapse of speedy trial time, double jeopardy and due process and equal protection violations. PCR. 2798-2802. CCRC South began representing Mr. Knight after filing a Notice of Appearance in Palm Beach County Circuit Court on July 5, 2001. An evidentiary hearing was initially scheduled in 2005, but was first delayed due to the state's objection to an initially granted hearing on Florida's lethal injection procedures and then further delayed by years of protracted public records litigation that resulted in multiple productions of additional records.

CCRC was removed from the case at Mr. Knight's request on February 22, 2010, and the lower court refused to appoint substitute counsel, so thereafter, Mr. Knight represented himself in circuit court with CCRC South appointed as standby counsel by Judge Garrison. After Judge Garrison's retirement, Judge Colbath was assigned to the case. CCRC South was not reappointed as counsel until a hearing held before Judge Colbath on November 28, 2011, with a written order memorializing same rendered on December 5, 2011.

Judge Colbath presided at a hearing on June 3, 2011 and thereafter entered an order on July 6, 2011, all while Mr. Knight was still representing himself. The order made a finding that, regarding the January 3, 1995 hearing at which the state entered a nol pros on the charges that Mr. Knight was then facing: "[u]nder oath,

the Defendant admitted that the venire panel was sworn in the jury assembly room prior to being transported to the individual judge for further questioning. PCR. 3338; 3379-80. (June 3, 2011 transcript). Also, the Defendant explained that he was not raising a speedy trial claim. PCR. 3382.

Based on Mr. Knight's testimony at the June 3rd hearing as reported in the order, the court then denied Mr. Knight's *pro se* motion for discharge "upon the finding that Defendant's speedy trial had not expired and that jeopardy had not attached on January 3, 1995 when the State *nol prosse* case number 1994-4885-CF-A02. PCR. 3383.

The finding by the lower court was contradicted by comments at the June 3, 2011 hearing by Assistant State Attorney Andy Slater: "I just would like to point out that Mr. Knight has asserted that his case; even though they never raised a claim of – that speedy trial period had run; on October 28, 1994, a Defense continuance was assert – was charged to the Defense and the case was continued for 60 days. And that would effectively have waived speedy trial. So we have that transcript now."

At the same hearing, Mr. Knight pointed out that the "new transcript" relied upon by the state, had just been provided for the first time in open court after years of public records litigation, and is "in direct conflict with the Court docket, which states the State moves the Court for a continuance on 10/24. Which was granted

without objection by the Defense." PCR. 3392. A portion of the 10/28/94 transcript was then read into the record with ASA Slater making a representation that the transcript memorializes an agreement to a continuance and that "both parties join in that".

Slater stated at the hearing that he consulted with ASA Deluna, the prosecutor who entered the nol prosse, before recharging Mr. Knight and that he thereafter ordered a copy of the transcript – he stated at the hearing that "a jury was not sworn in that case." PCR. 3349. Mr. Knight's position at the hearing was that the jury pool was sworn in the jury assembly room before reporting to Judge Mounts' courtroom and the venire was present at the time the nol prosse was announced in open court. According to Judge Colbath's order, Mr. Knight's speedy trial period had not run on Jan 3, 1995. Mr. Knight disagreed that the defense ever agreed to a continuance and stated his belief on the record that the January 3, 1995 trial date was already set well outside of the speedy trial rule. PCR. 3377.

Amy Borman, General Counsel, Fifteenth Judicial Circuit, also appeared at the June 3, 2011 hearing and described her attempt to obtain copies of the missing transcripts of eight hearings in Mr. Knight's 1994 case, six of which she had in her possession in open court on June 3, 2011 court dated May 12, 1994, June 2, 1994, July 14, 1994, October 28, 1994, December 30, 1994 and January 3, 1995. She also

stated that there were two otheres which would be provided later, both dated June 16, 1994. One transcript dated August 26, 1994 was never located or provided to Mr. Knight. PCR. 3366-67.

A Notice of Compliance was served by Ms. Borman on June 10, 2011 with transcripts of the two June 16, 1994 hearings attached (3 pages and 21 pages). Assistant Attorney General Leslie Campbell admitted on the record that new records were being disclosed deep into the history of the case "Public records have been disclosed today from that 1994 case. You have six transcripts." PCR. 3396.

The Attorney General was ordered to provide proposed orders at the conclusion of the hearing, which were provided to Mr. Knight. Before he was able to file any objections, he received the rendered orders and then he filed a Motion for Continuance of the scheduled *Huff* hearing and a Motion for Clarification on July 14, 2011. The second motion advised the lower court that the proposed orders that had been ordered and then provided to the court by the state based on the lower court's findings at the June 3, 2011 hearing were misleading and erroneous. Specifically, Mr. Knight stated in his Motion for Clarification:

> Defendant respectfully submits that there was no argument for discharge with respect to the double jeopardy and/or speedy trial violations asserted in defendant's amended [Rule 3.851] claims 17 and 18 during the June 3, 2011 hearing. As the State points out, testimony was given for the purpose of reconstructing the record as it relates to the double jeopardy and speedy trial issues. The State goes on to advise this court that at an evidentiary hearing testimony will be offered by the state to refute Defendant's testimony regarding said

> issues. The State further advises this Court that a *Huff* hearing is necessary to address the double jeopardy and speedy trial issues. . . One can only presume, based upon the foregoing, the state was readily aware that: A) No motion for discharge was argued with respect to the double jeopardy and/or speedy trial issue and; B) Said issues, Claims 17 and 18 were scheduled for a Huff hearing on August 22, 2011. Thus defendant is at odds as to why the State submitted an erroneous order to this Court.

PCR. __. After the *Huff* hearing took place, Mr. Knight filed a Motion for Discharge for Violation of Speedy Trial on September 30, 2011, pursuant to the lower court's July 6, 2011 Order on Defendant's Motion to Reconstruct the Record and for Discharge of the Case. PCR. 2798-2802. The motion noted that Rule 3.191(a), Fla. R. Crim. P. provides that "Except as otherwise provided by this rule and subject to the limitations imposed under subdivisions (e) and (f), every person charged with a crime shall be brought to trial . . .within 175 days if the crime charged is a felony." The motion then explained that the lower court's July 6, 2011 Order, entered following the hearing of June 3, 2011, had found "that defendant's speedy trial had not expired and that jeopardy had not attached on January 3, 1995 when the state nolle prosse Case No. 94-4885 CF A02." See PCR. __. He further argued that in consideration of the postconviction court's finding regarding speedy trial, that the Florida Supreme Court's "decisions in *Reed v. State*, 649 So. 2d 227 (Fla. 1995) and *State v. Agee*, 622 So. 2d 473 (Fla. 1993), [should have] prevented the state from the indictment and retrial of defendant in the instant case."

