Filing # 14598111 Electronically Filed 06/09/2014 04:48:19 PM

RECEIVED, 6/9/2014 16:48:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

RONALD ALAN KNIGHT,

Petitioner,

vs. Case No. SC14-567

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

Respondent.
_____/

---

**RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

---

PAMELA JO BONDI
ATTORNEY GENERAL

KATHERINE Y. MCINTIRE
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0521159
1515 NORTH FLAGLER DRIVE
9TH FLOOR
WEST PALM BEACH, FL. 33401
(561) 837-5000
(561) 837-5108

ATTORNEY FOR RESPONDENT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**RULES**

## PROCEDURAL HISTORY

Initially, Knight had been charged with the murder of Richard Kunkel ("Kunkel") under case number 94-4885 and was represented by Jose Sosa in that matter. As the cause was being prepared for trial, the defense sought and received a continuance. However, on January 3, 1995, as a result of Knight's intimidation of multiple witnesses to the point where those witnesses would no longer cooperate, the State enter a nolle prosequi, before the jury was selected and sworn and before the trial commenced. (January 3, 1995 transcript)

Following Knight's conviction of the separate murder of Brendan Meehan ("Meehan case"), charges for the Kunkel homicide were re-initiated under case number 97-5175 ("Kunkel case") based upon a May 8, 1997 indictment for first-degree murder of Kunkel, armed robbery, burglary of a dwelling, and grand theft of Kunkel's automobile (ROA 2-4; Indictment). After discharging both his appointed counsel, Ann Perry ("Perry") on October 31, 1997, and Jose Sosa ("Sosa") on January 8, 1998, Knight represented himself at trial and waived his jury. (SROA 1-63) Sosa, who had represented Knight in the 1994 case, was appointed as standby counsel for trial. The non-jury trial was held from March 11, 1998 through March 16, 1998 following which Knight was convicted as charged.

Prior to the commencement of the penalty phase, Knight again opted to

waive a jury as finder of fact. Sosa, however, was reappointed as counsel of record. Following the penalty phase, on May 29, 1998, Judge Garrison entered the Judgment and the Sentencing orders and imposed a death sentence upon Knight for first-degree murder. (ROA 427-30, 434)

Knight's death sentence was based upon the following aggravation and mitigation. The aggravators found were: (1) prior violent felony (Knight was previously convicted of first-degree murder and armed robbery with a firearm); (2) murder was committed during the course of a felony, to-wit, a robbery; (3) the murder was committed for pecuniary gain (merged with committed during the course of a robbery); and (4) the murder was cold, calculated, and premeditated ("CCP"). Regarding mitigation, this Court gave "considerable weight" to the statutory mitigator of "under the influence of extreme mental or emotional disturbance," noting that two (2) experts had testified that Knight suffered from a paranoid disorder, which was chronic, even though there was no testimony that Knight was under any particular stress or emotional disturbance at the time of the murder. Judge Garrison also gave "some consideration" to the non-statutory mitigator of Knight's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" being impaired, but not substantially.

As non-statutory mitigation, this Court found the following: (1) Knight suffered from a broken home and unstable childhood (proven but given little weight); (2) Knight has the support and love of family members (proven but given little weight); and (3) alleged disparate treatment of co-defendants (given little weight). Knight received a life sentence for the armed robbery, fifteen years for the burglary conviction, and five years for the grand theft of an automobile (ROA 418, 420-26; 5/29/98 - Judgment and Sentencing Orders).

In its opinion on direct appeal, the Florida Supreme Court found the following facts:

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

complying, Knight fired one shot striking Kunkel in the back. Kunkel fell to the ground and began crying for help. Knight then ordered Brennault and Peirson to search Kunkel's pockets. Peirson complied, but Brennault refused. Knight and Peirson then dragged Kunkel's body out of the road. They left Kunkel to die beside a canal where his body was later discovered. Knight threatened to kill Peirson and Brennault if they told anyone about the murder.

