IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-1949

MICHAEL L. KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF TWELFTH JUDICIAL CIRCUIT FOR SARASOTA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 08-CF-1087

INITIAL BRIEF OF APPELLANT

Maria Christine Perinetti
Florida Bar No. 0013837
Raheela Ahmed
Florida Bar No. 0713457
Donna Ellen Venable
Florida Bar No. 100816
CAPITAL COLLATERAL
REGIONAL COUNSEL-
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

Statutes

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Michael Lee King's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851. Page references to the record on appeal are designated with R[volume number]/[page no]. Citations to the postconviction record on appeal will be cited in the form PC[volume number]/page number].

REQUEST FOR ORAL ARGUMENT

Given the gravity of the case and the complexity of the issues raised herein, King, through counsel, respectfully requests this Court grant oral argument.

STATEMENT OF THE CASE

Michael King was charged by consolidated indictment and information in Sarasota County with first degree murder, kidnapping, and sexual battery of Denise Amber Lee. R1/63-64; R11/2107-09; R13/260, 263. The case was tried before the Honorable Deno G. Economou. King was represented by Assistant Public Defenders Carolyn Schlemmer, John Scotese, and Jerome Meisner. Assistant State Attorneys Lon Arend, Suzanne O'Donnell, and Karen Frauvillig represented the State of Florida. Jury selection took place on August 17-21, 2009. The guilt/innocence phase of the trial took place on August 24-28, 2009. On August 28, 2009, the jury returned guilty verdicts for all three counts. R7/1267-68. The penalty

phase trial took place on May 23-24, 2006. On September 4, 2009 the jury unanimously recommended death. R7/1354. A *Spencer*[1] hearing was held on October 28, 2009. R30/3757-66. The Court imposed a death sentence on December 4, 2009. R30/3771-92. The sentencing order is located at R11/2047-64. The judgments are located at R7/1366-67 and R11/2138-39.

The judgment and sentence were affirmed in an opinion dated February 9, 2012. *King v. State*, 89 So. 3d 209 (Fla. 2012). This Court denied rehearing on May 21, 2012. *King v. State*, 2012 Fla. LEXIS 1193 (Fla. 2012). The United States Supreme Court denied certiorari on October 15, 2012. *King v. Florida*, 133 S.Ct. 478, 184 L.Ed. 2d 300 (2012).

King filed a Motion to Vacate Judgment and Sentence on September 4, 2013. PC2/282-343. The State filed its Answer on November 4, 2013. PC3/347-399. A case management conference was held on February 3, 2014. On February 4, 2014 the circuit court issued an order granting an evidentiary hearing on Claims I, II, and VI. PC5/784-85.

An evidentiary hearing was held on June 23, 2014. The circuit court filed an order denying King's Motion to Vacate Judgment and Sentence on August 21, 2014. PC8/1173-94. A notice of appeal was timely filed on September 19, 2014.

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

PC9/1422-23.

STATEMENT OF FACTS

Evidence Presented at Trial

In the opinion on direct appeal in the case at hand, this Court summarized the testimony presented during the guilt phase trial:

> The trial court record reflects that on January 17, 2008, at approximately 3:30 p.m., Nathan Lee returned to his home on Latour Avenue in North Port, Florida, to find his wife, Denise Amber Lee, missing. The doors were locked, but her keys, purse, and cellular telephone were in the house. The couple's two sons, ages six months and two years, were in a crib together, which was not typical. At around 4 p.m. that day, Detective Chris Morales of the North Port Police Department was notified that Denise Lee was missing. When Morales responded to the home on Latour Avenue, he found no signs of forced entry or a struggle, and the children were unharmed.
>
> Earlier that day, between 1 and 2 p.m., a neighbor of the Lees was watching television from a position which provided a view of the street. During that time, she saw a green Camaro "creeping up and down my road going very slow." The Camaro had a black "car bra," which is a leather or vinyl casing across the front of the car which protects against impact from insects or rocks. The neighbor observed the car circle the street four or five times. When the neighbor walked outside to investigate because the driver appeared to be lost, the car pulled into the Lees' driveway. The neighbor made eye contact with the driver but, believing that the operator of the vehicle had found the residence he was looking for, she returned to her house. Ten or fifteen minutes later, the neighbor again stepped outside and saw the Camaro depart from the Lees' residence. The neighbor did not observe Denise Lee entering or being forced into the Camaro.
>
> Later that day, between the hours of 5:30 and 6 p.m., Michael King unexpectedly arrived at the home of his cousin, Harold Muxlow. King

was wearing a white shirt with a design. King asked Muxlow for a flashlight, a gas can, and a shovel, explaining that his lawnmower was stuck in his front yard. After Muxlow provided King the tools, King immediately left. As Muxlow was walking back to his house, he heard a female voice from the vehicle exclaim, "Call the cops." Muxlow turned around and walked down the driveway toward King, asking what he was doing. King lifted his head from beside the passenger side of the car and replied, "Nothing, don't worry about it." Muxlow initially turned and began to walk toward his house but, curious, he turned around once again and walked to the edge of the street toward the car. There, he saw King crawling over the console in the Camaro and pushing the head of a person with shoulder-length hair down in the back seat. He also observed part of the person's knee rise up. King then climbed into the driver's seat and drove away.

Thinking the incident was suspicious, Muxlow drove to King's residence to investigate if King had returned and whether a lawnmower was in fact stuck in the yard. When Muxlow arrived, he found neither King's green Camaro nor a lawnmower in King's yard. Muxlow placed an anonymous 911 phone call in which he provided a description of King's vehicle and informed the dispatcher that a person might be in the described vehicle against her will.

At 6:14 p.m., the Sarasota County Sheriff's Office received another 911 call. During trial, the parties stipulated that the female voice on this 911 call was that of Denise Lee. Harold Muxlow testified that a second, male voice also present on the 911 recording was that of his cousin, Michael King. The recording of the 911 call presented during trial was transcribed by the court reporter as follows:

> DISPATCHER: 911.
>
> [LEE: I'm sorry. I'm sorry. I just want to go—]
>
> DISPATCHER: Hello?
>
> [LEE: I'm sorry. I just want to see my family.]
>
> MALE VOICE: Why did you do that?

LEE: I'm sorry. [I just want to see my family.]

DISPATCHER: Hello?

LEE: I just want to see my family again. Please.

DISPATCHER: Hello? Hello?

LEE: I just want to see my family again. Let me go.

DISPATCHER: Hello?

MALE VOICE: (Inaudible) the f**king phone.

LEE: Please let me go. Please let me go. Please let me see my family again.

MALE VOICE: No f**king problem.

LEE: Okay.

DISPATCHER: Hello?

(Inaudible).

LEE: I'm sorry.

[MALE VOICE: I was gonna let you go and then you go f**k around.]

LEE: [I'm sorry. Please] let me go.

MALE VOICE: Where's my phone?

DISPATCHER: Hello?

[MALE VOICE: Now I've got to go to the next street because of him.]

LEE: I'm sorry. Please let me go.

MALE VOICE: What are you doing?

(Inaudible)

LEE: Please let me go, please. Oh, God, please.

[MALE VOICE: (inaudible) in front of my cousin Harold.]

DISPATCHER: Hello?

LEE: Please let me go, [God] please.

MALE VOICE: I told you I would.

DISPATCHER: Hello?

LEE: Help me.

DISPATCHER: What's the address?

LEE: Please help me.

DISPATCHER: What's the address that you're at? [(to supervisor): Coming off the North Port Tower.]

LEE: Please.

MALE VOICE: I'm not (inaudible).

DISPATCHER: Hello?

LEE: Please let me go.

DISPATCHER: What is the address that you're at? Hello, ma'am?

LEE: Where are we going?

MALE VOICE: I've got to go up and around now because of what you did.

LEE: Up and around where?

MALE VOICE: Didn't you see (inaudible). Exactly four streets—well, five streets over from your house.

LEE: I couldn't tell (inaudible).

DISPATCHER: What's your name, ma'am? Hello? What's your name?

LEE: Please. My name is Denise. I'm married to a beautiful husband, and I just want to see my kids again.

DISPATCHER: Your name's Denise?

LEE: I'm sorry.

DISPATCHER (to supervisor): I'm thinking too, that he doesn't know.

LEE: Please, God. Please protect me.

DISPATCHER: Are you on I-75?

LEE: Where are we?

[MALE VOICE: What did you do with my cell phone?]

LEE: I don't know. Please. Protect me, please.

DISPATCHER: Where are you at? Can you tell if you're on I-75?

LEE: I don't know where your phone is. I'm sorry.

[MALE VOICE: You be honest with me.]

LEE: Can't you just tell me where we are?

DISPATCHER: Are you blindfolded? If you are, press the button.

LEE: I don't have your phone. Please, God.

(Inaudible).

LEE: I don't have it. I'm sorry.

DISPATCHER: Denise? Do you know this guy?

[MALE VOICE: Be honest.]

LEE: I don't—I don't have it. I'm sorry.

DISPATCHER: Denise, do you know this guy? (to supervisor: She might have the phone laid down and not hear a thing I'm saying too. He keeps saying a phone.)

LEE: I don't know where it is. Maybe if I could see I could help you find it.

(Inaudible).

[LEE: No, sir.]

DISPATCHER: Denise?

LEE: I'm looking for it. Uh-huh?

DISPATCHER: How long have you been gone from your house?

LEE: I don't know.

DISPATCHER: How long?

LEE: I don't know.

DISPATCHER: Do you know how long you've been gone from your house?

(Inaudible).

DISPATCHER: What's your last name?

LEE: Lee.

DISPATCHER: Lee?

LEE: Yeah.

DISPATCHER: Do you know-

LEE: I don't know where your phone is.

DISPATCHER: Your name is Denise Lee?

LEE: Uh-huh.

DISPATCHER: Can you tell at all what street you're on?

LEE: No.

DISPATCHER: Do you know this guy that's with you?

LEE: No.

DISPATCHER: You don't know him from anywhere?

LEE: No. Please. Oh, God, help me.

DISPATCHER: What's your address? What's your home address; do you know?

(Inaudible).

LEE: I don't know. Please just take me to my house. Can you take me home, on Latour, please?

DISPATCHER: Can you see or do you have a blindfold on?

LEE: I can't see. Where are we?

(Inaudible).

DISPATCHER: Can they turn off the radio or turn it down?

LEE: I can't hear you. It's too loud. Where are we?

(Inaudible).

LEE: Are you going to hurt me?

MALE VOICE: Give me the phone.

LEE: Are you going to let me out now?

MALE VOICE: As soon as I get the phone.

LEE: Help me.

At that moment, the call was terminated. The cellular telephone number from which the 911 call was dialed was identified as belonging to Michael King. Law enforcement proceeded to King's residence in North Port and forcibly entered the premises; however, neither Lee nor King was there.

