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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-567

RONALD ALAN KNIGHT,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

WILLIAM M. HENNIS III
Litigation Director
Fla. Bar No. 0066850

NICOLE M. NOËL
Staff Attorney
Fla. Bar No. 41744

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL—SOUTH
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

ARGUMENT 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.

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.

In its response to Mr. Knight's habeas petition, the State begins by asserting that Mr. Knight's claim should be procedurally barred because Mr. Knight's "assertions of trial court error should have been raised on direct appeal." (Response at 11.) However, the State seems confused as to the purpose of a habeas petition. That is precisely the point of a habeas petition: to allege ineffective assistance of appellate counsel. *See* Fla. R. App. P. 9.142 (4). Thus, the State appears to concede that appellate counsel was ineffective for failing to raise these issues on direct appeal. The State's confusion is further evinced by its citation to *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010). In *Schoenwetter*, this Court merely reiterated the well-established principle that the habeas petition is an inappropriate vehicle for raising issues that could have been, or were, raised in the initial postconviction motion. *Id*. However, since claims of ineffective assistance of appellate counsel can only be raised in a habeas petition, the State's reliance on *Schoenwetter* is

misplaced.

Next, the State relies on *Griffin v. State*, 820 So. 2d 906, 912 (Fla. 2002) and *Spann v. State*, 857 So. 2d 845 (Fla. 2003) to argue that Mr. Knight is precluded from challenging the voluntariness of his waiver because he never sought to withdraw it before the trial court. However, as undersigned counsel pointed out in the habeas petition, this Court decided *Griffin* in May 2002 and *Spann* in 2003. (Petition at 18, n. 2.) Mr. Knight's direct appeal was decided in November 2000, a year and a half before this Court announced the new rule in *Griffin*. *See Knight v. State*, 770 So. 2d 663 (2000). Therefore, regardless of whether Mr. Knight had attacked his waiver in the trial court, direct appeal counsel could and should have raised this claim on direct appeal.

Turning to the merits of Mr. Knight's claim, the State cites to *Griffin* for the proposition that the standard for determining the voluntariness of a waiver is similar to that of determining the validity of a plea. *Griffin v. State*, 820 So. 2d at 912. This Court did not reach the merits of the defendant's claim in *Griffin*, as the Court announced a new rule precluding defendants from attacking the voluntariness of a waiver of a sentencing jury on direct appeal unless the issue was first raised in the trial court. *Id*. at 913. Additionally, *Griffin* concerned the waiver of a penalty phase jury, not a guilt phase jury, and thus is inapposite to Mr. Knight's claim regarding waiver of a guilt phase jury.

This Court's proclamation that the standard when determining the voluntariness of a waiver is similar to that of determining the validity of the plea provides little guidance to trial courts, because while there is a well-defined protocol in place for ensuring the voluntariness of a plea, no such protocol exists to guide trial courts through the process of ensuring that a jury waiver is knowing, intelligent, and voluntary. The absence of a clear standard is particularly worrisome in a capital case.

Here, the trial court's colloquy was insufficient to establish that Mr. Knight understood the fundamental right he was waiving. The entire colloquy was as follows:

> 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?[1]
>
> 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

[1] The record thus indicates that Mr. Knight had signed the written waiver **before** the court conducted the colloquy.

> 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.) Incredibly, the State quotes this colloquy in its response to argue that it clearly showed that Mr. Knight's waiver was knowing, intelligent, and voluntary, when in fact it illustrates just the opposite.[2] The trial court did not attempt to explain that Mr. Knight could participate in jury selection, or that biased jurors could be stricken from the panel, or that the jury's verdict must be unanimous, or any other details about the process which would have enabled him to make an intelligent decision about waiving this fundamental right.

