No. _____

IN THE

Supreme Court of the United States

MICHAEL L. KING,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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Appendix A

United States Court of Appeals for the Eleventh Circuit Opinion affirming District Court's denial of 28 U.S.C. § 2254 petition for a writ of habeas corpus, dated October 25, 2019. *King v. Sec'y, Dep't of Corr.*, 793 Fed. Appx. 834 (11th Cir. 2019).

793 Fed.Appx. 834
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Michael L. KING, Petitioner - Appellant,
v.
SECRETARY, DEPARTMENT OF
CORRECTIONS, Attorney General, State
of Florida, Respondents - Appellees.

No. 18-11421
|
(October 25, 2019)

Synopsis

Background: After his convictions for murder, kidnapping, and involuntary sexual battery were affirmed on direct appeal, 89 So.3d 209, and his motion for postconviction relief was denied, 211 So.3d 866, petitioner sought federal habeas relief, raising ineffective assistance of counsel claims. The United States District Court for the Middle District of Florida, No. 8:17-cv-00985-VMC-TGW, Virginia M. Hernandez Covington, J., denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Martin, Circuit Judge, held that:

Florida Supreme Court's determination that trial counsel made strategic decision to allow State to strike juror was not unreasonable application of clearly established law or unreasonable determination of the facts;

trial counsel's failure to present evidence showing petitioner was exposed to harmful toxins throughout his life during penalty phase of capital murder trial was not deficient performance, and thus was not ineffective assistance; and

District Court's adoption of portions of State's response brief in its order denying petition for writ of habeas corpus did not deprive petitioner of fair and impartial tribunal, and thus did not violate petitioner's due process rights.

Affirmed.

Attorneys and Law Firms

***835** Lisa Marie Bort, Ali A. Shakoor, Capital Collateral Regional Counsel, Temple Terrace, FL, for Petitioner - Appellant

Scott A. Browne, Attorney General's Office, Criminal Division, Tampa, FL, for Respondent - Appellee Secretary, Department of Corrections

Pam Bondi, Attorney General's Office, Tallahassee, FL, for Respondent - Appellee Attorney General, State of Florida

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:17-cv-00985-VMC-TGW

Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

Opinion

MARTIN, Circuit Judge:

Michael King, a Florida death row inmate, appeals the District Court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Mr. King has raised three issues in this appeal: (1) whether trial counsel rendered ineffective assistance of counsel for failing to preserve a challenge to a peremptory strike under ***836** Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) and J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994); (2) whether trial counsel rendered ineffective assistance of counsel for failing to investigate Mr. King's exposure to toxic substances; and (3) whether the District Court violated due process or otherwise abused its discretion by adopting portions of the State's response brief in its order denying Mr. King's § 2254 petition. After careful consideration, and with the benefit of oral argument, we affirm the denial of Mr. King's habeas petition.

I. BACKGROUND AND PROCEDURAL HISTORY

Mr. King was convicted and sentenced to death in 2009 for the murder, kidnapping, and involuntary sexual battery of Denise Amber Lee. See King v. State ("King I"), 89 So. 3d

209, 219 (Fla. 2012). Mr. King's crimes against Mrs. Lee were nightmarish. The horrific nature of his crimes is not disputed, so we will not elaborate on them here. Rather, in this appeal we address whether the performance of Mr. King's trial counsel was deficient and whether the District Court erred when it incorporated portions of the State's response brief into its order.

A. RELEVANT TRIAL PROCEEDINGS

At his trial, Mr. King was represented by Carolyn Schlemmer, John Scotese, and Jerome Mesiner. See King v. State ("King II"), 211 So. 3d 866, 879 (Fla. 2017). Ms. Schlemmer had been working on death penalty cases "for the better part of 20 years" at the time she came to represent Mr. King. Mr. Scotese had handled one capital case and therefore met the qualifications to handle capital cases on his own, while Mr. Mesiner did not. See id. at 884.

During voir dire, the State moved to use a peremptory challenge of Juror 111, an African American woman. Mr. Scotese objected and asked for a "race neutral" justification for the strike. The State responded with:

> On Juror Number 111, she's an 18-year-old female. She came across as meek, young and inexperienced. She's the youngest on the panel we have existing so far. Her statement during the original death qualification was that living life in prison is more awful than a death sentence. Her brother has a pending felony drug charge. She watches the television show CSI. Commonly, a concern of ours is that they would hold us to a TV standard as opposed to a regular standard. And based on these foregoing reasons, we exercise our peremptory challenge on Number 111.

In response, the trial court stated that other jurors on the panel "watch CSI or watch Perry Mason or whatever." The State then asserted that "[our] race neutral reason, this is not a challenge for cause, she indicated that living a life in prison is more awful than a death sentence." The trial court explained that "[o]ther jurors have said the same thing." In response, the State said it would "strike [the] other jurors ... remaining on the panel that have said" life without parole is worse than the death sentence.

The trial court then repeated that Juror 111's brother "has a pending ... criminal charge" and the State confirmed this was true. Thus, the trial court found that Juror 111's brother's pending drug charge was "a genuine race neutral reason" for removing Juror 111 from the jury, and overruled Mr. Scotese's objection to the State's peremptory challenge.

Also relevant to this appeal is the penalty-phase evidence of Mr. King's mental health. Mr. King offered the testimony of ***837** Dr. Joseph Chong Sang Wu, who conducted a PET scan and concluded that Mr. King had a traumatic brain injury. King II, 211 So. 3d at 876. Dr. Wu testified that people who suffer frontal lobe injuries are more likely to have poor judgment, exhibit blunted affect, take excessive risks, have difficulty regulating impulses such as aggression, and have difficulty separating fantasy from reality. Id. at 876–77. According to Dr. Wu, Mr. King's "most recent verbal IQ score placed him in the borderline retarded range." Id. at 877. Mr. King also presented the testimony of Dr. Kenneth Visser, who performed an IQ test on Mr. King. That testing of Mr. King produced a verbal IQ score of 71, a performance IQ score of 85, and a full-scale IQ of 76. Id. Dr. Visser testified that this placed King in the borderline intellectual functioning range. Id.

Ultimately, the jury unanimously recommended a sentence of death. King II, 211 So. 3d at 878. The trial court found the existence of two statutory mitigating circumstances: (1) Mr. King's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight), and (2) his age, thirty-six (little weight). Id. The trial court further found that Mr. King had established thirteen nonstatutory mitigating circumstances. See id. at 878–79. Nonetheless, the trial court found that the State proved four aggravating circumstances beyond a reasonable doubt and sentenced Mr. King to death. Id. at 878.

B. DIRECT APPEAL

On direct appeal, the Florida Supreme Court affirmed Mr. King's convictions and death sentence. King I, 89 So. 3d at 212. The United States Supreme Court denied his petition for writ of certiorari on October 15, 2012. King v. Florida, 568 U.S. 964, 133 S. Ct. 478, 184 L.Ed.2d 300 (2012).

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C. STATE COLLATERAL PROCEEDINGS

In September 2013, Mr. King filed a motion for postconviction relief in the trial court under Florida Rule of Criminal Procedure 3.851. In his Rule 3.851 motion, Mr. King argued, among other things, that his trial counsel was ineffective for failing to investigate and present evidence regarding his exposure to toxic substances and for failing to properly preserve a Batson/J.E.B. challenge for direct appeal. After conducting an evidentiary hearing, the state postconviction court issued a written order denying relief in August 2014. The Florida Supreme Court affirmed the denial of relief in January 2017, King II, 211 So. 3d at 870–71, and denied his motion for rehearing on March 13, 2017.

D. FEDERAL HABEAS PROCEEDINGS

Mr. King filed his § 2254 petition in the District Court on April 27, 2017. He sought relief on six grounds. For our purposes, Mr. King raised both of his ineffective assistance of counsel claims and asserted that the Florida Supreme Court's resolution of those claims was contrary to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). In particular, Mr. King argued that his trial counsel was ineffective for failing to investigate the effects of the toxins Mr. King was exposed to during his childhood and in his job as a plumber. He also raised the Batson/J.E.B. issue again.

The District Court denied habeas relief and held that the Florida state courts reasonably applied Strickland in ruling that Mr. King failed to establish that his trial counsel's failure to investigate his exposure to toxic substances was deficient. The ***838** District Court found that trial counsel consulted several experts to ascertain whether Mr. King suffered any neurological disorders. Further, one of these experts discussed Mr. King's exposure to toxins from rat poisoning and crack pipe fumes, but, at the time of trial, neither Mr. King, his family, the investigator, nor the medical experts alerted Mr. King's trial counsel to the possible exposure of toxic chemicals from growing up near farms or from his plumbing career. As a result, the District Court held that Mr. King's trial counsel had no reasonable basis for further toxin exposure investigation, so was not ineffective. The District Court also ruled Mr. King's trial counsel was not ineffective for failing to preserve the Batson/J.E.B. challenge for direct appeal because there was evidence that Mr. King's trial counsel did not want Juror 111—the juror at issue—on the jury.

II. STANDARD OF REVIEW

A. HABEAS STANDARDS

Under § 2254, a prisoner held "in custody pursuant to the judgment of a State court" may seek habeas relief only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Generally, a prisoner must first "fairly present" his federal claims to the state court and exhaust his state court remedies before seeking federal habeas relief. Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998) (alteration adopted and quotation marks omitted). When a state court has adjudicated a prisoner's claims on the merits, this Court's review is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, this Court may not grant habeas relief with respect to such a claim unless the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The AEDPA standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316, 1325 (11th Cir. 2013) (en banc) (quotation marks omitted). A decision "is not 'contrary to' federal law unless it contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." Id. (quotation marks omitted). A state court's decision is not "an unreasonable application of federal law unless the state court identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case, unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply." Id. (citation omitted). When assessing a § 2254 petition under AEDPA, we do not ask whether the state court decision is correct, but rather whether it is reasonable. Id.

A district court's denial of a habeas corpus petition is reviewed de novo. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010). "It is the petitioner's burden to establish his right to

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habeas relief[,] and he must prove all facts necessary to show a constitutional violation." Blankenship v. Hall, 542 F.3d 1253, 1270 (11th Cir. 2008) (citation omitted). The state court's factual determinations ***839** are entitled to a presumption of correctness, and Mr. King bears the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS UNDER AEDPA

To establish a case of ineffective assistance of counsel, a petitioner must show that (1) his counsel's performance was deficient and (2) his defense was prejudiced by the deficient performance. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. There is a strong presumption that counsel's performance "falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065. Trial counsel's performance will not be considered deficient unless counsel's representation fell below an objective standard of reasonableness or was "outside the wide range of professional competent assistance." Id. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. If a petitioner fails to make a sufficient showing on either prong of the inquiry, his ineffective assistance of counsel claim fails. Id. at 687, 104 S. Ct. at 2064.

AEDPA adds another layer of deference to the Strickland analysis. See, e.g., Williams v. Allen, 598 F.3d 778, 789 (11th Cir. 2010). To prevail on either of his ineffective assistance of counsel claims, Mr. King must therefore establish that (1) he has satisfied the elements of the Strickland standard and (2) that the State court applied Strickland in a manner that was contrary to, or involved an unreasonable application of clearly established Supreme Court precedent, or that the State court applied Strickland to facts it unreasonably determined. See id.

III. DISCUSSION

A. INEFFECTIVE ASSISTANCE – BATSON/J.E.B. CLAIM

We begin with Mr. King's ineffective assistance of counsel claim regarding the State's peremptory strike of Juror 111. He first argues that the Florida Supreme Court's determination that Ms. Schlemmer strategically chose to forgo a challenge to Juror 111 was an unreasonable determination of the facts under our decision in Davis v. Sec'y for Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003). [1] He points out that after the State sought to use a peremptory strike on Juror 111, Ms. Schlemmer stated that "we just have an issue" and Mr. Scotese raised the objection. Mr. King says this record shows that Ms. Schlemmer sought to object to the State removing Juror 111 from the jury. Mr. King also ***840** maintains that Ms. Schlemmer inappropriately offered post hoc rationalizations for her decision under Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). Under the governing standards, these arguments fail.

Mr. King has not shown that the Florida Supreme Court's assessment of trial counsel's performance is contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts. On this record, the Florida Supreme Court's determination that Mr. King's trial counsel made a tactical decision to allow the State to strike Juror 111 was not unreasonable. The Florida Supreme Court noted Ms. Schlemmer's testimony that although she did not have a specific recollection of the jury selection, based on the large "NO" written next to notes about Juror 111 she did not want Juror 111 on the panel. Based on this, she implied that further pressing of a Batson challenge was unnecessary. Further, even if Ms. Schlemmer was not the person who wrote "NO" next to the entry for Juror 111, Ms. Schlemmer was lead counsel during jury selection and oversaw the objections raised by others on her team. Thus the Florida Supreme Court reasonably determined that, as a matter of trial strategy, Mr. King's trial counsel made a decision to allow the State to strike Juror 111. In other words, the Florida Supreme Court did not apply the facts in an objectively unreasonable manner when it rejected Mr. King's Batson/J.E.B. claim. 28 U.S.C. § 2254(d). And it did not unreasonably apply Strickland when it denied Mr. King's claim because under Strickland, an attorney does not perform incompetently when, as here, she makes a strategic decision that other competent attorneys might have made.

We need not address the merits of Mr. King's prejudice argument because he failed to make a showing of deficient performance. See Osley v. United States, 751 F.3d 1214, 1222 (11th Cir. 2014) (noting "a court need not address both prongs if the defendant has made an insufficient showing on one").

B. INEFFECTIVE ASSISTANCE – TOXIN EXPOSURE EVIDENCE

Mr. King next argues his trial counsel was ineffective during the penalty phase of his trial because she failed to investigate and present evidence showing Mr. King was exposed to harmful toxins throughout his life. Mr. King says that, had his trial counsel investigated and presented evidence of his exposure to toxic substances, that evidence would have explained Mr. King's behavior and provided an additional explanation of his low IQ and brain injury. In particular, Mr. King claims "the deficient performance in this case stems not from the complete lack of investigation or consultation with experts, but rather from a lack of consultation with an expert specifically tailored to the needs of Mr. King's case."

As set out above, the Florida Supreme Court noted that trial counsel consulted several experts to ascertain whether Mr. King suffered any neurological disorders. The Court noted further that, at the time of trial, neither Mr. King, his family, the investigator, nor the medical experts alerted Mr. King's trial counsel to his possible exposure of toxic chemicals from growing up near farms or in the course of his plumbing career. King II, 211 So. 3d at 882–83. The record supports this assessment by the Florida Supreme Court. Ms. Schlemmer testified she consulted with seven psychologists, one of whom reported no neurotoxic exposure. And, during her investigation, Mr. King reported only exposure to the possible toxic substance of "crack pipe fumes," "marijuana," and "rat ***841** poison." The Florida Supreme Court reasonably summarized trial counsel's investigation and noted that "[t]hrough her persistence, [Ms.] Schlemmer was able to present some mitigating mental health evidence via the testimony of Dr. Wu." King II, 211 So. 3d at 882. Given these facts, and viewing counsel's performance through the lens of AEDPA deference, we conclude that the scope of trial counsel's investigation was reasonable. See Strickland, 466 U.S. at 699, 104 S. Ct. at 2070 (holding that "counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance" and that "strategy choice was well within the range of professionally reasonable judgments"); Williams v. Allen, 598 F.3d 778, 793–94 (11th Cir. 2010) (holding counsel's presentation of voluntary intoxication evidence was not deficient and, by failing to "demonstrate[ ] that counsel needed to argue further," petitioner could not show counsel's strategy was unreasonable); see also Newland v. Hall, 527 F.3d 1162, 1202 (11th Cir. 2008) ("In evaluating the reasonableness of a defense attorney's investigation, we weigh heavily the information provided by the defendant.").

C. DUE PROCESS CLAIM

Finally, Mr. King argues that the District Court violated his due process rights and abused its discretion by incorporating portions of the State's response brief into its order denying Mr. King's § 2254 petition. This argument fails as well, however, because a court's adoption of portions of a party's brief does not render its decision fundamentally unfair.

We caution district courts against this practice. However, the findings contained in the District Court's order, "though not the product of the workings of the district judge's mind, are formally [hers]; they are not to be rejected out-of-hand, and they will stand if supported by evidence." United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 1047, 12 L.Ed.2d 12 (1964). There is no evidence here "that the process by which the [District Court] arrived at [the decision] was fundamentally unfair." See In re Colony Square Co., 819 F.2d 272, 276 (11th Cir. 1987) (holding that orders drafted by a litigant without notice to the opposing party are not automatically invalid). This is not a case in which the District Court issued a "one-sentence summary denial[ ]," depriving us the opportunity to conduct meaningful appellate review. Danley v. Allen, 480 F.3d 1090, 1091 (11th Cir. 2007) (holding district court orders "should contain sufficient explanations of their rulings"). On the contrary, the District Court set forth its reasons for denying each of Mr. King's six claims in a 91-page order. We do not view the District Court's actions as depriving Mr. King of his right "to an impartial and disinterested tribunal." Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L.Ed.2d 182 (1980); see also Williams v. Pa., —— U.S. ——, 136 S. Ct. 1899, 1909, 195 L.Ed.2d 132 (2016) ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements."). Because the District Court's adoption of portions of the State's brief in its opinion did not deprive Mr. King of a fair and impartial tribunal, we must deny Mr. King's claim.

IV. CONCLUSION

The Florida Supreme Court's assessment of Mr. King's trial counsel's performance was not contrary to or an unreasonable application of federal law. Mr. King cannot, therefore, prevail on either of his ineffective assistance of counsel claims. Also, although we do not endorse district courts indiscriminately incorporating a ***842** party's brief into their orders, there is

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no prohibition on the District Court from including in its order portions of a party's brief that are supported by the evidence.

AFFIRMED.

All Citations

793 Fed.Appx. 834

Footnotes

1 Mr. King also asserts that the Florida Supreme Court "was not able to complete an adequate review of the Batson claim on direct appeal" because he claims his trial counsel was otherwise deficient in (1) failing to identify the race of similarly situated jurors; (2) failing to correct the trial court and the prosecutor's misunderstanding of Juror 111's questionnaire; (3) failing to conduct a comparative juror analysis; and (4) failing to raise a J.E.B. challenge to the State's peremptory strike of Juror 111. We decline to address these arguments because our resolution of Mr. King's Batson claim renders them moot. In particular, as we explain below, we conclude that we must affirm the District Court's determination of Mr. King's Batson claim because the State court's determination that trial counsel's decision not to press the Batson claim was a permissible strategic one, was not contrary to or an unreasonable application of clearly established federal law, and it was not based on an unreasonable determination of the facts.

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DEATH PENALTY CASE

Appendix B

United States District Court for the Middle District of Florida Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, dated February 5, 2018.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL L. KING,

Petitioner,

-vs- Case No. 8:17-cv-985-T-33TGW
DEATH PETITION

SECRETARY, DEPARTMENT OF CORRECTIONS

Respondent.

O R D E R

This cause is before the Court on Michael L. King's 28 U.S.C. § 2254 timely-filed petition for writ of habeas corpus. King also filed a memorandum in support of the petition and a court-ordered addendum affirming there were no grounds raised in the memorandum that were not raised in the petition. (Docs. 18 and 20).

Respondent responded to the petition (Doc. 24), and King filed a reply. (Doc. 32)

After review, the petition must be denied.

BACKGROUND

On February 6, 2008, King was indicted for the first-degree murder of Denise Amber Lee. The Florida Supreme 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 kidnaping, sexual battery, and murder of the victim, a young married mother of two young children. Following a unanimous jury recommendation, the state trial court sentenced King to death.

On direct appeal, the Florida Supreme Court summarized the aggravators and

mitigators found by the state trial court:

> On December 4, 2009, the trial judge sentenced King to death for the murder of Denise Amber Lee. In pronouncing King's sentence, the trial court determined that the State had proven beyond a reasonable doubt the existence of four statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel (HAC), *see* § 921.141(5)(h), Fla. Stat. (2007) (great weight) [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 kidnaping, *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 Denise Lee'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); 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.

Id.

Direct Appeal

On February 9, 2012, the Florida Supreme Court affirmed King's conviction and death sentence. *King*, 89 So. 3d at 209. The Court denied King's motion for rehearing May 21, 2012, and the mandate issued June 6, 2012. The United States Supreme Court denied King's petition for writ of certiorari October 15, 2012. *King v. Fla*., 568 U.S. 964 (2012).

On September 4, 2013, King filed a Rule 3.851 motion for postconviction relief raising six grounds. (C2/282-343).

Following a one-day evidentiary hearing on June 23, 2014 (C8/1195-C9/1421), the state trial court denied the motion August 21, 2014. (Id./1173-94). Following briefing, including supplemental briefing addressing the application of *Hurst v. Florida,* 136 S. Ct. 616 (2016), and oral argument January 26, 2017, the Florida Supreme Court affirmed the denial of postconviction relief. *King v. State*, 211 So. 3d 866 (Fla. 2017). (C20). The state trial

court denied King's motion for rehearing March 13, 2017 (C21; C22), and the mandate issued March 29, 2017. (C23).

STANDARDS OF REVIEW

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires that a federal court must afford a high level of deference to the state court's decision(s). *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). AEDPA modified a federal habeas court's role in reviewing state prisoner applications to prevent retrials and to ensure that state court convictions are properly enforced. *Bell v. Cone*, 535 U.S. 685, 693 (2002). The federal court will presume the correctness of state court findings of fact unless the petitioner rebuts that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Section 2254(d) forbids federal courts from granting habeas relief for claims that previously were "adjudicated on the merits" in state court, unless the petitioner can establish that the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court law, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2). As the Eleventh Circuit Court of Appeals recently explained in *Lambrix v. Secretary, Department of Corrections*, the AEDPA imposes a significant hurdle for a habeas petitioner to meet. The *Lambrix* Court explained:

> A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is "objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 582 U.S. ——, ——, 137 S.Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (*per curiam*) (quoting *Woods v. Donald*, 575 U.S. ——, ——, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (*per curiam*)). This standard is "meant to be" a difficult one to

> meet. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011). AEDPA thus "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting *Hardy v. Cross*, 565 U.S. 65, 66, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011) (*per curiam*)).

Lambrix v. Sec'y, DOC, 872 F.3d 1170, 1181-82 (11th Cir. 2017),

Ineffective Assistance of Counsel Standard

To have a facially valid claim in alleging ineffective assistance of counsel, a Petitioner must meet the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland*'s two-part test requires a Petitioner to demonstrate that counsel's performance was deficient and "there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. However, if a claim fails to satisfy the prejudice component, the court need not make a ruling on the performance component.

The standard of review is "doubly deferential" when "a *Strickland* claim [is] evaluated under the § 2254(d)(1) standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123-24 (2009). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable -- a substantially higher threshold." *Id.* (quotation marks omitted).

DISCUSSION

GROUND ONE

> Trial Counsel Provided Prejudicial Ineffective Assistance By Failing To Investigate and Present Evidence of Toxic Substances that Mr. King Was Exposed to Throughout His Life. The State Court's Resolution of Mr. King's

> Claim Was an Unreasonable Application of Clearly Established Federal Law, Including *Strickland v. Washington,* 366 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). Further, in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.
>
> Ground one, as restated by Respondent:
>
> Whether Trial Counsel Provided Ineffective Assistance By Failing To Investigate And Present Evidence Of Toxic Substances That Mr. King Was Exposed To Throughout His Life In Mitigation During His Penalty Phase?

King raised this ground in his Rule 3.851 motion for postconviction relief. The state trial court denied the ground after an evidentiary hearing. The state trial court found that trial counsel was not deficient and that King had not established prejudice for counsel's failing either to investigate chemical exposure or to present such evidence during King's penalty phase.

On appeal, the Florida Supreme Court affirmed the denial of Rule 3.851 relief, stating:

> Toxic Substances
>
> King first claims that trial counsel rendered ineffective assistance during the penalty phase because counsel failed to investigate King's possible exposure to toxic substances during his childhood and when he worked as a plumber as an adult.
>
> . . .
>
> During the evidentiary hearing, King presented testimony from Wagoner, King's coworker, and Dr. Lugo, a medical toxicologist who is also licensed to practice medicine in Mexico. Dr. Lugo reviewed King's medical, employment, and school records, as well as the competency evaluations performed prior to King's initial trial. Dr. Lugo also interviewed King, members of his family, a girlfriend of King's, and Wagoner to determine what toxic substances King may have been exposed to as a child and during his career as a plumber. Dr. Lugo testified that King was chronically exposed to environmental toxins throughout his childhood in suburban and rural Michigan.

Many chemicals that are now understood to cause developmental problems and low IQ in children were commonly and liberally applied to farms and golf courses, which King lived near throughout his childhood. Dr. Lugo testified that such chemical exposure in King's childhood could have had an additive effect on a head injury that King suffered during a sledding accident, which may have exacerbated King's neurological symptoms.

However, during cross-examination, Dr. Lugo admitted that he was not qualified to diagnose brain damage, and he did not perform any tests on King. Additionally, Dr. Lugo testified that he initially believed that King spent his entire childhood on a farm, but subsequently learned that King lived at several different locations, one of which was five to ten miles away from the nearest farm. Dr. Lugo also admitted that he knew of no studies that established higher rates of brain damage or other health problems among children who were raised in the same areas as King.

Wagoner detailed the chemicals that she and King used as plumbers, some of which induced headaches and lightheadedness. Dr. Lugo also testified that King was both chronically and acutely exposed to toxic chemicals as a plumber. These chemicals can cause drowsiness, impaired thinking, impaired reflexes, loss of consciousness, and loss of memory. Dr. Lugo believed that King suffered side effects from exposure to these chemicals based on reports that King told his girlfriend that he occasionally became lost and was in a catatonic state. However, Wagoner also testified that these chemicals are commonly used in the plumbing industry; any side effects that she suffered appeared to be temporary; and when she worked with King, he tended to act in a supervisory capacity.

Schlemmer, who primarily oversaw the penalty phase of King's trial, testified that she extensively explored several potential avenues of mental health mitigation before ultimately presenting Dr. Wu. She initially retained Dr. Ross and Dr. Sesta, who did not believe King's report of having passed out from exposure to rat poison. Dr. Sesta and Dr. Ross believed that King was malingering and was a pathological liar; accordingly, Schlemmer believed that their testimony would damage the credibility of the defense. Schlemmer retained four additional experts -- Dr. Kasper, Dr. DeClue, Dr. Regnier, and Dr. Gamache -- none of whom were able to provide information that would have aided King's defense. Schlemmer also retained Dr. Visser, who only considered King's competency and testified during King's trial regarding King's low IQ. *See King*, 89 So. 3d at 220. Schlemmer purposely limited Dr. Visser's examination of King to his competency alone because she was concerned that if Dr. Visser also conducted a neuropsychological evaluation on King, Dr. Visser would reach similar conclusions as Dr. Sesta and Dr. Ross -- that King

was malingering and a pathological liar.

As she was "grasping at straws," Schlemmer retained Dr. Wu, who conducted a PET scan of King and found brain abnormalities. Schlemmer testified that the PET scan needed to be correlated to some injury or other clinical diagnosis. The only evidence available to the defense was the sledding accident that King suffered as a child. His family members all attributed his neurological symptoms and behavioral changes to the sledding accident, and King's medical records from that accident had been destroyed. Schlemmer testified that the only toxic substance exposure that King reported was rat poison and crack pipe fumes, which was reported to, but not believed by, Dr. Sesta. Neither King nor his family members ever reported concerns about environmental toxins. Additionally, Schlemmer testified that she could not present testimony from King's mother, whom Schlemmer suspected would commit perjury about the sledding accident if she testified.