Mr. Knight's motion further pointed out that the state had conceded that the

new charge of first degree murder in Case No. 97-5175 was based on the same occurrence as the original nol prossed charge of second degree murder in Case No. 94-4885 CF A02 and that it was filed long after the initial speedy trial period had to have run. Mr. Knight's motion pled that this state action was a violation of Fla. R. Crim. P. 3.191(o), which prohibits the state from circumventing the remedial provisions of the speedy trial rule by acting to enter a nolle prosse and then later refilling charges after the speedy trial period has expired. See *State v. Williams*, 791 So. 2d 1088, 1091 (Fla. 2001). Mr. Knight's motion further stated:

> Defendant asserts that this case does not involve prosecutorial oversight in failing to timely bring an active case to trial. Rather, it involves a conscious decision by the prosecutor to enter nolle prosequi to avoid a judgment of acquittal in case No. 94-4885 CF A02, followed by the prosecutors conscious decision more than two years later to reinstate the case. The state's actions served to deprive the defendant of the opportunity to avail himself of the remedies under rule 3.191(p)(3). See *State v. Gibson*, 783 So. 2d 1155, 1158-59 (Fla. 5th DCA 2001) Also *State v. Clifton*, 905 So. 2d 172, 175-76 (Fla. 5th DCA 2005). Hence it is this mischief that the Florida Supreme Court seeks to prohibit by its adoption of Rule 3.191(o), and its decisions in *Agee*, *Reed* and *Williams*.
>
> The State has argued that the speedy trial rule is not self-executing, and thus Mr. Knight or his legal representative, if any, had some obligation during the period from January 3, 1995 until the trial on the 1997 charges to do something affirmative to either get a speedy trial or to obtain discharge, that necessity was mooted out by the state's actions in terminating prosecution and then attempting to re-indict in violation of Mr. Knight's state and federal due process rights:
>
> When the state enters a nolle prosequi or voluntarily dismisses the action by an announcement of "no action," the state essentially proclaims its intention to terminate the prosecution and proceed no

> further. Simply doing nothing to initiate prosecution after the accused is taken into custody signifies that the state does not intend to initiate prosecution. In these instances, the state essentially abandons the prosecution before the defendant can avail himself or herself of the protection of the speedy trial rule. To allow the state to proceed with the prosecution in these instances would circumvent the intent and purpose of the speedy trial rule. This is the mischief that the court seeks to prohibit by its adoption of rule 3.191(o) and its decisions in *Agee*, *Genden*, and *Williams*.

State v. Clifton, 905 So. 2d 172, 177 (Fla. App 5 Dist. 2005). If Judge Colbath's order is taken into consideration in these circumstances, and Mr. Knight's speedy trial time had not expired at the time of the nol pros on January 3, 1995, surely it must have expired prior to his indictment on May 8, 1997 on first degree murder charges arises out of the same occurrences. These are not circumstances where "once the applicable time period has expired, the accused must file a notice of expiration pursuant to rule 3.191(h)" as noted in *Clifton*. *Id.* at 175. Once the nol pros took effect, Mr. Knight's defense counsel Jose Sosa was no longer representing Mr. Knight until he was reappointed as co-counsel to Ann Perry two and a half years later on June 30, 1997 in the successor Case No. 97-5175 CF A02. Here, counsel on both cases negligently failed to file either a notice of expiration pursuant to rule 3.191(h) or a motion for discharge with the trial court pursuant to rule 3.191(p)(3), those failures should not affect the postconviction court's ability to rule on Mr. Knight's motion for discharge.

The facts found by Judge Colbath and memorialized in his order negated any

evidentiary hearing concerning the deficient performance and the obvious prejudice to Mr. Knight when he was tried, convicted and sentenced to death for criminal charges arising out of the same circumstances. Mr. Knight's motion of October 26, 2011, entitled Motion for Ruling on Defendant's Motion For Discharge took the position that the lower court's failure to rule on the September 30, 2011 motion for discharge "when there is no lawful basis to reserve ruling, creates further unwarranted delay which the Florida Supreme Court seeks to remove from the processing of death penalty cases." PCR. 2931-34.

The motion also noted that "[t]he issues surrounding Defendant's speedy trial in the instant case, initially nolle prossed on January 3, 1995 in Case No. 94-4885 CF A02, have been at issue for the last decade due to the State's continued failure to provide public records in a timely manner. However, on June 3, 2011, this court, through ongoing post conviction proceedings in the instant case, found that defendant's speedy trial had not expired on January 3, 1995 when the state entered nolle pros in Case No. 94-4885 CF A02, and thereafter, issued the July 6, 2011 Order with respect thereto."

On November 16, 2011 the lower court entered an Order Denying Defendant's Motion for Discharge of Speedy Trial filed on October 21, 2011. PCR. 2929. After Mr. Knight filed a Motion for Rehearing, the lower court entered an order on December 13, 2011 granting Defendant's Motion for rehearing,

vacating the court's earlier November 16, 2011 Order, but denying Defendant's Motion for Discharge for Violation of Speedy Trial. PCR. 2950-51. The court found:

> . . . [t]he Defendant's arguments are misplaced. A motion for discharge is properly brought before trial, rather than after conviction. *Agee*, *Reed* and *Williams* each involved situations where the defendant moved for discharge prior to trial. In order to address such a claim after conviction, a defendant should file a postconviction motion alleging counsel was ineffective for not filing a motion for discharge, or similar claim. In this case, the Defendant currently has a motion for postconviction relief pending before the Court. In his Motion, the Defendant makes similar claims regarding speedy trial violations and alleges his counsel was ineffective for failing to file a motion for discharge. Therefore, his present contentions are more properly addressed in the claims in that Motion.
>
> The lower court was aware that Mr. Knight had been precluded from raising or seeking discharge prior to trial because all the records and transcripts related to the 1994 nol prosse case were never available to him either at the time of trial on the 1997 refiling or to his postconviction counsel except in piecemeal fashion from 2005 until the hearing on June 3, 2011 where six transcripts were provided with the later production of two additional transcripts on June 10, 2011 and one transcript still never produced. In that regard, the State has admitted that there was a co-mingling of records in their files. These facts are directly related to the *Richardson* violation argued elsewhere in this Brief.

Judge Colbath's findings below are contradictory. First, that Mr. Knight's speedy trial time had not expired in his post June 3, 2011 orders, and second, using that finding as a rationale for defeating any argument that Mr. Knight had been subjected to double jeopardy when he was indicted for first degree murder in Case No. 97-5175 CF. These contradictory findings are an abuse of discretion and an

unreasonable determination of the facts. The December 2011 order on re-hearing is the law of the case. No further evidentiary development should have been necessary after the lower court's findings regarding speedy trial. See *Sherrod* at 164. The State was precluded from recharging Mr. Knight after nol prosse the case under the unique circumstances of Mr. Knight's case. The indictment was an invalid charging document. This Court should enter an order striking the proceedings below and directing the lower court to enter an order allowing discharge by operation of law.