Although Mr. Knight was represented by standby counsel, Jose Sosa, the trial court should not have assumed that Mr. Sosa's off-the-record discussion of

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[2] The State also quoted Mr. Garcia, the attorney for Mr. Knight's co-defendant, Tim Pearson, to show that Mr. Knight's desire to waive his jury was "long-standing and well-known." ("Mr. Knight, we know what his wishes are; he would like to go non-jury before Your Honor.") First, a capital defendant's "long-standing and well-known desire" to waive a jury has nothing to do with whether the waiver is constitutionally adequate. That is not the standard. Second, a statement by a co-defendant's attorney regarding Mr. Knight's wishes—which would obviously be tainted by a conflict of interest—likewise has nothing to do with Mr. Knight's constitutional rights or the validity of his waiver.

waiver with a client who had recently discharged him was sufficient.[3] The purpose of a colloquy by the court is to ensure that the defendant understands fundamental rights he or she is waiving, even when the defendant is represented by counsel. For example, in the context of a plea, regardless of whether a criminal defendant is represented by counsel, the court is still required to engage in a lengthy colloquy designed to ensure that the defendant understands his or her rights. *See* Fla. R. Crim. P. 3.172(c). The fundamental right to a jury trial in a capital case is certainly no less critical. Although there is currently no requirement that a trial court engage in such a colloquy when accepting a waiver of a guilt or penalty phase jury, this Court has recognized the need for one, as will be discussed further in the Claim II argument below. *See Griffin v. State, infra*.

ARGUMENT 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.

With respect to the State's erroneous argument that this claim is procedurally barred because: (1) the claim was not raised on direct appeal; and (2) the claim was not first raised in the trial court under *Griffin*—a case which

[3] Mr. Knight discharged Mr. Sosa on January 8, 1998. This colloquy occurred on February 20, 1998.

announced a new rule a year and a half after Mr. Knight's direct appeal—undersigned counsel rests on its counterargument in Claim I and will not repeat it here.

The role of the jury in Florida's death penalty scheme is critical, as this Court has repeatedly acknowledged. *See 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"); *Cooper v. State*, 336 So. 2d 1133, 1140 (Fla. 1976) (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"); *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"). Despite this longstanding perception of the importance of the role of the jury, there has never been a clear directive to trial courts regarding the proper procedure to follow when a capital defendant wishes to waive a sentencing jury.

In 2002, this Court recognized the need for a rule to guide trial courts during colloquies preceding the acceptance of a waiver of a sentencing jury.

> [W]e refer this issue to the Florida Bar Criminal Rules Committee to devise a rule to guide a trial court during a colloquy preceding an acceptance of a defendant's waiver of his right to a sentencing jury. In the context of a plea, Florida Rule of Criminal Procedure 3.712(c) provides the trial court with a checklist of factors that must be covered in a colloquy to ensure the voluntariness of a plea entered into by the defendant. We believe a similar rule delineating the various rights of a capital defendant in a capital phase would ensure that the trial court conduct a colloquy which apprises the defendant of all the rights relinquished through a waiver (i.e., presentation of mitigation, advisory nature of jury, etc.).

Griffin v. State, 820 So. 2d at 913, n. 9. A year later, this Court again beseeched the Rules Committee to draft a rule to guide trial judges when conducting a colloquy of a capital defendant who wishes to waive a sentencing jury. *Thibault v. State*, 850 So. 2d 485, 487, n. 2 (Fla. 2003) ("We note that in *Griffin*, we requested the Florida Bar Criminal Procedure Rules Committee to propose a rule to guide trial judges during a colloquy on a defendant's waiver of the right to a sentencing jury. *See* 820 So.2d at 913 n. 9. An on-the-record colloquy between the court and the defendant would have prevented the error necessitating reversal of the death sentences in this case."). Despite this Court's entreaties, there still is no rule addressing this issue, and no clear guidance exists for trial courts to ensure that waivers of capital sentencing juries are constitutionally adequate.

In the plea context, this Court recognized long ago that "[a] plea of guilty is both a confession and a conviction. . . . Clearly, it is an extremely important step in

the criminal process and should not be hurried or treated summarily." *Williams v. State*, 316 So. 2d 267, 270-71 (Fla. 1975). In response, the Rules Committee in 1977 proposed a new rule, acknowledging the *Williams* Court's emphasis on the importance of [the plea] procedure. Fla. R. Crim. P. 3.172 Committee Notes on 1977 Adoption ("In view of the supreme court's [sic] emphasis on the importance of this procedure as set forth in *Williams v. State*, 316 So. 2d 267 (Fla. 1975), the committee felt it appropriate to expand the language of former rule 3.170(j) (deleted) and establish a separate rule").

