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

MICHAEL L. KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the Answer Brief of Appellee will be in the form [AB]/[page number]. The Answer Brief from King's direct appeal will be in the form [DAB]/[page number].

ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT I

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

The Appellee argues that "[c]ounsel cannot be ineffective for failing to present an alternate explanation for brain damage through a toxicologist" where "there were no red flags in King's background suggesting that such an investigation would prove useful" and counsel hired four experts in an effort to develop mitigation. AB/38. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 10.11. (Commentary at p.112-13) (2003), advises that, "Counsel should choose experts who are tailored to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge to testify persuasively about a particular fact/field of expertise." *See also*, *Caro v. Calderon*, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (remanded for an evidentiary hearing where, although counsel consulted four experts, including a psychologist,

psychiatrist, and medical doctor, counsel failed to consult a neurologist or toxicologist who could have explained the neurological effects of the defendant's exposure to pesticides), *cert. denied*, 527 U.S. 1049 (1999). Trial counsel provided deficient performance by failing to hire experts specifically tailored to the needs of King's case. Three of the four experts (Dr. Sesta, Dr. Ross, and Dr. Kasper) hired by the defense in preparation for penalty phase were neuropsychologists. None of these experts provided any useful information. The fourth expert, Dr. Wu, is a medical doctor who conducted a PET scan of King. He testified that King has a divot in the frontal lobe and abnormal activity within his frontal lobe, which is consistent with a traumatic brain injury. This presumably resulted from a sledding accident when King was six years old. Trial counsels' failure to investigate King's toxic exposures was objectively unreasonable because they were aware that King worked as a plumber and that he grew up in Michigan on or near farms. They failed to hire a toxicologist to investigate how King's toxic exposures could have contributed to his brain abnormalities. *See Porter v. McCollum*, 130 S.Ct. 447, 453 (2009). Although the Appellee argues that Dr. Sesta included in his report "a discussion of toxin exposure with King" (AB/39), Dr. Sesta is not a toxicologist, and he specifically looked at rat poison and crack fumes. Neither Dr. Sesta nor any of the experts hired by King's trial counsel investigated King's exposure to pesticides

or the chemicals used in the plumbing industry. While the Appellee attributes trial counsel's failure to present evidence regarding King's toxic exposures to trial counsel not wanting to "present speculative testimony regarding chemical exposure at the risk of losing credibility with the jury" (AB/47), trial counsel did not investigate King's toxic exposures in the first place, and therefore there would be no reasonable basis for such a strategy. *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003).

Additionally, the Appellee is critical of Dr. Lugo's qualifications, which they refer to as "modest". AB/43-44. Andrés Lugo, M.D. testified on behalf of King at the post-conviction evidentiary hearing regarding his public health assessment of King. PC10/1555-1613. The Appellee points out that he is not licensed to practice medicine in the United States, that while he has studied to obtain his Ph.D. he has not yet obtained it, and that all of his expert testimony in the United States has been on behalf of capital defendants. AB/44. Dr. Lugo's credentials and 28 years of experience as a medical toxicologist are extensive, as highlighted by his curriculum vitae and his testimony. Dr. Lugo has a medical degree from the University of Mexico, a Master of Science in toxicology from the University of Minnesota, and a Master of Public Health from the University of Texas-Houston. PC10/1556; PC7/1062. Dr. Lugo has completed the requirements for a Ph.D. in toxicology from

the University of Minnesota, and he is still working on his doctoral thesis. PC10/1556. He is a Fellow of the American College of Medical Toxicology; he holds a certification in toxicology from the American College of Medical Toxicology; he is a member of the American Academy of Clinical Toxicology, the International Conference of Toxicology, the American Society of Toxicology, and the American Medical Association; and he was certified for over twenty years by the American Association of Poison Control Centers. PC10/1559; PC7/1062. Dr. Lugo has authored a book for the Mexican government cataloguing the pesticides available in Mexico, in addition to numerous other publications regarding toxicology. PC10/1560; PC7/1065-66. After graduating from medical school in 1981, Dr. Lugo completed three years of training in a toxicology program at the University of Southern California Poison Center, where he continued to work for some time. PC10/1555-56. He has also worked at poison control centers in Texas and Minnesota, and he has taught toxicology at poison control centers, Texas Tech University, the University of New Mexico, the University of South Florida, and the Universidad Autonoma de Ciudad Juarez in Chihuahua, Mexico. PC10/1556, 1559-60; PC7/1065. From 1994 to 2000, he worked with the University of California-Davis to provide toxicology training for farm workers who worked with pesticides in southern California, New Mexico, and Arizona. PC10/1561. He has worked as a

toxicology consultant part-time since 1994 and full-time since 2007, consulting for large corporations in Latin America, as well as in approximately 25 capital cases over the past fifteen years. PC10/1557, 1561. He is often hired or consulted in cases, including civil class action cases, in which he does not testify, which lends to the credibility of his work. PC10/1562. While the Appellee is critical of the fact that Dr. Lugo is not licensed to practice medicine in the United States, he is licensed to practice medicine in Mexico, and he still sees patients in Latin America, where he treats individuals who have been exposed to toxic substances. PC10/1558. The Appellee has offered no evidence that the effects or treatment of toxic exposures in the United States are any different than that in Latin America, or that doctors licensed in Mexico are somehow inferior to doctors licensed in the United States, although that seems to be the Appellee's implication.