In *Florida DOC v. Watts* this Court said it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner," citing to *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999). *Watts*, 800 So. 2d at 232. In *Watts* this Court also noted the concurring opinion of Chief Justice Wells in *Allen v. Butterworth*, 756 So. 2d 52, 68 (Fla. 2000), which is applicable to petitioner's current status:

> The procedures of postconviction in capital cases must be focused so that the defendant who should not be on death row is removed from that condition at as early a time as possible. That is the legitimate goal of postconviction proceedings and the abiding reason that we must continue our efforts in removing unwarranted delay from the processing of these cases.

Watts at 233.

The jurisdiction of the circuit court is a fundamental issue. That jurisdiction should have been to the ministerial act of entering a discharge. The failure by the

original trial court to clearly enter a discharge of record was only magnified by the failure of the postconviction court to do so. Both omissions were fundamental error that deprived Mr. Knight of the due process of law where the error "reach[ed] down into the validity of the trial itself." See *Maddox v. State*, 760 So. 2d 89, 96, 98 (Fla. 2000) ("The reason that courts correct error as fundamental despite the failure of the parties to adhere to procedural rules requiring preservation is not to protect the interests of a particular aggrieved party, but rather to protect the interests of justice itself"). The State should have been prohibited from re-indicting Mr. Knight in 1997. As in *Watts*, no rule or statute addresses the unique circumstances of Mr. Knight's case. He applied for discharge at the first opportunity when he had all the files and records. His speedy trial rights were infringed by the state's nol prosse. The State was thereafter prohibited from re-charging him. The nol prosse case was on charges of 2nd degree murder.

Initially, Mr. Knight was not charged capitally and the recharging prejudiced him yet again when he was re-indicted for 1st degree murder. Judge Colbath's discretionary decision in December 2011 to not grant a discharge was incorrect. He improperly exercised discretion on a matter, entering a discharge, that should have been operational by law and statute.

On March 12, 2012 counsel filed a writ of prohibition with this Court, SC12-483. No action was ever taken after the State filed a response and the

evidentiary hearing below ultimately took place without any intervention by this Court. The State's response relied on a transcript dated October 28, 1994 in circuit court case number 94 4885 CFA02. According to the State's statement of the facts, "[o]n October 28, 1994, Knight through his counsel, Sosa, was granted a continuance."

The transcript that the State quoted was not produced to Mr. Knight until July 18, 2008, after many years of public records litigation in circuit court during which both the state and the court reporting authorities denied that notes or transcripts existed.[6]

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[6] The history of the attempt to obtain the records and transcripts related to Case No. 94 4885 CFA02 was detailed in Mr. Knight's Amended Supplement to Amended Motion To Vacate which was served below on March 27, 2008. It states at pages 3- 5:

> 3. A computer print out document dated February 1, 2000, first provided to counsel on September 6, 2006, by the Palm Beach County Clerk of Circuit Court concerning case number 94-4885CF A02, indicates that the court file in that case had a purge date of January 3, 2000. See Attachment A: *County/Circuit Court Criminal History Report History Purge List*, Pages 18355-18366. A post-trial Order To Transcribe Proceedings dated June 23, 1998 in the instant case, 97-5175 CFA02, did not include a request to transcribe any portion of the prior proceedings under 94-4885CF A02. The mandate issued following direct appeal of Mr. Knight's instant case on December 13, 2000. CCRC became counsel for Mr. Knight well after the court file purge date noted *supra*. During the prior public records litigation in the instant case, the state attorney indicated in a State Response to Demand for Additional Public Records dated July 31, 2003 that "[a]fter completing a diligent search of all available data bases. . . the records for case number[] 94-4885 CF A02 were not located".

4. After acquiring the computer print out from the Clerk, undersigned counsel first orally requested, through Rick Hussey, Manager of Court Reporting Services for the Fifteenth Judicial Circuit, the transcription of any existing proceedings reported by court reporters named in the clerk's docket print out in Case No. 94-4885. Counsel was thereafter advised telephonically by Mr. Hussey that one of the court reporters, Martin Brooks, was deceased. He also advised that would check to see if there were surviving notes, tapes or transcripts from any of the named court reporters. Mr. Knight himself simultaneously made a *pro se* records request to Mr. Hussey, who advised him by letter dated December 5, 2006, that the tapes and stenographic notes of the court reporters were no longer available. Nothing was provided.

5. A public records request by CCRC South was thereafter directed to the Office of the State Attorney on February 22, 2007, and copied to the Attorney General. That request noted that "[N]o transcripts of any of the proceedings in 94-4885CF A02 have been provided from any source," and it also referenced the January 3, 1995 nol-pros hearing date before Judge Mounts. No objection has been filed by the State to this request. No additional records, transcripts or notes were provided by the State.

6. On June 5, 2007 Assistant Attorney General Leslie T. Campbell attached a partial transcript of a January 3, 1995 hearing in Case No. 94-4885CF A02 to the State's Response to Mr. Knight's *pro se* Petition for writ of Habeas Corpus in Florida Supreme Court Case No. SC07-867, a transcript which was transcribed from the notes of court reporter Phyllis A. Dames on May 3, 2007. This transcript had never before surfaced. Nonetheless, in an October 3, 2007 letter, Rick Hussey responded to CCRC's written request of September 17, 2007, stating that "[t]his office is no longer in possession of the stenographic notes and/or the tape(s) of the proceedings held in the above mentioned case(s)."

7. The December 5, 2006 and October 3, 2007 letters from Rick Hussey, Court Reporting Services, specifically stated that no steno notes or tapes were available for hearings reported in Case No. 94-4885 CF A02 on 5/12/94, 5/31/94, 6/1/94, 6/2/94, 6/6/94, 6/7/94, 6/8/94, 6/9/94, 6/13/94, 6/16/94, 6/21/94, 7/1/94, 7/14/94, 8/26/94, 10/28/94, 12/30/94, and 1/3/95. This is in spite of the fact that by the time of the second letter, reporter Dames had already done a transcription from her steno notes of the January

The State's Response fails to mention the docket entry for that same date, October 28, 1994, of the Response. That entry reads as follows:

> MARVIN U. MOUNTS, JR., JUDGE PRESIDING SHIRLEY DELUNA, ASSISTANT STATE ATTORNEY PRESENT DEFENDANT PRESENT DEFENSE COUNSEL PRESENT, J. SOSA, ESQ. COURT REPORTER PRESENT MARTIN BROOKS DEPUTY CLERK(S) PRESENT: MARY ELLEN ELDER HAVING BEEN PREVIOUSLY ARRAIGNED AND PLEAD NOT GUILTY; BEFORE THE COURT FOR CALENDAR CALL. STATE MOVES FOR A CONTINUANCE. MOTION GRANTED WITHOUT OBJECTION BY THE DEFENSE. CASE REMAINS SET FOR TRIAL. CASE PASSED TO 01/03/95, DIV. S, AT 9:00 FOR TRIAL WITH JURY AND 12/30/94, DIV. S, AT 9:30 FOR CALENDAR CALL.