During the early evening of January 17, while Shawn Johnson was stopped at a traffic light, he heard an adult female voice screaming for help. At the North Port police station, Johnson subsequently selected Michael King from a photo lineup as the man who was operating the green Camaro from which the screams for help were emanating. Johnson also identified King as the driver during trial.

On that same day, at approximately 6:30 p.m., Jane Kowalski was stopped at a traffic light on Highway 41 when she heard someone screaming and a "commotion" coming from the Camaro that was in the

traffic lane beside her. Kowalski made eye contact with the male driver of the Camaro. She subsequently identified King from a photo lineup and also during trial as the man who was driving the car. Kowalski described the screaming as, "Horrific, terrified. I've never ever heard anything like that in my life." As she watched, the man driving the Camaro turned around and began to push something down in the backseat. After the driver finished the downward motion, Kowalski saw a hand rise up from the back seat and begin banging loudly on the passenger-side window. When the traffic light turned green, Kowalski hesitated with the intent to be in a position to read the license plate of the Camaro as it passed. However, King refused to drive forward and, when Kowalski began to slowly roll forward, he changed traffic lanes and pulled behind her. When Kowalski realized that King would not pass her, she dialed 911 and described her observations of the Camaro and the behavior of the driver. While speaking with the dispatcher, Kowalski observed the Camaro make another lane change and then make a left turn onto Toledo Blade Boulevard, heading toward Interstate 75. Due to the traffic, she was unable to change lanes and follow the Camaro.

At 9 p.m. that evening, Deputy Christian Wymer and State Trooper Edward Pope were posted at Toledo Blade Boulevard near Interstate 75 watching for a green Camaro. From a series of "be on the lookout" (BOLO) announcements, the officers had a description of the car, a license plate number, and driver's license photos of Lee and King. At approximately 9:10 p.m., a green Camaro matching the description given in the BOLO drove from Toledo Blade Boulevard onto the on-ramp for I-75 southbound. Trooper Pope followed the Camaro and eventually caused it to stop. Based upon the information he had at that time, Pope conducted a felony stop, i.e., he placed his vehicle in a tactical position and drew his weapon. He ordered the driver to exit the vehicle multiple times, but the driver did not comply. Only after a fifth command, during which Pope advised that if the driver did not comply, he (Pope) would fire into the vehicle, the door opened and the driver exited from the front door backwards, leaning over the console toward the passenger seat. Pope identified the driver as a "perfect match" to the person on Michael King's driver's license.

During the stop, Pope observed that King was wet from the waist down and had mud resin on the base of his shoes. King was wearing jeans and a shirt with a camouflage pattern. In King's pockets, Pope discovered a wallet that contained King's driver's license with a photo that matched the picture that Pope had previously received. Pope also recovered a cellular phone, from which the battery and the SIM card had been removed. On the bra of the Camaro, Pope observed hair strands, and he also observed hair strands on the spoiler with what appeared to be blood pellets. A viscous, sap-like substance was present on the bra of the car. Inside the vehicle, Pope observed a gas can on the passenger seat and a cellular phone battery on the passenger-side floorboard. Pope observed a blanket and a ring in the backseat; however, Lee was not in the car. During trial, the parties stipulated that the ring found in the backseat of the Camaro belonged to Denise Lee.

After the car was towed to the North Port Police Department, a shovel with dirt caked on the underside was discovered in the back seat. During trial, Harold Muxlow identified the shovel as the one that he gave King on the afternoon of January 17. A palm print found on the outside of the driver's-side window of the Camaro was identified as belonging to Denise Lee. DNA testing on the hair recovered from the outside of the Camaro matched the known profile of Lee to the exclusion of 110 trillion other Caucasians. Hair found in the backseat of the Camaro matched Lee's DNA to the exclusion of 9 trillion other individuals. The blanket located in the backseat tested positive for blood and matched Lee's DNA to the exclusion of 9 trillion other individuals. Blood found on the outside of the Camaro matched the DNA profile of Denise Lee at the ten loci the DNA technician was able to derive from the sample. Similarly, the sap-like substance found on the bra of the Camaro matched the known DNA profile of Denise Lee at the eight loci the technician was able to derive from the swabbing.

After a search warrant was obtained, a thorough search of King's home was conducted. Upon entering the house, an evidence technician observed that there were a number of rectangular mirrors hanging on the wall side-by-side in the dining room; however, there was also one set of hooks on the wall not supporting a mirror. Upon entering the master bedroom, the technician noted that a yellow blanket covered the

window. A Winnie the Pooh blanket, pillows, and a wad of duct tape with hair attached were on the floor. Directly across from the pillows and the blanket, a mirror identical to those hanging in the dining room was propped against the wall.

In the kitchen, the technician observed an intact roll of duct tape on the bar. A garbage bag in the pantry contained more duct tape with hair attached. The hairs that were attached to the duct tape in the garbage bag matched the known DNA profile of Denise Lee to the exclusion of 110 trillion other Caucasians. Swabs taken from the ends of the wadded duct tape located in the master bedroom matched the DNA profile of Michael King to the exclusion of one quadrillion other Caucasians. The Winnie the Pooh blanket found in the master bedroom tested positive for blood and semen. The semen on the blanket matched the known DNA profile of King to the exclusion of 1.1 quadrillion other individuals, and Lee could not be excluded as the contributor of the blood.

On January 18, during the subsequent effort to locate Denise Lee, an individual involved in the search noticed an area of land near Plantation Boulevard in North Port where the earth appeared to be disturbed. In the vicinity of the disturbed area were two small piles of sand that were out of place for the normal terrain. In those two piles of sand were what appeared to be blood. According to a crime scene technician, it appeared that the blood had been on the ground previously and the sand had been placed on top of the blood because the sand had absorbed the blood. A forensics team commenced the excavation of the disturbed area on the morning of January 19. As the team removed the earth, they noticed scallop marks, which were consistent with a round-nose shovel digging straight down into the earth. At a depth of three feet one inch, the team discovered the nude body of Denise Lee, lying on her side in a fetal position. A gunshot wound was visible on the body, and there was water in the bottom of the hole.

A couple of days after the body of Lee was recovered, a single nine-millimeter shell casing was discovered in the grass near the gravesite, but a projectile was never found. A couple of hundred yards away from the gravesite, a crime scene technician recovered a pair of boxer shorts owned by Nathan Lee—but often worn by Denise Lee—and a shirt

belonging to Denise Lee. The boxer shorts tested positive for sperm cells, and those cells matched the DNA profile of King to the exclusion of 3.5 trillion other individuals.

During the trial, State witness Robert Salvador testified that on the day of the abduction, he and King engaged in target practice at a local firing range. The sign-in sheet for the range reflected times of 11:57 a.m. for Salvador and 11:58 a.m. for King. Upon arriving at the range, Salvador observed King remove a nine-millimeter handgun from under the passenger seat of his Camaro. Salvador and King stayed at the range for approximately one hour and, during that time, King fired at least three weapons—his own nine-millimeter handgun, Salvador's nine-millimeter handgun, and one of Salvador's twenty-two caliber handguns. King did not bring any ammunition to the firing range, so Salvador allowed King to use his ammunition. Salvador believed that when the duo left the range, there was no more ammunition in King's gun, but also testified that there were times when Salvador was not looking when King could have taken ammunition from Salvador's supply. On the return to their vehicles, Salvador carried King's pistol in a bag because range rules prohibited the open carrying of firearms. King's nine-millimeter handgun was returned to its original position under the passenger seat of the Camaro.

During the investigation, Salvador met law enforcement officials at the range and identified the location where he and King had been firing. With Salvador's assistance, the North Port Police Department collected forty-seven nine-millimeter shell casings from the tables and the ground where King and Salvador had been firing on January 17. A crime analyst from the Florida Department of Law Enforcement confirmed that the tool-marks on the casing found near the burial site matched the tool-marks on three of the forty-seven casings collected from the firing range. However, no DNA was recovered from the shell casing discovered at the burial site, and the weapon from which these casings had been fired was never found.

The medical examiner testified that Denise Lee died from a single gunshot wound to the head. The size of the wound indicated that the bullet could not have been larger than one centimeter, and that the projectile that caused the injury could have been from either a nine-

> millimeter or a thirty-eight caliber weapon. Further, the wound was consistent with the gun having been placed against Lee's head at the time it was fired. The location of the entrance wound, to the right of Lee's right eyebrow, led the medical examiner to conclude that the gun would have been in Lee's field of vision if her eyes were open. The medical examiner further explained that when the gun was discharged, Lee's eye exploded, and he opined that the sap-like substance located on the bra of the Camaro could have been Lee's ocular fluid. According to the medical examiner, there was aspirated blood in Lee's lungs, which indicates that Lee continued to breathe for a period of time after the wound was inflicted.
>
> With regard to the rest of Lee's body, two pieces of duct tape were removed from her hair during the autopsy. The medical examiner found bruises on Lee's wrists and, due to their same general location on each wrist, concluded that they could have been caused by ligatures and were consistent with defensive injuries. The medical examiner noted that Lee had vaginal bruising and anal tearing, both of which were caused by insertion trauma. The medical examiner concluded from the condition of the injuries that they were inflicted pre-mortem and were nonconsensual. Semen recovered from Lee's vagina matched the DNA profile of King to the exclusion of 1 quadrillion other Caucasians.

King v. State, 89 So. 3d 209, 212-219 (Fla. 2012).

This Court also summarized the testimony presented during the penalty phase trial:

> During the penalty phase, the State offered victim impact statements from Lee's father and Lee's husband. King offered the testimony of Dr. Joseph Chong Sang Wu, who conducted a PET scan on King. According to Wu, the PET scan demonstrated abnormal activity within his frontal lobe. Wu concluded that this abnormal activity was consistent with a traumatic brain injury. The PET scan also revealed an abnormal notch or divot in King's frontal lobe at the top of his head. Wu testified that when King was six years old, he suffered a head injury in a sledding accident, and his siblings reported that his behavior changed significantly after that incident. Wu testified that individuals

who suffer frontal lobe injuries are more likely to have poor judgment, exhibit blunted affect, take excessive risks, have difficulty regulating impulses such as aggression, and have difficulty separating fantasy from reality. With regard to the latter, Wu was provided with statements from family members reporting that when King was seventeen, after watching the movie *The Texas Chainsaw Massacre*, he obtained a chainsaw and started chasing family members with it, while exhibiting no expression on his face. At the age of thirteen, while acting out a cartoon, King nearly killed his brother with a bow and arrow. After the sledding injury, King required special education services. According to Wu, King's most recent verbal IQ score placed him in the borderline retarded range.

