IN THE SUPREME COURT OF FLORIDA

MICHAEL L. KING,

Appellant,

v. **CASE NO. SC14-1949**
L.T. No. 58-2008-CF-001087

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the direct appeal record will be designated with "T" followed by the appropriate volume and page numbers. Citations to the supplemental record from the direct appeal will be designated as "SR" followed by the appropriate volume and page numbers. The record on appeal from the denial of King's motion for post-conviction relief, will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT OF THE CASE AND FACTS

I. Trial and Direct Appeal

This Court's direct appeal opinion in King v. State, 89 So. 3d 209, 212-22 (Fla. 2012), recites the facts of King's convictions for the kidnapping, sexual battery, and murder of the victim, [D.L.], a young married mother of two young children. Following a unanimous jury recommendation, the trial court sentenced King to death. On direct appeal, this Court provided the following summary of the aggravators and mitigators found by the trial court:

> On December 4, 2009, the trial judge sentenced King to death for the murder of [D.L.]. 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) [fn6]; (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).
>
> fn6. With regard to this aggravator, the trial court stated:
>
> It is most extraordinary and extremely rare that one can actually hear [the] emotions in the voice of an innocent victim, who is doomed to be murdered.... [T]he 911 recording of the victim[ ] tragically reveals her fear, mental state, her terror and her

emotional strain. One need only listen to portions of this call to comprehend her mental state.

The trial court also expressed in a footnote, "The court acknowledges that although it quotes from the 911 call, it cannot, by any means, convey the fear and terror clearly heard in [D.L.]'s voice in that recording."

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) [fn7]; and (2) his age at the time of the offense (thirty-six years old), *see* § 921.141(6)(g), Fla. Stat. (little weight).[FN8] 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).

> fn7. The trial court stated that only moderate weight was accorded to this mitigating circumstance due to the conflicting opinions of the experts.

> fn8. It is both unclear and questionable why the trial court found age to be a mitigating factor.
>
> 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.

II. Post-Conviction Proceedings

a) Procedural History

King filed a motion for post-conviction relief on September 6, 2013. Following the filing of the state's response, a case management hearing was conducted on February 3, 2014. An evidentiary hearing was conducted on four claims.

The evidentiary hearing was conducted on June 23, 2014. King presented testimony from expert witness Dr. Andres M. Lugo as well as King's former coworker, Lori Wagoner. He also presented testimony from his trial attorneys Carolyn Schlemmer, Jerome Meisner, and John Scotese. The State called King's mitigation specialist, Karen McClellan, as a witness.

b) Evidentiary Hearing Facts

i) The trial attorneys and mitigation specialist

King's lead attorney, Carolyn Schlemmer, was from the Office of the Public Defender in the Twelfth Circuit. Schlemmer was admitted to the Florida Bar in 1981 and became board

certified in 1998. (V11/1686). At the time of the evidentiary hearing, Schlemmer had been serving as chief of the capital division for over six years. (V11/1671).

Schlemmer had decades of experience working on death penalty cases. (V11/1687). She handled approximately fifteen death penalty cases prior to King's case, and most cases resulted in pleas to life or life sentences. (V11/1673-74). Schlemmer served as the Twelfth Circuit representative on the Death Penalty Steering Committee for the Florida Public Defender Association. (V11/1687). She attended death penalty training seminars every year since the mid-1990s. (V11/1689). She has been featured numerous times in the Life Over Death training program on the death penalty. (V11/1688). She was also a recipient of the Jim Slater Award for Professionalism. (V11/1686).

Schlemmer testified that she immediately became involved in King's case once her office was appointed in 2008. (V11/1671-72). Schlemmer served as lead counsel, and Jerome Meisner and John Scotese served under her as co-counsel. (V11/1672). Schlemmer assigned Scotese and Meisner to the guilt phase, and she put herself in charge of the penalty phase. (V11/1673). She had discussions with her co-counsel about both phases. (V11/1673).

Schlemmer initiated the penalty phase investigation "very early on." (V11/1676). Schlemmer used Woody Speed and Karen Tekely as investigators. (V11/1674). Speed was the chief investigator of Sarasota, and he handled the guilt phase investigation. (V11/1674). Tekely, who had a degree in criminology, mainly handled the penalty phase. (V11/1674). Tekely and Speed worked together and shared duties with regard to both phases. (V11/1674).

Schlemmer stated that her client presented various claims and information that required research and follow-up, and she was never presented with a claim that she did not look into. (V11/1715-16, 1720). For example, King claimed that the victim was shot by a helicopter, so Schlemmer deposed the pilots from the helicopters. (V11/1516). King further alleged that he had a consensual relationship with the victim that was observed by school bus drivers and a school crossing guard. (V11/1720). Schlemmer, therefore, interviewed the bus drivers and crossing guard to see whether they could verify King's claims. (V11/1720). In response to King's assertion that sex with the victim was consensual, Schlemmer hired Dr. Edward Willey, a former medical examiner, to determine whether the victim was sexually assaulted. (V11/1714-15).

Schlemmer hired many experts in an effort to find mental health mitigation for King that could be presented during the penalty phase. (V11/1690-1706). She first retained Dr. Sesta, who also worked with Dr. Ross. (V11/1691). Schlemmer specifically requested that Dr. Sesta determine whether King had any organic brain damage or traumatic brain injury.[1] (V11/1692). Doctors Sesta and Ross interviewed King, reviewed records, and conducted neuro-psych testing. (V11/1691-92). The neuro-psych testing yielded invalid results. (V11/1692).

Dr. Sesta consulted with Dr. Ross as well as another expert, and all the doctors agreed that the tests were invalid. (V11/1694). Dr. Sesta believed that King was "faking[,]" "malingering" and "a pathological liar." (V11/1693). Dr. Sesta concluded that he could not get a valid profile from King because King faked tests and was dishonest. (V11/1693-94).

Dr. Sesta had discussed toxin exposure with King, as King alleged that he had been exposed to toxins from rat poisoning and crack pipe fumes. (V11/1695, 1681). There was no indication that King ever mentioned toxin exposure from a farm or his plumbing career. (V11/1695, 1681). Nevertheless, Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer

[1] Dr. Sesta and Dr. Ross also determined that King was competent and that he was not mentally retarded. (V11/1691).

that there was no neurotoxin defense. (V11/1695, 1678). He further advised that King had no psychiatric condition or neurological issues that could be presented as mitigation. (V11/1694-95). Based on the doctors' findings, Schlemmer could not use Dr. Sesta or Dr. Ross as mitigation experts in King's case because they were unable to provide testimony relating to organic brain damage or traumatic brain injury. (V11/1695, 1697).

Once Schlemmer determined that Drs. Sesta and Ross could not give her any mitigation whatsoever, she retained Dr. Kasper for another opinion. (V11/1698). Dr. Kasper initially found King incompetent, but then upon receiving additional information, she deemed him competent. (V11/1698). She conducted her own neuro-psych testing, and she ultimately reached the same conclusions as Dr. Sesta and Dr. Ross, that King was malingering. (V11/1698, 1702). She determined that there was no organic brain damage, or physical or psychiatric issues that could be presented for mitigation. (V11/1699-1700).

Schlemmer next hired Dr. Joseph Wu to conduct a PET scan "as a last effort." (V11/1676-77, 1704). The PET scan showed a divot in front of King's forehead. (V11/1678-79). Schlemmer explained that even with the results of the PET scan, she was

required to have clinical correlation in order for Dr. Wu to testify. (V11/1677, 1705).

Schlemmer knew from the very beginning of the case that King was involved in a sledding accident. (V11/1704). The hospital records had been destroyed, but they had pictures of the area and pictures of the sled, and they also had reports from King's family members that focused on the sledding accident. (V11/1705-05). His family believed that King's behavior was solely from the sledding accident. (V11/1705). "They never mentioned poisons, toxins, or living on a farm, or nothing like that. It was always from the sledding accident." (V11/1705).

The sledding accident was a concrete incident with witnesses and evidence that correlated with the PET scan to provide mental health mitigation. (V11/1706). Therefore, Schlemmer presented as much evidence as she could to show the brain injury from the sledding incident. (V11/1706-08, 1717). Schlemmer felt that the divot on the frontal lobe was the most significant mitigating evidence, especially given the fact that family members stated King acted differently after the sledding accident. (V11/1717). Schlemmer believed that it was the only evidence available as mental mitigation in connection with the PET scan to show frontal lobe brain damage. (V11/1705-08).

Schlemmer testified that she had no evidence to support King being exposed to toxins and the testing did not correspond with toxin exposure. (V11/1716-18). King never presented her with any information about such toxic exposure. (V11/1716-17). If King had been exposed to toxic pesticides, he would have had an organic injury; however, the doctors said there was no evidence of neuro-exposure organic injury. (V11/1718).

Even if she had evidence that King could have been exposed to toxins while living in Michigan, she would not have presented it because it would have only amounted to speculation that was not specific to King, and it could have caused her to lose credibility with the jury. (V11/1717-18). Moreover, Schlemmer testified that she had strategic reasons for not using certain evidence and calling certain witnesses. Schlemmer was not able to use Dr. Sesta, Dr. Ross, or Dr. Kasper as experts because their testimony would have conflicted with Dr. Wu's findings. (V11/1696). She did not call King's mother as a witness during the penalty phase because several family members had advised that she planned to commit perjury about the sledding accident. (V11/1708).

Schlemmer investigated King's employment history. However, she chose not to use that information because employers reported damaging behavior by King such as dishonesty and inappropriate

conduct toward women. (V11/1709-11). Schlemmer felt that she had to be very careful about giving this harmful information to an expert because she did not want such information revealed on cross-examination. (V11/1710-11).

Schlemmer presented evidence of King's low IQ through the testimony of Dr. Visser, who evaluated King only for competency. (V11/1700-01). Schlemmer testified that all of the other doctors who tested King's IQ could have been harmful to King's case because the findings from the neuro-psych evaluations would have rebutted other mitigation she planned to present. (V11/1701-02).

In addition to being evaluated by doctors Visser, Sesta, Ross, and Kasper, King was also evaluated by doctors Gamache, DeClue, and Regnier. (V11/1702-03). Nothing in those evaluations led Schlemmer to believe that there was any other mental mitigation available. (V11/1703-04). Therefore, Schlemmer felt that other than Dr. Visser's testimony about King's low IQ, none of the seven psychologists who evaluated King had any findings that were mitigating. (V11/1704).

Schlemmer testified that she, Meisner, and Scotese were all involved in jury selection in King's case. (V11/1683). She handled most of the death qualification aspect of voir dire. (V11/1683). Scotese typed the notes from voir dire, and they all reviewed the notes and discussed them together. (V11/1685). When

asked about Scotese's objection [to juror 111], Schlemmer admitted that she had no independent recollection of whether he made the motion completely on his own or whether he asked her first and she advised him to go ahead. (V11/1685-86). However, Schlemmer explained that as lead counsel in the case, she was in charge of the jury selection. Although she received input and advice from her co-counsel, the ultimate decisions during voir dire were hers to make. (V11/1727).