PCR. __. Judge Colbath's finding that speedy trial had not run was made only after the lower court took into account both the October 28, 1994 transcript and the

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> 3, 1995 hearing in 94-4885CF A02, apparently at the request of the State three months before.
>
> 8. On October 18, 2007, CCRC South received from Court Reporting Services a copy of a transcript from another hearing, a December 30, 1994 hearing before Judge Mounts in Case No. 94-4885CF A02, reported by court reporter Barry Crane. It had been completed on October 6, 2007. There was no cover letter or other explanation.

Only after a Fla. R. Crim. P. 3.852 Renewed Demand for public records was served on the office of the State Attorney on May 30. 2008 did additional records and transcripts emerge. The demand indicates what was discovered in the process: an estimated 13,426 pages of additional materials. Petitioner's Appendix H at Page 5. It was only after the lower court entered an order requiring the state attorney to produce the records that were co-mingled that the missing transcripts from the court reporting office began to dribble in over the next three years. PCR. 1493-1600. Amended Supp. To Amended 3.851 Motion, March 27, 2008 at 1496-98.

docket entries, along with the testimony of Mr. Knight, and the testimony of Assistant State Attorney Andy Slater at a June 3, 2011 hearing. The lower court also had the benefit of reviewing the numerous other transcripts and docket entries related to circuit court case number 94 4885 CFA02.

The lower court also reviewed the hearing transcript dated December 30, 1994, when the State again requested a continuance over the objection of Mr. Knight as voiced by counsel Jose Sosa: "Your Honor, first of all, my client is present in court as he has been throughout, he objected to the continuance. None of the State witnesses have shown up for any depos on six different occasions, Your honor . . .and at this point in time, my client objects to a continuance, and were prepared to go on what we have." The court also refers to the January 3, 1995 hearing where the State entered the nolle prosse, a hearing that Mr. Knight has always contended is facially incomplete. Both the docket entry and Clerk's notes state that "Defendant and Bondsman discharged as to this case." These entries may indicate that trial counsel Sosa requested discharge after the State's nol pros, either *ore tenus*, or by written motion that was destroyed along with the balance of the court file of the 1994 case.

Mr. Knight filed a Motion for Dismissal of Charges in the lower court on March 27, 2012.[7] PCR. 2976.

[7] Counsel herein advises this Court that the motion filed in the lower court

The intent of the writ of prohibition filed in this Court was not to contest disputed issues of fact, such as the double jeopardy claim or the different accounts of the alleged continuance on October 28, 1994, but rather to seek (1) an order to show cause against the respondent; and (2) to obtain the entry of a writ of prohibition ending the proceedings in this case, except for the ministerial entry of an order in the circuit court of discharge or dismissal of the indictment below based on a violation of Mr. Knight's speedy trial rights as acknowledged in the lower court's orders. *See Nolet v. State*, 920 So. 2d 1214 (Fla. 1st DCA 2006). This Court need now do no more than uphold those orders as to the finding regarding speedy trial, which was based on competent and substantial evidence.

The State's argument below was a thinly veiled attempt to seek rehearing of Judge Colbath's orders finding that Mr. Knight's speedy trial time had not run at the time of the January 3, 1995 entry of nol prosse on Palm Beach County circuit court case number 94 4885 CFA02. If the State believed Judge Colbath's orders of June 3, 2011, July 6, 2011 and December 13, 2011 were in error, their remedy was to file for rehearing below, which they failed to do on multiple occasions, or to appeal. The State should be judicially estopped from changing its position,

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on March 26, 2012, *Motion for Dismissal of Charges*, should have been denominated as a *Motion to Dismiss Indictment*. In addition a scrivener's error on page two of the motion incorrectly referred to the date of the nolle prosse as January 5, 2005. The correct date should have been January 3, 1995.

particularly where the State drafted the order finding that Mr. Knight's speedy trial time had not run, a finding which they now oppose. See *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990).

Of course, Mr. Knight contended, and the lower court agreed, that Mr. Knight's speedy trial time had not run on January 3, 1995 when the State entered its nolle prosse. In addition, discharge was entered on the docket of January 3, 1995, indicating that someone moved for discharge, orally or otherwise.[8] There is a Memo from the state attorney file that is of record, dated January 12, 1995, from Assistant State Attorney DeLuna, the prosecutor in the 1994 case, to State Attorney Selvig. PCR. 2803. The memo explains the State's rationale at the time for the nolle prosse: "*It was then decided that if the state did not locate the new witnesses by day of trial, rather than proceeding with the little evid. the State had and face a JOA, the State would nolle prosse with the hope of refiling. As it turns out, the State was unable to proceed to trial and had to nolle prosse at day of trial*." This is precisely the kind of state action that Fla. R. Crim. P. 3.191(o) was intended to insulate the accused from. *See State v. Agee*, 622 So. 2d 473, 475 (Fla. 1993) ("To allow the State to unilaterally toll the running of the speedy trial period by entering a nol pros would eviscerate the rule – a prosecutor with a weak case could simply enter a nol pros while continuing to develop the case and then refile

[8] See Fla. R. Crim. P. 3.191 (n) Discharge from Crime; Effect.

charges based on the same criminal episode months or even years later, thus effectively denying an accused the right to a speedy trial while the State strengthens its case").

The double jeopardy issue in this case was explored in a colloquy between Mr. Knight and Judge Colbath. PCR. 3377-83. Mr. Knight told the court that "[t]he issue is because, under that rule [Fla. R. Crim. P. 3.191(c)], the jury – the trial commences when the jury panel for the voir dire examination is seated in the courtroom." Id. at 3378. Judge Colbath responded as follows, making a ruling which he has consistently stuck with:

> That's not – yeah, that's not when jeopardy attaches. That's when the case is brought to trial for purposes of complying with the speedy trial rule. Those are two different concepts. They run kind of close together. And usually – in a lot of cases, most of the cases, they run more or less side by side. But, the – But – so, I'll grant your motion to reconstruct or amend the record. I've let you do that with your sworn testimony. And I'll deny your request to discharge the case on grounds that either, A, I don't get that you're complaining about speedy trial, but if you are, that A. that speedy trial did not expire. And B, that jeopardy did not attach. And so, for those reasons I'll deny your request that you've asked for with regard to that.

Id. at 3382-83. Mr. Knight's contention was that there is no need for jurors to take an oath twice. Thus, if they had been sworn in the jury room, they need not be sworn again. The rules of court indicate that prospective jurors may be sworn collectively or individually. See Fla. R. Crim. P. 3.300 (a); See also *Lott v. State*, 826 So. 2d 457, 458 (Fla. 1st DCA 2002). His contention was that jeopardy did

attach in his case where a sworn jury was in court on January 3, 1995, before the state entered the nolle prosse. See *Stuart v. State*, 360 So. 2d 406 (Fla. 1978) (Swearing and qualifying of panel of jurors for week does not amount to commencement of action within speedy trial rule where case **is not called and seated for voir dire in particular case**) (emphasis added). *Stuart* supports a finding that double jeopardy may attach after you are sitting in the courtroom in a situation where speedy trial has not run.

