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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-820

RONALD ALAN KNIGHT,

Petitioner,

v.

MICHAEL D. CREWS, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Knight's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, demonstrating that Mr. Knight was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the direct appeal record shall be "R. ____." Citations to the trial transcripts shall be "T. ____." Citations to the postconviction record shall be "PCR. ____." Citations to the postconviction evidentiary hearing transcripts shall be "PCR-T. ____." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." FLA. CONST. Art. I, §

13.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied a direct appeal. *See*, *e.g.*, *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors are warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Knight requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

The Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida entered the judgments of conviction and death sentence currently at issue.

Ronald Knight was initially charged with first degree murder in 1994, but the charge was nolle prossed on January 3, 1995. (PCR. 2304.) The charges were later re-filed and Mr. Knight was indicted on May 8, 1997 by a grand jury for the first-degree murder of Richard Kunkel, armed robbery, burglary of a dwelling, and grand theft of a vehicle. (R. 2-4.)

Attorney Ann Perry was appointed to represent Mr. Knight at trial. (R. 53.) Attorney Jose Sosa was appointed as second chair counsel. (R. 73.) Mr. Knight eventually discharged Ms. Perry and Mr. Sosa and proceeded to trial pro se, with Mr. Sosa present as standby counsel for the guilt phase of the trial. (R. 28-30.) Mr. Sosa acted as Mr. Knight's counsel for the penalty phase. (T. 378.) Mr. Knight purportedly waived his right to a jury for both the guilt phase and the penalty phase. (R. 338.)

The non-jury guilt-innocence phase of the trial was held March 11, 1998 through March 16, 1998. (T.1-373) The court found Mr. Knight guilty as charged. (T. 366-67.) Following a non-jury penalty phase proceeding before the trial court, the court sentenced Mr. Knight to death on May 29, 1998. (R. 420-23.)

Mr. Knight timely appealed to this Court, which affirmed his convictions and sentences. *Knight v. State,* 770 So. 2d 663 (Fla. 2000). On direct appeal, Mr. Knight argued that: (1) the court erred in allowing Mr. Knight to represent himself; (2) the court erred in failing to renew its offer of court-appointed counsel at every critical stage of the proceeding; and (3) the court erred in considering Knight's prior murder conviction as an aggravating factor in sentencing him to death because the other murder occurred after Mr. Kunkel's murder. *Knight*, 770 So. 2d at 665. Mr. Knight then filed a Petition for Certiorari in the United States Supreme Court, which was denied. *Knight v. Florida*, 532 U.S. 1011 (2001).

On September 27, 2001, Mr. Knight filed his first postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851, which the court struck because it erroneously believed that it was not verified. (PCR. 21.) The court reinstated the motion on October 30, 2001 when it determined that the verification was notarized on September 10, 2001, and the court deemed the motion properly filed as of September 27, 2001. (PCR. 114.) Thus, the pre-October 1, 2001 version of Rule 3.851 applies to this case. The court subsequently allowed Mr. Knight to file an amended motion (PCR. 210), and Mr. Knight filed his Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend on June 2, 2004. (PCR. 211-320.) On December 6, 2006, Mr. Knight filed a Supplement to Amended Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend. (PCR. 1223-1316.) On March 27, 2008, Mr. Knight filed an Amended Supplement to Amended Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend. (PCR. 1493-1669.) Additionally, Mr. Knight filed three pro se claims which were adopted by postconviction counsel. (PCR. 2104-29, 2605-14.)

The circuit court held evidentiary hearings on May 1-3, June 21, and August 1-2, 2012. (PCR-T. 712-1657.) On February 5, 2013, the circuit court entered an order denying Mr. Knight's claims for relief. (PCR. 3084-3445.) Mr. Knight timely filed an appeal, which is being filed simultaneously with this petition. The

Petitioner specifically incorporates herein the facts presented in his initial brief.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. KNIGHT'S WAIVER OF A GUILT PHASE JURY WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY, THUS DEPRIVING HIM OF HIS RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Knight had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. *Strickland v. Washington,* 466 U.S. 668 (1984). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The two-prong *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F.2d 1508, 1513 (11th Cir. 1989). Appellate counsel's performance was deficient and Mr. Knight was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Knight's rights under the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution. Counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Knight involved "serious and substantial deficiencies." *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Individually and cumulatively, the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So. 2d at 1165 (citation omitted).