Schlemmer remembered meeting with co-counsel to discuss who they did and did not want on the panel. (V11/1728, 1731-32). During their discussion, someone in the group wrote down their decisions by marking "yes, "no" or a question mark on each juror's questionnaire form. (V11/1732-33). Upon being shown the questionnaire form from juror 111 that was admitted into evidence as State's Exhibit 3, Schlemmer acknowledged that she did not want that juror on the panel. (V11/1725-28). Schlemmer felt that she was too young; she would have empathized with the victim regarding the horrible 911 call; she was a follower, not a leader; and she was too into CSI. (V11/1730). Schlemmer's file had a big "no" written next to juror 111. (V11/1730-32). Schlemmer was not certain who wrote "no," but she thought that Scotese had written it. (V11/1731-32).

Schlemmer's co-counsel Jerome Meisner testified that he had been working at the Public Defender's Office for twenty-six years. (V10/1615). He had served as misdemeanor division chief, felony division chief and capital crimes homicide division chief. (V10/1615). King's case was his second capital trial. (V10/1615).

Meisner became involved with King's case approximately four or five months before the trial. (V10/1615). He was assigned to the guilt phase with Scotese. (V10/1617). Meisner may have had some informal strategic discussions with co-counsel about penalty phase, but it was not his area of responsibility in the trial. (V10/1625). Upon being asked whether he recalled speaking with Schlemmer about penalty phase strategy, Meisner stated:

> The clearest memory I have as I sit here today was discussing the significance of the head injury that Mr. King had received as a child when he had been pulled on a sled and apparently his head impacted with a four-by-four post or -- so I do recall vaguely having a conversation with her about that.

(V10/1618).

Meisner had no specific recollection of juror 111 or of any discussions that occurred during jury selection. (V10/1626). He was shown jury selection notes from King's case, and he identified them as notes that he had written. (V10/1620). Meisner's personal notes written about juror 111 reflected the

following: life without parole was more severe than death penalty; could consider death penalty/life without parole retained; and could go both ways. (V10/1623). Meisner had no independent recollection of meeting with co-counsel to discuss jurors that they liked and did not like in King's case, although it would have been common practice to do so. (V10/1626). It was possible that his juror notes were used during those meetings. (V10/1626).

Co-counsel John Scotese testified that he had been working for the Public Defender's Office since 1994. (V10/1628). King's case was his second capital case. (V10/1628-29). He was death qualified to first chair a capital case. (V10/1629). Scotese was sure that he spoke with Schlemmer about penalty phase strategy, although he had no specific recollection of their conversations. (V10/1630). He did not recall speaking with Schlemmer or experts about King's possible exposure to toxic substances. (V10/1630).

Scotese's role in jury selection was to take notes. (V10/1631-32, 1643). Schlemmer was primarily responsible for jury selection, and Scotese conferred with her and he suggested opportunities to make potential objections. (V10/1630-32, 1643). Even if he shared his opinion about a juror with Schlemmer, it would ultimately be her decision whether to accept or strike the juror. (V10/1646).

Scotese typed his notes on his computer in the courtroom as the jurors were speaking. (V10/1645). The notes reflected his own thoughts and opinions. (V10/1645). Scotese noted reasons why he did not want certain jurors in King's case; however, he did not list any reasons for not wanting juror 111. (V10/1637). On a different set of his notes, he wrote "no" next to juror 111. (V10/1653). That set of notes was admitted into evidence as State's Exhibit 2. (V10/1657).

Scotese did not have an independent recollection of juror 111, nor did he recall specific discussions with co-counsel regarding juror 111. (V10/1634-35, 1641). Scotese's notes indicated that juror 111 was African American. (V10/1635). It was his usual practice to document whether a juror was from a minority group so he would know whether to make a Batson or Neil challenge. (V10/1635).

Scotese was asked whether he would object to the State's peremptory strike to an African American juror if he definitely did not want that juror on the jury panel. (V10/1636). He responded,

> It would have to be just a – in my opinion, I think it would just have to be a – something outrageous was said that I wouldn't make the objection. It would have to be something really clear that I just felt like there was no way the objection was going to be sustained. For example, somebody just said I can't be fair and impartial in this case.

(V10/1636). Scotese subsequently admitted that he asked for a race-neutral reason nearly 100 percent of the time a peremptory was used on a minority juror. (V10/1655).

In King's case, Scotese requested a race-neutral reason for the State's peremptory strike of juror number 111 because he felt that there was nothing "obvious" about her that was race-neutral, so he wanted to hear what the State had to say. (V10/1638). It was his intention to preserve this issue for direct appeal. (V10/1639). Scotese did not recall whether he consulted the juror questionnaire form when he made his objection, and he did not have a recollection of conducting a comparative juror analysis on juror 111. (V10/1640-41).

Scotese had no specific recollection of any communication with Schlemmer or Meisner when he made his objection to the State's peremptory strike of juror 111. (V10/1641-42). However, according to Scotese, any objection made by him during jury selection would have been made with Schlemmer's approval. (V10/1632).

The State presented the testimony of Karen McClellan, who was an investigator with the Office of the Public Defender for over fifteen years. (V11/1662). She has worked with Carolyn Schlemmer in the past and she continued to work with her on

occasion. (V11/1662). McClellan served as the mitigation specialist in King's case. (V11/1662). She attempted to gather as much background information on King as she could, and in doing so, she spoke to King as well as numerous family members, friends, former employers, and co-workers. (V11/1663). McClellan traveled to Michigan to speak with King's family members. (V11/1663). McClellan had also lived in Waterford, Michigan, a town where King had also lived, so she was familiar with it. (V11/1664-65). Through various sources, McClellan developed a timeline of all of King's known addresses. (V11/1663-64). McClellan's timeline was admitted into evidence as State's Exhibit 1. (V11/1666).

McClellan learned that King lived on a farm for a short period of time, but family members never discussed the farm at great length. (V11/1665, 1668). It was McClellan's understanding that neither King nor his family members were farm workers. (V11/1665). During her contact with family members and her investigation of King's numerous residences, no one had ever mentioned chemical exposure to pesticides or farming chemicals. (V11/1665).

McClellan admitted on cross-examination that she did not ask the families about pesticides and that she did not speak to King's co-workers or employers about the chemicals used in the

plumbing business. (V11/1669). She did not recall speaking with Dr. Wu about possible toxic exposure that King may have had. (V11/1669).

ii) Toxicologist Andres Lugo and King's co-worker

Dr. Andres M. Lugo, a medical toxicologist, testified on behalf of King. (V10/1555). Dr. Lugo received his medical degree from University of Mexico, and he obtained his medical license in Mexico. (V10/1556, 1558). He admitted that he had no license to practice medicine in the United States, and he was not qualified to either treat or diagnose any medical condition in the United States. (V10/1558, 1564).

He did, however, receive a master of science in toxicology from University of Minnesota. (V10/1556). While he had studied to obtain his Ph.D., he never actually qualified to be able to obtain it. (V10/1607). He explained that he began working and he never finished his thesis paper. (V10/1607). He clarified, "It's not that I didn't qualify. I just couldn't do it." (V10/1608).

Dr. Lugo had worked as a toxicology consultant in capital punishment cases for fifteen years. (V10/1557). He estimated that he worked on about twenty-five different capital cases. (V10/1561). All of his expert testimony as a toxicologist in the United States had been on behalf of capital defendants. (V10/1609).

King's attorneys contacted him and asked him to determine whether King had been exposed to toxic substances. Dr. Lugo requested aerial photographs of some of the places where King had lived. (V10/1567). He looked at Google maps and looked "for all kind of sources on geographical type information to locate the area" that King lived and to find out what environmental conditions were present during that time. (V10/1567). He met with Dr. Penner, a professor from Michigan State University who conducted a lot of research on pesticides. (V10/1569). He spoke with Dr. Penner about the pesticides and herbicides used by agricultural farm workers in Michigan during the 1970s and 1980s. (V10/1569).

In addition to conducting his own research, Dr. Lugo looked at materials from King's case, spoke with King, King's family members, and his former co-workers, and he compiled a public health assessment on King. (V10/1571). His first objective for the assessment was to identify any potential toxic exposure by looking at the environment, health data, and family and community information. (V10/1571-72).

Dr. Lugo testified that King's mother was exposed to toxic substances while she was pregnant with King because she lived "in very close proximity to farm land and large farming agricultural areas where pesticides were applied." (V10/1573).

According to Dr. Lugo, she had "circumstantial exposure[]." Id.

Lugo determined that King was exposed to toxic substances during the early years of his life. (V10/1572). From 1973-1979 King lived in Silverwood, Michigan. (V10/1573-74). King lived in Waterford, Michigan from 1979 to 1986, and after that he lived in Ortonville. (V10/1573-74). According to Dr. Lugo, the house in Silverwood was located on two acres of property in a rural area. (V10/1574). Dr. Lugo stated that the house in Waterford had land that was "somewhat farmland" next to it, and it was near a golf course. (V10/1574). The house in Ortonville had "some acres there for farming." (V10/1574). Dr. Lugo stated that bigger farms were located near these homes. (V10/1575).

Upon being asked whether King and his family moved around a fair amount, Dr. Lugo stated:

> Yeah, they moved around. But when I was studying the pesticide exposure in the farmland, farm families, one of the main issues is people moving from one place to another and another. That doesn't change the amount of the – really the exposure because they are pretty much in the same kind of region.

(V10/1601). Dr. Lugo stated that the "family lived in the farmland" but that King's father was an auto worker. (V10/1605).

Dr. Lugo agreed that the family lived in a suburb of Pontiac, Michigan. (V10/1606). Dr. Lugo conceded that when he initially wrote his report he thought that King had actually

grown up on a farm, although he testified that after researching the properties he still believed that King grew up on a farm because he was in "a farming area." (V10/1601). He looked at maps to find the distances of King's homes from the nearest farms, and he determined the family was no more than five to ten miles away from farmland. (V10/1605).

Dr. Lugo could not point to any specific studies showing higher instances of brain damage among people growing up in the suburbs of Pontiac, Michigan. (V10/1607). Upon being asked what separated King from the thousands of people in suburban Pontiac, Michigan with regard to his exposure to chemicals, Dr. Lugo testified that was different genetic information regarding the way people responded to chemicals. (V10/1606). He also stated that way of life, what people do, and the environment in which they live all play a role. (V10/1606). He admitted, "when I looked at this case, I really – I was convinced that he was exposed even if they were not in the middle of the farm, but near farmland, that was enough for me to really explain the exposure." (V10/1606).

Dr. Lugo determined that King was exposed to pesticides such as Carbofuran, Diphonate, Heptachlor, Toxaphene, Parathion, Methyl Parathion. (V10/1576). Dr. Lugo explained that these pesticides were used during the 1970s and 1980s and most of them

have since been banned in the United States and all over the world. (V10/1576). Dr. Lugo learned from Dr. Penner that these chemicals would have been used around the areas where King lived as a child. (V10/1577). On cross-examination, Dr. Lugo revealed that these chemicals were consistent with chemicals used all over the United States during that time period. (V10/1613). He explained, "most of the information I got was from the Department of Agriculture, and Dr. Penner, who told me about the number of pesticides, herbicides used in the state, which was consistent with the pesticides and chemicals used all over the United States during that period of time." (V10/1613).

In addition to exposure coming from nearby farms, Dr. Lugo testified that King was also exposed to pesticides because Michigan had a lot of water and soil contamination. (V10/1578). Some chemicals remained in the soil for a few months while others could remain for thirty years or more. (V10/1578). Dr. Lugo also found it significant that King lived near a golf course because "golf courses like to keep the grass really nice and green" and "they have to apply a lot of herbicides, fertilizers, and pesticides to keep off pests or any crops that are not for the greens." (V10/1575). Dr. Lugo found that King had been exposed to an even higher level of pesticides and herbicides because he had worked at the golf course. (V10/1575).