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

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

During the penalty phase, the State presented evidence that Knight had previously been convicted of another murder occurring under very similar circumstances. The other aggravating factors presented and relied upon by the trial judge were that the murder occurred while Knight was engaged in the commission of a robbery, the murder was committed for pecuniary gain, and the murder was cold, calculated, and premeditated. The trial court merged the "committed during a robbery" and "for pecuniary gain" aggravators. Knight presented some mitigation, the most significant of which was expert witnesses who testified that Knight suffered from a paranoid disorder that was exacerbated by his unstable childhood. The court gave this mitigating factor

> considerable weight. Knight also presented mitigating evidence that he had the support and love of his mother, brother, and sisters and that the death penalty would be disparate treatment because his cofelons received much lighter sentences. The court gave these factors little weight.
>
> ---
>
> [1] During the penalty phase of the trial, Knight was represented by Mr. Sosa.
>
> [2] Peirson received three years in prison and Brennault received five years' probation. The evidence revealed neither of them knew Knight planned to kill Richard Kunkel.
>
> [3] Knight took Kunkel's keys and wallet from him after he shot him. He got Kunkel's address from his driver's license.

*Knight v. State*, 770 So.2d 663, 664-65 (Fla. 2000). The Florida Supreme Court found no merit to Knight's arguments and affirmed the convictions and sentences. *Id.* at 665. On April 30, 2001, the United States Supreme Court denied certiorari. *Knight v. Florida*, 121 S.Ct. 1743 (2001).

On or about September 27, 2001, Knight filed an unverified, shell postconviction motion, which, was stricken, but later reinstated when it was determined that the verification had been notarized on September 10, 2001. Knight, who for periods of time has represented himself, was permitted to file multiple amendments and supplements to his original motion for postconviction

relief which Capital Collateral Regional Counsel ("CCRC") adopted once he was reappointed at Knight's request. An evidentiary hearing was granted on all of the claims, original, amended, and supplemented, with the exception of Claim 14 (challenge to lethal injection) and Amended Claim 19 (based on the American Bar Association Report on the death penalty). Additionally, Knight, through counsel, admitted that Claim 8 (innocent of the death penalty); Claim 12 (death penalty applied in racially biased manner); Claim 13 (Florida's capital sentencing is unconstitutional), and Claim 15 (Knight is insane to be executed) where either legal claims or were premature, thus, no evidence would be presented at the hearing. The trial court denied Knight's motion for post conviction relief, and all its amendments, on February 6, 2013. The appeal of the trial court's denial is currently pending before this Court in Knight v. State, SC13-820.

On March 25, 2014, Knight filed the instant petition for writ of habeas corpus.

## REASONS FOR DENYING THE PETITION

### KNIGHT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL (Restated)

On March 25, 2014, Knight filed a petition for writ of habeas corpus alleging that appellate counsel was ineffective on direct appeal for various reasons. In this petition, Knight contends that appellate counsel was ineffective for failing to challenge the voluntariness of his waiver of both his guilt and penalty phase jury. Knight further contends that appellate counsel was ineffective for "failing to raise the claim that the record on appeal was incomplete" (Petition, 24). While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995), this Court will find that the issues are without merit since Knight has failed to prove that appellate counsel's actions were both deficient and prejudicial as required under Strickland v. Washington, 466 U.S. 668 (1984).

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington . standard for claims of trial counsel ineffectiveness." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). Given that the Strickland standard

applies, this Court has stated:

> Thus, the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). See Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted); See Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability

have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 862 So.2d at 718. See Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." Holland v. State, 916 So.2d 750, 760 (Fla. 2005). With these principles in mind, it is clear that Knight has not met his burden and all relief must be denied.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL KNIGHT'S GUILT PHASE JURY WAIVER (Restated)

As point I of the instant petition, Knight argues that appellate counsel was ineffective for failing to challenge the voluntariness of his waiver of a guilt phase jury. Specifically, Knight alleges that he 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 his guilt or innocence". Petition, 8. In support of his position that his waiver was involuntary, Knight goes on to engage in an extensive dissertation describing both the trial court's and his standby trial counsel's

deficiencies which led to the alleged involuntariness of his guilt phase waiver of jury. Specifically, Knight alleges that neither the trial court nor standby counsel adequately informed him of his right to a fair and impartial jury or his right to acquittal absent a unanimous verdict. Petition, 8. Knight also contends that the trial court's colloquy with regard to his guilt phase jury waiver was wholly insufficient. Petition, 8. Indeed, Knight continues, the trial court did not inform him that he could participate in jury selection, that the jury verdict had to be unanimous, or that biased jurors could be stricken from the panel. Petition, 10.

Knight goes on to explain the reasons that he waived his right to a guilt phase jury – reasons that he, himself, explained during the evidentiary hearing on his 3.851 claims. Petition, 12-14. These reasons amount to "mistaken belief[s]" that he had about his options with regard to jury selection vis a vis pre-trial publicity and the possibility of a change of venue. Knight is not entitled to relief based on these contentions.