Schlemmer also offered an explanation as to why she did not have Dr. Wu investigate King's potential exposure to toxic plumbing chemicals. Interviews with King's former employers revealed damaging information about King that could potentially be used by the State in rebuttal, including that King: had been fired for lying; had made inappropriate comments to women; had exposed himself to a woman who was breastfeeding a child; and had stolen jobs by underbidding his employer. Accordingly, Schlemmer limited Dr. Wu's investigation and testimony to the sledding accident.

Additionally, the State presented testimony from Karen McClellan, the mitigation specialist during King's trial. She reported that she traveled to Michigan, where she visited some of the addresses listed by King, and spoke to members of his family. One of these addresses was a suburb of Pontiac, Michigan. Additionally, neither King nor his family members informed her of previous farm work, nor did they report complaints about chemical exposure. However, she admitted that she did not speak to anyone involved with King's case regarding potential toxic substance exposure, nor did she confer with Schlemmer regarding the possibility of retaining an expert toxicologist.

The postconviction court found that King had not established deficiency or prejudice as required by *Strickland*. We agree.

Quite simply, this case is not one in which counsel acted deficiently through a failure to investigate King's mental health or reliance upon previous social history reports. *Cf. Porter*, 558 U.S. at 39-40, 130 S.Ct. 447 (finding counsel to be deficient for failure to investigate the defendant's mental health, family background, or history of military service); *Wiggins v. Smith*, 539 U.S.

> 510, 524-26, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (concluding that counsel's reliance only on reports from a presentencing investigation report and the Baltimore City Department of Social Services for mitigation constituted deficiency). Rather, Schlemmer conferred with eight different neuropsychology or mental health experts, nearly all of whom concluded that King was malingering and a pathological liar, or were otherwise unable to provide helpful testimony. *See Hodges v. State*, 885 So. 2d 338, 348-50 (Fla. 2004) (finding that counsel was not deficient for choosing not to present mental health mitigation after receiving unfavorable reports from two experts). Through her persistence, Schlemmer was able to present some mitigating mental health evidence via the testimony of Dr. Wu, which was corroborated by testimony from King's family members that his behavior changed after the sledding accident. Further, Schlemmer explained that the only indication that King may have been exposed to toxic substances were claims of exposure to rat poison and crack pipe fumes, which at least one expert did not believe. Schlemmer testified that she explored any potential avenues of mitigation based on information provided by King and his family -- including hiring an independent medical examiner and interviewing helicopter pilots after King claimed that he and Lee had engaged in consensual sex and that she was killed after being shot from a helicopter -- but there was simply no evidence to suggest that King's exposure to toxic substances would be anything more than pure speculation. Trial counsel did not render deficient performance regarding King's potential exposure to toxic substances.
>
> Because we conclude that King has failed to establish deficiency, we need not consider whether these decisions of trial counsel resulted in prejudice. *E.g., Zommer*, 160 So. 3d at 377. Therefore, we deny this claim.

King, 211 So. 3d at 880-83.

The Florida courts reasonably applied *Strickland* to the facts in this case and reasonably denied relief.

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 counsel presented evidence on King's brain damage during the guilt and penalty phases of King's trial.

Counsel's testimony during the evidentiary hearing established that counsel's

background investigation was objectively reasonable under *Strickland*. *Contrast Sears v. Upton*, 561 U.S. 945, 951-52 (2010) (concurring with the postconviction 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, in the penalty phase, King's counsel presented extensive testimony on King's alleged brain damage, however caused, and argued the issue to the jury. The state 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 on the evidence presented by defense counsel. This evidence included a PET scan and the testimony of Dr. Joseph Wu, clinical director of a brain imaging center.

The state trial court concluded:

> 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.

(A11/2058-59).

In addition, counsel developed and presented evidence of the head injury King suffered when he was six years old, which the state trial court weighed in mitigation. (Id./2060-61). Counsel investigated the possibility that King might have suffered brain damage from the head injury. The record establishes that, in the penalty phase, counsel presented testimony of King's childhood head injury and resulting brain damage through his

family members and an expert.

Because **trial counsel** consulted with a number of experts, including Dr. Wu, in an effort to develop brain damage mitigation, **penalty phase counsel** was not ineffective for declining to present **additional** evidence. Such evidence would have been 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 the investigation would be useful. King has not established that, had counsel pursued such evidence, any persuasive, much less compelling mitigation evidence would have been developed.

King's defense attorneys consulted multiple experts in their attempt to develop supportive evidence of mental health or brain damage mitigation. Trial counsel also consulted with Dr. Wu. Three of the experts were decidedly not helpful to King. A neuropsychologist did not conclude King suffered from brain damage. He opined that King was malingering on tests designed to assess brain damage or dysfunction. *See King*, 211 So. 3d at 880-83 ("Rather, Schlemmer conferred with eight different neuropsychology or mental health experts, nearly all of whom concluded that King was malingering and a pathological liar, or were otherwise unable to provide helpful testimony.").

While King faults defense counsel for failing to pursue additional toxin exposure evidence or failing to hire a specific expert to evaluate King's possible toxic exposure, King overlooks the fact that counsel had no reasonable basis for further investigation. Neuropsychologist Dr. Joseph Sesta's evaluation testimony included a discussion of toxin exposure because King alleged that he had been exposed to toxins from rat poisoning and crack pipe fumes. (C11/1695, 1681). There was no indication that King ever mentioned toxin exposure from growing up near farms or in the course of his plumbing career. (Id./1695, 1681).

Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer that there was not a neurotoxin defense. (Id./1695, 1678). He further advised that King had no psychiatric condition or neurological issues that could be presented as mitigation. (Id./1694-95).

While King faults defense counsel for failing to further pursue toxin exposure or hire a specific expert to evaluate King's possible toxic exposure, King overlooks the fact that counsel had no reasonable basis for further investigation.

Included within Dr. Sesta's evaluation was his discussion of toxin exposure with King, because King alleged that he had been exposed to toxins from rat poisoning and crack pipe fumes. (Id./1681,1695). There was no indication that King ever mentioned to the doctor, toxin exposure from growing up near farms or in the course of his plumbing career. (Id./1695,1681). Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer that there was no neurotoxin defense. (Id./1695, 1678). Dr. Sesta further advised that King had no psychiatric condition or neurological issues that could be presented

as mitigation. (Id./1694-95).

Counsel cannot be faulted for relying on her mental health experts at the time of trial where there was no allegation that these experts were unqualified or that counsel failed to provide them with any readily available background material necessary for their evaluation. *See McClain v. Hall*, 552 F.3d 1245, 1253 (11th Cir. 2008) ("That McClain later secured a more favorable opinion of an expert than the opinion of Dr. Maish does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance."); *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("the mere fact a defendant can find, years after the fact, [an] ... expert who will testify favorably for him does not demonstrate that counsel was ineffective for failing to produce that expert at trial.").

Defense counsel could have reasonably stopped after consulting with two experts and not fallen below *Strickland*'s standard of reasonably effective assistance. However, once Schlemmer determined that the initial experts could not provide any mitigation whatsoever, she retained another expert, Dr. Kasper, to develop mitigation. (C11/1698). Dr. Kasper initially found King incompetent, but upon receiving additional information, she deemed him competent. (Id./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. (Id./1698, 1702). Dr. Kasper determined that King had no organic brain damage, or physical or psychiatric issues that could be presented in mitigation. (Id./1699-1700).

After receiving this unfavorable report, defense counsel continued her investigation. She hired Dr. Joseph Wu to conduct a PET scan "as a last effort." (Id./1676-77, 1704). The

PET scan showed a divot in the front of King's forehead. (Id./1678-79). Schlemmer explained that even with the results of the PET scan, she was required to have clinical correlation to permit Dr. Wu's testimony. (Id./1677, 1705).

Schlemmer knew that King was involved in a sledding accident. (Id./1704). King's family believed that King's behavior resulted solely from the sledding accident. (Id./1705). "They never mentioned poisons, toxins, or living on a farm, or nothing like that. It was always from the sledding accident." (Id.).

The sledding accident was a concrete incident with witnesses who defense counsel could use to correlate the PET scan results. (Id./1706). Therefore, Schlemmer presented as much evidence as she could to establish brain injury from the sledding incident. (Id./1706-08, 1717). Schlemmer testified at the evidentiary hearing that she had no evidence to support King's being exposed to toxins, and the testing did not correspond with toxin exposure. (Id./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. (Id./1718).

So, with all that counsel did do, retaining multiple experts, and actually presenting evidence of brain damage, King faults counsel for not doing more. However, the *Strickland* standard is one of reasonableness, not that counsel could have possibly done more. King failed to establish that no reasonable defense attorney would have failed to retain a toxicologist such as Lugo. *Cullen v. Pinholster*, 563 U.S. 170, 197 (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).

This case does not present a close question even under *de novo* review. With the additional deference due to review of an ineffective assistance of counsel claim under the AEDPA, ground one has no merit. 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 no red flags to suggest that environmental toxins were an important or significant factor in King's background; defense experts' concluded that brain damage or even toxin exposure was not present in this case.

Finally, even if defense counsel Schlemmer had evidence that King had been exposed to toxins while living in Michigan, she would not have presented the evidence if it were based on speculation. Counsel explained, at the evidentiary hearing, that presenting weak or speculative testimony might have caused her to lose credibility with the jury. (Id./1717-18). As noted, King's expert faced significant challenges on cross examination.

Given this record, counsel cannot be considered ineffective for failing to retain and present Lugo to testify at trial, during the guilt **or** penalty phase. *See McClain*, 552 F.3d at 1253. Lugo was an expert with modest qualifications and acknowledged he was not licensed to diagnose or treat any medical condition in the United States. (C10/1558, 1564). Lugo presented tenuous testimony in support of King's toxin exposure based on broad and sweeping generalizations that would apply to hundreds of thousands and possibly millions of Americans in general (simply living within miles of a farm in the 1970's). Lugo offered an opinion on brain damage based on King's anecdotal exposure to chemicals. Lugo could not quantify any particular level of exposure.

Furthermore, King's proximity to farmland was an open question at trial. The

methodology of quantifying that exposure and then extrapolating its effects on King's mental functioning was subject to significant question. *See Bertolotti v. Dugger*, 883 F.2d 1503, 1518 (11th Cir. 1989) ("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based.") (citing *Elledge v. Dugger*, 823 F.2d 1439, 1447 (11th Cir. 1987)). King **did not** grow up on a farm as he asserts he did in his memorandum. (Pet. Memo, Doc. 18 at 8).

Lugo conceded that when he initially wrote his report, he thought King had actually grown up on a farm. Lugo testified that, after researching the properties, he still believed that King grew up in "a farming area." (C10/1601). Lugo agreed that the family lived in a suburb of Pontiac, Michigan. (Id./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." (Id./1605). Lugo was not aware of any specific studies of the area outside of Pontiac, Michigan, documenting high 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." (Id./1607).

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. (Id./1597). Lugo admitted that he saw King's evaluation from Dr. Sesta, a neuropsychologist, who found no brain damage. (Id./1598). Lugo did not speak to any of the

doctors who had previously evaluated King. (Id./1599). While Lugo offered non-medically verified conclusions regarding King's likely chemical exposure, at the time of trial, counsel had King examined by qualified doctors including neuropsychologists, who found no evidence of brain damage, from whatever source. It is clear that nothing in King's background would have alerted counsel to the need to hire a toxicologist.

Finally, defense investigator McClellan learned that King lived on a farm for a short period of time, but family members never discussed the farm. (C11/1665, 1668). McClellan's understanding was that neither King nor his family members were farm workers. (Id./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. (Id./1665).

Toxic Effects of Plumbing Chemicals

King's evidence of exposure to the toxic effects of plumbing chemicals was similarly unimpressive although exposure to plumbing chemicals was more concrete than King's nebulous "proximity to farmland" theory of exposure.

Lori Wagoner, a plumber at Babe's Plumbing, worked with King while he was employed by Babe's Plumbing from 2004-2007. (C11/1736-37). According to Wagoner, King was very capable of doing his job as a plumber and was "actually running the jobs" like a "superintendent." (Id./1744). Wagoner remembered King complaining about headaches and named a number of common plumbing chemicals which she and King used. (Id./1737-39).

Wagoner admitted that she had any effects King might have had from plumbing chemicals, and those effects appeared to be temporary. (Id./1744). Those chemicals were

not unique to Babe's Plumbing or to Florida; any plumber working throughout the country would use similar chemicals. (Id./1743). Wagoner has not been diagnosed with, or treated for, brain damage. She was not aware of anyone at Babe's Plumbing being diagnosed with brain damage. (Id./1743-44).

While there was evidence King was exposed to common plumbing chemicals, any link to verifiable brain damage was absent. Again, trial counsel cannot be faulted for failing to uncover and utilize such tenuous evidence. King cites no Supreme Court precedent that suggests, much less establishes that defense counsel could be considered ineffective in this case. The cases King cites are distinguishable. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), trial counsel failed to discover that the defendant suffered consistent abuse during the first six years of his life; was the victim of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care"; was homeless for portions of his life; and had diminished mental capacities. 539 U.S. at 528-29, 535. In *Porter v. McCollum*, 558 U.S. 30 (2009), trial counsel collected no records, conducted no interviews, and had only one short meeting with his client concerning the penalty phase; a reasonable investigation would have revealed that the defendant was abused as a child, served heroically in the Korean War but experienced trauma therefrom, had a long-term substance abuse problem, and had impaired mental health and mental capacity. 558 U.S. at 32-35.

In sum, the alternate explanation for King's brain damage offered during the evidentiary hearing was weak and not 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 with changes in King's behavior following a sledding accident. That postconviction counsel found a toxicologist to offer yet another, and, demonstrably weaker theory of brain damage, does not in any way establish that defense counsel rendered deficient performance under *Strickland*.

Again, in the habeas context, a "doubly" deferential standard is applied that takes into account § 2254's deference to state courts and the ordinary deference to counsel, affirming if "there is any reasonable argument that counsel" acted pursuant to prevailing professional standards set forth in controlling law. *See Harrington v. Richter*, 562 U.S. 86, 89 (2011). Since the state court decision is not contrary to, or, an unreasonable application of clearly established Supreme Court precedent, ground one has no merit.

The Florida Supreme Court reasonably applied Supreme Court precedent in finding that King failed to establish deficient performance during the penalty phase and nothing presented during the postconviction hearing undermined confidence in the outcome of this "heavily aggravated" case. The Florida Supreme Court held that it did not need to proceed to the *Strickland* prejudice prong because King had failed to establish deficient performance.

The state courts' determination that King failed to establish deficient performance is entitled to considerable deference in federal court. *See Woodford v. Visciotti*, 537 U.S. 1149 (2003) (reversing appellate court's rejection of state court's finding that petitioner was not prejudiced by his counsel's failure to present mitigation evidence at the penalty phase

of his trial); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (observing that as for the second prong of the *Strickland* test, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high.").

King's death sentence, supported by four powerful aggravators, and recommended by the jury 12-0, is not undermined by King's postconviction allegation of ineffective assistance. King's postconviction evidence did not establish a single additional mitigating circumstance. King merely offered an alternate cause of brain damage that had already been presented and found by the trial court. In addition, Lugo, the expert who offered this additional mitigation testimony, was seriously challenged by the State on his methodology and defense background. He did not provide mitigation.

Further, the defense did not challenge any of the substantial aggravation presented. *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.").

The State presented a strong case in aggravation, including two of the most weighty aggravators under Florida's capital sentencing scheme: Heinous, Atrocious or Cruel (HAC), and Cold Calculated and Premeditated (CCP). *See Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1301 (11th Cir. 2012) (noting that the heinous, atrocious or cruel and the cold, calculated and premeditated aggravating factors are considered two of the weightiest aggravators in Florida's capital sentencing scheme) (citing *Larkins v. State*, 739 So. 2d 90, 92-95 (Fla. 1999)). The HAC aggravator alone would far eclipse the mitigation presented

during the hearing below.

The young mother of two in this case suffered a prolonged, torturous and horrendous death at King's hands. In finding the murder was HAC, the state trial court wrote, in part:

> [t]he 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.
>
> Denise Lee 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 Denise Lee 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. Denise Lee was 5 feet, 2 inches tall, and weighed 109 pounds.
>
> After completing these brutal acts, the defendant continued his abduction of Denise Lee. 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 Denise Lee 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 Denise Lee 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 Denise Lee's head down in the back seat. The defendant, continuing his abduction, drove away from Muxlow's home.
>
> At some point Denise Lee 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, Denise Lee was able to use his cell phone to call the 911operator without the knowledge of the defendant. The 911 call will be discussed in more detail below.
>
> Furthermore, while the defendant drove, the kidnaping continued. With Denise Lee in the back seat, two people, Shawn Johnson and Jane Kowalski, each while driving down Highway 41, saw Denise Lee in the backseat of defendant's car screaming for help. Ms. Kowalski 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. Kowalski 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 Denise Lee 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 Denise Lee 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]
>
> Denise Lee: Please let me go, please. Please, Oh God, please.
>
> Denise Lee: Please let me go. Help me. I don't know.
>
> . . .
>
> Denise Lee: I'm married to a beautiful husband and I just want to see my kids again.
>
> Denise Lee: 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 Denise Lee's voice in that recording.].

The call abruptly ended. The defendant took the cell phone away from Denise Lee and broke it apart. To further indicate the fear Denise Lee 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 Denise Lee'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.

([Sentencing Order] A11/2049-53). The Court notes that King placed the handgun against Denise Lee's right eye, in her field of vision, which indicates that she was quite aware at the end of her lengthy ordeal, that death was her imminent fate. (A26/2901, 2912).

The state trial court, in pronouncing King's sentence, determined that the State had proven beyond a reasonable doubt the existence of the four aggravating factors (A27/3190-93). There was no reason to believe that evidence of an additional risk factor for brain damage or toxic environment, even if established, would substantially or even marginally alter the sentencing outcome in this case. *See Cullen v. Pinholster*, 563 U.S. 170, 200 (2011) (Where the new evidence largely duplicated the mitigating evidence presented at the time of trial, there was no reasonable probability of a different outcome had such evidence been presented.).

King has not identified any legal or factual error in the state courts' application of the *Strickland* deficiency or prejudice prongs. *See Penry v. Johnson*, 532 U.S. 782, (2001) (noting that issue is not whether state decision was incorrect but whether it was objectively unreasonable); *Bell*, 535 U.S. 685 (same).

Ground one does not merit habeas corpus relief.

GROUND TWO

> Trial Counsel Provided Prejudicial Ineffective Assistance of Counsel for Failing To Properly Preserve the *Batson* Issue Regarding the State's Peremptory Strike of Juror 111 for Direct Appeal. The State Court's Resolution of Mr. King's Claim Was an Unreasonable Application of Clearly Established Federal Law, Including *Strickland v. Washington*, 366 U.S. 668 (1984) and *Batson v. Kentucky*, 476 U.S. 79 (1986). Further, in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.

Ground two, as restated by Respondent:

> Whether The State Courts' Denial Of An Ineffective Assistance Of Counsel Claim Based Upon Counsel's Failure To Preserve A *Batson v. Ky.*, 476 U.S. 79 (1986), Claim For Appeal Was Contrary To, Or, An Unreasonable Application Of Clearly Established Supreme Court Precedent?

King raised this claim in his Rule 3.851 motion for postconviction relief, and the state trial court held an evidentiary hearing. The state trial court found neither deficient performance nor prejudice resulting from trial counsel's failure to preserve a racial or gender challenge to striking a potential juror. The Florida Supreme Court affirmed the denial of postconviction relief on appeal, stating:.

> Failure To Preserve a *Batson* Error
>
> King next asserts that trial counsel rendered ineffective assistance when they failed to preserve an alleged *Batson* error during jury selection. Specifically, King alleges that counsel failed to challenge the veracity of the State's proffered reason for excluding Juror 111, which was that her brother was facing a pending felony drug charge. King asserts that this reason was not supported by the facts of the record, which indicated that Juror 111 had previously been convicted of a drug-related offense and was facing a charge of disorderly conduct at the time of jury selection. King also alleges that counsel failed to conduct a comparative juror analysis after initially raising the *Batson* objection, and failed to object to the State's gender-based

discriminatory peremptory challenge of Juror 111.

As with his previous claim, King must demonstrate both that counsel rendered deficient performance by failing to preserve the *Batson* challenge to Juror 111, and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The Supreme Court held in Batson that peremptory challenges cannot be used to exclude members of racial minorities from a jury. 476 U.S. at 96-97, 106 S.Ct. 1712. The procedure and principles governing *Batson* challenges are as follows:

> 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 venire person 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). The court's focus in step 3 is not the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination.
>
> *Voir dire* proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous. 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.

Melbourne v. State, 679 So. 2d 759, 764-65 (Fla. 1996) (footnotes omitted). Similarly, the exclusion of jury members on the basis of gender is prohibited, and peremptory strikes based on suspected gender discrimination are subject

to the same procedure. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Welch v. State*, 992 So. 2d 206, 211 (Fla. 2008).

During *voir dire* of King's trial, the following exchange occurred:

> THE COURT: Up to Juror 111, including 111. What says the State?
>
> [THE STATE]: The State will strike Juror 111.
>
> THE COURT: Okay, we're up to 114, Juror 114 as the 12th juror. What says the Defense?
>
> MS. SCHLEMMER: Your Honor, we just have an issue.
>
> MR. SCOTESE: We have an objection. She is a minority and we'd ask for a race neutral --
>
> THE COURT: For Juror [111]?
>
> MR. SCOTESE: Yes.
>
> THE COURT: All right, thank you. Juror 111 --
>
> [THE STATE]: Yes, Judge. 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 qualification was that living life in prison is more awful than a death sentence. Her brother has a pending felony drug charge. She watches the television show CSI. Commonly, a concern of ours is that they would hold us to a TV standard as opposed to a regular standard.
>
> And based on those foregoing reasons, we exercise our peremptory challenge on Number 111.
>
> MR. SCOTESE: Your Honor, it is our position that those are not sufficient reasons. There's many people here on this jury that have similar -- there is one person who is --

> THE COURT: I understand on the panel you've got jurors who watch CSI or watch Perry Mason or whatever. That's not --
>
> [THE STATE]: As a single thing, a genuine -- my race neutral reason, this is not a challenge for cause, she indicated that living a life in prison is more awful than a death sentence.
>
> THE COURT: Other jurors have said it. Other jurors have said the same thing.
>
> [THE STATE]: And I will strike what other jurors are remaining on the panel that said that. I'm consistently getting rid of any --
>
> THE COURT: Here's what I'm going to find. The fact that -- was it her brother who has a pending --
>
> [THE STATE]: Yes. According to her questionnaire, her brother has a pending drug charge.
>
> THE COURT: Pending criminal charge? All right. I'm going to find based upon that that is a genuine race neutral reason and I'll grant the challenge, peremptorily. I'll find that the explanation is facially race neutral and the reason given is genuine; and given all the circumstances, the explanation is not a pretext and the strike will be sustained.

Ultimately, seven women were seated on King's jury, and the State did not exercise all of its peremptory strikes. During the postconviction evidentiary hearing, evidence was presented that Scotese and Meisner primarily handled the guilt phase of King's trial. At the time of King's trial, Scotese had handled one capital case and was death-qualified; Meisner was not qualified to handle capital cases. Meisner took notes and conferred with co-counsel during jury selection, but testified that he no longer had any independent recollection of jury selection during King's trial. Scotese testified that he took notes and questioned some jurors during jury selection. According to Scotese, objections during jury selection were made with Schlemmer's approval.

Scotese testified that at the time of King's trial, he was familiar with *Batson,* and he usually noted when a potential juror was a minority to remind himself to raise potential *Batson* challenges. He also testified that it was his usual practice to request a race-neutral basis for a peremptory strike of a minority juror, and that it would be rare for him to fail to do so, unless a race

neutral basis for the peremptory strike was obvious to him. However, he was not familiar with case law that prohibits the use of peremptory strikes on the basis of gender, and he did not consider raising a gender-based objection to the State's exercise of a peremptory strike of Juror 111. Scotese also testified that he attempts to conduct comparative juror analyses to preserve *Batson* challenges, but admitted that he was "not very good at it." He also did not recall consulting Juror 111's questionnaire regarding the matter of the pending charge against her brother, but testified that if he had found a discrepancy between her questionnaire and her answers during voir dire, he would have pressed the matter for clarification.

Schlemmer testified that she had no independent recollection of the *Batson* challenge to Juror 111. However, after reviewing Juror 111's questionnaire, she added that she would not have wanted Juror 111 to serve on King's jury because Juror 111 indicated that a friend's father was a police officer. Schlemmer was concerned that Juror 111 might have been biased in favor of the State in light of the fact that the victim's father in this case was also a police officer. Further, Juror 111 included other responses in her questionnaire that concerned Schlemmer, such as the fact that she regularly watched crime shows like CSI. Schlemmer also thought that due to her relatively young age, Juror 111 might empathize with the victim upon hearing Lee's frightened 911 call. Schlemmer also testified that once the State had provided several race-neutral reasons for striking Juror 111, she did not believe there was a strong reason to maintain the *Batson* challenge.

Additionally, both handwritten and typed notes created by defense counsel during voir dire were admitted during the evidentiary hearing. Several handwritten notes were added to the typed notes that detailed the impressions of the defense attorneys with respect to potential jurors. Notably, a large handwritten "NO" was written next to the notes pertaining to Juror 111. None of the attorneys who testified during the evidentiary hearing were sure who had written the "NO."

The postconviction court found that King failed to establish deficiency or prejudice. It concluded that the *Batson* challenge was not valid in light of multiple race neutral reasons offered by the State regarding Juror 111. Moreover, King failed to show that a seated juror was actually biased, the standard used to evaluate prejudice when a defendant alleges during postconviction that trial counsel was ineffective for failure to raise or preserve a cause challenge.

We agree with the trial court's conclusion that King failed to show that trial counsel rendered ineffective assistance with respect to this matter. As an

initial point, we note that we previously considered and rejected the merits of King's *Batson* challenge on direct appeal. *King*, 89 So. 3d at 229-31. As we indicated then, the reason proffered by the State -- that Juror 111's brother was facing a criminal charge -- is a valid race-neutral reason to exercise a peremptory strike. *Id.* at 230 (citing *Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla.1992); *Bowden v. State*, 588 So. 2d 225, 229 (Fla.1991)); *see also Rice v. Collins*, 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (concluding that it was reasonable for the trial court to accept as race-neutral reasons for striking a minority female juror the facts that she was nineteen years old, single, lacked ties to the community, and might be too tolerant of the crimes at issue); *cf. Nowell v. State*, 998 So. 2d 597, 604–05 (Fla. 2008) (holding that the State's age based justification for exercising a strike was pretextual in that case, but noting that a juror's age can be a relevant consideration when evaluating the genuineness of a proffered justification). The reasons offered by the State during trial are similarly gender-neutral. Then, as now, King's underlying *Batson* claim is meritless.

To the extent that King's present claim rests on allegations of deficiency for failure to preserve the *Batson* challenge by failing to correct the State or the trial court regarding the nature of the charges faced by Juror 111's brother, or by failing to conduct a comparative juror analysis, we conclude that trial counsel did not act deficiently. [fn5] The evidence admitted during the postconviction hearing indicated that defense counsel did not want Juror 111 to serve for several reasons. Further, they were concerned about the impartiality of Juror 111 for some of the same reasons as the State, such as the fact that Juror 111 admitted that she watched television shows like CSI and she was young. Schlemmer testified that she was concerned that Juror 111 mentioned that a friend's father was a police officer. In light of such information, Schlemmer did not believe that any merit remained to the *Batson* challenge. Schlemmer's abandonment of a meritless claim did not constitute deficiency. *See, e.g., Troy v. State*, 57 So. 3d 828, 842- 43 (Fla. 2011) (refusing to consider counsel deficient for failure to raise meritless claims).