ARGUMENT II

KING'S TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY PRESERVE THE *BATSON*[1] ISSUE REGARDING THE STATE'S PEREMPTORY STRIKE OF JUROR 111 FOR DIRECT APPEAL.

The Appellee argues that this claim is a "repackaging of King's *Batson* claim which was rejected on the merits in King's direct appeal", and that therefore it is

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986).

"procedurally barred from review in a motion for post-conviction relief." AB/54. Contrary to the Appellee's assertion, the *Batson* claim that was raised in King's direct appeal was not decided on the merits. Although the Appellee now argues that trial counsel raised the *Batson* claim and it was preserved for direct appeal (AB/64), the Appellee argued on direct appeal that the claim regarding the State's peremptory strike of Juror 111 was "unpreserved" (DAB/85). The Appellee on direct appeal identified a number of deficiencies in trial counsel's performance as follows:

> When challenged, the prosecutor in his case offered a number of facially racially neutral reasons for striking juror 111, starting with her age, 18, the youngest juror and her inexperience. 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.

(V20, 1764).

> In response, the defense counsel simply started "it is our position that those are not sufficient reasons." (V20, 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. (V20, 1765). The judge found the fact her brother had a pending drug charge was a genuine race neutral reason for the strike. (V20, 1766).

Defense counsel did not challenge the factual basis for the reason provided, the pending drug charge, mentioned by the prosecutor and accepted by the trial court below. On appeal, with the benefit of time and hindsight, and, apparently after scouring the juror questionnaires, appellate counsel asserts the strike must have been pretextual because one or more jurors may have had family members who had been charged or convicted of criminal offenses. However, defense counsel, at no point below, challenged the prosecutor's or the court's reasons by asserting the pending criminal charge applied to other non-challenged jurors. This precludes such a claim now as jury selection is not a process by which a defendant can sit idly at the time of jury selection only to spring a potential error by scrutinizing questionnaires in an effort to perfect his pretext argument on appeal. Trial counsel below did not mention or cite a single similarly situated juror to the one challenged by the State. Consequently, this claim has been waived. *Hoskins v. State*, 965 So. 2d 1, 9-11 (Fla. 2007) (noting that while on appeal the defendant named a number of potential jurors who were "situated similarly" to the challenged juror, his failure to name these jurors and make this argument at trial operated to waive this claim on appeal) (citing *Davis v. State*, 691 So. 2d 1180, 1181 (Fla. 3d DCA 1997) (noting that the similarly situated juror argument "was not made to the trial judge and was consequently waived for purposes of appellate review"). *See also Rimmer v. State*, 825 So. 2d 304, 321 (Fla. 2002) (A judge cannot "be faulted for accepting the facial reason offered by the State, especially where the State's factual assertion went unchallenged by the defense."); *Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla. 1992) (Any "claim that this reason is not supported by the record was not raised below and therefore has been waived."); *Floyd v. State*, 569 So. 2d 1225, 1229 (Fla. 1990) ("[W]hen the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged.").

> Another of the many problems with appellant's argument is the failure to establish the race of any of the comparators he mentions for the first time on appeal. *Alonzo v. State*, 46 So. 3d 1081, 1084 (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.") (citing *Davis*, 691 So. 2d at 1182 (where record did not reflect race of allegedly similarly situated jurors, it was impossible for this Court to determine the issue of pretext). This is yet another reason to find the claim waived because trial counsel did not identify a single comparator at the time of trial.

DAB/86-89.

The Appellee further argued on direct appeal that "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." DAB/90. In contrast, King in post-conviction identified the race of similarly situated jurors on his jury, corrected the misunderstanding regarding juror 111's brother's drug charge, and conducted a comparative juror analysis.

On direct appeal, this Court found that trial counsel failed to properly preserve the *Batson* claim for appellate review:

> 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 v. State, 89 So. 3d 209, 230-31 (Fla. 2012).