King also suffered from headaches and buzzing in his head, both of which were exacerbated by stress. In December 2007, after breaking up with a girlfriend, facing bankruptcy along with the loss of his Florida home, and being unemployed for a prolonged period of time, King began to behave strangely, as if dazed. At times he appeared to be in a catatonic state. Family members testified that he became paranoid during that time. Further, a second girlfriend stated that on January 15, 2008 (two days before the abduction), King's behavior was becoming more extreme in that he believed the neighbors were looking in the windows. Wu concluded that, due to the frontal lobe injury, King demonstrates a significant impairment in his ability to conform his behavior to the requirements of law. On cross-examination, however, Wu admitted that he had not been provided with information about King's affect or behavior on January 17 or 18.

King's siblings, his father, and his sister-in-law testified further as to King's sledding accident and his strange, risk-taking behavior after that incident. Furthermore, the family and King's girlfriends testified that they never saw King abuse drugs or alcohol. Testimony was presented that King was a successful plumber, he tried to lead an honest life, and he never became violent with women, even when the earlier girlfriend who broke up with King was the aggressor and struck him. King's sister-in-law testified that King's wife left him for a man she met on the Internet, after which King obtained custody of their son. When King returned to Florida in early 2008 to attempt to redeem his house from

foreclosure, the son remained with King's brother and sister-in-law in Michigan. The son, who was thirteen at the time of the penalty phase, is currently an excellent student in Michigan, but has attended counseling to help him cope with his mother's departure and his father's actions.

A records custodian at the Sarasota Sheriff's Office testified that during the entire time King was incarcerated, he never received a disciplinary report. A jail deputy also testified that King's behavior had been good.

Dr. Kenneth Visser performed an IQ test on King, which produced a verbal IQ score of 71, a performance IQ score of 85, and a full scale IQ of 76. This placed King in the borderline intellectual functioning range. However, on cross-examination, Visser opined that the ability of King to concentrate was actually stronger than the IQ score indicated. Visser stated that King was strong in important areas such as comprehension of why laws are necessary and why certain rules are in place. King was also strong in his ability to look at a situation, understand its natural progression, and predict the consequences. Visser testified that he did not perform validity testing to detect whether King was malingering. On redirect examination, Visser referred to King's childhood education records which demonstrated that he was held back in first grade, that at age eight he could not write all of the letters of the alphabet, and that a social worker in 1984 recommended that King continue his placement as a special-education student.

The State presented Dr. Michael Gamache, who testified that he conducted psychometric tests on King to evaluate his cognitive skills. A validity test administered to King indicated that he was not applying full effort and, therefore, Gamache concluded that the test results were not reliable as an indication of King's actual abilities. Gamache also administered an IQ test to King, which produced a full scale IQ of 76. However, Gamache testified that IQ scores tend to remain stable throughout one's lifetime, and when King took IQ tests in 1979 and 1984—both after the sledding accident—he received full IQ scores of 85 and 82, respectively. Gamache opined that King's true IQ score is likely in the low average range, or somewhere in the 80s.

Gamache disagreed with Wu that some of King's symptoms reported by his girlfriends and family were consistent with frontal lobe damage. For example, Gamache testified that paranoia and difficulty separating fantasy from reality are symptoms atypical of frontal lobe damage, but rather are a sign of psychosis. Further, he asserted that blunted affect is not indicative of frontal lobe damage. Instead, inappropriate affect is more common because it is consistent with the inability to control impulses. Based upon his evaluation of King and the records he reviewed—which included correspondence between King and family members, employment records, interviews and deposition transcripts, and competency evaluations—Gamache concluded that King's ability to conform his conduct to the requirements of the law is not substantially impaired.

Finally, the State presented the testimony of Detective Chris Morales who was in the presence of King for eight or nine hours on January 17 and 18, 2008. Morales testified that during that time, King was lucid, conversational, and appeared normal. On cross-examination, Morales acknowledged that during one phone call to his brother, King spoke of a conspiracy that he was going to be raped, beaten, and murdered by the jailers and urged his brother to call 911 from Michigan.

On September 4, 2009, the jury recommended a death sentence by a vote of twelve to zero. During the *Spencer* hearing, the defense presented the following additional documents: bankruptcy records; King's divorce file; school records; jail records to demonstrate good behavior and King's unwillingness to take medication; and work records.

On December 4, 2009, the trial judge sentenced King to death for the murder of Denise Amber Lee. In pronouncing King's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel (HAC), *see* § 921.141(5)(h), Fla. Stat. (2007) (great weight); (2) the murder was cold, calculated, and premeditated (CCP), *see* § 921.141(5)(i), Fla. Stat. (2007) (great weight); (3) the murder was committed for the purpose of avoiding lawful arrest, *see* § 921.141(5)(e), Fla. Stat. (2007) (great weight); and (4) the murder was committed while King was engaged in

> the commission of a sexual battery or kidnapping, *see* § 921.141(5)(d), Fla. Stat. (2007) (moderate weight).
>
> The trial court concluded that King established the existence of two statutory mitigating circumstances: (1) King's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, *see* § 921.141(6)(f), Fla. Stat. (2008) (moderate weight); and (2) his age at the time of the offense (thirty-six years old), *see* § 921.141(6)(g), Fla. Stat. (little weight). The trial court found thirteen nonstatutory mitigating circumstances, which included: (1) a head injury in 1978 (moderate weight); (2) a PET scan with abnormal findings in the frontal lobe demonstrating a brain injury (moderate weight); (3) an IQ in the borderline range between low average and mentally retarded (moderate weight); (4) repeating grades in school and being placed in special education classes (little weight); (5) being despondent and depressed and attempting to address his bankruptcy, unemployment, a failed marriage, an impending foreclosure on his home, and breaking up with his girlfriend (little weight); (6) a history of nonviolence (moderate weight); (7) being a cooperative inmate (some weight); (8) never abusing drugs or alcohol (some weight); (9) having a thirteen-year-old son whom he helped raise and for whom he cares (little weight); (10) being a good father (little weight); (11) being a devoted boyfriend (little weight); (12) being a good worker (little weight); and (13) having a close relationship with family and friends (little weight). The trial court concluded that the aggravating circumstances established in this case substantially outweighed the mitigating circumstances and imposed a sentence of death upon Michael King.

King, 89 So. 3d at 219-222.

Evidence Presented in Postconviction

The defense called five witnesses at the evidentiary hearing, and the State called one witness. Additionally, the defense introduced as Defense Exhibit A the Department of Motor Vehicles records of the jurors and potential jurors as self-

authenticating business records, which identified their races and genders. PC12/1809-1959. The content of the witness' testimony is as follows:

Lori Wagoner

Lori Wagoner has worked as a plumber for fifteen years, and is currently an employee at Babe's Plumbing. PC11/1736. She worked with King at Babe's from 2004-2007, where King was also a plumber. PC11/1737. The two went on calls together ten to fifteen times. PC11/1742. King seemed capable of doing his job as a plumber. PC11/1744. King complained to her of headaches. PC11/1737.

Ms. Wagoner testified that she and King used the following products on a daily basis in 2004-2007: Oatey's CPVC glue, Oatey's purple primer, Oatey's clear primer, 50/50 solder, 910 solder, Dapp caulk, hydraulic cement, regular sand base cement, and lead Oakum. PC11/1737-40. They used these products under houses and in attics, where temperatures reached 110-115 degrees in the summer. PC11/1739. Babe's provided ventilation fans for some areas, but sometimes the areas where they were working were too small to fit a fan. PC11/1739-40. The products caused dizziness if they stayed there long enough and did not get air, and the effects were worsened by heat and/or lack of ventilation. PC11/1739-40. She described how CPVC glue made her feel high, and her eyes became glossy. PC11/1740. The effects she experienced appeared to be temporary. PC11/1744.

She is not aware of any plumbers from Babe's who have been diagnosed with or treated for brain damage, including herself. PC11/1743.

Ms. Wagoner was not contacted by King's attorneys or any experts regarding King prior to his trial in 2009. PC11/1740-41. She would have been available to testify at King's trial about everything she testified to at the postconviction evidentiary hearing. PC11/1741-42.

Andrés Lugo, M.D.

Andrés Lugo, M.D. is a medical toxicologist with approximately 28 years of experience. PC10/1555. He would have been available to consult on King's case in 2008 or 2009. V10/1595. He holds a Master of Science degree in toxicology from the University of Minnesota and a medical degree from the University of Mexico, and he is a fellow of the American College of Toxicology. PC10/1556, 1558. His previous employment experience includes work at a poison control center, and he is currently employed full time as a toxicology consultant. PC10/1557. He holds a license to practice medicine in Mexico, and he treats patients who have been exposed to toxic substances. PC10/1558. His CV was introduced as Defense Exhibit B. PC7/1062-66.

Dr. Lugo was hired by CCRC-Middle to look at the possibility of King's exposure to toxic substances while he was working as a plumber. PC10/1566. After

looking at King's background and family history, Dr. Lugo expanded his toxicology investigation to also include exposure to pesticides. PC10/1566. Dr. Lugo was provided with King's medical records, employment records, school records, competency evaluations, mental health evaluations, penalty phase testimony and aerial photographs of the areas where King grew up. PC10/1567. He also conducted independent research and interviewed King, King's parents, King's three brothers (James, Gary, and Rodney), King's girlfriend (Jennifer Robb), King's coworker (Lori Wagoner), and Dr. Penner, a professor from Michigan State University who has been doing a lot of research on pesticides. PC10/1568-69. The information that Dr. Lugo received from collateral sources was consistent with what King reported. V10/1611.

Public health assessments or toxicology health assessments use a methodology developed by the U.S. Department of Health, whereby data is gathered to determine when and how an individual was exposed to toxic substances. PC10/15769-70. Dr. Lugo has been performing public health assessments for almost twenty years, and King's case was not the first time he conducted a public health assessment in a capital case. PC10/1571.

Dr. Lugo's first objective in conducting a public health assessment of King was to identify any potential toxic exposures. PC10/1571-72. He identified the

addresses where King and his family lived in Michigan when King was growing up. PC10/1573-74. Although these areas have become more developed, at the time they were mostly rural areas dedicated to farmland. PC10/1574. When King's mother was pregnant with him, the family lived at 3117 Clifford Road in Silverwood on two acres of land that they were working close to large agricultural areas where pesticides were applied. PC10/1573-74. From 1979 to 1986, the family lived at 2608 West Walton Boulevard in Waterford, which was near some farmland and a golf course. PC10/1574-75. Finally, in 1986, the family moved to 1840 Hadley Road in Ortonville, where they had some acres for farming. PC10/1574. Even during the years when King and his family were not living on farms, there were larger farms in the area. PC10/1575.