In *Wilson*, this Court stated:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Id. In Mr. Knight's case, appellate counsel failed to act as a zealous advocate. Mr. Knight was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise a number of issues to this court, which, had they been raised, would have entitled Mr. Knight to relief.

This Court has established the criteria for proving a claim of ineffective assistance of appellate counsel:

> The criteria for proving ineffective assistance of appellate counsel parallels the Strickland standard for ineffective

> trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Wilson, 474 So. 2d at 1163, citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines).[1] "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed

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[1] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Knight's case. However, notwithstanding the fact that Mr. Knight's case was tried in 2002, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In *Rompilla v. Beard*, 545 U.S. 374 (2005, in which case the trial took place in 1989 prior to the promulgation of either the 1989 or the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

to raise a number of such grounds. In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

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. Mr. Knight's waiver of a trial by jury was invalid because Mr. Knight labored under critical misconceptions about his rights to select a fair and impartial jury and his right to an acquittal absent a unanimous verdict. Neither the trial court nor standby counsel adequately informed Mr. Knight of these rights, making his decision to waive a jury unknowing and involuntary. The trial court's colloquy with Mr. Knight regarding his desire to waive a jury was wholly insufficient to establish any presumption of a valid waiver. Because the waiver was invalid, the resulting proceeding was so flawed as to constitute fundamental error, an error "so prejudicial as to vitiate the entire trial." *Rutherford*, 774 So. 2d at 646, citing *Chandler v. State*, 702 So. 2d 186, n.5.

The record is completely void of any showing that Mr. Knight's waiver of a trial by jury was knowing, intelligent, or voluntary. Mr. Knight has a ninth-grade education and no legal training. Neither the trial court, nor Mr. Knight's attorney,

Jose Sosa, nor any other person advised Mr. Knight about the significant benefits of invoking his fundamental right to a trial by jury. Because Mr. Knight was unaware of these benefits to a jury trial, his decision to waive a jury was not knowing and voluntary.

On January 8, 1998, during a pre-trial hearing, Mr. Knight stated, "I'm not so sure I am going to have a jury trial anyways." (R. 1076.) The court responded that it was premature to address that issue and noted that it was still scheduled for a jury trial. (R. 1076.) Subsequently, at a pretrial hearing held on February 20, 1998, the court noted—*before* conducting its colloquy—that Mr. Knight had already executed a written waiver of a jury trial. (PCR. 2021.) The court then failed to conduct a meaningful and sufficient colloquy on Mr. Knight's expressed preference to have a bench trial. Instead, the court merely told him that he had a right to have a twelve-person jury determine guilt or innocence:

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

> entitled to have a jury of those 12 people consider aggravating and mitigating factors in your case to determine whether or not they would recommend life instead or a death sentence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you decided to waive that right and have me try the case?
>
> THE DEFENDANT: Yes, sir.

(PCR. 2021-22.)

The trial court's colloquy of Mr. Knight was entirely insufficient to establish on the record a knowing, intelligent, and voluntary waiver of a trial by jury. The court did not inform Mr. Knight that he could participate in jury selection, or that any jury verdict must be unanimous, or that biased jurors could be stricken from the panel, or any other details about the process which would have enabled Mr. Knight to make an intelligent decision about waiving this fundamental right.