ARGUMENT IV

MR. KNIGHT WAS DEPRIVED OF DUE PROCESS WHEN THE TRIAL COURT FAILED TO HOLD A HEARING ON A DISCOVERY VIOLATION PURSUANT TO *RICHARDSON V. STATE*.

Mr. Knight was deprived of 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). When Mr. Knight took over his case, he began and continued to complain that the state was not meeting its discovery obligation. *See also, Evans v. State,* 770 So. 2d 1174 (Fla. 2000) (holding the State's nondisclosure of the changes in witnesses testimony from her original police statement was tantamount to failing to name a witness at all); *Jones v. State*, 514 So. 2d 432 (Fla. 4th DCA 1987) (once discovery has been made to defendant, State has continuing duty to notify defense of substantial and material change in report or witness statement

containing important factual scenario). The failure by trial counsels Perry and Sosa to raise this issue at the time of their respective discharges was deficient performance that prejudiced Mr. Knight. See *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Fla. R. Crim. P. 3.220 requires the state to deliver to the defense the complete statements of listed witnesses. Such statements include, "any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." Fla. R. Crim. P. 3.220(b)(1)(B). Here, the state had knowledge of multiple statements by Dain Brennault in both the Kunkel and Meehan cases. The State was also well aware that the Kunkel case had originally been charged as a second degree murder case in 1994 and nolle prossed in early 1995. Any failure by the State to provide all the witness statements and depositions to Mr. Knight is a plain violation of Rule 3.220. Mr. Knight repeatedly this issue brought to the court's attention. Had Judge Garrison responded properly to Mr. Knight's concerns, the court would have been obligated to conduct an inquiry into discovery violations and to then determine the effects of non-disclosure and the extent of any prejudice to the defense. *Richardson v. State,* 246 So.2d 771 (Fla. 1971) In *Scipio v. State,* 928 So.2d 1138 (Fla.2006), the court explained:

> This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush. Because full and fair discovery is essential to these important goals, we have repeatedly emphasized not only

> compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context. This Court has explained that the rules of discovery are intended to avoid surprise and 'trial by ambush.'

928 So.2d at 1144 (internal citations omitted)(emphasis added).

In accordance with Florida Rules of Criminal Procedure 3.220(j) the prosecution has a continuing duty to disclose the discovery of any additional witnesses *or materials* that the party would have been under a duty to disclose or produce at the time of the previous compliance. Specifically, Fla. R. Crim. P. 3.220(a)(1)(ii) states that a prosecutor's obligation consists only of disclosing those statements which are "written… and made by said person and signed or otherwise adopted or approved by him, or a *stenographic*, mechanical, electrical, *or other recording*, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement...." (emphasis added). Case law interpreting the State's obligations under 3.220 differ from the circuit court's conclusory finding of a procedural bar.

In *Casica v. State*, 24 So.3d 1236 (Fla. 4th DCA 2009) the defendant was convicted in a jury trial in the Circuit Court of armed sexual battery, kidnapping, and tampering with a witness or victim. On appeal, the District Court reversed and remanded, holding that the defendant was procedurally prejudiced by the State's discovery violation, thus warranting a new trial. "When the State's failure to

comply with the rules of discovery is brought to the court's attention, the court must conduct a *Richardson* hearing to determine if that failure has prejudiced the defendant." *Barrett v. State,* 649 So.2d 219, 221-22 (Fla. 1994). The inquiry at that hearing is "whether there is a reasonable possibility that the discovery violation 'materially hindered the defendant's trial preparation or strategy.' " *Scipio v. State,* 928 So.2d 1138, 1150 (Fla. 2006) (quoting *State v. Schopp,* 653 So.2d 1016, 1020 (Fla. 1995)).

An analysis of procedural prejudice "considers how the defense might have responded had it known about the undisclosed piece of evidence and contemplates the possibility that the defense could have acted to counter the harmful effects of the discovery violation." *Scipio,* 928 So.2d at 1149. It is immaterial whether the discovery violation would have made a difference to the fact finder in arriving at the verdict. *Id.* at 1150. In *Casica,* the State's failure to disclose a change in the witness testimony did in fact materially hinder the defendant's trial preparation. *Id.* at 1241. The Defendant argued that his trial strategy with regard to the witness at issue would have been materially different had he known of the change in testimony. *Id.* at 1241. For instance, instead of moving to strike the testimony, defense counsel would have hired an expert to rebut the testimony. *Id* at 1241. Similarly in the case at present, had Mr. Knight had the 1994 nolle prosse files and transcripts, the ME Investigators report about the crime scene that speculated that

Kunkel had been killed at a different site than where the body was dumped and all the statements and depositions of Dain Brennault, Mr. Knight's trial strategy would have been materially different. First, he would have filed a motion for discharge based on the 1994 case documents, second, he may well have retained the services of Jose Sosa to help with the discharge and at the guilt phase, and third, he would have had additional information to use in impeaching Dain Brennault.

In *Scipio v. State,* 928 So.2d 1138 (Fla. 2006), the Defendant was convicted by jury in the Circuit Court of first degree murder, for which he was sentenced to life in prison without the possibility of parole. The District Court of Appeal, held both that the state had an obligation under the discovery rule to disclose any material change in a statement provided by the investigator for the medical examiner's office, and that the state's failure to advise the defense of the material change in the deposition testimony of the medical examiner's investigator constituted a violation of the discovery rule which imposes on the state a continuing duty to disclose. *Id.* at 1138. "When it should be obvious to the Government that the witness's answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury" *U.S. v. Harris,* 498 F.2d 1164, 1169 (3d Cir. 1974). Hiding behind a myopic reading of Florida's discovery rules is inconsistent with the proper

administration of justice as well as the "purpose and spirit of those rules." *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006).

Knight testified at the evidentiary hearing below that he never received certain specified documents through the discovery process including the 1994 documents related to the nol pros while he was representing himself, either from Ms. Perry, Mr. Sosa, Judge Garrison or from the State. PCRT. 1496-1509. Had the *Richardson* hearing arguably requested by Knight been provided by the trial court, the court would have had the opportunity to safeguard the truth-finding function and prohibit the State's actions.

Knight needed to have access to the 1994 case documents, all materials related to state witness Dain Brennault, and the crime scene report authored by medical examiner investigator Wayne Arbaczawsky to prepare his *pro se* guilt phase case in the brief window of time available to him after Jose Sosa was discharged weeks before trial. If proper discovery had been provided pre-trial he would have been in a position to do so.

Although an evidentiary hearing was granted, the lower court found the *Richardson* claim to be procedurally barred. PCR. 3142. Evidence presented at the hearing below indicated that most of the 1994 transcripts had not been created at the time of the direct appeal. In addition, the Order scolded Mr. Knight, who was only acting *pro se* in his case beginning January 8, 1998 when attorney Jose Sosa

was discharged and became stand-by counsel, for alleged inaction concerning his quest for files related to the 1994 case and any other discovery he did not have once he was representing himself: "If those files [that he had received in discovery] did not contain what the defendant was seeking, he was free to file any motion or letter alerting the Court to this fact." PCR. 3147.