In addition to living near a golf course from 1979 to 1986, King and his brothers also worked at the golf course fixing the irrigation systems, getting into the tanks, and cleaning. PC10/175. An abundance of herbicides, pesticides, and fertilizers are applied to golf courses to keep the grass looking nice and green. PC10/1575.

Prior to the age of 18, King was exposed to pesticides including Carbofuran, Diphonate, Heptachlor, Toxaphene, Parathion, and Methyl Parathion. Many of the pesticides used in Michigan in the 1970s and 1980s are currently banned in the

United States and all over the world because of their severe neurotoxic side effects. PC10/1576-77. Although the negative effects of pesticides have been widely known since the late 1990's to early 2000's, when King was growing up in the 1970's and 1980's, people were not aware of the problems with these pesticides, and they did not take measures to protect themselves. PC10/1576, 1579. Sometimes the pesticides were put into the irrigation systems. PC10/1577. Other times, they were applied by airplane dusters, which would spray the pesticides on the fields. PC10/1577. The chemicals were carried miles away, so even if one was not living on a farm, they could still be exposed by living near an agricultural field. PC10/1577. The water, food, and soil were all contaminated with pesticides. PC10/1578. Dr. Lugo testified that it is not practical to perform a blood test on an individual 20 to 30 years after they are exposed to pesticides to determine the level of pesticides in their blood. PC10/1578-79.

Dr. Lugo explained the difference between acute and chronic exposure to toxic substances. Acute exposure means that a person is exposed to the substance for a few hours, days, or possibly months. PC10/1579. Chronic exposure spans months or years, and is usually at a low level. PC10/1579. Chronic exposure is probably more damaging than acute exposure because there is a bioaccumulation of chemicals in the body, and they have an additive effect. PC10/1579-80. King's

exposure to pesticides was a chronic environmental exposure. PC10/1580.

Dr. Lugo described the potential side effects of the pesticides that King was exposed to when he was growing up. Children are more vulnerable to pesticide exposure than adults. PC10/1581. When a person is exposed early in life, either in the embryonic stage or during the developmental stages, the organs are affected, and the effects will probably last longer than if the person is exposed at any other time in his life. PC10/1580. This exposure can cause developmental problems, and can affect cognitive functions and brain functions. PC10/1582-83. Some pesticides are linked to low IQ and developmental brain defects. PC10/1583. Most of the pesticides King was exposed to as a child are linked to cognitive and behavioral problems. PC10/1583. Some of the side effects that King suffered included frequent headaches, orientation problems, and difficulty concentrating. PC10/1584. His school records also reflect poor performance in school, and he was placed in special education. PC10/184.

In addition to his exposure to pesticides, King was also exposed to toxic substances when he worked as a plumber. King was employed as a plumber for approximately 15 years, from 1992 through 2007. PC10/1584. The Occupational Health and Safety Administration classifies plumbing as a hazardous job. PC10/1585. Plumbers are exposed to toxic hazards, and they work with heavy

metals, salt chemical solvents, toxic gases, solvents, glues, and cements, under stressful situations, and at high temperatures. PC10/1585. The chemicals that King was using as a plumber are linked to brain damage. PC10/1589. King's exposure to chemicals when he worked as a plumber was both acute and chronic, such that he was repeatedly exposed over long periods of time with acute periods of severe exposure when he worked in areas with poor ventilation and in high temperatures. PC10/1586. This type of exposure is particularly harmful because his body was already saturated with chemicals when the acute exposure occurred, after which time he continued with his regular chronic exposure. PC10/1586.

Dr. Lugo described some of the side effects that can result from the chemicals King used as a plumber. Some of the chemicals King worked with can affect cognitive functions such as memory, concentration, moderate variable skills, and abstract thinking. PC10/1589. They can also have physical effects, such as numbness in the extremities, as well as headaches and dizziness, which King complained of in 2007. PC10/1589-90. The solvents King used can cause sedation, amnesia, drowsiness, impaired thinking, impaired reflexes, loss of orientation, passing out, and blackouts. PC10/1587-88, 1590. Depending on the amount of exposure, symptoms may last for a few hours to several days, and the exposure may cause permanent brain damage. PC10/1591. King suffered from some of these

symptoms, such as when he would become disoriented driving and would have to pull over or call his girlfriend because he could not find his way home. PC10/1588. Other people reported instances around 2007 when King would stare out the window without moving, or would look out the window without moving and say that someone was looking at him. PC10/1588.

Different people have different levels of susceptibility to toxic substances. PC10/1591. When an individual is exposed to one substance, and is subsequently exposed to another substance, there is an additive effect such that the effect of both substances is increased. PC10/1593. Prior head traumas or brain injuries can also have an additive effect, which makes a person more susceptible to toxic exposures. PC10/1593. In King's case, Dr. Lugo found that there was an additive effect due to King's history of head trauma, exposure to pesticides early in life, and later exposure to chemical solvents and toxic substances when he worked as a plumber. PC10/1594. King was more vulnerable to the toxic substances he was exposed to as a plumber because of his previous exposure to pesticides. PC10/1594.

Jerome Meisner

Jerome Meisner has been an attorney with the Office of the Public Defender in the Twelfth Circuit for 26 years, and he has tried four capital cases as co-counsel. PC10/1616. At the time of King's trial in August of 2009, he had only handled one

other capital case. PC10/1615. Although he is currently qualified to first chair a capital case, he was not death qualified at the time of King's trial. PC10/1616.

Mr. Meisner testified that he first became involved in King's case four or five months before the trial date. PC10/1616. Mr. Meisner and Mr. Scotese worked on the guilt phase, and Ms. Schlemmer worked primarily on the penalty phase. PC10/1617. Mr. Meisner did not assist in the penalty phase. PC10/1617.

Although Mr. Meisner does not have an independent recollection of the jury selection in King's case, he testified that his role during jury selection was to take notes and confer with co-counsel if necessary. PC10/1619-20. He takes notes during jury selection because the volume of information and the number of jurors involved can be difficult for an attorney to remember. PC10/1619. The attorneys may refer to these notes when making objections to peremptory challenges. PC10/1619-20.

Handwritten notes as notes Mr. Meisner created during King's jury selection were introduced as Defense Exhibit D. PC10/1620; PC7/1097-1171. Aside from the word "Jerry" with an arrow at the top of the page on which juror 111 is referenced (PC7/1133), Mr. Meisner recognized the rest of the handwriting in the notes as his own. PC10/1621. Although Mr. Meisner does not have any independent recollection of juror 111 or any discussions with co-counsel about juror 111

(PC10/1624-25), his notes concerning this juror read as follows:

> #111 Furlow
> LWOP more severe than D.P.
> Could consider DP/LWOP
> Retained → Could go both ways

PC7/1133.

"Furlow" referred to the juror's name. PC10/1623. "LWOP" stands for "life without parole" and "DP" stands for "death penalty". PC10/1623.

Following the above lines pertaining to juror 111, Mr. Meisner wrote "I absolutely believe the defendant guilty, don't know if I can forget what I heard outside, excused." PC7/1133. After reviewing the transcripts from voir dire regarding juror 111 and juror 113 (R16/817-824), Mr. Meisner determined that those statements were in reference to juror 113, and not juror 111. PC10/1624.

John Scotese

John Scotese has been an attorney with the Office of the Public Defender in the Twelfth Circuit since 1994. PC10/1628. He testified that he has handled a total of two capital trials, his second being King's case. PC10/1628. He believes that he was qualified to sit as a first chair at King's trial, and he is also currently death qualified. PC10/1629.

Mr. Scotese represented King in the case at hand. PC10/1630. He and Mr. Meisner handled the guilt phase, and Ms. Schlemmer handled the penalty phase.

PC10/1630. Mr. Scotese was heavily involved in the case in the first two or three months after King's arrest, and his involvement dropped off until six or seven months before trial. PC10/1630. He is sure that he had discussions with Ms. Schlemmer about penalty phase strategy, but he has no independent recollection about such discussions. PC10/1630.

By the time of King's trial, Mr. Scotese was familiar with *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). PC10/1631. He has received training in preserving appellate issues during jury selection, and whenever he objects to a peremptory strike made by the State on the basis of race or gender, it is his intention to preserve the issue for review on direct appeal. PC10/1631.

Ms. Schlemmer was the lead counsel during jury selection. PC10/1643. Mr. Scotese's role during jury selection in King's case was to take notes, question a few of the jurors, confer with co-counsel, and make objections where appropriate. PC10/1631-32. He took notes during jury selection so that he could have intelligent conversations with co-counsel about the jurors afterwards, or during the proceedings. PC10/1632. He referred to these notes when making objections during jury selection and during cause challenges. PC10/1632. Whenever he made objections during jury selection, it was with the approval of Ms. Schlemmer, who was the first chair in the case. PC10/1632. He spoke on the record only when

authorized to do so. PC10/1644.

Notes typed by Mr. Scotese during jury selection were introduced as Defense Exhibit D. PC10/1633; PC7/1068-95. Mr. Scotese typed the notes contemporaneously with the jurors speaking, and the notes were later edited to remove jurors who were not death qualified. PC10/1634, 1645. He made copies of the notes and provided them to co-counsel. PC10/1652.

Mr. Scotese's typed notes with handwritten notes added were introduced as State's Exhibit Two. PC7/1004-1054. The exhibit consists of two copies of Mr. Scotese's typed notes with different handwritten notes on each copy. PC10/1649. Mr. Scotese testified that the handwriting on both sets of notes appears to be his, but it is possible that these notes were written by someone else. PC1649-50. Next to the typed notes regarding juror 111 in the first set, the word "no" is written in what appears to be Mr. Scotese's handwriting. PC10/1653; PC7/1014. He did not have any independent recollection of writing the handwritten notes, or the meaning of the "yes's" and "no's" in the first set of notes. PC10/1650. He also did not know when the handwritten notes were written. PC10/1656.

In his notes regarding King's jury selection, Mr. Scotese recorded reasons why he did not want certain jurors so that he could have concise conversations with his co-counsel. PC10/1637-38. One example of a juror whom he would not want

on his jury was juror 8, about whom he noted, bolded and underlined, "**He is too eager to serve. Looks at Goff[2] and says he can "work out". He is a no for me. SEES GOFFF AND DL UNCLE STEVE WEEKLY. Not clear if Steve Lee is Uncle.**" PC7/1068; PC10/1637. Another example was juror 15, about whom he wrote "**I think juror 15 is a killer**." PC7/1070; PC10/1638. In contrast, he did not record any reasons in his notes for not wanting juror 111 on the jury. PC10/1638. In other places, he appeared to have written, "Carolyn doesn't like this person" after having discussions with Ms. Schlemmer. PC10/1645-46.

