IN THE SUPREME COURT OF FLORIDA

MICHAEL KING,	:	
Appellant,	:	
vs.	:	Case No. SC09-2421
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Michael King (appellant) was charged by consolidated indictment and information in Sarasota County with first degree murder, kidnapping, and sexual battery of [redacted] (1/63-64;11/2107-09;13/260,263). A defense motion to suppress in-custody statements made to law enforcement officers (at the scene of and immediately following the arrest, at the North Port police department, and at the county jail) and to Harold Muxlow (at the police department), on the ground, inter alia, that King's requests for an attorney had been ignored, was granted by Circuit Judge Deno Economou (4/624-31;5/947-53;12/159-200;13/201-250).

Two pretrial motions were filed seeking to exclude or limit the testimony of FDLE firearms examiner John Romeo. In a motion in limine defense counsel asserted:

> 2. The State of Florida cannot lay a proper foundation or predicate for such testimony.
>
> 3. Casings taken from a gun range on January 18, [2008] cannot be tied to Mr. King (and therefore no such opinion should be allowed into evidence).
>
> 4. Officer Saxton of the North Port Police Department went to the Knights Trail Gun Range on January 18 and collected several casings from the ground in the area where Mr. King has allegedly been THE DAY BEFORE. Everyone who uses the gun range has casings drop onto the floor. There is no way to determine what belongs to who unless someone had been standing there and immediately collected the casings and no others were present.
>
> 5. These casings were then sent to FDLE to compare to the casing found at the burial site.
>
> 6. Because the State of Florida cannot lay the proper foundation and/or chain of custody and cannot tie those casings to Mr. King, they should not be allowed to present the opinion of Mr. Romeo.

> The testimony/evidence is not relevant to these proceedings. Even if the Court found the evidence relevant, the prejudice of said evidence clearly outweighs the probative value, and would lead to misleading the jurors and confusion of the issues under Florida Statute 90.403. (5/871)

Judge Economou denied this motion "subject to the State laying a proper foundation and chain of custody" (6/1010). [At trial, defense counsel renewed his prior objection. The judge overruled it based on his prior ruling, and said "[Y]ou may have a continuing objection as to that" (24/2437-38;see 2527). State Exhibit 104, consisting of the 47 fired cartridge cases which Officer Saxton gathered up at the firing range, was introduced into evidence subject to the previous objection (24/2441-42;see 25/2640-41)].

The defense also moved to exclude and/or limit any testimony by John Romeo stating his conclusion that three of the 47 shell casings collected from the firing range were fired from the same firearm as a single shell casing (State Exhibit 61) found near the location where [redacted] body was found. Defense counsel pointed out that this was not a traditional ballistics case, because Romeo's analysis did not include test-firing or comparison to any specific firearm; he was simply comparing the markings on the cartridge cases and purporting to state with 100% certainty that they were fired from the same weapon. The defense contended that Romeo's conclusion was (1) insufficiently reliable to warrant admission into evidence, (2) not based on adequate defining standards nor on adequate empirical foundation; (3) would mislead the jury; and (4) "[t]he testimony by Mr. Romeo that he is 100% certain that all of the [casings] were fired from the same weapon

is not supported by underlying principles that have been sufficiently tested and accepted by the relevant scientific community" (6/1044-46,1052-54;see 21/1801-06). Defense counsel requested that the trial judge conduct a Frye[1] hearing (19/1494-97;21/1802-03). The state, on the other hand, contended that a Frye hearing was unnecessary, and the judge overruled the defense's objection without conducting one (19/1495;21/1806-11,1812-14;24/2527).

During jury selection, the trial court overruled the defense's objection to the state's peremptory strike of a minority juror (no. 111)(20/1764-65).

The case proceeded to trial before Judge Economou and a jury on August 24-28, 2009, and resulted in verdicts of guilty as charged on all three counts (7/1267-68;27/3074-75). The penalty phase took place on September 1-4; the jury unanimously recommended a death sentence (7/1354;30/3754). On December 4, 2009, the trial court imposed the death penalty[2], finding four statutory aggravating factors (HAC, CCP, homicide committed for the purpose of avoiding arrest, and homicide committed during the course of a kidnapping or sexual battery); three of these were assigned great weight, and the fourth moderate weight (11/2047-58,2063-64).

The court found as a statutory mitigating factor that King's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired by brain damage, resulting from a head injury suffered in a snow

[1] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923); see Ramirez v. State, 810 So.2d 836 (Fla. 2001), a copy of which was appended to the defense's motion (6/1063-82).
[2] King was also sentenced to life imprisonment for kidnapping and thirty years for sexual battery (11/2064,2138,2147-50).

sledding accident at age six. [Dr. Wu had testified that PET scan results were “compatible with significant brain injury”]. Due to the conflicting opinions of the defense expert and the state’s expert (Dr. Gamache) as to the applicability of the statutory mitigator, the trial court gave it moderate weight (11/2058-59). The court also found and gave moderate weight to two related nonstatutory mitigating factors; the head injury itself, and the fact that the frontal lobe damage may cause “bizarre behavior, paranoia, lack of impulse control, aggression, impaired cognition, and risk-taking” (11/2060-61). [In the penalty phase extensive testimony was presented from Michael King’s brothers Gary and Rodney, two former girlfriends, and Dr. Wu regarding King’s history of intermittently displaying such behaviors, both during his adolescence and during the stressful period in the weeks preceding the crime (27/3195-2000;28/3259,3380-81,3384-88;29/3469-81,3494,3492-93,3498-3502,3516-28,3531,3536-41)]. The court found and gave moderate weight to King’s borderline IQ (in between mentally retarded and low average), and to King’s history of non-violence (11/2061-62). The court found as a mitigator but gave little weight to King’s depression, headaches, and stress in the weeks before the crime due to his unemployment, impending bankruptcy, impending foreclosure on his home, and his girlfriend breaking up with him (11/2062). Given some weight were the mitigators that King has never abused drugs or alcohol, and that he has been a cooperative inmate in jail before trial (11/2063). Given little weight were several other nonstatutory mitigators, including King’s educational deficiencies (being placed in special ed

and learning disabled classes, and having to repeat grades); his being a good father to his 13 year old son; his close relationship with his friends and family; and his being a good worker (21/2061-63).

STATEMENT OF THE FACTS

The state's theory of the case was that [redacted] was kidnapped, sexually battered, and shot to death by Michael King, and that nobody else was involved. Specifically, the prosecutor repeatedly argued to the jury that Robert Salvador had nothing to do with the murder (26/2970,2976-79,2987-90;2995;27/3001,3025, 3029-31).

The defense, while not expressly conceding that King committed the kidnapping and sexual battery, did not really argue an alternative theory as to those offenses. Instead the focus of the defense was that the state did not prove beyond a reasonable doubt that King was the person who shot Ms. Lee. The defense contended that the shooter may have been Robert Salvador, who had been target shooting with King at a firing range earlier in the day (21/1843-46,1849;27/3002,3007,3011-22).

The case was tried on the mutual understanding that the jury could not convict King of first-degree murder unless it found beyond a reasonable doubt that he (and not Salvador) was the shooter. The jury was given the Introduction to Homicide instruction that "[i]f you find that Denise Amber Lee was killed by Michael L. King" then it must consider the circumstances to determine the degree of the offense (27/3032-33). In order to convict for premeditated murder, the jury was instructed that it

must find, inter alia, that the death was caused by the criminal act of Michael King (27/3034). The jury was not instructed on principals [see Florida Standard Jury Instructions in Criminal Cases, 3.5(a)], nor did the state request such an instruction. As to felony murder, the jury was instructed on three essential elements, each of which it had to find beyond a reasonable doubt in order to convict; (1) that Ms. Lee was dead; (2) that her death occurred in the commission of kidnapping by King; and (3) that "Michael L. King was the person who actually killed Denise Amber Lee" (27/3035) [Standard Jury instruction 7.3.3a]. The jury was not given (and the state did not request)(see 25/2800;26/2801) an alternative element instruction [Standard Jury Instruction 7.3.3b], which if given would have permitted a conviction even if King were not the actual perpetrator, if the jury found beyond a reasonable doubt that both he and the person who did kill the victim were principals in the underlying felony. Both the state and the defense were aware in their closing arguments that the murder charge was being prosecuted only on the theory that King was the actual killer (see 26/2995;27/3002,3019-20), and it was never suggested to the jury that King might be found guilty of premeditated murder or felony murder even if Salvador was the shooter.

Jennifer Eckert was [redacted] next door neighbor on Latour Avenue in North Port. In the early afternoon of January 17, 2008, between 1:00 and 2:00 p.m., she saw a dark green Camaro slowly circling the block, about 4-5 times. Ms. Eckert went outside and saw the car pull into the Lee driveway. The driver was the only

occupant she saw. He had a heavy-set face, blondish hair, and light eyes. Assuming he was a friend of the Lees, Ms. Eckert went back inside her house. 10-15 minutes later she saw the car pull out of the driveway (21/1924-49).

The police were first notified that [redacted] was missing a little after 4:00 p.m. When the first officer arrived at her house on Latour, she found the front door locked from the inside, the windows closed, and Ms. Lee's two small children home alone. There was no sign of forced entry and no sign of a struggle. Ms. Lee's vehicle was outside, and her keys, cell phone, and purse were in the house (21/1851,1873-75,1894-1902;23/2284-85).

Harold Muxlow is Michael King's cousin. On January 17, 2008, between 5:30 and 6:00 p.m., King showed up unexpectedly at the front door of Muxlow's house on Karluk Street in North Port. King said his lawnmower was stuck in the front yard and he needed to borrow some tools; a shovel, a gas can, and a flashlight. King came inside and they chatted for a while. According to Muxlow, King was wearing a white shirt with a design on it. Then they went to the trailer where the tools were kept, and Muxlow gave him the requested items. King's car was parked by the mailbox. As Muxlow headed back toward his house he heard a female voice saying to call the cops. Muxlow yelled to his cousin, "What the fuck are you doing," and King said "Nothing, don't worry about it". Muxlow thought it was a boyfriend/girlfriend thing, but curiosity got the best of him, so he turned around and walked toward the car. He could see a silhouette in the center of the car, and shoulder-length hair. Muxlow saw King push her head down; then he drove

away (21/1953-66,1972-74,1988-89,1997;24/2429).

Something didn't seem right to Muxlow, so he called his daughter Sabrina and told her what he thought just happened. He told her not to call the police (but he later learned that she called them anyway). He drove to King's house and didn't see anything stuck in the yard. King's car (a green Camaro) was not there either, and nobody answered the door. Muxlow anonymously called 911, but he wasn't completely forthcoming and did not identify his cousin (21/1966-71,1993-94).

When Muxlow returned to his house, the police were there; they questioned him then, and returned several times that night (21/1971,1974). Muxlow owns a 9mm handgun. He advised the police of its presence when they interviewed him (21/1974-76; see25/2714-15). Muxlow has never seen his cousin Michael King in possession of a 9mm handgun (21/1987-88).

An audiotape of a 911 call received at 6:14 p.m. was played to the jury (22/2132-34,2137;23/2239-44). The female voice on the tape was self-identified as Denise, and stipulated to be [redacted] (23/2239,2241). The male voice was identified by Muxlow as his cousin Michael King (21/1976-78,1996-98), and the third voice is that of the dispatcher. On the tape, Denise is repeatedly heard asking to be let go and to see her family again. She tells the dispatcher she doesn't know where she is, doesn't know the guy she's with, and - - when asked her home address - - says "Can you take me home, on Latour, please?" Asked by the dispatcher if she has a blindfold on, she replies that she can't see. The male identified as King is heard telling her to give him the phone.

Denise asks if he's going to let her out now, and he replies "As soon as I get the phone." She then says "Help me" (23/2239-44).

Shawn Johnson was driving south on 41 to Fort Myers in the early evening. At a stoplight at the corner of Chamberlain he heard six or eight screams for help coming from the car (a Camaro) next to him. The voice was female. Johnson rolled down his window and saw the driver (21/2000;22/2001-03). The next day, after he heard people talking about it and realized it wasn't a prank, he called 911 and the police. Johnson was shown a photo lineup and (after being told by the detective, "I'd like you to pick somebody out" or words to that effect) identified King's photograph. Johnson also identified King in court as the driver of the Camaro (22/2004-08,2014-19).

Jane Kowalski was also driving southbound on 41 heading to Fort Myers; she was talking to her sister on a hands-free cell phone. It was just starting to get dark. At a stoplight at Cornelius Blvd./Cranberry St. she heard screaming and commotion coming from the car next to her. The car was a Camaro, dark-colored or blue. She described the screaming as loud and terrified, and it continued the whole time they were at the light. Kowalski looked at the driver who, with one hand, was pushing something down in the back seat. A small hand came up from the back seat and was banging hard on the passenger-side window (22/2091-2101).

Kowalski told her sister to get ready to write down the license tag number when she could get behind the vehicle to read it. When the light turned green she hesitated, waiting for the Camaro to go, but that car didn't pull forward either; it stayed

behind her and wouldn't pass. There was other traffic around them. When she realized she wasn't going to get the tag, Kowalski ended the phone call with her sister and called 911 (22/2101-06).

An audiotape of Kowalski's 911 call was played to the jury (22/2105-11). In it she said she thought it was a 5 or 10 year old child screaming in the back seat and banging on the window. The driver was a white male with sort of light-colored hair. The driver turned left on Toledo Blade; there was a lot of traffic and Kowalski didn't think she could catch up (22/2108-11).

The following Sunday, Kowalski spoke with North Port police. By that time she'd already seen Michael King's picture on the TV news. She identified King from a photo lineup (22/2112-16,2126). In court she identified King as the driver of the dark-colored Camaro and she identified a photo of the vehicle (22/2116,2119-20).

As a result of the leads and information they'd developed, police officers went to Michael King's residence on Sardinia Avenue, just after 7:00 p.m. Nobody was home, but a television in the front room was on (with loud volume) and a clock radio in the master bedroom was playing very loud music. There was a roll of silver duct tape on the kitchen counter. In the bedroom there were two blankets (one with a Winnie-the-Pooh design) and some pillows on the floor. A yellow blanket covered the window. A mirror (which appeared to have been taken down from the dining room wall) was on the bedroom floor, slanted against the wall. In a corner was a hairband (stipulated to be the same type worn by [redacted]) and some wadded up silver duct tape with what appeared to be long

light-brown hairs (21/1876-77;23/2268-73,see 2333,2336-40). [The next morning a warrant was obtained, and the house on Sardinia was processed for evidence (21/1872;23/2322-25,2356-57). Investigators cut and removed a large area of the bedroom carpet. A garbage bag in the kitchen pantry contained some duct tape with hair on it. However, no 9mm handgun or ammunition was found anywhere in the house (23/2322-25,2333-35,2341-46,2356-57)].

Based on the information they'd been given, the police were looking for a dark green 1993 or 1994 Camaro, with a known tag number registered to Michael King (21/1863-64;22/2021-22,2038). A little after 9:00 p.m. on January 17, Deputy Wymer and Trooper Pope were positioned on Toledo Blade near I-75 when they saw a Camaro generally fitting the description get on the on-ramp to I-75 southbound. Pope followed the vehicle and soon was able to verify a tag match. After an abortive attempt to contact dispatch, he turned on his lights and siren and did a "felony stop". Pope drew his weapon and ordered the driver out of the car. After five commands and a threat by Pope to fire into the car, the driver got out, exiting backwards. Pope put him on the ground, patted him down, and handcuffed him (21/1852;22/2020-29,2038-50,2059-60).

Trooper Pope identified the person he arrested as Michael King (22/2050-51). At the time of his arrest, King was wearing blue jeans, a camouflage T-shirt, and black sneakers. His clothing was dirty and wet from his waist line down to this shoes. From King's pockets, Pope seized a cell phone with its battery missing, a wallet containing his driver's license, and a container for ear plugs (of the type used at firing ranges). [redacted] was not

inside the Camaro. Items found inside the vehicle included a five gallon gas can, a shovel with dirt caked on the bottom, a blue flashlight, a wooden bed railing, a yellow blanket, and a container of baby wipes. There was a ring on the back seat. [The ring was stipulated to belong to [redacted]]. On the front passenger-side floorboard was a piece of paper with a footprint and, beside it, the missing cell phone battery. The floorboard appeared to be wet, thought not soaked. On the vinyl covering on the front exterior of the Camaro, and on the "spoiler" on the rear of the vehicle, there were some hair strands and (on the spoiler) what appeared to be some blood pellets. On the hood was an unidentified mucus or sap-like substance (21/1877-78;22/2050-61;23/2289-96,2301-16,2321,2357-58,2391).

Trooper Pope testified that no firearm (9mm or otherwise) and no bullets were found inside the car, or on King's person, or anywhere in the vicinity. From the time Pope first observed the green Camaro on Toledo Blade getting ready to merge onto the Interstate, until the time he stopped the vehicle and arrested King, he did not see any objects being thrown out of the vehicle (22/2028-29,2060-64;see 21/1878).

The search for [redacted], already underway, continued and expanded throughout the night and the following day (21/1853-54). On the night of January 18, near an abandoned construction site in the vicinity of the Plantation Blvd. and Toledo Blade, a dog search led to the discovery of a disturbed area of sandy ground. Further inspection indicated some spots of blood. Excavation began the next morning, and eventually Ms. Lee's body was recovered,

buried 3-4 feet deep. She was unclothed, in a tight fetal position with her left side down. There was some water at the very bottom of the hole (21/1852,1865-69;22/2167-2209;25/2787-92;26/2834-42,2853-59).