In *Tucker v. State*, 559 So. 2d 218, 220 (Fla. 1990), this Court addressed the issue of whether a defendant's oral waiver of a jury was sufficient. In its analysis, this Court discussed the circumstances in *Enrique v. State*, 408 So. 2d 635 (Fla. 3d DCA 1981) *rev. denied*, 419 So. 2d 1280 (Fla. 1982). In *Enrique*, the court held that a defendant's waiver of a jury was not knowing and intelligent where the court merely advised a pro se defendant that he was entitled to be tried by a jury of his peers, even though the defendant had signed a written waiver. In finding Tucker's

waiver valid, this Court distinguished *Enrique*, stating that in that case, the waiver was inadequate because "Enrique did not have the assistance of counsel and because the court made an inadequate inquiry into [the defendant's] waiver." *Tucker*, 559 So. 2d at 220.

This Court instructed that:

> An appropriate oral colloquy will focus a defendant's attention on the value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, then the colloquy will serve to verify the defendant's understanding of the waiver. Executing a written waiver following the colloquy reinforces the finality of the waiver and provides evidence that a valid waiver occurred.

Tucker, 559 So. 2d at 220. The trial court's colloquy of Mr. Knight in the instant case utterly failed to meet this standard. The trial court did not sufficiently determine whether Mr. Knight understood the consequences of his waiver. In fact, the record shows that Mr. Knight executed the waiver form *before* the colloquy, which indicates that the waiver was not knowing or intelligent. Before accepting the waiver form, the court should have ensured that Mr. Knight fully understood the substantial rights he was waiving.

Although Mr. Knight stated that he had talked to Mr. Sosa, the court did not inquire into the substance of Mr. Knight's understanding about the value of a jury trial and the likely consequences of a waiver. There is nothing on the record

indicating the substance of any discussion between Mr. Sosa and Mr. Knight on this issue. Although Mr. Knight testified at the evidentiary hearing that he discussed waiver with Mr. Sosa, Mr. Knight clarified that at his previous trial, he had not been allowed to participate in jury selection and was instead told to "sit at the table, not to ask any questions, just to take notes and whatnot." (PCR-T. 1602.) Due to the trial court's and Mr. Sosa's failure to inform him of his rights surrounding a jury trial, the jury selection process, and the likely consequences of a waiver, and based on his experience with the jury selection process in his previous murder trial, Mr. Knight waived his right to a jury trial based on an incorrect understanding that he could do nothing to prevent biased jurors from sitting on his jury.

Because of the extensive pre-trial publicity that occurred prior to the start of his trial, Mr. Knight believed that most, if not all, individuals that were part of the venire would have been exposed to significant negative pre-trial publicity and that the severity and intensity of the media attention surrounding his case made it extremely difficult, if not impossible, for anyone to set aside his or her pre-conceived notions about the case, thus denying him a fair and unbiased jury. Mr. Knight waived a jury trial because he erroneously believed that he had no power or ability to prevent biased jurors from sitting on his jury. Because his purported waiver of a jury was attributable to this mistaken belief, his waiver was not

knowing, intelligent, or voluntary.

Further, he did not know or understand, and was never advised, that he had the right to seek a change of venue during the jury selection process if it became evident that a jury could not be impaneled which was not unduly infected with the negative pre-trial publicity against him. At the evidentiary hearing, Mr. Knight testified that he waived the jury because due to "the TV and newspaper coverage . . . [he] didn't believe [he] was going to get an impartial result." (PCR-T. 1605.) He also testified that he did not know he could have requested a change of venue. (PCR-T. 1604.)

Because Mr. Knight was convinced that most, if not all, of the venire members would be unduly infected with the extensive negative pre-trial publicity, and because he did not know that he had the ability to seek a change of venue should it become evident that it would be impossible to impanel an impartial jury, he believed that the only course of action he could take protect his right to a fair trial was to waive a jury altogether. Because Mr. Knight's decision to waive a jury was based on this fundamental misconception, his waiver was not knowing, intelligent, or voluntary.

Additionally, when Mr. Knight waived his right to a trial by jury, he was never told and did not know that he was entitled to an acquittal absent a unanimous vote of guilty by all twelve jurors. The right to a unanimous verdict is critical to the

fundamental right to a jury trial. Because he waived a jury without understanding this critical function of the jury, his waiver was not knowing, intelligent, or voluntary. At his evidentiary hearing, Mr. Knight testified that he did not know that a unanimous jury verdict would be required to find him guilty, and that his previous attorney had not explained it to him. (PCR-T. 1605.) He also testified that he did not realize that he could still have a penalty phase jury, even if he waived the guilt phase jury. (PCR-T. 1609.)