Although Mr. Scotese does not have any independent recollection of juror 111, his notes reflect the following:

> 111 African American. Young. Cashier at Winn Dixie. Born in 1990. Would be able to consider both LWOP and DP. Father's friend is police officer. LWOP is worse than DP. Her little sister got in trouble. Brother go[t] drug charge. They pled. She likes watching CSI so it was interesting exp.

PC7/1078-79.

As noted above, juror 111 is African American. PC10/1635. Mr. Scotese requested a race-neutral reason for the State's peremptory strike of juror 111 because he did not feel that there was anything obvious about her that would provide a race-neutral reason for the strike, and he wanted to see what the State would say.

[2] Mr. Goff is the victim's father.

PC10/1638.

It is Mr. Scotese's usual practice to note when a juror is a minority juror to preserve *Batson* or *Neil* challenges, or to remind himself to make these challenges. PC10/1635. He regularly objects when the State exercises a peremptory challenge on an African American juror, and it would be rare for him not to object. PC10/1636. The only situation he could think of where he would not object to the State's use of a peremptory challenge on an African American juror would be where the juror said something outrageous and he knew that there was no way the objection would be sustained. PC10/1636.

Mr. Scotese did not consider objecting to the peremptory strike of juror 111 on the basis of gender. PC10/1639. At the time of King's trial, Mr. Scotese does not believe he was familiar with the case law that holds that the Equal Protection Clause prohibits peremptory challenges on the basis of gender as well as race. PC10/1639. He believes, however, that female jurors are less likely to impose the death penalty. PC10/1639.

Mr. Scotese had access to the juror questionnaires during jury selection. PC10/1640-41. He does not recall whether he consulted juror 111's juror questionnaire when he was arguing his objection to see what her response was with regard to her brother's felony charge. PC10/1641. However, if he consulted juror

111's juror questionnaire and found a discrepancy between what the State said and what was actually in the juror's questionnaire, he would have brought that to the court's attention. PC10/1641.

Mr. Scotese did not conduct a comparative juror analysis with regard to juror 111. PC10/1641. It is not Mr. Scotese's usual practice to conduct a comparative juror analysis (ie. make a record with regard to the racial makeup of the jury pool in order to preserve that issue for appeal) when he makes *Batson* challenges. PC10/1640. Although he believes it makes for a better argument and it is something that he tries to do, he acknowledged that he is not very good at it. PC10/1640. He has not received any training or done any reading about comparative juror analysis. PC10/1640.

Mr. Scotese did not recall any communications with Ms. Schlemmer or Mr. Meisner from the time he made the objection to the State's peremptory strike of juror 111 until the objection was denied. PC10/1641-42. Neither co-counsel urged him to abandon his objection in any way. PC10/1642. Mr. Scotese further testified that he was not at any point trying to lose his objection so that the State would be able to strike juror 111, and when he made the objection he was trying his hardest to preserve the issue for direct appeal. PC10/1642, 1657.

Carolyn Schlemmer

Carolyn Schlemmer has been an attorney since 1981. PC11/1686. At the time of the evidentiary hearing, she was employed at the Office of the Public Defender in the Twelfth Circuit as the capital division chief for the capital divisions of Manatee and Desoto Counties. PC11/1671. She has handled approximately 15 death penalty cases. PC11/1673.

At the time her office was appointed to represent King in 2008, Ms. Schlemmer was the only death qualified attorney in her entire office, so she became involved right away. PC11/1671-72. Mr. Scotese also became involved pretty much immediately, and Mr. Meisner came on the case later. PC11/1672-73. Mr. Scotese and Mr. Meisner handled the guilt phase portion of the case, and Mr. Schlemmer was in charge of the penalty phase. PC11/1673. They were assisted by two investigators, Woody Speed and Karen Tekely (McClellan). PC11/1674.

As lead penalty phase counsel, Ms. Schlemmer made pretty much all of the decisions, including which witnesses to call and which experts to retain. PC11/1675-76. She began the penalty phase investigation very early on in the case. PC11/1676. King was cooperative in signing record releases, but when her investigator attempted to obtain medical records from Michigan they had been destroyed. PC11/1676, 1704. In all, seven psychologists had contact with King. PC11/1704. The Public

Defender's Office hired Dr. Wu, Dr. Sesta, Dr. Ross, and Dr. Kasper. PC11/1677. Dr. Sesta, Dr. Ross, and Dr. Kasper felt that King was malingering, and the results of their neuropsychological testing were invalid. PC11/1693-95, 1698-1700. Ms. Schlemmer determined that King was competent, and that he was not mentally retarded. PC11/1691. There was no mitigation in terms of mental health, but a PET scan of King revealed a brain injury that resulted from a sledding accident, which they brought out at the penalty phase trial through Dr. Wu, as well as King's family members. PC11/1677-78, 1707. Dr. Visser, who performed a competency evaluation, testified about King's low IQ. PC11/1702.

Through her investigator, Ms. McClellan, who traveled to Michigan and interviewed King's family members, Ms. Schlemmer learned about some of the places where King grew up. PC11/1679-80. She learned that King lived on a farm for part of his life. PC11/1680. She was also aware that King worked as a plumber, and she obtained his employment records, which she introduced during the *Spencer* hearing. PC11/1680. Some of his employers had information about King being dishonest or inappropriate with women. PC11/1710-11. When she was questioned about whether she asked any of the experts to look into King's exposure to chemicals or toxins, Ms. Schlemmer replied as follows:

> Q. Did you specifically ask any of your experts, any of them to look into exposure of chemicals or toxins in Mr. King's life?

> A. Apparently I had because there was several notes that we talked about at deposition throughout my files where we were discussing neurotoxic exposure, poisoning, things such as that.
>
> Q. Who did you specifically talk to about that?
>
> A. It was a note in my file regarding Dr. Sesta and Dr. Ross. They worked in conjunction, but they formed their own opinions. I think Dr. Ross even went to see Mr. King if I'm not mistaken as well. It started back on February 11th of 2008, there was a note by me that he was exposed to marijuana or crack pipe fumes. The doctor believed there was nothing medical as a result of that. He didn't have any medical problems. 04/29/08, which would be this note here, I have from Dr. Sesta. It says, "No neurotoxic exposure, no neuro injury. The defendant claims he passed out from rat poison. The doctor doesn't believe it." There was no neurological defense.

PC11/1681-82.

King's family members attributed King's behavior to his sledding accident, and they never mentioned poison, toxins, or living on a farm. PC11/1705. Aside from her notes regarding her discussion with Dr. Sesta, no one suggested that she look into toxic exposures. PC11/1716. She further testified that the neuropsychological testing would not have supported testimony about toxic exposures, and she does not feel that testimony about King's exposure to pesticides would have been helpful in this case. PC11/1717-18.

Ms. Schlemmer, Mr. Scotese, and Mr. Meisner were all involved in King's jury selection. PC11/1683. Since Ms. Schlemmer was the one with the most penalty phase experience, she would have been the lead. PC11/1727. The ultimate decisions

would have been hers, but she would have taken advice and input from co-counsel. PC11/1727. Mr. Meisner and Mr. Scotese took notes while she questioned the jurors. PC11/1684. The attorneys referred to these notes when they got together and discussed the jurors. PC11/1684-85.

Ms. Schlemmer does not have an independent recollection of Mr. Scotese's *Batson* objection regarding juror 111. PC11/1685. Looking back, Ms. Schlemmer stated that she can see why she would not have wanted juror 111, so she would not have made the objection. PC11/1685. Specifically, she speculated that she would not have wanted juror 111 because her dad's friend is a police officer, she was too young, she would have empathized with the victim on the 911 call, she was a follower, and she was into CSI. PC11/1730. Regarding her dad's friend who was a police officer, juror 111 indicated that she does not know him and has not seen him in ten years. PC11/1734. There was also a "no" written next to juror 111 in the notes in the file, but Ms. Schlemmer does not know who wrote the words "yes" and "no" on the notes. PC11/1730. However, Mr. Scotese "likes to make objections and motions." PC11/1685. She cannot say whether Mr. Scotese made the objection totally on his own, or whether he looked over at her and she said to go ahead. PC11/1686. If Mr. Scotese made a *Batson* objection on a person whom she did not want on the jury, she probably would not want to fight too hard. PC11/1729.

Karen McClellan

Karen McClellan has been an investigator with the Office of the Public Defender for 15 and a half years. PC11/1662. She was the mitigation specialist on the King case, and she was tasked with gathering background information on King. PC11/1663. As part of her work on this case, she travelled to Michigan and went to the homes of King's family members, which were not the homes where King grew up. PC11/1663, 1668. Her understanding was that King lived on a farm for a short period of time, but not that King or his family were farm workers. PC11/1665. Neither King nor any of his family members told her about any exposure to farming chemicals or pesticides in Michigan or any chemicals when King worked as a plumber in Florida. PC11/1665. However, she never asked anyone about the pesticides that were used in Michigan or the chemicals that were used in the plumbing business, and she did not speak with Ms. Schlemmer about hiring a toxicologist in this case. PC11/1669. She searched for, but did not obtain, hospital records on King. PC11/1665.

Ms. McClellan created a timeline of all of King's known addresses, which was introduced as State's Exhibit One. PC11/1663-66; V7/1003. She obtained the information regarding King's addresses from King's family members, but she did not verify any of the information with public records or aerial photographs.

PC11/1667. Ms. McClellan previously lived in Waterford, Michigan, which was one of the towns where King lived at one point. PC11/1664. She described Waterford as a suburb of Detroit near Pontiac, Michigan, where there are a lot of lakes. PC11/1664.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

Under *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The circuit court erred when it denied King's claim that trial counsel provided prejudicial ineffective assistance under *Strickland* by failing to investigate and present evidence of toxic substances he was exposed to throughout his life. Although trial counsel retained a number of experts in preparation for penalty phase, they provided deficient performance when they failed to investigate and present evidence of King's toxic exposures, despite being aware that King grew

up on a farm in Michigan and worked as a plumber for over a decade. The testimony that was presented at the evidentiary hearing regarding the pesticides King was exposed to when he was growing up in Michigan and the chemicals he used when he worked as a plumber would have helped explain King's behaviors, and it would have provided an additional explanation for King's low IQ and brain injury. There is a reasonable probability that if this evidence had been presented to the jury, King would have received a life sentence.

ARGUMENT II: The circuit court erred when it denied King's claim that trial counsel provided prejudicial ineffective assistance under *Strickland* when they failed to properly preserve the *Batson* issue regarding the State's peremptory strike of juror 111 for direct appeal. Trial counsel provided deficient performance when they (1) failed to object to the State's discriminatory peremptory strike of juror 111 on the basis of gender; (2) failed to identify the race of similarly situated jurors on King's jury; (3) failed to correct the trial court or the prosecutor with regard to any misunderstanding of the facts in juror 111's questionnaire; and (4) failed to conduct a comparative juror analysis. There is a reasonable probability that if trial counsel had properly preserved the *Batson* challenge, King's convictions and sentences would have been reversed on direct appeal.