Although we do not need to consider whether prejudice resulted, having concluded that counsel did not act deficiently, we also reject King's claim that he can demonstrate prejudice pursuant to *Davis v. Secretary* for the *Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003). In *Davis*, trial counsel raised a meritorious *Batson* challenge during voir dire, but failed to renew the objection before the jury was sworn in as required by *Joiner v. State*, 618 So. 2d 174, 175-76 (Fla. 1993). 341 F.3d at 1312. Although his subsequent claim that the failure to preserve the *Batson* challenge constituted ineffective assistance of counsel was rejected by the Third District Court of

Appeal, the Eleventh Circuit Court of Appeals granted him relief pursuant to a federal writ of habeas corpus. *Id.* at 1312, 1317. The Eleventh Circuit considered the decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), which involved a notice of appeal that was untimely filed, to support the proposition that *Strickland* may on occasion require determination of how deficient performance affected the client's appeal, rather than the trial. *Davis*, 341 F.3d at 1314-15. Concluding that counsel's failure to preserve his *Batson* challenge solely affected Davis's appeal, the Eleventh Circuit held that the correct prejudice inquiry under such circumstances was whether there was a reasonable likelihood of a more favorable outcome on appeal. *Id.* at 1315-16.

However, the decision in *Davis* has since been recognized by the Eleventh Circuit as a "razor thin exception." *Purvis v. Crosby*, 451 F.3d 734, 739-40 (11th Cir. 2006) ("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."). Further, the Eleventh Circuit has rarely applied the exception in *Davis. See United States v. Williams*, 731 F.3d 1222, 1236 n.10 (11th Cir. 2013); *Brown v. United States*, 533 Fed. App'x. 881, 883 n.2 (11th Cir. 2013); *Lockwood v. Hooks*, 415 Fed. App'x. 955, 957 (11th Cir. 2011); *Carratelli v. Stepp*, 382 Fed. App'x. 829, 832-33 (11th Cir. 2010); *Crawford v. Hooks*, 244 Fed. App'x. 300, 303-04 (11th Cir. 2007). Other federal appellate courts have flatly rejected *Davis's* interpretation of *Flores-Ortega. Kennedy v. Kemna*, 666 F.3d 472, 486 (8th Cir. 2012) (citing *Taylor v. United States*, 279 Fed. App'x. 368, 369 (6th Cir. 2008)).

More importantly to King's claim, this Court has also explicitly rejected *Davis. Carratelli v. State*, 961 So. 2d 312 (Fla. 2007). First, the Court explained that the standard regarding prejudicial error on direct appeal differs from that in a postconviction claim asserting ineffective assistance. *Id.* at 317–18. A properly preserved error permits the trial court to correct errors as they arise and is reviewed for manifest error on direct appeal. *Id.* at 318. A defendant who can show that a juror suspected of bias was improperly seated is entitled to relief on direct appeal; however, an unpreserved error on direct appeal regarding an improper juror is not considered reversible. *Id*. at 319-20 (citing *Busby v. State,* 894 So. 2d 88, 96-97 (Fla. 2004); *Singer v. State*, 109 So. 2d 7, 19 (Fla. 1959)).

By comparison, a defendant claiming in a postconviction motion that trial counsel was ineffective is governed by *Strickland*. *Carratelli,* 961 So. 2d at 320. This Court specifically rejected *Davis'*s proposition that it may be

proper to consider the effect of counsel's deficiency on the defendant's appeal, rather than during trial. *Id.* at 321. The Court explained that renewing an objection before a jury is sworn in is fundamentally a trial concern, not solely an appellate matter. *Id.* Further, the Court determined that *Strickland*'s concerns with prejudice centered "on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 322 (quoting *Strickland,* 466 U.S. at 696, 104 S.Ct. 2052). This Court also noted that *Flores-Ortega* did not create such a sweeping change to *Strickland* as suggested by *Davis,* but simply permitted reviewing courts to presume prejudice when a defendant is entirely denied a proceeding, such as can occur when counsel fails to file a timely notice of appeal. *Carratelli,* 961 So. 2d at 322-23.

Accordingly, when considering the failure to preserve a challenge to potential jurors in *voir dire*, the reviewing court should focus on the defendant's trial, not his appeal. *Id.* at 323. Under such circumstances, this Court held that a defendant must show that a biased juror served during the defendant's trial to satisfy *Strickland*'s requirement of showing a reasonable probability of a more favorable result. *Id.* at 323-34.

King asserts that *Carratelli* is distinguishable because *Carratelli* involved cause challenges, not peremptory strikes. However, the Court accepted jurisdiction in *Carratelli* based on conflict with the decision in *Austing v. State*, 804 So. 2d 603 (Fla. 5th DCA 2002), which concerned peremptory strikes. *Carratelli*, 961 So. 2d at 317. In *Austing,* the Fifth District Court of Appeal had reached a similar conclusion as the Eleventh Circuit in *Davis* that the prejudice resulting from the failure to preserve a *Batson* challenge during trial should be evaluated by the effect on the defendant's appeal. 804 So. 2d at 604. Nonetheless, we rejected that rationale in *Austing* without considering any distinction between the nature of peremptory and cause strikes. *Carratelli*, 961 So. 2d at 317, 327.

Therefore, King's reliance on *Davis* is misplaced. Under *Carratelli,* King has not demonstrated prejudice because he offered no evidence to indicate that any of the jurors who were seated in his trial were actually biased. Rather, the evidence King presented on postconviction was simply that this Court would have ruled differently on direct appeal if the *Batson* challenge had been fully preserved. This is insufficient to demonstrate prejudice in this context. Therefore, we reject this claim.

King, 211 So. 3d at 883-88.

King faults counsel for failing to preserve a *Batson* challenge for direct appeal. The

Florida Supreme Court issued a merits ruling and found the trial court did not err in denying the State's challenge to Juror 111 because the prosecutor offered valid reasons for the strike. *King*, 89 So. 3d at 229-30. King faults his trial counsel for not doing more to perfect a record that King contends could have prevailed on direct appeal. However, this claim is reviewed in this court from the denial of an ineffective assistance of counsel claim. Under this posture, the state court's ruling is due double deference -- under *Strickland* and the AEDPA. Ground two has no merit.

King largely ignores the fact that lead defense counsel did not want Juror 111 to sit on King's jury. Defense counsel Schlemmer explained that, as lead counsel in the case, she was in charge of jury selection. Although she received input and advice from her co-counsel, the ultimate decisions during *voir dire* were hers to make. (C11/1727). Her co-counsel, 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.(C10/1655). This *pro forma* objection does not overcome lead counsel's tactical determination that she did not want Juror 111 to sit on King's jury.

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 Juror 111 on the panel and would have wanted her stricken. (C11/1725-1728; 1730). Schlemmer felt that Juror 111 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."

(Id./1730). Schlemmer's file had a big "No" written next to Juror 111. (Id./1730-1732). Schlemmer was not certain who wrote "No," but she thought that Scotese had written the word. (Id./1731-32).

During jury selection, one of King's defense counsel failed to perfect, for appeal, an objection to a juror that lead defense counsel did not even want sitting on the jury. King asks this Court to reverse his convictions based on this failure to perfect the objection for appeal. The law does not countenance such a result because an attorney's actions during *voir dire* are considered to be a matter of trial strategy. *See Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) ("The attorney's actions during voir dire are considered to be a matter of trial strategy."). As a tactical decision, counsel's performance is virtually immune from postconviction challenge. *See Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (the petitioner's burden of persuasion is a heavy one, "petitioner must establish that no competent counsel would have taken the action that his counsel did take."). This meritless claim was properly denied by the state court, as King failed to demonstrate either deficient performance or prejudice.

King fails to establish that the Florida courts' resolution of this claim conflicts with any clearly established Supreme Court precedent. King's memorandum discusses the general law relating to strikes applicable on direct appeal from the Supreme Court. However, he fails to identify a single Supreme Court case that supports his claim related to the defendant's burden in postconviction proceedings, that is, addressing a claim of ineffective assistance of trial counsel. (Pet. Memo, Doc. 18 at 13).

Under well-established Florida law, 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 v. State*, 961 So. 2d 312, 320 (Fla. 2007). 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 postconviction 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).

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 had 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. King had to show a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different. King did not attempt to make such a showing in state court. *See 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 venire person, even if in error, resulted in any prejudice to the defendant).

Rather than cite Supreme Court precedent, King cites an Eleventh Circuit case, *Davis v. Secretary for Dept. of Corr*ections, 341 F.3d 1310, 1315-16 (11th Cir. 2003), for the proposition that he need not show any prejudice on the outcome of his trial. King's reliance upon *Davis* is misplaced. In *Davis*, trial counsel failed to preserve for appeal a sufficient, adequate, and apparently meritorious *Batson* challenge -- leading to default of that issue on appeal in state court. King's counsel raised the claim and it was preserved for direct appeal. The Florida Supreme Court found there was no *Batson* violation in this case. As the trial court noted, in this case the State offered several valid reasons for the strike. Consequently, unlike *Davis*, there was no meritorious *Batson* objection available to counsel -- to raise either at trial or on appeal.

A more recent and directly relevant case is the Eleventh Circuit's decision in *Price v. Secretary*, *Florida Dept. of Corrections*., 548 F. App'x. 573, 576-77 (11th Cir. 2013), in which the court 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. In *Price*, 548 F. App'x. at 576-77, the court 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. Ill.*, 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, "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. Ala*., 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.

The Florida Supreme Court decision does not contravene any Supreme Court precedent, and conforms to the view accepted by most courts, including the Eleventh Circuit, That is, courts have recognized that an ineffective assistance of counsel claim based on 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. *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."); *Sneed v. Fla. Dep't of Corr.*, 496 F. App'x. 20, 27 (11th Cir. 2012) (*per curiam*) ("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); *State v. Bouchard*, 922 So. 2d 424, 429-30 (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.").

No biased or unqualified jurors sat on King's jury. King's guilt was supported by overwhelming evidence. King's trial was not rendered unfair or unreliable based on counsel's asserted deficient performance in failing to persuade the trial court that prospective Juror 111 should be retained.

Thus, this claim is legally and factually insufficient to warrant relief. King has offered no persuasive reasons to reverse the state court decision that relied on settled Florida precedent requiring an assessment of prejudice emanating from counsel's performance on the outcome of the trial (the stage at which it was furnished), not the appeal.

Since there is no Supreme Court precedent that contravenes this legal proposition, King's claim necessarily fails. The Supreme Court recently rejected the notion that a postconviction defendant should be treated the same in raising a structural error under an ineffective assistance of counsel claim as a defendant on direct appeal. In *Weaver v. Massachusetts,* ___ U.S. ___, 137 S. Ct. 1899, 1913 (2017), the Court observed:

> ...When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted

> as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.

In cases where nothing in the Supreme Court's jurisprudence addresses the issue on point or the precedent is ambiguous and gives no clear answer to the question, it cannot be said that the state court's conclusion is contrary to, or constitutes an unreasonable application of, "clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008); *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003).

Defense counsel had no valid *Batson* objection to exercise on prospective Juror 111. The prosecutor in this case offered a number of racially neutral reasons for striking Juror 111, starting with her age, 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.

(A20/1764).

In response, defense counsel simply stated "it is our position those are not sufficient reasons." (Id./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 who said that. (Id./1765). The judge found the fact Juror 111's brother had a pending drug charge was a genuine race neutral reason for the strike. (Id./1766). Even if this Court were inclined to look only to the outcome of the appeal, rather than the outcome at trial, King has fallen far short of establishing that his challenge would have had any chance of success on appeal had counsel acted differently at trial. Even on direct appeal of an overruled *Batson* objection, a trial court's evaluation of a prosecutor's reasons for using a peremptory challenge can be reversed only on a showing of clear error. *Hernandez v. N.Y.*, 500 U.S. 352, 363-66 (1991). This highly deferential standard reflects the recognition that the trial court's determination is based primarily on credibility, the evaluation of which "lies 'peculiarly within a trial judge's province.'" *Hernandez,* 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). *See also Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1321 (11th Cir. 1999) ("A district court's *Batson* determinations are largely findings of fact entitled to great deference on review.") (citing *Batson*, 476 U.S. at 98 n.21).

As the Florida Supreme Court found on direct appeal, 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." (A35/605).

The prosecutor offered several valid, racially neutral reasons for his peremptory strike of Juror 111. Contrary to King's assertion, the court did not find any of the prosecutor's reasons pretextual. To the contrary, the state trial court recognized in its order that the State had offered several valid reasons for the strike. *See Batson*, 476 U.S. at 95 (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 18 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. *See also*, *Smith v. Dunn*, 2017 WL 4532040 *2 (11th Cir., Oct. 10, 2017) (citing *Adkins v. Warden, Holman CF,* 701 F.3d 1241, 1257-58 (11th Cir. 2013) (explaining that age "may be [a] facially race-neutral reason for a strike, but finding that the strikes at issue could not be justified on the basis of age

because the prosecution used age-related reasons to justify strikes of people ranging in age from 31 to 85 years old)); *Lamar v. Hetzel*, 2014 WL 2569030 *39 (S.D. Ala., June 9, 2014) (Lamar cites no case law that established age is not a race-neutral reason for utilization of peremptory challenges or any case that would have established that the reasons offered by the State for striking Juror 40 were a mere pretext for unlawful racial discrimination . . .)

Since age is a 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 King, either in the outcome at trial, or, the outcome on direct appeal. 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 F. App'x. 935, 936 (11th Cir. 2007) (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)).

The prosecutor in King's case not only mentioned Juror 111's age, but also her lack of experience and perceived meekness. The record supports the prosecutor's basis for the strike, not only as to age, but also as to 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. (Id./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 another, valid, race neutral reason mentioned by the prosecutor for the strike. (A35/605).

Defense counsel did not assert that any similarly situated juror who had a relative with a felony charge or pending felony charge had not been challenged. Moreover, even now, with the benefit of unlimited time and after meticulous review of 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, 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.

In an effort to buttress his *Batson* claim, King attempted to fault counsel in state court for failing to add gender as a reason to object to the state's strike. However, adding gender as a possible reason for the strike as King argues (Pet. Memo, Doc. 18 at 17), would not be persuasive on this record.

King's jury included a majority of seven females. The State exercised only seven of its thirteen peremptory challenges. (Id./1766). Consequently, the record refutes any suggestion that the State exercised its challenges in a gender discriminatory manner. The

prosecutor did not assert at any point that he was striking Juror 111 because she was a female. Nothing presented at trial or in postconviction suggests, much less establishes that the State exercised its strikes in a discriminatory manner.

The facts establish that even if this Court were to review the state court record, not as a claim of ineffective assistance of counsel, but, rather as an initial reviewing court on appeal as King suggests, the *Batson* challenge was properly rejected. There was no pattern of race based strikes and the prosecutor's race neutral reasons for striking Juror 111 were not shown to be pretextual.

Moreover, the lead counsel in King's case testified during the postconviction hearing to the reasons she did not want Juror 111 to sit on King's jury. King has not cited any case in which a trial counsel was held ineffective for failing to preserve a *Batson* challenge to a juror that lead counsel did not actually want sitting on the defendant's jury.

For the forgoing reasons, King has failed to establish the state court decision was either contrary to, or, an unreasonable application of clearly established Supreme Court precedent.

Ground two does not warrant habeas corpus relief.

GROUND THREE

> Fla. Stat. § 945.10, Which Prohibits Mr. King from Knowing the Identity of the Execution Team Members, Is Unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution. The State Court's Resolution of Mr. King's Claim Was an Unreasonable Application of Clearly Established Federal Law. Further, in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.

Ground three, as restated by Respondent:

> Whether Fla. Stat. § 945.10, Which Prohibits Mr. King From Knowing The Identity Of the Execution Team Members, Is Unconstitutional Under The Eighth And Fourteenth Amendments of The United States Constitution?

King developed this ground during his Rule 3.851 proceedings. The state trial court denied the claim based on established state law that prohibits identification of execution team members. On appeal, the Florida Supreme Court affirmed, stating:

> Identity of Executioners
>
> King also asserts that section 945.10, Florida Statutes (2014), which exempts from disclosure the identity of those individuals who participate in the lethal injection procedure, is unconstitutional. This Court has rejected recent challenges to the statute's validity. *See Correll*, 184 So. 3d at 486 (citing *McLean v. State*, 147 So. 3d 504, 513 (Fla. 2014); *Darling v. State*, 45 So.3d 444, 447-48 (Fla. 2010); *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008)). Additionally, the Court presumes that those individuals charged with conducting an execution will perform their duties properly. *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007). Although King asserts that executions in Florida and elsewhere have gone awry, undermining the presumption in *Lightbourne*, several executions have been conducted in Florida with no reported problems. *See Correll*, 184 So. 3d at 486 ("[T]he recent executions of Johnny Kormondy, Chadwick Banks, Eddie Davis, John Henry, and Robert Hendrix have been carried out with no subsequent allegations of difficulties."). [fn6] Thus, we reject this claim as well.
>
> > Fn6. The executions of Jerry Correll in October 2015 and Oscar Ray Bolin, Jr., in January 2016 were similarly completed with no allegations of improper conduct or incompetence.

King, 211 So. 3d at 888-89.

This claim is meritless. First, this claim is not cognizable in a federal habeas petition. This claim does not challenge either the validity of King's convictions or his death sentence.

To the extent this claim can be viewed as a challenge to the State's lethal injection protocol, such claim does not lie in habeas. *See McNabb v. Comm'r Ala. Dep't of Corr.*, 727

F.3d 1334, 1344 (11th Cir. 2013) (An inmate challenging a state's method of execution claim is not attacking the validity of his confinement or sentence; consequently his challenge is not appropriate for habeas corpus but in a section 1983 lawsuit. Consequently, this claim must be dismissed.).

In addition, King notably fails to cite any clearly established precedent from the Supreme Court that supports his position that he is entitled to the sensitive and protected information he seeks. Accordingly, he has plainly failed to establish that the decision below conflicts with, or, is an unreasonable application of clearly established Supreme Court precedent. *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260 (11th Cir. 2014) (upholding Georgia's lethal injection secrecy act against constitutional challenges).

Ground three does not warrant habeas relief.

GROUND FOUR

> The Trial Court Erred in Accepting as Genuine the Prosecutor's Proffered Reason for His Peremptory Strike of a Minority Juror (111), Based on Her Questionnaire Response, Where the Claimed Reason Was Equally Applicable or More Applicable to Other Jurors Whom the Prosecutor Did Not Challenge, and Who Served on the Jury. The State Court's Resolution of Mr. King's Claim as an Unreasonable Application of Clearly Established Federal Law, Including *Batson v. Kentucky*, 476 U.S. 79 (1986). Further, in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.

Ground four, as restated by Respondent:

> Whether the State Court's Finding that the Prosecutor's Race Neutral Reasons For A Peremptory Strike of a Minority Juror Was an Unreasonable Application of, or Contrary to Any Clearly Established Supreme Court Precedent?

King raised this ground on direct appeal. The Florida Supreme Court rejected this

claim, stating:

> Peremptory Strike of Minority Juror
>
> 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 venire person 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.

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 v. State, 89 So. 3d at 229-31.

Most of ground four is procedurally barred. The Florida Supreme Court held that defense counsel's failure to challenge the factual basis for the juror strike -- a pending drug charge -- and his failure "to identify the race of the similarly situated jurors who were seated on King's jury[]" essentially waived the pretext issue. *Id.* It was defense counsel's duty to object to the reasons for the strike and to cite an appropriate comparator. Defense counsel's failure to do so waived the pretext argument on appeal. In other words, the issue was procedurally barred. Issues procedurally barred in state court cannot be considered

on federal habeas. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Mincey v. Head,* 206 F.3d 1106, 1135-36 (11th Cir. 2000), *cert. denied*, 532 U.S. 926 (2001).

The only exception to this Court's reviewing King's procedurally barred claim would King's showing cause and prejudice pursuant to *Wainwright v. Sykes, supra*, and *Teague v. Lane*, 489 U.S. 288, 298 (1989). King has the burden, *United States v. Frady*, 456 U.S. 152 (1982), and King has not shown cause and prejudice to overcome the procedural bar.

The procedurally barred claims involve issues that, according to Florida law, should have been objected to at trial to be properly preserved for review. There are two prerequisites to federal habeas review: 1) the applicant must have fairly apprised the highest state court with the appropriate jurisdiction of the federal rights allegedly violated, and 2) the applicant must have presented his claims in state court in a procedurally correct manner. *Upshaw v. Singletary*, 70 F.3d 576, 578-79 (11th Cir.1995). King has not met the prerequisites.

The only part of ground four properly exhausted in state court is defense counsel's objection and the judge's acceptance of the drug charge as an acceptable race neutral reason for the strike. The state court identified the applicable Supreme Court precedent, *Batson,* and reasonably applied it to the facts of this case.

Even if this Court were conducting *de novo* review of the state court ruling, the challenge would be upheld as non-discriminatory. Furthermore, additional deference is due to the state court ruling on a juror challenge under the AEDPA. *See Davis v. Ayala*, 135

S.Ct. 2187, 2202 (2015) (reversing the Ninth Circuit's grant of relief on the basis of allegedly discriminatory strikes, noting the substantial deference accorded to state court rulings under the AEDPA).

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 striking Juror 111. Accordingly, King waived his challenge to the striking of juror 111 based on the erroneous reading of her questionnaire.

In *Batson v. Kentucky*, the Supreme Court established a three-step process for evaluating a defendant's objection to a peremptory challenge. The defendant must first make a prima facie showing that a challenge was based on race. If a defendant makes this showing, the prosecution must offer a race-neutral basis for the challenge. The prosecutor's explanation need not be persuasive or even plausible. Last, the court must determine whether the defendant has shown "purposeful discrimination." *Batson*, 476 U.S. at 97-98; *accord Rice v. Collins*, 546 U.S. 333, 338 (2006). The burden of persuasion remains with the opponent of the strike. *Rice*, 546 U.S. at 338.

Florida law mirrors *Batson*'s three step requirements. In *Melbourne v. State*, 679 So. 2d at 764, the court set out a three step process to resolve an allegation of discrimination during jury selection: (1) A party objecting to the other side's use of a peremptory challenge

on racial grounds must make a timely objection, identify the venire person as a member of a distinct racial group, and request the court to direct the challenger to offer a race neutral reason for the strike; (2) the court must ask the proponent of the strike to explain the reason for the strike and the proponent must come forward with a race-neutral explanation; and (3) if the reason is facially race neutral and the trial court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. *Id*.

Aside from the existence of any procedural bar, the record refutes that the prosecutor exercised his strike for an impermissible reason. When challenged, the prosecutor offered a number of facially race-neutral reasons for striking juror 111, starting with her age, 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.

(A20/1764).

In response, defense counsel stated "It is our position those are not sufficient reasons. There's many people here on this jury that have similar -- there is one person who is -- ." (Id./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 who had said that. (Id./1765). The judge found the fact Juror 111's brother had a pending drug charge was a genuine race neutral reason for the strike. (Id./1766).

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 error below, or on appeal. 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." (A35/605). If defense counsel had reason to doubt the prosecutor's assertion that the charge was pending, he should have made that objection below. The prosecutor offered several valid, racially neutral reasons for his peremptory strike of juror 111. *See Batson*, 476 U.S. at 95 (noting the need for a judge to take into "account all possible explanatory factors in the particular case").

While the racial makeup of the panel is not known, the defense challenged only a single strike on the basis of race. Therefore there was no pattern of strikes against any particular group. King has not shown that any of the relevant circumstances that a trial court may consider have been shown to apply in this case. These relevant circumstances include 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 out the juror for special treatment. *See Murray*, 3 So. 3d at 1120.

Defense counsel did not assert that any similarly situated juror had not been

challenged. That postconviction counsel's "mining of questionnaires and voir dire from a made record" has now added comparators, is of no consequence. Trial counsel did not make this argument below and he accepted the state's explanation. This Court may not grant relief on arguments not properly preserved for appeal in the Florida Supreme Court. Moreover, even now, King has not found a single appropriate juror comparator. *Melbourne*, 679 So. 2d at 765 ("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.").

The Court notes that while arguing that defense counsel should have challenged the Juror 111 strike on gender, as well as race under Claim II above, some of the juror comparisons counsel now offers, jurors 92 and 98, are women whom the State did not challenge. (Pet. Memo, Doc. 18 at 23).

None of the non-challenged comparators mentioned by appellate counsel had the characteristics of being young and inexperienced, 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).

"[A] federal habeas court can only grant [the] petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." 546 U.S. at 338-39. The state court factual findings are presumed correct on habeas review. 28 U.S.C. § 2254(e)(1). The AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Felkner*

v. Jackson, 562 U.S. 594, 598 (2011) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)).

King has not shown the state courts' interpretation of the facts was in error or clearly erroneous. Since the state court ruling is deferential to the trial judge's assessment of the strike, and this claim is viewed through the deferential lens of the AEDPA, ground four has no merit.

Ground four does not warrant habeas corpus relief.

GROUND FIVE

> King's Constitutional Rights To Present this Defense and To Fully Cross Examine a Key Prosecution Witness Were Violated by a Series of Trial Court Rulings Regarding Robert Salvador (And Compounded by the Prosecution's Taking Unfair Tactical Advantage of its Own Failure to Contemporaneously Object to the Defense's Cross Examination of Salvador, and by the Prosecutor's Burden Shifting Comments in Closing Argument). The State Court's Resolution of Mr. King's Claim Was an Unreasonable Application of Clearly Established Federal Law. Further in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.

Ground five as restated by Respondent:

> Whether State Trial Court Evidentiary Rulings Violated King's Constitutional Rights To Present His Defense And To Fully Cross-Examine A Prosecution Witness?

King raised this claim, asserting errors in evidentiary rulings by the trial court, at trial and on direct appeal. The Florida Supreme Court addressed this claim:

> <u>The Cross–Examination of Robert Salvador</u>
>
> In his first claim, King asserts that the trial court improperly limited the cross- examination of State witness Robert Salvador. We disagree.
>
> The record reflects that during cross-examination, defense counsel confronted Salvador with prior inconsistent statements. For example, when the police first visited Salvador's residence at 1:30-2:00 a.m. on January 18,

[fn10] Salvador failed to inform the police that he had been with King the day before. Salvador later visited the North Port Police Department and told police that he was with King at the firing range on the 17th. Salvador also initially informed the police that when he arrived home on the 17th, he deleted all phone calls that he received from King that day; however, he later informed the police that there was one call from King that had not been deleted. Toward the end of cross-examination, the following dialogue occurred:

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

After Salvador was excused as a witness, the prosecutor asked to address a matter outside of the presence of the jury. After the jury left the courtroom, the State argued that defense counsel did not have a good-faith basis for asking the inflammatory questions because of prior inconsistent statements made by King which had been suppressed by the trial court. The State argued the "door was opened" by defense counsel's cross examination because the jury would assume that defense counsel had received the factual information in the questions from King himself. The State argued that King's suppressed statements should now be allowed into evidence because they were inconsistent with the theory that Salvador shot Denise Lee. The trial court ultimately refused to admit King's prior statements. While the trial court concluded that merely asking Salvador if he shot Denise Lee was not improper, the judge instructed the jury to disregard the three other questions asked by defense counsel, stating that "there is no basis in fact from the evidence for the asking of said questions." Defense counsel subsequently moved for a mistrial based upon the instruction, which the trial court denied.