A day or two after discovery of the body, during a line search through the brush using metal detectors, a single 9mm shell casing was found in the grass (21/1880-81;23/2248-65). At another nearby location, near the intersection of Plantation Blvd. and Panacea Blvd., various clothing items were found, including a shirt with a broken strap, a bra with part of its strap missing, a pair of men's boxer shorts (blue), and a pair of women's underwear (red). An item of white material (later determined to be similar in appearance and construction to the bra) was found snared to a tree limb. The shirt belonged to [redacted]; the bra was of same size and type she wore; the boxers belonged to Ms. Lee's husband and she regularly wore them; and the women's underwear were of the same size and type she wore (and her husband later found that a pair was missing)(21/1867-69;23/2263;24/2403-21,2496-05).

An autopsy was conducted by Dr. Daniel Schultz. He removed two pieces of duct tape from Ms. Lee's hair (26/2862;see 23/2397-99). [This duct tape was visually different from the duct tape in the garbage bag in Michael King's kitchen pantry. It was consistent in class characteristics to the duct tape roll on the kitchen counter and the duct tape on the bedroom floor, but no conclusive "fracture match" could be made (24/2509-10)].

The cause of death was a single bullet would to the head. It was a contact wound, with its entry at the right eyebrow and its

exit on the left side of the back of the head. No projectile was recovered (26/2886-87,2893,2901,2910). It was possible, according to Dr. Schultz, that as a result of the gunshot vitreous fluid from the eye could have been ejected. However, there is no way to scientifically test whether the sticky fluid on the exterior front of the Camaro was in fact vitreous fluid (26/2893-97,2916).

Dr. Schultz observed recent pre-mortem bruises on Ms. Lee's back, legs, face, and wrists. The bruising on her wrists could have been caused by ligature, by compression with someone's hands, or by impact (26/2864-67,2873-86). The doctor saw nothing inconsistent with the time of death having been the evening of January 17 (26/2873).

Pre-mortem injuries in the vaginal and anal areas were, according to Dr. Schultz, caused by insertion trauma (penetration), and were not consistent with consensual sex (26/2902-05). There was some mucoid grey/white material in each of these areas; laboratory testing would be necessary to determine whether or not the substance was semen (26/2903-04). [The vaginal, anal, and oral swabs were later analyzed by FDLE biology lab analyst Setlak, who determined that the vaginal swabs contained sperm cells. However, there was no semen (or foreign DNA of any kind) in the anal swab, and no semen in the oral swab (24/2465-66,2476,2485)].

The state used two DNA experts, Setlak of the FDLE and Noppinger, a private corporation lab director. Their testimony is summarized as follows: The sperm cells from Ms. Lee's vaginal

swabs matched Michael King's profile.[3] A swab from the duct tape on King's bedroom floor matched King. Hairs from the duct tape in the kitchen trash can matched Lee. A hair from the hood of the green Camaro matched Lee. A swab from the Camaro's hood was consistent with Lee's profile (10 of 13 loci), and a swab from the vinyl covering was also consistent with Lee's profile (8 of 13 loci). [One of these swabs gave chemical indications for the presence of blood; the other did not]. A hair found in the back seat of the Camaro matched Lee. There was a bloodstain on the blanket on the car's back seat, which was identified as a mixture stain. The major contributor matched Lee's profile. A complete profile could not be obtained as to the minor contributor because it was a small amount (5 of 13 loci could be determined), but King could not be excluded. The Winnie the Pooh blanket on King's bedroom floor, and the cuttings from the carpet, contained semen stains that matched King, and mixture bloodstains that did not exclude King or Lee. [However, another piece of the carpet contained a semen stain with a cellular fraction indicating a female contributor, which did exclude Lee]. A bloodstain on the piece of bra strap located off Plantation Blvd. was consistent with Lee. A stain on the boxer shorts contained sperm cells and regular cells; the sperm fraction matched King, while the remaining cell fraction was a mixture consistent with King's and Lee's profiles (24/2464-74,2486;25/2744-56,2460-61).

[3] Where the term "match" is used, the statistical odds against the DNA belonging to someone else is - - according to Setlak or Noppinger - - astronomical. Where the term "consistent with" is used, the odds range from a high of 1 in 390 million to a low of 1 in 310 (25/2754).

No foreign DNA was found in [redacted] fingernail clippings (24/2486). The clothing King was wearing at the time of his arrest was tested. There was no blood at all on his blue jeans or sneakers. Some blood was detected on the waistband of his black boxers, but the partial DNA profile obtained from that item was consistent with King's own blood, and no foreign DNA was found (25/2766-67). Mr. Noppinger (of the private DNA lab) was asked to take a look at the shell casing found near the burial site, but he was unable to obtain any DNA profile from it (25/2763-64,2768-71).

The green Camaro and items inside it were processed for prints. A palmprint on the outside of the driver's side window matched [redacted] right palm. A fingerprint on the cell phone battery matched King's left index finger, and a print on the inside lid of the baby wipes container matched King's left thumb (24/2431-34;25/2728-35). There were other prints of value on or inside the Camaro which could not be identified (24/2443-45;25/2733-35).

Concerted efforts were made by law enforcement, from January 2008 and ongoing up to the time of the trial, to locate a 9mm gun. In the location where King was arrested officers combed both sides of I-75, grass and tree-line, as well as the median and the Toledo Blade on-ramp, as far as an object could possibly be thrown. Careful searches were conducted throughout the areas near Plantation Blvd. (both the burial site and where articles of clothing were found), and in and around King's residence and neighborhood. Larger lakes and canals were thoroughly searched by dive teams, sewers were inspected, and retention ponds were drained. Metal

detectors were used. Despite these efforts, no 9mm gun was found (See 21/1853-54,1879-82;22/2028-29,2060-64;23/2215-16,2255-65).

Lead detective Chris Morales testified that early on in the investigation Robert Salvador was considered a suspect and was treated as such (21/1890-91). Salvador had been at the Knight's Trail Gun Range on January 17, target shooting with Michael King (21/1883-84). At the request of law enforcement, Salvador turned in four guns he had used at the firing range that day, one of which was a 9mm. Detective Morales testified that Salvador's 9 mm firearm was never test-fired nor compared to the shell casing found near the location where [redacted] body was discovered (21/1884). This, according to the detective, was because investigators were satisfied with Salvador's alibi; "he was able to prove and show to us either by receipt or video camera at stores, Home Depot in Venice, where he was at, the exact times, knowing as an investigator that he could not possibly be in that area at the same time" (21/1887). [No video from Home Depot or any other store was introduced into evidence (see 27/3016-17). The prosecutor - - on the second day of the trial - - finally sent Salvador's 9mm firearm (as well as another 9mm which belonged to Harold Muxlow) to the FDLE lab, but their expert, John Romeo, informed them that he would not have sufficient time to do any testing or comparison (23/2360-61)].

Detective Morales acknowledged that Robert Salvador had made inconsistent statements to investigators regarding his whereabouts, and that Salvador had withheld information about his January 17th contacts with Michael King, and lied about his pre-

vious contacts with King (21/1888-90). When initially questioned by the police, on the 17th, Salvador failed to tell them he'd been with King that day. When interviewed on the 18th, he stated that he'd been to the gun range (with King); then he went to Checkers, then to his storage facility, and then went home. When interviewed on the 20th, he said he'd been to the gun range, Home Depot, a customer's house, Checkers, his storage facility, then went home. On the 20th, Salvador produced a receipt from Checkers, where he'd had a hamburger (21/1888-90).

Robert Salvador is a self-employed handyman and remodeler. He initially met Michael King (a plumber) through work about 3-4 years before the trial. Salvador had done some paid jobs for King at the latter's house, and King also referred a lot of work to Salvador. One time they went on a fishing trip together (24/2530-32,2567-68). For a few months in late 2007, Salvador hadn't seen King; he heard he'd been fired and moved back to Michigan (24/2533).

In January 2008, King called Salvador, told him he was back in town, and asked if anyone had any work, or any furniture because he was trying to move back into his house. Salvador said he had a TV he could give him. On the morning of Thursday, January 17, King called to check about the TV. Salvador, who was planning to go to the gun range to target shoot invited King to come along. King had once told Salvador he had a .357, so Salvador asked if he still had it. King said no, he had a 9 millimeter, but no ammunition. Salvador told him not to worry about it; he [Salvador] would supply the ammunition (24/2536-37,2570).

Salvador considered himself a firearms collector and was hoping to be in competitive shooting some day. He brought four of his own guns to the firing range that day - - a 9mm, two .22 pistols, and a Russian pistol - - as well as a couple of plastic boxes in which he carried his ammunition (24/2537-38,2570-71).

The Knight's Trail firing range is located in Laurel. King didn't know where it was, so Salvador arranged to meet him at a gas station, and King (who was driving a green Camaro) followed him from there. They both parked in the dirt lot, and Salvador observed King get his weapon (which - - contrary to the rules of the establishment - - was not encased) from under his passenger-side seat. Salvador explained the rule violation, took King's gun (which was mostly black, had a clip, and looked like a 9mm), and put it in his own bag (24/2539-44).

Salvador had a prepaid card; he told them to take two sessions off, and he and King signed in (24/2544-46;31/149). The facility has a roofed pavilion lined with tables, and ranges of different lengths. Salvador did not remember whether he and King were at the 10 yard range or the 25 yard range. Salvador fired his own 9mm and the two .22s, while King fired his own 9mm, Salvador's 9mm, and at least one of the .22s. Salvador supplied all of the ammunition used by himself and King. Some of Salvador's 9mm ammunition was new, and some were reloads. [A reload, he explained, is a fired shell which has then been reloaded with new powder and a new bullet](24/2547-48,2571).

When firing a semiautomatic, the shells are ejected and fall on the ground. Asked what happens to the fired shells at the gun

range, Salvador replied “They just get broomed into the dirt usually”. During the course of the day they get all over, and you can step on them and slip, so either the person shooting or gun range employees will from time to time sweep them out of the way (24/2550).

Salvador and King shot for an hour or so, until about 1:00 or a little later (24/2546,2549). When they were finished, Salvador offered to give King the remainder of the 9mm bullets that were in one of the boxes, but King declined. As far as Salvador knew, King had no more ammunition left in his magazine. There is a procedure at the gun range where you have to put your handgun down and, if it is a semiautomatic, take the magazine out and lay it on the table next to the gun. An employee inspects it to see that there are no bullets in the gun. When they stopped shooting, King followed that procedure. So - - while Salvador didn’t inspect it personally - - he believed that King left the gun range without any ammunition (24/2572-73). However, Salvador stated on redirect that he wasn’t watching his box of ammunition at all times, so if King had pocketed some he wouldn’t necessarily have been aware of it (24/2593-95). On recross, Salvador reiterated that he believed, when King left the range, that he had no bullets with him; “I would have no reason to believe otherwise” (24/2597).

After they finished shooting, Salvador and King walked back to their cars. King’s gun was in Salvador’s bag. After King unlocked his car from the driver’s side, Salvador put King’s gun back under the passenger seat. Salvador got into his own vehicle, and they both drove away, parting ways (24/2550-51). Salvador went

to work and at some point during the day he went to his storage unit to clean his guns and exchange work tools (24/2551,2592).

At some point on January 17, Salvador tried to delete all calls made by Michael King to his cell phone (although one call, perhaps inadvertently, was left on). Salvador explained that he did this because he "wasn't quite up front" with his wife about how often he was going to the gun range, and she didn't like him hanging around with King (24/2578-79,2591).

At 2:00 a.m. that night, police officers rang Salvador's doorbell, waking him up. They asked him if he knew Michael King, and Salvador said yes. The officers told him King had been apprehended, and they told him why, and they seemed surprised Salvador didn't know about it. When the investigators let Salvador know it was about a kidnapping, Salvador withheld the information that he'd been with King that day at the gun range. The police talked to him for about five minutes, and then left (24/2551-52,2774-78). Right away Salvador and his wife went on the Internet, but he still didn't think it was that serious; maybe it was some kind of domestic dispute (24/2553).

The next morning (January 18), Salvador decided to go talk to the police again, which resulted in a late afternoon or early evening interview at the police station. The police were trying to find the missing woman; they were being hard on Salvador and treating him like a suspect. Salvador tried to explain his whereabouts the day before. Either on the 18th, or during a subsequent interview on the 20th, Salvador believed he provided the police with some receipts (24/2557,2564-65,2574-75,2584). [At a Richard-

son hearing on the defense's discovery objection (later withdrawn), it was indicated that two receipts were produced; one was from Wolf Camera (a transaction which occurred in the morning of the 17th, before Salvador went to the gun range with King) and the other from Checkers. Salvador did not recall if the police gave them back to him, but in any event he no longer had them. The prosecutor represented that "[t]he police did not take custody of those receipts. They gave them back to Mr. Salvador" (24/2557-63)].

On cross, Salvador acknowledged that the version of his activities on the afternoon of the 17th which he told the police on the 18th was different from what he told them on the 20th. On the 18th, he said that when he left the range he went to Checkers and to his storage unit and then went home. On the 20th he added two more places; a customer's (Mrs. Todd's) house and Home Depot. He was at Home Depot around 3:30 and (according to his statement) Checkers around 4:00, and he got home around 5:30 or 6:00 (24/2581-84). Salvador agreed that the Checkers receipt (which he now indicated he provided on the 20th) was the only receipt he provided which covered any portion of the afternoon hours of January 17 (24/2584,2596-97).

Salvador testified he was doing the best he could, but he has trouble remembering where he was, "which is the normal case for my type of business" (24/2584-85). He acknowledged that on the 18th he withheld the information that he'd been at Michael King's house the week before (24/2586-87).

When Salvador accompanied the police to the gun range (which

according to Officer Saxton occurred on January 18), he assisted them in looking for "whatever 9 millimeter shells we could find that we could pick up". Asked how many shells there were around there, he replied "Thousands" (24/2565-66;see 2446).

Salvador also went to his storage shed with the police and gave them all the weapons they asked for (24/2592-93).

On cross, without contemporaneous objection by the state, defense counsel cross-examined Salvador regarding his possible participation in the charged homicide:

> Q: Mr. Salvador, at the gun range on January 17th, 2008, you arranged to meet Michael King later that day; didn't you?
>
> A: I'm sorry. Can you repeat the question?
>
> Q: Sure. The question is on January 17th, 2008, at the gun range, before you left, before you parted ways with Michael King, you arranged to meet him later that day; didn't you?
>
> A: No, sir.
>
> Q: And didn't you go over to his home on Sardinia that day, January 17th, 2008?
>
> A: No, sir. I did not.
>
> Q: And wasn't the purpose of going over there to bring a lawn mower and a gas can?
>
> A: Absolutely not.
>
> Q: To help him cut his grass?
>
> A: No, sir.
>
> Q: And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?
>
> A: No, sir.
>
> Q: And, Mr. Salvador, didn't you fire the shot that killed and took the life of [redacted]?
>
> A: Absolutely not. (24/2587-88)

[The trial court subsequently struck all except the last question and answer from the above-quoted cross-examination, and in a strongly worded instruction told the jury to disregard them. The judge also denied the defense's motion for mistrial, and restricted defense counsel's closing argument to comport with the prior rulings. Facts relating to this sequence of events are set forth in Issue I, infra].

On redirect, the prosecutor (Ms. O'Donnell) asked Salvador:

Q: Okay. Have you - - before January 17th of 2008, had you ever seen [redacted] before in your life?

A: No, I haven't.

Q: Did you shoot [redacted] in the head?

A: No, absolutely not. (24/2596)

Officer Michael Saxton testified - - over the defense's continuing relevancy, foundation, and chain of custody objection based on its pretrial motion in limine [see Issue II, infra] - - that he met with other detectives and a subject (Robert Salvador) at the Knight's Trail Gun Range on January 18. They were looking for 9 millimeter Luger shell casings. Saxton received information telling him where to go within the gun range. He explained that there are tables facing out toward the down range area, "and then there is cement sidewalk and then behind there is grass and maybe little stones or shell." Saxton checked behind the tables and behind the cement area "where everybody sweeps the casings from the day [to]". He gathered a total of 47 casings; 45 Winchester Luger 9-millimeters and two Fiocchi USA 9-millimeter Lugers, and

as far as he knew these were all sent to the lab (24/2437-43,2446).

The lead detective, Morales, testified that despite massive, thorough, and ongoing searches no nine-millimeter handgun was recovered which could be tied to this case (21/1879-82).

> MR. MEISNER [defense counsel]: So there have not been any tests performed on any nine-millimeter in this case because there's no nine-millimeter in custody?
>
> A: Correct.
>
> Q: And ordinarily, what would happen is, if you do have a gun in custody you would be test-firing it and making comparison, wouldn't you?
>
> A: Ballistics, yes, sir.
>
> Q: Those are called ballistics tests?
>
> A: Yes, sir.
>
> Q: And if you've recovered a bullet, you can compare the bullet recovered from the bullet fired out of the handgun?
>
> A: Correct.
>
> Q: In this case, there was no bullet recovered; was there?
>
> A: That's correct.
>
> Q: And so there's been an attempt made to look at shell casings because a shell casing was recovered; right?
>
> A: Yes, sir.
>
> Q: And the attempt has been made to compare a shell casing found at this site where Ms. Lee's body was re-vered with the shell casings taken from the Knight's Trail Gun Range?
>
> A: Yes.
>
> Q: Is that right?
>
> A: Yes. (24/1882-83)

[As previously discussed, the prosecutor represented to the

trial court (outside the presence of the jury) on the second day of the trial that Robert Salvador's 9mm handgun and Harold Muxlow's 9mm handgun had been submitted that day to the FDLE firearms expert Romeo, but there was insufficient time to test them or perform any comparisons (23/2360-62)].