ARGUMENT III: The circuit court erred in denying King's claim that Florida's

lethal injection method of execution is cruel and unusual punishment and would deprive King of due process and equal protection of the law. Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and the Florida Constitution's prohibition against cruel and unusual punishment.

ARGUMET IV: The circuit court erred when it denied King's claim that Fla. Stat. § 945.10 (2015), which prohibits him from knowing the identity of execution team members, is unconstitutional. There is legitimate concern regarding the individuals who will be participating in King's execution, and whether a lack of training and experience on their part could cause King to suffer cruel and unusual punishment in violation of the Eighth Amendment. King's constitutional right to know the identity and qualifications of the executioners overwhelmingly overrides Florida's unsubstantiated safety concerns for the executioners.

ARGUMENT V: King's Eighth Amendment right against cruel and unusual punishment may be violated, as he may be incompetent at the time of execution. Although undersigned counsel acknowledges that this claim is not ripe at this time, it is being raised to preserve the issue for future review.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF TOXIC SUBSTANCES THAT KING WAS EXPOSED TO THROUGHOUT HIS LIFE.

King alleged in Claim I of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance during the penalty phase when they failed to investigate and present evidence of toxic substances that King was exposed to throughout his life. V2/287-94. The circuit court held an evidentiary hearing on this claim, and found that King failed to establish either deficient performance or prejudice. PC8/1186-88. King seeks review of these findings.

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690.

There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

trial, whose result is unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In *Wiggins v. Smith*, the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed

for reasonableness . . .” *Strickland*, 466 U.S. at 690-91.

Counsel’s duty to investigate and prepare applies to the penalty phase, as well as the guilt phase, of a capital trial. In *Rompilla v. Beard*, the United States Supreme Court held that counsel rendered deficient performance which fell below prevailing norms as set out in the ABA Guidelines, citing counsel’s failure to review Rompilla’s prior conviction, failure to obtain school records, failure to obtain records of Rompilla’s prior incarceration, and failure to gather evidence of a history of substance abuse. *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463, 129 L.Ed. 2d (2005). The *Rompilla* Court found that “this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts . . .” *Id.* at 2462. However, despite the scope of this mitigation investigation, including speaking to family members and consulting with mental health experts, the Court still found that counsel rendered deficient performance by failing to look at a court file, which contained a report that detailed mitigation and suggested numerous areas of mitigation to investigate.

Attorneys in capital cases commonly investigate and present mitigation regarding toxic substances that the defendant was exposed to and their effects on his or her behavior. *See, e.g.*, *Hodges v. State*, 885 So. 2d 338, 346 (Fla. 2003) (“A

toxicologist testified that the general area in which Hodges grew up was polluted, and that a river from which Hodges' family reported that Hodges caught and consumed fish contained lead."); *Rodgers v. State*, 113 So. 3d 761, 767 (Fla. 2013) (testimony from a psychologist during penalty phase about the lack of safety precautions regarding the use of pesticides on the family's farm). In the case at hand, trial counsel's performance was deficient under *Strickland*. Although, as the circuit court correctly pointed out, trial counsel retained a number of experts in preparation for penalty phase, they failed to investigate and present evidence of the toxic substances King was exposed to throughout his life, despite being aware that King grew up on a farm in Michigan and worked as a plumber for over a decade. V11/1680. Ms. Schlemmer relied on King's family members, who are not experts, to attribute King's behavior to his sledding accident, and neither she nor her investigator, Ms. McClellan, questioned witnesses about or hired an expert to look into King's toxic exposures. V11/1669, 1705. Regarding Ms. Schlemmer's testimony about Dr. Sesta's findings that there was no neurotoxic exposure, his inquiry appears to have been limited to King's exposure to marijuana or crack pipe fumes, as well as a self-report that King passed out from rat poison, and there is no evidence that any expert hired by trial counsel considered the effects of pesticides or chemicals used in the plumbing business. V11/1681-82. As Ms. Schlemmer

testified, her plan for penalty phase was to use the PET scan to present evidence of a brain injury from a sledding accident. PC11/1707. Evidence regarding King's toxic exposures would have been consistent with that strategy. Furthermore, any argument that counsel's failure to present evidence of King's toxic exposures constitutes a strategic decision on the part of trial counsel fails, as any strategic decision to forego the presentation of mitigating circumstances must be an informed strategic decision, made after sufficient investigation has taken place to enable counsel to make a reasonable choice among his available options. *Wiggins*, 539 U.S. at 527. In the case at hand, trial counsel could not have made a strategic decision not to present evidence of King's toxic exposures because it is not an area that they investigated.

King was prejudiced under *Strickland* by trial counsel's failure to investigate and present evidence of King's toxic exposures, which would have helped explain King's behaviors and provided an additional explanation for King's low IQ and brain injury. At trial, the defense presented the testimony of Dr. Wu, who testified that a PET scan conducted on King demonstrated abnormal activity in King's frontal lobe, which is consistent with a traumatic brain injury, presumably from a sledding accident that occurred when King was six years old. Additional testimony from Dr. Wu, as well as several lay witnesses, established a history of poor judgment, strange,

risk-taking behavior, difficulty regulating impulses, difficulty separating fantasy from reality, and a history of headaches and buzzing in his head. Dr. Visser performed IQ testing, and testified that King's full scale IQ of 76 placed him in the borderline intellectual functioning range. The defense also presented testimony that King was a successful plumber, and King's employment records were introduced at the *Spencer* hearing. *King*, 89 So. 3d at 219-22.

At the postconviction evidentiary hearing, King presented testimony from Andrés Lugo, M.D. and Lori Wagoner regarding King's toxic exposures. Dr. Lugo, a certified medical toxicologist, was hired by postconviction counsel to perform a toxicology health assessment or public health assessment of King. As described above, Dr. Lugo testified that King suffered from chronic environmental exposure to pesticides when he was growing up in Michigan, as well as exposure to toxic substances during the 15 years he worked as a plumber. The side effects of these toxic exposures include brain damage, low IQ, developmental brain defects, cognitive and behavioral problems, headaches, orientation problems, difficulty concentrating, dizziness, sedation, amnesia, anesthesia, impaired thinking, and blackouts. Ms. Wagoner, King's coworker from Babe's Plumbing, provided additional testimony about the chemicals King was exposed to when he worked as a plumber, the conditions under which they worked, and the side effects she personally

experienced when using these chemicals. As Dr. Lugo explained, in King's case, there was an additive effect due to King's history of head trauma, exposure to pesticides as a child, and later exposure to toxic chemicals when he worked as a plumber, which made King more susceptible to toxic exposures. This is especially significant in light of testimony at trial that in December 2007, shortly before the crime, King began to behave strangely, as if dazed, appeared at times to be in a catatonic state, and became excessively paranoid. *King*, 89 So. 3d at 219. Evidence regarding King's toxic exposures would have helped explain King's behaviors leading up to the murder and low IQ, and it would have provided additional evidence that King suffered from a brain injury. There is a reasonable probability that if this additional information had been presented to the jury, King would have received a life sentence. Therefore, King is entitled to a new penalty phase trial.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY PRESERVE THE *BATSON* ISSUE REGARDING THE STATE'S PEREMPTORY STRIKE OF JUROR 111 FOR DIRECT APPEAL.

King alleged in Claim II of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance for failing to properly preserve the *Batson* issue regarding the State's peremptory strike of juror 111 for direct

appeal. V2/294-307. The circuit court held an evidentiary hearing on this claim, and found that King failed to establish either deficient performance or prejudice. PC8/1188-91. The circuit court further found that King did not have a valid *Batson* claim to exercise on juror 111. PC8/1189. King seeks review of these findings.

Introduction

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges in a criminal trial, and that the "defendant does have the right to be tried by a jury whose members are elected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86. This prohibition against the discriminatory use of peremptory challenges also rests on the constitutional right to an impartial jury drawn from a representative cross-section of the community. U.S. Const. 6th Amend.; *Batson*, 476 U.S. 89; *Taylor v. Louisiana*, 419 U.S. 522, 531, 95 S.Ct. 692, 42 L.Ed. 2d 690 (1975). Since *Batson*, the Court has repeatedly reiterated its commitment to nondiscriminatory jury selection procedures. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed. 2d 196 (2005); *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed. 2d 175 (2008).

Individual jurors, as well as the defendant, have a right to nondiscriminatory jury selection procedures, free from discrimination based on race, ethnicity, or

gender. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991); *Welch v. State*, 992 So. 2d 206 (Fla. 2008). Defendants may raise *Batson* claims on behalf of individual jurors under the doctrine of third party standing, even when the defendant and the excluded juror are not of the same race or gender. *See Powers*, 499 U.S. at 415-16; *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1317 (11th Cir. 2003); *Welch*, 992 So. 2d 206. The discriminatory exclusion of prospective jurors is not subject to a harmless error review, as the United States Supreme Court has reversed convictions without even considering whether the improper exclusion of jurors had any effect on the outcome of the trial. *See Powers*, 499 U.S. at 416; *Batson*, 476 U.S. at 100.

Pursuant to *Batson*, when a defendant establishes a prima facie case of discrimination in the State's exercise of peremptory challenges and the prosecutor gives a race-neutral reason for those challenges, the trial court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 92 (citation omitted). Under *Batson's* three-step process, a defendant must first establish a prima facie case of discrimination by showing that the excluded jurors belong to a cognizable group and that a reasonable inference arises that the prosecutor used his peremptory challenges on the ground of group bias. *Johnson v. California*, 545 U.S. 162, 166, 125 S.Ct. 2410, 162 L.Ed.

129 (2005); *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995). The burden then shifts to the prosecutor to present race-neutral explanations for exercising each of his peremptory challenges. *Batson*, 476 at 96-98. Finally, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991).

This Court, in its opinion regarding King's direct appeal, summarized the procedure that a trial court in Florida must use to resolve *Batson* challenges:

> A trial court's decision to allow a peremptory strike of a juror is based primarily on an assessment of credibility, and, therefore, this decision will be affirmed unless it is clearly erroneous. *See Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996). Further, peremptory challenges are presumed to be exercised in a nondiscriminatory manner. *See id*. However, where a party alleges that a peremptory strike is racially based, a three-part procedure applies to resolve the allegation:
>
> > A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained.