Limitations on the cross-examination of a witness are within the sound discretion of the trial court, and a ruling concerning such limitations will only be reversed if the aggrieved party demonstrates an abuse of that discretion. *See Kormondy v. State*, 845 So. 2d 41, 52 (Fla. 2003). The United States Supreme Court has held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). However, the Supreme Court has also explained that this opportunity is not without limitation:

> While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury....
>
> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. *See, e.g.*, 41 C.J.S., Homicide § 216, pp. 56-58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises

> a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am.Jur.2d, Homicide § 286, pp. 136-38 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged....[Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." (footnotes omitted)).

Holmes v. South Carolina, 547 U.S. 319, 326-27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

For a defendant to make statements in questions to introduce a theory of the possibility that someone else committed a crime, there must be sufficient evidence in the record to support that underlying theory. *See Cohen v. State*, 581 So. 2d 926, 927 (Fla. 3d DCA) (holding that where the defendant alleged that the victim met with a drug dealer days before the murder, the theory that "somebody else did it" was properly excluded where "there is insufficient evidence on the record to support its relevancy"), review denied, 592 So. 2d 679 (Fla. 1991). Other jurisdictions have also concluded that the other evidence introduced in the case must provide a clear link to the crime charged. In *Johnson v. United States*, 552 A.2d 513 (D.C. 1989), the District of Columbia Court of Appeals explained:

> "[B]efore evidence of the guilt of another may be deemed relevant and thereby admissible, the evidence must clearly link that other person to the commission of the crime...."
>
> What we mean by "clearly link" ... is proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense.... [S]ee 29 Am.Jur.2d, Evidence § 441 (1967) (defendant should not be able to "indulge in conjectural inferences that some other person might have committed the offense").

Id. at 516 (quoting *Brown v. United States*, 409 A.2d 1093, 1097 (D.C. 1979)). Similarly, in a case where the defendant contended that the murder of the victim was a revenge killing because the victim's father was a police informant, the Arkansas Supreme Court held that the trial court did not abuse

its discretion in excluding this evidence where it only created an inference or conjecture as to the guilt of the third party, and "there was no direct or circumstantial evidence linking the drug dealers to the actual perpetration of this particular crime." *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28, 32 (2004).

Furthermore, questions asked during cross examination must have a good-faith basis.

. . .

At issue in this case is whether the trial court abused its discretion in instructing the jury to disregard the questions which included statements by defense counsel that (1) Salvador had agreed to meet King later in the day on January 17, 2008; (2) Salvador actually went to King's house later that day; and (3) Salvador met King at Plantation Boulevard before Denise Lee was shot. Defense counsel presented no tangible evidence to support his contention that any of these events actually occurred. For example, to support these questions, the defense could have presented independent evidence to support the statements in the questions. Instead, defense counsel relied upon Salvador's inconsistent statements with regard to other facts, contending they evidenced a guilty conscience due to Salvador's purported involvement in the shooting of Denise Lee. For two reasons, we conclude that the trial court did not abuse its discretion when it instructed the jury to disregard the questions.

First, Salvador's inconsistent statements and alleged evasiveness with regard to other facts do not provide a clear link to the death of [D.L.]. *See Johnson*, 552 A.2d at 516. A huge inferential leap would be required to equate these alleged prior inconsistent statements with guilt of murder. In fact, during trial, Salvador provided more logical explanations as to why he provided police different facts and engaged in what could be perceived as suspicious conduct, such as deleting King's phone calls. Salvador explained that when the police appeared at his house at 1:30-2:00 a.m. on the morning of January 18, they only asked Salvador if he knew who King was -- not whether he had seen King that day -- and the visit lasted only five minutes. Although Salvador was informed during the visit that King had been apprehended in relation to a kidnaping, Salvador testified that he did not believe the matter was that serious and assumed it was only a domestic disturbance between King and one of his girlfriends.

Furthermore, Salvador admitted that he had lied to his wife about going to the firing range because he was supposed to be working, and he did not

want her to think that he was not working to support the household. Salvador also explained that he deleted the phone calls from King before the 1:30-2:00 a.m. visit by police because his wife did not like King and did not want Salvador to spend time with him. Finally, Salvador stated that during his meetings with the police, he felt as though he was being treated as a suspect (which he was until January20):

> I was terrified at the time, of course, the situation of being that close to somebody that could have done something like that. So I'm not going to sit here and say that I wasn't afraid. I'm not going to sit here and say that I wasn't tongue tied, and it was very difficult for me to try to remember everything that had gone on.

Thus, the fact that Salvador's actions and statements concerning other facts can be attributed to fear and also a desire to keep information from his wife demonstrates that there is no clear link between these actions and the murder of Denise Lee.

Second, the facts asserted in the questions asked by defense counsel, and defense counsel's theory of the murder, were highly implausible. Under that theory, Salvador arranged to meet King near Plantation Boulevard for the sole purpose of shooting someone whom he had never met. Moreover, during trial, Detective Chris Morales testified that Salvador had established he could not have been in the area of the crime at the time it occurred. Given the sheer unlikelihood and improbability of defense counsel's scenario -- unsupported by any evidence whatsoever -- plus the elimination of Salvador as a suspect in the murder based on independent facts established by law enforcement, we conclude that the trial court's decision to strike the three questions for lack of sufficient evidence in the record to support those allegations (or defense counsel's theory for that matter) was a reasonable and sound use of discretion. *See Cohen*, 581 So.2d at 927.

King v. State, 89 So. 3d at 222-26.

The Florida Supreme Court decision reasonably applied the facts to reject this claim. The decision below was neither contrary to, nor an unreasonable application of clearly established Supreme Court precedent. Moreover, in light of the overwhelming evidence establishing King's guilt, this alleged error, even if established, would not warrant habeas

relief. Accordingly, this claim will be denied.

The state court evidentiary ruling did not prevent King from presenting a defense and did not constitute an abuse of discretion, nor denial of due process in a ruling that does not conflict with any clearly established Supreme Court precedent.

The first question is whether this claim is a constitutional claim, or a state evidentiary ruling claim. Trial court errors in the application of state evidentiary law generally are not cognizable as grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-(1991); *Marshall v. Lonberger*, 459 U.S. 422, 438, n.6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). Trial court rulings on state procedure or evidentiary rules do not rise to the level of federal constitutional claims warranting relief in habeas corpus unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment. *Estelle*, 502 U.S. at 69-70.

King argues that he was prevented from presenting his defense by the trial court's rulings on cross examination of a single state witness, Robert Salvador. The trial court disallowed three questions asked of Salvador on cross examination and instructed the jury to disregard those questions.

Under well-established Florida law, the state trial court is vested with discretion in controlling the proper bounds of cross examination. *See Kormondy v. State*, 845 So. 2d 41, 52 (Fla. 2003) (Limitation on the examination of a particular witness is within in the sound discretion of the trial court); *Sanders v. State*, 707 So. 2d 664, 667 (Fla. 1998) (a "trial judge has broad discretion in determining limitations to be placed on cross examination.").

Such discretion does not offend the constitution. *See Chambers v. Miss.*, 410 U.S. 284, 295 (1973) (noting that trial judges retain wide latitude to impose reasonable limits on cross examination based on concerns about harassment, prejudice, confusion of the issues, or to limit marginally relevant areas of inquiry.); *Crane v. Ky.*, 476 U.S. 683, 690 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted."). Under the facts of this case, no abuse of discretion has been shown, much less a constitutional violation meriting habeas relief.

An attorney must have a "good-faith factual basis" for asking questions of a witness on cross examination. *Rhodes v. State*, 547 So. 2d 1201, 1205 (Fla. 1989) (citations omitted). In this case, defense counsel exceeded the proper bounds when cross examining Salvador, by asserting specific facts in leading questions for which counsel had no good faith basis, and which did not relate to, explain, or contradict any testimony presented on direct examination. *See Gosciminski v. State*, 994 So. 2d 1018, 1024 (Fla. 2008) (finding trial court erred in allowing state to insinuate that the victim's ring was covered in blood without a "good faith basis for asking this question or making such a suggestion to the jury."). The following questions asked by defense counsel were improper: 1) "didn't you go over to his home on Sardinia that day, January 17th 2008?" 2) "And wasn't the purpose of going over there to bring a lawn mower and a gas can?" 3) "And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?" (A24/2587-88).

Defense counsel argued that Salvador's consciousness of guilt led him to ask those questions. (A25/2601). However, the trial court did not see the connection between Salvador's initially "not being totally candid with law enforcement with your taking it to the next step saying, did you agree to meet the defendant, did you go to the scene of the crime, and did you kill Denise Lee? I don't see that connection. I really don't see that connection. Maybe you can enlighten me because I don't see it." (Id./2602). Defense counsel did not provide any basis for this line of questioning -- simply repeating the question and noting that Mr. Salvador "denied it repeatedly." (Id./2602). The trial court, in response, stated "I still don't see the good-faith basis for you asking those questions." (Id./2602). Defense counsel argued that Salvador had been shooting with King and owned a 9 millimeter gun, and had testified that Mr. King did not leave with 9 millimeter ammunition. (Id./2602-03). Further, defense counsel asserted that Salvador had "lied about his whereabouts to police" and that he had previously been to King's house on Sardinia. (Id./2603). Defense counsel strenuously asserted that he had not now opened the door to admission of King's suppressed statements regarding the death of Denise Lee. (Id./2603-04).

The prosecutor argued that defense counsel's cross examination had now opened the door for introduction of King's suppressed statements. The prosecutor maintained that once defense counsel asserted in cross examination that Salvador later met King, and then shot and killed Denise Lee, the lack of good faith or lack of factual basis, "is that he obtains that information from his client, that his client is telling him that that's what happened." "And, in fact, the tone and behavior in which he yelled and pointed at the witness when he did it, was an implication that defense counsel Meisner knew that to be true and that he had been

told that by his client." (Id./2604-05).

Consequently, the prosecutor asserted the defense had opened the door to King's suppressed statements that people he did not know, "wearing masks and gloves," kidnapped him and Denise Lee and that they are the ones who must have killed her; and that a "helicopter shot Denise Lee." (Id./2605). Those statements are inconsistent with the "defendant's knowing that Robert Salvador was the person who shot Denise Lee." (Id./2605).

The prosecutor noted that there was no basis for asking any of the cross examination questions in any of Salvador's interviews and statements and in his deposition. "I still have no idea where the good faith basis was for this. And I would remind the Court that the law doesn't require the defendant to take the stand to open the door. The behavior of defense counsel can open the door. And with that, I'll leave that in the Court's discretion." (Id./2612). The "specificity" of the questions, like "bringing a lawn mower and a gas can to come over to King's house" suggested that King was the only person who would know that and suggested that that's what King told his attorney. (Id./2618).

The trial court again questioned the "good faith basis" for such questions. The court stated:

> Yeah, but the issue is really the good-faith basis matter.
>
> Quite frankly, Mr. Meisner, I do have some concerns in that regard. So I guess the question is, what's the remedy? Because, obviously, I think you went beyond, number one, any legitimate inference from the evidence.

(Id./2618). In response, defense counsel Meisner stated: "Well, Judge. If you're considering - - you're asking me what a potential remedy is. I think I've established my position that I

haven't opened the door. If you think otherwise, one possible remedy is simply striking it from the record and instructing the jury on that." (Id./2618).

The judge indicated he had to choose between two remedies, admitting the suppressed statements as requested by the State, or, the second option, suggested by defense counsel, striking those questions and instructing the jury to completely disregard it. The trial court thought the remedy proposed by the State would potentially create other issues down the road, "foreseeable but unforeseeable as well." (Id./2619). After some discussion, the trial court adopted the remedy of an instruction, a middle ground approach that was initially suggested by defense counsel, as the better alternative to admission of King's suppressed statements. Ultimately, the judge instructed the jury to completely disregard the first three questions. (Id./2628-29).

King attempts to meet his AEDPA burden by submitting that the Florida Supreme Court's ruling conflicts with *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). However, *Holmes* is distinguishable and does not provide a basis to reverse the ruling of the state court.

The defendant in Holmes sought to introduce evidence that another man had attacked the victim, proffering at a pretrial hearing the testimony of witnesses who placed the other man in the victim's neighborhood on the morning of the attack, and the testimony of additional witnesses who testified at the pretrial hearing that the other man had either proclaimed the defendant's innocence or had actually admitted to having committed the crimes. *Holmes*, 547 U.S. at 323. The trial court excluded the defendant's evidence of

third-party culpability. The South Carolina Supreme Court affirmed by referencing the strong evidence of the defendant's guilt without assessing the strength of the third party evidence of guilt sought to be introduced by the defendant.

The United States Supreme Court explained why this holding was untenable:

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third- party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.

Holmes, 547 U.S. at 320. The Supreme Court noted that the defendant had challenged the credibility of much of the State's evidence, including its forensic evidence.

King had neither the quantity nor quality of third party culpability evidence that was at issue in *Holmes*. King was not prevented from presenting any evidence on his own behalf. The three questions defense counsel asked Salvador had no factual basis, unlike the actual evidence the defendant sought to introduce in *Holmes*.

Thus, *Holmes* does not support King's argument. To the contrary, *Holmes,* recognizes that "[w]hile the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. 319, 326

(citations omitted).

Essentially, King contends that he, unlike the State, does not need to have a good faith basis for his cross examination questions. While courts have provided some leeway to defendants when the issue relates to a defendant's right to present a defense, it is not true, as King contends, that no rules or restrictions apply to such evidence.

King's argument contains several fatal flaws. First, there was no evidence to support the facts defense counsel insinuated into the questions he asked Salvador. At no point did the defense present any evidence to support those facts, or, even an inference or logical supposition to support those facts from anything learned at trial or in pretrial discovery. When challenged, counsel failed to allude to or cite, a statement, record, report, hearsay statement, or, even double hearsay statement from which the specific facts asserted in the three questions he asked Salvador could have been derived. Even when pressed by the trial court, defense counsel did not cite any source for those facts, including his client, King.

King was not denied the right to fairly cross examine Salvador to assess his possible motive or bias, as King now contends. (Pet. Memo, Doc. 18 at 30). The trial court allowed defense counsel's accusatory questions he asked State witness Salvador to stand -- implying that Salvador, not King, killed Denise Lee. Since the defense did not present any evidence to support this allegation, the question and the accusatory tone (Id./2604-05) of the defense counsel were improper. There was no evidence that Salvador knew Denise Lee; had any motive to kill her; that he was anywhere near the murder scene; or left any physical evidence in any of the relevant crime scenes (the victim's house, King's Camaro, King's

house, or the burial site).[1] The trial court would have been well within its discretion to advise the jury to disregard that question as well. *See Cohen v. State*, 581 So. 2d 926, 927 (Fla. 3d DCA 1991) (holding that "third party's possible culpability in the murder was properly excluded because there is insufficient evidence on the record to support its relevancy") (string cites omitted).

What hurt the defense in this case was the overwhelming amount of forensic and eyewitness testimony establishing King's guilt -- not the court's disallowing three questions of a single state witness. Defense counsel was allowed to accuse Salvador of murder on the witness stand, and, again, argue this theory to the jury without any factual support.

The defense presented no evidence during the trial from which the jury could find or infer the facts in defense counsel's questions, and, since Salvador emphatically denied the factual assertions in those questions, the trial court's instruction to disregard those questions did not prejudice the defense. The jury was properly instructed by the judge that their verdict must be based upon the evidence introduced during the trial. (A21/1887; A27/3045). There was no evidence presented to support any of the 'facts' contained in defense counsel's questions. In other words, the judge's instruction was superfluous because there was no evidence from which the facts asserted in those questions could have been found

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[1] After defense counsel accused Salvador of murder, the State sought to call Salvador's wife to testify that Salvador was home with her at the time of the murder. The defense objected on the ground of a discovery violation. The trial court excluded her as a witness because the State had not listed her as a witness prior to trial. (Id./2707-10). Since Salvador cooperated with the investigation, and there was no evidence that he was involved in Lee's kidnaping, raping and murdering Denise Lee, the State had no previous reason to call Mrs. Salvador to testify to Salvador's location at the time of the murder.

or inferred by the jury. Consequently, King did not suffer prejudice as a result of the trial court's instructions to disregard those questions.

To buttress his argument, King contends that the trial court impermissibly commented on defense counsel's credibility. King's argument is factually inaccurate. The trial court did advise the jury as discussed above to disregard those three questions and answers. The court advised the jury: "I'm asking you to disregard such because there is no basis in fact from the evidence or the inference from the evidence for the asking of said questions." (A25/2629). The trial court's instruction did not comment on defense counsel's credibility. The court did not chastise or otherwise condemn trial defense counsel. In any case, with or without the court's instruction, the jury was aware that no evidence supported the facts in those questions. Accordingly, the trial court's instruction was reasonable, and King has not demonstrated a state court evidentiary error or a violation of Due Process.

Finally, King makes an unrelated burden shifting argument, referencing the prosecutor's closing argument. (Pet. Memo, Doc. 18 at 35). However, King fails to credibly link his comments to any claim of error related to the trial court's disallowance of those three questions. King does not show that the State made any improper closing argument, much less a prejudicial burden-shifting comment.

In closing argument, the prosecutor properly addressed defense counsel's attempt to shift blame for the murder on to Salvador or some other, unspecified party. The law does not require the prosecutor to sit silent in closing argument. *See McKenney v. State*, 967 So. 2d 951, 955 (Fla. 3d DCA 2007)(rejecting claim that the prosecutor could not respond to defense counsel's "rhetorical question and comments to the jury during the State's closing"

noting that "[t]he defense essentially asks that the State be prohibited from answering the question first posed by defense counsel...").

Since defense counsel, in opening statement, told the jury that "the evidence" would "show" "the person who fired that single shot, the person who ended her life was not Michael King" (A21/1843-44), and in cross examining Salvador, actually accused him of murdering the victim, the State was certainly allowed to ask the jury to consider the fact that no evidence presented during the trial supported such a theory. *See Caballero v. State*, 851 So. 2d 655, 660 (Fla. 2003) (while it is not permissible to comment on the defendant's right to remain silent, "it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the State's response."); *Barwick v. State*, 660 So. 2d 685, 694 (Fla. 1995) (Prosecutor's argument asking the jury to consider "what fact, what testimony, what anything have you heard" to contradict the State's evidence was not a comment on the defendant's failure to testify but merely asked "the jury to consider the evidence presented."), *receded from on other grounds, Topps v. State*, 865 So. 2d 1253 (Fla. 2004); *White v. State*, 377 So. 2d 1149, 1150 (Fla. 1979) ("It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue.") (citations omitted).

In light of the overwhelming evidence of King's guilt, if any error can be discerned from the state court evidentiary ruling, the error was clearly harmless under *Brecht*.

Assuming some constitutional error could be discerned, given the uncontradicted and

overwhelming evidence of King's guilt, the error was harmless. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court stated the standard for relief where error is determined, on habeas review. "The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht,* 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See Jamerson v. Sec'y, Dep't of Corr.*, 410 F.3d 682, 687-88 (11th Cir. 2005) (noting that "habeas proceedings are not forums to relitigate state trials and that 'habeas proceedings are secondary and limited' and that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). King has not shown that the alleged error was harmful to the outcome of his case.

King's assignment of error encompasses the trial court's instruction to disregard a total of three questions to a single state witness, and, in instructing the jury, told the jury that the reason the court so instructed them was that there were no facts or factual inferences to support those questions. The trial court's action was not an important or significant matter in this capital trial in which King was caught red-handed leaving the vicinity of Denise Lee's fresh burial site, with compelling and uncontradicted eyewitness and physical evidence establishing that he kidnaped, raped, and murdered Denise. The victim was last seen and heard in a 911 call, alive in King's control, screaming and pleading for help, and in his car

after having been taken from her home and her two young children. The State presented a substantial amount of evidence establishing King's guilt. *See Trepal v. Sec'y, Fla. Dep't of Corr.*, 584 (F. 3d 1088, 1119 (noting that a substantial and injurious effect on the verdict from a constitutional error is less likely when the State's evidence is strong or overwhelming.)

DNA testing confirmed that sperm cells inside Denise Lee's vagina and on her shorts found at the burial site, matched King at all 13 loci, to the exclusion of all other person's on the planet, or one in one quadrillion Caucasians. (A24/2465- 67). Denise Lee's burial site was found within hours of her disappearance and her body had fresh bruising and injuries to her inner thigh, vagina, and anus which were consistent with forcible rape. (A26/2903, 2922). Denise Lee made a 911 call from King's cell phone, pleading for help, and begging to see her family again. (A23/2239-41). King's voice was identified on that same 911 call, demanding his phone. (A21/1978,1998). King was apprehended in his car with that same phone, in the vicinity of the burial site, still wet and muddy from digging the hole in which Lee's body was ultimately found. DNA and fingerprint evidence established that Denise was held in King's car. The physical evidence included DNA from blood and hair, matched conclusively to Denise Lee and Lee's palm print on the driver's side window, and her wedding/engagement ring as found on the back seat of King's car when King was apprehended. The evidence indicated that King's car was at east partially spattered by Denise Lee's blood and fluid as a result of the fatal gunshot wound. Denise Lee's eyeball disintegrated as a result of the gunshot, and blood on the hood of King's car consistent with Denise Lee's was found, as well as head hair and a gelatinous material, consistent with the

mucous or viscous material contained in a human eyeball. (A26/2895-96).

DNA evidence also established that Denise was held in King's home, the likely scene of the sexual battery. Hair found on silver duct tape in King's kitchen trash can was matched to Denise Lee at all 13 locations, and therefore to the exclusion of all other people on the planet, or, one in 110 trillion Caucasians. (A24/2470-71). Duct tape consistent with this tape was found on and around the hair on Denise Lee's head when her body was found. Bruising along Lee's wrist suggests that her hands were bound with duct tape. (A26/2867). A roll of silver duct tape was found on King's kitchen counter. This roll of tape was consistent with the piece found in the trash, and another wadded up piece found in King's master bedroom (A23/2270-71), as well as the duct tape found on Denise Lee's body. Blood stains or mixtures from a blanket on King's bed and carpeting in his master bedroom were consistent with Denise Lee's. The sperm matched to King.

Pursuant to stipulation, the parties agreed that "the hair tie found at Michael King's house on Sardinia Avenue is the same type as hair ties worn by Denise Lee." (Id./2338).

King did not counter any of the forensic evidence and did not offer an innocent explanation. The physical and forensic evidence alone was more than sufficient to establish King's guilt. Nonetheless, compelling eyewitness testimony also established that King acted alone in kidnaping, raping, and murdering Denise Lee.

Denise Lee's neighbor identified a green Camaro with a dark cover over its headlights (matching the description of King's Camaro), circling the block slowly four or five times on the afternoon of her disappearance. The car parked in the victim's driveway and the sole occupant of the car had a physical description consistent with King's. (A21/1928,

1931, 1937).

Muxlow, King's cousin, after unknowingly providing the implements King would use for disposing of Denise Lee's body (flashlight and shovel), heard Denise Lee screaming for help from King's car. Muxlow observed King push Denise Lee's head down from the back seat and "take off in his car." (Id./1963).

Two witnesses observed King in his Camaro in the vicinity of the burial site, shortly prior to Lee's murder, and heard Denise screaming for help. Both positively identified King as the driver of the Camaro from where the screams came. (Id./2007-08; A22/2116). One, in addition to hearing "horrific" screams, observed Denise Lee's hand banging on the window of King's car, "very loudly." (A22/2099).

Finally, the police stopped King in the vicinity of the burial site, alone. His jeans were still wet and covered in dirt and sand. The victim was found some four feet deep and she was lying in water. King's car still had the shovel, flashlight, and gas can that Muxlow had loaned him earlier that evening. The shovel had dirt and sand on it and was consistent with the rounded shovel that was used to dig Denise Lee's grave. (A25/2790-91).

There is no conceivable view of the evidence in this case for which defense counsel's three cross examination questions, without any record or, for that matter, non-record factual basis, could have altered the outcome of this trial. Balanced against the overwhelming and uncontradicted evidence of King's guilt is an alleged error so insignificant that it could not have contributed to the verdict, much less be said to have had a substantial and injurious effect on the verdict. *See Hammonds v. Comm'r, Ala. Dep't of Corr.*, 2017 WL 4675707, at *8 (11th Cir., Oct. 17, 2017) ("Where the State's evidence was overwhelming, the

constitutional error is unlikely to have substantially influenced the jury's verdict.") (citing *Hill v. Turpin*, 135 F.3d 1411, 1417 (11th Cir.1998)).

Ground five does not warrant habeas corpus relief.

GROUND SIX

> Mr. King's Death Sentence Is Unconstitutional under *Hurst v. Fla*. The State Court's Resolution of Mr. King's Claim Was an Unreasonable Application of Clearly Established Federal Law, Including *Hurst v. Fla.*, 136 S.Ct 616 (2016), *Ring v. Ariz*., 536 U.S. 84 (2002), and *Apprendi v. N.J.*, 530 U.S. 466 (2000). Further, in Many Respects, the State Court Made an Unreasonable Determination of Facts in Light of the State Court Record.

Ground Six, as restated by Respondent:

> Whether King's Death Sentence Is Unconstitutional Under *Hurst v. Florida*, 136 S. Ct. 616 (2016)?

King raised this claim on appeal from the denial of King's initial motion for postconviction relief. After supplemental briefing and oral argument, the Florida Supreme Court found any *Hurst* error harmless and issued an opinion denying relief:

> During the pendency of King's postconviction appeal, the United States Supreme Court issued *Hurst v. Florida*, in which it held that Florida's capital sentencing scheme violated the Sixth Amendment. *See* 136 S.Ct. at 621. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. On remand from the Supreme Court, we held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State* (*Hurst v. State*), 202 So. 3d 40, 53 (Fla. 2016). We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. *See id.* Finally, we determined that a *Hurst* error is capable of harmless error review. *See id.* at 66-67. Recently, in *Mosley v. State*, Nos. SC14-436 & SC14-2108, 209 So. 3d 1248, 2016 WL 7406506 (Fla. Dec. 22, 2016), we further held that our

decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *See Mosley*, 209 So. 3d at 1273-74, 2016 WL 7406506, at *18 ("We conclude that ... *Hurst* [*v. State*] should be applied to ... defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*.").

Accordingly, because King's sentence became final on October 15, 2012, when the United States Supreme Court denied King's petition for certiorari, *King v. Florida*, 133 S.Ct. 478, we must consider whether any *Hurst* error in King's penalty phase proceedings was harmless beyond a reasonable doubt. In *Hurst v. State*, we explained the standard by which harmless error should be evaluated:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So. 2d [1129,] 1137 [(Fla. 1986)], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > The test is not a sufficiency-of-the evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.
>
> *DiGuilio*, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

Id. at 68 (alteration in original). Finally, in *Davis v. State*, 207 So. 3d 142, 41 Fla. L. Weekly S528 (Fla. Nov. 10, 2016), we determined that a *Hurst* error was harmless beyond a reasonable doubt and reiterated that "[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Id.* at 174, 41 Fla. L. Weekly at S539.

When the jury recommended that King be sentenced to death, it did not make specific factual findings with regard to the existence of any aggravating circumstances, nor did it make any findings with regard to the relative weight of the aggravating and mitigating circumstances. Therefore, we conclude that his sentence was contrary to *Hurst v. Florida*.

However, as in *Davis,* we conclude that this is one of those rare cases in which the *Hurst* error was harmless beyond a reasonable doubt. We initially must emphasize the unanimous jury recommendation of death in this case. The jury reached this unanimous recommendation even though it was specifically instructed, "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous." Thus, this unanimous recommendation begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The instructions that were given informed the jury that it needed to determine whether the aggravation outweighed the mitigation before it could recommend a sentence of death:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that you find exist.
> ....
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such

> weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
> ....
>
> If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating circumstances found to exist sufficiently outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.