Unlike the *Batson* claim argued on direct appeal, the post-conviction claim is based on ineffective assistance of counsel for trial counsel's failure to properly preserve the *Batson* claim for direct appeal. It is not a claim that was or should have been raised on direct appeal. With rare exception, claims of ineffective assistance of counsel are not cognizable on direct appeal. *See Smith v. State*, 998 So. 2d 516, 522 (Fla. 2008). Such claims are properly raised in post-conviction motions, as King did in this case by raising this claim in his Rule 3.851 motion for post-conviction relief. *Smith*, 998 So. 2d at 522; *see Guardado v. State*, No. SC12-1040, 2015 WL 1725144, at *8 (Fla. Apr. 16, 2015), *as revised on reh'g* (Oct. 8, 2015) (holding that Guardado's claim that penalty phase counsel were ineffective for failing to object to the State's cause challenges of two jurors is the proper subject of a rule 3.851 motion). Thus, the instant claim is not procedurally barred.

The Appellee cites several cases from the Eleventh Circuit Court of Appeals for the proposition that the *Strickland*[2] prejudice standard requires an examination of the prejudice to the trial, as opposed to the appeal. AB/65-66. While this is generally true, the Eleventh Circuit Court of Appeals in *Davis*[3] recognized a narrow

[2] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).
[3] *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003).

exception where trial counsel is acting as appellate counsel. As the Eleventh Circuit explained in a subsequent case:

> Our decision in *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003), is not to the contrary. There trial counsel objected during voir dire to the *Batson* error that was being committed but when his objection was rejected, counsel failed to take the next step of renewing that objection after the conclusion of voir dire; in the Florida courts that is a necessary step before the issue may be reviewed on appeal. *Id.* at 1312. This Court held that because the failure of counsel was solely in his role as appellate counsel at trial (those are not the words we used in *Davis*, but it is what we meant), the prejudice inquiry should focus on the effect that counsel's omission at trial had on the appeal. Id. at 1315-16.
>
> Our reasoning and the result in *Davis* arguably were pushing things given what the Supreme Court said in *Strickland* about measuring the effect of counsel's errors at the guilt stage of a trial against the result of the trial instead of the appeal. Perhaps mindful of that, we drew our holding in *Davis* narrowly. We stressed in *Davis* that it was a case involving "peculiar circumstances" where the only effect of trial counsel's error was on the appeal, and that it was not the usual case where counsel had failed to bring an issue to the attention of the trial court at all. 341 F.3d at 1315. We carefully limited our holding to situations "when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal." Id. at 1316.
>
> We distinguished in *Davis* our prior decision in *Jackson v. Herring*, 42 F.3d 1350, 1361-62 (11th Cir. 1995), where the failure to raise the *Batson* issue at all during the trial was held to be a trial stage error with prejudice to be measured against effect on the reasonable doubt determination. We explained in *Davis*: "Unlike the situation in *Jackson* where defense counsel remained absolutely silent as [the] prosecutor . . . struck all blacks from the venire, Davis's trial counsel ably brought the state's possibly unconstitutional conduct to the trial court's

> attention" and then failed to preserve the error for appeal. *Davis*, 341 F.3d at 1315 (internal marks and citation omitted).

Purvis v. Crosby, 451 F.3d 734, 739 (11th Cir. 2006).

In the cases cited by the Appellee[4], trial counsel, like trial counsel in *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995), failed to make any objection at all. In those cases, the prejudice analysis is focused on the trial stage. In contrast, Davis' trial counsel objected to the State's peremptory strike of a minority juror, but failed to preserve the issue for appeal. King's case is similar to *Davis* because King's trial counsel objected to the State's peremptory strike of juror 111, but, as this Court found on direct appeal, he waived the claim for direct appeal because he failed to properly preserve it. Therefore, the prejudice inquiry in this case should focus on the effect that trial counsel's deficient performance at trial had on the direct appeal.

[4] *Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006); *Price v. Secretary, Florida Dept. of Corrections*, 548 F.Appx. 573, 576 (11th Cir. 2013), *cert. denied*, 134 S.Ct. 1896 (2014); *Sneed v. Florida Dept. of Corrections*, 496 F.Appx. 20, 27 (11th Cir. 2012).

ARGUMENT III

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

The Appellant, King, continues to rely on his Initial Brief for all purposes, and does not concede or waive any argument or issues asserted. The Initial Brief of Appellant sufficiently replies to the arguments put forth by the Appellee in the Answer Brief and cites to the relevant and complete facts from the record on appeal.

ARGUMENT IV

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

The Appellant, King, continues to rely on his Initial Brief for all purposes, and does not concede or waive any argument or issues asserted. The Initial Brief of Appellant sufficiently replies to the arguments put forth by the Appellee in the Answer Brief and cites to the relevant and complete facts from the record on appeal.

ARGUMENT V

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

The Appellant, King, continues to rely on his Initial Brief for all purposes, and does not concede or waive any argument or issues asserted. The Initial Brief of Appellant sufficiently replies to the arguments put forth by the Appellee in the Answer Brief and cites to the relevant and complete facts from the record on appeal.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT has been emailed to Scott A. Browne, Assistant Attorney General, at capapp@myfloridalegal.com and Scott.Brown@myfloridalegal.com and mailed via United States Postal Service to Michael L. King, DOC #132254, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 19th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

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

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