At the outset, Knight goes to great lengths to point out trial court error as well as trial counsel deficiencies. The law is clear, however, that "ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion". *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Johnston v. State*, 63 So.3d 730, 746

(Fla. 2011). Any assertions of trial court error should have been raised on direct appeal. Further, this Court is already reviewing the trial court's order with regard to trial counsel's representation in Knight v. State, SC13-820 – an order which addresses this issue as it was raised in Petitioner's 3.851 motion for post conviction relief. As the instant petition is nothing more than an attempt to have this Court review his late assertions of trial court error and repeat assertions of trial counsel ineffectiveness, it must be denied as procedurally barred. *Schoenwetter v. State*, 46 So.3d 535, 562 (Fla. 2010) ("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla.1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

Turning to the merits of Petitioner's claims, or lack thereof, there is no basis for which to grant relief. "Appellate counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record." *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006). As a preliminary matter, Respondent points out that appellate

counsel may have been foreclosed from challenging the voluntariness of Knight's waiver where he never sought to withdraw it before the trial court. As explained by *Griffin v. State*, 820 So.2d 906, 912 (Fla. 2002), determining the voluntariness of a waiver is similar to that of determining the validity of a plea. However, in order to challenge the voluntariness of a plea on appeal, the defendant must first move to withdraw the plea at the trial court. *Id.* Here, Knight never sought to withdraw his waiver at the trial court. Thus it follows that any challenge to the voluntariness of the waiver could only be raised by collateral attack through a post conviction motion. *Cf. Griffin v. State*, 820 So.2d 906, 913 (Fla. 2002)( "[F]ailure of a capital defendant to first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review on direct appeal."); *Spann v. State*, 857 So. 2d 845 (Fla. 2003) (relying on *Griffin v. State*, 820 So.2d 906 (Fla. 2002) to hold that Spann was foreclosed from challenging, on direct appeal, the voluntariness of his waiver of a sentencing jury since he did not move to withdraw the waiver).

Assuming that appellate counsel was not foreclosed from raising this issue on appeal, there was no error in the failure to do so where the record is clear that Knight's waiver of a jury for the guilt phase portion of his trial was knowing, intelligent and voluntary. *Guzman v. State*, 868 So.2d 498, 511 (Fla. 2003) ("A defendant's waiver of a jury trial is valid only if the waiver is knowing, intelligent,

and voluntary."). On February 10, 1998, Knight wrote a letter to the trial court wherein he advised, among other things, that "it is [his] wish to proceed in a non-jury trial as it was at our last hearing" (ROA 327). This letter was filed with the clerk on February 18, 1998. Further, the transcript of the February 20, 1998 hearing reveals that the trial court addressed Knight's decision to waive his jury both on that day as well as two days earlier. Indeed, the proceedings are clear that Knight's decision to waive his jury was long-standing and well-known:

> MR. GARCIA [counsel for co-defendant Pearson]: Mr. Knight, we know what his wishes are; he would like to go non-jury before Your Honor.
>
> ***
>
> THE COURT: All right. Mr. Sosa.
>
> MR. SOSA: Yes.
>
> THE COURT: I know we discussed this on Wednesday, but Mr. Knight still wishes to waive jury, would you execute that in writing?
>
> MR. SOSA: I will go over it one more time, but as of yesterday that [sic] was his wishes.
>
> THE COURT: I just need it in writing, so let's get that done and so we know what we're doing on the second.
>
> ***
>
> THE COURT [to Knight]: Now you have conferred with Mr. Sosa previously here today and executed a waiver of your right to a jury trial; is that correct?
>
> KNIGHT: 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?
>
> KNIGHT: Yes, sir.
>
> THE COURT: In the event that they were to find you guilty of this offense, a capital offense, you would be entitled to have a jury of those 12 people consider aggravating and mitigating factors in your case to determine whether or not they would recommend life sentence or a death sentence?
>
> KNIGHT: Yes, sir.
>
> THE COURT: And you decided to waive that right and have me try the case?
>
> KNIGHT: Yes, sir.

(PCR Vol. 11, 2014-2022).

The record on direct appeal is clear that Knight knowingly, intelligently and voluntarily wished to proceed to trial without a jury. Knight's post-conviction contention that his waiver was anything but voluntary is simply not supported by the record on direct appeal. Hence, Knight has failed to show error, preserved or fundamental, which appellate counsel failed to litigate.