From these instructions, we can further conclude that the jury unanimously made the requisite factual findings to support a death sentence before it returned the unanimous recommendations. Although the record indicates that the jury did ask the trial court whether a juror could recommend death "without agreeing to all four of the aggravating circumstances beyond a reasonable doubt," the jury ultimately returned a unanimous verdict based on the conclusion of all twelve jurors that sufficient aggravating circumstances existed that outweighed the mitigating circumstances. Considering the effect on the fact-finder as the central focus of our *Hurst* harmless error analysis, we further note that when King first appealed his sentence to this Court, he did not challenge the finding of any aggravating circumstances found below. [fn7]

Finally, the egregious facts of this case and both the evidence and how it was presented further resolve any doubt that a rational jury would have unanimously found that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. As we previously stated in King's direct appeal:

> King abducted a young mother from her home, leaving her two children -- an infant and a toddler -- unattended. He transported her to his house where she was bound with duct tape, raped, and sodomized. He then acquired a shovel, drove her to an abandoned construction [site], and shot her in the head. Given the angle of the entrance wound, and the fact that a substance appearing to be ocular fluid was found on the car, it is logical to conclude that Lee was not blindfolded at the time of her shooting, and she saw the gun as it was placed against her head. Furthermore, because Lee was abducted from her home

> between 1 and 2 p.m. on the 17th, and her 911 call was made at 6:14 p.m., it can be deduced that Lee was held captive by King for over four hours. As noted in the sentencing order, rarely is a court able to experience what a deceased victim encountered. In this case, anyone who listens to the 911 call placed by Denise Lee will hear the abject terror she was experiencing plus her panicked, frantic pleas to the 911 dispatcher (for help) and King (to be returned home). This murder was unquestionably cold and cruel.

King, 89 So. 3d at 232. Here the evidence captured and presented placed the jury in the terrible circumstances imposed by King. Moreover, in the course of that 911 call, not only does the listener hear Denise Lee's fear, the listener also hears King state multiple times that he had intended to release Lee until she called out to King's cousin, Harold Muxlow, to call the police. *See id.* at 213-14. Multiple witnesses observed a woman screaming for help from a car driven by King, one of whom described the screaming as "[h]orrific" and "terrified." *Id.* at 213-16. Thus, the evidence of the HAC, CCP, and avoid arrest aggravating circumstances -- which King did not contest on direct appeal -- was overwhelming and essentially uncontroverted.

Against these facts, in a light most favorable to King, the jury was presented mitigating evidence that addressed that: (1) King suffered a childhood sledding accident, which affected his judgment, risk-taking, and behavior; (2) King displayed unusually aggressive behavior toward family members when he was a teenager; (3) King suffered from headaches and other neurologic symptoms as an adult; (4) as an adult, King tried to live a stable, successful life, although he struggled with foreclosure; (5) King did not receive any disciplinary reports while he was incarcerated; and (6) King was placed in special education classes as a child. *Id.* at 219-20. Additionally, the jury considered King's intellectual functioning. *Id.* at 220. Ultimately, however, as emphasized above, the jury unanimously recommended a sentence of death. *Id*. at 2*21.* [fn8]

Although the Supreme Court in *Hurst v. Florida* cautioned against substituting the jury recommendation for the factual findings required by the Sixth Amendment, [fn9] we conclude that this is one of the rare cases in which a *Hurst* error is harmless beyond a reasonable doubt. We reach this conclusion in light of the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State.

If any case were to present us with a harmless *Hurst* error, this is it.

King v. State, 211 So. 3d at 889-93 (footnotes omitted).

King has not demonstrated that the state court ruling was contrary to, or an unreasonable application of clearly established Supreme Court precedent. King's case was final on direct appeal October 15, 2012, when the Supreme Court denied *certiorari*. *King v. Fla.,* 568 U.S. 964 (2012).

Hurst v. Florida is not retroactive under federal law and has no application to King's case. In addition, the jury necessarily found King eligible for a death sentence by their guilt phase findings that King had committed the separate offenses of sexual battery and kidnaping. Finally, the jury recommendation in this case was unanimous, and any *Hurst* error was harmless, as determined by the Florida Supreme Court.

No Constitutional Violation

King may not ask this Court to overturn the Florida Supreme Court's harmless error analysis to enforce an alleged violation of state decisional law. There was no federal constitutional violation in King's case.

A unanimous jury convicted King of sexual battery and kidnaping, and based on these convictions, he was indisputably eligible for a death sentence. King's eligibility for a death sentence is supported by unanimous jury findings, unlike *Hurst's* eligibility. Hurst was in a distinctly different position from King. Hurst was convicted of first degree murder, but did not have any prior criminal history or a felony conviction contemporaneous with the murder. *Hurst v. State*, 147 So. 3d 435, 440-41 (Fla. 2014). Accordingly, *Hurst* presented the

Supreme Court with a 'pure' claim under *Ring v. Arizona*, 536 U.S. 584 (2002), where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445-47.

In *Ring v. Arizona*, 536 U.S. 548 (2002), the United States Supreme Court held that a defendant has the right to have a jury, rather than a judge, decide on the existence of an aggravating factor that makes the defendant eligible for the death penalty. The Court based its judgment on the broader constitutional principle that the Sixth Amendment right to trial by jury encompasses the right to a jury finding of all facts that are necessary to put a defendant to death. In its decision, the Court held that Arizona's sentencing statute, under which the judge determined the presence or absence of aggravating factors necessary to make a defendant eligible for the death penalty violated this Sixth Amendment guarantee.

Prior to the Supreme Court's decision in *Hurst*, the Florida Supreme Court had consistently rejected *Ring* claims in cases like King's, where the defendant is convicted of a qualifying contemporaneous felony, an aggravator under Florida's capital sentencing scheme. *See Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012) (noting that where jury finds a qualifying felony conviction as charged in the indictment, there is no constitutional error under *Ring*).

The changes the Florida Supreme Court made to the death penalty in *Hurst v. State* were not mandated by the United States Supreme Court holding in *Hurst v. Florida*. *Hurst v. Florida* did not require a jury, rather than a judge, to find every aggravating circumstance, but only the predicate aggravators sufficient to render a defendant eligible for the death

penalty. Likewise, *Hurst v. Florida* did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and whether mitigation is sufficiently substantial to warrant leniency. *Hurst v. Florida* does not hold there is a constitutional right to any jury sentencing.

In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applies to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010). King's eligibility for a death sentence, unlike Hurst's, is supported by unanimous jury findings. *See Alleyne v. United States*, 570 U.S. 99, 115-17 (2013) (this Court explained that "[t]he essential point is that the aggravating factor produced a higher range, which, in turn, conclusively indicates that the factor is an element of a distinct and aggravated crime.").

Based on the Supreme Court's jurisprudence, the only factual finding necessary to impose the death penalty is a conviction for murder (the guilt phase) plus the addition of an aggravating factor. Finding additional aggravators does not expose the defendant to any higher or additional penalty. Nor does the weighing of aggravation and mitigation. Supreme Court precedent does not require that the jury make determinations regarding the sufficiency of the aggravators or their relative weight in comparison to the mitigation, or whether death should be imposed. Those determinations are made by the sentencing court in the course of exercising its discretion with regard to sentence selection.[2] *See United States v. O'Brien,*

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[2] In cases where the Florida Supreme Court has applied *Hurst* -- either those cases in the pipeline or those cases in which the convictions were not final when *Ring* issued, the court has included as an "element" the weighing of aggravating and mitigating factors.

560 U.S. 218, 224 (2010) (recognizing that *Apprendi* does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible). *See also, In re Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) (noting that "*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment" and that [. . .] "*Hurst* focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible[.]").

The Supreme Court's recent decision in *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In *Jenkins*, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the **guilt** phase, the Supreme Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty

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Expansion of the Court's ruling in *Hurst* to include weighing [selection of the sentence] has effectively resulted in a rule requiring reversal in any case lacking a unanimous death recommendation. *See, e.g., Dubose v. State,* 210 So. 3d 641, 657 (Fla. 2017) ("We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the *Hurst* error is not harmless.").

phase with eligibility for a death sentence firmly established beyond a reasonable doubt. The Supreme Court concluded that the federal habeas court erred in concluding that inadequate factual findings invalidated Jenkins' death sentence.

The Eleventh Circuit provided a similar analysis in rejecting a claim that *Ring,* as applied in *Hurst,* invalidated a defendant's death sentence in Alabama. *Waldrop* v. Comm'r, Ala. Dep't of Corr., 2017 WL 4271115, *20-21 (11th Cir., Sept. 26, 2017). In denying habeas relief, the *Waldrop* Court stated:

> The Alabama Supreme Court did not unreasonably apply *Ring* when it rejected Mr. Waldrop's Sixth Amendment claim. Mr. Waldrop became death-eligible under Alabama law when the jury convicted him of murder during a robbery in the first degree. The commission of a capital offense during a robbery is an aggravating circumstance under § 13A-5-49. As explained above, Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. See § 13A-5- 45(e). Mr. Ring and Mr. Hurst, by contrast, were not death-eligible based on their convictions alone. In their cases, it was the trial court's independent finding of a statutory aggravating factor that exposed them to a higher maximum punishment of death, rather than merely life imprisonment. Because the situation here is materially distinguishable from those presented in *Ring* and its progeny, the Alabama Supreme Court's decision was not contrary to and did not involve an unreasonable application of Supreme Court precedent.[fn7]
>
> Mr. Waldrop also argues that *Ring* requires more than a jury finding of a statutory aggravating factor at the guilt phase. He contends that the weighing of aggravating and mitigating factors must be done by the jury. *See* Supp. Br. of Appellant at 7-9. The Alabama Supreme Court disagreed with that argument, and we cannot hold otherwise unless its application of *Ring* was so unreasonable that no "fairminded jurist" could agree with the conclusion. *See Richter*, 562 U.S. at 101, 131 S.Ct. 770.
>
> The Alabama Supreme Court's conclusion here -- that the Sixth Amendment is satisfied under *Ring* if a jury finds a qualifying aggravating factor at the guilt phase -- is one that fairminded jurists could agree with.

Indeed, it is consistent with Justice Scalia's explanation of the holding in *Ring:*

> What today's decision says is that the jury must find the existence of the fact that an factor existed. Those [s]tates that leave the ultimate life-or-death decision to the judge may continue to do so -- by requiring a prior jury finding of an aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612-13, 122 S.Ct. 2428 (Scalia, J., concurring). It is also consistent with the rationale of *Hurst*, which applied *Ring. See Hurst*, 136 S.Ct. at 624 (explaining that the Sixth Amendment does not allow the trial court "to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty").

More importantly, Mr. Waldrop's alternative argument that the Sixth Amendment forbids the trial court from independently weighing the aggravators against the mitigators is foreclosed by *Lee v. Commissioner, Alabama Department of Corrections*., 726 F.3d 1172 (11th Cir. 2013). In *Lee*, as here, an Alabama jury found the existence of an aggravating circumstance when it convicted the defendant of murder during the course of a robbery. *See id.* at 1197-98. We concluded that "[n]othing in Ring -- or any other Supreme Court decision -- forbids the use of an aggravating circumstance implicit in a jury's verdict." *Id*. at 1198. We went on to hold that "*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances." *Id. See also Ring*, 536 U.S. at 597 n.4, 122 S.Ct. 2428 ("[Mr. Ring] does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator.").

The only distinction between this case and *Lee* is that here the trial court found an additional aggravating factor (that the crime was heinous, atrocious, and cruel) not found by the jury. But *Ring* concerned death eligibility. Once Mr. Waldrop was convicted, the jury had already found the only "aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S.Ct. 2428. The trial court's finding of an additional aggravating circumstance did not increase the maximum penalty to which Mr. Waldrop was exposed, and therefore falls outside the clearly established holding in *Ring*.

In sum, aside from the question of retroactivity and harmlessness under state law,

there is no underlying constitutional error in King's case. The unanimous verdict by King's jury establishing his guilt of contemporaneous offenses was clearly sufficient to meet the Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. There is no underlying constitutional violation.

Hurst Is not Retroactive to King.

King may not ask this Court to enforce a retroactivity ruling based on state law. In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017), the Florida Supreme Court held that any case in which the death sentence was final before June 24, 2002, the date *Ring v. Arizona*, 536 U.S. 584 (2002) was decided, would not receive relief based on *Hurst v. Florida*. In making its decision, the court recognized that its retroactivity test of *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) "provides more expansive retroactivity standards than those adopted in *Teague*." *Asay*, 210 So. 3d at 15 (citing *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005)). Subsequently, the Florida Supreme Court issued an opinion in which it granted retroactive application of *Hurst v. State*, 202 So. 3d 40, under a state retroactivity analysis to those cases that were decided following *Ring*. *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) ("We conclude that under a standard *Witt* analysis, *Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*."). This state law decision does not create a constitutional right to retroactive application of any decision of the Supreme Court.

The Supreme Court has held that, in general, a state court's retroactivity

determination is a matter of state law, not federal constitutional law. *Danforth v. Minn.*, 552 U.S. 264 (2008). King cannot petition this Court to enforce a violation of state decisional law.

That the Florida Supreme Court held that *Hurst* was retroactive to King's case does not mean that King can enforce that retroactivity ruling in federal court. *See Asay*, 210 So. 3d 1 and *Mosley,* 209 So. 3d 1248. When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Ky.*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004).

The Eleventh Circuit recently recognized, "[n]o U.S. Supreme Court decision holds that its *Hurst* decision is retroactively applicable." *Lambrix v. Sec'y*, *DOC*, 872 F.3d 1170, 1182 (11th Cir.), *cert.denied*, 138 S.CT. 312 (2017). In *Lambrix v. Secretary, Florida Department of Corrections*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), the Eleventh Circuit recognized that "under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review." *Summerlin* controls and mandates that *Hurst v. Florida* is not retroactive in federal courts under *Teague*.

In *Schriro v. Summerlin*, the Supreme Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin* holds that the decision in *Ring* was procedural and non-retroactive. 542 U.S. at 349

What King is really arguing is that the State court erred in its application of the State's more lenient rule of retroactivity. However, a state law ruling concerning retroactive application of a state sentencing statute provides no grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions[] . . ." and that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") (citing 28 U.S.C. § 2241; and *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (*per curiam*)); *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (holding again that "only noncompliance with federal law [. . .] renders a State's criminal judgment susceptible to collateral attack in the federal courts]" and that habeas "relief does not lie for errors of state law." (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (citation and internal quotation omitted)). Because King was not entitled to retroactive application of *Hurst* under federal constitutional law, this claim has no merit.

The Florida Supreme Court's determination that any *Hurst* error was harmless in this case is well supported by the record in light of the substantial aggravation and unanimous jury recommendation.

King appears to argue as if he were entitled to *de novo* review of the Florida Supreme Court's ruling under the *Chapman v. California* "harmless beyond a reasonable doubt standard." *Chapman v. Calif.,* 386 U.S. 18 (1967). However, King comes to this Court on habeas review under the *Brecht v. Abrahamson* standard. Under the *Brecht* standard, King must establish the constitutional error had a "substantial" or "injurious" effect on the result of his penalty phase. *See Fry v. Pliler*, 551 U.S. 112, 116 (2007) (quoting

Brecht, supra, at 631) (quoting *Kotteakos, supra*, at 776).

The AEDPA requires deference to the state court ruling on harmless error. *See Burns v. Sec'y*, *Fla. Dep't of Corr.*, 720 F.3d 1296, 1305 (11th Cir. 2013) (noting the interplay between *Brecht* and AEDPA, noting that when a state court has determined that the constitutional error was harmless under *Chapman,* "'a habeas petition cannot be successful unless it satisfies both AEDPA/*Chapman* and *Brecht*.'") (quoting *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1307 (11th Cir. 2012)). In King's case, the state court conclusion that *Hurst* error is harmless beyond a reasonable doubt is not beyond fair minded disagreement.

King's jury returned a unanimous death recommendation for the murder of Denise Lee. The record supports a conclusion, beyond a reasonable doubt, that a rational jury would have found the existence of the aggravators, the sufficiency of the aggravators, and that the aggravators outweighed the mitigators. The State presented a massive case in aggravation including some of the most weighty in Florida's sentencing scheme, such as "heinous, atrocious and cruel (HAC)" and "cold, calculated and premeditated (CCP)." *See, e.g., Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999) (noting 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..."). There is no conceivable argument that the jury would not have found the existence of the CCP, HAC, and avoid arrest aggravators applicable in this case. *King*, 211 So. 3d at 892 ("Thus, the evidence of the HAC, CCP, and avoid arrest aggravating circumstances -- which King did not contest on

direct appeal -- was overwhelming and essentially uncontroverted."). King made no challenge to any of the aggravators in state court or in this Petition.

The Florida Supreme Court has consistently found that *Hurst* error is harmless in cases involving unanimous jury recommendations. *See, e.g. Kaczmar v. State*, 228 So. 3d 1 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717 (Fla. 2017); *Knight v. State*, 225 So. 3d 661 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587 (Fla. 2017); *Middleton v. State,* 220 So. 3d 1152 (Fla. 2017); *Morris v. State*, 219 So. 3d 33 (Fla. 2017)*; Oliver v. State*, 214 So. 3d 606 (Fla. 2017)*; King v. State,* 211 So. 3d 866; *Davis v. State*, 207 So. 3d 142 (Fla. 2016)..

Denise Lee's murder and the prolonged ordeal and terror that preceded her murder, recounted partially in a chilling 911 call, is unquestionably heinous, atrocious and cruel. The facts of this case reveal that King committed a methodical crime, not the least bit impulsive, from targeting the victim, to the extended period of control and domination he exercised, to the planning for her demise and his attempt to cover up his crimes. (*See* A11/2053-57 [Sentencing Order discussing the CCP and Avoiding Arrest aggravators].) The horrendous facts of this case led the Florida Supreme Court to conclude: "If any case were to present us with a harmless *Hurst* error, this is it." *King,* 211 So. 3d at 893.

Given the massive case in aggravation presented by the State, and the unanimous jury vote for death, any error was harmless. The Florida Supreme Court's finding the error harmless beyond a reasonable doubt is factually supported and inherently reasonable. That ruling is due substantial deference under the AEDPA. In addition, King has not shown that

the alleged error was harmful under the substantial or injurious *Brecht* standard.

Ground Six does not warrant habeas relief.

King's Reply and the Court's Conclusion

Having considered King's petition, the memorandum in support of the petition, and King's reply, this Court finds that the state courts' adjudication on the merits was not contrary to, and did not involve an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *Davis v. Ayala,* 135 S.CT. 2187, 2198 (2015).

Accordingly, the Court orders:

That King's 28 U.S.C. § 2254 petition for writ of habeas corpus is denied. The Clerk is directed to enter judgment for the Respondent and to close this case.

CERTIFICATE OF APPEALABILITY AND

LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

The Court declines to issue a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

Because Petitioner is not entitled to a certificate of appealability, Petitioner is not entitled to appeal in forma pauperis. Petitioner is required to pay the $505.00 appellate filing

fee unless the appellate court grants Petitioner in forma pauperis status on appeal.

ORDERED at Tampa, Florida, on February 5, 2018.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Counsel of Record

No. _____

IN THE

Supreme Court of the United States

MICHAEL L. KING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix C

Respondents' Response to Petition for Writ of Habeas Corpus and Memorandum of Law, filed December 1, 2017.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MICHAEL L. KING,

Petitioner,

v. **CASE NO. 8:17-cv-00985-VMC-TGW**
DEATH PENALTY CASE

SECRETARY, DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW

COME NOW the Respondents, Secretary, Florida Department of Corrections, et al., by and through the undersigned Assistant Attorney General, and hereby submit this Response to the Petition for Writ of Habeas Corpus and Memorandum of Law filed herein and state that the Petition of Michael L. King, hereinafter "Petitioner," should be denied without an evidentiary hearing for the reasons stated.

The Appendices consisting of the state court records and transcripts, briefs, opinions, etc., will be filed under separate cover and certificate of service.

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PRELIMINARY STATEMENT

As far as the Respondent can discern from the record, United States District Court Judge Virginia M. Hernandez Covington was not involved in any state court proceedings in the Petitioner's case.

STATEMENT OF FACTS

I. Trial and Direct Appeal

On February 6, 2008, Michael L. King was indicted for first-degree murder for the killing of [D.L]. The Florida Supreme 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, the 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 221-222.

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) Relevant 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. (C11/1686). At the time of the evidentiary hearing, Schlemmer had been serving as chief of the capital division for over six years. (C11/1671). Schlemmer had decades of experience working on death penalty cases. (C11/1687). She handled approximately fifteen death penalty cases prior to King's case, and most cases resulted in pleas to life or life sentences.[1] (C11/1673-74).

Schlemmer testified that she immediately became involved in King's case once her office was appointed in 2008. (C11/1671-72). Schlemmer served as lead counsel, and Jerome Meisner and John Scotese served under her as co-counsel. (C11/1672). Schlemmer assigned Scotese and Meisner to the guilt phase, and she put herself in charge of the penalty

[1] Schlemmer served as the Twelfth Circuit representative on the Death Penalty Steering Committee for the Florida Public Defender Association. (C11/1687). She attended death penalty training seminars every year since the mid-1990s. (C11/1689). She has been featured numerous times in the Life Over Death training program on the death penalty. (C11/1688). She was also a recipient of the Jim Slater Award for Professionalism. (C11/1686).

phase. (C11/1673). She had discussions with her co-counsel about both phases. (C11/1673). Schlemmer initiated the penalty phase investigation "very early on."[2] (C11/1676).

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. (C11/1715-16, 1720). For example, King claimed that the victim was shot by a helicopter, so Schlemmer deposed the pilots from the helicopters. (C11/1516). King further alleged that he had a consensual relationship with the victim that was observed by school bus drivers and a school crossing guard. (C11/1720). Schlemmer, therefore, interviewed the bus drivers and crossing guard to see whether they could verify King's claims. (C11/1720). 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. (C11/1714-15).

Schlemmer hired many experts in an effort to find mental health mitigation for King that could be presented during the

[2] Schlemmer used Woody Speed and Karen Tekely as investigators. Speed was the chief investigator of Sarasota, and he handled the guilt phase investigation. (C11/1674). Tekely, who had a degree in criminology, mainly handled the penalty phase. (C11/1674). Tekely and Speed worked together and shared duties with regard to both phases. (C11/1674).

penalty phase. (C11/1690-1706). She first retained Dr. Sesta, who also worked with Dr. Ross. (C11/1691). Schlemmer specifically requested that Dr. Sesta determine whether King had any organic brain damage or traumatic brain injury.[3] (C11/1692). Doctors Sesta and Ross interviewed King, reviewed records, and conducted neuro-psych testing. (C11/1691-92). The neuro-psych testing yielded invalid results. (C11/1692).

Dr. Sesta consulted with Dr. Ross as well as another expert, and all the doctors agreed that the tests were invalid. (C11/1694). Dr. Sesta believed that King was "faking[,]" "malingering" and "a pathological liar." (C11/1693). Dr. Sesta concluded that he could not get a valid profile from King because King faked tests and was dishonest. (C11/1693-94).

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. (C11/1695, 1681). There was no indication that King ever mentioned toxin exposure from a farm or his plumbing career. (C11/1695, 1681). Nevertheless, Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer that there was no neurotoxin defense. (C11/1695,

[3] Dr. Sesta and Dr. Ross also determined that King was competent and that he was not mentally retarded. (C11/1691).

1678). He further advised that King had no psychiatric condition or neurological issues that could be presented as mitigation. (C11/1694-95). 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. (C11/1695, 1697).

Once Schlemmer determined that Drs. Sesta and Ross could not give her any mitigation whatsoever, she retained Dr. Kasper for another opinion. (C11/1698). Dr. Kasper initially found King incompetent, but then upon receiving additional information, she deemed him competent. (C11/1698). She conducted her own neuro-psych testing, and she ultimately reached the same conclusions as Dr. Sesta and Dr. Ross, that King was malingering. (C11/1698, 1702). She determined that there was no organic brain damage, or physical or psychiatric issues that could be presented for mitigation. (C11/1699-1700).

Schlemmer next hired Dr. Joseph Wu to conduct a PET scan "as a last effort." (C11/1676-77, 1704). The PET scan showed a divot in front of King's forehead. (C11/1678-79). 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. (C11/1677, 1705).

Schlemmer knew from the very beginning of the case that King was involved in a sledding accident. (C11/1704). 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. (C11/1705-05). His family believed that King's behavior was solely from the sledding accident. (C11/1705). "They never mentioned poisons, toxins, or living on a farm, or nothing like that. It was always from the sledding accident." (C11/1705).

The sledding accident was a concrete incident with witnesses and evidence that correlated with the PET scan to provide mental health mitigation. (C11/1706). Therefore, Schlemmer presented as much evidence as she could to show the brain injury from the sledding incident. (C11/1706-08, 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. (C11/1717). Schlemmer believed that it was the only evidence available as mental mitigation in connection

with the PET scan to show frontal lobe brain damage. (C11/1705-08).

Schlemmer testified that she had no evidence to support King being exposed to toxins and the testing did not correspond with toxin exposure. (C11/1716-18). King never presented her with any information about such toxic exposure. (C11/1716-17). 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. (C11/1718).

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. (C11/1717-18). 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. (C11/1696). 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. (C11/1708).

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. (C11/1709-11). 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. (C11/1710-11).

Schlemmer presented evidence of King's low IQ through the testimony of Dr. Visser, who evaluated King only for competency. (C11/1700-01). 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. (C11/1701-02).

In addition to being evaluated by doctors Visser, Sesta, Ross, and Kasper, King was also evaluated by doctors Gamache, DeClue, and Regnier. (C11/1702-03). Nothing in those evaluations led Schlemmer to believe that there was any other mental mitigation available. (C11/1703-04). 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. (C11/1704).

Schlemmer testified that she, Meisner, and Scotese were all involved in jury selection in King's case. (C11/1683). She handled most of the death qualification aspect of voir dire. (C11/1683). Scotese typed the notes from voir dire, and they all reviewed the notes and discussed them together. (C11/1685). 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. (C11/1685-86). 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. (C11/1727).

Schlemmer remembered meeting with co-counsel to discuss who they did and did not want on the panel. (C11/1728, 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. (C11/1732-33). 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. (C11/1725-28). 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. (C11/1730). Schlemmer's file had a big "no" written next to juror 111. (C11/1730-32). Schlemmer was not certain who wrote "no," but she thought that Scotese had written it. (C11/1731-32).

Co-counsel John Scotese testified that he had been working for the Public Defender's Office since 1994. (C10/1628). King's case was his second capital case. (C10/1628-29). He was death qualified to first chair a capital case. (C10/1629). Scotese was sure that he spoke with Schlemmer about penalty phase strategy, although he had no specific recollection of their conversations. (C10/1630). He did not recall speaking with Schlemmer or experts about King's possible exposure to toxic substances. (C10/1630).

Scotese's role in jury selection was to take notes. (C10/1631-32, 1643). Schlemmer was primarily responsible for jury selection, and Scotese conferred with her and he suggested opportunities to make potential objections. (C10/1630-32, 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. (C10/1646).

Scotese typed his notes on his computer in the courtroom

as the jurors were speaking. (C10/1645). The notes reflected his own thoughts and opinions. (C10/1645). 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. (C10/1637). On a different set of his notes, he wrote "no" next to juror 111. (C10/1653). That set of notes was admitted into evidence as State's Exhibit 2. (C10/1657).

Scotese did not have an independent recollection of juror 111, nor did he recall specific discussions with co-counsel regarding juror 111. (C10/1634-35, 1641). Scotese's notes indicated that juror 111 was African American. (C10/1635). It was his usual practice to document whether a juror was from a minority group so he would know whether to make a Batson[4] or Neil challenge. (C10/1635).