Mr. Knight's testimony at the evidentiary hearing demonstrates that he repeatedly did just that in the two months prior to the commencement of the trial on March 11, 1998. Mr. Knight's evidentiary hearing testimony is rife with specific identification of the letters he wrote to Judge Garrison seeking the discovery that was never provided. PCR. 1516-21; 1562-73; 1582. The lower court's order implies there are some set of magic words that Mr. Knight needed to invoke in order to call the trial court's attention to the discovery problems he was having.

Mr. Knight's testimony about a *Richardson* violation was not limited to the 1994 nolle prosse transcripts but also to specific items he needed for impeachment, items that he testified that he never received in discovery despite the assurances of Shiner and the testimony of Ann Perry. The lower court did not find Mr. Knight's testimony to be credible with the exception of his comments that he chose to waive a jury at the penalty phase because he believed that by doing so he would be less likely to receive a death penalty. PCR. 3112. The lower court's credibility finding

was not based on competent and substantial evidence, but rather was a misapprehension of the totality of facts presented below, especially in light of the record of Knight'a correspondence to the judge that was part of the record. Thus, the finding is an abuse of discretion.

Mr. Knight testified that he thought Judge Garrison would colloquy Anne Perry or Jose Sosa about their failure to obtain the 1994 case records but he failed to do so. PCRT. 1502-07; 1593-94. He further testified that the trial record reflected that Judge Garrison ordered Sosa and Shiner to give him all of the discovery. He asked Shiner if he was holding anything back, and Shiner said no. After that, he got boxes of records from Sosa. He still did not have all the records and he wrote another letter in Feb. 1998, as he was still having discovery problems with the State. PCRT. 1519-1524. He testified that he never received all the statements made by Dain Brennault, information that he needed to impeach Brennault at the trial based on the different accounts he later learned his multiple statements contained about the crime. He also testified that he did not recall getting any reports from the Medical Examiner or Medical Examiner investigator, Wayne J. Arbaczawski, whose report he also learned later, during postconviction, contradicted the State's theory of the case. PCRT. 1598-1600; 1639. Later in February 1998, he wrote to the judge again about discovery problems. He complained that the State was still adding witnesses and no deposition transcripts,

statements, or tapes had been provided to him barely a month before the trial. He always asked for a hearing in the letters. PCRT. 1518-1523.

More specifically, this Court must consider the entire context of the instant argument where the record below reflects that the State has continued to withhold materials from Mr. Knight and his counsel during post conviction, culminating with the last minute "discovery" by the state attorney of a signed transcript that had never been provided through the public records or any other process until the final day of the evidentiary hearing. This document emerged only after a question of authenticity concerning the unsigned version of the transcript came up in open court. The entire history of the records process in postconviction supports Mr. Knight's complaints about lax and inadequate provision of discovery materials while he was representing himself at trial. The transcripts from the 1994 case emerged only during the long history of litigation in postconviction, years after the State had certified that everything had been produced.

As for the materiality of the witness statements that were not provided, as noted *supra*, at the evidentiary hearing below Dain Brennault testified that he had consistently told the same story, "the absolute truth" in all his statements. However the reality is that his testimony at trial contradicted his numerous pre-trial statements, interviews, and depositions.

Brennault's multiple statements included an initial May 9, 1994 Statement to

Palm Beach County Sheriff's Office Detective Scott Smith in which the general outline of his statement is similar to his trial testimony. Yet this first account to law enforcement included no description of an initial or first stop in Loxahatchee or any account of other gunfire besides the single shot that killed Kunkel that Dain said was fired by Ronald Knight.

A year later Dain gave a statement on May 12, 1995 to the Palm Beach Co. Sheriff's Office. This statement involved the Meehan case, and not the Kunkel case. Dain did say in this statement that Ronald Knight used cocaine, information that would have been potentially useful to the penalty phase experts. May 12, 1995 statement at 20.

Brennault also gave a second statement concerning the Meehan case on May 15, 1995 to Detective Van Houten. The only mention of the Kunkel homicide in this statement was speculation by Dain that Ronald Knight may have told Dain's mother about the details of the Kunkel homicide. May 15, 1995 statement at 11.

On August 4, 1995 Dain gave a second statement to Detective Scott Smith, and shortly thereafter Dain was formally deposed on August 29, 1995 in the Meehan case, No. 95-5038 CF A02, with ASA Slater and Knight's defense counsel for the Meehan case, Gregg Lerman, both present. In the deposition there is only limited discussion of the Kunkel case with the state attorney attempting to get Dain to keep quiet. In the deposition Dain denies that he ever held the gun and

eventually invokes his right to remain silent regarding the Kunkel case. Deposition of August 29, 1995 at 56-69.

Dain gave another statement to the state attorney, this time concerning the Kunkel case, on March 20, 1997. Mr. Knight attempted to use this deposition to impeach Dain at both the pre-trial deposition and at trial. PCRT. 1639. In the March 20 deposition Brennault said the following. The victim, Kunkel was real drunk (Depo. at 32). Knight was driving and he made an initial stop of the car "to piss" (Depo. at 35). Knight, Pearson and Dain all handled the gun at the first stop. Kunkel did not (Depo. at 37). He stated that the gun was fired at the first stop twice, both times by Pearson, ("I think it was kind of done in a serious way to see if the guy was going to get scared") and he repeated that he, Dain, had held the gun at the first stop. (Depo. at 37-38). Thereafter Dain says he got in front seat, with Pearson behind him. Thereafter there was a 2nd stop when Ronald Knight had to go to bathroom (Depo. at 38-40). Knight and Kunkel both got out of the car to urinate, Knight had pistol in hand at 42, and pointed the gun at Kunkel, telling him you are "not riding with us anymore." Knight had the gun on the roof of car at 45. Pearson had placed the gun between console & seat after 1st stop. (Depo. at 46). Dain says he saw Knight pick out gun when getting out at 2nd stop. (Depo. at 47). Thereafter, Dain says that Knight pointed the gun, a black 9mm Glock, at Kunkel and told him to "take off your pants". Thereafter Kunkel's hat fell off and Knight shot him after

Kunkel started laughing. (Depo. at 48-49). He described one shot and big flash. (Depo. at 50). Kunkel said "help me" three times and Knight responded by putting gun to Kunkel's temple and telling him to "shut up." (Depo. at 51). He then told the two others to search victim, Dain did not but Pearson. (Depo. at 52). He stated that Knight pointed the gun at him and Pearson afterwards. (Depo. at 54). Knight told them before Pearson's search that "fags keep money in their socks." (Depo. at 55).