John Romeo testified over the defense's renewed and continuing objections (based on scientific unreliability, as well as the relevancy/chain of custody objections regarding the gathering of shell casings at the gun range (24/2527;25/2647-48)[see Issue III, infra]. Romeo is an FDLE crime lab analyst supervisor, assigned to the firearms section. That section primarily deals with "examination of bullets, cartridge cases, and other ammunition components to determine if they could be identified or eliminated as having been fired in a specific firearm. Other duties include the determination of firing distance; serial number restoration; examination of firearms for function and operability; and (what he would be talking about today) comparing ammunition components in the absence of a firearm (25/2630-31).

Romeo explained the operation of a semiautomatic pistol. Upon firing, a cartridge case would be expelled out of the ejection port, typically to the right-hand side. The expelled cartridge would travel 3 to 5 feet or further (a "varied variable event depending on a number of factors) and it would fall "wherever it lands" (25/2633-39).

Romeo received a total of 48 nine millimeter Luger fired cartridge cases. 47 of these were represented as having been removed from a firing range, and one was from a crime scene

(25/2640-41). Using a comparison microscope (“a microscope with an optical bridge that allows me to see things side by side”), Romeo looked first for class characteristics. These define a broad group source, such as caliber, brand stamp, and firing pin shape (25/2641-44,2654-56). Subclass characteristics “are characteristics that define a smaller group source but are not indicative of a single firearm”, while individual characteristics, according to Romeo, are tool marks “which are unique to every single firearm” (26/2656). Asked to explain what is meant by the term “tool mark”, Romeo said “The science behind what I do is tool mark identification in which a harder object, meaning a tool, marks a softer object when it come in contact with it either by impressing, striating, or a combination of both, marks of individual or unique nature onto a softer object.” In firearms identification, the firearm just happens to be the tool imparting those characteristics (25/2644-45). According to Romeo, every firearm - - even those manufactured on the assembly line - - is different microscopically. He acknowledged that he has no idea how many firearms manufacturers make 9 millimeters or have many 9 millimeter pistols are manufactured each year (25/2645,2656-57).

Romeo acknowledged that, in addition to objective factors, there is a “subjective component” in determining whether an observed characteristic is an individual characteristic or a subclass characteristic (25/2657-58,2662). He wouldn’t expect examiners to disagree “[i]f they were trained properly”, but he allowed that it was possible (25/2657-58). Specifically, it would be unlikely for examiners to disagree on whether something was an

identification or whether it was an elimination (i.e., “the complete opposite”). However, there can be differences of opinion between whether an identification could be made or whether the results were inconclusive (25/2662-63).

Describing his own method of examination, Romeo said he would not necessarily “look at every single area of the cartridge case that was marked by the firearm. If I gotten to a sufficient agreement of individual characteristics, I may stop” (26/2661). Asked whether there was a minimum number of points of similarity he must find in order to conclude that the casings were fired from the same firearm, Romeo replied:

> For me, yes, there are. It would be - - my criteria would have to be met as to what I deemed sufficient agreement of quantity and quality of those individual marks.
>
> MR. SCOTESE (defense counsel): That’s your individual standard, correct?
>
> A: That is correct. (25/2661)

Romeo agreed that another firearms examiner might require more or fewer points of similarity in order to determine a match or an exclusion (25/2661-62). “I should stress to the jury that it’s not always about the number of lines. It also depends on the uniqueness of what I’m seeing, the uniqueness of the shape, for example” (25/2662).

State Exhibit 61 (FDLE no. 421), the shell casing from the crime scene, was a 9 millimeter Luger caliber. Romeo determined its class characteristics, as well as the class characteristics of the other 47 cartridge cases. Not all of these had the same class characteristics as the casing from the crime scene, so he sepa-

rated out the ones that did from those that did not. Ultimately, using his comparison microscope “to inter-compare those microscopic marks and see if I had a reproducible pattern of sufficient quality and quantity”, he concluded that three of the 47 fired cartridge cases submitted to him (FDLE nos. 420-42,420-46,and 420-47; contained within State Exhibit 104) had tool markings which were the same as the one fired cartridge case from the crime scene (25/2643-47;see 24/2442). [There were three different manufacturers; 420-42 was a Winchester casing, 420-46 and 420-47 were Fiocchi casings, while the casing from the crime scene was a Remington Peters (25/2643-44,2650-53)]. Asked how certain he was that these four cartridge casings were all fired from the same firearm, Romeo answered (over defense renewed and continuing objection recognized by the trial judge) that he was absolutely sure; one hundred percent certain (25/2647-49).

SUMMARY OF THE ARGUMENT

Under the instructions to the jury in this case (without objection by the state, and without any request by the state for an instruction on principals), the jury could not convict King of first-degree premeditated murder or felony-murder unless it found beyond a reasonable doubt that King was the actual killer. The defense theory of the case was that the person who shot [redacted] to death was Robert Salvador; or at least there was a reasonable doubt that it might have been Salvador. Supporting the defense's contention was evidence (1) that the bullet which killed Ms. Lee was probably from Salvador's cache of ammunition; (2) that Salvador's 9-mm firearm (which was in the state's possession) was never test-fired nor compared to the fired shell casing found near the crime scene; (3) that - - despite massive and ongoing search efforts - - no 9-mm firearm connected to Michael King was ever found (and the only evidence that King even had a 9-mm firearm came from the testimony of Robert Salvador; King's cousin Harold Muxlow never saw him in possession of a 9-mm handgun); (4) that Salvador was evasive and made inconsistent statements regarding his whereabouts on the day of the murder; (5) that the minimal corroboration that caused the police to believe Salvador's "alibi" (i.e., the Checkers receipt and the Home Depot surveillance video, neither of which were presented to the jury) were from the afternoon (Salvador said he got home around 5:30 or 6:00) and did not cover the time period from about 6:30-9:00 p.m. when the shooting had to have taken place; and (6) that Salvador deleted, or tried to delete, all calls on his cell phone made by Michael King on the

day of the murder.

The prosecutor - - trying to obtain a tactical advantage - - triggered a series of rulings and comments which individually and cumulatively destroyed King's right to a fair trial on the murder charge, as well as his right to confront and fully cross-examine a key adverse state witness - - Robert Salvador - - whose motive for testifying as he did may well have been to cover up his own participation in the murder. The series of errors was also especially harmful as to the penalty determination, since if the jurors believed that Robert Salvador was the actual killer and was getting off scott-free, they may well have been less inclined to recommend the death penalty for King.

Defense counsel cross-examined Salvador with regard to whether, when they were at the gun range, he had arranged to meet King later in the day; whether he later went to King's house on Sardinia to bring him a lawn mower and a gas can; whether that evening he met King out on Plantation Blvd.; and whether he (Salvador) fired the shot that killed [redacted]. Salvador insisted that he had not done any of those things; the jury had the opportunity to assess his demeanor and credibility.

The state did not object to any of the cross-examination. In fact, the state followed it up on re-direct by getting Salvador to reiterate his denial of participation. It was only after Salvador left the witness stand that the lead prosecutor asked to approach the bench, seeking to drive a bulldozer through a supposedly open door. The prosecutor argued that he should now be able to introduce King's exculpatory in-custody statements, which had been

suppressed due to right-to-counsel violations, to rebut the inferences which he claimed the jury would draw that defense counsel had gotten the information underlying his cross-examination questions from his client, King. The judge correctly ruled that that door had not been opened.

Only after its primary tactic failed did the state change course and successfully request a strongly worded instruction from the judge not only telling the jurors to disregard a significant portion of defense counsel's cross-examination of Salvador, but also directly conveying the judge's opinion that there was no evidence or inference from the evidence to support the asking of these questions. This was an impermissible judicial comment on the evidence which irreparably damaged the defense's theory of the case and the credibility of defense counsel, as it strongly suggested that he'd done something improper in his accusatory questioning of Salvador.

The harm caused by the striking of an important line of constitutionally-guaranteed cross-examination, and by the judge's comment conveying to the jurors his view of the evidence, was compounded by the resulting limitation of defense counsel's closing argument (counsel could not argue anything about a planned meeting; only that Salvador somehow appeared and shot Ms. Lee); and by the prosecutor's conduct in his closing argument in which he (1) ridiculed the defense's planned meeting theory which defense counsel was prevented from arguing; (2) told the jury that Rob Salvador's experience on the witness stand was the worst day in Salvador's life; and (3) over objection and motion for mistri-

al, shifted the burden of proof on the main disputed issue of identity of the shooter [Issue I].

The trial court also harmfully erred (as to the murder conviction and death sentence) by allowing the state to introduce the scientifically unreliable testimony of FDLE firearms examiner John Romeo, without a Frye hearing. This was not a traditional ballistics comparison, because Romeo did not have any 9-mm firearm connected to King to test-fire (and Salvador's 9-mm firearm was not provided to Romeo until there was insufficient time for testing to occur). See Sexton v. State, 93 S.W.3d 96,101 (Tex.Crim.App. 2002). Moreover, Romeo's own testimony establishes that this was "It's a match because I say so" junk science, precluded by the Frye standard. See Ramirez v. State, 810 So.2d 836 (Fla. 2001). Romeo's "standards" are individual and subjective, and there is no reason to believe they have general acceptance in the relevant scientific community [Issue II]. Moreover, the shell casings collected at the gun range, and used in Romeo's comparison, were irrelevant because they were not shown to be connected to King [Issue II].

The state's peremptory strike of a minority juror (no. 111) based on the prosecutor's less-than-accurate representation of her questionnaire response was pretextual because the reason applied equally or more strongly to other jurors who were not challenged by the state, and who served on the jury [Issue IV]. King's death sentence should be reduced to life imprisonment without parole based on the mitigation prong of the proportionality test [Issue V].

ARGUMENT

ISSUE I. KING'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT HIS DEFENSE AND TO FULLY CROSS-EXAMINE A KEY PROSECUTION WITNESS WERE VIOLATED BY A SERIES OF TRIAL COURT RULINGS REGARDING ROBERT SALVADOR (AND COMPOUNDED BY THE PROSECUTION TAKING UNFAIR TACTICAL ADVANTAGE OF ITS OWN FAILURE TO CONTEMPORANEOUSLY OBJECT TO THE DEFENSE'S CROSS-EXAMINATON OF SALVADOR, AND BY THE PROSECUTOR'S BURDEN-SHIFTING COMMENTS IN CLOSING ARGUMENT).

The theory of defense in this capital case was that the state did not prove beyond a reasonable doubt that Michael King was the person who shot and killed Ms. Lee; instead the shooter may have been Robert Salvador. The state (which could have requested instructions on principals but did not) chose to try this case solely on its theory that nobody else but King was involved in any of the charged crimes, and that Salvador had nothing to do with the murder. Accordingly, for premeditated murder the jury was not instructed on principals.[4] For felony murder, the jury was not

[4] That standard instruction (3.5(a)), which was neither requested nor given, reads:

> If the defendant helped another person or persons [commit][attempt to commit] a crime, the defendant is a principal and must be treated as if [he][she] had done all the things the other person or persons did if
>
> 1. the defendant had a conscious intent that the criminal act be done and
>
> 2. the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist or advise the other person or persons to actually [commit][attempt to commit] the crime.
>
> To be a principal, the defendant does not have to be present when the crime is [committed][or][attempted].

given the alternative (7.3.3b) instruction which would have allowed it to convict if it found that Ms. Lee was killed by a person other than King, as long as it also found that King and the other person were both principals in the crime or crimes. Instead, the jury was only given the 7.3.3a instruction, which required it to find beyond a reasonable doubt, as an essential element, that King was the person who actually killed Ms. Lee (27/3035). Both the state and the defense were aware in their closing arguments that the murder charge was being prosecuted only on the theory that King was the actual killer (see 26/2995;27/3002,3019-20), and it was never suggested to the jury that King might be found guilty of premeditated murder or felony murder even if Salvador was the shooter.

Therefore, identity of the shooter was a defense to the murder charge in this case, since a jury cannot convict on a legal theory on which it wasn't instructed. (Nor can an appellate court affirm a criminal conviction on a theory upon which the jury wasn't instructed). See Chiarella v. United States, 445 U.S. 222, 236 (1980); State v. Wulff, 557 N.W.2d 813,817 (Wis. 1997); State v. Montgomery, 759 A.2d 995,1019 n.45 (Conn. 2000); Garrett v. State, 905 A.2d 334,339 n.5 (Md. 2006). [Undersigned counsel will concede that the errors or series of errors discussed in Issues One, Two, and Three, concerning Salvador, the cartridge cases gathered at the firing range, and the FDLE firearms examiner's testimony, are harmless as to the kidnapping and sexual battery convictions. However, they are all harmful as to the murder conviction and the death penalty. And the errors which hamstrung

defense counsel's ability to argue Salvador's involvement in the murder were especially harmful as to penalty, since if the jurors believed Salvador was the actual shooter and was getting off scott free - - without even any testing or comparison of his nine-millimeter handgun - - they might well have been less inclined to recommend the death penalty for King].

A defendant has a constitutional right to have the jury hear his theory of the case, and not just the prosecution's, so that they can decide what the truth is. And a defendant has the right to test the veracity of an adverse witness - - especially a key prosecution witness - - by full and fair cross-examination regarding his possible motives and biases, including the witness' possible motivation to cover up his own involvement in the charged crime. See Washington v. State, 737 So.2d 1208, 1218-19 (Fla. 1st DCA 1999); McCoy v. United States, 760 A.2d 164,174 (D.C. 2000).

In the instant case, the evidence showed that Robert Salvador was target shooting with King until about 1:00 p.m. on the day the murder occurred. We know, by his own admission, that Salvador owned a nine-millimeter firearm. Conversely, the only evidence that King possessed a nine-millimeter firearm was the testimony of Salvador. Assuming without conceding the admissibility and accuracy of firearms examiner John Romeo's testimony that three of the 47 cartridge cases gathered at the firing range were a 100% certain match to the shell casing found at the crime scene (and assuming further that the cartridge cases from the firing range were sufficiently connected to Salvador and/or King), then it appears probable that Ms. Lee was killed with Salvador's ammuni-

tion, since (according to Salvador) King didn't have any of his own. Moreover, Salvador believed King's gun was empty when they left the firing range and he (Salvador) put the gun under King's passenger seat. [Salvador allowed that King could have pocketed some when Salvador wasn't looking, but he had no reason to believe this occurred, and King had turned down Salvador's offer to give him a box of ammunition]. We also know that Salvador deleted, or tried to delete, all of King's calls to Salvador's cell phone made on January 17; and that during the investigation Salvador withheld information from the police about his contacts with King, and gave inconsistent statements about his whereabouts on the 17th. The police considered Salvador a suspect, at least until they decided they believed his alibi, but the only receipt he provided relating to the afternoon or evening of the 17th was from Checkers where he said he had a hamburger around 4:00 p.m. Detective Morales also referred to a video camera from Home Depot (where Salvador said he went before Checkers, around 3:30). Neither the receipt (which the prosecutor said was returned to Salvador, and which Salvador said he no longer had) nor any store surveillance tape was introduced into evidence, and - - in any event - - the period of time when the shooting could have occurred was at least several hours, from around 6:30 p.m. (Ms. Lee's 6:14 p.m. 911 call, followed by the events witnessed by Shawn Johnson and June Kowalski when it was just starting to get dark) to around 9:00 p.m. when King's car was stopped by Trooper Pope near I-75 and Toledo Blade. (In the last of his inconsistent statements to the police, made on January 20, Salvador claimed to have gone to four places - - his customer Mrs.

Todd’s house, Home Depot, Checkers, and his storage unit - - and that he got home around 5:30 or 6:00). [See defense closing argument at 27/3016-17]. Salvador’s wife did not testify, and there is no evidence that she made any statements to the police vouching for his whereabouts between 6:00 and 9:00 p.m. Therefore, Salvador had no alibi; if the police chose to believe him it was on faith.

According to investigators (who were evidently assuming that Salvador’s 9-millimeter was not connected to this case), no 9-millimeter firearm connected to this case was ever found, despite massive and ongoing searches of King’s house and neighborhood; the vicinity where Ms. Lee’s body was found; the nearby location where her clothing was found; the area around Toledo Blade and I-75 where King’s car was spotted and then stopped; and numerous lakes, retention ponds, canals, and sewers. Moreover, at the time of his arrest no blood (except for spots of his own blood on the waist-band of his boxers) was found on King’s person or his clothing. The prosecutor’s explanation for this was that (despite his leaving many other items of evidence of kidnapping and sexual battery in his house and car, and despite the fairly quick discovery of Ms. Lee’s clothing), King had somehow managed to successfully dispose of the firearm and how own bloody clothing (26/2973-76,2984,2986). Defense counsel’s explanation was that the gun was never found because somebody else (most likely Robert Salvador) shot Ms. Lee and then either disposed of the gun or took it home with him. According to defense counsel, the reason no large amounts or even microscopic spots of blood were found on King’s

person or clothing is because he was not the shooter (27/3006-19,3022).

Robert Salvador's 9-millimeter firearm was never test-fired nor compared to the shell casing found at the crime scene, nor did the prosecution even submit it to the FDLE firearms examiner until the second day of the trial, when (according to Mr. Romeo) there was insufficient time before his testimony to test it.