Scotese was asked whether he would object to the State's peremptory strike of an African American juror if he definitely did not want that juror on the jury panel. (C10/1636). 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.

[4] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986).

(C10/1636). 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. (C10/1655).

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. (C10/1638). It was his intention to preserve this issue for direct appeal. (C10/1639). 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. (C10/1640-41).

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. (C10/1641-42). However, according to Scotese, any objection made by him during jury selection would have been made with Schlemmer's approval. (C10/1632).

The State presented the testimony of Karen McClellan, who was an investigator with the Office of the Public Defender for over fifteen years. (C11/1662). She had worked with Carolyn Schlemmer in the past and she continued to work with her on occasion. (C11/1662). McClellan served as the mitigation

specialist in King's case. (C11/1662). 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. (C11/1663). McClellan traveled to Michigan to speak with King's family members. (C11/1663). McClellan had also lived in Waterford, Michigan, a town where King had also lived, so she was familiar with it. (C11/1664-65). Through various sources, McClellan developed a timeline of all of King's known addresses. (C11/1663-64). McClellan's timeline was admitted into evidence as State's Exhibit 1. (C11/1666).

McClellan learned that King lived on a farm for a short period of time, but family members never discussed the farm at great length. (C11/1665, 1668). It was McClellan's understanding that neither King nor his family members were farm workers. (C11/1665). 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. (C11/1665).

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. (C11/1669). She did not recall speaking

with Dr. Wu about possible toxic exposure that King may have had. (C11/1669).

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

Dr. Andres M. Lugo, a medical toxicologist, testified on behalf of King. (C10/1555). Dr. Lugo received his medical degree from University of Mexico, and he obtained his medical license in Mexico. (C10/1556, 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. (C10/1558, 1564).

He did, however, receive a master of science in toxicology from University of Minnesota. (C10/1556). While he had studied to obtain his Ph.D., he never actually qualified to be able to obtain it. (C10/1607). He explained that he began working and he never finished his thesis paper. (C10/1607). He clarified, "It's not that I didn't qualify. I just couldn't do it." (C10/1608).

Dr. Lugo had worked as a toxicology consultant in capital punishment cases for fifteen years. (C10/1557). He estimated that he worked on about twenty-five different capital cases. (C10/1561). All of his expert testimony as a toxicologist in the United States had been on behalf of capital defendants. (C10/1609).

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. (C10/1567). 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. (C10/1567). He met with Dr. Penner, a professor from Michigan State University who conducted a lot of research on pesticides. (C10/1569). He spoke with Dr. Penner about the pesticides and herbicides used by agricultural farm workers in Michigan during the 1970s and 1980s. (C10/1569).

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. (C10/1571). 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. (C10/1571-72).

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." (C10/1573).

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. (C10/1572). From 1973-1979 King lived in Silverwood, Michigan. (C10/1573-74). King lived in Waterford, Michigan from 1979 to 1986, and after that he lived in Ortonville. (C10/1573-74). According to Dr. Lugo, the house in Silverwood was located on two acres of property in a rural area. (C10/1574). Dr. Lugo stated that the house in Waterford had land that was "somewhat farmland" next to it, and it was near a golf course. (C10/1574). The house in Ortonville had "some acres there for farming." (C10/1574). Dr. Lugo stated that bigger farms were located near these homes. (C10/1575).

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.

(C10/1601). Dr. Lugo stated that the "family lived in the farmland" but that King's father was an auto worker. (C10/1605).

Dr. Lugo agreed that the family lived in a suburb of Pontiac, Michigan. (C10/1606). 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." (C10/1601). 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. (C10/1605).

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. (C10/1607). 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. (C10/1606). He also stated that way of life, what people do, and the environment in which they live all play a role. (C10/1606). 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." (C10/1606).

Dr. Lugo determined that King was exposed to pesticides such as Carbofuran, Diphonate, Heptachlor, Toxaphene, Parathion, Methyl Parathion. (C10/1576). 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. (C10/1576). Dr. Lugo learned from Dr. Penner that these chemicals would have been used around the areas where King lived as a child. (C10/1577). On cross-examination, Dr. Lugo revealed that these chemicals were consistent with chemicals used all over the United States during that time period. (C10/1613). 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." (C10/1613).

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. (C10/1578). Some chemicals remained in the soil for a few months while others could remain for thirty years or more. (C10/1578). 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." (C10/1575). 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. (C10/1575).

Dr. Lugo opined that King had "chronic environmental exposure" to pesticides. (C10/1580). He testified that chronic exposure involved years of being exposed to low levels of chemicals. (C10/1579). 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. (C10/1582-83). Dr. Lugo testified that some pesticides King was exposed to as a child were linked with low IQ and developmental brain defects. (C10/1583). Dr. Lugo stated that a child exposed to pesticides could have effects of the exposure later in life as an adult. (C10/1582).

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. (C10/1594). King worked as a plumber for approximately fifteen years. (C10/1584). Dr. Lugo

testified that King would have been more vulnerable to the substances exposed to as a plumber due to his previous exposures. (C10/1594).

King had worked in areas with poor ventilation and would have breathed high concentrations of vapors. (C10/1586). 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. (C10/1587-88). He explained that people could experience "blackout periods" where they lose orientation. (C10/1588).

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. (C10/1588). King's headaches and dizziness that he suffered from in 2007 were also a potential side effect of the chemicals, according to Dr. Lugo. (C10/1590). It was Dr. Lugo's belief that all of these symptoms were evidence of exposure to chemicals King was using as a plumber. (C10/1588-89).

Dr. Lugo further testified that chemicals King used as a plumber had been linked to brain damage. (C10/1589). Other effects included peripheral neurological symptoms, like

numbness of the extremities and strange feelings under the extremities. (C10/1589). 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. (C10/1585-86).

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. (C10/1597). The specialists would then conduct testing to determine whether brain damage was present. (C10/1597). Dr. Lugo admitted that he saw King's evaluation from Dr. Sesta, a neuropsychologist, where no brain damage was found. (C10/1598). Dr. Lugo did not speak to any of the doctors that had tested King. (C10/1599).

Dr. Lugo claimed that he had conducted his own neuro-psych testing on King. (C10/1583). 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. (C10/1583-84). Dr. Lugo later admitted that he actually conducted a public health assessment, which was "like a kind of testing." (C10/1599-1600). 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." (C10/1600). His compilation of the assessment largely relied on receiving good-faith responses from King. (C10/1600). 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. (C10/1610-11).

Dr. Lugo felt that King's "behavior was affected and his cognitive functions were affected, we know that." (C10/1592). Lugo stated that when King was a child he "was growing, developing, and he was in an area where these chemicals were used." (C10/1592). Lugo concluded "that gives us all the information" and King "met all the criteria for exposure. (C10/1592-93). Therefore, he believed that the exposure was "most commonly positive of the behavioral and neurological problems." (C10/1593).

Lori Wagoner, a plumber from Babe's Plumbing, worked with King while he was employed by Babe's Plumbing from 2004-2007. (C11/1736-37). According to Wagoner, King was very capable of doing his job as a plumber. (C11/17444). In fact, King was "actually running the jobs" like a "superintendent." (C11/1744).

She remembered King complaining about headaches, but she never saw him take any medication. (C11/1737). 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. (C11/1737-39). The products were provided by Babe's Plumbing, and they were used in attics and underneath houses. (C11/1739).

Wagoner testified that the attics could be over one-hundred degrees during the summer. (C11/1739). She stated that if she did not get fresh air, the smell of the products would make her dizzy. (C11/1739). She noticed that the products affected her more if there was not proper ventilation. (C11/1740). According to Wagoner, the personal side-effects experienced from the chemicals included feeling high and having glossy eyes. (C11/1740).

Wagoner admitted that any effects King might have had from the chemicals, she has had as well, and those effects appeared to be temporary. (C11/1744). Once she left the confined space of the hot attic, she felt better. (C11/1744). 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.

(C11/1743). 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. (C11/1743-44).

STATEMENT OF PROCEDURAL HISTORY

I. Direct Appeal

On direct appeal, King raised the following issues, as quoted from Petitioner's initial brief:

> ISSUE I: KING'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT HIS DEFENSE AND TO FULLY CROSS-EXAMINE A KEY PROSECUTION WITNESS WERE VIOLATED BY A SERIES OF TRIAL COURT RULINGS REGARDING ROBERT SALVADOR (AND COMPOUNDED BY THE PROSECUTION TAKING UNFAIR TACTICAL ADVANTAGE OF ITS OWN FAILURE TO CONTEMPORANEOUSLY OBJECT TO THE DEFENSE'S CROSS-EXAMINATON OF SALVADOR, AND BY THE PROSECUTOR'S BURDEN-SHIFTING COMMENTS IN CLOSING ARGUMENT)
>
> ISSUE II: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE 47 FIRED CARTRIDGE CASES FROM THE GUN RANGE, NONE OF WHICH WERE SHOWN TO BE CONNECTED TO MICHAEL KING; AND FURTHER ERRED IN ALLOWING THE INTRODUCTION OF THE FDLE FIREARMS EXAMINER'S OPINION THAT THREE OF THOSE SHELL CASINGS WERE FIRED FROM THE SAME UNKNOWN FIREARM AS THE SINGLE FIRED CARTRIDGE CASE (ALSO NOT SHOWN TO BE CONNECTED TO KING) FOUND IN THE GRASS NEAR THE CRIME SCENE.
>
> ISSUE III: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE FDLE FIREARMS EXAMINER ROMEO'S OPINION THAT HE WAS 100 PER CENT CERTAIN THAT THREE OF THE 47 CARTRIDGE CASES FROM THE GUN RANGE WERE FIRED FROM THE SAME UNKNOWN NINE-MILLIMETER FIREARM AS THE CARTRIDGE CASE FOUND NEAR THE CRIME SCENE; WHERE (1) ROMEO DID NOT EXAMINE OR TEST-FIRE ANY SPECIFIC FIREARM; (2) ROMEO'S METHODS WERE TOO SUBJECTIVE AND INSUFFICIENTLY RELIABLE TO ENABLE

> HIM TO CLAIM 100 PER CENT CERTAINTY BEFORE THE JURY; AND (3) THE JUDGE REFUSED TO HOLD A *FRYE* HEARING BEFORE ALLOWING THE STATE TO INTRODUCE ROMEO'S OPINION.
>
> ISSUE IV: THE TRIAL COURT ERRED IN ACCEPTING AS GENUINE THE PROSECUTOR'S PROFFERED REASON FOR HIS PEREMPTORY STRIKE OF A MINORITY JUROR (111) BASED ON HER QUESTIONNAIRE RESPONSE, WHERE THE CLAIMED REASON WAS EQUALLY APPLICABLE OR MORE APPLICABLE TO OTHER JURORS WHOM THE PROSECUTOR DID NOT CHALLENGE, AND WHO SERVED ON THE JURY.
>
> ISSUE V: KING'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT WITHOUT POSSIBLITY OF PAROLE ON PROPORTIONALITY GROUNDS, BASED ON THE MITIGATION PRONG OF THE APPLICABLE TEST.

(A40).

The Florida Supreme Court affirmed King's convictions and death sentences in an opinion dated February 9, 2012. King v. State, 89 So. 3d 209 (Fla. 2012). King's motion for rehearing was denied May 21, 2012 and the mandate issued on June 6, 2012.

King filed a petition for writ of certiorari in the U.S. Supreme Court on August 9, 2012, which was denied October 15, 2012. King v. Florida, 568 U.S. 964, 133 S. Ct. 478 (2012).

II. State Post-Conviction Proceedings

On September 4, 2013, King filed a "Motion to Vacate Judgment and Sentence," pursuant to Fla. R. Crim. P. 3.851, raising six claims. (C2/282-343). The following claims were raised in the circuit court:

> CLAIM I: TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF TOXIC SUBSTANCES THAT MR. KING WAS EXPOSED TO THROUGHOUT HIS LIFE.
>
> CLAIM II: MR. KING'S TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY PRESERVE THE *BATSON* ISSUE REGARDING THE STATE'S PEREMPTORY STRIKE OF JUROR 111 FOR DIRECT APPEAL.
>
> CLAIM III: FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. [KING] OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PORTIONS OF THE FLORIDA CONSTITUTION.[fn6]
>
> > fn6. Counsel acknowledges that this claim is not supported by current case law
>
> CLAIM IV: FLA. STAT 945.10 PROHIBITS MR. KING FROM KNOWING THE IDENTITY OF THE EXECUTION TEAM MEMBERS, DENYING HIM HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FQURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.
>
> CLAIM V: MR. KING'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. KING MAY BE INCOMPETENT AT TIME OF EXECUTION
>
> CLAIM VI: CUMULATIVE ERROR DEPRIVED THE DEFENDANT OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State filed a written response on November 4, 2013. (C3/347-99). Following a one-day evidentiary hearing on June 23, 2014 (C8/1195-C9/1421), the trial court, The Honorable Deno G. Economou, issued its order on August 21, 2014, denying King post-conviction relief. (C8/1173-94).

King filed a timely notice of appeal to the Florida Supreme Court. He filed his initial brief April 2, 2015, raising the following five issues:

> ARGUMENT I: THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTICE ASSISTANCE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF TOXIC SUBSTANCES THAT KING WAS EXPOSED TO THROUGHOUT HIS LIFE.
>
> ARGUMENT II: THE CIRCUIT COURT ERRED IN DENYING KING'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROPERLY PRESERVE THE *BATSON* ISSUE REGARDING THE STATE'S PEREMPTORY STRIKE OF JUROR 111 FOR DIRECT APPEAL.
>
> 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.
>
> 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.
>
> 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.

(C13).

King did not file a petition for writ of habeas corpus in the Florida Supreme Court. Following briefing, including

supplemental briefing addressing the application of Hurst v. Florida, 136 S. Ct. 616 (2016), and oral argument, on January 26, 2017, the Florida Supreme Court affirmed the denial of post-conviction relief. King v. State, 211 So. 3d 866 (Fla. 2017) (C20). King's motion for rehearing was denied March 13, 2017 (C21; C22) and the mandate issued March 29, 2017. (C23).

III. Federal Habeas Proceedings

King filed his petition for writ of habeas corpus on April 27, 2017, raising six claims for relief (Doc. 1) but did not serve Respondents with a copy of the petition until August 18, 2017 when Petitioner and Respondents received notification from the Eleventh Circuit Court of Appeals that the petition had been docketed and were notified by Respondents that they had never received a copy of the petition.

On August 25, 2017, Petitioner filed a Memorandum of Law in Support of the Petition for Writ of Habeas Corpus (Doc. 18) but were directed in an Order issued August 28, 2017 to submit an addendum to the memorandum setting out the grounds raised in the memorandum that were not raised in the petition. (Doc. 19). This response is offered in response to King's claims for relief, pursuant to this Court's Order of September 20, 2017. (Doc. 21).

DEFERENTIAL REVIEW UNDER THE AEDPA

Upon AEDPA review, a federal court must afford a high level of deference to the state court's decision. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008). AEDPA modified a federal habeas court's role in reviewing state prisoner applications in order to prevent retrials and to ensure state-court convictions are properly enforced. Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 1849 (2002). The federal court will presume the correctness of state court findings of fact, unless the petitioner is able to rebut that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Section 2254(d) forbids federal courts from granting habeas relief for claims that previously were "adjudicated on the merits" in state court, unless the petitioner can establish that the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court law, or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2). As the Eleventh Circuit Court of Appeals recently explained in Lambrix v. Sec'y, DOC, 872 F.3d 1170, 1181-82 (11th Cir. 2017), the AEDPA imposes a significant hurdle for a habeas petitioner to meet.

The court explained:

> A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is "objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 582 U.S. ----, ----, 137 S.Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (per curiam) (quoting *Woods v. Donald*, 575 U.S. ----, ----, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (per curiam)). This standard is "meant to be" a difficult one to meet. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011). AEDPA thus "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting *Hardy v. Cross*, 565 U.S. 65, 66, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011) (per curiam)).

NO EVIDENTIARY HEARING IS REQUIRED

The burden is on the petitioner in a federal habeas corpus proceeding to show the necessity for an evidentiary hearing. See, e.g. Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984); Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984). No evidentiary hearing is required by a district court if a state court has made findings of fact, as the federal courts must presume those facts to be correct. Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745 (1963); 28 U.S.C. § 2254(d).

Petitioner's claims are clearly without merit based upon state and federal law. A state court need not conduct an evidentiary hearing to be entitled to a presumption of

correctness for factual findings. Carter v. Johnson, 110 F.3d 1098 (5th Cir. 1997). Nonetheless, Petitioner was afforded a full and fair evidentiary hearing in state court below on his ineffective assistance of counsel claims. None of Petitioner's present claims require additional factual development in federal court.

In addition, the Eleventh Circuit has acknowledged that AEDPA brought a significant change to the standards governing the granting of evidentiary hearings in federal habeas cases. Breedlove v. Moore, 279 F.3d 952, 959 (11th Cir. 2002) and and 28 U.S.C. § 2254(e)(2).

ARGUMENT

Ground One: Whether Trial Counsel Provided Ineffective Assistance By Failing To Investigate And Present Evidence Of Toxic Substances That Mr. King Was Exposed To Throughout His Life In Mitigation During His Penalty Phase?

This claim was raised in state court below in King's motion for post-conviction relief. Following an evidentiary hearing, the state trial court denied the motion, finding trial counsel was neither deficient nor had King established any prejudice as a result of counsel failing to either investigate chemical exposure or present such evidence during the penalty phase in this heavily aggravated case. King raised

this claim on appeal from the denial of post-conviction relief. In denying this claim, the Florida Supreme Court stated:

> Toxic Substances
>
> King first claims that trial counsel rendered ineffective assistance during the penalty phase because counsel failed to investigate King's possible exposure to toxic substances during his childhood and when he worked as a plumber as an adult. This Court has established the procedures for reviewing a claim of ineffective assistance of counsel:
>
> > To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.; see also Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995). For the second prong, "*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). *Strickland* does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Strickland*, 466 U.S. at 693-94, 104

> S.Ct. 2052). This Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions de novo. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

Rodgers v. State, 113 So. 3d 761, 767 (Fla. 2013). Moreover, the failure to satisfy one prong of *Strickland* will defeat a claim of ineffective assistance of counsel. *See, e.g., Zommer v. State*, 160 So. 3d 368, 377 (Fla. 2015) ("[B]ecause *Strickland* requires that a defendant establish both deficiency and prejudice, an appellate court evaluating a claim of ineffectiveness is not required to issue a specific ruling on one component of the test when it is evident that the other component is not satisfied." (citing *Mungin v. State*, 932 So. 2d 986, 996 (Fla. 2006))).

During the evidentiary hearing, King presented testimony from Wagoner, King's coworker, and Dr. Lugo, a medical toxicologist who is also licensed to practice medicine in Mexico. Dr. Lugo reviewed King's medical, employment, and school records, as well as the competency evaluations performed prior to King's initial trial. Dr. Lugo also interviewed King, members of his family, a girlfriend of King's, and Wagoner to determine what toxic substances King may have been exposed to as a child and during his career as a plumber. Dr. Lugo testified that King was chronically exposed to environmental toxins throughout his childhood in suburban and rural Michigan. Many chemicals that are now understood to cause developmental problems and low IQ in children were commonly and liberally applied to farms and golf courses, which King lived near throughout his childhood. Dr. Lugo testified that such chemical exposure in King's childhood could have had an additive effect on a head injury that King suffered during a sledding accident, which may have exacerbated King's neurological symptoms.

However, during cross-examination, Dr. Lugo admitted that he was not qualified to diagnose brain damage, and he did not perform any tests on King. Additionally, Dr. Lugo testified that he initially believed that King spent his entire childhood on a farm, but subsequently learned that King lived at several different locations, one of which was five to ten miles away from the nearest farm. Dr. Lugo also admitted that he knew of no studies that established higher rates of brain damage or other health problems among children who were raised in the same areas as King.

Wagoner detailed the chemicals that she and King used as plumbers, some of which induced headaches and lightheadedness. Dr. Lugo also testified that King was both chronically and acutely exposed to toxic chemicals as a plumber. These chemicals can cause drowsiness, impaired thinking, impaired reflexes, loss of consciousness, and loss of memory. Dr. Lugo believed that King suffered side effects from exposure to these chemicals based on reports that King told his girlfriend that he occasionally became lost and was in a catatonic state. However, Wagoner also testified that these chemicals are commonly used in the plumbing industry; any side effects that she suffered appeared to be temporary; and when she worked with King, he tended to act in a supervisory capacity.

Schlemmer, who primarily oversaw the penalty phase of King's trial, testified that she extensively explored several potential avenues of mental health mitigation before ultimately presenting Dr. Wu. She initially retained Dr. Ross and Dr. Sesta, who did not believe King's report of having passed out from exposure to rat poison. Dr. Sesta and Dr. Ross believed that King was malingering and was a pathological liar; accordingly, Schlemmer believed that their testimony would damage the credibility of the defense. Schlemmer retained four additional experts—Dr. Kasper, Dr. DeClue, Dr. Regnier, and Dr. Gamache—none of whom were able to provide information that would have aided King's defense. Schlemmer also retained Dr. Visser, who only considered King's competency and testified during

King's trial regarding King's low IQ. *See King*, 89 So. 3d at 220. Schlemmer purposely limited Dr. Visser's examination of King to his competency alone because she was concerned that if Dr. Visser also conducted a neuropsychological evaluation on King, Dr. Visser would reach similar conclusions as Dr. Sesta and Dr. Ross—that King was malingering and a pathological liar.

As she was "grasping at straws," Schlemmer retained Dr. Wu, who conducted a PET scan of King and found brain abnormalities. Schlemmer testified that the PET scan needed to be correlated to some injury or other clinical diagnosis. The only evidence available to the defense was the sledding accident that King suffered as a child. His family members all attributed his neurological symptoms and behavioral changes to the sledding accident, and King's medical records from that accident had been destroyed. Schlemmer testified that the only toxic substance exposure that King reported was rat poison and crack pipe fumes, which was reported to, but not believed by, Dr. Sesta. Neither King nor his family members ever reported concerns about environmental toxins. Additionally, Schlemmer testified that she could not present testimony from King's mother, whom Schlemmer suspected would commit perjury about the sledding accident if she testified.

Schlemmer also offered an explanation as to why she did not have Dr. Wu investigate King's potential exposure to toxic plumbing chemicals. Interviews with King's former employers revealed damaging information about King that could potentially be used by the State in rebuttal, including that King: had been fired for lying; had made inappropriate comments to women; had exposed himself to a woman who was breastfeeding a child; and had stolen jobs by underbidding his employer. Accordingly, Schlemmer limited Dr. Wu's investigation and testimony to the sledding accident.

Additionally, the State presented testimony from Karen McClellan, the mitigation specialist during King's trial. She reported that she traveled to

Michigan, where she visited some of the addresses listed by King, and spoke to members of his family. One of these addresses was a suburb of Pontiac, Michigan. Additionally, neither King nor his family members informed her of previous farm work, nor did they report complaints about chemical exposure. However, she admitted that she did not speak to anyone involved with King's case regarding potential toxic substance exposure, nor did she confer with Schlemmer regarding the possibility of retaining an expert toxicologist.

The postconviction court found that King had not established deficiency or prejudice as required by *Strickland*. We agree.

Quite simply, this case is not one in which counsel acted deficiently through a failure to investigate King's mental health or reliance upon previous social history reports. *Cf. Porter*, 558 U.S. at 39-40, 130 S.Ct. 447 (finding counsel to be deficient for failure to investigate the defendant's mental health, family background, or history of military service); *Wiggins v. Smith*, 539 U.S. 510, 524-26, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (concluding that counsel's reliance only on reports from a presentencing investigation report and the Baltimore City Department of Social Services for mitigation constituted deficiency). Rather, Schlemmer conferred with eight different neuropsychology or mental health experts, nearly all of whom concluded that King was malingering and a pathological liar, or were otherwise unable to provide helpful testimony. *See Hodges v. State*, 885 So. 2d 338, 348-50 (Fla. 2004) (finding that counsel was not deficient for choosing not to present mental health mitigation after receiving unfavorable reports from two experts). Through her persistence, Schlemmer was able to present some mitigating mental health evidence via the testimony of Dr. Wu, which was corroborated by testimony from King's family members that his behavior changed after the sledding accident. Further, Schlemmer explained that the only indication that King may have been exposed to toxic substances were claims of exposure to rat poison and crack pipe fumes,

> which at least one expert did not believe. Schlemmer testified that she explored any potential avenues of mitigation based on information provided by King and his family—including hiring an independent medical examiner and interviewing helicopter pilots after King claimed that he and [D.L.] had engaged in consensual sex and that she was killed after being shot from a helicopter—but there was simply no evidence to suggest that King's exposure to toxic substances would be anything more than pure speculation. Trial counsel did not render deficient performance regarding King's potential exposure to toxic substances.
>
> Because we conclude that King has failed to establish deficiency, we need not consider whether these decisions of trial counsel resulted in prejudice. *E.g.*, *Zommer*, 160 So. 3d at 377. Therefore, we deny this claim.

King, 211 So. 3d at 880-83.

A. Preliminary statement on applicable legal standards for ineffective assistance of counsel claims under the AEDPA

Of course, the two-prong test for ineffective assistance of counsel established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. "The Supreme Court has recognized that because representation is an art and not a science, "[e]ven the best criminal defense

attorneys would not defend a particular client in the same way." Waters v. Thomas, 46 F.3d 1506 (11th Cir.) (*en banc*), cert. denied, 516 U.S. 856, 116 S. Ct. 160 (1995) (citing Strickland, 466 U. S. at 689).

Ultimately, under the AEDPA a habeas petitioner "must do more than satisfy the Strickland v. Washington, 466 U.S. 668 (1984), standard. He must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied Strickland to the facts of his case in an objectively unreasonable manner.'" Rutherford, 385 F.3d at 1309 (quoting Bell v. Cone, 535 U.S. 685, 699 (2002)). Consequently, ineffective assistance claims considered in federal court on habeas review are subject to additional deference. See Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420 (2009) (noting that a "doubly deferential judicial review" applies to a Strickland claim "evaluated under the § 2254(d)(1) standard") (citing Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S. Ct. 1 (2003) (per curiam)).

With these principles in mind, King has not come close to meeting his heavy burden to obtain relief under Strickland and the AEDPA. The Florida courts reasonably applied Strickland to the facts in this case to deny relief. Accordingly, habeas relief must be denied.

B. The state courts reasonably applied established Supreme Court precedent in finding 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.

As an initial matter, the investigation conducted by counsel, reflected in counsel's testimony during the evidentiary hearing, established that counsel's background investigation was objectively reasonable under Strickland. Contrast Sears v. Upton, 561 U.S. 945, 951-52, 130 S. Ct. 3259, 3264 (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). More specifically, 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 and the testimony of an expert, Dr. Joseph Wu, clinical director for a brain imaging center. The trial court

concluded:

> 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.

(A11/2058-59).

Further, the trial court found and weighed evidence regarding King's head injury suffered at the age of six based upon mitigation evidence developed and presented by King's trial counsel. (A11/2060-61). Accordingly, 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 any persuasive, much less compelling mitigation evidence 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 a large number of 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. See King, 211 So. 3d at 880-83 ("Rather, Schlemmer conferred with eight different neuropsychology or mental health experts, nearly all of whom concluded that King was malingering and a pathological liar, or were otherwise unable to provide helpful

testimony.").

While King faults defense counsel for failing to further pursue toxin exposure or hire a specific expert to evaluate King's possible toxic exposure, 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. (C11/1695, 1681). There was no indication that King ever mentioned toxin exposure from growing up near farms or in the course of his plumbing career. (C11/1695, 1681). Nevertheless, Dr. Sesta saw no evidence of neurotoxin exposure, and he advised Schlemmer that there was no neurotoxin defense. (C11/1695, 1678). He further advised that King had no psychiatric condition or neurological issues that could be presented as mitigation. (C11/1694-95).