Dr. Lugo opined that King had "chronic environmental exposure" to pesticides. (V10/1580). He testified that chronic exposure involved years of being exposed to low levels of chemicals. (V10/1579). Potential side effects of a child being exposed to pesticides could include developmental problems, paralysis, low reactivity, poor coordination, chronic degenerative disease, cancer, or heart disease. (V10/1582-83). Dr. Lugo testified that some pesticides King was exposed to as a child were linked with low IQ and developmental brain defects. (V10/1583). Dr. Lugo stated that a child exposed to pesticides could have effects of the exposure later in life as an adult. (V10/1582).

Dr. Lugo thought that King's exposure to pesticides earlier in life caused an "additive effect" when King was exposed to chemical solvents and toxic substances later in life while working as a plumber. (V10/1594). King worked as a plumber for approximately fifteen years. (V10/1584). Dr. Lugo testified that King would have been more vulnerable to the substances exposed to as a plumber due to his previous exposures. (V10/1594).

King had worked in areas with poor ventilation and would have breathed high concentrations of vapors. (V10/1586). Dr. Lugo described the potential side effect of exposure to chemicals used in plumbing work as anesthesia/sedation, which

included drowsiness, impaired thinking, and impaired reflexes, and it could lead to a person passing out. (V10/1587-88). He explained that people could experience "blackout periods" where they lose orientation. (V10/1588).

Dr. Lugo testified that he found evidence of King suffering from blackout periods because he mentioned that he had been disorientated on several occasions while driving home from work. (V10/1588). King's headaches and dizziness that he suffered from in 2007 were also a potential side effect of the chemicals, according to Dr. Lugo. (V10/1590). It was Dr. Lugo's belief that all of these symptoms were evidence of exposure to chemicals King was using as a plumber. (V10/1588-89).

Dr. Lugo further testified that chemicals King used as a plumber had been linked to brain damage. (V10/1589). Other effects included peripheral neurological symptoms, like numbness of the extremities and strange feelings under the extremities. (V10/1589). Dr. Lugo recognized that those chemicals used by King during his plumbing work were standard chemicals that were consistent with those used throughout the country. (V10/1585-86).

On cross-examination, Dr. Lugo admitted that he was not qualified to diagnose brain damage, but as a medical toxicologist, he would tell other specialists his toxicology

findings and whether he suspected brain damage. (V10/1597). The specialists would then conduct testing to determine whether brain damage was present. (V10/1597). Dr. Lugo admitted that he saw King's evaluation from Dr. Sesta, a neuropsychologist, where no brain damage was found. (V10/1598). Dr. Lugo did not speak to any of the doctors that had tested King. (V10/1599).

Dr. Lugo claimed that he had conducted his own neuro-psych testing on King. (V10/1583). He found evidence that King was suffering from side effects of chemical exposure due his frequent headaches, orientation problems, lack of concentration, and poor school performance as a child. (V10/1583-84). Dr. Lugo later admitted that he actually conducted a public health assessment, which was "like a kind of testing." (V10/1599-1600). He conceded that the assessment did not have a validity scale; however, "the information we've put together has been proven to be the diagnosis for exposure." (V10/1600). His compilation of the assessment largely relied on receiving good-faith responses from King. (V10/1600). Dr. Lugo relied on all different sources of information when forming his opinion, and the information he received from King was consistent with information from the other sources. (V10/1610-11).

Dr. Lugo felt that King's "behavior was affected and his cognitive functions were affected, we know that." (V10/1592).

Lugo stated that when King was a child he "was growing, developing, and he was in an area where these chemicals were used." (V10/1592). Lugo concluded "that gives us all the information" and King "met all the criteria for exposure. (V10/1592-93). Therefore, he believed that the exposure was "most commonly positive of the behavioral and neurological problems." (V10/1593).

Lori Wagoner, a plumber from Babe's Plumbing, worked with King while he was employed by Babe's Plumbing from 2004-2007. (V11/1736-37). According to Wagoner, King was very capable of doing his job as a plumber. (V11/17444). In fact, King was "actually running the jobs" like a "superintendent." (V11/1744).

She remembered King complaining about headaches, but she never saw him take any medication. (V11/1737). Wagoner testified that King would have used the following chemicals: 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. (V11/1737-39). The products were provided by Babe's Plumbing, and they were used in attics and underneath houses. (V11/1739).

Wagoner testified that the attics could be over one-hundred degrees during the summer. (V11/1739). She stated that if she did not get fresh air, the smell of the products would make her

dizzy. (V11/1739). She noticed that the products affected her more if there was not proper ventilation. (V11/1740). According to Wagoner, the personal side-effects experienced from the chemicals included feeling high and having glossy eyes. (V11/1740).

Wagoner admitted that any effects King might have had from the chemicals, she has had as well, and those effects appeared to be temporary. (V11/1744). Once she left the confined space of the hot attic, she felt better. (V11/1744). Wagoner further admitted that those chemicals were not unique to Babe's Plumbing or to Florida; any plumber working throughout the country would use similar chemicals. (V11/1743). Wagoner was not diagnosed or treated for brain damage, and she was not aware of anyone at Babe's Plumbing being diagnosed with brain damage or treated for brain damage. (V11/1743-44).

Wagoner knew that King went to trial in 2009, but no one from the Public Defender's Office talked to her in 2008 or 2009 about King's case, and she did not talk to any doctors related to King's case. (V11/1740-41). She was available to testify in 2009. (V11/1741-42). Since then, she has spoken with members from the Public Defender's Office and she has talked with Dr. Lugo about the chemicals used in plumbing. (V11/1740-41).

SUMMARY OF THE ARGUMENT

ISSUE I––Trial counsel had King examined by multiple experts and the neuropsychological results did not support a finding of brain damage. Nonetheless, counsel pursued such mitigation through a PET scan and ultimately presented evidence of brain damage in mitigation. That post-conviction counsel has found yet another expert to propound toxic exposure as a possible cause of brain damage is of no consequence. King's alleged brain damage, however caused, was extensively presented by defense counsel in the penalty phase, argued to the jury, and found as mitigation by the trial court. King's post-conviction evidence has fallen far short of establishing either deficient performance or resulting prejudice under Strickland.

ISSUE II––King's defense attorneys were not ineffective in either raising or perfecting a Batson objection to a juror stricken by the State. Nothing presented by King at trial or in post-conviction suggests, much less establishes that the State exercised its strikes in a gender or racially discriminatory manner. Further, King failed to allege, much less establish any prejudice under Strickland for the allegedly improper strike of a single juror. There is no reason to believe this juror would view the overwhelming evidence arrayed against King any

differently than any other juror. Accordingly, this claim was properly denied by the trial court.

ISSUE III—Lethal injection is a constitutional method of execution and this Court has routinely rejected such challenges to Florida's protocol which now employs midazolam as the anesthetizing first drug. King has offered no compelling reasons to depart from this settled precedent.

ISSUE IV--King is not entitled to know the identity of the execution team members. This claim is without merit as a matter of clearly established law.

ISSUE V--Florida law is clear that the issue of competency for execution is not properly raised until such time as the Governor has issued a death warrant.

ARGUMENT

I.

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF TOXIC SUBSTANCE EXPOSURE IN SUPPORT OF KING'S CLAIM THAT HE SUFFERED FROM BRAIN DAMAGE?

King accuses his trial attorneys of rendering ineffective assistance in the penalty phase of his trial by failing to investigate and present evidence of toxic chemical exposure in support of his claim that he suffered from brain damage. Following the evidentiary hearing, the trial court found King had established neither deficient performance nor resulting prejudice in this heavily aggravated case. The trial court's denial of this claim is well supported by the record.

A. The Standard Of Review On Appeal And The Ineffective Assistance Standard

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs *de novo*.[2] Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

[2] This standard of review applies to all issues of ineffectiveness addressed in this brief.

Of course, pursuant to Strickland v. Washington, 466 U.S. 668, 690 (1984), a defendant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and the reliability of the proceeding that confidence in the outcome is undermined.

In Harrington v. Richter, 562 U.S. 86, 105 (2011), the Supreme Court reiterated (emphasis added) how difficult it is to meet Strickland's ineffective assistance standard:

> Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. **Even under de novo review, the standard for judging counsel's representation is a most deferential one.** Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence

> under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

A defendant's burden of establishing prejudice also presents a significant hurdle for a defendant to overcome. With regard to the penalty phase, this Court has stated that a defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000), cert. denied, 534 U.S. 878 (2001) (quoting Strickland, 466 U.S. at 695)). The defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

B. King Failed To Establish Deficient Performance Where Defense Counsel Conducted An Extensive, Objectively Reasonable Investigation Into The Possibility That King Suffered From Brain Damage And Ultimately Presented Evidence Of King's Brain Damage In The Penalty Phase

In rejecting this claim below, the court stated, in part:

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. King failed to establish deficient conduct or prejudice.

This is not a case where Mr. King's counsel failed to investigate mental health mitigation. Eight[fn7] psychologists interacted with and evaluated Mr. King throughout the course of his case. These experts performed competency evaluations and IQ tests, and looked for any mental health mitigation for purposes of the penalty phase. The general consensus amongst these professionals was that Mr. King did not suffer from organic brain damage or traumatic brain injury, and that he was malingering and a pathological liar. Dr. Wu was the outlier with his ability to provide any mental health mitigation.

fn7. (1) Dr. Joseph J. Sesta, Ph.D., M.P.; (2) Dr. Rhona M. Ross, Psy.D., ABPdN; (3) Dr. Mary E. Kasper, Ph.D.; (4) Dr. Kenneth A. Visser, Ph.D; (5) Dr. Michael P. Gamache, Ph.D; (6) Dr. Joseph Chong-Sang Wu, M.D.; (7) Dr. Gregory DeClue, Ph.D.; and (8) Dr. Eddy Regnier, Ph.D.

Dr. Wu conducted a PET scan and opined that Mr. King had a frontal lobe abnormality as a result of a sledding accident that he was involved in at six years of age. He correlated Mr. King's behavioral abnormalities as occurring after the sledding accident, with reports of family members and school records. Testimony and evidence of Mr. King's frontal lobe abnormality was presented extensively at trial, and the Court found and weighed a statutory mental mitigating circumstance, giving it moderate weight. *(See* Sentencing Order, pp. 12-13). Moreover, the Court found and weighed evidence regarding Mr. King's head injury that he suffered as a result of a sledding accident that he was involved in at six years of age, giving it moderate weight. *(See* Sentencing Order, pp. 14-15).

The Court concludes even if evidence of Mr. King's exposure to pesticides and chemicals was presented at the penalty phase, there is no reasonable probability he would have received a different sentence. For a defendant to establish that he was prejudiced by trial counsel's failure to investigate and present mitigation, the defendant "must show that but for his counsel's deficiency,

there is a reasonable probability he would have received a different sentence. To assess that probability, a court must consider 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the [postconviction] proceeding'-and 'reweig[h] it against the evidence in aggravation.'" *Dennis v. State,* 109 So. 3d 680, 695 (Fla. 2012) (quoting *Porter,* 558 U.S. at 41 (quoting *Williams v. Taylor,* 529 U.S. 362, 397-98 (2000))). "A reasonable probability is a 'probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland,* 466 U.S. at 694).