Apparently realizing that the record on direct appeal does not support the contention that his waiver was involuntary, Knight encourages this Court to look

beyond the record on direct appeal to support his post conviction allegation that his waiver was a product of "an incorrect understanding that he could do nothing to prevent biased jurors from sitting on his jury". Petition, 12. Indeed, Knight uses these proceedings to describe the extent of his alleged ignorance with regard to jury selection[1]. Knight goes on to cite portions of his self-serving testimony from the evidentiary hearing on his 3.851 claims of ineffective assistance of trial counsel in efforts to bolster his claims of ignorance. This tactic, however, is also unpersuasive.

The law is clear that appellate counsel has no duty to go beyond the record on appeal when considering claims to be litigated. *Rutherford v. Moore*, 774 So.2d 637, 646 (Fla. 2000)("Appellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal. The appellate record is limited to the record presented to the trial court."). Accordingly, Knight is bound to the record from his direct appeal for the purpose of attempting to establish entitlement to relief on this claim. The record on appeal reflects that the voluntariness of Knight's waiver was never challenged in the

[1] Indeed, Knight takes full advantage of the fact that trial counsel, Sosa, passed away after his trial, thus is unavailable to refute Knight's contentions of ignorance raised both in this petition and in the 3.851 Motion for Post Conviction Relief.

circuit court and thus not an issue preserved for purposes of appeal. Nor would one challenge the waiver where the record clearly reflected that Knight was intent on waiving his right to a jury for the guilt phase portion of his trial, executed a written waiver memorializing that fact, and assured the trial court that he understood the ramifications of a waiver and had conferred with counsel in executing the written waiver. Knight cannot demonstrate ineffectiveness on the part of appellate counsel. Holland v. State, 916 So.2d 750, 760 (Fla. 2005)("[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success."); *State v. Upton*, 658 So. 2d 86, 87 (Fla. 1995)("When the record contains a written waiver signed by the defendant, the waiver will be upheld.").

Even assuming that this Court could consider Knight's untimely allegations of "critical misconceptions" for purposes of determining whether appellate counsel was ineffective, relief must still be denied where his claims are refuted by the direct appeal record colloquys. In sum, Knight attempts to align himself with the defendant in *Enrique v. State*, 408 So.2d 635 (Fla. 3d DCA 1981) and alleges error in his waiver as he allegedly labored under the mistaken belief, formed during the *Meehan* case, that he could not participate in the jury selection if he was represented by counsel and his misconceptions about his right to an acquittal

absent a unanimous verdict. *Enrique*, however, does not direct relief.

In *Enrique*, "the defendant was without counsel, and there [was] not the slightest indication that he was possessed of any more information respecting the meaning of jury trial than that provided by the court". *Enrique*, 408 So.2d at 637. No such concerns exist in the instant cause. Here, Knight had opted for, and selected, a jury during the *Meehan* case[2]. Moreover, because he had a jury during the *Meehan* case, it follows that Knight sat through jury selection and instructions in that case, including Fla. Std. Jury Insr. (Crim.) 2.08 (1995 ed. Rev.) which advises the jury that they must reach a unanimous verdict in order to convict.

Nor do Knight's current protestations of ignorance with regard to his ability to seek a change of venue in light of pretrial publicity concerns invalidate his waiver. As explained in *Tucker v. State*, 559 So.2d 218, 220 (Fla. 1990):

> 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.

[2] This Court may take judicial notice of the Fourth District court records of Knight's direct appeal in *Knight v. State*, 4D96-307 as well as the fact that Knight was tried and convicted by a jury for the murder of Brendan Meehan. *See* §90.202(6); §90.202(12), Florida Statutes.

This is exactly the type of colloquy conducted in the instant cause. What is more, the waiver was memorialized in written fashion. Florida law does not impose a requirement that a defendant be explained, on the record, every nuance of jury selection that may or may not become an issue in order for a waiver to be considered voluntary. Accordingly, appellate counsel was not ineffective for failing to raise any issues arising from Knight's waiver of a guilt phase jury.