Mr. Knight failed to understand the value of a jury trial or the likely consequences of a waiver, because the court and his attorney failed to adequately explain it to him. Had Mr. Knight understood the value of a trial by jury, the likely consequences of a waiver, that he could seek and obtain a change of venue if the venire was determined to be infected with undue pre-trial publicity making the selection of a fair and unbiased jury impossible, that he could participate in jury selection, and that the jury's verdict had to be unanimous, he would not have waived his right to be tried by a jury of his peers. Because he did not fully understand his rights, his waiver was not knowing, intelligent, or voluntary.

Appellate counsel's failure to raise on appeal the issue of Mr. Knight's invalid waiver of his fundamental right to a trial by jury was deficient performance that prejudiced Mr. Knight. Had appellate counsel raised this meritorious claim, there is a reasonable probability that this Court would have remanded the case for a

new trial.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. KNIGHT'S WAIVER OF A PENALTY PHASE JURY WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY, THUS DEPRIVING HIM OF HIS RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

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 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 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:

> Section 921.141(1), Florida Statutes (2002), governs the procedure to be followed in the penalty phase of a capital trial. It provides, in pertinent part: "If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In 1974, shortly after the enactment of section 921.141, this Court stated that the defendant's right to a penalty-phase jury is
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> > *an essential right of the defendant under our death legislation, though it may be waived*. The question before this Court is whether the appellant has waived this right. We cannot presume a waiver where the record is silent . . . and the failure to either object or request the jury sentencing procedure cannot constitute such a waiver. We hold that the record must affirmatively show that the defendant voluntarily and intelligently waived the right to have a sentencing jury render its opinion on the appropriateness of the death penalty, granted him by the express provision of § 921.141, F.S.
>
> *Lamadline, 303 So. 2d at 20* (emphasis supplied). In *Lamadline*, we vacated the sentence of death because there was no express waiver of the advisory jury.

Thibault v. State, 850 So. 2d 485, 486-87 (Fla. 2003) (citations omitted). In *Mann v. Dugger*, 844 F. 2d 1446 (11th Cir. 1988), the Eleventh Circuit discussed this Court's recognition of the fundamental role of the jury in Florida's death penalty scheme:

A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury plays a significant role in the Florida capital sentencing scheme. *See Messer v. State, 330 So.2d 137, 142 (Fla. 1976)* ("The legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); *see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987)* ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); *Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974)* (right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." *Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied*, *431 U.S. 925, 97 S. Ct. 2200, 53 L. Ed. 2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982)* (the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); *Chambers v. State, 339 So.2d 204, 209 (Fla. 1976)* (England, J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In *Tedder v. State, 322 So.2d 908, 910 (Fla. 1975),* the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." That the court meant what it said in *Tedder* is

> amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life.

Id. at 1450-51. Given the fundamental importance of the jury's role in capital sentencing in Florida, a defendant's waiver of the penalty phase jury cannot be deemed voluntary if the defendant is not informed of, or does not understand, all of the various and substantial rights he relinquished by enacting a waiver.

Before a defendant facing the death penalty can knowingly, intelligently and voluntary waive a penalty phase jury and waive all the rights associated with a penalty phase jury, he must have a full understanding of all the rights he would be giving up as a result of a waiver. *See Griffin*, 820 So. 2d n.9 (referring the issue of penalty phase jury waiver to Florida Bar Criminal Procedure Rules Committee to "devise a rule to guide a trial court during a colloquy preceding an acceptance of a defendant's waiver of his rights to a sentencing jury" and noting that a rule similar to rule 3.172(c), which provides a checklist of factors that must be covered in a colloquy to ensure the voluntariness of a plea would "ensure that the trial court conduct a colloquy which apprizes the defendant of all the rights relinquished through a waiver (i.e. presentation of mitigation, advisory nature of jury, etc.").[2] In

[2] This Court announced a rule in May 2002 that the failure of a capital defendant to first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review of the issue on direct appeal. *Griffin*, 820 So. 2d at 913. However, Mr. Knight's direct appeal was decided a year and a half earlier, in November

Mr. Knight's case, the trial court conducted virtually no colloquy whatsoever and the court certainly did not inform Mr. Knight of any rights associated with penalty phase juries.