Considering all of the evidence presented during the penalty phase and the evidentiary hearing, this mitigating circumstance would not have outweighed the four aggravating circumstances the Court found, which included two of the weightiest aggravating factors: (1) the murder was heinous, atrocious, or cruel (HAC); and (2) it was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification. [fn8] There is no reasonable probability that Mr. King would have received a different sentence, and the Court's confidence in the outcome is not undermined. Accordingly, claim one is denied.

> fn8. The Court considered and weighed four aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel (HAC) (great weight); (2) the murder was cold, calculated, and premeditated (CCP) (great weight); (3) the murder was committed for the purpose of avoiding lawful arrest; and (4) the murder was committed while King was engaged in the commission of a sexual battery or kidnapping (moderate weight).
>
> The Court considered and weighed two statutory mitigating circumstances: (I) King's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (moderate weight);

> and (2) his age at the time of the offense (thirty-six years old) (little weight).
>
> In addition to the two statutory mitigating circumstances above, the Court considered and weighed thirteen non-statutory 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)

(V8/1186-88).

The trial court's rejection of this claim is well supported by the record. King did not come close to satisfying either prong of Strickland in this case. The investigation conducted by counsel, reflected in counsel's notes, records requests, and testimony during the evidentiary hearing establish that counsel's background investigation was objectively reasonable under Strickland. Contrast Sears v. Upton, 561 U.S. 945, 951 (2010) (Concurring with the post-conviction court that "the

cursory nature of counsel's investigation into mitigation evidence—'limited to one day or less, talking to witnesses selected by [Sears'] mother'—was 'on its face ... constitutionally inadequate.'") (quoting the lower court).

The record reflects that King's alleged brain damage, however caused, was extensively presented by defense counsel in the penalty phase and argued to the jury. The trial court found and weighed a statutory mental mitigating circumstance [substantial impairment in ability to conform his conduct to the requirements of the law] based upon the evidence presented by defense counsel, which included a PET scan. The trial court provided the following analysis of the evidence presented during the penalty phase:

> The defense presented the testimony of Dr. Joseph C. Wu, M.D., the clinical director of the Brain Imaging Center, University of California-Irvine. Dr. Wu met with the defendant once and conducted a P.E.T. scan on him in August 2008 at the National P.E.T. Scan Center, in Pinellas County, Florida.
>
> According to Dr. Wu, the defendant suffered a head injury at approximately age six from a snow sledding accident while living in Michigan with his family. He testified that as a result of the accident, the defendant suffered an injury to the frontal lobe of his brain. In his opinion, the P.E.T. scan results were compatible with significant brain injury. In Dr. Wu's opinion, the defendant's ability to conform his conduct to the requirements of the law was substantially impaired.

> Dr. Wu based his opinion on facts received from the defendant's family, school records, the report of Dr. Visser, a psychologist who performed tests for verbal and performance I.Q. scores in June 2009, and the results of the P.E.T. scan. Significantly, however, there were no hospital or medical records from the accident for his review, and, other than the P.E.T. scan, Dr. Wu never personally performed any neuropsychological testing or evaluation of the defendant.
>
> In rebuttal, the State presented the testimony of Dr. Gamache, a forensic psychologist. Dr. Gamache met with the defendant on two occasions (April 2, 2009 and August 31, 2009). Based upon the evaluations performed on the defendant, Dr. Gamache testified that, in his opinion, the capacity of the defendant to conform his conduct to the requirements of the law was not substantially impaired.
>
> Although the expert witnesses disagree as to whether this statutory mitigating factor has been established, the court is reasonably convinced that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired. Due to the conflicting opinions of the expert witnesses for the defense and prosecution, the court gives this mitigating circumstance moderate weight.

(T11/2058-59).

Further, the trial court found and weighed evidence regarding King's head injury suffered at the age of six. The court found:

> **Michael King suffered a head injury in 1978.**
>
> As found above, the evidence indicated that the defendant received a head injury from a snow sledding accident at the age of six years. This evidence was presented through the testimony of his family. However, no hospital or any medical records were

presented to indicate the severity of the accident.

The court finds this mitigating factor has been established and gives it moderate weight.

> **The PET. scan of Michael King's brain resulted In abnormal findings in the frontal lobe demonstrating a brain injury that causes bizarre behavior, paranoia lack of impulse control, aggression, impaired cognition, and risk taking all of which may be episodic in nature.**
>
> Dr. Wu testified that as a result of the P.E.T. scan of Michael King, in his opinion, frontal lobe injury was sustained from the snow sledding accident. In his opinion, bizarre behavior, paranoia, lack of impulse control, aggression, impaired cognition, and risk-taking may occur as a result. He testified that any of these behaviors may occur but are not a "certainty" to occur.
>
> Dr. Gamache disputed Dr. Wu's findings regarding the symptoms that may occur but did agree that difficulty in regulating impulse control, mood regulation, and impaired cognition may occur as a result of any frontal lobe damage.
>
> The court finds this mitigating factor as established and gives it moderate weight.

(T11/2060-61).

This is not a case where defense counsel failed to investigate the possibility that the defendant may have suffered from brain damage. To the contrary, the record establishes that King's childhood head injury and resulting brain damage, supported by family members and expert testimony, was presented by defense counsel in the penalty phase. Consequently, additional evidence suggesting an alternate etiology for the

brain damage [environmental exposure] is not compelling and would be largely cumulative to the evidence actually developed and presented by trial counsel. See Jones v. State, 998 So. 2d 573, 586-587 (Fla. 2008) ("We have repeatedly held that counsel is not ineffective for failing to present cumulative evidence.") (citing Darling v. State, 966 So. 2d 366, 377-78 (Fla. 2007) and Whitfield v. State, 923 So. 2d 375, 386 (Fla. 2005)).

Counsel cannot be ineffective for failing to present an alternate explanation for brain damage through a toxicologist, particularly where there were no red flags in King's background suggesting that such an investigation would prove useful. Nor, did King establish that had counsel pursued such evidence that anything compelling would have been developed.

The defense attorneys in this case did not stop with one expert, or even two, or three in their attempts to develop positive mental health mitigation evidence or evidence of brain damage. Trial counsel consulted with no fewer than four experts, including Dr. Wu, in an effort to develop mitigation. Three of those experts were decidedly unhelpful to King and included a neuropsychologist, who did not conclude King suffered from brain damage and that he was malingering on tests designed to assess brain damage or dysfunction.

Schlemmer first retained Dr. Sesta, who also worked with Dr. Ross. (V11/1691). Schlemmer specifically requested that Dr. Sesta determine whether King had any organic brain damage or traumatic brain injury.[3] (V11/1692). Doctors Sesta and Ross interviewed King, reviewed records, and conducted neuro-psych testing. (V11/1691-92). The neuro-psych testing yielded invalid results. (V11/1692). Dr. Sesta consulted with Dr. Ross as well as another expert, and all the doctors agreed that the tests were invalid. (V11/1694). Dr. Sesta believed that King was "malingering" and "a pathological liar." (V11/1693). Dr. Sesta concluded that he could not get a valid profile from King because King faked tests and was dishonest. (V11/1693-94).

While King faults defense counsel for failing to further pursue toxin exposure or hire a specific expert to evaluate King's possible toxic exposure (Appellant's Brief at 46), King overlooks the fact that counsel had no reasonable basis for such further investigation. Included within Dr. Sesta's evaluation was a discussion of toxin exposure with King, as King alleged that he had been exposed to toxins from rat poisoning and crack pipe fumes. (V11/1695, 1681). There was no indication that King ever mentioned toxin exposure from growing up near farms or in

[3] Dr. Sesta and Dr. Ross also tested King for competency and mental retardation, and they determined that King was competent and he was not mentally retarded. (V11/1691).

the course of his plumbing career. (V11/1695, 1681). Nevertheless, Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer that there was no neurotoxin defense. (V11/1695, 1678). He further advised that King had no psychiatric condition or neurological issues that could be presented as mitigation. (V11/1694-95).

Counsel cannot be faulted for relying upon her mental health experts at the time of trial where there was no allegation these experts were unqualified or that counsel failed to provide them with any readily available background material necessary for their evaluation. See Stewart v. State, 37 So. 3d 243, 252-53 (Fla. 2010) ("This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire.") (citing State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987)); Dufour v. State, 905 So. 2d 42, 58 (Fla. 2005) ("Simply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief.).

Defense counsel could have reasonably stopped after having consulted with two experts and not fallen below Strickland's

standard of reasonably effective assistance. However, once Schlemmer determined that the initial experts could not give her any mitigation whatsoever, she retained yet another expert, Dr. Kasper, in an effort to develop mitigation. (V11/1698). Dr. Kasper initially found King incompetent, but then upon receiving additional information, she deemed him competent. (V11/1698). She conducted her own neuro-psych testing, and she ultimately reached the same conclusions as Dr. Sesta and Dr. Ross, that King was malingering. (V11/1698, 1702). Dr. Kasper determined that there was no organic brain damage, or physical or psychiatric issues that could be presented in mitigation. (V11/1699-1700).

After receiving this unfavorable report, yet again, defense counsel did not stop her investigation. Schlemmer next hired Dr. Joseph Wu to conduct a PET scan "as a last effort." (V11/1676-77, 1704). The PET scan showed a divot in the front of King's forehead. (V11/1678-79). Schlemmer explained that even with the results of the PET scan, she was required to have clinical correlation in order for Dr. Wu to testify. (V11/1677, 1705). Through her investigation Schlemmer knew that King was involved in a sledding accident. (V11/1704). King's family believed that King's behavior was solely from the sledding accident. (V11/1705). "They never mentioned poisons, toxins, or living on

a farm, or nothing like that. It was always from the sledding accident." (V11/1705).

The sledding accident was a concrete incident with witnesses who defense counsel could use to correlate the PET scan results. (V11/1706). Therefore, Schlemmer presented as much evidence as she could to show the brain injury from the sledding incident. (V11/1706-08, 1717). Schlemmer testified that she had no evidence to support King being exposed to toxins and the testing did not correspond with toxin exposure. (V11/1716-18). King never presented her with any information about toxic exposure and the doctors who evaluated King did not find evidence of such exposure. (V11/1718).

So, with all that counsel did do, retaining multiple experts, and actually presenting evidence of brain damage, collateral counsel still faults counsel for not doing even more. However, the Strickland standard is one of reasonableness, not that counsel could have possibly done more. See Morris v. State, 931 So. 2d 821, 828 (Fla. 2006) ("To establish the first prong under Strickland, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness under "prevailing professional norms."). King failed to establish that no reasonable defense attorney would have failed to retain a toxicologist such as Dr. Lugo. Cullen v.

Pinholster, 131 S. Ct. 1388, 1407-1408 (2011) ("There comes a point where a defense attorney will reasonably decide that another strategy is in order, thus 'mak[ing] particular investigations unnecessary.'") (quoting Strickland 466 U.S. at 689). Consequently, the trial court properly found that King had not established his counsel was ineffective in this case.

It must be remembered that King was not an agricultural worker and did not grow up on a farm. King grew up in a suburb of Pontiac, Michigan. There were simply no red flags available to counsel to suggest that environmental toxins were an important or significant factor in King's background, particularly given trial counsel's experts' conclusions that brain damage or even toxin exposure was not present in this case.