With this backdrop, defense counsel cross examined Salvador -- without contemporaneous objection by the state - - regarding his possible participation in the charged homicide:

> Q: Mr. Salvador, at the gun range on January 17th, 2008, you arranged to meet Michael King later that day; didn't you?
>
> A: I'm sorry. Can you repeat the question?
>
> Q: Sure. The question is on January 17th, 2008, at the gun range, before you left, before you parted ways with Michael King, you arranged to meet him later that day; didn't you?
>
> A: No, sir.
>
> Q: And didn't you go over to his home on Sardinia that day, January 17th, 2008?
>
> A: No, sir. I did not.
>
> Q: And wasn't the purpose of going over there to bring a lawn mower and a gas can?
>
> A: Absolutely not.
>
> Q: To help him cut his grass?
>
> A: No, sir.
>
> Q: And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?
>
> A: No, sir.
>
> Q: And, Mr. Salvador, didn't you fire the shot that killed and took the life of [redacted]?

A: Absolutely not. (24/2587-88)

On redirect, the prosecutor (Ms. O'Donnell) asked Salvador:

Q: Were they [the police] treating you like a suspect.

A: Apparently they were. I didn't realize it at the time, but I was told later they were and it felt like it.

Q: Okay. Have - - before January 17th of 2008, had you ever seen [redacted] before in your life?

A: No, I haven't

Q: Did you shoot [redacted] in the head?

A: No, absolutely not. (24/2595-96)

After a brief re-cross (24/2596-97), Salvador was excused from the witness stand.

Given the various facts and circumstances pointing to Salvador's possible participation in the murder, and in light of his plausible motivation to cover up his own involvement, defense counsel's accusatory cross-examination was both proper and constitutionally guaranteed. Davis v. Alaska, 415 U.S. 308 (1974); Purcell v. State, 735 So.2d 579 (Fla. 4th DCA 1999); see Tomengo v. State, 864 So.2d 525,530 (Fla. 5th DCA 2004). ("A defendant, as a matter of right, may cross-examine a State witness with respect to his motive, interest, or animus, which is connected to the cause or the parties to the cause", and the trial court does not have discretion to exclude such questions). A witness' possible involvement in the charged crime (and his desire to cover up his involvement) is certainly a strong factor bearing on his interest in the outcome of the trial and his motivation to testify as he does (especially where, as here, the

witness has already made inconsistent and evasive statements regarding his whereabouts on the day of the crime and regarding his contacts with the defendant). Washington v. State, 737 So.2d at 1218-19; McCoy v. United States, 760 A.2d at 174; see also Cherry v. State, 659 So.2d 1069,1073 (Fla. 1995); Harris v. State, 726 So.2d 804,806 (Fla. 4th DCA 1999); Lavette v. State, 442 So.2d 265,267-68 (Fla. 1st DCA 1983).

But even assuming arguendo that the trial judge might have had some discretion to limit defense counsel's line of cross-examination, he had no obligation even to consider the matter absent a contemporaneous objection by the state. J.B. v. State, 705 So.2d 1376,1378 (Fla. 1998). The contemporaneous objection rule applies to the prosecution as well as the defense. See State v. Calvert, 15 So.3d 946,948-49 (Fla. 4th DCA 2009). "[T]he rationale for its application is two-fold: (1) to require an objection at the time the error is committed to give the trial court the opportunity to correct it; and (2) to prevent a litigant from allowing an error to go unchallenged so it may be used as a tactial advantage later." State v. Calvert, 15 So.3d at 948, quoting Crumbley v. State, 876 So.2d 599,601 (Fla. 5th DCA 2009) (emphasis suppled); see F.B. v. State, 852 So.2d 226,229 (Fla. 2003).[5]

The tactic of allowing an "inadmissible tidbit" (or, in this case, a proper line of cross) "into evidence without objection in

[5] See also Kiefer v. State, 909 So.2d 572,574 (Fla. 5th DCA 2005), Wooten v. State, 904 So.2d 590,592 (Fla. 3d DCA 2005); Williams v. Lowe's Home Centers, Inc., 973 So.2d 1180,1185 (Fla. 5th DCA 2008); Clear Channel Communications, Inc. v. City of North BayVillage, 911 So.2d 188,190 (Fla. 3d DCA 2005).

the hope of driving a bulldozer through a supposedly open door, is not a practice to be encouraged". State v. Henley, 557 P.2d 33,35 (Or. App. 1976); State v. Davis, 634 P.2d 279,283 (Or. App. 1981); see Irick v. United States, 565 A.2d 26,46 (D.C. App. 1989).

And it soon became apparent this is exactly what the state had in mind. After Robert Salvador was excused from the witness stand, the lead prosecutor asked to approach the bench, saying he had a matter to discuss outside the presence of the jury (24/2597-98).

> MR. AREND: Judge, I have great concerns at this point over what just took place in this courtroom. The Court is well aware that attorneys on cross-examination can only ask questions they have a good-faith belief that they know the answer to that question. (24/2599)

The prosecutor - - referring to the exculpatory statements King made at the time of his arrest (which were suppressed pre-trial because his invocation of his right to an attorney had been ignored by law enforcement) - - said "It's the state's position that based on that cross-examination, the door is opened and we should be allowed to present those witnesses and the other statements of Mr. King." The prosecutor asserted that based on the cross-examination "the jury...would have to believe that Mr. King told that to Mr. Meisner [defense counsel], that that's where that information is coming from" (24/2599-2600).

The judge asked defense counsel for his response. Counsel replied that he asked those questions in good faith, backed up by Salvador's inconsistent statements on January 18th and 20th concerning his whereabouts on the 17th (24/2600;see 25/2602-03,

2612-16). [The trial judge noted, as well, the testimony concerning Salvador's ammunition, and the question of whether King had any ammunition when he left the firing range (25/2608)]. Defense counsel acknowledged that if King were to take the stand and testify differently than what he'd said at the time of his arrest, then the suppressed statements would become admissible, "but he has not taken the stand and I have not opened the door. So I don't see any grounds for granting the motion that the State is asking for" (25/2601,see 2612).

The first twenty pages of the bench conference focus exclusively on the state's tactical effort to use the cross-examination of Salvador as a conduit for the introduction of the suppressed statements (24/2599-25/2618). Asked by the judge to explain why he thought there was a connection between defense counsel's cross-examination of Salvador and King's prior exculpatory statements, the prosecutor replied:

> I'm happy to help you with this because my answer is completely different right now. I'm not saying I change it from before. The circumstances have changed based on the behavior of defense counsel here today.
>
> When the question was asked by Mr. Meisner that you agreed to meet with King and then you shot and killed [redacted], the implication when a lack of good-faith cross-examination question like that is made, is that he obtains his information from his client, that his client is telling him that that's what happened. And, in fact, the tone and behavior in which he yelled and pointed at the witness when he did it, was an implication that Mr. Meisner knew that had to be true and that the had been told that by his client.

(25/2604-05, see 2617-18,2620)

[Undersigned appellate counsel would reiterate here that, assuming arguendo that defense counsel yelled and pointed at

Salvador during the cross-examination, the state did not see fit to object to his "tone and behavior" while it was occurring. The prosecutor also represented during the bench conference that defense counsel's ultimate question to Salvador "wasn't, Did you kill her? It was, you killed her: didn't you? It was in a demanding tone" (25/2609). The prosecutor added, "Actually, I wouldn't have objected if the question was, Did you kill her? I think that would have been an appropriate question" (25/2610). The fact is, the state didn't object to defense counsel's question (which, according to the transcript, was "And, Mr. Salvador, didn't you fire the shot that killed and took the life of [redacted]") nor to any of the six questions leading up to it (24/2587-88). The state itself, on redirect, examined Salvador to reiterate his denial of involvement, and then allowed re-cross to occur and Salvador to stand down, before the lead prosecutor approached the bench; now indignantly complaining of defense counsel's supposed lack of good faith, and trying to seize a tactical advantage by bringing in the unconstitutionally obtained statements through the supposedly open door].

The trial judge stated that he was not going to delve into any attorney/client communication; "That's not something I'm even going to come close to" (25/2606). Moreover, even if defense counsel had received information from King which prompted him to formulate his cross-examination questions to Salvador, that would tend to establish - - rather than negate - - a good faith basis for the inquiry. See Scull v. United States, 564 A.2d 1161,1164 (D.C. App. 1989), which states, "Further, where counsel has

information from her own client, which she does not know to be false and which is not 'inherently incredible', she has a sufficient good-faith basis for the proposed cross-examination". (In the instant case, the state may argue that defense counsel knew the information about Salvador to be false because of King's statements at the time of his arrest. However, it was those statements (that a helicopter shot Ms. Lee, and/or that King and Ms. Lee were both kidnap victims and one of the masked kidnappers must have killed her) which were inherently incredible. If King later told defense counsel that Robert Salvador met him at Plantation and Panacea and shot Ms. Lee, defense counsel would have no knowledge that that information was false, especially in light of (1)Salvador's evasiveness about his whereabouts; (2) the fatal bullet appears to have come from Salvador's cache of ammunition; (3) Salvador's nine-millimeter handgun was never tested; (4) Salvador was the only witness who said King owned a 9-mm firearm; and (5) no 9-mm firearm tied to King was ever found.

The trial judge correctly declined the state's request for a ruling allowing it to introduce the suppressed statements; basically concluding that it would open a can of worms (25/2619,2622-23). See Rogers v. State, 844 So.2d 728,732-33 (Fla. 5th DCA 2003), rejecting the state's attempt to extend the rationale of Harris v. New York, 401 U.S. 222 (1971)(which allows introduction of statements obtained in violation of Miranda to rebut a defendant's testimony which is inconsistent with the prior statements) to apply to rebuttal of a defense attorney's

closing argument.

However, the trial judge was not persuaded that defense counsel had a good-faith basis for the questions, so he asked counsel what the remedy might be. Defense counsel said he believed he'd established his position, but "[i]f you think otherwise, one possible remedy is simply striking it from the record and instructing the jury on that" (25/2618). The prosecutor wasn't satisfied with that; he wanted a more strongly worded and specific admonishment:

> MR. AREND: A curative instruction of "just strike the statements" I don't think is sufficient. I understand you make the ultimate call. But my position is that wouldn't be sufficient for them to fully understand and not walk back out of the jury room at the end of the day, thinking to themselves, where in the world would Mr. Meisner have gotten that from? All those specifics, gas cans and meeting him out there, and going to shoot and he didn't have any bullets, putting all that together. I think the only thing they could conclude is that he got that from King. (25/2620)

Mr. Arend said he would work on a proposed instruction which would convey to the jury that the questions asked of Salvador were improper and were not based on any evidence. He still maintained, however, that the door was opened for introduction of the suppressed statements, either verbatim or through the testimony of the deputies (25/2620-21).

Defense counsel strongly objected to the prosecutor's proposals, including his request for a more strongly worded instruction (25/2621-22). "I don't think I opened the door. I don't think I demonstrated bad faith here today. You get to decide that issue. If you do decide it, a simple instruction would be effective enough" (25/2622).

The trial judge decided that he would strike and instruct the jury to disregard all of the questions leading up to the last one ("And, Mr. Salvador, didn't you fire the shot..."), but that he would not strike that final question because he didn't think it crossed the line (25/2623-27). The judge said:

> What I'm going to do is instruct the jury that those particular questions have no basis in fact, or the evidence, the inference in the evidence, and they are to completely disregard these questions as submitted to the witness and should not be considered by them whatsoever. (25/2623)

Defense counsel said:

> Judge, I would object to your ruling and on the grounds previously stated.
>
> THE COURT: All right, sir. Thank you.
>
> MR. MEISNER: And the wording of the instructions that you articulated.
>
> THE COURT: All right, sir. (25/2627)

The jurors then re-entered the courtroom, and the judge instructed them as follows:

> Ladies and gentlemen, please pay attention to what I'm about to instruct you as this point. I'm going to instruct you and require you to disregard and to not consider whatsoever the following questions as proposed by Mr. Meisner to the witness, Mr. Salvador.
>
> As to these questions, you shall completely disregard the questions being asked and their answers and you shall in no way consider them whatsoever.
>
> The questions that you shall completely disregard and not consider are the questions to Mr. Salvador:
>
> Did you not go over to Mr. King's home on Sardinia that day on January 17th, 2008?
>
> You are to completely disregard and not consider in any manner whatsoever that question.
>
> Secondly, you are to completely disregard and not consider the question:

> Wasn’t the purpose of your going over, meaning to Mr. Salvador, your going over to Mr. King’s home was to bring him a lawn mower and a gas can and to help him cut his grass.
>
> You are to completely disregard and not consider in any manner whatsoever that question as well.
>
> And, finally you are to completely disregard and not consider in any manner whatsoever the question by Mr. Meisner to Mr. Salvador:
>
> Didn’t you meet Mr. King out on Plantation Boulevard and Panacea Boulevard during the evening hours of January 17th, 2008.
>
> Again, you are not to consider that question whatsoever and you are to completely disregard that question as well.
>
> All right. Thank you, ladies and gentlemen. (25/2626-27)

At this point, the prosecutor asked to approach the bench, and he reminded the judge that he’d said he was also going to tell the jury that there was no basis in fact or evidence to support these questions (25/2629). The judge acknowledged that he’d forgotten to say that, so when the bench conference ended he made the following additional comment to the jurors:

> I’m asking you to disregard such because there is no basis in fact from the evidence or the inference from the evidence for the asking of said questions.(25/2629)

If the state - - supposedly so outraged by defense counsel’s cross-examination of Salvador - - had made a contemporaneous objection, the trial court could simply have overruled it or sustained it. If he had sustained it, we might still be arguing on appeal whether King’s right of full and fair cross-examination was erroneously limited, but we would not be confronted with the much larger problem of King’s right to present his defense - -

and defense counsel's credibility before the jury - - being blown to smithereens by the way the matter was handled. This was, in essence, a "gotcha" maneuver by the prosecution; which withheld its objection in the hope of gaining a significant tactical advantage, and - - only when that strategy failed - - persuaded the trial judge not only to strike cross-examination of a key state witness who credibility was (to say the least) suspect, but to do it in such a way as to convey to the jury that the defense was bogus, that Robert Salvador shouldn't have been questioned in an accusatory manner, and that defense counsel had improperly tried to mislead them. See Scipio v. State, 928 So.2d 1138,1151 (Fla. 2006), in which this Court wrote:

> ...[T]he rug was completely pulled out from underneath the defense's theory of the case. ...Not only was the only available defense evidence removed, in the process the defense was made to look utterly foolish, as later pointed out and emphasized by the State in its closing argument to the jury. Hence, not only did the State improperly ambush or pull a "gotcha" on the defense, it then used its improper ambush as a hammer to humiliate the defense before the jury.

[As will unfold, the prosecutor in the instant case also capitalized on his own "gotcha" tactic in closing argument].

Undersigned appellate counsel (as did trial counsel) submits, first of all, that the cross-examination of Salvador was proper, done in good faith, and relevant to his motivation to testify as he did against King. A defendant has the constitutional right to present his defense; including a third party perpetrator defense, so long as there is some quantum of evidence connecting the third party to the crime. See, e.g., Holmes v. South Carolina, 547 U.S. 319 (2006), discussed in Summers v. State, 231 P.3d 125,145-49

(Okla. Crim. App. 2010); see also Joyner v. State, 678 N.E.2d 386,390 (Ind. 1997); Diamen v. United States, 725 A.2d 501,528 (D.C. 1997); McCoy v. United States, supra, 760 A.2d at 174. [The likelihood that the bullet which killed [redacted] belonged to Salvador, along with everything else previously discussed, is "some quantum of evidence"]. A defendant has the constitutional right to confront a key state witness concerning his motivations and self-interest, including his own possible involvement in the crime. See Washington v. State, 737 So.2d at 1218-19; Harris v. State, 726 So.2d at 806; Lavette v. State, 442 So.2d at 267-68; Diamen, 725 A.2d at 528; McCoy, 760 A.2d at 174-75. An accused's right of full and fair cross-examination is a crucial means of testing the truthfulness of the witness' testimony; it "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." California v. Green, 399 U.S. 149,158 (1970); Conner v. State, 748 So.2d 950,955 (Fla. 1999); see also Abreu v. State, 804 So.2d 442,443 (Fla. 4th DCA 2001).

Here, the jurors' assessment of Robert Salvador's demeanor when confronted by defense counsel's unobjected-to questions concerning his activities on January 17, culminating in his possible commission of the murder, was critical to their determination of his credibility.

Even assuming arguendo that a state objection, had it been timely made, to some or all of the line of cross-examination could have been sustained without violating King's Sixth Amend-

ment rights, that does not justify or ameliorate the damage which was done here.

As this Court recognized in Whitfield v. State, 452 So.2d 548,549 (Fla. 1984), "Especially in a criminal prosecution, the trial court should take great care not to intimate to the jury the court's opinion as to the weight, character, or credibility of any evidence adduced." Because of the dominant position occupied by the judge - - which overshadows those of the attorneys, litigants, court officers, and witnesses - - any comment by the judge which is capable "directly or indirectly, expressly, inferentially, or by innuendo" of conveying to the jury the view he takes of the case destroys the impartiality of the trial. Brown v. State, 11 So.3d 428,433-34 (Fla. 2d DCA 2009); Brown v. State, 678 So.2d 910,911 (Fla. 4th DCA 1996); Fogelman v. State, 648 So.2d 214,219 (Fla. 4th DCA 1994); Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959); see also Jacques v. State, 883 So.2d 902,905-06 (Fla. 4th DCA 2004); Simmons v. State, 803 So.2d 787 (Fla. 1st DCA 2002); Fla. Stat. § 90.106.