> *Murray v. State*, 3 So. 3d 1108, 1119 (Fla. 2009) (quoting *Melbourne*, 679 So. 2d at 764). We have explained that in step 3, the focus of the court is on the genuineness, *not* the reasonableness, of the explanation. *See Rodriguez v. State*, 753 So. 2d 29, 40 (Fla. 2000).

King, 89 So. 3d at 229.

Juror 111

According to both driver's license records and notes from the trial attorney file, juror 111 is an African American female. PC7/1078-79; PC12/1859. When the State attempted to exercise a peremptory challenge on juror 111, the defense objected, and stated that "She is a minority and we'd ask for a race-neutral --" The following exchange took place:

> Mr. Arend: Yes, Judge. On Juror Number 111, 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 statement 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 the foregoing reasons, we exercise our peremptory challenge on Number 111.
>
> Mr. Scotese: 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 a 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 had a pending –
>
> Mr. Arend: Yes. According to her questionnaire, her brother has a pending drug charge.
>
> The Court: Pending drug charge? All right. I'm going to find based upon that that it 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.

R20/1764-65.

When defense counsel subsequently accepted the jury, she did so only "subject to all prior motions, challenges objections, the State cause challenges we didn't agree with, et cetera." R20/1769.

Ineffective Assistance of Counsel

King's trial counsel provided prejudicial ineffective assistance of counsel for failing to properly preserve the *Batson* issue regarding the State's peremptory strike of juror 111 for direct appeal. *See Davis*, 341 F.3d 1310; *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed. 2d 985 (2000). King suffered prejudice under

Strickland because, but for counsel's failure to properly preserve this issue, he would have prevailed on direct appeal. As the Eleventh Circuit Court of Appeals explained in *Davis*, "[W]hen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Davis*, 34 F.3d at 1316. This is in contrast to the usual *Strickland* prejudice analysis, as to show an effect upon the trial, as opposed to the appeal, would be impossible in such a case. *Davis*, 34 F.3d at 1315. Thus, it is necessary for this court to assess how King would have fared on appeal if trial counsel had properly preserved his *Batson* claim for review. *Davis*, 34 F.3d at 1316.

Citing *Caratelli v. State*, 961 So. 2d 312 (Fla. 2007), the circuit court rejected King's argument that King was prejudiced in his appeal:

> In *Caratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007), the Florida Supreme Court made it clear that "where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." *Id*. at 323. The court then explained that it is not enough for the defendant to demonstrate that, had the alleged error in the denial of the for-cause challenges been preserved, such error would have resulted in a reversal on appeal; rather, the defendant must demonstrate that the juror in question was not impartial- i.e., that the juror was biased against the defendant, and the evidence of the bias must be plain on the face of the record." *Id*. at 324.

PC8/1190.

This case is distinguishable from *Caratelli* in that it involves a *Batson* challenge as opposed to a cause challenge.[3] Unlike a cause challenge, where juror bias is at the center of the analysis, *Batson* challenges have nothing to do with jurors being biased, but are based on the right of both the defendant as well as individual jurors to a nondiscriminatory jury selection process. *Batson*, 476 U.S. at 85-86; *Powers*, 499 U.S. 400. With regard to a *Batson* claim, there is no analysis to be made in terms of whether an actually biased juror served on the jury (especially considering that the juror in question was excluded and did **not** serve on the jury), or whether the improper exclusion of jurors had any effect on the outcome of the trial. *See Powers*, 499 U.S. at 416; *Batson*, 476 U.S. at 100. If the prejudice standard with regard to ineffective assistance of counsel claims for failure to raise or preserve *Batson* claims is the effect on the trial, as opposed to the effect on direct appeal, it would be impossible for a defendant to ever prevail on such a claim. *See Davis*, 34 F.3d at 1315

On direct appeal, this Court denied relief in light of King's failure to demonstrate that the trial court's decision to allow the peremptory strike of juror 111

[3] Undersigned counsel acknowledges that in the same opinion, this Court disapproved *Austing v. State*, 804 So. 2d 603 (Fla. 5th DCA 2002), which involved a State challenge to defense counsel's peremptory strike, to the extent that it was inconsistent with this holding. *Caratelli*, 961 So. 2d at 327

was clearly erroneous. This failure was a direct result of trial counsel's failure to properly preserve the claim for appellate review, which, if it had been done, would have resulted in relief. Any argument by the State that King's attorneys purposely failed to preserve this issue for direct appeal because they did not want juror 111 to serve on the jury is not supported by the record. Mr. Scotese, who objected to the State's peremptory strike of juror 111, testified at the evidentiary hearing that neither of his co-counsel urged him to abandon his objection in any way, that he was not at any point trying purposely to lose his objection so that the State would be able to strike juror 111, and that when he made the objection he was trying his best to preserve the issue for direct appeal. PC10/1642, 1657.

Trial counsel performed deficiently in the following areas:

1. Failure to object to the State's discriminatory peremptory strike of juror 111 on the basis of gender

The Equal Protection Clause prohibits peremptory challenges on the basis of gender as well as on the basis of race. *J.E.B. v. Ala. Ex. rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419 (1993); *Abshire v. State*, 642 So. 2d 542 (Fla. 1994). Trial counsel provided prejudicial ineffective assistance by failing to object to the peremptory strike of juror 111 on the basis of gender, where it was clear that the State was exercising a peremptory strike on this juror, at least in part, because of her gender.

When the defense objected to the State's strike of juror 111 and requested a

race-neutral reason, although he went on to provide several other reasons for striking this juror, the first thing he mentioned was that, "she's an 18-year-old female." R20/1764. He further described her as "meek, young, and inexperienced." R20/1764. Clearly, the gender of juror 111 was a consideration in the State's decision to exercise a peremptory strike. The prosecutor's assertion that juror 111 was "meek" is not supported by the record, and instead appears to be an assumption or stereotype based on her age and gender. In fact, she answered all of the questions that were posed to her, and when the prosecutor asked who has been in a courtroom before aside from jury experience, juror 111 raised her hand and volunteered, "My little sister got in trouble one time for stealing and my brother had a charge." R19/1531. She went on to indicate that she was looking forward to serving as a juror if chosen. R19/1531.

The State exhibited a clear pattern in this case of exercising peremptory challenges on female jurors. The jury was comprised of five males and seven females. There were three female alternate jurors and one male alternate juror. The State exercised a total of eight peremptory challenges, on jurors 47, 53, 54, 90, 94, 103, 111, and 133. R20/1759-61, 1764, 1767, 1772. The jury questionnaires, which were included in the record on appeal, reveal that each of the State's peremptory challenges was used to strike a female juror. SR2/257-61, 288-92, 294-98; SR3/483-

87, 507-11, 558-62; SR4/603-07, 614-18. In contrast, the defense used seven peremptory challenges to strike male jurors (jurors 8, 15, 67, 81, 109, 126, and 157), and seven peremptory challenges to strike female jurors (jurors 23, 29, 33, 38, 40, 104, and 145). R20/1759-63, 1766, 1771-73; SR1/50-54, 88-92, 130-34, 163-66, 184-88; SR2/209-13, 220-24, 360-64; SR3/434-38, 564-68; SR4/592-96, 683-87, 782-86; SR5/845-49. The fact that seven women were seated as jurors is of no importance, as "number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate." *State v. Slappy*, 522 So. 2d 18, 21 (Fla.), *cert. denied* 487 U.S. 1219 (1988); *See also, United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("[T]he striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even where valid reasons for the striking of some black jurors are shown.") Nevertheless, the State's pattern of striking only female jurors evidences a discriminatory intent. *Batson*, 476 U.S. at 97.

Trial counsel's failure to challenge the State's strike of juror 111 based on gender was clearly not a strategic decision, but rather was based on unfamiliarity with the case law supporting such an objection. Mr. Scotese, who objected to the State's peremptory strike of juror 111 based on race, testified at the evidentiary hearing that at the time of King's trial, he does not believe he was familiar with the

case law that holds that the Equal Protection Clause prohibits peremptory challenges on the basis of gender as well as race, and he did not consider objecting to the peremptory strike of juror 111 on the basis of gender. PC10/1639. Furthermore, he is of the belief that female jurors are less likely to impose the death penalty. PC10/1639.

2. Failure to identify the race of the similarly situated jurors on King's jury

According to driver's license records, which were introduced as Defense Exhibit A, PC12/1809-1958, King's jury was comprised of four white males (jurors 11, 27, 123, and 125), one male who identified as "other" (juror 114), and seven white females (jurors 5, 21, 24, 75, 92, 98, and 108). R20/1779. The alternate jurors consisted of one white male (juror 132) and three white females (jurors 150, 151, and 160). R20/1779.

This Court held on direct appeal that "King has failed to identify the race of the similarly situated jurors who were seated on King's jury. Since the race of the seated jurors is unclear, King cannot show that the strike of juror 111 was racially motivated." *King*, 89 So. 3d at 231. King's trial counsel provided ineffective assistance when they failed to identify the race of the similarly situated jurors who were seated on King's jury.

3. Failure to correct the trial court or the prosecutor with regard to any misunderstanding of the facts in juror 111's questionnaire

The trial judge expressed doubt as to some of the prosecutor's proffered reasons for striking juror 111. R20/1764-65. The only basis for the strike that the judge evaluated and found to be genuine rather and not pretextual was Mr. Arend's statement that "[a]ccording to her questionnaire, her brother has a pending drug charge." R20/1764-65.

Appellate counsel argued on direct appeal that the State's assertion regarding juror 111's juror questionnaire was not entirely accurate. 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?), juror 111 checked "Yes", and she wrote, "My brother has a felony drug charge." SR4/605. In response to question 33 (Are there any criminal charges pending against you or a family member of which you are aware?), juror 111 checked "Yes", and she wrote, "My brother may be charged with disorderly conduct." SR4/605. Appellate counsel argued that juror 111's brother's felony drug charge was apparently a prior conviction, and there were no charges pending against her brother, only the possibility of a disorderly conduct charge being filed in the future. Initial Brief of Appellant at 91. Neither party questioned juror 111 about the details of her brother's charges, and King's trial counsel did not correct the State or the trial court with regard to the pending charges (or lack thereof) of juror 111's brother.

This Court held on direct appeal:

> On appeal, King asserts that, according to juror 111's questionnaire, her brother did not have a pending drug charge, but was only facing the possibility of a disorderly conduct charge. However, during voir dire, defense counsel did not correct the trial court or the prosecutor with regard to any misunderstanding of the facts in juror 111's questionnaire. Had defense counsel done so, the trial court could have inquired of the prosecutor further with regard to the basis for the strike of this juror. Accordingly, King's challenge to the striking of juror 111 based upon the erroneous reading of the questionnaire has been waived.

King, 89 So. 3d at 230.