Finally, even if Schlemmer had evidence that King could have been exposed to toxins while living in Michigan, she would not have presented it if it was simply based upon speculation. Counsel explained that presenting weak or speculative testimony may have caused her to lose credibility with the jury. (V11/1717-18).

Given this record, it strains credulity to suggest that counsel could be considered ineffective for failing to retain and present Dr. Lugo. Dr. Lugo was an expert with modest

qualifications[4] and acknowledged he was not licensed to diagnose or treat any medical condition in the United States. (V10/1558, 1564). Dr. Lugo presented tenuous testimony in support of King's toxin exposure based upon broad and sweeping generalizations that would probably apply to hundreds of thousands and possibly millions of Americans in general [simply living within miles of a farm in the 70's]. Dr. Lugo offered an opinion on brain damage based upon King's anecdotal exposure to chemicals by simply living in a semi-rural or suburban environment. But, it was not possible to quantify any particular level of exposure. King's proximity to farmland itself was an open question below. And, the methodology of quantifying that exposure and then extrapolating its effects on King's mental functioning was subject to significant question.

Dr. Lugo conceded that when he initially wrote his report he thought that King had actually grown up on a farm, although he testified that after researching the properties he still believed that King grew up in "a farming area." (V10/1601). Dr. Lugo agreed that the family lived in a suburb of Pontiac,

[4] Dr. Lugo was not a licensed medical doctor in the United States. He possessed a master of science in toxicology from University of Minnesota. (V10/1556). While he had studied to obtain his Ph.D., he never actually obtained his doctorate. (V10/1607). All of his expert testimony as a toxicologist in the United States had been on behalf of capital defendants. (V10/1609).

Michigan.[5] (V10/1606). Lugo looked at maps to find the distances of King's homes from the nearest farms, and he determined the family was a "few miles," or no more than "five" to "ten" miles away from "farmland." (V10/1605). Dr. Lugo was not aware of any specific studies of this area outside of Pontiac Michigan documenting higher instances of brain damage or behavioral problems. Nor, was he aware of any epidemic of brain damage or health issues tied to this specific area of Michigan: "Not that I know of." (V10/1607).

Dr. Lugo admitted that he was not qualified to diagnose brain damage, but as a medical toxicologist, he would tell other specialists his toxicology findings and whether he suspected brain damage. (V10/1597). Dr. Lugo admitted that he saw King's evaluation from Dr. Sesta, a neuropsychologist, who found no brain damage. (V10/1598). Dr. Lugo did not speak to any of the doctors that had previously evaluated King. (V10/1599).

While Dr. Lugo offered non-medically verified conclusions regarding King's likely chemical exposure, at the time of trial,

[5] Defense investigator McClellan learned that King lived on a farm for a short period of time, but family members never discussed the farm. (V11/1665, 1668). It was McClellan's understanding that neither King nor his family members were farm workers. (V11/1665). During her contact with family members and her investigation of King's numerous residences, no one had ever mentioned to her any chemical exposure to pesticides or farming chemicals. (V11/1665).

counsel had King examined by actual doctors including neuropsychologists, who found evidence of brain damage, from whatever source, lacking. It is clear that nothing in King's background would have alerted counsel to the need to possibly hire a toxicologist, such as a hospital admission or other evidence of acute chemical exposure.

King's evidence on exposure to the toxic effects of plumbing chemicals was similarly unimpressive. However, exposure to plumbing chemicals was at least a bit more concrete than Dr. Lugo's nebulous "proximity to farmland" theory of exposure.

Lori Wagoner, a plumber from Babe's Plumbing, worked with King while he was employed by Babe's Plumbing from 2004-2007. (V11/1736-37). According to Wagoner, King was very capable of doing his job as a plumber and was "actually running the jobs" like a "superintendent." (V11/1744). Wagoner remembered King complaining about headaches and recited a number of common plumbing chemicals which she and King have used. (V11/1737-39). According to Wagoner, the side-effects she experienced from the chemicals included feeling high and having glossy eyes. (V11/1740).

On cross-examination, Wagoner admitted that any effects King might have had from the chemicals, she has had as well, and those effects appeared to be temporary. (V11/1744). For example,

once Wagoner left the confined space of a hot attic, she felt better. (V11/1744). Wagoner further admitted that those chemicals were not unique to Babe's Plumbing or to Florida; any plumber working throughout the country would use similar chemicals. (V11/1743). Wagoner has not been diagnosed with or treated for brain damage. Nor, was she aware of anyone at Babe's Plumbing being diagnosed with brain damage. (V11/1743-44).

While there was evidence King was exposed to plumbing chemicals, any link to verifiable brain damage in King was notably absent. Again, trial counsel cannot be faulted for failing to uncover and utilize such tenuous evidence.

In sum, the alternate explanation for King's brain damage offered during the evidentiary hearing was weak and non-medically verifiable. As Schlemmer testified during the evidentiary hearing, she would not present speculative testimony regarding chemical exposure at the risk of losing credibility with the jury. More is not always better. Trial counsel presented evidence of King's likely brain damage through a PET scan and correlated that observable brain scan to changes in King's behavior following a sledding accident. That post-conviction counsel found a toxicologist to offer yet another, and, demonstrably weaker theory of brain damage, does not in any

way establish defense counsel rendered deficient performance under Strickland.

C. King Failed To Establish Any Resulting Prejudice As Evidence Of Brain Damage Was Presented During The Penalty Phase And Nothing Presented During The Post-Conviction Hearing Undermines Confidence In This Heavily Aggravated Case

The lower court also found that King had failed to establish any prejudice as a result of counsel's alleged deficiency. This ruling, too, is well supported by the record.

King's death sentence, supported by four powerful aggravators, recommended by the jury 12-0, and as imposed by the trial court, is not undermined by King's post-conviction allegation of ineffective assistance. With regard to the penalty phase, this Court has recognized the heavy burden the defendant bears in establishing that counsel's alleged deficiencies would alter the outcome. In Butler v. State, 100 So. 3d 638, 668 (Fla. 2012), this Court addressed the weighty aggravation of a heinous, atrocious and cruel murder in assessing Strickland:

> As we have observed, HAC is considered one of the weightiest aggravators in the statutory scheme. *See Aguirre-Jarquin v. State*, 9 So. 3d 593, 610 (Fla. 2009). Given the extreme and prolonged nature of the assault and murder in this case, we find that the HAC aggravator far eclipses the evidence concerning Butler's disadvantaged upbringing, intellectual deficits, and substance abuse.

In this case, the post-conviction evidence King presented in mitigation is of far less significance than that presented in

Butler. Indeed, not a single new mitigator was established, simply an alternate cause of brain damage which has already been presented and found by the trial court. And, the HAC aggravator alone, as in Butler, would far eclipse the mitigation presented during the hearing below. However, unlike Butler, King's case is more heavily aggravated and included that the murder was cold calculated, and premeditated. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) (stating that "heinous, atrocious, or cruel" and cold, calculated and premeditated aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme...").

The young mother of two in this case suffered a prolonged, torturous and horrendous death at the hands of Mr. King. The HAC aggravator alone far outweighs anything King now asserts defense counsel should have presented in mitigation. In finding the murder was HAC, the trial court stated, in part:

> ...the defendant was seen by the victim's next-door neighbor driving "very slowly" through the neighborhood, "back and forth" approximately four or five times. The neighbor found this so suspicious that she went outside, where she saw the defendant, who was driving a green Camaro automobile, drive into the victim's driveway.
>
> [DL] was subsequently abducted from her home by the defendant, leaving in the home her two children, ages 6 months and 2 years of age, together in a crib. The defendant drove her to his home, a few miles away. At his home, with [DL] bound with duct tape, the

defendant sexually battered and restrained her over the course of several hours. The medical examiner found "insertion trauma" injuries to her vagina and anus, bruising of her wrists, arms, face, thigh and other areas of her body. [D.L.] was 5 feet, 2 inches tall, and weighed 109 pounds.

After completing these brutal acts, the defendant continued his abduction of [D.L.]. The defendant drove her to the home of his cousin Harold Muxlow, who lived a few miles away. The defendant arrived between 5:30 and 6:00 PM. While [D.L.] remained in the car, the defendant left his car and obtained from Muxlow a shovel, a flashlight, and a gas can. After Muxlow gave these items to the defendant, Muxlow heard [D.L.] call out, "call the cops." Muxlow saw the defendant enter the car from the passenger side of the car, climbing over the console, and pushing [D.L.]'s head down in the back seat. The defendant, continuing his abduction, drove away from Muxlow's home.

At some point [D.L.] was able to obtain the defendant's cell phone, quite possibly while the defendant was talking outside his car to Muxlow. At 6:14 PM, while the defendant was driving, [D.L.] was able to use his cell phone to call the 911 operator without the knowledge of the defendant. The 911 call will be discussed in more detail below.

Furthermore, while the defendant drove, the kidnapping continued. With [D.L.] in the back seat, two people, Shawn Johnson and Jane Kowalski, each while driving down Highway 41, saw [D.L.] in the backseat of defendant's car screaming for help. Ms. Kowaiski called the 911 operator to report what she saw. She told the 911 operator that she heard loud, "horrific" and "terrified" screaming coming from the defendant's car. She saw what appeared to be a child screaming and "banging on the window" from the backseat. The defendant intentionally evaded Ms. Kowaiski by slowing down and then turning left onto another road, Toledo Blade Boulevard. After turning onto Toledo Blade Boulevard, the defendant drove to a remote, secluded area.

. . .

Did [D.L.] feel terror or fear as these events unfolded, or fear and emotional strain preceding her almost instantaneous death? This court, in the calm reflection of the moment, and by the written words of this sentencing order, detached and objective, can find beyond all reasonable doubt that such terror, fear and emotional strain existed in the mind of [D.L.] prior to her murder. Any words by this court, however, are not capable of truly expressing the reality of such terror.

It is most extraordinary and extremely rare that one can actually hear such emotions in the voice of an innocent victim, who is doomed to be murdered. State's exhibit number 102, the 911 recording of the victim, tragically reveals her fear, mental state, her terror and her emotional strain. One need only listen to portions of this call to comprehend her mental state:

> [the trial court cited the full transcript, only portions are reproduced here]
>
> [D.L.]: Please let me go, please. Please, Oh God, please.
>
> [D.L.]: Please let me go. Help me. I don't know.
>
> . . .
>
> [D.L.]: I'm married to a beautiful husband and I just want to see my kids again.
>
> [D.L.]: Please God.... Please protect me.
>
> . . .
>
> fn9. [The court acknowledges that although it quotes from the 911 call, it cannot, by any means, convey the fear and terror clearly heard in [D.L.]'s voice in that recording.].

The call abruptly ended. The defendant took the cell phone away from [D.L.] and broke it apart. To further indicate the fear [D.L.] surely felt, she removed a ring she always wore and left it in the back seat as a clear marker of her presence in the car. The defendant drove the green Camaro to a deserted area,

> down a barricaded road not accessible to regular automobile traffic. He took her out of the car, into a wooded area and murdered her by shooting her above the right eye.
>
> The defendant's words and actions reveal a crime that was conscienceless, pitiless, and unnecessarily tortuous with an utter indifference to [D.L.]'s suffering. His telling her that he would let her go as soon as she gave him the cell phone was a lie, knowing full well that he was going to take her to a secluded area and murder her.
>
> The court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it great weight.