In the instant case, the trial court had two good options, and a third option which, while erroneous, might not have destroyed the fairness of the trial. (1) He could have ruled, correctly, that defense counsel's cross-examination of Salvador was a proper inquiry into his possible involvement in the crime and his motivation to testify, with the good-faith basis for the questioning coming from reasonable inferences from the evidence (i.e., Salvador's evasiveness, his inconsistent statements concerning his whereabouts on the 17th, and all of the evidence

pertaining to nine-millimeter guns and ammunition), and possibly also coming from privileged client communications. (2) He could have ruled, correctly, that the state - - by failing to contemporaneously object to the cross-examination, and seeking instead to gain a tactical advantage by using it as a vehicle to introduce unconstitutionally obtained statements - - waived any objection to the line of cross-examination. (3) Assuming without conceding that any "remedy" was warranted, he could simply have instructed the jury to disregard the questions and answers.

Instead, the judge accepted the prosecutor's invitation to take a completely inappropriate and unfair Option 4, which was to further instruct the jury that the reason he was telling them to disregard the cross-examination "[is] because there is no basis in fact from the evidence or the inference from the evidence for the asking of said questions" (25/2629). Plainly, this added comment, specifically objected to by the defense, was more than capable of conveying to the jurors that the trial judge believed there was no evidence of Robert Salvador's participation in the crime, and that defense counsel's accusatory questioning of Salvador was abusive and improper.

The prosecutor, at the climax of his initial closing argument, egregiously compounded the effect of the judge's comment that no evidence or inference from the evidence supported defense counsel's cross-examination of Salvador:

> Thursday, January 17th, 2008, that was the worst day in the life of [redacted], and it's the life that we've talked about. Thursday, January 17th, 2008 was the last day in the life of [redacted]. Wednesday of this week, August 26th of 2009, was the worst day in the life of Rob Salvador. Today, Friday, August 28th, 2009, is the

> day in the life of Michael King that he will be held responsible for the kidnapping, rape and murder of Denise Amber Lee. (27/3001)

The defense in this case - - which was undermined by the prosecutor's tactical machinations resulting in the judge's unwarranted instruction - - was that Rob Salvador was the person who actually shot and killed [redacted]. The judge's added comment on the evidence appeared to disapprove of the defense, and instead appeared to validate the state's argument that Robert Salvador had nothing to do with the crime. See Simmons, 803 So.2d at 788; Jacques, 678 So.2d at 905-06. The comment also suggested to the jury that defense counsel had done something improper, see Brown, 678 So.2d at 913, which in turn enabled the prosecutor to basically accuse defense counsel of persecuting poor Rob Salvador.

The entire sequence of events, and the apparent departure from judicial neutrality destroyed the fairness of the trial. See Brown, 11 So.3d at 433-34; Jacques, 883 So.2d at 905-06; Simmons, 803 So.2d at 788-89; Brown, 678 So.2d at 911-13; Fogelman, 648 So.2d at 219; Hamilton, 109 So.2d at 424-25.

Early on the next morning of trial, the judge heard and denied competing requests by the prosecutor and defense counsel. The prosecutor asked the judge to also strike the last cross-examination question ("And, Mr. Salvador, didn't you fire the shot that killed and took the life of [redacted]?"), while the defense asked for a mistrial due to the prejudicial effects of what had already taken place (25/2676-93;7/1237-42). In response to the state's request, and in his motion for mistrial, defense

counsel again set forth the facts and circumstances which he believed gave him a good-faith basis for all of the cross-examination of Salvador (25/2683-86,2690-92;7/1237-40). In the written motion, defense counsel stated:

> Furthermore, the State did not object to any of the questions at issue that were posed to Mr. Salvador by defense counsel. The State allowed the questioning to occur and conducted a redirect examination. It was only after Mr. Salvador stepped down from the witness stand that the State argued the defense counsel's line of questioning was improper.
>
> The instructions given to the jury by the Court to disregard the questions and answers at issue were in error. The instructions, without cause, effectively eliminated any defense for the Defendant.

(78/1240)(emphasis supplied).

The trial judge, in announcing that his rulings from yesterday remained in effect in all respects, added:

> Now, having said that, let's not go down the road or open - - reopen the door that I just closed regarding those other three questions. Obviously, Mr. Meisner, or whoever does the final argument, keep in mind that that ruling applies also to argument before the jury. Is that understood as well?
>
> MR. MEISNER: Yes, Your Honor.

(25/2688)(emphasis supplied).

Later that day, after the close of all the evidence, defense counsel sought to clarify what he could or could not argue to the jury, without running afoul of the judge's prior rulings. The trial judge answered that counsel was free to argue that Robert Salvador actually shot and killed Ms. Lee at the location where her body was found, but that he could not argue or imply that there was any agreement or plan for Salvador to meet King there (26/2932-39). The judge explained several times what he saw as

the rationale for his prior ruling, and how it would impact closing argument:

> Now, I would not sustain an objection - - you use your own wording - - I mean the way you want to phrase it is perfectly fine, you choose your words. If you were to say something along the lines, for instance, I didn't know how Mr. Salvador got there, arrived at the scene, we'll never know, but I do know blah, blah, blah, blah, what occurred there.
>
> ... ...
>
> We'll never know how he got there, we'll never know how he knew to go there.
>
> ... ...
>
> [I]f you said something to the effect of I don't know how he got there, I don't know - - or we'll never know why he did it, how he got there, you know, something along those lines.
>
> ... ...
>
> That's [the] main reason for any ruling, because you have this implication that they both agreed for whatever reason to meet at this location, and there is no evidence of that. I mean, how he got there - - I never, you're going to obviously argue that he got there. And you can go from there.

(26/2933,2934,2935-36)

The prosecutor wanted to make sure he understood: "You're describing an argument that would be to the effect of I don't know how they were going to be there, but I know he was there to - -" (26/2935).

> MR. AREND [Prosecutor]: What would cause me to object is if the argument was done in a manner that again suggested that it was coming from some information from King that was outside of what came in in the testimony. And I think you're probably going to stay away from that.
>
> MR. MEISNER [defense counsel]: At all costs. I'm going to argue only what was in the courtroom.

THE COURT: Do you understand the basis of my main reason for excluding it was you implied that they got together to go to the scene.

ME. MEISNER: I understand that was your ruling. Respectfully, I didn't agree with it, but I'm going to abide by it to the best of ability.
(26/2937)

The judge said:

Appreciate you all doing this now, I don't want to get into this - - objection, approach the Bench, objection, approach the Bench, objection, send the jury out - - that doesn't work for you or for him when it comes to final argument.

MR. MEISNER: That's why we discussed it early.

THE COURT: And I agree. But do you understand, Mr. Arend, what I'm saying?

MR. AREND: I do. I don't want us to be objecting through - -

THE COURT: As far as where I'm coming from as why I excluded, because of - -

MR. MEISNER: I think I fully understand what your decision is. (26/2938)

So it was abundantly clear to all concerned that under the terms of the court's ruling, defense counsel could not argue - - and was not going to argue - - that there was any plan or agreement for Salvador to meet King at Plantation and Panacea to commit this murder. Incredibly, in his initial closing argument, before defense counsel had a chance to say a word, Mr. Arend - - the same prosecutor who sandbagged the defense with his tactical belated objection to the cross-examination of Salvador - - ridiculed before the jury the very argument which the court told defense counsel he could not make:

MR. AREND: The third option, if you look at the facts, is that the defendant kidnapped and raped [redacted]

> but did not commit the murder. To believe the evidence would show this particular situation, you would have to believe that at the time at the gun range between Rob Salvador and Michael King or Michael King and any random third person that a plan is made to meet later in the day for a shooting to take place; that Rob Salvador, the man you met here, for some reason said, Hey, I've really always wanted to shoot somebody. Sure, I'm a gun enthusiast. That's something that I'd - - I'll do that. I'll meet you around 6:30 at Plantation. All the things happened throughout the day, the kidnapping, abduction, the rape, the things that happened at King's house. They get out to Plantation. And when you get to Plantation you have Michael King standing there with [redacted], and he says, I'll kidnap you, I'll rape you, but, damn it, I draw the line at murder. I'm not that bad of a man. Rob, come here and help me out and take care of this.
>
> And how is that based? Where does that come from? It comes from the idea that Salvador lied and that because Salvador lied at some point and the gun was not found and there's a question about the bullet, that that could suggest that Salvador did one of those two situations as I've described there. (26/2987-88)

In light of the prosecutor's argument, the judge's earlier comment on the evidence is shown to be even more prejudicial. To recap: defense counsel's questions on cross suggesting that there was a prior plan for Salvador to meet King at Plantation and Panacea on the evening of January 17 were stricken; the jury was instructed to completely disregard them; and the jury was further told by the judge that the reason "I'm asking you to disregard such [is] because there is no basis in fact from the evidence or the inference from the evidence for the asking of said questions." Then, after defense counsel was expressly prohibited from arguing that Salvador met King pursuant to a prior plan or agreement (basically told he could word it in some way that Salvador somehow materialized at the scene), and with the jurors already having been told by the judge that there was no evidence

or inference to support defense counsel's cross-examination of Salvador regarding a planned meeting, the prosecutor whose tactics gave rise to the whole botched sequence of events chose to compound the errors by ridiculing a defense theory which the defense was prevented from arguing. See Scipio v. State, 928 So.2d at 1150; Garcia v. State, 564 So.2d 124,128-29 (Fla. 1990); Quaggin v. State, 752 So.2d 19,26 (Fla. 5th DCA 2000); Miller v. State, 712 So.2d 451,453(Fla. 2d DCA 1998).

For a criminal defendant, closing argument is, or should be, his last clear chance to persuade the jury that a reasonable doubt may exist. Herring v. New York, 422 U.S. 853,862 (1975); Williams v. State, 912 So.2d 66,68 (Fla. 4th DCA 2005). A trial court abuses its discretion when it limits defense counsel's closing argument in such a way as to prevent him from presenting his theory of the case to the jury. Jean v. State, 27 So.3d 784, 786 (Fla. 3d DCA 2010); Goodrich v. State, 854 So.2d 663 (Fla. 3d DCA 2003); Hendrickson v. State, 851 So.2d 808,810 (Fla. 2d DCA 2002). In addition, no area is more deserving of "wide latitude" than defense counsel's ability to argue the credibility of the witnesses who testified at trial. Williams, 912 So.2d at 68; Goodrich, 854 So.2d at 665. In this case, the trial judge - - by striking counsel's cross-examination of Salvador and by commenting to the jury (at the prosecutor's request) that there was no evidence or inference to support the cross-examination - - improperly bolstered Salvador's credibility with the jurors, while simultaneously suggesting that defense counsel had tried to mislead them. Then, based on his prior erroneous rulings, the

judge hamstrung defense counsel's ability to argue his theory of the case; counsel could only contend that Salvador somehow appeared at the scene to commit the murder, but he could not even imply that there was a plan or agreement. And then, the prosecutor - - aided significantly by the judge's earlier comment to the jurors that there was no evidence or inference to support defense counsel's cross-examination of Salvador about a planned meeting - - proceeded to rip the already eviscerated defense to shreds. King's constitutional right to effective assistance of counsel and his right to present his defense were irreparably violated. See Goodrich, 854 So.2d at 665; United States v. Kellington, 217 F.3d 1084,1099-1100 (9th Cir. 2000); State v. Frost, 161 P.3d 361,365-66 (Wash. 2007).

And even that was not all. The purpose of an opening statement "is to outline what an attorney expects to be established by the evidence". Stephens v. State, 975 So.2d 405,420-21 (Fla. 2007), quoting Occhicone v. State, 570 So.2d 902,904 (Fla. 1990). In the instant case the prosecutor properly outlined his view of the evidence as follows:

> This is the case about the last day in the life of [redacted]. This is the case where you will be presented with the evidence that shows that Michael King kidnapped [redacted] from her home. This is the case where you will hear evidence that Michael King raped [redacted] in his home. And this is the case you will hear evidence that Michael King killed [redacted].(21/1836-37)

As previously mentioned, there was no specific defense presented on the kidnapping and sexual battery charges; only on the murder. Defense counsel properly outlined his view of the evidence as follows:

> Ladies and gentlemen of the jury, this case will present you with a question of identity. Who killed [redacted]?
>
> The evidence will show that on January 17, 2008, a person placed a gun to the head of this young woman and fired a single shot that ended her life. The evidence will also show that the person who placed the gun to her head, the person who fired that single shot, the person who ended her life was not Michael King. (21/1843-44)

After discussing Robert Salvador and the questions he expected to arise regarding the nine-millimeter handgun and ammunition, defense counsel ended his opening statement, "And at the conclusion of this trial, the evidence will show that Michael King did not fire the shot that ended [redacted] life" (21/1849).

As was shown earlier in this Point on Appeal, if the jurors believed Robert Salvador was the actual killer, or had a reasonable doubt whether it was Salvador or King, they could not have convicted King on the murder charge under the instructions they were given. The state neither objected to the instructions which were given, nor requested an instruction on principals as to either premeditated or felony murder. To the contrary, the prosecutor understood that the issue before the jury was whether Michael King was the person who actually killed [redacted] (26/2995), and the prosecutor aggressively took the position that Robert Salvador had nothing whatsoever to do with the murder. The state's effort to persuade the jury of that position was the motivation for every one of the prosecutor's requests, objections, and tactical maneuvers which are the subject of this composite Point on Appeal.

In his closing argument to the jury, the prosecutor read back to them what defense counsel had said in opening statement he expected the evidence to show (26/2989-90). The prosecutor then said to the jury:

> I submit to you to hold them to the statement that they said to you in opening and ask for the evidence that they said would show that someone other than Michael King committed this offense.

(26/2990)(emphasis supplied)

Defense counsel objected on the ground that the prosecutor's comment shifted the burden of proof. When the trial court overruled his objection, defense counsel unsuccessfully moved for a mistrial on that ground and on the previous grounds raised (26/2990).

As this Court recognized in Gore v. State, 719 So.2d 1197,1200 (Fla. 1998):

> The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt.

See also Ramirez v. State, 1 So.3d 383,386 (Fla. 4th DCA 2009); Paul v. State, 980 So.2d 1282 (Fla. 4th DCA 2008).

Defense counsel, in outlining in his opening statement his theory of defense and what he expected the evidence to show, was not assuming the burden of proof, nor did he "invite" the state's burden-shifting remarks to the jury. See People v. Beasley, 893 N.E.2d 1032,1040 (Ill.App. 2008)("[W]hile defendant may have invited the State to explain why it chose not to submit certain

items for fingerprinting, a defendant in a criminal case can never "open the door" to shift the burden of proof"). Except in cases involving an affirmative defense such as insanity, an accused need not produce any evidence or meet any burden of proof or persuasion. It is incumbent on the prosecution to prove beyond a reasonable doubt every element of the charge, and a reasonable doubt can arise from the evidence, lack of evidence, or conflict in the evidence.

The prosecutor's statement to the jurors urging them to ask the defense for evidence that someone other than King committed the murder was a blatantly improper burden-shifting comment, made all the more egregious by all of his earlier tactical efforts to torpedo the defense's theory that Robert Salvador was the killer.

In view of the pervasiveness of the series of rulings and comments (by the judge as well as the prosecutor) which violated King's constitutionally guaranteed rights to present his defense, to confront and cross-examine a critical adverse witness, and to the appearance of judicial impartiality, the state cannot meet its "harmless error" burden of showing beyond a reasonable doubt that each of the errors and improprieties - - individually and especially in combination - - could not have contributed to the murder conviction. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1989); Cooper v. State, 2010 WL 3339170 (Fla. Aug. 26, 2010). Obviously the prosecutor believed that defense counsel's cross-examination of Robert Salvador might affect the jury's view of the case, or he wouldn't have been so anxious to have it stricken. Similarly, if the prosecutor thought it didn't matter, he'd

have been satisfied with the judge's instruction to disregard the cross-examination, and he wouldn't have pressed so hard for the further instruction to the jury - - amounting to a judicial comment on the evidence - - that no evidence or inference supported defense counsel's questions. Finally, if the prosecutor believed it would make no difference, he wouldn't have compounded the errors by ridiculing a defense theory which defense counsel was precluded from arguing, and shifting the burden of proof by urging the jurors to ask the defense for the evidence that someone other than King committed the murder. Nothing in this ongoing sequence of events was inadvertent or isolated; the torpedoing of the defense that Robert Salvador was the actual killer resulted from a series of tactical decisions by the state. See Gunn v. State, 78 Fla. 599, 83 So. 511 (1919); Farnell v. State, 214 So.2d 753,764 (Fla. 2d DCA 1968)("Who can say that the [errors complained of]...did not and could not have the effect that the state's attorney intended). The limitation of cross-examination and the resulting restriction of defense counsel's closing argument, exacerbated by the judge's comment on the evidence and the prosecutor's improper closing argument, destroyed King's ability and violated his right to present his defense on the murder charge, and cannot be deemed "harmless error". DiGuilio; Cooper; see also Joyner v. State, 678 N.E.2d 386,390 (Ind. 1997). King's conviction of first-degree murder, and the death sentence imposed on that count, should be reversed for a new trial.