Trial counsel provided prejudicial ineffective assistance by failing to correct the trial court or the prosecutor about their misunderstanding of juror 111's questionnaire. Mr. Scotese testified at the evidentiary hearing that, although he had access to the juror questionnaires during jury selection, he could not recall whether he consulted juror 111's questionnaire when he was arguing his objection to see what her response was with regard to her brother's felony charge. PC10/1640-41. However, if he had consulted the questionnaire and found a discrepancy between what the State said and what was actually in the questionnaire, he would have brought that to the court's attention. PC10/1641. By failing to correct this error, trial counsel waived his challenge to the striking of juror 111 based upon the erroneous reading of the questionnaire, and allowed for the use of a peremptory strike on this African American female juror based on a reason that the court found to be genuine and not pretextual, where in it does not appear to have been accurate.

4. Failure to conduct a comparative juror analysis

The United States Supreme Court has made it clear that in order to establish discriminatory intent, a critical part of the *Batson* inquiry is to engage in a comparison of stricken minority jurors with otherwise similar non-minority jurors who were allowed to serve. *Dretke*, 545 U.S. at 241; *Miller-El v. Cockrell*, 537 U.S. 322, 343, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003). A prosecutor's motives for his strikes are revealed as pretextual where a given explanation is equally applicable to a juror against whom the prosecutor did not exercise a peremptory challenge. *See Dretke*, 545 U.S. at 241; *Cockrell*, 537 U.S. at 343.

First, the prosecutor stated regarding juror 111 that, "Her statement during the original death qualification was that living life in prison is more awful than a death sentence." R20/1767. Juror 114, a male who identified as "other", was not challenged by either party, and he served on the jury. When defense counsel asked him how he feels about life without the possibility of parole, he responded, "Sometimes I think that's worse than death." R16/827. Although both individuals indicated that life without parole could be worse than a death sentence, the State only exercised a peremptory challenge on the African American female juror, and not on the "other" male juror. This suggests that this reason provided by the State for striking juror 111 is pretextual, as it is equally applicable to juror 114, on whom the

State did not exercise a peremptory challenge.

That aside, it bears repeating that the only basis for the strike that the judge evaluated and found to be genuine rather and not pretextual was Mr. Arend's statement that "[a]ccording to her questionnaire, her brother has a pending drug charge." R20/1764-65. As appellate counsel argued on direct appeal, other jurors who were not challenged by the State and who served on the jury also had family members who had been convicted of a crime[4]:

> Most tellingly, juror 114 [other/male], 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 is 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 other jurors 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 [white/female] and 125 [white/male] (neither of whom were challenged by the state, and both of whom served on the jury) stated on their questionnaires that

[4] Where appropriate, the race and gender of each juror has been included in brackets in the form [race/gender] by post-conviction counsel to aid in the comparative juror analysis.

they had close family members who had been charged with driving without a license 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 system back and forth") of burglary of a conveyance and throwing an explosive device (SR4/679, see 19/1532-33). A forth selected juror (no. 75) [white/female] 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 perceived the experience (16/1517-64). Juror 98 [white/female] (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 [white/female] (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 a 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 have 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 [other/male] (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 <u>ever</u> 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 also have struck juror 92, whose brother – like juror 111's brother – is a convicted felon . . .
>
> In the instant case, juror 111's questionnaire revealed what her brother was convicted of a drug charge 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 and 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[5] pretext.

Initial Brief of Appellant at 91-96.

This Court rejected appellate counsel's argument that there were other jurors on the panel who had relatives with criminal charges because trial counsel waived that challenge by not raising it before the trial court. *King*, 89 So. 3d at 230. Mr. Scotese testified that, although he believes it makes for a better argument and it is something that he tries to do, he is not very good at conducting comparative juror

[5] Post-conviction counsel would add that the pretext was discriminatory on the basis of gender as well as race.

analyses, and it is not his usual practice to do so. PC10/1640. He further testified that he has not received and training in or done any reading about comparative juror analysis. PC10/1640. Trial counsel provided prejudicial ineffective assistance by failing to conduct a comparative juror analysis before the trial court, which would have revealed that the reasons provided by the State for exercising a peremptory strike on juror 111 were pretextual and preserved the issue for appellate review.

Conclusion

King's trial counsel provided deficient performance when he failed to properly preserve the *Batson* claim regarding juror 111. There is a reasonable probability that if trial counsel had properly preserved the *Batson* challenge as described above, King's convictions and sentences would have been reversed on direct appeal. Therefore, King is entitled to a new trial.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE KING OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PORTIONS OF THE FLORIDA CONSTITUTION.

In Claim III of King's motion for postconviction relief, he alleged that

Florida's lethal injection method of execution is cruel and unusual punishment. V2/307-08. The circuit court found that this claim is without merit. PC8/1191-92. King seeks review of these findings.

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F. 3d 1029, 1033 (9th Cir. 2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183, 161 L.Ed. 2d 1 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L.Ed. 2d 630 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L.Ed. 519 (1890), are not permitted.

Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and

the Florida Constitution's prohibition against cruel and unusual punishment. The United States Supreme Court, in *Glossip v. Gross*, 83 U.S.L.W. 3622 (U.S. Jan. 23, 2015) has granted certiorari review on a question involving Oklahoma's three-drug lethal injection protocol, which is virtually identical to Florida's three-drug lethal injection protocol. As such, the defendant requests that the death sentence be vacated or that this Court order that any execution be stayed.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT FLA. STAT. § 945.10, WHICH PROHIBITS KING FROM KNOWING THE IDENTITY OF THE EXECUTION TEAM MEMBERS, IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In Claim IV of King's motion for postconviction relief, he alleged that Fla. Stat. § 945.10 (2015), which prohibits him from knowing the identity of the execution team members, is unconstitutional. PC8/308-10. The circuit court found that this claim is without merit. PC8/1192. King seeks review of these findings.

Fla. Stat. § 945.10 (2015) exempts from disclosure under Section 24(a), Article I of the Florida Constitution information which identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection. This statute was found to satisfy the Florida constitutional requirement that

such exemptions provide a meaningful exemption that is supported by a thoroughly articulated public policy in this case based upon concerns for the safety of those involved in executions. *Bryan v. State*, 753 So.2d 1244, 1250-51 (Fla. 2000). There is also a presumption in Florida that the members of the executive branch will properly perform their duties in carrying out an execution. *Provenzano v. State*, 761 So.2d 1097, 1099 (2000). This presumption is no longer valid. Evolving standards of decency as recognized in Eighth Amendment jurisprudence render Fla. Stat. § 945.10 unconstitutional. Federal courts have found that concerns that execution team members would be publicly identified and retaliated against was an overreaction, supported only by questionable speculation. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Importantly, the Court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. *Id*. at 882. Pennsylvania courts have likewise found safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A. 2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used as a means of execution has consistently grown as additional

problems with executions in these states have been noted. These states include Florida; Maryland (*see Oken v. Sizer*, 321 F. Supp. 2d 658, 659 (D. Md. 2004)); Ohio (s*ee State v. Rivera*, 2009 WL 806819 (Ohio Ct. App. 2009); California (*see Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006)); and Missouri (*Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. 2006)). The recent problems with lethal injections documented in numerous states raise specific concerns about Eighth Amendment considerations. In order to avoid the infliction of unnecessary pain during an execution, it is essential that the inmate be properly anesthetized prior to and during the injection of the other chemicals. Evidence of inmates: (1) taking longer than expected times to die; (2) writhing, twitching and exhibiting other signs of pain after the administration of at least two of the drugs; (3) having improper amounts of drugs in their system post-mortem; (4) having chemicals spill out onto the death chamber floor; and (5) showing signs of not being completely unconscious after the period expected by the administration of the anesthetic, all point to problems with the drugs not being properly administered by competent personnel.

Executions carried out by anonymous team members puts an inmate at an unnecessary or foreseeable risk of infliction of pain and violates due process. This includes the fact that Florida has used low lighting and protective suits to hide the identity of execution team members, increasing the likelihood of mistakes. The

burden to show an Eighth Amendment violation in capital punishment cases is on the condemned. Without access to the identities of the team members, King is unconstitutionally deprived of his ability to establish a violation. To deprive him of this information violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to ensure his punishment is not cruel and unusual. Finally, the problems in Missouri show that merely requiring the involvement of medical personnel is not a sufficient protection. The process of securing medically qualified personnel for Florida executions, as described in the testimony at the *Lightbourne* hearings, likewise is not a sufficient constitutional protection. Without access to the identities of these individuals, there is no way for a condemned person to determine whether they are competent and qualified and thus ensure the Eighth Amendment is not violated.

Since the identity of the members of the execution team is protected by statute, there is no way for a petitioner to establish how the involvement of any of these individuals creates a substantial risk of serious harm. With the mounting evidence of botched executions continuing to grow, this statute deprives King of his due process rights to ensure he is not subject to cruel and unusual punishment. Therefore this statute is unconstitutional.

ARGUMENT V

KING'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS KING MAY BE INCOMPETENT AT TIME OF EXECUTION.

Given that federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, King raised the issue in Claim V of his motion for postconviction relief, PC8/310-11, and he is raising it now.

In accordance with Fla. R. Crim. P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed. 2d 335 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Fla. Stat. §922.07 (1985) and *Martin v. Wainwright*, 497 So. 2d 872 (Fla. 1986). Likewise, the issue is not ripe under federal law until the death warrant is signed. *See Poland v. Stewart*, 41 F. Supp. 2d 1037 (D. Ariz 1999) (holding that such claims truly are not ripe unless a death warrant has been

issued and an execution date is pending); *Martinez-Villareal v. Stewart*, 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed. 2d 849 (1998) (dismissing Respondent's *Ford* claim as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed. 2d 203 (1993) (holding that the issue of sanity [for the *Ford* claim] is properly considered in proximity to the execution). However, it should be noted that in a report dated December 27, 2008, Mary Elizabeth Kasper, Ph.D. found that King did not meet the criteria for being competent to proceed, and that he "appear[ed] to be paranoid to the point that he [was] not able to function with his defense team." R5/919.

CONCLUSION

Based on the arguments in this brief and the record on appeal, the circuit court improperly denied King relief on his 3.851 motion. King respectfully requests that this Honorable Court reverse the circuit court's order denying relief, vacate his conviction and sentence of death, and grant him a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been emailed to Scott A. Browne, Assistant Attorney General, at capapp@myfloridalegal.com and Scott.Browne@myfloridalegal.com and mailed via United States Postal Service to Michael L. King, DOC #132254, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 2nd day of April, 2015.

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar No. 0013837
Raheela Ahmed
Florida Bar No. 0713457
Donna Ellen Venable
Florida Bar No. 100816
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619
(813) 740-3544

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

/s/ Maria Christine Perinetti
Maria Christine Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsel for Appellant