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 McClain v. Hall, 552 F.3d 1245, 1253 (11th Cir. 2008) ("That McClain later secured a more favorable opinion of an expert than the opinion

of Dr. Maish does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance."); Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) ("the mere fact a defendant can find, years after the fact, [an] ... expert who will testify favorably for him does not demonstrate that counsel was ineffective for failing to produce that expert at trial.").

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. (C11/1698). Dr. Kasper initially found King incompetent, but then upon receiving additional information, she deemed him competent. (C11/1698). She conducted her own neuro-psych testing, and she ultimately reached the same conclusions as Dr. Sesta and Dr. Ross, that King was malingering. (C11/1698, 1702). Dr. Kasper determined that there was no organic brain damage, or physical or psychiatric issues that could be presented in mitigation. (C11/1699-1700).

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." (C11/1676-77, 1704). The PET scan showed a divot in the front of King's forehead. (C11/1678-79). 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. (C11/1677, 1705). Through her investigation Schlemmer knew that King was involved in a sledding accident. (C11/1704). King's family believed that King's behavior was solely from the sledding accident. (C11/1705). "They never mentioned poisons, toxins, or living on a farm, or nothing like that. It was always from the sledding accident." (C11/1705).

The sledding accident was a concrete incident with witnesses who defense counsel could use to correlate the PET scan results. (C11/1706). Therefore, Schlemmer presented as much evidence as she could to show the brain injury from the sledding incident. (C11/1706-08, 1717). Schlemmer testified that she had no evidence to support King being exposed to toxins and the testing did not correspond with toxin exposure. (C11/1716-18). King never presented her with any information about toxic exposure and the doctors who evaluated King did not find evidence of such exposure. (C11/1718).

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. King failed to establish that no reasonable defense attorney would have failed to retain a toxicologist such as Mr. Lugo. Cullen v. Pinholster, 563 U.S. 170, 197, 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).

This case does not present a close question even under *de novo* review. With the additional deference due to review of an ineffective assistance of counsel claim under the AEDPA, this claim is plainly meritless in federal court.

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. (C11/1717-18). Indeed, as noted, King's expert faced significant challenges on cross-examination.

Given this record, it strains credulity to suggest that counsel could be considered ineffective for failing to retain and present Mr. Lugo. See McClain, 552 F.3d at 1253 ("That McClain later secured a more favorable opinion of an expert than the opinion of Dr. Maish does not mean that trial counsel's failure to obtain that expert testimony constituted deficient performance."). Mr. Lugo was an expert with modest qualifications[5] and acknowledged he was not licensed to diagnose or treat any medical condition in the United States. (C10/1558, 1564). Lugo presented tenuous testimony in support of King's toxin exposure based upon broad and sweeping generalizations that would probably apply to hundreds of

[5] Mr. Lugo was not a licensed medical doctor in the United States. He possessed a master of science in toxicology from University of Minnesota. (C10/1556). While he had studied to obtain his Ph.D., he never actually obtained his doctorate. (C10/1607). All of his expert testimony as a toxicologist in the United States had been on behalf of capital defendants. (C10/1609).

thousands and possibly millions of Americans in general [simply living within miles of a farm in the 70's]. 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. See Bertolotti v. Dugger, 883 F.2d 1503, 1518 (11th Cir. 1989) ("Before we are convinced of a reasonable probability that a jury's verdict would have been swayed by the testimony of a mental health professional, we must look beyond the professional's opinion, rendered in the impressive language of the discipline, to the facts upon which the opinion is based.") (citing Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987)). King did not grow up on a farm as he asserts in his memorandum. (Pet. Memo, Doc. 18 at 8).

Mr. 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." (C10/1601). Dr. Lugo agreed that the family lived in a suburb of Pontiac,

Michigan.[6] (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." (C10/1605). 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." (C10/1607).

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. (C10/1597). Lugo admitted that he saw King's evaluation from Dr. Sesta, a neuropsychologist, who found no brain damage. (C10/1598). Lugo did not speak to any of the doctors that had previously evaluated King. (C10/1599).

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

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[6] Defense investigator McClellan learned that King lived on a farm for a short period of time, but family members never discussed the farm. (C11/1665, 1668). It was McClellan's understanding that neither King nor his family members were farm workers. (C11/1665). 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. (C11/1665).

trial, 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 Mr. Lugo's nebulous "proximity to farmland" theory of exposure.[7]

While there was evidence King was exposed to common plumbing chemicals, any link to verifiable brain damage in King was notably absent.[8] Again, trial counsel cannot be

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[7] Lori Wagoner, a plumber from Babe's Plumbing, worked with King while he was employed by Babe's Plumbing from 2004-2007. (C11/1736-37). According to Wagoner, King was very capable of doing his job as a plumber and was "actually running the jobs" like a "superintendent." (C11/1744). Wagoner remembered King complaining about headaches and recited a number of common plumbing chemicals which she and King have used. (C11/1737-39).

[8] Wagoner admitted that any effects King might have had from plumbing chemicals, she has had as well, and those effects appeared to be temporary. (C11/1744). Those chemicals were not unique to Babe's Plumbing or to Florida; any plumber working throughout the country would use similar chemicals. (C11/1743). 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. (C11/1743-44).

faulted for failing to uncover and utilize such tenuous evidence. King cites no Supreme Court precedent which suggests, much less establishes that defense counsel could be considered ineffective in this case. Indeed, the cases cited by King wherein the high hurdle of meeting the deficiency and prejudice prongs have been found are easily distinguishable from the instant case.

For example, in Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), trial counsel failed to discover that the defendant suffered consistent abuse during the first six years of his life, was the victim of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," was homeless for portions of his life, and had diminished mental capacities. 539 U.S. at 528-29, 535. In Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447 (2009), trial counsel collected no records, conducted no interviews, and had only one short meeting with his client concerning the penalty phase; a reasonable investigation would have revealed that the defendant was abused as a child, served heroically in the Korean War but experienced trauma therefrom, had a long-term substance abuse problem, and had impaired mental health and mental capacity. 130 S. Ct. 447, 449, 453.

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. Again, a "doubly" deferential standard is applied in the habeas context that takes into account § 2254's deference to state courts and the ordinary deference to counsel, affirming if "there is any reasonable argument that counsel" acted pursuant to prevailing professional standards as set forth in controlling law. See Harrington v. Richter, 562 U.S. 86, 89, 131 S. Ct. 770, 778 (2011). Since the state court decision is not contrary to, or, an unreasonable application of clearly established Supreme Court precedent, this claim must be denied.

C. The state trial court reasonably applied Supreme Court precedent in finding that 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 the outcome of this heavily aggravated case.

The state post-conviction court also found that King failed to establish any prejudice as a result of counsel's alleged deficient performance.[9] This ruling, too, is well supported by the record and is fully in accord with all applicable Supreme Court precedent. The state courts' determination that King failed to establish prejudice is entitled to considerable deference in federal court. See Woodford v. Visciotti, 537 U.S. 1149, 123 S. Ct. 957 (2003) (reversing appellate court's rejection of state court's finding that petitioner was not prejudiced by his counsel's failure to present mitigation evidence at the penalty phase of his trial); Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1322 (11th Cir. 2002) (observing that as for the second prong of the Strickland test, "[a] petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high.").

[9] The Florida Supreme Court held that it did not need to proceed to the prejudice prong because King had failed to meet the first prong of establishing deficient performance.

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. As an initial matter, it must be remembered that King's post-conviction evidence did not establish a single additional mitigating circumstance. King simply offered an alternate cause of brain damage which has already been presented and found by the trial court. In addition, the expert who offered this additional mitigation testimony, Lugo, was seriously challenged by the State on his methodology and defense background. Consequently, evidence on the mitigation side of the ledger has hardly been altered. And, notably, the defense did not challenge any of the substantial aggravation presented.[10] 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

[10] As recited by the Florida Supreme Court in King, 89 So. 3d at 219-222: "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)."

evidence of aggravation, and he also has not provided evidence of mitigation that is sufficiently strong to outweigh it.").

The State presented an absolutely overwhelming case in aggravation, including two of the most weighty aggravators under Florida's capital sentencing scheme, CCP and HAC. See Ponticelli v. Sec'y, Florida Dept. of Corrections, 690 F.3d 1271, 1301 (11th Cir. 2012) (noting that the heinous, atrocious or cruel and the cold, calculated, and premeditated aggravating factors are considered two of the weightiest aggravators in Florida's capital sentencing scheme) (citing Larkins v. State, 739 So. 2d 90, 92-95 (Fla. 1999)). The HAC aggravator alone, would far eclipse the mitigation presented during the hearing below.

The young mother of two in this case suffered a prolonged, torturous and horrendous death at the hands of Mr. King. 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. Kowalski 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. Kowalski 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.

(A11/2049-53). 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. (A26/2901, 2912). See Sochor v. Dept. of Corrections, 685 F.3d 1019, 1030 (11th Cir. 2012) (holding that where the death sentence is supported by substantial aggravation [HAC and prior violent felony], a habeas petitioner faces an especially heavy burden to establish that the mitigation which was not presented due to counsel's

deficient performance would have sufficiently altered the sentencing balance to establish prejudice under Strickland).

In conclusion, since King's alleged brain damage has already been presented to the jury[11], 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 Cullen v. Pinholster, 563 U.S. 170, 200, 131 S. Ct. 1388, 1409 (2011) (where the new evidence largely duplicated the mitigating evidence presented at the time of trial there was no reasonable probability of a different outcome had such evidence been presented). King has not identified any legal or factual error in the state courts' application of either the deficiency or prejudice prongs of Strickland in this case. See Penry v. Johnson, 532 U.S. 782, 121 S. Ct. 1910 (2001) (noting that issue is not whether state decision was incorrect but whether it was objectively unreasonable); Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843 (2002) (same). Accordingly, this claim must be denied.

[11] 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. (A27/3190-93).

Ground Two: Whether The State Courts' Denial Of An Ineffective Assistance Of Counsel Claim Based Upon Counsel's Failure To Preserve A Batson V. Kentucky, 476 U.S. 79 (1986), Claim For Appeal Was Contrary To, Or, An Unreasonable Application Of Clearly Established Supreme Court Precedent?

This claim was raised in state court below and an evidentiary hearing was held on King's motion for post-conviction relief. The State post-conviction court found neither deficient performance nor prejudice resulting from trial counsel's failure to preserve a racial or gender challenge to striking of a potential juror. The Florida Supreme Court affirmed the denial of post-conviction relief on appeal, stating:

> Failure to Preserve a *Batson* Error
>
> King next asserts that trial counsel rendered ineffective assistance when they failed to preserve an alleged *Batson* error during jury selection. Specifically, King alleges that counsel failed to challenge the veracity of the State's proffered reason for excluding Juror 111, which was that her brother was facing a pending felony drug charge. King asserts that this reason was not supported by the facts of the record, which indicated that Juror 111 had previously been convicted of a drug-related offense and was facing a charge of disorderly conduct at the time of jury selection. King also alleges that counsel failed to conduct a comparative juror analysis after initially raising the *Batson* objection, and failed to object to the State's gender-based discriminatory peremptory challenge of Juror 111.

As with his previous claim, King must demonstrate both that counsel rendered deficient performance by failing to preserve the *Batson* challenge to Juror 111, and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The Supreme Court held in *Batson* that peremptory challenges cannot be used to exclude members of racial minorities from a jury. 476 U.S. at 96-97, 106 S.Ct. 1712. The procedure and principles governing *Batson* challenges are as follows:

> 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). The court's focus in step 3 is not the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful discrimination.
>
> Voir dire proceedings are extraordinarily rich in diversity and no rigid set of rules will work in every case. Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous. 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.

Melbourne v. State, 679 So. 2d 759, 764-65 (Fla. 1996) (footnotes omitted). Similarly, the exclusion of jury members on the basis of gender is prohibited, and peremptory strikes based on suspected gender discrimination are subject to the same procedure. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Welch v. State*, 992 So. 2d 206, 211 (Fla. 2008).

> During voir dire of King's trial, the following exchange occurred:
>
> THE COURT: Up to Juror 111, including 111. What says the State?
>
> [THE STATE]: The State will strike Juror 111.
>
> THE COURT: Okay, we're up to 114, Juror 114 as the 12th juror. What says the Defense?
>
> MS. SCHLEMMER: Your Honor, we just have an issue.
>
> MR. SCOTESE: We have an objection. She is a minority and we'd ask for a race neutral—
>
> THE COURT: For Juror [111]?
>
> MR. SCOTESE: Yes.
>
> THE COURT: All right, thank you. Juror 111—
>
> [THE STATE]: Yes, Judge. 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 qualification was that living life in prison is more awful than a death sentence. Her brother has a pending felony drug charge. She

watches the television show CSI. Commonly, a concern of ours is that they would hold us to a TV standard as opposed to a regular standard.

And based on those foregoing reasons, we exercise our peremptory challenge on Number 111.

MR. SCOTESE: Your Honor, it is our position that those are not sufficient reasons. There's many people here on this jury that have similar—there is one person who is—

THE COURT: I understand on the panel you've got jurors who watch CSI or watch Perry Mason or whatever. That's not—

[THE STATE]: As a single thing, a genuine—my race neutral reason, this is not a challenge for cause, she indicated that living a life in prison is more awful than a death sentence.

THE COURT: Other jurors have said it. Other jurors have said the same thing.

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

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

[THE STATE]: Yes. According to her questionnaire, her brother has a pending drug charge.

THE COURT: Pending criminal charge? All right. I'm going to find based upon that that is a genuine race neutral reason and I'll grant the challenge, peremptorily. I'll find that the explanation is facially race neutral and the reason given is genuine; and given all the circumstances, the explanation is not a pretext and the strike will be sustained.

Ultimately, seven women were seated on King's jury, and the State did not exercise all of its peremptory strikes.

During the postconviction evidentiary hearing, evidence was presented that Scotese and Meisner primarily handled the guilt phase of King's trial. At the time of King's trial, Scotese had handled one capital case and was death-qualified; Meisner was not qualified to handle capital cases. Meisner took notes and conferred with co-counsel during jury selection, but testified that he no longer had any independent recollection of jury selection during King's trial. Scotese testified that he took notes and questioned some jurors during jury selection. According to Scotese, objections during jury selection were made with Schlemmer's approval.

Scotese testified that at the time of King's trial, he was familiar with *Batson*, and he usually noted when a potential juror was a minority to remind himself to raise potential *Batson* challenges. He also testified that it was his usual practice to request a race-neutral basis for a peremptory strike of a minority juror, and that it would be rare for him to fail to do so, unless a race-neutral basis for the peremptory strike was obvious to him. However, he was not familiar with case law that prohibits the use of peremptory strikes on the basis of gender, and he did not consider raising a gender-based objection to the State's exercise of a peremptory strike of Juror 111. Scotese also testified that he attempts to conduct comparative juror analyses to preserve *Batson* challenges, but admitted that he was "not very good at it." He also did not recall consulting Juror 111's questionnaire regarding the matter of the pending charge against her brother, but testified that if he had found a discrepancy between her questionnaire and her answers during voir dire, he would have pressed the matter for clarification.

Schlemmer testified that she had no independent recollection of the *Batson* challenge to Juror 111. However, after reviewing Juror 111's questionnaire,

she added that she would not have wanted Juror 111 to serve on King's jury because Juror 111 indicated that a friend's father was a police officer. Schlemmer was concerned that Juror 111 might have been biased in favor of the State in light of the fact that the victim's father in this case was also a police officer. Further, Juror 111 included other responses in her questionnaire that concerned Schlemmer, such as the fact that she regularly watched crime shows like CSI. Schlemmer also thought that due to her relatively young age, Juror 111 might empathize with the victim upon hearing [D.L.]'s frightened 911 call. Schlemmer also testified that once the State had provided several race-neutral reasons for striking Juror 111, she did not believe there was a strong reason to maintain the *Batson* challenge.

Additionally, both handwritten and typed notes created by defense counsel during voir dire were admitted during the evidentiary hearing. Several handwritten notes were added to the typed notes that detailed the impressions of the defense attorneys with respect to potential jurors. Notably, a large handwritten "NO" was written next to the notes pertaining to Juror 111. None of the attorneys who testified during the evidentiary hearing were sure who had written the "NO."

The postconviction court found that King failed to establish deficiency or prejudice. It concluded that the *Batson* challenge was not valid in light of multiple race neutral reasons offered by the State regarding Juror 111. Moreover, King failed to show that a seated juror was actually biased, the standard used to evaluate prejudice when a defendant alleges during postconviction that trial counsel was ineffective for failure to raise or preserve a cause challenge.

We agree with the trial court's conclusion that King failed to show that trial counsel rendered ineffective assistance with respect to this matter. As an initial point, we note that we previously considered and rejected the merits of King's *Batson* challenge on direct appeal. *King*, 89 So. 3d at 229-

31. As we indicated then, the reason proffered by the State—that Juror 111's brother was facing a criminal charge—is a valid race-neutral reason to exercise a peremptory strike. *Id.* at 230 (citing *Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla. 1992); *Bowden v. State*, 588 So. 2d 225, 229 (Fla. 1991)); *see also Rice v. Collins*, 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (concluding that it was reasonable for the trial court to accept as race-neutral reasons for striking a minority female juror the facts that she was nineteen years old, single, lacked ties to the community, and might be too tolerant of the crimes at issue); cf. *Nowell v. State*, 998 So. 2d 597, 604–05 (Fla. 2008) (holding that the State's age-based justification for exercising a strike was pretextual in that case, but noting that a juror's age can be a relevant consideration when evaluating the genuineness of a proffered justification). The reasons offered by the State during trial are similarly gender-neutral. Then, as now, King's underlying *Batson* claim is meritless.

To the extent that King's present claim rests on allegations of deficiency for failure to preserve the *Batson* challenge by failing to correct the State or the trial court regarding the nature of the charges faced by Juror 111's brother, or by failing to conduct a comparative juror analysis, we conclude that trial counsel did not act deficiently.[fn5] The evidence admitted during the postconviction hearing indicated that defense counsel did not want Juror 111 to serve for several reasons. Further, they were concerned about the impartiality of Juror 111 for some of the same reasons as the State, such as the fact that Juror 111 admitted that she watched television shows like CSI and she was young. Schlemmer testified that she was concerned that Juror 111 mentioned that a friend's father was a police officer. In light of such information, Schlemmer did not believe that any merit remained to the *Batson* challenge. Schlemmer's abandonment of a meritless claim did not constitute deficiency. *See, e.g., Troy v. State*, 57 So. 3d 828, 842–43 (Fla. 2011) (refusing

to consider counsel deficient for failure to raise meritless claims).

Although we do not need to consider whether prejudice resulted, having concluded that counsel did not act deficiently, we also reject King's claim that he can demonstrate prejudice pursuant to *Davis v. Secretary for the Department of Corrections*, 341 F.3d 1310 (11th Cir. 2003). In *Davis*, trial counsel raised a meritorious *Batson* challenge during voir dire, but failed to renew the objection before the jury was sworn in as required by *Joiner v. State*, 618 So. 2d 174, 175-76 (Fla. 1993). 341 F.3d at 1312. Although his subsequent claim that the failure to preserve the *Batson* challenge constituted ineffective assistance of counsel was rejected by the Third District Court of Appeal, the Eleventh Circuit Court of Appeals granted him relief pursuant to a federal writ of habeas corpus. *Id.* at 1312, 1317. The Eleventh Circuit considered the decision in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), which involved a notice of appeal that was untimely filed, to support the proposition that *Strickland* may on occasion require determination of how deficient performance affected the client's appeal, rather than the trial. *Davis*, 341 F.3d at 1314-15. Concluding that counsel's failure to preserve his *Batson* challenge solely affected Davis's appeal, the Eleventh Circuit held that the correct prejudice inquiry under such circumstances was whether there was a reasonable likelihood of a more favorable outcome on appeal. *Id.* at 1315-16.

However, the decision in *Davis* has since been recognized by the Eleventh Circuit as a "razor thin exception." *Purvis v. Crosby*, 451 F.3d 734, 739-40 (11th Cir. 2006) ("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."). Further, the Eleventh Circuit has rarely applied the exception in *Davis*. *See United States v. Williams*, 731 F.3d 1222, 1236 n.10 (11th

Cir. 2013); *Brown v. United States*, 533 Fed.Appx. 881, 883 n.2 (11th Cir. 2013); *Lockwood v. Hooks*, 415 Fed.Appx. 955, 957 (11th Cir. 2011); *Carratelli v. Stepp*, 382 Fed.Appx. 829, 832-33 (11th Cir. 2010); *Crawford v. Hooks*, 244 Fed.Appx. 300, 303-04 (11th Cir. 2007). Other federal appellate courts have flatly rejected *Davis*'s interpretation of *Flores-Ortega*. *Kennedy v. Kemna*, 666 F.3d 472, 486 (8th Cir. 2012) (citing *Taylor v. United States*, 279 Fed.Appx. 368, 369 (6th Cir. 2008)).

More importantly to King's claim, this Court has also explicitly rejected *Davis*. *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007). First, the Court explained that the standard regarding prejudicial error on direct appeal differs from that in a postconviction claim asserting ineffective assistance. *Id.* at 317-18. A properly preserved error permits the trial court to correct errors as they arise and is reviewed for manifest error on direct appeal. *Id.* at 318. A defendant who can show that a juror suspected of bias was improperly seated is entitled to relief on direct appeal; however, an unpreserved error on direct appeal regarding an improper juror is not considered reversible. *Id.* at 319-20 (citing *Busby v. State*, 894 So. 2d 88, 96-97 (Fla. 2004); *Singer v. State*, 109 So. 2d 7, 19 (Fla. 1959)).

By comparison, a defendant claiming in a postconviction motion that trial counsel was ineffective is governed by *Strickland*. *Carratelli*, 961 So. 2d at 320. This Court specifically rejected *Davis*'s proposition that it may be proper to consider the effect of counsel's deficiency on the defendant's appeal, rather than during trial. *Id.* at 321. The Court explained that renewing an objection before a jury is sworn in is fundamentally a trial concern, not solely an appellate matter. *Id.* Further, the Court determined that *Strickland*'s concerns with prejudice centered "on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 322 (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052). This Court also noted that *Flores-Ortega* did

not create such a sweeping change to *Strickland* as suggested by *Davis*, but simply permitted reviewing courts to presume prejudice when a defendant is entirely denied a proceeding, such as can occur when counsel fails to file a timely notice of appeal. *Carratelli*, 961 So. 2d at 322-23.

Accordingly, when considering the failure to preserve a challenge to potential jurors in voir dire, the reviewing court should focus on the defendant's trial, not his appeal. *Id.* at 323. Under such circumstances, this Court held that a defendant must show that a biased juror served during the defendant's trial to satisfy *Strickland*'s requirement of showing a reasonable probability of a more favorable result. *Id.* at 323-34.

King asserts that *Carratelli* is distinguishable because *Carratelli* involved cause challenges, not peremptory strikes. However, the Court accepted jurisdiction in *Carratelli* based on conflict with the decision in *Austing v. State*, 804 So. 2d 603 (Fla. 5th DCA 2002), which concerned peremptory strikes. *Carratelli*, 961 So. 2d at 317. In *Austing*, the Fifth District Court of Appeal had reached a similar conclusion as the Eleventh Circuit in *Davis* that the prejudice resulting from the failure to preserve a *Batson* challenge during trial should be evaluated by the effect on the defendant's appeal. 804 So. 2d at 604. Nonetheless, we rejected that rationale in *Austing* without considering any distinction between the nature of peremptory and cause strikes. *Carratelli*, 961 So. 2d at 317, 327.

Therefore, King's reliance on *Davis* is misplaced. Under *Carratelli*, King has not demonstrated prejudice because he offered no evidence to indicate that any of the jurors who were seated in his trial were actually biased. Rather, the evidence King presented on postconviction was simply that this Court would have ruled differently on direct appeal if the *Batson* challenge had been fully preserved. This is insufficient to

> demonstrate prejudice in this context. Therefore, we reject this claim.

King, 211 So. 3d at 883-88.

As an initial matter, while King faults counsel for failing to preserve a Batson challenge on direct appeal, the Florida Supreme Court did issue a merits ruling and found the trial court did not err in denying a race based challenge to juror 111 because the prosecutor offered valid race neutral reasons for the strike. King, 89 So. 3d at 229-30. King faults his trial counsel for not doing more to perfect a record that he contends could have prevailed on direct appeal. However, this claim is reviewed here from the denial an ineffective assistance of counsel claim. Under this posture, the state court's ruling is due double deference -- Strickland and the AEDPA. Under this deferential review, the instant claim is completely devoid of merit.

King largely ignores the fact that lead counsel did not even want juror 111 to sit on King's jury.[12] Schlemmer

[12] 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. (C11/1727). Her co-counsel, 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. (C10/1655). This *pro forma* objection does not overcome lead

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. (C11/1727). 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. (C11/1725-1728; 1730). 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. (C11/1730). Schlemmer's file had a big "no" written next to juror 111. (C11/1730-1732). Schlemmer was not certain who wrote "no," but she thought that Scotese had written it. (C11/1731-32).

Despite the immense legal 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. See Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995) ("The attorney's actions during voir dire are

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counsel's tactical determination that she did not want juror 111 sit on King's jury.

considered to be a matter of trial strategy."). As a tactical decision, counsel's performance is virtually immune from post-conviction challenge. See Chandler v. U.S., 218 F.3d 1305, 1315 (11th Cir. 2000) (the petitioner's burden of persuasion is a heavy one, "petitioner must establish that no competent counsel would have taken the action that his counsel did take."). This meritless claim was properly denied by the state courts below, as King failed to demonstrate either deficient performance or prejudice.

King fails to establish the Florida courts' resolution of this claim conflicts with any clearly established Supreme Court precedent. King's memorandum discusses the general law relating to strikes applicable on direct appeal from the Supreme Court. However, he fails to identify a single Supreme Court case which supports his claim before this Court relating to the defendant's burden in post-conviction, addressing a claim of ineffective assistance of trial counsel. (Pet. Memo, Doc. 18 at 13).

Under well-established Florida law, 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 v. State, 961 So. 2d 312, 320 (Fla. 2007). 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 had 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 had to show a reasonable probability that, but for counsel's unprofessional errors, the result of his **trial** would have been different.

King did not even attempt to make such a showing in state court. See 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).

Rather than cite to Supreme Court precedent, King cites an Eleventh Circuit Court of Appeals' case, Davis v. Secretary for Dept. of Corrections, 341 F.3d 1310, 1315-1316 (11th Cir. 2003), for the proposition that he need not show any prejudice on the outcome of his trial. King's reliance upon Davis 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. The Florida Supreme 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 either at trial or on appeal.

A more recent and directly relevant case is the Eleventh Circuit Court of Appeals' decision in Price v. Secretary,

Florida Dept. of Corrections, 548 Fed. Appx. 573, 576-577 (11th Cir. 2013) (unpublished) which 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. In Price, 548 Fed. Appx. at 576-577, the court 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, "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.

Again, the Florida Supreme Court decision does not contravene any Supreme Court precedent, and, indeed, conforms to the view accepted by most courts, including the Eleventh Circuit Court of Appeals, that have 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. 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."); Sneed v. Florida Dept. of Corrections, 496 Fed. 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); 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."); 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.").[13]

There were simply no biased or unqualified jurors to sit on King's jury. 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.[14] Thus, this claim is legally and factually insufficient to warrant relief.

King has offered no persuasive reasons to reverse the state court decision in this case which relied upon settled

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[13] 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.

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.).

[14] 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.