Mr. Knight did not know or understand that, had he not waived a penalty phase jury, he would have obtained from the jury a life recommendation by persuading only six of the twelve jurors to vote for life. At his evidentiary hearing, Mr. Knight testified that he did not understand that if as few as six jurors recommended life, such a recommendation would have amounted to a life recommendation. (PCR-T. 1607.)

Mr. Knight further did not understand that, had six of the twelve jurors voted for life, thereby resulting in a life recommendation, the trial court judge would have been legally bound to give the jury's life recommendation great weight. *See Tedder v. State*, 322 So. 2d 908 (Fla. 1975). Additionally, in the face of a life recommendation from the jury, the trial court could not impose a death sentence as long as there was a reasonable basis in the record to support the jury's recommendation. *See Keen v. State*, 775 so. 2d 263, 282-77 (Fla. 2000). "The jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence." *Id*. at 285. Absent

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2000. *Knight v. State*, 770 So. 2d 663 (2000). Therefore, appellate counsel could and should have raised this claim on direct appeal.

compelling evidence to override, the trial court must follow the jury's life recommendation. *See State v. Coney*, 845 So. 2d 120, 131 (Fla. 2003). In sum, because Mr. Knight did not understand the rights he was giving up by waiving a penalty phase jury, his waiver was not knowing, intelligent, or voluntary.

Mr. Knight's waiver was also rendered involuntary by the fact that, as previously argued in Claim 1 *supra*, Mr. Knight believed that the venire would be so infected with negative pre-trial publicity that he could not get a fair trial and did not realize that he had the ability to seek a change of venue to protect his right to a fair and impartial jury. At the evidentiary hearing, he testified that he did not know he could request a change of venue to prevent biased jurors from being seated on his jury. (PCR-T. 1604.) Consequently, because Mr. Knight unknowingly perceived he had no ability to protect himself from a biased, partial jury, he chose to waive a jury in both the guilt-innocence phase and the penalty phase.

Adding to the involuntary nature of the waiver is the fact Mr. Knight incorrectly believed that his decision to waive a guilt-innocence phase jury meant that he automatically waived a penalty phase jury as well. Mr. Knight did not understand that he still had the right under Florida law to a jury convened strictly for the purpose of the making a sentencing recommendation. The trial court perpetuated this critical misunderstanding when, during its cursory colloquy regarding Mr. Knight's desire to waive a guilt-innocence phase jury, the court

questioned Mr. Knight as follows:

> THE COURT: You understand perfectly well that you are entitled to a trial to try this case [sic] in front of a jury of 12 people to consider your guilt or innocence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: **In the event that they were to find you guilty of this offense, a capital offense, you would be entitled to have a jury <u>of *those* 12 people</u> consider aggravating and mitigating factors in your case to determine whether or not they would recommend life sentence or death sentence?**
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you decided to waive that right and have me try the case?
>
> THE DEFENDANT: Yes, sir.

(PCR. 2021-22.) (emphasis added). The trial court's language suggested to Mr. Knight that waiver of a guilt-innocence phase jury amounted to a penalty phase jury waiver as well.