Dain also testified on December 19, 1997 at co-defendant Timothy Pearson's bond hearing.[9] He testified that Pearson brought the gun and placed it between the seat and console. Statement at 19. Dain said there was a first stop of about five minutes during which they used the restroom by "peeing in the bushes." Statement at 20-21. (There is no mention of the gun being out at the first stop or of the gun being fired by Tim Pearson or anyone else at the first stop in this statement). Dain said everyone in the car was drinking – and he indicated that Kunkel was "very intoxicated." Statement at 22. At the second stop, Knight urinated again, and Dain stated that he saw the gun in Knight's hands. Statement at 24. Knight pointed the gun at Kunkel and told him that you aren't riding with us anymore. Statement at 25-26. Then Knight shot Kunkel. Statement at 27.

[9] In his pre-trial deposition on February 4, 1998, when questioned by Mr. Knight, Dain stated that "[t]he statement I gave on the bond hearing is the correct and full truth of what I have to say." Deposition of 2/4/98 at 74.

Afterwards, Dain says that Knight pointed the gun at both Dain and Tim Pearson and ordered them to take off Kunkel's clothes, but Dain refused and Tim finds Kunkel's wallet and $20. Tim helps Knight place Kunkel's body in canal. Statement 29-30. Knight threatens both if they are not silent. Statement at 32.

Dain gave an 82 page deposition in the instant case on February 4, 1998[10] prior to his trial testimony on March 11, 1998. Mr. Knight participated in this deposition. Mr. Knight also used this deposition for impeachment at trial. In the deposition Dain admits that in his statement to Detective Smith in 1994, "I know some of the things I said were false." Depo. at 10. He initially says that he does not know which of his multiple statements is accurate, but finally settles on the statement that he gave at Timothy Pearson's bond hearing (December 19, 1997) as "the correct and full truth of what I have to say." Depo. at 48; 74). He also says that he cannot remember if the weapon was taken out at the first stop in Loxahatchee and that he does not recall the weapon being fired two times at the first stop. (Depo. at 58). Again, although Brennault claimed lack of memory at the evidentiary hearing, his testimony clearly shows that he gave different statements at different times and could not remember which one was true.

Brennault testified as a witness for the state at Mr. Knight's trial on March

[10] Actually the Deposition was mis-dated and apparently occurred on March 4, 1998 a week prior to the trial.

11, 1998. R. 1096-1191. Knight cross-examined him at 1149-1187. Prior to cross, Mr. Knight had stand-by counsel Jose Sosa give Mr. Brennault copies of some of his prior statements and depositions. R. 1152. Per the record Knight had discovery copies of some of Dain's statements at this point, including (1) a May 9, 1994 statement to Detective Smith; (2) an August 4, 1994 or 1995 statement (the transcript varies as to the date), also to Detective Smith; (3) a March 20, 1997 state attorney deposition after plea agreement, and; (4) the statement Dain made on December 19, 1997 at Tim Pearson's bond hearing. Dain was also provided with a copy of his February 4, 1998 deposition, with Ronald Knight asking the questions, which according to the trial record was actually on March 4, 1998 the week before trial. R. 1187.

At trial on cross Dain testified that Timmy (Pearson) had the gun in the car. R. 1156. He testified that there were two stops after Miami Subs. R. 1160. He testified that he did not remember the weapon being brought out at the first stop. R. 1162. He also testified that he didn't remember if Pearson fired the weapon at first stop, but that if his prior deposition says so, he agreed that's what he said at the time. R. 1162. He admitted that all were smoking marijuana. R. 1164. He stated that "Its hard to remember, it's five years now, I'm just trying to help everybody out." R. 1168.

There is no indication from the record that Mr. Knight had available through

discovery Brennault's statements of 5/12/95 to the P.B.C.S.O. and 5/15/95 to Detective Van Houton or the 8/29/96 Deposition in the Meehan case. They were not used by Knight during the trial or at the pre-trial deposition. This is important because Mr. Knight contended at trial, in several of his pro se pleadings entered while representing himself, in letters to Judge Garrison, and in his proffered testimony at the evidentiary hearing, that the State failed to provide him with material evidence in pre-trial discovery. Specifically, Knight testified on proffer that he never received all the multiple statements and depositions of Dain Brennault or a crime scene report authored by medical examiner investigator Wayne Arbaczawsky in which the investigator opined that the victim had been killed at a separate location before the body was dumped at the location where it was found. (PCRT.1637-40). These suppressed documents, in Mr. Knight's view, supported an alternate account of the crime in which Mr. Knight was not the shooter, an account that he himself testified about at his trial. PCRT. 1639.

If Knight had obtained these items prior to trial in discovery, Knight testified that he could have used them to impeach Dain Brennault's testimony and the State's theory of the crime: that Knight was the shooter and instigator of the killing. Knight's proffer about not having Wayne Arbaczawsky's ME investigator crime scene report or the Dain Brennault statements where Dain described a gun being fired at "the first stop" thus potentially inculpating someone other than

Ronald Knight as the perpetrator can be found at PCRT. 1639-40.

As previously noted, Brennault testified at the deposition on March 20, 1997 that both he, Knight and Pearson all handled the murder weapon at an initial stop where Pearson shot the gun twice, and then made a second stop where the victim's body was dumped, which contradicted his trial testimony and supported Knight's. (PCRT. 1639). The medical examiner investigator's report and the missing Dain Brennault statement/deposition were also noted by Mr. Knight at PCRT. 1674-75 in a October 10, 2012 hearing following the completion of the evidentiary hearing. See PCRT. 1658-96. The subject of the hearing was Mr. Knight's then pending *pro se* motion to discharge CCRC and to obtain conflict-free counsel for purposes of filing a post-hearing memorandum of law.

There was a discovery violation at trial where Mr. Knight, proceeding *pro se*, was not supplied with material discovery information. This history of discovery shenanigans continued when the records of the Meehan case and the Kunkel case were co-mingled by the state attorney's office during postconviction. Thereafter there was a continuing saga of missing transcripts from the 1994 case that emerged piecemeal during the post conviction process despite the assurances of the State from 1999 on that all relevant and material documents had been turned over pursuant to Chapter 119 and Fla. R. Crim. P. 3.852.[11]

[11] On the final day of the evidentiary hearing Assistant State Attorney Slater

The testimony below of court reporter Phyllis Dames, Court reporting Supervisor Rick Hussey and the assistant district attorney who helped to prosecute Mr. Knight, demonstrated that Mr. Knight was denied the records and transcripts related to the 1994 nol prosse case prior to his capital trial and thereafter during a substantial portion of his postconviction proceedings. PCRT. 1339-52; 1352-1407; 1438-70. Based on Anne Perry's testimony and the contents of her trial file and Mr. Knight's testimony, neither Mr. Knight, nor his short-term prior guilt phase counsel Anne Perry or Jose Sosa ever obtained these materials. Trial prosecutor Marc Shiner testified that if he had a complete record of the 1994 nolle prosse case he would have turned it over to Perry, Sosa and Knight. PCRT. 1199. He also testified at the evidentiary hearing that he gave Mr. Knight "everything he had." PCRT 1199.