ISSUE II. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE 47 FIRED CARTRIDGE CASES FROM THE GUN RANGE, NONE OF WHICH WERE SHOWN TO BE CONNECTED TO MICHAEL KING; AND FURTHER ERRED IN ALLOWING THE INTRODUCTION OF THE FDLE FIREARMS EXAMINER'S OPINION THAT THREE OF THOSE SHELL CASINGS WERE FIRED FROM THE SAME UNKNOWN FIREARM AS THE SINGLE FIRED CARTRIDGE CASE (ALSO NOT SHOWN TO BE CONNECTED TO KING) FOUND IN THE GRASS NEAR THE CRIME SCENE.

There are three insurmountable problems with the "It's a match because I say it's a match" testimony of FDLE firearms examiner John Romeo. The second (scientific unreliability) and third (no Frye hearing) are addressed in Issue III. But the threshold problem is relevancy.

In his pretrial motion in limine, defense counsel asserted:

> 2. The State of Florida cannot lay a proper foundation or predicate for such testimony.
>
> 3. Casings taken from a gun range on January 18, [2008] cannot be tied to Mr. King (and therefore no such opinion should be allowed into evidence).
>
> 4. Officer Saxton of the North Port Police Department went to the Knights Trail Gun Range on January 18 and collected several casings from the ground in the area where Mr. King has allegedly been THE DAY BEFORE. Everyone who uses the gun range has casings drop onto the floor. There is no way to determine what belongs to who unless someone had been standing there and immediately collected the casings and no others were present.
>
> 5. These casings were then sent to FDLE to compare to the casing found at the burial site.
>
> 6. Because the State of Florida cannot lay the proper foundation and/or chain of custody and cannot tie those casings to Mr. King, they should not be allowed to present the opinion of Mr. Romeo.
>
> (5/871)

The defense objected on relevancy grounds, and also contended that under §90.403 any marginal probative value was outweighed by prejudicial impact (5/871).

The trial judge denied this motion “subject to the State laying a proper foundation and chain of custody” (6/1010). At trial, when Officer Saxton began to testify that he was requested to go to a gun range, counsel renewed his objection to any evidence collected from the gun range. The judge overruled it based on his prior ruling, and said “[Y]ou may have a continuing objection as to that” (24/2437-38, see also 24/2442,2527).

The set-up at the Knight’s Trail Gun Range was described by Robert Salvador. The facility has a roofed pavilion lined with tables, and ranges of different lengths. [Salvador did not remember whether he and King were at the 10 yard range or the 25 yard range]. When firing a semiautomatic, the shells are ejected and fall on the ground. Asked what happens to the fired shells at the gun range, Salvador replied “They just get broomed into the dirt usually”. During the course of the day they get all over, and you can step on them and slip, so either the person shooting or gun range employees will from time to time sweep them out of the way (24/2547-50).

The sign-up sheet (State Exhibit 105) indicates that at least eight other customers arrived at the shooting range on January 17 before Salvador and King got there, and at least seven more came afterwards (31/149). Since the last entry appears to be at 2:45 p.m., it is likely that another sheet was used for later in the afternoon of the 17th, and there is no telling how many people used the gun range on the 18th before the police arrived there that day accompanied by Robert Salvador. [Also, since there was no testimony as to how often or how thoroughly gun range em-

ployees gather up and dispose of the accumulation of shells, many of them could have been there for days or even weeks prior to the 17th].

On the 18th, Salvador assisted the police in looking for "whatever 9 millimeter shells we could find that we could pick up" (24/2565-66). Whenever Salvador found a 9 millimeter shell, he would hand it over to one of the police officers that were helping (24/2566).

> Q: [by Ms. O'Donnell, prosecutor]: Did you show them where you were standing?
>
> A [Salvador]: Yes.
>
> Q: And were there still shells on the ground where you were standing?
>
> A: Yes.
>
> ... ...
>
> Q: And how many shells were around there?
>
> A: Thousands. (24/2565-66)

Officer Saxton testified that he met with other detectives and a subject (Robert Salvador) at the Knight's Trail Gun Range on January 18. They were looking for 9 millimeter Luger shell casings. Saxton received information telling him where to go within the gun range. He explained that there are tables facing out toward the down range area, "and then there is cement sidewalk and then behind there is grass and maybe little stones or shell." Saxton checked behind the tables and behind the cement area "where everybody sweeps the casings from the day [to]". He gathered a total of 47 casings; 45 Winchester Luger 9-millimeters and two Fiocchi USA 9-millimeter Lugers, and as far as he knew these were

all sent to the lab (24/2437-43,2446).

These 47 fired cartridge cases were irrelevant and inadmissible because they were not shown to have been fired by Michael King, nor were they shown to have ever been in the possession of Michael King (nor, for that matter, Robert Salvador). Green v. State, 27 So.3d 731,737-38 (Fla. 2d DCA 2010). See, e.g. Jones v. State, 32 So.3d 706,712-13 (Fla. 4th DCA 2010); Moore v. State, 1 So.3d 1177 (Fla. 5th DCA 2009); O'Connor v. State, 835 So.2d 1226,1231 (Fla. 4th DCA 2003); Cooper v. State, 778 So.2d 542,544 (Fla. 3d DCA 2001); Fugate v. State, 691 So.2d 53 (Fla. 4th DCA 1997); Sosa v. State, 639 So.2d 173,174 (Fla. 3d DCA 1994); Huhn v. State, 511 So.2d 583,589 (Fla. 4th DCA 1987).

A trial court's discretion in ruling on questions of admissibility is limited by the rules of evidence [see, e.g., Johnston v. State, 863 So.2d 271,278 (Fla. 2003); Nardone v. State, 798 So.2d 870,874 (Fla. 4th DCA 2001)], and irrelevant, prejudicial evidence cannot be introduced. [Fla.Stat. §§90.402; 90.403; see,e.g., O'Connor, 835 So.2d at 1230]. The state may contend that three of these 47 cartridge cases which were not shown to be connected to King became relevant when John Romeo offered his opinion that the markings on those cartridge cases matched the markings on the one cartridge case which was found in the vicinity of the crime scene. Aside from the scientific unreliability and subjectivity of Romeo's methods [Issue III], the problem with the state's anticipated argument is that the single cartridge case found near the scene was not independently shown to be connected to King either. It was found in the grass, during a large-scale search using

multiple metal detectors, near the burial site (which was in an abandoned construction site). There was no evidence of how long it had been there, or whether it was necessarily from the shot that killed [redacted]. [A cartridge case would have been ejected as a result of that shot, but the shooter could have picked it up and disposed of it]. The only way to "connect" that fired cartridge case with Michael King would be to assume - - as a basis for admissibility - - that King was the shooter (which is the very fact in dispute which the state's ballistics comparison was offered to prove). That is circular logic.

What occurred here is the state had its expert compare 47 fired 9mm cartridge cases not shown to be connected to King with one other fired 9mm cartridge case not shown to be connected to King, and (without having any 9mm firearm connected to King, and without testing the 9mm firearm which belonged to Robert Salvador) the expert purported to conclude with 100 per cent certainty that 3 of the 47 were fired from the same unknown firearm as the one cartridge case found near the crime scene. Apart from the scientific unreliability issues, the cartridge cases gathered at the gun range, which could have been fired by anyone who used that facility, were irrelevant, prejudicial, and inadmissible; and their introduction over objection was harmful error as to the murder conviction and death sentence.

ISSUE III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE FDLE FIREARMS EXAMINER ROMEO'S OPINION THAT HE WAS 100 PER CENT CERTAIN THAT THREE OF THE 47 CARTRIDGE CASES FROM THE GUN RANGE WERE FIRED FROM THE SAME UNKNOWN NINE-MILLIMETER FIREARM AS THE CARTRIDGE CASE FOUND NEAR THE CRIME SCENE; WHERE (1) ROMEO DID NOT EXAMINE OR TEST-FIRE ANY SPECIFIC FIREARM; (2) ROMEO'S METHODS WERE TOO SUBJECTIVE AND INSUFFICIENTLY RELIABLE TO ENABLE HIM TO CLAIM 100 PER CENT CERTAINTY BEFORE THE JURY; AND (3) THE JUDGE REFUSED TO HOLD A FRYE HEARING BEFORE ALLOWING THE STATE TO INTRODUCE ROMEO'S OPINION.

Asked by the prosecutor to define the term "took mark", FDLE firearms examiner Romeo explained, "The science behind what I do is tool mark identification in which a harder object, meaning a tool, marks a softer object when it come in contact with it either by impressing, striating, or a combination of both, marks of individual or unique nature onto a softer object. When it comes to firearms identification, the firearm just happens to be the tool that is imparting those unique characteristics" (25/2644-45).

In Ramirez v. State, 810 So.2d 836,845-46 (Fla. 2001), this Court noted that "[t]he basic principle in toolmark comparison is the reproduction of similar marks with the suspected tool or instrument, similarity as nearly as possible the conditions under which the original marks were made"[6] (emphasis supplied). A commonly used procedure is described in Ramirez as follows:

> (1) the expert attempts to duplicate the original crime-scene mark by using the suspected tool to create a comparable mark on a similar test medium; (2) the test mark (i.e., the "exemplar") is compared to the original mark via microscopic examination; (3) patterns of impressions or groups of striations are matched up under a three-dimensional stereoscopic comparison microscope; (4) two-dimensional photomicrographs (i.e., photos) of the comparison are taken for record purposes; and (5) if the marks are sufficiently similar, the

[6] Quoting Leland V. Jones, Locating and Preserving Evidence in Criminal Cases, in 1 Am.Jur. Trials 555,616 (1964).

> expert may conclude that they were made by the same tool (i.e., the suspected tool). [Footnote omitted]

(emphasis supplied)

The instant case does not involve a traditional ballistics test. Romeo did not have a suspected tool (unless one counts Robert Salvador's nine-millimeter firearm, which was not submitted to Romeo until the second day of the trial, and which - - for that reason - - was never tested). There was no "test mark" or "exemplar" to compare to the crime scene cartridge case. Instead, Romeo merely looked at 47 fired nine-millimeter shell casings randomly collected at the gun range, weeded out the ones which obviously had different class characteristics, and then using a comparison microscope concluded that three of the 47 had sufficiently similar individual characteristics to the crime scene cartridge case so that he could determine - - with 100 per cent certainty - - that they were fired from the same (unknown) nine-millimeter firearm.

Romeo's own testimony reveals a clear example of "It's a match because I say it's a match" junk science; exactly the kind of testimony which the Frye[7] test is designed to prevent because its misleading claim of infallibility unduly influences the jury. See Ramirez, 810 So.2d at 844,847 and 848-49; Flanagan v. State, 625 So.2d 827,828 (Fla. 1993); State v. Sercey, 825 So.2d 959,976 (Fla. 1st DCA 2002).

Defense counsel, in his amended motion in limine to exclude Romeo's opinion testimony, pointed out that this was not a traditional ballistics case, because Romeo's analysis did not include

[7]Frye v. Unites States, 293 F. 1013 (D.C. Cir. 1923).

test-firing of or comparison to any specific firearm; he was simply comparing the markings on the cartridge cases and purporting to state with 100% certainty that they were fired from the same weapon. The defense contended that Romeo's conclusion was (1) insufficiently reliable to warrant admission into evidence, (2) not based on adequate defining standards nor on adequate empirical foundation; (3) would mislead the jury; and (4) "[t]he testimony by Mr. Romeo that he is 100% certain that all of the [casings] were fired from the same weapon is not supported by underlying principles that have been sufficiently tested and accepted by the relevant scientific community" (6/1044-46,1052-54;see 21/1801-06). While defense counsel did not initially request a Frye hearing, he rethought his position on that and on August 19, 2009 (before trial but during jury selection) informed the prosecutor that he was going to be requesting a Frye hearing. On the 20th, defense counsel said he was going to re-file his written motion to clarify his position. The judge said, "Okay. Not a problem." (19/1494-95). The judge noted that both sides had already submitted authority. He asked defense counsel if he was going to provide any additional authority; defense counsel said no. The judge then asked the prosecutor, "Does this come as a surprise regarding the Frye? Are you going to need to give me additional authority or not?" (19/1495). The prosecutor replied:

> Judge, I'm going to need - - it's my position that we don't need a Frye hearing.
>
> THE COURT: I understand.
>
> MS. O'DONNELL [prosecutor]: ...And I will be providing that.

THE COURT: Sure. (19/1495)

It was agreed that a hearing on the threshold question (i.e., whether or not a Frye hearing was required) would be held the next day after jury selection, "[w]ith the understanding if we need to go the next step, we don't have to do it tomorrow" (19/1496).

As authority, the defense provided this Court's opinion in Ramirez (6/1063-82), and also submitted United States v. Glynn, 576 F.Supp. 2d 567 (S.D. N.Y. 2008)(finding, under federal Daubert[8] standard, that ballistics identification opinions are too significantly subjective and lacking in scientific rigor to be viewed as "science", and that government's expert would therefore be limited to opining only that a firearms match was "more likely than not", and could not testify that he reached his conclusions to any degree of certainty)(6/1055-61). [Note that the Frye test requires a higher level of reliability than the more lenient standard in Daubert. Ramirez, 810 So.2d at 843 n.8; Brim v. State, 695 So.2d 268,271-72 (Fla. 1997). See also State v. Sercey, 825 So.2d at 976, in which it was the state, successful in part in a state appeal, which asserted that the two gate-keeping tests in Frye and Daubert, both "designed to remove junk science from the courtroom" are sufficiently similar that Daubert-based caselaw can be persuasive in a Frye jurisdiction such as Florida]. In addition, the defense provided a 2009 study of the National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) (6/1083-87), which notes the subjectivity and

[8] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

vague standards for determining a "match", and recognizes that "the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated"; "[a] significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to quantitatively characterize the probability of uniqueness" (6/1086).

The state, in opposing the necessity for a Frye hearing, provided nine cases (6/1088-1200;7/1201-27)[9]. In eight of those nine cases, the ballistics testimony is simply mentioned in the recitation of the facts; there is no indication that it was either objected to at trial nor challenged on appeal. In only one of the cases - - Riner, decided in 1937 - - was the ballistics testimony challenged at all, and there is no indication that a Frye hearing was requested, held, or denied. [Frye was decided in 1923, but was not cited in any Florida caselaw until 1952[10]; a Westlaw search indicates that of the 205 Florida citations to Frye, 202 are from 1983 or later]. Seven of the nine cases appear to involve the traditional tool mark comparison method described in Ramirez, 810 So.2d at 846; i.e., where the expert has (1) one or more bullets or shell casings recovered from a body or crime scene, and (2) a known firearm suspected of being used in the crime. The expert

[9] Riner v. State, 176 So. 38,39-40 (Fla. 1937); Copeland v. State, 457 So.2d 1012,1015 (Fla. 1984); Smith v. State, 746 So.2d 1162,1165 (Fla. 1st DCA 1999); Francis v. State, 808 So.2d 110,121 (Fla. 2001); Anderson v. State, 822 So.2d 1261,1263 (Fla. 2002); Shaw v. State, 824 So.2d 265,267 (Fla. 4th DCA 2002); Parker v. State, 904 So.2d 370,373 (Fla. 2005); Hertz v. State, 941 So.2d 1031,1034 (Fla. 2006); Riechmann v. State, 966 So.2d 298,302 (Fla. 2007).

[10] Kaminski v. State, 63 So.2d 339,340 (Fla. 1952).

test-fires the firearm, and then microscopically compares the markings on the test-fired projectile or projectiles ("exemplars") with the markings on the crime-scene projectile or projectiles, and arrives at the opinion that the specific bullet or casing was fired from the specific gun. Riner, 176 So. at 39-40; Smith, 746 So.2d at 1165; Francis, 808 So.2d at 121; Anderson, 822 So.2d at 1263; Shaw, 824 So.2d at 267; Parker, 904 So.2d at 373; Hertz, 941 So.2d at 1034. In one case - - Reichmann, 966 So.2d at 302 - - the police found three handguns and several rounds of ammunition in the defendant's hotel room; the firearms examiner merely testified that the bullets were of the same type as the bullet that killed the victim, and that the fatal bullet could have been fired from any of the three makes of guns found in Reichmann's room. The only one of the state's cases which appears to involve a comparison of spent shell casing with spent shell casing in the absence of a known firearm is Copeland, 457 So.2d at 1015, and there is nothing in that opinion to suggest that the testimony was objected to below, or subjected to Frye testing to determine whether the examiner's methods were scientifically reliable, or challenged on appeal.

At the conclusion of the legal argument on the threshold question of whether a Frye hearing was required (21/1801-11), the trial judge declined to hold an evidentiary hearing, finding "that this is not a new or novel principle, theory or methodology" (21/1811). The judge cited three more cases found by Court Counsel - - Walker v. State, 957 So.2d 560,568-69 (Fla. 2007); Chavez v. State, 832 So.2d 730,744 (Fla. 2002); and State v. Williams, 992

So.2d 330,332 (Fla. 3d DCA 2008)(21/1811-12). [Walker and Chavez involve the comparison of bullets or casings with a specific firearm, while Williams - - like the instant case - - involves comparison of casings in the absence of a suspected firearm. In none of the three cases is there any suggestion that the ballistics testimony was objected to below; or that a Frye hearing was requested, held, or denied. No appellate issue challenging the ballistics testimony was raised or decided in Walker, 957 So.2d at 569, or Chavez, 832 So.2d at 747-67 and n.45, while Williams was a state petition for certiorari successfully challenging the exclusion of Williams Rule evidence].