The trial record establishes prima facie evidence that the waiver was not knowing, intelligent, or voluntary. The trial court made absolutely no inquiry of Mr. Knight regarding his request to waive a penalty phase jury, and Mr. Knight never signed a written waiver. After the trial judge found Mr. Knight guilty, the following exchange occurred:

> THE COURT: All right. Mr. Knight, if you would step up again. We had a discussion previously both [sic] both

> your decision to represent yourself as well as your decision to have the case tried by the Court as opposed to a jury. It was not appropriate then to discuss your options since, of course, we did not know the outcome of the trial itself. But now that there is going to be a Phase II part of the trial to consider the imposition of the death penalty, was it your intention to waive the jury to cover that as well?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Or did you want a jury impaneled to consider that?
>
> THE DEFENDANT: No.
>
> THE COURT: Did you also discuss that with Mr. Sosa to have the jury - -
>
> THE DEFENDANT: Yes.
>
> THE COURT: We can impanel a jury to consider that; if you want to think about that for a while, it's up to you.
>
> THE DEFENDANT: No.
>
> THE COURT: You want the Court to consider that?
>
> THE DEFENDANT: Yes, sir.

(T. 369-70). The Court then switched to the issue of proceeding to the penalty phase without the assistance of counsel. (T. 370-71.) The previous discussion the court referred to was its statement during the limited pre-trial colloquy regarding Mr. Knight's decision to waive a guilt-innocence phase jury, where the court told him that he had the right to have the jury make a recommendation on whether or

not to sentence him to death or life imprisonment. (PCR. 2021-22.)

There was no more discussion in any form about impaneling a penalty phase jury. At the start of the penalty phase, Mr. Knight changed his mind about proceeding pro se, and allowed the court to re-appoint Mr. Sosa as his counsel. However, the issue of a penalty phase jury was never again raised by the court, Mr. Knight, or Mr. Sosa, despite Mr. Knight's wavering and vacillating regarding his prior decision to represent himself.

Neither the trial court nor Mr. Sosa informed Mr. Knight that he would be entitled to a life recommendation if as few as six jurors voted for life and that the trial court, in the face of a life recommendation, could not override that recommendation absent a compelling reason. Because Mr. Knight was not informed of and did not understand or comprehend the fundamental nature and legal ramifications of the advisory nature of a penalty phase jury's sentencing recommendation, his waiver was not knowing, intelligent, or voluntary. Appellate counsel's failure to raise this meritorious issue prejudiced Mr. Knight and a new penalty phase proceeding is required.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT THE RECORD ON APPEAL WAS INCOMPLETE, THUS DEPRIVING MR. KNIGHT OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner was deprived of his right to effective appellate counsel when appellate counsel failed to ensure that the record on appeal was complete. Adequate appellate review is impossible when portions of the trial record are missing and the record fails to accurately reflect what occurred at trial. Here, the materials from the 1994 court file of Mr. Knight's case that was nolle prossed should have been requested and included as part of the record on direct appeal, as well as the transcripts of all hearings related to the waiver of counsel and the waiver of the jury at both phases of the trial.

Petitioner cannot be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. *See Delap v. State*, 350 So. 2d 462, 463 (Fla. 1977) (remanded for new trial where the record on appeal was incomplete and thus the Court could not properly review the case on appeal); *McKenzie v. State*, 754 So. 2d 851 (Fla. 2nd DCA 2000) (remanded for new trial when record on appeal was incomplete). The United States Supreme Court has made clear that "[i]t cannot be gainsaid that meaningful appellate review requires that the appellate court consider

the defendant's actual record." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Where the record on appeal is incomplete or inaccurate, there can be no meaningful appellate review.

Mr. Knight has a constitutional right to a complete record on appeal. *See Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (adequate appellate review requires access to transcripts); *Entsminger v. Iowa*, 386 U.S. 748 (1967) (petitioner was entitled to relief where the clerk filed an incomplete record on appeal). In a capital case, the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution demand an accurate record of all proceedings in the trial court. See Parker, 498 U.S. at 321 ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").