### B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE ON APPEAL KNIGHT'S PENALTY PHASE JURY WAIVER (Restated)

Knight next argues that his appellate counsel was ineffective for failing to challenge the voluntariness of his waiver of a penalty phase jury. According to Knight, he is entitled to a new penalty phase proceeding where "the trial court conducted virtually no colloquy whatsoever and the court certainly did not inform [him] of any rights associated with penalty phase juries". Petition, 19. Because of the trial court's errors, Knight continues, he "did not know" or "understand", that had he not waived a penalty phase jury he would have obtained a life recommendation if he persuaded six jurors to vote for life. Nor did he know that, given a life recommendation, 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. Petition, 19. Knight further contends that he was under the impression that once he waived his right to jury trial then he automatically waived a penalty phase jury. Petition, 20. Coupled with his misgivings expressed in the previous claim with regard to pretrial publicity, Knight concludes that his waiver of a penalty phase jury was involuntary. Appellate counsel was not ineffective for failing to raise this unpreserved and non-meritorious issue.

At the outset, Respondent points out that in support of his claim, Knight once again resorts to self-serving testimony and allegations not contained in the 1998 direct appeal record, but offered at the 2011 post conviction evidentiary hearing. Knight, however, has yet to explain how appellate counsel may be faulted when all that was available on direct appeal was the 1998 trial record. Recall, appellate counsel had no duty to go beyond the record on appeal when considering claims to be litigated. *Rutherford v. Moore*, 774 So.2d 637, 646 (Fla. 2000)("Appellate counsel cannot be deemed ineffective for failing to investigate and present facts in order to support an issue on appeal. The appellate record is limited to the record presented to the trial court."). Accordingly, Knight is bound to the record from his direct appeal for the purpose of attempting to establish entitlement to relief on this claim.

Respondent also reiterates that the law is clear that "ineffective assistance of

appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion". *Freeman v. State*, 761 So.2d 1055, 1069 (Fla. 2000). Like Knight's claim with regard to the voluntariness of his waiver of a jury for the guilt phase portion of his trial, this claim is nothing more than an attempt to have this Court review his late assertions of trial court error and repeat assertions of trial counsel ineffectiveness. As such, it must be denied as procedurally barred. *Schoenwetter v. State*, 46 So.3d 535, 562 (Fla. 2010) ("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

In addition to being procedurally barred, this claim is utterly devoid of merit. Recall, "[a]ppellate counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record." *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006); *Griffin v. State*, 820 So.2d 906, 913 (Fla. 2002)( "[F]ailure of a capital defendant to

first attack the voluntariness of a waiver of a sentencing jury at the trial court precludes review on direct appeal."); *Spann v. State*, 857 So. 2d 845 (Fla. 2003) (relying on *Griffin v. State*, 820 So.2d 906 (Fla. 2002) to hold that Spann was foreclosed from challenging, on direct appeal, the voluntariness of his waiver of a sentencing jury since he did not move to withdraw the waiver). Appellate counsel was foreclosed from raising this claim as Knight failed to seek withdrawal of his waiver of a sentencing jury. Even assuming that the issue was properly preserved for review, appellate counsel was not ineffective for failing to raise it where the record reflects that the waiver was clearly voluntary. *Armstrong*, 862 So.2d at 718 ("If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.").

In *Lamadline v. State*, 303 So. 2d 17 (Fla. 1974), this Court instructed that in order for a defendant's waiver of a sentencing jury to be considered valid, 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 19-20. To that end, a defendant must be advised that he has a right under §921.141, F.S., to have a jury impaneled to render an advisory

opinion as to whether he should be sentenced to death or life imprisonment. *Id.*

At bar, Knight made clear that he wished to waive a jury for the purpose of determining his guilt. On the day of his jury trial waiver, the following exchange occurred:

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

(PCR Vol. 11, 2021-2022).

Prior to the commencement of the penalty phase, the matter was revisited

with the following exchange taking place:

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

(ROA Vol. 11, 369-70).

This record clearly reflects that the trial court informed Knight of his right to a penalty phase jury of 12 and that a penalty phase jury would consider aggravating and mitigating factors to determine whether or not they would recommend life sentence or a death sentence. The record also reflects that Knight assured the trial court that he had discussed the decision to waive his penalty phase jury with Sosa.