Therefore, there does not appear to be any controlling Florida caselaw in which even traditional ballistics comparison has been approved or excluded after being subjected to a Frye hearing (see 21/1810-11). Nor does there appear to be any controlling caselaw (i.e, where the issue was raised) dealing with comparison of the markings on bullets or casings in the absence of a firearm. Nor is there any Florida caselaw on whether the methodology is sufficiently rigorous as to allow an expert to claim 100 per cent certainty, or whether his testimony should be limited to opining that the casings are consistent with having been fired from the same firearm, or that a match is “more likely than not” (see United States v. Glynn, supra, 578 F.Supp.2d at 568-75).

At trial, John Romeo testified over the defense’s renewed and continuing objections based on scientific unreliability (24/2527). His own testimony amply demonstrates the subjective nature and

lack of scientific rigor pointed out in the defense's motion and supporting authorities:

Romeo is an FDLE crime lab analyst supervisor, assigned to the firearms section. That section primarily deals with "examination of bullets, cartridge cases, and other ammunition components to determine if they could be identified or eliminated as having been fired in a specific firearm. Other duties include the determination of firing distance; serial number restoration; examination of firearms for function and operability; and (what he would be talking about today) comparing ammunition components in the absence of a firearm (25/2630-31).

Romeo received a total of 48 nine millimeter Luger fired cartridge cases. 47 of these were represented as having been removed from a firing range, and one was from a crime scene (25/2640-41). Using a comparison microscope ("a microscope with an optical bridge that allows me to see things side by side"), Romeo looked first for class characteristics. These define a broad group source, such as caliber, brand stamp, and firing pin shape (25/2641-44,2654-56). Subclass characteristics "are characteristics that define a smaller group source but are not indicative of a single firearm", while individual characteristics, according to Romeo, are tool marks "which are unique to every single firearm" (26/2656). Asked to explain what is meant by the term "tool mark", Romeo said "The science behind what I do is tool mark identification in which a harder object, meaning a tool, marks a softer object when it come in contact with it either by impressing, striating, or a combination of both, marks of individual or unique

nature onto a softer object.” In firearms identification, the firearm just happens to be the tool imparting those characteristics (25/2644-45). According to Romeo, every firearm - - even those manufactured on the assembly line - - is different microscopically. He acknowledged that he has no idea how many firearms manufacturers make 9 millimeters or have many 9 millimeter pistols are manufactured each year (25/2645,2656-57).

Romeo acknowledged that, in addition to objective factors, there is a “subjective component” in determining whether an observed characteristic is an individual characteristic or a subclass characteristic (25/2657-58,2662). He wouldn’t expect examiners to disagree “[i]f they were trained properly”, but he allowed that it was possible (25/2657-58). Specifically, it would be unlikely for examiners to disagree on whether something was an identification or whether it was an elimination (i.e., “the complete opposite”). However, there can be differences of opinion between whether an identification could be made or whether the results were inconclusive (25/2662-63).

Describing his own method of examination, Romeo said he would not necessarily “look at every single area of the cartridge case that was marked by the firearm. If I gotten to a sufficient agreement of individual characteristics, I may stop” (26/2661). Asked whether there was a minimum number of points of similarity he must find in order to conclude that the casings were fired from the same firearm, Romeo replied:

> For me, yes, there are. It would be - - my criteria would have to be met as to what I deemed sufficient agreement of quantity and quality of those individual marks.

MR. SCOTESE (defense counsel): That's your individual standard, correct?

A: That is correct. (25/2661)

Romeo agreed that another firearms examiner might require more or fewer points of similarity in order to determine a match or an exclusion (25/2661-62). "I should stress to the jury that it's not always about the number of lines. It also depends on the uniqueness of what I'm seeing, the uniqueness of the shape, for example" (25/2662).

State Exhibit 61 (FDLE no. 421), the shell casing from the crime scene, was a 9 millimeter Luger caliber. Romeo determined its class characteristics, as well as the class characteristics of the other 47 cartridge cases. Not all of these had the same class characteristics as the casing from the crime scene, so he separated out the ones that did from those that did not. Ultimately, using his comparison microscope "to inter-compare those microscopic marks and see if I had a reproducible pattern of sufficient quality and quantity" he concluded that three of the 47 fired cartridge cases submitted to him (FDLE nos. 420-42,420-46,and 420-47; contained within State Exhibit 104) had tool markings which were the same as the one fired cartridge case from the crime scene (25/2643-47;see 24/2442). [There were three different manufacturers; 420-42 was a Winchester casing, 420-46 and 420-47 were Fiocchi casings, while the casing from the crime scene was a Remington Peters (25/2643-44,2650-53)]. Asked how certain he was that these four cartridge casings were all fired from the same firearm, Romeo answered (over defense renewed and continuing

objection recognized by the trial judge) that he was absolutely sure; one hundred percent certain (25/2647-49).

Romeo's testimony provides a vivid example of what Frye-testing is designed to keep out of the courtroom - - "it's a match because I say so." See Ramirez v. State, 810 So.2d at 847,848-89, and 853. While Ramirez dealt with knife-mark identification, this Court's observations apply with equal force to Romeo's method of comparing shell casings (especially in the absence of a known firearm or exemplars produced by test-firing):

> According to Hart, a technician's ability to identify microscopic similarities in casts is developed by training and is passed on from one technician to another in the workplace. A "match" under his method is declared if there is "sufficient similarity" in the striated marks on the casts to eliminate the possibility of coincidence. This determination is entirely subjective and is based on the technician's training and experience; there is no minimum number of matching striations or percentage of agreement or other objective criteria that are used in this method. No photographs are made of the casts, Hart explained, because lay persons and those not trained in this procedure would be unable to understand the comparison process; similarly, no notes are made describing the basis for identification. Once a match is declared under this theory, no other knives are examined because an identification under this method purportedly eliminates all other knives in the world as possible sources of the wound. Under Hart's method of identification, a team of expert technicians trained by him would be virtually impossible to challenge notwithstanding the fact that his procedure is untested and yet to be accepted by the relevant scientific community. There is no objective criteria that must be met, there are no photographs, no comparisons of methodology to review, and the final deduction is in the eyes of the beholder, i.e., the identification is a match because the witness says it is a match.

810 So.2d at 847.

The underlying rationale for the Frye test is to ensure scientific reliability. Ramirez, 810 So.2d at 843-44; Arnold v.

State, 807 So.2d 136,140 (Fla. 4th DCA 2002). "If expert testimony relies on a scientific principle, test, or methodology which by its nature implies infallibility, it is subject to Frye." Ehrhardt, Florida Evidence (2010 Ed.), §702.3, p. 699-700; see Ramirez, 810 at 844 So.2d 847-49; Flanagan v. State, 625 So.2d at 828 (trustworthiness of expert scientific testimony is especially important because jurors will naturally assume that the scientific principles underlying the expert's conclusions are valid). The expert's "bold assertion" of the reliability of his own method is insufficient. Ramirez, at 844.

"In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply the principle to the case at hand". Ramirez, 810 So.2d at 844; Brim, 695 So. 2d at 272. Romeo himself explained on direct examination that "[t]he science behind what I do" is toolmark identification, and that ballistics identification is simply toolmark ID where the tool happens to be a firearm. As recognized in Ramirez, at 845 , "[t]he basic principle in toolmark comparison is the reproduction of similar marks with the suspected tool or instrument, simulating as nearly as possible the conditions under which the original marks were made." Plainly, then, whatever the level of reliability and general acceptance traditional ballistics identification may have [and a number of recent studies and appellate decisions have raised serious questions about that, emphasizing the extreme subjectivity and lack of standards for

determining a "match"][11], the scientific reliability of the testing procedures underlying Romeo's opinion in the case at hand - - purporting to conclude with 100 per cent certainty (without testing any specific firearm) that a spent cartridge case from the crime scene was fired from the same firearm as three spent cartridge cases from the gun range - - has never been established in Florida under the Frye test (or, as far as the undersigned can ascertain, in any U.S. jurisdiction under Frye or Daubert).

See Sexton v. State, 93 S.W. 3d 96,101 (Tex. Crim. App. 2002) in which the firearms examiner (Crumley) also claimed 100 per cent accuracy. The Texas Court of Criminal Appeals disagreed, finding the toolmark identification unreliable:

> Crumley's bare assertion is one that the available literature contradicts, however. The literature says that these marks may enable an examiner to connect cartridge cases with the same weapon. The only literature that explains what circumstances make it possible for an examiner to do so requires that the examiner possess knowledge of the manufacturing process of the tool surface and have the tool available for creating test toolmarks. In this case, the magazine or magazines that made the marks upon which Crumley based his identification were not found by the police. Therefore Crumley was not able to make test marks for comparison. Also, Crumley did not say whether he was familiar with the manufacturing process of the magazine or magazines that he said left identifiable marks on the live rounds and cartridge cases.

(emphasis in opinion)

See also United States v. Hicks, 389 F.3d 514,525 (5th Cir. 2004)("Hicks' case is wholly distinguishable from Sexton because

[11] See United States v. Glynn, supra, 578 F.Supp.2d at 569-75; United States v. Willock, 696 F.Supp.2d 536,549-74 (D.Md.2010); United States v. Taylor, 663 F.Supp.2d 1170,1172-80 (D.N.M. 2009); United States v. Monteiro, 407 F.Supp.2d 351,354-75 (D. Mass. 2006), and scientific studies cited therein.

the .30-30 rifle suspected of having produced the spent shell casings was available and was used for purposes of comparison testing")(emphasis in opinion).

What about the nine cases submitted by the state, and the three more found by court counsel, in which ballistics identification was introduced? In only one of those - - Riner from 1937 - - was the unreliability of the ballistics comparison even raised as an issue, and there is nothing to indicate that a Frye hearing was held in Riner. (Moreover, Riner involved a pistol which was introduced into evidence and was (presumably) test-fired by the firearms expert). Therefore, the trial judge in the instant case erred in concluding that the testing procedures used by Romeo to apply the principles of toolmark identification to the case at hand were not new or novel. Moreover, as recognized by Professor Ehrhardt:

> Although Frye applies to new or novel scientific techniques, its application should not be limited exclusively to unconventional evidence. When evidence rests upon a scientific principle, test, or methodology, Frye seeks to ensure that the evidence possesses a certain minimal level of reliability. Simply because the test or theory has existed for some period of time or because evidence based on that theory has been admitted in other legal actions does not mean that the evidence possesses the level of reliability demanded by Frye. The better view if that until the principle, test, or methodology has been subjected to a thorough Frye analysis in Florida, it should be subject to Frye testing". [footnotes omitted].

Ehrhardt, Florida Evidence (2010 Ed.), §702.3, p.704-05.

John Romeo's testimony is replete with statements revealing the subjectivity and lack of scientific standards for determining a "match" (25/2657-58,2661-63). Many of the reliability concerns discussed in Glynn, 578 F.Supp.2d at 569-75; Willock, 696

F.Supp.2d at 549-74; Taylor, 663 F.Supp.2d at 1172-80, and Monteiro, 407 F.Supp.2d at 354-75, and in the various reports and studies cited in those cases, are amply illustrated by Romeo's own statements. For example, Romeo agreed that it is up to the individual examiner to determine whether a given marking is a subclass characteristic or an individual characteristic (25/2957-58). He wouldn't expect examiners to disagree "[i]f they were trained properly", but he acknowledged it is possible, as there is a "subjective component" to that determination (25/2957-58). Examiners, according to Romeo, would be unlikely to disagree on whether what they are seeing is an identification or - - its polar opposite - - an elimination, but they might have a difference of opinion whether it is an identification or whether it is inconclusive (25/2662-63). Asked how many points of similarity are needed for an examiner to conclude that two or more cartridge cases were fired from the same firearm, Romeo acknowledged that he uses his own individual standard (25/2661). "[M]y criteria would have to be met as to what I deemed sufficient agreement of quantity and quality of those individual marks" (25/2661) (emphasis supplied). He agreed that another firearms examiner might require more or fewer points of similarity in order to determine a match (25/2661-62). Romeo's most disconcerting admission is that he doesn't necessarily even "look at every single area of the cartridge case that was marked by the firearm" (25/2661). If he sees what he considers sufficient agreement of individual characteristics, he may stop looking (25/2661). [This of course leaves open the possibility that there could be inconsistent markings on the

cartridge cases which Romeo never saw - - markings which might have resulted in an elimination, or perhaps a finding of inconclusiveness. The possibility that another examiner might have looked at all of the markings on the casing, or looked at different parts of the casing, might account for why even Romeo agreed that there can be differences of opinion as to "a match" vs. "inconclusive"].

Just as much as in Ramirez, this was "it's a match because I say so" junk science; unreliable and inadmissible under the Frye standard.

Under the less rigorous [see Ramirez, 810 So.2d at 843 n.8; Brim, 695 So.2d at 271-72] Daubert standard, recent federal District Court decisions have discussed some of these reliability concerns:

> According to a recent National Academies Report, "The validity of the fundamental assumptions of uniqueness and reproducibility of a firearms-related toolmarks has not yet been fully demonstrated." Ballistic Imaging, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, National Research Council of the National Acadamies, 3 (2008). That report went on to state, "A significant amount of research would be needed to scientifically determine the degree to which firearms-related toolmarks are unique or even to qualitatively characterize the probability of uniqueness." Id.

United States v. Taylor, 663 F.Supp. 2d at 1175-76.

> Arguably the biggest obstacle facing any firearms examiner is that there is no such thing as a "perfect match." Even two bullets known to have been fired consecutively from the same gun will display some differences. See Alfred A. Biasotti, A Statistical Study of the Individual Characteristics of Fired Bullets, 4 Forensic Sci. 34,44 (1959). Even more problematic, bullets fired from different guns may have significantly similar markings, reflecting class or sub-class, rather than individual, characteristics.

Taylor, at 1177.

> The Committee went on to say that, "a fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process....AFTE has adopted a theory of identification, but it does not provide a specific protocol." Id. At 5-21. At one point the Committee concluded that, "[e]ven with more training and experience using new techniques, the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." Id. At 5-20. Even the Government concedes that "the field continues to rely on a subjective match standard." Govt. Resp. [Doc. 313] at 20. See also Monteiro, 407 F.Supp.2d at 371-72 ("[O]ne critical problem with the AFTE Theory [of toolmark identification] is the lack of objective standards....[T]here is no generally accepted standard for distinguishing between class, subclass, and individual characteristics."); United States v. Green, 405 F.Supp.2d 104,114 (D.Mass.2005) ("In effect, there are no national standards to be applied to evaluate how many marks must match."); United States v. Glynn, 578 F.Supp.2d 567,572 (S.D.N.Y.2008) ("[B]allistics opinions are significantly subjective. Moreover, the standard defining when an examiner should declare a match-namely "sufficient agreement"-is inherently vague.").

Taylor, at 1178 (emphasis supplied).

> The conclusion that a recovered cartridge case matches a test-fired cartridge case is based on a subjective "threshold currently held in the minds eye of the examiner and...based largely on training and experience in observing the difference between known matching, and known non-matching impression toolmarks." Rich and Gryzbowski et al., Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards, 35 AFTE J.209,213 (2003)(Ex. 18). A recent article has highlighted the complexity of comparing patterns because of the difficulty in distinguishing between class, subclass, and individual characteristics, noting that a firearm "may be wrongly identified as the source of a toolmark it did not produce if an examiner confuses subclass characteristics shared by more than one tool with individual characteristics unique to one and only one tool." Schwartz, supra, at 8. both experts seem to agree that most examiners do not accept quantitative standards for determining whether two cartridge cases were fired from the same gun.

United State v. Monteiro, 407 F.Supp.2d at 362-63.

In view of the serious doubts of reliability, at the very least a firearms examiner should be "prevented from making outlandish and unsupported pronouncements about the degree of certainty of his or her identification." United States v. Willock, 696 F.Supp.2d at 469-70. "[W]ithout a proper basis for supporting the confidence level testified to, there is a real danger of misleading the jury." Willock, at 574.

Here, John Romeo testified, over the defense's renewed and continuing objection, that he was "absolutely sure" - - "a hundred percent certain" - - that the cartridge case from the crime scene was fired from the same firearm as three of the cartridge cases from the gun range (25/2647-49), despite Romeo not even test-firing any specific firearm. See Sexton. His purportedly scientific conclusion was unreliable, misleading, and inadmissible.

If this Court determines that the trial court erred in allowing the state to introduce Romeo's scientifically unreliable conclusion, it should reverse for a new trial on the murder conviction and the resulting death sentence. See Ramirez.

If the Court determines that the trial court's error was not in allowing Romeo's conclusion, but rather in allowing it without first subjecting it to a Frye hearing, then current caselaw would appear to permit a limited remand to the trial court to conduct a post-trial, post-appeal Frye hearing to determine whether Romeo's methods have gained general acceptance in the relevant scientific community (as of the time of the post-appeal hearing), with a new trial on the murder count granted only if the trial court finds

that the Frye test was not satisfied. Brim v. State, 695 So.2d at 275. Howver, undersigned counsel believes that, for the reasons recognized in Greene v. State, 351 So.2d 941 (Fla. 1977) and Land v. State, 293 So.2d 704 (Fla. 1974), such a remedy would be inadequate under the circumstances of this case. In Land, this Court held that a trial court's failure to conduct a pretrial evidentiary hearing on the voluntariness of a confession was error of such proportion as to require a new trial; a limited remand for a post-appeal hearing on the matter would not suffice:

> Otherwise, the result is 'piecemeal' prosecution. Where the hearings come after the trial, the likely result is that judges, who are concerned with, as was the majority below, 'court dockets (that) are entirely too congested' become somewhat less sensitive to due process considerations, and see retrial as 'useless and expensive trials which will serve no real purpose.' We, however, are convinced that, when a man's liberty is at stake, considerations of due process outweigh those of economics.