As a result of the combined efforts of the Committee and this Court, Rule 3.172(c) now provides a detailed checklist of factors for a trial court to address before accepting a plea of guilty or nolo contendere:

> (c) Determination of Voluntariness. Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:
>
> (1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;
>
> (2) if not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;
>
> (3) the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and

cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;

(4) that upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;

(5) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;

(6) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in a prosecution for perjury;

(7) the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;

(8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and

(9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to

> determine whether the present or prior offenses were sexually motivated , as this admonition shall be given to all defendants in all cases.
>
> (10) that if the defendant pleads guilty or nolo contendere and the offense to which the defendant is pleading is one for which automatic, mandatory driver's license suspension or revocation is required by law to be imposed (either by the court or by a separate agency), the plea will provide the basis for the suspension or revocation of the defendant's driver's license.
>
> (d) DNA Evidence Inquiry. Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.
>
> (e) Acknowledgment by Defendant. Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.

Fla. R. Crim. P. 3.172(c).

In stark contrast, the only rule regarding waiver of the fundamental right to a jury trial is Florida Rule of Criminal Procedure 3.260, which provides simply that "[a] defendant may in writing waive a jury trial with the consent of the state."

There is no rule addressing the waiver of a sentencing jury in a capital case. As a result, the trial judge conducted an inadequate colloquy which failed to establish that Mr. Knight's waiver of his penalty phase jury was knowing, intelligent, or voluntary. Appellate counsel's failure to raise this meritorious issue prejudiced Mr. Knight and a new penalty phase proceeding is required.

ARGUMENT III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT THE RECORD ON APPEAL WAS INCOMPLETE.

Regarding Mr. Knight's claim that appellate counsel was ineffective for failing to ensure that the record on appeal was complete, the State contends that the claim has no merit because Mr. Knight failed to prove that the omitted depositions and transcripts contained any meritorious issues for appeal. (Response at 26-27). In other words, the State contends, paradoxically, that Mr. Knight cannot claim that his inability to examine portions of his record for error create a constitutional issue unless he can first prove that constitutional errors are contained in the very documents which were denied him. Put simply, according to the State, Mr. Knight must prove what is in the omitted portion of the record before he can establish that he was entitled to it for purposes of his direct appeal.

However, the law provides, for this very reason, that capital defendants have a right to complete review of trial records by this Court, *Delap v. State*, 350 So. 2d

462, 463 n.1 (Fla. 1977), and requires circuit courts to certify the record on appeal in capital cases. Fla. Stat. § 921.141(4); FLA. CONST. ART. V, § 3(b)(1). This Court must review "the entire record of the conviction and sentence of death." *Delap*, 350 So. 2d at 463 n.1 (citing § 921.141(4)). If a full and complete record of the trial court proceedings is not available for review by this Court, there is "no alternative but to remand for a new trial." *Id*. at 463.

Further, the nature of the missing portions of the record is indicative of constitutional error such that whatever requirement may fall on Mr. Knight to establish potential errors in the unexamined portions of the record has been satisfied. A major area of the omitted record involves statements and depositions of Mr. Knight's co-defendant, Dain Brennault, who offered self-serving testimony at trial that Mr. Knight was the shooter. As Mr. Knight represented himself at trial, it was critical that he have access to all available information which could have been used for impeachment purposes. Brennault gave contradictory statements to police on May 12, 1995 and again on May 15, 1995. Additionally, Brennault testified about the instant case during a deposition in the Brendan Meehan case, a related homicide for which Mr. Knight was charged. The State had copies of all three statements in its possession but failed to provide them to Mr. Knight in discovery, an omission that was particularly damaging given that Mr. Knight represented himself at the guilt/innocence phase of his trial.

Without a complete record on appeal, appellate counsel was per se ineffective. The absence of these records was prejudicial to Mr. Knight—he was unable at trial to impeach a material and damaging State witness or to challenge the State's theory of the case. Thereafter, appellate counsel was likewise unable to properly challenge Mr. Knight's conviction and sentence without a complete record. Mr. Knight is entitled to a new trial.

Respectfully submitted,

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850
hennisw@ccsr.state.fl.us

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 21st day of July 2014.

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director
CCRC-South