(T11/2049-53). The State can add little to the analysis provided by the trial court in the sentencing order, but, notes that King placed the handgun against [D.L.]'s right eye, in her field of vision, which indicates that she was quite aware at the very sad end of her lengthy ordeal, that death was her imminent fate. (V26/2901, 2912).

Since King's alleged brain damage has already been presented to the jury[6], there is no reason to believe that evidence of an additional risk factor for brain damage, toxic environment, **even if established**, would substantially or even marginally alter the sentencing outcome in this case. See Atwater v. State, 788 So. 2d 223, 233 (Fla. 2001) (rejecting an

[6] Dr. Joseph Wu's testimony was that frontal lobe damage can render an individual prone to impulsive acts or violent outbursts, especially during periods of stress. (T27/3190-93).

ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented during the penalty phase); Downs v. State, 740 So. 2d 506, 515-16 (Fla. 1999) (rejecting ineffective assistance claim for failing to present mitigating evidence where most, if not all, of the evidence was, in fact, presented.). Accordingly, this claim was properly denied below. See Suggs v. McNeil, 609 F.3d 1218, 1232 (11th Cir. 2010) ("Suggs has not provided evidence of mitigation that directly contradicts any of this evidence of aggravation, and he also has not provided evidence of mitigation that is sufficiently strong to outweigh it.").

II.

WHETHER MR. KING'S TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY PRESERVE A BATSON ISSUE FOR DIRECT APPEAL?

King next argues that defense counsel was ineffective for failing to perfect his objection to the peremptory strike of juror 111, and failed to raise gender, in addition to race to challenge the strike. The claim is procedurally barred from review in a motion for post-conviction relief. This is little more than a repackaging of King's Batson[7] claim which was rejected on the merits in King's direct appeal. Moreover, King's attempt to pursue relief on the basis of ineffective assistance of counsel is foreclosed by this Court's established precedent. Accordingly, this claim was properly rejected by the trial court below.

In rejecting this claim, the trial court stated the following:

> After reviewing and considering the evidence presented, observing the demeanor and assessing the credibility of the witnesses, and relying upon these observations and evaluations in resolving disputed issues of fact, the Court finds Mr. King failed to establish deficient conduct or prejudice.
>
> The Court concludes Mr. King's counsel did not have a valid *Batson* claim to exercise on Juror 111. The State offered a number of race neutral reasons for striking Juror 111, including her age, inexperience,

[7] Batson v. Kentucky, 476 U.S. 79 (1986).

and the fact that Juror 111's brother had a pending drug charge.[fn9] (*See* Trial Transcript, p. 1764). The Court ultimately found the fact that her brother had a pending drug charge was a genuine race neutral reason for the strike. (*See* Trial Transcript, p. 1766). As the Florida Supreme Court explained in its opinion affirming Mr. King's convictions and sentences, this is a valid basis for upholding a peremptory strike. *King*, 89 So. 3d at 230 (citing *Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla. 1992) ("The fact that a juror has a relative who has been charged with a crime is a race-neutral reason for excusing that juror."); Bowden v. State, 588 So. 2d 225, 229 (Fla. 1991)). The result would have been the same had counsel requested a gender neutral reason for the strike.

fn9. Juror 111's questionnaire provides:

31. Have you or a family member ever been arrested or charged with a crime?
Yes. My brother has a felony drug charge.

32. Have you or a family member ever been convicted of a crime?
Yes. My brother has a felony drug charge.

33. Are there any criminal charges pending against you or a family member of which you are aware?
Yes. My brother may be charged with disorderly conduct.

(See State's Exhibit No. 3, p. 3).

In *Carratelli 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." The court held "a defendant alleging that counsel was ineffective for failing to object or preserve a claim of reversible error in jury selection must demonstrate prejudice at the trial, not on appeal." *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 is required to demonstrate that "an actually biased juror served on the jury." *Id.* "Under the actual bias standard, 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.

Since this decision, the Third District Court of Appeal affirmed a trial court's summary denial of a postconviction claim that counsel was ineffective for failing to object to the State's exercise of peremptory strikes against two Hispanic jurors. *Yanes v. State*, 960 So. 2d 834, 835 (Fla. 3d DCA 2007). In affirming the trial court, the Third District cited to Carratelli for the proposition that "postconviction relief cannot be granted ...unless the lawyer's error resulted in a jury that was not impartial." *Id. See also Jones v. State*, 10 So. 3d 140, 142 (Fla. 4th DCA 2009) (holding postconviction relief cannot be granted unless the lawyer's error resulted in a jury that was not impartial).

The Court rejects Mr. King's reliance on *Davis v. Secretary for the Department of Corrections*, 341 F. 3d 1310 (11th Cir. 2003). In Davis, the petitioner argued that his trial counsel was ineffective for failing to preserve a Batson claim for appeal. *Id.* at 1313. The Eleventh Circuit held that "when 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." *Id.* at 1316. Significantly, unlike the instant case,

> Davis's *Batson* challenge was "well taken." [ ] As this observation suggests, his claim is meritorious as a matter of law. Davis established a prima facie case of racial discrimination with

> respect to the second black juror's removal from the jury panel, and the state failed altogether to rebut the inference thereby raised.

Id. (citation omitted) (footnote omitted). As set forth above, Mr. King's *Batson* challenge was without merit.

The Court notes that the Florida Supreme Court believed that Davis misread its opinion in *Joiner v. State*, 618 So. 2d 174 (Fla. 1993), writing:

> As we explained in *Joiner*, jury selection is by nature a dynamic process. The requirement of renewing objections before the jury is impaneled allows both the attorney and the court, knowing the final composition of the jury, to reconsider their positions. From the attorney's point of view, many factors may militate in favor of abandoning a previous objection. *Joiner*, 618 So. 2d at 176. From the court's point of view, the trial court may "exercise[ ] discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling." *Id.* Thus, the renewal requirement provides the party with the opportunity at trial to timely raise a claim previously denied (or decide not to), and provides the trial court the opportunity to readdress the claim and possibly correct an error. Id. These considerations are quintessentially issues about the trial, not the appeal. As the Fourth District noted: "The requirement of preservation is central to the trial process." *Carratelli* II, 915 So. 2d at 1262. Therefore, contrary to Carratelli's argument, the requirements we imposed in Joiner address the trial itself. We reject the proposition that trial counsel renewing an objection (or failing to do so) before a jury is impaneled is acting as appellate counsel.

Carratelli, 961 So. 2d at 321-22.

> The Court concludes Mr. King has not met his burden in demonstrating that the jury was not impartial. Mr. King's guilt was supported by overwhelming evidence, and the Court's confidence in the outcome is not undermined. Accordingly, claim two is denied.

(V8/1189-91).

As an initial matter, as argued by the State below, this claim is procedurally barred from review. The substance of this claim was raised and addressed by this Court on direct appeal. This Court stated:

> In his next claim, King asserts that the trial court erroneously accepted the State's explanation for exercising a peremptory strike to remove a minority juror. We conclude that no such error has been demonstrated.
>
> A trial court's decision to allow a peremptory strike of a juror is based primarily on an assessment of credibility and, therefore, that 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 (step 3).

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).

Here, when asked why the prosecution chose to exercise a peremptory strike of juror 111,[FN13] the following response was given:

> 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.
>
> fn13. Because of the high-profile nature of this case, the jurors were referenced by number throughout the trial.

Soon thereafter, the following dialogue occurred:

> PROSECUTOR: 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.
>
> COURT: Other jurors have said it. Other jurors have said the same thing.

PROSECUTOR: And I will strike what other jurors are remaining on the panel that said that. I'm consistently getting rid of any—

COURT: Here's what I'm going to find. The fact that—was it her brother who has a pending—

PROSECUTOR: Yes. According to her questionnaire, her brother has a pending drug charge.

COURT: Pending criminal charge? All right. I'm going to find based upon that that is a genuine race neutral reason and I'll grant the challenge, peremptorily.

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 her questionnaire has been waived. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."); *see also Rimmer v. State*, 825 So. 2d 304, 321 (Fla. 2002) ("The trial court in this instance cannot be faulted for accepting the facial reason offered by the State, especially where the State's factual assertion went unchallenged by the defense.").

Further, this Court has previously upheld peremptory strikes where the basis for the strike was the same as that relied upon by the trial court in this case. *See, e.g., Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla. 1992) ("The fact that a juror has a relative who has been charged with a crime is a race-

> neutral reason for excusing that juror."); *Bowden v. State*, 588 So. 2d 225, 229 (Fla. 1991). Although King now contends that there were other jurors on the panel who had family members with criminal charges, defense counsel did not raise that challenge before the trial court. Accordingly, that challenge has also been waived. *See Davis v. State*, 691 So. 2d 1180, 1181 (Fla. 3d DCA 1997).
>
> Moreover, 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. *See Alonzo v. State*, 46 So. 3d 1081, 1084 n.2 (Fla. 3d DCA 2010) ("If the record fails to identify the respective race of the challenged and unchallenged jurors, the appellate court cannot determine if pretext exists."), review denied, 70 So. 3d 586 (Fla. 2011); *Davis*, 691 So. 2d at 1182 (where record failed to reflect the race of allegedly similarly situated jurors, it was impossible for the Court to determine the issue of pretext).
>
> In light of the foregoing, King has failed to demonstrate that the trial court's decision to allow the peremptory strike of juror 111 was clearly erroneous. *See Melbourne*, 679 So. 2d at 764. Therefore, we deny relief on this claim.

King, 89 So. 3d at 229-30.

Since this claim, or a variant of it, was raised and rejected on direct appeal, it may not be relitigated in a motion for post-conviction relief. See Melton v. State, 949 So. 2d 994, 1013-14 (Fla. 2006) (concluding that such challenges should be raised on direct appeal); Reaves v. State, 826 So. 2d 932, 936 n.3 (Fla. 2002) (concluding that a claim regarding whether the jury was a fair cross-section of the community is procedurally

barred as a direct appeal issue). The contention that counsel was ineffective for failing to object to the alleged error cannot be used to circumvent the bar. Post-conviction proceedings are not second appeals. Chandler v. Dugger, 634 So. 2d 1066, 1070 (Fla. 1994); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Robinson v. State, 707 So. 2d 688, 697-99 (Fla. 1998). In any case, King's claim is both legally and factually without merit.

King presents this claim as if raising an ineffective assistance of counsel claim puts him back in the posture he would have been in had counsel raised this claim at trial. This is simply not true.[8] See Carratelli v. State, 961 So. 2d 312, 318

[8] As noted by Philbert v. Brown, 2012 WL 4849011, *13 (October 11, 2012, E.D.N.Y.) (unpublished), it is simply impossible to recreate the trial conditions and therefore a contemporaneous objection is necessary. The court observed:

> There is good reason why failure to object gives rise to waiver of the objection: raising the objection during jury selection allows the trial court to remedy the error without requiring a new trial, *McCrory*, 82 F.3d at 1247; the reasons for using a peremptory strike are often highly subjective, and elucidating the reasoning behind them may not be possible if not challenged promptly, *id.* at 1248; moreover, the trial judge is tasked with determining whether the prosecutor has acted with purposeful discrimination, and this determination relies upon the judge's contemporaneous observations, *id.*

It would nearly be impossible in this case to recreate voir dire in the post-conviction setting and ask the prosecutor his gender neutral reasons for striking a number of potential female jurors.