What is more, to the extent that Knight's current explanations as to why he waived his penalty phase jury can even be considered, the direct appeal record, as well as the circumstances surrounding his trial, specifically refutes them. For instance, Knight's allegation and evidentiary hearing testimony that he did not know that it took only six jurors to recommend a life sentence is belied by the fact that he had been prosecuted through the penalty phase in the *Meehan* case where he would have heard the standard capital jury instruction that only six members were required to give a life recommendation. Fla. Std. Jury Insr. (Crim.) Penalty Proceedings – Capital Cases §921.141 (1995 Ed. Rev.)(p. 1208) ("On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death, your advisory sentence will be: The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole for 25 years."). Knight's allegation that

he "incorrectly believed that his decision to waive guilt-innocence phase jury meant that he automatically waived a penalty phase jury as well" because of the trial court's language during its colloquy on the guilt phase jury waiver is equally as incredible. Indeed, the record is clear that AFTER he was convicted, the trial court inquired as to whether Knight wished a jury to be impaneled to consider the sentence. (ROA Vol. 11, 370). Any suggestion that Knight believed that his waiver of a guilt phase jury amounted to a waiver of penalty phase jury is simply absurd.

At bar, the record reflects that Knight's waiver of a penalty phase jury was knowing, intelligent, and voluntary. As any challenge to the voluntariness of the waiver on direct appeal would have been either procedurally barred or utterly devoid of merit, appellate counsel is not ineffective for failing to raise it. Armstrong, 862 So.2d at 718 ("If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.").

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT THE RECORD ON APPEAL WAS INCOMPLETE (Restated)

As his final claim, Knight contends that appellate counsel was ineffective for

failing to ensure the record on appeal was complete on direct appeal. According to Knight, appellate counsel erred by not obtaining a number of materials, namely 1) the 1994 court file of his nolle prossed case, 2) transcripts of all hearings related to the waiver of counsel and the waiver of the jury at both phases of the trial, and 3) relevant and material portions of the records from the co-defendants' statements and depositions. Again, Knight cannot demonstrate that his appellate counsel was in any way ineffective for failing to raise these meritless claims.

Initially, inasmuch as Knight argues that his record on direct appeal was incomplete as it was missing the 1994 court file of his nolle prossed case, Respondent submits that such an argument must be patently rejected. Rule 9.200(a)(1), Fla. R.App. P. infers that the contents of the record must consist of specific material generated in the case being reviewed on appeal. Knight's 1994 case was closed and never the subject of an appeal. Accordingly, Knight cannot characterize his direct appeal record as incomplete because it did not include records from a closed case with another case number.

To the extent that Knight points out a number of documents that he wished would have been included in the record on appeal, i.e. depositions and transcripts of hearings that occurred in the lower tribunal on *THIS* case, the fact that these documents were not included does not, in and of itself, direct error. In order for

such a claim to arguably have merit, it is incumbent upon Knight to point to an error that occurred during the missing portions of the proceedings. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000)("Thompson has not pointed to any errors that occurred during the untranscribed portions of the proceedings. Therefore, these habeas claims are without merit."); *Rodriguez v. State*, 919 So.2d 1252, 1287 (Fla. 2005)("Rodriguez has not sufficiently pled this claim as he has not explained what issues he was unable to raise as a result of any missing or inaccurate record. Thus, Rodriguez is not entitled to relief on this claim."); *Freeman v. State*, 761 So. 2d 1055, 1073 (Fla. 2000)("Even if the Court were to assume that failure to include this portion of the record fell measurably below the standard of competent counsel, Freeman has not demonstrated that the failure prejudiced him. Accordingly, this claim is without merit".). Although Knight generally suggests that the lack of a full record per se prejudiced his cause and conclusorily states that "[c]ertainly the mandatory proportionality review conducted by this Court on direct appeal was impaired as a result of this incomplete record", Knight has made no attempt to specifically identify an error that went unaddressed as a result of unincluded portions of the record. As he has failed to make such an allegation, he is not entitled to relief.

In sum, this record is absolutely devoid of any evidence that appellate

counsel was ineffective in his representation of Knight. Hence, this petition must be denied.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court deny all relief based on the merits.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Katherine Y. McIntire
KATHERINE Y. MCINTIRE
Assistant Attorney General
FLA. BAR NO. 0521159
1515 North Flagler Drive
9TH Floor
West Palm Beach, FL 33401
(561) 837-5000
(561) 837-5108

ATTORNEY FOR RESPONDENT

## CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Response to the Petition for Writ of Habeas Corpus has been furnished by United States Email to William Hennis at hennisw@ccsr.state.fl.us and Nicole Noel, Staff Attorney at noeln@ccsr.state.fl.us on June 9, 2014.

/s/ Katherine Y. McIntire
KATHERINE Y. MCINTIRE

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 14 point Times New Roman, a font that is not proportionally spaced.

/s/ Katherine Y. McIntire
KATHERINE Y. MCINTIRE