The right to a record on appeal is meaningless unless it is accurate, complete, and reliable. Appellate counsel, who was not present for the trial proceedings in this case, had no means to fully review the proceedings below with a defective record, and thus, was unable to render effective assistance. *See Delap*, 350 So. 2d at 463. Mr. Knight was one of three co-defendants, along with Timothy Pearson and Dain Brennault, implicated in the murder for which he was convicted and ultimately sentenced to death by the trial court. There was no attempt by trial counsel or appellate counsel to incorporate the relevant and material portions of the

records from the co-defendants' statements and depositions in the record on appeal of Mr. Knight's case. Therefore, Mr. Knight's right to appeal and to meaningful access to the courts are negated because both appellate counsel and this Court were unable to fully review the proceedings below on direct appeal.

A criminal defendant has a due process right to effective assistance of counsel on appeal. *Evitts*, 469 U.S. at 396. In *Hardy v. United States*, 375 U.S. 277, 280-81 (1964), the United States Supreme Court held that appellate counsel could not provide constitutionally adequate representation without a complete transcript. Similarly, in *Bounds v. Smith*, 430 U.S. 817 (1977) and *Lewis v. Casey*, 518 U.S. 343 (1996), the Court held that the right to access to the courts encompasses a "meaningful" access.

The right to effective representation includes access to the records necessary to file a complete appeal. This is particularly important when trial counsel does not handle the appeal and new counsel is appointed for appellate purposes. In *United States v. Selva*, 559 F.2d 1303, 1305-06 (5th Cir. 1977), the Eleventh Circuit Court of Appeals held that where appellate counsel is different than trial counsel, specific prejudice need not be shown when there are transcript deficiencies, and that prejudice is presumed. A demonstration of substantial omissions from the transcript is sufficient to require a new trial. *Id*.

Here, however, specific prejudice exists because it is apparent that neither

the parties on direct appeal nor this Court could rely on the accuracy of a record where a complete set of transcripts from the 1994 nolle prosse and transcripts of the later waivers after indictment for first degree murder were simply not present in the record on appeal. Certainly the mandatory proportionality review conducted by this Court on direct appeal was impaired as a result of this incomplete record.

In *Entsminger*, the United States Supreme Court held that appellants are entitled to a complete and accurate record. In remanding the case, the Court stated that there was "no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction by operation of the clerk's transcript procedure," which "automatically deprived him of a full record, briefs, and arguments" for his appeal. *Entsminger*, 386 U.S. 752. The Court concluded that "[b]y such action, 'all hope of any (adequate or effective) appeal at all . . . was taken from the petitioner." *Id*. *See also Dobbs v. Zant*, 506 U.S. 357, 358 (1993) ("We have emphasized before the importance of reviewing capital sentences on a complete record"); *Evitts v. Lucey*, 469 U.S. 387 (1985) (reiterating that effective appellate review begins with giving an appellant an advocate and the tools necessary for the advocate to do an effective job); *Commonwealth v. Bricker*, 487 A.2d 346 (Pa. 1985) (citing *Entsminger* in condemning the trial court's failure to record and transcribe the sidebar conferences so that appellate courts could obtain an accurate picture of the trial proceedings).

The Sixth Amendment also mandates a complete transcript. In *Hardy*, Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." *Hardy,* 375 U.S. at 288.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided to counsel, appellant and the appellate court. *Mayer v. Chicago*, 404 U.S. 189, 195 (1971). Full appellate review of proceedings resulting in a death sentence is required to ensure that the sentence comports with the Eighth Amendment. *See Dobbs*, 506 U.S. at 358; *Johnson v. State*, 442 So. 2d 193 (Fla. 1983) (Shaw, J. dissenting) (noting that meaningful, effective appellate review cannot be accomplished when the transcript contains omissions and inaccuracies). In a capital case, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demand a reliable transcript of all proceedings in the trial court. *See Parker*, 498 U.S. at 321. This the Petitioner never had. Mr. Knight is entitled to a new trial.

CONCLUSION

For the reasons stated herein, Mr. Knight respectfully requests that this Court grant his petition for a writ of habeas corpus and order a new trial and/or a new penalty phase proceeding, and grant any other relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by electronic service to Leslie Campbell at leslie.campbell@myfloridalegal.com, this 25th day of March 2014.

/s/ William M. Hennis III
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