(Fla. 2007) (noting that to obtain a new trial on direct appeal a defendant alleging the erroneous denial of a cause challenge during jury selection must show only that preserved error occurred, but the standard is much more strict to obtain post-conviction relief). Indeed, this case demonstrates the wisdom of this Court's decision, for it is nearly impossible to recreate the fluid dynamics involved in jury selection from the memories and thought processes of trial counsel years after the jury has been selected.

In order to establish that counsel was ineffective for failing to object to the jury selection process, two requirements must be met. First, the defendant must establish that counsel's performance was deficient. Second, the defendant must establish that counsel's deficient performance prejudiced him or her. Carratelli, 961 So. 2d at 320. To establish deficiency, the defendant must prove that counsel's performance was unreasonable. To establish prejudice, the defendant must prove 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." Carratelli, 961 So. 2d at 320 (quoting Strickland, 466 U.S. at 694). In establishing the standard for post-conviction relief,

the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding *whose result is being challenged*." Carratelli, 961 So. 2d at 322 (quoting Strickland, 466 U.S. at 696, emphasis in original). In the context of a claim of prejudice arising from counsel's performance in jury selection, the proceeding "whose result is being challenged" is the trial. Carratelli, 961 So. 2d at 322. Thus, to obtain relief, King has to do more than just show that women were excluded or even that if a challenge to the prosecutor's use of peremptory challenges had been made that it might have been successful. He has to show a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different. King has not even attempted to make such a showing.

King's reliance upon Davis v. Secretary for Dept. of Corrections, 341 F.3d 1310, 1315-1316 (11th Cir. 2003) is misplaced. In Davis, trial counsel failed to preserve a sufficient, adequate, and apparently meritorious Batson challenge he had raised at trial for appeal - leading to default of that issue on appeal in state court. Here, counsel raised the claim and it was preserved for direct appeal. This Court found there was no Batson violation in this case. And, as the trial court noted, the State in this case offered several valid reasons for the strike. Consequently, unlike Davis, there was

simply no meritorious Batson objection available to counsel---to raise at either at trial or on appeal.

The Eleventh Circuit Court of Appeals has recently reaffirmed that the prejudice standard requires an examination of the stage at which trial counsel's performance is provided, not the appeal as King contends.[9] In Price v. Secretary, Florida Dept. of Corrections, 548 Fed. Appx. 573, 576 -577 (11th Cir. 2013) (unpublished), the Eleventh Circuit stated:

> In order to succeed on his ineffective assistance of counsel claim, Mr. Price must show—in addition to deficient performance—a reasonable probability that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. Although a successful *Batson* claim requires automatic reversal on direct appeal, see Rivera v. Illinois, 556 U.S. 148, 161, 129 S. Ct. 1446, 173 L.Ed.2d 320 (2009), the same is not true on collateral review. Despite Mr. Price's arguments to the contrary,

[9] See Purvis v. Crosby, 451 F.3d 734, 739 (11th Cir. 2006) (stating that, where petitioner claims counsel should have objected, "we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal."); Price v. Secretary, Florida Dept. of Corrections, 548 F. Appx. 573, 576 (11th Cir. 2013) (unpublished) ("[W]e agree with the district court that 'there is no evidence that an African American juror would have seen the evidence any differently than the white jurors seated on the jury.' ... As the district court noted, race was not the central theme of this case, and did not play a significant role."), cert. denied, 134 S. Ct. 1896 (2014); Sneed v. Florida Dept. of Corrections, 496 F. Appx. 20, 27 (11th Cir. 2012) (per curiam) (unpublished) ("Indeed, Sneed has not shown that, had counsel objected, his challenge would have been successful, nor is it clear that the second prospective black juror being on the jury would have carried a reasonable probability of changing the outcome of the trial.") (citation omitted).

> "the law of this circuit [is] that an ineffective assistance of counsel claim based on the failure to object to a structural error at trial requires proof of prejudice." *Purvis v. Crosby*, 451 F.3d 734, 742 (11th Cir. 2006) (addressing partial closing of a courtroom during trial). In *Jackson v. Herring*, 42 F.3d 1350, 1361 (11th Cir. 1995), for example, we addressed the showing *Strickland* requires of petitioners alleging ineffective assistance of counsel for failure to raise an equal protection objection under *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L.Ed.2d 759 (1965). We proceeded to "determine whether there [was] a 'reasonable probability' of a different result sufficient to undermine our confidence in the outcome of [the] case." *Jackson*, 42 F.3d at 1361. We are bound to do the same here, despite having expressed some concerns about *Jackson* in *Eagle*, 279 F.3d at 943 n. 22.
>
> Having conducted a thorough review of the record, we agree with the district court that "there is no evidence that an African American juror would have seen the evidence any differently than the white jurors seated on the jury." *Price*, 2011 WL 2561246, at *7. As the district court noted, race was not the central theme of this case, and did not play a significant role. To be sure, the victim in this case was Caucasian, and both Ms. Edlow and Mr. Price were African-American. But that alone does not establish that "there is a 'reasonable probability' of a different result sufficient to undermine our confidence in the outcome of this case." *Jackson*, 42 F.3d at 1361. Significantly, Mr. Price does not attempt to show otherwise.

Courts, like this one, have generally recognized that an ineffective assistance of counsel claim based upon the failure to challenge the prosecutor's strike of a juror faces the heavy burden of establishing prejudice in the form of a biased juror actually sitting on his jury or that the outcome of his trial

would have been different with a different juror sitting on his jury.[10] Frances v. State, 143 So. 3d 340, 348 (Fla. 2014) (citing Carratelli and noting that there is no reason to believe that the removal of a particular venireperson, even if in error, resulted in any prejudice to the defendant). In Jones v. State, 10 So. 3d 140, 141-42 (Fla. 4th DCA 2009), the Fourth District Court of Appeal reaffirmed its prior holding in Jenkins v. State, 824 So. 2d 977, 984 (Fla. 4th DCA 2002), stating:

> *. . .[W]e do not see how the claim of a lawyer's failure to raise a Neil objection could ever be the basis for post-conviction relief for incompetence of counsel.* Unlike the situation where a biased juror served on a jury, the failure of a lawyer to raise a *Neil* challenge does not mean that the jury was biased. The state might have acted in bad faith in exercising

[10] State v. Bouchard, 922 So. 2d 424, 429-430 (Fla. 2d DCA 2006) (holding that "the Strickland standard focuses on the effect of the deficient performance on the reliability of the outcome in the proceeding in which the deficient performance occurred rather than on whether counsel's deficient performance in the trial court affected the defendant's appellate rights."); Young v. Bowersox, 161 F.3d 1159, 1160, 1161 (8th Cir. 1998) (In asserting counsel was ineffective in failing to make a Batson objection, the claim fails where there was no showing the individual jurors who tried him were not impartial and therefore defendant failed to meet the prejudice prong of Strickland); Strong v. State, 263 S.W. 3d 636, 648-649 (Mo. 2008) ("In accordance with these authorities, this Court holds that counsel's failure to raise a Batson objection, absent any attempt by Mr. Strong to demonstrate that unqualified persons served on the jury, does not amount to a structural defect that entitles him to a presumption of prejudice.") (note omitted); State v. Caughron, 855 S.W. 2d 526, 539 (Tenn. 1993) (Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the [d]efendant to show that a juror is in some way biased or prejudiced.").

> its peremptory challenges, but the jury trying the case might have been simon-pure in its objectivity and ability to follow the law. In such a situation, there can be no showing that counsel's failure to assert a *Neil* challenge had any effect on the defendant's ability to receive a fair trial. Thus, there can be no prejudice sufficient to support post-conviction relief. (emphasis in original)

The Jones court explained that even if the language from Jenkins was arguably dicta, it was consistent with Carratelli v. State, 961 So. 2d 312 (Fla. 2007) and supported the denial of a post-conviction claim that counsel was ineffective for failing to object to the State's exercise of peremptory strikes against two Hispanic jurors. Jones, 10 So. 3d at 141-42; accord Yanes v. State, 960 So. 2d 834, 835 (Fla. 3rd DCA 2007) (concluding that post-conviction relief cannot be granted in this context unless the lawyer's error resulted in a jury that was not impartial.). Obviously, in a case where King's guilt was supported by completely overwhelming evidence, it cannot be said that the outcome of King's trial was rendered unfair or unreliable based upon counsel's asserted deficient performance in failing to persuade the trial court to retain prospective juror 111.[11] Thus, this claim is legally and factually insufficient to warrant relief.

[11] It should be noted that there were no obvious or even conceivable racial issues involved in this case. Both King and the victim were Caucasian.

King has offered no compelling reasons to disregard the now settled precedent of this Court to assess prejudice emanating from counsel's performance on the outcome of the trial, not the appeal. Nonetheless, assuming for a moment that this Court were to go down the path King urges and assess the merits of a claim for which King has offered no legally cognizable claim of prejudice, the record alone refutes this claim. Defense counsel had no valid Batson objection to exercise on prospective juror 111.

King curiously asserts that Defense counsel was ineffective for failing to challenge the strike of juror 111 on the basis of gender, in addition to race [the objection raised at trial]. (Appellant's Brief at 57). King's claim moves from a tenuous, academic challenge to the preposterous when one considers that the jury included a majority of seven females.[12] Notably, of the seven peremptory strikes used by defense counsel on female jurors, five of those prospective female jurors were apparently acceptable to the State. [Juror 23, T20/1760; Juror 29, T20/1763; Juror 38, T20/1761; Juror 40, T20/1762; Juror 104, T20/1766). The State also only exercised **seven** of its **thirteen**

[12] While King asserts that the prosecutor included as a reason for his strike that juror 111 was a female (Appellant's Brief at 58), this statement was clearly intended as a point of identification. The prosecutor did not assert at any point, that he was striking this prospective juror because she was a female.

peremptory challenges. (T20/1766). Consequently, the record clearly refutes any suggestion that the State exercised its challenges in a gender discriminatory manner. See Com. v. Spotz, 587 Pa. 1, 37-38, 896 A. 2d 1191, 1212-1213 (Pa. 2006) (rejecting an ineffective assistance of counsel claim where the defendant failed to establish a prima facie case of purposeful discrimination where the prosecutor accepted four women jurors and "four women who were eliminated by defense counsel's exercise of peremptory challenges" and where nothing else in the transcript indicated the prosecutor was targeting female jurors for special treatment). Nothing presented at trial or in post-conviction suggests, much less establishes that the State exercised its strikes in a discriminatory manner. Such a claim is ludicrous on the basis of this record.

As for the claimed failure to perfect a race based challenge, the prosecutor in this case offered a number of racially neutral reasons for striking juror 111, starting with her age, 18. This juror was clearly the youngest juror on the panel. The prosecutor stated:

> On juror 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 those foregoing reasons, we exercise our peremptory challenge on Number 111.

(T20/1764).

In response, the defense counsel simply stated "it is our position those are not sufficient reasons." (T20/1764-65). The prosecutor added that he had several reasons for the challenge; the juror also said that living in prison was worse or more awful than a death sentence. When the court noted other jurors had said that, the prosecutor added that he intended to strike any other jurors that had said that. (T20/1765). The judge found the fact her brother had a pending drug charge was a genuine race neutral reason for the strike. (T20/1766). Even if this Court were inclined to reverse its own longstanding precedent and look simply to the outcome of the appeal, rather than on the outcome at trial, King has fallen far short of establishing that his challenge would have any chance of success on appeal had counsel acted differently at trial.