In addition to the *Richardson* violation at trial where Mr. Knight was not supplied with material discovery information, as noted herein, Mr. Knight was also denied due process when he was repeatedly denied access to public records under Chapter 119 and Fla. R. Crim. P. 3.852 during the process of his postconviction litigation. The due process violation continued through the postconviction process

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produced in open court an original copy of the transcript of the August 26, 1994 hearing that had never been produced to the defense. The transcript was signed by original court reporter Brooks. The original signed transcript was entered into evidence as State's Ex. 5 and was also filed with the clerk's office. (PCRT. 1567-68).

when the records of the Meehan and Kunkel cases were co-mingled during postconviction.

ARGUMENT V

MR. KNIGHT'S ALLEGED WAIVER OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL AND ASSOCIATED WAIVERS OF A JURY AT BOTH PHASES WERE NOT KNOWING, INTELLIGENT AND VOLUNTARY

Mr. Knight's alleged waivers of his guilt phase jury, of representation by guilt phase counsel, and his waiver of a jury at the penalty phase were not knowing, intelligent, and voluntary. The lower court held that as to each of these areas, the guilt phase jury waiver, the penalty phase jury waiver and the waiver of counsel for the guilt phase, a procedural bar is now in place. In regard to the waiver of guilt phase counsel, pursuant to the lower court's order that bar is in place "because it was raised and rejected by the Florida Supreme Court on direct appeal, it is also meritless and conclusively refuted by the record." Order at 25.

In the evidentiary hearing below Mr. Knight testified in great detail as to the reasons behind the alleged waivers. Some of this testimony was allowed into evidence and some of it was on proffer. This Court should review Mr. Knight's testimony *de novo* and also review the testimony of psychiatrist Strauss in considering whether or not Mr. Knight's decision to proceed *pro se* at the guilt phase of his trial was made in a knowing, intelligent and voluntary fashion. See

PCRT. 1482-1641 & 811-849.

The Sixth Amendment to the United States Constitution provides that a defendant has a fundamental right to a jury trial. Mr. Knight is entitled to a new trial because he did not knowingly, intelligently, and voluntarily waive his right to have a jury determine the issue of guilt or innocence. The lower court found this claim to be procedurally barred because it was not raised on direct appeal. Order at 15.[12]

In addition, Mr. Knight's death sentence must be vacated and he is entitled to a new penalty phase proceeding because he did not knowingly, intelligently and voluntarily waive his right to a penalty phase jury. The lower court also found this claim to be procedurally barred because it could have been raised on direct appeal. Order at 26. The trial court, in its discretion, may honor a defendant's request to proceed without a penalty phase jury only upon a finding that the defendant's waiver is knowing, intelligent, and voluntary. *See State v. Hernandez*, 645 So. 2d 432 (Fla. 1994); *Sireci v. State*, 587 So. 2d 450 (Fla. 1991); *Palmes v. State*, 397 So. 2d 648 (Fla. 1981); *State v. Carr*, 336 So. 2d 358 (Fla. 1976); *Lamadline v. State*, 303 So. 2d 17, 20 (Fla. 1974). The standard for determining the

[12] As to the Argument concerning the waiver of a guilt phase and a penalty phase jury, counsel adopts the argument in the Petition for Writ of Habeas Corpus being filed along with this Initial Brief and offered therein in support of a finding of ineffective assistance of direct appeal counsel in failing to raise either issue.

voluntariness of a waiver of the penalty phase jury is similar to that of determining the validity of a plea. *See Griffin v. State*, 820 So. 2d 906, 912 (Fla. 2002) (". . . we look to the procedures and body of law dealing with pleas and challenges associated therewith in determining the validity of a waiver"). In *Thibault v. State*, this Court reiterated the importance of the defendant's right to a penalty phase jury and the fundamental requirement that a waiver of this right be knowing, intelligent, and voluntary:

Knight misunderstood several facets of the process. Mr. Knight testified that he waived his guilt phase jury because in the Meehan case, he didn't get to participate in jury selection other than to sit there, and he didn't trust juries since his came back with a guilty verdict in fifteen minutes. He thought a judge would be more impartial. (PCRT. 1599-1603). He did not know that he could have moved for a change of venue instead of waiving his jury, since his primary concern was that he would not get a fair trial in front of a Palm Beach jury. (PCRT. 1605-06.) He did not know that he could waive his guilt phase jury and still have a jury at the penalty phase. (PCRT. 1609.) He did not know that if six or more jurors recommended life, he would have received a life recommendation. (PCRT. 1607.) He also stated that he didn't know the jury had to be unanimous to find him guilty. Mr. Knight testified in great detail about concerns that he had about not receiving records concerning the 1994 nol pros case in discovery, but he said that his

concerns about discovery didn't have anything to do with waiving the jury. Also he didn't know that if the jury recommended life, the judge could override and give him death. (PCRT. 1605-08.)

ARGUMENT VI

THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. § 922.105, AND THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES ARTICLE II, SECTION 3 AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

Florida's lethal injection protocol is unconstitutional. An evidentiary hearing on this claim was granted and then subsequently denied by Judge Garrison. Judge Colbath later denied Mr. Knight's updated requests for public records information directed to the Governor, Department of Corrections, FDLE and the Attorney General related to the May 2011 change in the lethal injection protocol by the Florida Department of Corrections when the first drug was substituted with pentobarbital. See Supplemental Record at 588-602.

Thereafter, the Department again changed the protocol in September 2012, changing the second drug in the three-drug protocol to vecuronium bromide, and then once again in 2013, changing the first drug in the protocol to midazolam hydrochloride as an anesthetic These continuing changes, combined with deficiencies in Florida's 2007 procedures, which remain in the 2012 and 2013

procedures, create a recipe for disaster. The most critical aspects of Florida's lethal injection process—specifically, the administration of the drugs, the assessment of consciousness, and the monitoring of the inmate for consciousness throughout the procedure—remain inadequate to protect against a substantial risk of harm. Yet, the procedures require that the administration of the three drugs be performed by an executioner who has no medical training and may be as young as eighteen years old. The assessment of the inmate's consciousness is then performed by a prison warden whose only medical training is that which is required of any corrections officer. Additionally, the monitoring of consciousness throughout the procedure is performed from another room, via a television monitor, by personnel of unknown qualifications and background.

These continuing deficiencies combined with the addition of a new, untested anesthetic of questionable efficacy undoubtedly create a substantial risk of harm. The continued failure by Florida to follow its own written procedures violates the Eighth Amendment and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

Mr. Knight requests that the case be remanded back to the circuit court for entry of an order discharging the case and/or in the alternative be remanded back to circuit court to provide for self representation. Otherwise, Mr. Knight requests

relief in the form of a new trial and/or a new penalty phase.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been electronically filed with electronic service to Leslie Campbell, Assistant Attorney General, at leslie.campbell@myfloridalegal.com, this 25th day of March, 2014.

I FURTHER HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/William M. Hennis
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