Greene, 351 So.2d at 942, quoting Land, 293 So.2d at 708.

As this Court further observed in Greene, "[a] judge is not a computer which can consistently make an objective determination as to the admissibility of a confession without the possibility that a prior jury verdict of guilt may influence that ruling." 351 So.2d at 942. While the instant case involves unreliable scientific testimony rather than a confession, the logic of Greene and Land applies. Especially in a case like this one, where there has been massive and emotionally galvanizing media coverage and community outrage (see the motion for change of venue and supporting documents, as well as the juror questionnaires and voir dire transcripts), it would be naïve to expect any trial judge not to

feel pressure to reach a decision in any post-trial, post-appeal Frye hearing which would allow the prior jury verdict to stand.

King's murder conviction and death sentence should be reversed for a new trial.

ISSUE IV. THE TRIAL COURT ERRED IN ACCEPTING AS GENUINE THE PROSECUTOR'S PROFFERED REASON FOR HIS PEREMPTORY STRIKE OF A MINORITY JUROR (111) BASED ON HER QUESTIONNAIRE RESPONSE, WHERE THE CLAIMED REASON WAS EQUALLY APPLICABLE OR MORE APPLICABLE TO OTHER JURORS WHOM THE PROSECUTOR DID NOT CHALLENGE, AND WHO SERVED ON THE JURY.

The defense objected to the prosecutor's peremptory excusal of juror 111, noting that "She is a minority, and we would ask for a race netural - -" (20/1764). The prosecutor replied:

> She's an 18-year-old female. She came across as meek, young and inexperienced. She's the youngest on the panel we have existing so far.
>
> Her statements during the original death qualification was that living life in prison is more awful than a death sentence. Her brother has a pending felony drug charge. She watches the television show CSI. Commonly, a concern of ours is that they would hold us to a TV standard as opposed to a regular standard.
>
> And based on those foregoing reasons, we exercise our peremptory challenge on Number 111.
>
> MR. SCOTESE [defense counsel]: Your Honor, it is our position that those are not sufficient reasons. There's many people here on this jury that have similar - - there is one person who is - -
>
> THE COURT: I understand on the panel you've got jurors who watch CSI or watch Perry Mason or whatever. That's not –
>
> MR. AREND: As single thing, a genuine – my race neutral reason, this is not a challenge for cause, she indicated that living a life in prison is more awful than a death sentence.
>
> THE COURT: Other jurors have said it. Other jurors have said the same thing.

> MR. AREND: And I will strike what other jurors are remaining on the panel that said that. I'm consistently getting rid of any –
>
> THE COURT: Here's what I'm going to find. The fact that – was it her brother who has a pending –
>
> MR. AREND: Yes. According to her questionnaire, her brother has a pending drug charge.
>
> THE COURT: Pending criminal charge? All right. I'm going to find based upon that that is a genuine race neutral reason and I'll grant the challenge, peremptorily. I'll find that the explanation is facially race neutral and the reason given is genuine; and given all the circumstances, the explanation is not a pretext and the strike will be sustained.
>
> That's as to Juror 111. So that brings us up to 114. (20/1764-66)

[Juror 114 was not challenged by either party, and he served on the jury (see 20/1779;27/3079)].

When defense counsel subsequently accepted the jury, he did so only subject to his prior objections, and the judge recognized "You're not waiving any of your objections whatsoever prior to this occasion as well as those made today regarding the make-up of this jury, and I accept that" (20/1769). See Joiner v. State, 618 So.2d 174 (Fla. 1993).

The striking of even a single juror for racial reasons violates the Equal Protection clause. State v. Slappy, 522 So.2d 18,21 (Fla. 1988); Bryant v. State, 565 So.2d 1298,1300 (Fla. 1990); Joiner v. State, 618 So.2d at 176; Young v. State, 744 So.2d 1077,1080 (Fla. 4th DCA 1999). "Each juror has a constitutional right to serve free of discrimination", Joiner, at 176, and in Florida both jurors and litigants have a right to a nondiscriminatory selection process. Murray v. State, 3 So.3d 1108,1119 (Fla. 2009). Where the party exercising a peremptory challenge of

a minority juror offers a facially race-neutral explanation, the next step is for the trial court to determine whether, in light of all the surrounding circumstances, the proffered reason is genuine or whether it is pretextual. Murray, 3 So.3d at 1120; Melbourne v. State, 679 So.2d 759,764 (Fla. 1996); Shuler v. State, 816So.2d 257 (Fla. 2d DCA 2002); Foster v. State, 732 So.2d 22 (Fla. 4th DCA 1999); Overstreet v. State, 712 So.2d 1174 (Fla. 3d DCA 1998). Among the factors which tend to negate the genuineness of a proferred explanation, and to show instead that it is an impermissible pretext, are a challenge based on reasons equally applicable to another juror or jurors who were not challenged, and failure to examine the juror (or perfunctory examination) regarding the matter giving rise to the challenge. Slappy, 522 So.2d at 22; Foster, 732 So.2d at 24; Overstreet, 712 So.2d at 1177; see Shuler, 816 So.2d at 259 ("Where [juror's] response was similar to the responses of other jurors who were not challenged by the prosecutor, the trial court erred in failing to reject the State's explanation as pretextual"); Fernandez v. State, 746 So.2d 516,518 (Fla. 3d DCA 1999) ("A perfunctory examination (or none) is indicative of a disingenuous or pretextual explanation for a challenge").

In the instant case, the trial judge expressed doubt as to some of the prosecutor's proffered reasons for striking juror 111; and the only basis for the strike which the judge evaluated, and found to be genuine rather than pretextual, was Mr. Arend's statement that "[a]ccording to her questionnaire, her brother has a pending drug charge."

First of all, the prosecutor's assertion regarding the questionnaire was not entirely accurate (which he might have realized if he had examined the juror about it). In response to questions 31 (Have you or a family member ever been arrested or charged with a crime?) and 32 (Have you or a family member been convicted of a crime?), she checked Yes, and where the questionnaire says "Please describe", she wrote "My brother has a felony drug charge." In response to question 33, asking if there are "any criminal charges pending against you or a family member of which you are aware?", she checked Yes, and wrote "My brother may be charged with disorderly conduct" (SR4/605). So if the prosecutor had read juror 111's questionnaire a little more carefully, he would have seen that there were no charges pending against her brother, only the possibility of a disorderly conduct charge being filed in the future. He would also have seen that the brother's felony drug charge was apparently a prior conviction.

The state will say on appeal that it doesn't matter because the brother's prior conviction would have been a valid race-neutral reason as well. And the state would be right were it not for the fact that other jurors who were not challenged by the prosecutor - - and who served on the jury - - also had family members who had been convicted of a crime. Most tellingly, juror 114, the very next juror up, gave answers on his questionnaire which - - if the prosecutor's reason for striking juror 111 had been genuine - - would have resulted in his being peremptorily challenged as well. Juror 114 checked Yes to question 31 ("Have you or a family member ever been arrested or charged with a

crime?). Where it says “Please describe”, he wrote “Private”. To question 32 (“Have you or a family member been convicted of a crime?), he again checked Yes and wrote “Private” (SR4/621). Obviously, if the prosecutor’s genuine concern had been to excuse all prospective jurors who had family members charged with or convicted of crimes, he would either have peremptorily challenged juror 114 based on his questionnaire responses, or at the very least he would have questioned him outside the presence of the other jurors[12] to determine the nature of the relationship, the seriousness of the charges (and whether they were similar to any of the charges in the case to be tried), and whether they would affect his ability to serve impartially.

In addition to juror 114, at least two other jurors, 92 and 125 (neither of whom were challenged by the state, and both of whom served on the jury)[13] stated on their questionnaires that they had close family members who had been charged with and convicted of felony offenses. Juror 92 has herself been charged with driving without a license, and her youngest brother is a convicted felon; she indicated that she does not recall the details (SR3/497). Juror 125’s son was charged and convicted (possibly as a juvenile, based on her statement in voir dire that she has two sons who six or seven years ago “were in the juvenile

[12] Jurors who are reluctant to discuss personal matters are often questioned on those subjects outside the presence of the others. Moreover, in this case individual voir dire of every prospective juror (including no. 114, see 16/824-30) was conducted regarding media coverage and the death penalty.

[13] The jurors who were selected and served on the jury (excluding the alternates) are 5,11,21,24,27,75,92,98,108,114,123, and 125 (20/1779;27/3074-80).

system back and forth") of burglary of a conveyance and throwing an explosive device (SR4/679,see 19/1532-33). A fourth selected juror (no. 75) has a brother who was convicted of DUI (SR3/403;20/1685).

During the group voir dire, the first topic the prosecutor brought up and discussed with many prospective jurors was whether they had ever been in a courtroom before and how they had perceived the experience (16/1517-64). Juror 98 (who was not challenged by the state, and who served on the jury) recently had to come to court because her son was involved in a fight; "[t]he details would be personal". The prosecutor said she didn't want to hear about the details. Asked if she watched the procedure, juror 98 answered, "It wasn't an actual trial. He had to come in for the charge". The incident did not cause her any ill will toward the criminal justice system; "[I]t was only upsetting that he had to be here" (19/1523-24;see SR3/532). Juror 92 (who was not challenged by the state and who served on the jury even though her questionnaire indicated her brother was a convicted felon) stated that her 11 year old son was a defendant in juvenile court last year, for damaging a school. Asked by the prosecutor if she had any resentment or ill will toward the court system because of that, juror 92 said she was upset that her son was called into court; it could have been taken care of outside the courtroom. She felt that her son's expulsion from school was sufficient punishment, and that it was excessive and a little harsh that he was also brought into court (19/1526-28).

When the prosecutor asked if anyone in the fourth row had ever been in a courtroom (aside from serving on a jury), juror no. 111 - - the minority juror who was peremptorily excused by the state - - raised her hand:

> PROSPECTIVE JUROR 111: My little sister got in trouble one time for stealing and my brother had a charge. I never been in a trial, but they just went up the –
>
> MS. FRAIVILLIG [prosecutor]: And you watched that? You were in the courtroom when that happened?
>
> PROSPECTIVE JUROR 111: Yes.
>
> MS. FRAIVILLIG: Anything about that that made you feel that you kind of are uncomfortable in the courtroom or that you learned something from that experience? Can you share any of that with us?
>
> PROSPECTIVE JUROR 111: I like it. I like watching CSI and stuff. So it was really interesting, so I probably –
>
> MS. FRAIVILLIG: So you're looking forward to this if you should be chosen?
>
> PROSPECTIVE JUROR 111: Yes. (19/1531)

Immediately after juror 111's last answer, the prosecutor asked juror 114 (the juror who said in his questionnaire that he or a family member had been charged with and convicted of a crime, and in response to "If yes, please describe" wrote "Private") if he had his hand up. Juror 114 replied, "No, I didn't" (19/1531-32). [Undersigned counsel is not suggesting that juror 114 was withholding information, since he may not have been in the courtroom when his relative was convicted. However, the prosecutor accepted him on the jury without ever inquiring into his questionnaire response].

During defense counsel's voir dire, she asked juror 111 if there was anything about the situation with her brother which

could affect her in sitting on a criminal case; she answered no (20/1699).

If the prosecutor's reason accepted by the trial court had been genuine rather than pretextual, then he [Mr. Arend] would at the very least have also struck juror 114, or at least examined him to find out which of his family members (or himself) had been convicted of a crime, what was the nature of the charge, and whether it was similar to the offenses being tried. And he would have also struck juror 92, whose brother - - like juror 111's brother - - is a convicted felon. See Foster v. State, 732 So.2d 22 (Fla. 4th DCA 1999), and contrast Allen v. State, 643 So.2d 87,88-89 (Fla. 3d DCA 1994). In Allen, the appellate court said:

> Appellant correctly recognizes that a challenge based on reasons equally applicable to jurors who were not challenged establishes an impermissible pretext. State v. Slappy, 522 So.2d 18,22 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). However, the trial transcript of the jury selection reveals that the trial judge struck Williams from the jury for reason not applicable to the other jurors. First, unlike the other jurors or their relatives, Williams' brother had been convicted of second degree murder, the exact same crime as the one charged to the defendant. More importantly, at a side bar conference, Williams told the judge that she thought the police and prosecution had treated her brother unfairly. These statements establish a possibility of prosecutorial prejudice in Williams not evident in the other jurors. Thus, it was fully within the trial judge's discretion to strike Williams from the jury for these reasons.

In the instant case, juror 111's questionnaire revealed what her brother was convicted of; a drug charge which has nothing to do with Michael King's trial (or even his penalty phase, since King was never a drug user). Juror 111 had no hesitancy in mentioning this fact and gave no indication that it would affect her in any way. Juror 114's questionnaire response of "Private", on

the other hand, not only failed to reveal who in his life was a convicted felon or what crime or crimes that person was found guilty of, it also suggests the existence of personal or emotional feelings on the juror's part. Yet the prosecutor neither delved into the matter, nor did he peremptorily challenge juror 114. The prosecutor also accepted juror 92, whose brother was a convicted felon, without any inquiry into the matter. All of this demonstrates that his reliance on his not-quite-accurate assertion regarding juror 111 that "[a]ccording to her questionnaire, her brother has a pending drug charge" was nothing more than an impermissible and racially discriminatory pretext.

This Court should reverse King's convictions and death sentence for a new trial.

ISSUE V. KING'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT WITHOUT POSSIBLITY OF PAROLE ON PROPORTIONALITY GROUNDS, BASED ON THE MITIGATION PRONG OF THE APPLICABLE TEST.

Proportionality review is a unique and highly serious function of this Court." Green v. State, 975 So.2d 1081,1087 (Fla. 2008). The death penalty in Florida is reserved for only the most aggravated and least mitigated of first-degree murders, and both prongs of that inquiry must be satisfied in order for a death sentence to be upheld. Cooper v. State, 739 So.2d 82,85 (Fla. 1999); Almeida v. State, 748 So.2d 922,933 (Fla. 1999); Crook v. State, 908 So.2d 350,351 (Fla. 2005).

As in Crook, undersigned counsel concedes that the trial court's findings of four aggravating factors are supported by the record, and that the aggravation prong of the proportionality test

is met. Accordingly, this Court is "next required to determine whether this case also falls within the category of the least mitigated of murders for which the death penalty is reserved". 908 So.2d at 357 (emphasis in opinion).

Here, the trial court found as a statutory mitigating factor that King's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired by brain damage, resulting from a head injury suffered in a snow sledding accident at age six. [Dr. Wu had testified that PET scan results were "compatible with significant brain injury"]. Due to the conflicting opinions of the defense expert and the state's expert (Dr. Gamache) as to the applicability of the statutory mitigator, the trial court gave it moderate weight (11/2058-59). The court also found and gave moderate weight to two related nonstatutory mitigating factors, the head injury itself, and the fact that the frontal lobe damage may cause "bizarre behavior, paranoia, lack of impulse control, aggression, impaired cognition, and risk-taking" (11/2060-61). [In the penalty phase extensive testimony was presented from Michael King's brothers Gary and Rodney, two former girlfriends, and Dr. Wu regarding King's history of intermittently displaying such behaviors, both during his adolescence and during the stressful period in the weeks preceding the crime (27/3195-2000,28/3259,3380-81,3384-88;29/3469-81,3494,3492-93,3498-3502,3516-28,3531,3536-41)]. See Santos v. State, 629 So.2d 838,840 (Fla. 1994) (mitigating factors "establishing substantial mental imbalance and loss of psychological control" are among the weightiest).

The trial court also found and gave moderate weight to King's borderline IQ (in between mentally retarded and low average), and to King's history of non-violence (11/2061-62). The court found as a mitigator but gave little weight to King's depression, headaches, and stress in the weeks before the crime due to his unemployment, impending bankruptcy, impending foreclosure on his home, and his girlfriend breaking up with him (11/2062). Given some weight were the mitigators that King has never abused drugs or alcohol, and that he has been a cooperative inmate in jail before trial (11/2063). Given little weight were several other nonstatutory mitigators, including King's educational deficiencies (being placed in special ed and learning disabled classes, and having to repeat grades); his being a good father to his 13 year old son; his close relationship with his friends and family; and his being a good worker (21/2061-63).

The evidence in the penalty phase shows that despite a lifetime of difficulties largely caused by his brain damage and learning deficiencies, Michael King managed to live a useful life - - gainfully employed as a plumber, never abusing alcohol or drugs, raising his son as a single father - - until this inexplicable violent explosion on January 17, 2008. While the aggravating factors are extreme, it should not be lost sight of that all four aggravators arose on the day of the murder, during the course of the criminal episode. Based on the totality of the mitigating evidence, considering all of King's life history, it cannot be concluded that this is among the least mitigated of first-degree

murders. King’s death sentence should therefore be reduced to life imprisonment without possibility of parole.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his three convictions [Issue IV], or his first degree murder conviction only [Issues I, II, and III], and his death sentence, and remand for a new trial. Appellant also requests that this Court reduce his death sentence to life imprisonment without possibility of parole [Issue V].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Scott Browne, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2011.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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