As this Court has already found, the pending or past felony drug charge or conviction was a valid, racially neutral reason for the strike. The fact that the State cited it as a "pending"

felony drug charge was not shown to be in error at trial. On the question of whether she or any other family member had been arrested or charged with a crime, Juror 111, stated on her questionnaire that her brother "has a felony drug charge." (SR4/605).

The prosecutor offered several valid, racially neutral reasons for his peremptory strike of juror 111. And, contrary to collateral counsel's assertion (Appellant's Brief at 61), the court did not find any of the prosecutor's reasons pretextual. To the contrary, the trial court recognized in its order, that the State had offered several valid reasons for the strike. See Batson v. Kentucky, 476 U.S. 79, 95 (1986) (noting the need for a judge to take into "account all possible explanatory factors in the particular case."). The defense only challenged a single strike on the basis of race, therefore there was no pattern of strikes against any particular group in this case. King has not shown that any of the relevant circumstances that a trial court may consider, including the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment have been shown to apply in this case. See Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009).

It is undeniable that juror 111 was the youngest prospective juror, just 19 years old at the time of trial. This was the first reason, of many, articulated by the prosecutor and is a valid, race and gender neutral reason. In Rice v. Collins, 546 U.S. 333, 338 (2006), the United States Supreme Court held that a state trial court's decision finding a prosecutor's reason for a peremptory strike of an African-American juror was race-neutral where the juror was young, single and lacked ties to the community. Indeed, "[a] potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." People v. Sims, 5 Cal. 4th 405, 430, 20 Cal. Rptr. 2d 537, 853 P. 2d 992 (Cal. 1993); United States v. You, 382 F.3d 958, 968 (9th Cir. 2004) ("valid and non-discriminatory" reasons for strikes included that one excused "juror lacked the sufficient age and maturity level" . . .); United States v. Williams, 934 F.2d 847, 849-50 (7th Cir. 1991) (youth and marital status are neutral considerations). Since youth is clearly a genuine, common, race-neutral reason for the prosecutor to strike a prospective juror, defense counsel's failure to perfect his challenge or otherwise object to gender cannot have prejudiced the defendant---either in the outcome at trial, or, the his outcome on direct appeal. See Saffold v. State, 911 So. 2d 255, 256 (Fla. 3d DCA 2005); Cobb v. State,

825 So. 2d 1080 (Fla. 4th DCA 2002); see also Daniels v. State, 837 So. 2d 1008, 1009 (Fla. 3d DCA 2002) (noting "[t]he prevailing view is that a peremptory challenge based on the age of the juror is permissible. See Weber v. Strippit, Inc., 186 F.3d 907, 911 (8th Cir. 1999), cert. denied, 528 U.S. 1078, 120 S.Ct. 794, 145 L.Ed.2d 670 (2000); United States v. Cresta, 825 F.2d 538, 545 (1st Cir. 1987); State v. Taylor, 142 N.H. 6, 694 A.2d 977 (1997); Baxter v. United States, 640 A.2d 714 (D.C. 1994)."). As a number of courts have recognized, prosecutors routinely remove young jurors, and such removals withstand challenge. See e.g. United States v. Williams, 214 Fed. Appx. 935, 936 (11th Cir. 2007) (unpublished) (finding a prosecutor's strike of a prospective juror based in part on "her youth and lack of worldly experience" to be genuine and observing it "is not unreasonable to believe the prosecutor remained worried that a young person with few ties to the community might be less willing than an older, more permanent resident" to find Williams guilty, quoting Rice v. Collins, 546 U.S. 333, 341 (2006)); United States v. Thompson, 450 F.3d 840 (8th Cir. 2006) (finding a prosecutor's strike of a 20 year-old prospective juror based in part on his age to be genuine); People v. Hamilton, 200 P. 3d 898, 933 (Cal. 2009) (finding a prosecutor's strike of a 22 year-old prospective juror based on his age to be genuine);

Leonard v. State, 969 P. 2d 288, 294 (Nev. 1998) (finding a prosecutor's strike of a 22 year-old prospective juror based on his age to be genuine).

The prosecutor not only mentioned her age, but, lack of experience and her perceived meekness. The record supports the prosecutor's basis for the strike, not only to age, but perceived meekness. During voir dire, the trial court had to ask juror 111 to speak up so that the court reporter could note her responses for the record. (T20/1697-98). Further, juror 111's view on the death penalty, that life in prison may be more of a punishment than the death penalty, was yet another, valid, race neutral reason mentioned by the prosecutor for the strike. (SR4/605).

As noted, defense counsel did not assert that any similarly situated juror with a felony charge or pending felony charge had not been challenged. Moreover, even now, with the benefit of unlimited time and after meticulously mining the prospective juror questionnaires, collateral counsel has not found a single appropriate comparator. Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996) ("The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense."). None of the non-challenged jurors possessed the same combination

of characteristics of being young and inexperienced (19), with a brother with a pending/past felony drug charge, with similar views on the death penalty [life in prison was worse than the death penalty]. King has not shown that adding gender or any other reason for the strike would have led the challenge to be successful at the trial level, much less operate to undermine confidence in the outcome of his appeal.

Finally, King largely ignores the fact that lead counsel did not even want juror 111 to sit on King's jury.[13] Schlemmer explained that as lead counsel in the case, she was in charge of the jury selection, and although she received input and advice from her co-counsel, the ultimate decisions were hers to make. (V11/1727). Upon being shown the questionnaire form from juror 111 that was admitted into evidence as State's Exhibit 3, Schlemmer acknowledged that she would not have wanted that juror on the panel and would have wanted her stricken. (V11/1725-1728; 1730). Schlemmer felt that she was too young; she would have empathized with the victim regarding the horrible 911 call; she

[13] Scotese acknowledged that Schlemmer was lead counsel and would have the final say on jury selection. While Scotese made the objection to juror 111, he acknowledged that he asked for a race-neutral reason nearly 100 percent of the time a peremptory strike was exercised on a minority juror. (V10/1655). This pro forma objection does not overcome lead counsel's tactical determination that she did not want juror 111 sit on King's jury.

was a follower, not a leader; and she was too into CSI. (V11/1730). Schlemmer's file had a big "no" written next to juror 111. (V11/1730-1732). Schlemmer was not certain who wrote "no," but she thought that Scotese had written it. (V11/1731-32).

Despite the immense hurdles facing this claim, King is in the unusual position of asking this Court to reverse his convictions on the failure to perfect an objection for appeal, on a juror that his lead attorney did not even want sitting on his jury. The law certainly does not countenance such an absurd result. This meritless claim was properly denied below.

III.

WHETHER THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

King's next claim, which alleges that Florida's lethal injection statute and procedures violate the Eighth Amendment, is procedurally barred. This challenge should have been made, if at all, on direct appeal. See Douglas v. State, 141 So. 3d 107, 127 (Fla. 2012) (Defendant "procedurally barred from raising these substantive claims [challenging lethal injection] because he could and should have raised them on direct appeal, but he failed to do so.") (citing Jones v. State, 928 So. 2d 1178, 1182 n.5 (Fla. 2006)). Post-conviction proceedings cannot be used as a second appeal.

Further, lethal injection is a constitutional method of execution and this Court has routinely rejected such challenges to Florida's protocol which now employs midazolam as the anesthetizing first drug. See Muhammad v. State, 132 So. 3d 176, 193-194 (Fla. 2013), cert. denied, 134 S. Ct. 894 (2014); Howell v. State, 133 So. 3d 511, 518-20 (Fla.), cert. denied, 134 S. Ct. 1376 (2014); Henry v. State, 134 So. 3d 938, 947-48 (Fla.), cert. denied, 134 S. Ct. 1536 (2014); Davis v. State, 142 So. 3d

867, 873 (Fla.), cert. denied, 135 S. Ct. 15 (2014)[14] King has offered no compelling reasons to depart from this settled precedent. See Reed v. State, 116 So. 3d 260, 267 (Fla. 2013) ("This Court has thus previously rejected each of these challenges to Florida's lethal-injection protocol and — based upon the sound principle of stare decisis — we continue the same course here."). Notably, the Supreme Court has recently upheld as constitutional Oklahoma's use of a similar protocol to Florida's employing midazolam.[15] Glossip v. Gross, --- S. Ct. ---, 2015 WL 2473454 (June 29, 2015). Accordingly, this claim was properly denied below.

[14] See also Chavez v. Palmer, 2014 WL 521067 (M.D. Fla. Feb. 10, 2014) (unpublished) (finding that the experts' testimony established that "when midazolam is properly administered in the massive dose required by the Florida protocol, it will render the individual insensate to noxious stimuli by placing the individual in an anesthetic state, unable to discern pain"), aff'd Chavez v. Florida SP Warden, 742 F.3d 1267 (11th Cir.), cert. denied, 134 S. Ct. 1156 (2014)

[15] To plead an Eighth Amendment claim, King must allege two things: (1) "that [Florida's] use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain," and (2) "identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. Glossip at *3 (citing Baze, 553 U.S. at 61). He has done neither.

IV.

WHETHER 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?

Although the trial court rejected King's claims below on the merits by citing controlling case law (V8/1192), the State also submits that this claim is procedurally barred from review in a motion for post-conviction relief. A substantive challenge to the constitutionally of the statute exempting the identity of the executioners from disclosure should have been raised, if at all, on direct appeal. See Israel v. State, 985 So. 2d 510, 520 (Fla. 2008); Fla. R. Crim. P. 3.851(e)(1) ("This rule does not authorize relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."). In any case, the claim is without merit.

This claim is without merit as a matter of clearly established law. King is not entitled to know the identity of the execution team members. See Troy v. State, 57 So. 3d 828, 841 (Fla. 2011) (noting the court has "repeatedly rejected challenges to the constitutionality of section 945.10 on the merits" and has declined to recede from that precedent) (string citations omitted); Henyard v. State, 992 So. 2d 120, 130 (Fla.

2008) (rejecting constitutional challenge to "section 945.10, Florida Statutes, which exempts the disclosure of the identity of an executioner from public records). Accordingly, this claim was properly denied below.

V.

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

Florida law is clear that the issue of competency for execution is not properly raised until such time as the Governor has issued a death warrant. See Griffin v. State, 866 So. 2d 1, 21-22 (Fla. 2003) (affirming summary denial of competency claim because the claim was not ripe for review); Hunter v. State, 817 So. 2d 786, 799 (Fla. 2002); Brown v. Moore, 800 So. 2d 223, 224 (Fla. 2001). And, contrary to King's assertion (Appellant's Brief at 74-75), such a claim need not be raised at this time simply to preserve it for later federal review. See Panetti v. Quarterman, 551 U.S. 930 (2007). Finally, King has offered no persuasive argument to suggest that he is in fact, incompetent. Accordingly, this claim should be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 2015, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the e-portal filing system which will send a notice of electronic filing to the following: Maria C. Perinetti (**perinetti@ccmr.state.fl.us)** and Raheela Ahmed (**ahmed@ccmr.state.fl.us)**, Assistants CCRC, Law Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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