Florida precedent requiring an assessment of prejudice emanating from counsel's performance on the outcome of the trial [the stage at which it was furnished], not the appeal. Since there is no Supreme Court precedent which contravenes this legal proposition, his claim necessarily fails.[15] Indeed, the Supreme Court recently rejected the notion that a post-conviction defendant should be treated the same in raising a structural error under an ineffective assistance of counsel claim as a defendant on direct appeal. In Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1913 (2017), the court observed:

> ...When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective-assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.

Nonetheless, assuming for a moment that this Court were to go down the path King urges and assess the merits of a

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[15] In cases where nothing in the Supreme Court's jurisprudence addresses the issue on point or the precedent is ambiguous and gives no clear answer to the question, it cannot be said that the state court's conclusion is contrary to, or constitutes an unreasonable application of, "clearly established Federal law." Wright v. Van Patten, 552 U.S. 120, 126, 128 S. Ct. 743, 747 (2008); Mitchell v. Esparza, 540 U.S. 12, 15-16, 124 S. Ct. 7, 10 (2003).

claim for which King has offered no legally cognizable claim of prejudice, the trial and post-conviction records refute the claim. Defense counsel had no valid Batson objection to exercise on prospective juror 111.

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.

(A20/1764).

In response, the defense counsel simply stated "it is our position those are not sufficient reasons." (A20/1764-65). 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.

(A20/1765). The judge found the fact her brother had a pending drug charge was a genuine race neutral reason for the strike. (A20/1766). Even if this Court were inclined to 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. Even on direct appeal of an overruled Batson objection, a trial court's evaluation of a prosecutor's reasons for using a peremptory challenge can be reversed only on a showing of clear error. Hernandez v. New York, 500 U.S. 352, 363-66, 111 S. Ct. 1859, 1868-69 (1991). This highly deferential standard reflects the recognition that the trial court's determination is based primarily on credibility, the evaluation of which "lies 'peculiarly within a trial judge's province.'" Hernandez, 500 U.S. at 365, 111 S. Ct. at 1869 (quoting Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 854 (1985)). See also Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1321 (11th Cir. 1999) ("A district court's Batson determinations are largely findings of fact entitled to great deference on review.") (citing Batson, 476 U.S. at 98 n.21, 106 S. Ct. 1712).

As the Florida Supreme Court found on direct appeal, 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." (A35/605).

The prosecutor offered several valid, racially neutral reasons for his peremptory strike of juror 111. And, contrary to Petitioner's assertion, 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, 476 U.S. at 95 (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, 126 S. Ct. 969, 973-74 (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, 853 P. 2d 992, 20 Cal. Rptr. 2d 537 (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 outcome on direct appeal. 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 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. (A20/1697-98). 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. (A35/605).

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.

In an effort to buttress his Batson claim, Petitioner attempted to fault counsel in state court for failing to add gender as a reason to object to the state's strike. However, adding gender as a possible reason for the strike as Petitioner argues (Pet. Memo, Doc. 18 at 17), would simply be absurd on this record.

King's claim moves from a tenuous, academic challenge to the preposterous when one considers that the jury included a majority of seven females.[16] 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, A20/1760; Juror 29, A20/1763; Juror 38, A20/1761; Juror 40, A20/1762; Juror 104, A20/1766). The State also only exercised **seven** of its **thirteen** peremptory challenges. (A20/1766). 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

[16] The prosecutor did not assert at any point that he was striking this prospective juror because she was a female.

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.

The above facts establish that even if this Court were to review the state court record, not as a habeas claim of ineffective assistance of counsel, but, rather as an initial reviewing court on appeal as Petitioner suggests, the Batson challenge was properly rejected. There was no pattern of race based strikes and the prosecutor's race neutral reasons for juror 111 were not shown to be pretextual. Moreover, the lead counsel in King's case testified during the post-conviction hearing to the reasons she did not want juror 111 to sit on King's jury. Petitioner has not cited any case in which a trial counsel was held ineffective for failing to preserve a Batson challenge to a juror that lead counsel did not actually want sitting on the defendant's jury. For all of the forgoing reasons, King has failed to establish the state court decision was either contrary to, or, an unreasonable application of

clearly established Supreme Court precedent. Accordingly, this claim must be denied.

Ground Three: Whether Fla. Stat. § 945.10, Which Prohibits Mr. King From Knowing The Identity Of The Execution Team Members, Is Unconstitutional Under The Eighth And Fourteenth Amendments Of The United States Constitution?

This claim was raised below in state court in King's motion for post-conviction relief. It was denied based upon well-established state law which prohibits identification of execution team members. The Florida Supreme Court stated:

> Identity of Executioners
>
> King also asserts that section 945.10, Florida Statutes (2014), which exempts from disclosure the identity of those individuals who participate in the lethal injection procedure, is unconstitutional. This Court has rejected recent challenges to the statute's validity. *See Correll*, 184 So. 3d at 486 (citing *McLean v. State*, 147 So. 3d 504, 513 (Fla. 2014); *Darling v. State*, 45 So.3d 444, 447-48 (Fla. 2010); *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008)). Additionally, the Court presumes that those individuals charged with conducting an execution will perform their duties properly. *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007). Although King asserts that executions in Florida and elsewhere have gone awry, undermining the presumption in *Lightbourne*, several executions have been conducted in Florida with no reported problems. *See Correll*, 184 So. 3d at 486 ("[T]he recent executions of Johnny Kormondy, Chadwick Banks, Eddie Davis, John Henry, and Robert Hendrix have been carried out with no subsequent allegations of difficulties.").[fn6] Thus, we reject this claim as well.

> Fn6. The executions of Jerry Correll in October 2015 and Oscar Ray Bolin, Jr., in January 2016 were similarly completed with no allegations of improper conduct or incompetence.

King, 211 So. 3d at 888-89.

This claim is meritless. First, this claim is not cognizable in a federal habeas petition.[17] This claim does not challenge either the validity of King's convictions or his death sentence. Consequently, this claim must be dismissed.

In addition, King notably fails to cite any clearly established precedent from the Supreme Court which supports his position that he is entitled to the sensitive and protected information he seeks. Accordingly, he has plainly failed to establish that the decision below conflicts with, or, is an unreasonable application of clearly established Supreme Court precedent. Consequently, this claim must be dismissed or denied. See Wellons v. Comm'r, Ga. Dep't of Corr., 754 F.3d 1260 (11th Cir. 2014) (upholding Georgia's lethal injection secrecy act against constitutional challenges).

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[17] To the extent this claim can be viewed as a challenge to the State's lethal injection protocol, such a claim does not lie in habeas. See McNabb v. Comm'r Ala. Dept. of Corr., 727 F.3d 1334, 1344 (11th Cir. 2013) (An inmate challenging a state's method of execution claim is not attacking the validity of his confinement or sentence; consequently his challenge is not appropriate for habeas corpus but in a section 1983 lawsuit).

Ground Four: Whether The State Court's Finding That The Prosecutors Race Neutral Reasons For A Peremptory Strike Of A Minority Juror Was An Unreasonable Application Of, Or Contrary To Any Clearly Established Supreme Court Precedent?

This claim was raised on direct appeal and rejected by the Florida Supreme Court. In rejecting this claim, the Florida Supreme Court provided the following analysis:

> *Peremptory Strike of Minority Juror*
>
> 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.
>
> 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 v. State, 89 So. 3d 209, 229-31 (Fla. 2012).

First, much of King's present claim is procedurally barred in federal court. The Florida Supreme Court held that defense counsel's failure to challenge the factual basis for the strike - a pending drug charge - and his failure "to identify the race of the similarly situated jurors who were seated on King's jury[]" essentially waived the pretext issue. King, 89 So. 3d at 229-31. In other words, it was trial

counsel's duty to object to the reasons for the strike and cite an appropriate comparator. Trial counsel's failure to do so waived much of the argument King attempted to pursue on appeal in state court. Issues found procedurally barred in state court cannot be considered in this proceeding.[18] Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991); Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977); Mincey v. Head, 206 F.3d 1106, 1135-36 (11th Cir. 2000), cert. denied, 532 U.S. 926, 121 S. Ct. 1369 (2001). The claims which have been procedurally barred involve issues which, according to Florida law, should have been objected to at trial in order to be properly preserved for review.[19]

The only part of this claim which was properly exhausted in state court is the defense counsel's objection and the

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[18] The only exception to reviewing King's procedurally barred claim would be a showing of cause and prejudice pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977). Teague v. Lane, 489 U.S. 288, 298, 109 S. Ct. 1060, 1068 (1989). The burden for showing cause and prejudice is upon the petitioner. United States v. Frady, 456 U.S. 152, 102 S. Ct. 1584 (1982). The State would note that Petitioner has not even alleged cause or prejudice with regard to any of the defaulted claims in the petition. As such, it follows that he has not met that burden.

[19] There are two prerequisites to federal habeas review: 1) the applicant must have fairly apprised the highest state court with the appropriate jurisdiction of the federal rights allegedly violated, and 2) the applicant must have presented his claims in state court in a procedurally correct manner. Upshaw v. Singletary, 70 F.3d 576, 578-79 (llth Cir. 1995).

judge's acceptance of the drug charge as an acceptable race neutral reason for the strike. In this case, the state court identified the applicable Supreme Court precedent, Batson, and reasonably applied it to the facts of this case. Petitioner's claim is plainly meritless. Even if this Court were conducting *de novo* review of the state court ruling, the challenge in this case would be upheld as non-discriminatory. However, additional deference is due to the state court ruling on a juror challenge under the AEDPA. See Davis v. Ayala, ___ U.S. ___, 135 S. Ct. 2187, 2202 (2015) (reversing the Ninth Circuit's grant of relief on the basis of allegedly discriminatory strikes, noting the substantial deference accorded to state court rulings under the AEDPA).

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 was waived in state court below.

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), the Supreme Court established a three-step process for evaluating a defendant's objection to a peremptory challenge. The defendant must first make a prima facie showing that a challenge was based on race. If a defendant makes this showing, the prosecution must offer a race-neutral basis for the challenge. The prosecutor's explanation need not be persuasive or even plausible. Lastly, the court must determine whether the defendant has shown "purposeful discrimination." Batson, 476 U.S. at 97-98; accord Rice v. Collins, 546 U.S. 333, 338 (2006). The burden of persuasion remains with the opponent of the strike.[20] Rice, 546 U.S. at 338. "[A] federal habeas court can only grant [the] petition if it was unreasonable to credit the prosecutor's race-neutral

[20] Florida law mirrors Batson's three step requirements. In Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996), the court set forth a three step process to resolve an allegation of discrimination during the jury selection process: (1) A party objecting to the other side's use of a peremptory challenge on racial grounds must make a timely objection, identify the venireperson as a member of a distinct racial group and request the court to direct the challenger to offer a race neutral reason for the strike; (2) the court must ask the proponent of the strike to explain the reason for the strike and the proponent must come forward with a race-neutral explanation; and (3) if the reason is facially race neutral and the trial court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. Id.

explanations for the Batson challenge." Id. at 338-39. The state court factual findings are presumed correct on habeas review. 28 U.S.C. § 2254(e)(1). Further, the "AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" Felkner v. Jackson, 562 U.S. 594, 598, 131 S. Ct. 1305, 1307 (2011) (quoting Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010)).

Aside from the existence of any procedural bar, the record refutes that the prosecutor exercised his strike for an impermissible reason. When challenged, the prosecutor in this 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.

(A20/1764).

In response, the defense counsel simply stated "it is our position those are not sufficient reasons." (A20/1764-65). 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. (A20/1765). The judge found the fact her brother had a pending drug charge was a genuine race neutral reason for the strike. (A20/1766).

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 below, or, for that matter on appeal. 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." (A35/605). If defense counsel had reason to doubt the prosecutor's assertion that it was a pending felony charge, he should have made that objection below. The trial court cannot be faulted for accepting this reason when the defense failed to challenge it below. See Washington v. Roberts, 846 F.3d 1283, 1294 (10th Cir. 2017) (rejecting a Batson claim, holding

that "in light of the trial judge's rulings, based on an obvious familiarity with the jurors' responses, and the absence of any challenge on that score by defense counsel at trial, we cannot agree that the Kansas Supreme Court unreasonably determined facts.").

The prosecutor offered several valid, racially neutral reasons for his peremptory strike of juror 111. See Batson, 476 U.S. at 95, 106 S. Ct. at 1722 (noting the need for a judge to take into "account all possible explanatory factors in the particular case."). While the racial makeup of the panel is not known, 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, 3 So. 3d at 1120.

As noted, defense counsel at trial did not assert that any similarly situated juror with a felony charge or pending felony charge had not been challenged. That post-conviction

counsel's meticulous mining of questionnaires and voir dire from a made record has now added comparators, is of no consequence. Trial counsel did not make this argument below and apparently accepted the State's explanation. This Court may not grant relief on such arguments not properly preserved for appeal in the Florida Supreme Court. Moreover, even now, with the benefit of unlimited time and after meticulously mining the prospective juror questionnaires, King did not find a single appropriate comparator.[21] Melbourne, 679 So. 2d at 765 ("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 comparators mentioned by appellate counsel had the 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].

In conclusion, King has not shown the state courts interpretation of the facts was in error, much less clearly erroneous. Since the state court ruling itself is deferential

[21] Incredibly, while arguing that trial counsel should have challenged the strike to juror 111 on the grounds of gender, as well as race under Claim II above, some the comparators counsel now offers, 92 and 98, are women whom the State did not challenge. (Pet. Memo, Doc. 18 at 23).

to the trial judge's assessment of the strike, and this claim is viewed through the deferential lens of the AEDPA, this claim is plainly without merit. Accordingly, it should be denied.

Ground Five: Whether State Trial Court Evidentiary Rulings Violated King's Constitutional Rights To Present His Defense And To Fully Cross-Examine A Prosecution Witness?

This claim, asserting errors in evidentiary rulings by the trial court, was raised at trial and on direct appeal. In rejecting this claim below, the Florida Supreme Court provided the following analysis:

> *The Cross-Examination of Robert Salvador*
>
> In his first claim, King asserts that the trial court improperly limited the cross-examination of State witness Robert Salvador. We disagree.
>
> The record reflects that during cross-examination, defense counsel confronted Salvador with prior inconsistent statements. For example, when the police first visited Salvador's residence at 1:30-2:00 a.m. on January 18,[fn10] Salvador failed to inform the police that he had been with King the day before. Salvador later visited the North Port Police Department and told police that he was with King at the firing range on the 17th. Salvador also initially informed the police that when he arrived home on the 17th, he deleted all phone calls that he received from King that day; however, he later informed the police that there was one call from King that had not been deleted. Toward the end of cross-examination, the following dialogue occurred:
>
> > COUNSEL: Mr. Salvador, at the gun range on January 17th, 2008, you arranged to meet Michael King later that day; didn't you?

SALVADOR: I'm sorry. Can you repeat the question?

COUNSEL: Sure. The question is on January 17th, 2008, at the gun range, before you left, before you parted ways with Michael King, you arranged to meet him later that day; didn't you?

SALVADOR: No, sir.

COUNSEL: And didn't you go over to his home on Sardinia that day, January 17th, 2008?

SALVADOR: No, sir, I did not.

COUNSEL: And wasn't the purpose of going over there to bring a lawn mower and a gas can?

SALVADOR: Absolutely not.

COUNSEL: To help him cut his grass?

SALVADOR: No, sir.

COUNSEL: And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?

SALVADOR: No, sir.

COUNSEL: And, Mr. Salvador, didn't you fire the shot that killed and took the life of [D.L.]?

SALVADOR: Absolutely not.

After Salvador was excused as a witness, the prosecutor asked to address a matter outside of the presence of the jury. After the jury left the courtroom, the State argued that defense counsel did not have a good-faith basis for asking the inflammatory questions because of prior inconsistent statements made by King which had been suppressed by the trial court. The State argued the

"door was opened" by defense counsel's cross-examination because the jury would assume that defense counsel had received the factual information in the questions from King himself. The State argued that King's suppressed statements should now be allowed into evidence because they were inconsistent with the theory that Salvador shot [D.L.]. The trial court ultimately refused to admit King's prior statements. While the trial court concluded that merely asking Salvador if he shot [D.L.] was not improper, the judge instructed the jury to disregard the three other questions asked by defense counsel, stating that "there is no basis in fact from the evidence for the asking of said questions." Defense counsel subsequently moved for a mistrial based upon the instruction, which the trial court denied.

Limitations on the cross-examination of a witness are within the sound discretion of the trial court, and a ruling concerning such limitations will only be reversed if the aggrieved party demonstrates an abuse of that discretion. *See Kormondy v. State*, 845 So. 2d 41, 52 (Fla. 2003). The United States Supreme Court has held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). However, the Supreme Court has also explained that this opportunity is not without limitation:

> While the Constitution ... prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury....

> A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. *See, e.g.*, 41 C.J.S., Homicide § 216, pp. 56–58 (1991) ("Evidence tending to show the commission by another person of the crime charged may be introduced by accused when it is inconsistent with, and raises a reasonable doubt of, his own guilt; but frequently matters offered in evidence for this purpose are so remote and lack such connection with the crime that they are excluded"); 40A Am.Jur.2d, Homicide § 286, pp. 136–38 (1999) ("[T]he accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged.... [Such evidence] may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." (footnotes omitted)).

Holmes v. South Carolina, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

For a defendant to make statements in questions to introduce a theory of the possibility that someone else committed a crime, there must be sufficient evidence in the record to support that underlying theory. *See Cohen v. State*, 581 So. 2d 926, 927 (Fla. 3d DCA) (holding that where the defendant alleged that the victim met with a drug dealer days before the murder, the theory that "somebody else did it" was properly excluded where "there is insufficient evidence on the record to support its relevancy"), *review denied*, 592 So. 2d 679 (Fla. 1991). Other jurisdictions have also concluded that the other evidence introduced in the case must provide a clear link to the crime charged. In *Johnson v. United States*, 552 A.2d 513 (D.C. 1989), the District of Columbia Court of Appeals explained:

> "[B]efore evidence of the guilt of another may be deemed relevant and thereby admissible, the evidence must clearly link that other person to the commission of the crime...."
>
> What we mean by "clearly link" ... is proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense.... *[S]ee* 29 Am.Jur.2d, Evidence § 441 (1967) (defendant should not be able to "indulge in conjectural inferences that some other person might have committed the offense").

Id. at 516 (quoting *Brown v. United States*, 409 A.2d 1093, 1097 (D.C. 1979)). Similarly, in a case where the defendant contended that the murder of the victim was a revenge killing because the victim's father was a police informant, the Arkansas Supreme Court held that the trial court did not abuse its discretion in excluding this evidence where it only created an inference or conjecture as to the guilt of the third party, and "there was no direct or circumstantial evidence linking the drug dealers to the actual perpetration of this particular crime." *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28, 32 (2004).

Furthermore, questions asked during cross-examination must have a good-faith basis. *See Rhodes v. State*, 547 So. 2d 1201, 1205 (Fla. 1989). Recently, in *Gosciminski v. State*, 994 So. 2d 1018 (Fla. 2008), this Court ordered that a capital defendant receive a new trial where the State asked a question that lacked a good-faith basis in the evidence. In that case, the deceased victim's diamond ring was stolen. *See id.* at 1020. The defendant's fiancée stated that the defendant had given her an engagement ring that matched the description of the victim's ring, but the defendant later had the ring returned to him, and it had not been seen again. *See id.* at 1021. However, witnesses who had seen the ring were asked to select the ring out of a lineup (a replica of the original ring was created by a jeweler for use in

the lineup). *See id.* at 1021 n. 3. Witnesses who picked the ring out of the lineup noted that the ring they actually saw was old, dirty, and covered with a dark substance. *See id.* at 1024.

The defendant testified during trial and, on cross-examination, the prosecutor asserted in questions that the substance on the ring was the victim's blood and accused the defendant of not wiping the blood off the ring before showing it to others. *See id.* at 1023. The trial court overruled the defense objection because there was a considerable amount of blood around the victim's body and the victim's hands were in bloody areas. *See id.* at 1024. It could therefore be inferred that at the time of the murder, the jewelry that was removed from the victim's hand was covered with blood. *See id.*

On appeal, this Court concluded that the trial court had abused its discretion when it overruled the objection and allowed the questions. *See id.* We noted that there was no evidence introduced during trial that demonstrated that the black substance on the ring was blood. *See id.* Although the trial court viewed photographs that showed a considerable amount of blood around the victim, we held that it could not be inferred that the ring the defendant exhibited to the witnesses actually had blood on it. *See id.* This Court ultimately concluded that the State had improperly suggested to the jury in the form of a question that the substance on the ring was blood, and the State lacked a good-faith basis for asking this question. *See id.*

At issue in this case is whether the trial court abused its discretion in instructing the jury to disregard the questions which included statements by defense counsel that (1) Salvador had agreed to meet King later in the day on January 17, 2008; (2) Salvador actually went to King's house later that day; and (3) Salvador met King at Plantation Boulevard before [D.L.] was shot. Defense counsel presented no tangible evidence to support his contention that any of these events actually occurred. For example, to support these questions,

the defense could have presented independent evidence to support the statements in the questions. Instead, defense counsel relied upon Salvador's inconsistent statements with regard to other facts, contending they evidenced a guilty conscience due to Salvador's purported involvement in the shooting of [D.L.]. For two reasons, we conclude that the trial court did not abuse its discretion when it instructed the jury to disregard the questions.

First, Salvador's inconsistent statements and alleged evasiveness with regard to other facts do not provide a clear link to the death of [D.L.]. *See Johnson*, 552 A.2d at 516. A huge inferential leap would be required to equate these alleged prior inconsistent statements with guilt of murder. In fact, during trial, Salvador provided more logical explanations as to why he provided police different facts and engaged in what could be perceived as suspicious conduct, such as deleting King's phone calls. Salvador explained that when the police appeared at his house at 1:30–2:00 a.m. on the morning of January 18, they only asked Salvador if he knew who King was—not whether he had seen King that day—and the visit lasted only five minutes. Although Salvador was informed during the visit that King had been apprehended in relation to a kidnapping, Salvador testified that he did not believe the matter was that serious and assumed it was only a domestic disturbance between King and one of his girlfriends.

Furthermore, Salvador admitted that he had lied to his wife about going to the firing range because he was supposed to be working, and he did not want her to think that he was not working to support the household. Salvador also explained that he deleted the phone calls from King before the 1:30–2:00 a.m. visit by police because his wife did not like King and did not want Salvador to spend time with him. Finally, Salvador stated that during his meetings with the police, he felt as though he was being treated as a suspect (which he was until January 20):

> I was terrified at the time, of course, the situation of being that close to somebody that could have done something like that. So I'm not going to sit here and say that I wasn't afraid. I'm not going to sit here and say that I wasn't tongue tied, and it was very difficult for me to try to remember everything that had gone on.
>
> Thus, the fact that Salvador's actions and statements concerning other facts can be attributed to fear and also a desire to keep information from his wife demonstrates that there is no clear link between these actions and the murder of [D.L.].
>
> Second, the facts asserted in the questions asked by defense counsel, and defense counsel's theory of the murder, were highly implausible. Under that theory, Salvador arranged to meet King near Plantation Boulevard for the sole purpose of shooting someone whom he had never met. Moreover, during trial, Detective Chris Morales testified that Salvador had established he could not have been in the area of the crime at the time it occurred. Given the sheer unlikelihood and improbability of defense counsel's scenario—unsupported by any evidence whatsoever—plus the elimination of Salvador as a suspect in the murder based on independent facts established by law enforcement, we conclude that the trial court's decision to strike the three questions for lack of sufficient evidence in the record to support those allegations (or defense counsel's theory for that matter) was a reasonable and sound use of discretion. *See Cohen*, 581 So.2d at 927.

King v. State, 89 So. 209, 222-26 (Fla. 2012).

The Florida Supreme Court decision reasonably applied the facts to reject this claim below. The decision below was neither contrary to, nor an unreasonable application of clearly established Supreme Court precedent. Moreover, in

light of the overwhelming evidence establishing King's guilt, this alleged error, even if established, would not warrant habeas relief. Accordingly, this claim should be denied.

A. The state court evidentiary ruling did not prevent King from presenting a defense and did not constitute an abuse of discretion, much less a denial of due process in a ruling that does not conflict with any clearly established Supreme Court precedent.

Initially, the State questions the constitutional pretensions of this claim. The underlying claim is little more than a state evidentiary ruling on the propriety of three questions on cross-examination of a state witness. Trial court errors in the application of state evidentiary law generally are not cognizable as grounds for federal habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991); Marshall v. Lonberger, 459 U.S. 422, 438, n.6, 103 S. Ct. 843, 853 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). Trial court rulings on state procedure or evidentiary rules do not rise to the level of federal constitutional claims warranting relief in habeas corpus unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment. Estelle, 502 U.S. at 69-70.

King argues that he was prevented from presenting his defense by the trial court's rulings on cross-examination of a single state witness, Robert Salvador. The trial court disallowed three questions asked of Salvador on cross-examination and instructed the jury to disregard those questions. Of course, under well-established Florida law, the trial court is vested with considerable discretion in controlling the proper bounds of cross-examination. See Kormondy v. State, 845 So. 2d 41, 52 (Fla. 2003) (Limitation on the examination of a particular witness is within in the sound discretion of the trial court); Sanders v. State, 707 So. 2d 664, 667 (Fla. 1998) (a "trial judge has broad discretion in determining limitations to be placed on cross-examination."). Such discretion does not offend the constitution. See Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046 (1973) (noting that trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, or to limit marginally relevant areas of inquiry.); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and

reliability-even if the defendant would prefer to see that evidence admitted."). Under the facts of this case, no abuse of discretion has been shown, much less a constitutional violation meriting habeas relief.

An attorney must have a "good-faith factual basis" for asking questions of a witness on cross-examination. Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (citations omitted). In this case, defense counsel far exceeded the proper bounds of cross-examination of Mr. Salvador by asserting specific facts in leading questions for which counsel had no good faith basis, and which did not relate to, explain, or contradict any testimony presented on direct examination. See Gosciminski v. State, 994 So. 2d 1018, 1024 (Fla. 2008) (finding trial court erred in allowing state to insinuate that the victim's ring was covered in blood without a "good faith basis for asking this question or making such a suggestion to the jury.").

The following questions asked by defense counsel were improper: 1) "didn't you go over to his home on Sardinia that day, January 17th 2008?" 2) "And wasn't the purpose of going over there to bring a lawn mower and a gas can?" 3) "And didn't you meet him out on Plantation Boulevard during the evening hours of January 17th, 2008?" (A24/2587-88).

Defense counsel argued that it was Mr. Salvador's consciousness of guilt that led him to ask those questions. (A25/2601). However, the trial court did not see the connection between Mr. Salvador's initially "not being totally candid with law enforcement with your taking it to the next step saying, did you agree to meet the defendant, did you go to the scene of the crime, and did you kill Denise []? I don't see that connection. I really don't see that connection. Maybe you can enlighten me because I don't see it." (A24/2602). Defense counsel Meisner did not provide any basis for this line of questioning, simply repeating the question and noting that Mr. Salvador "denied it repeatedly." (A24/2602). The trial court, in response, stated "I still don't see the good-faith basis for you asking those questions." (A24/2602). Defense counsel argued that Mr. Salvador had been shooting with King and owned a 9 millimeter, and had testified that Mr. King did not leave with 9 millimeter ammunition. (A24/2602-03). Further, Mr. Meisner asserted that Mr. Salvador had "lied about his whereabouts to police" and that he had previously been to King's house on Sardinia. (A24/2603). Defense counsel strenuously asserted that he had not now opened the door to

admission of King's suppressed statements regarding the death of [D.L.].[22] (A24/2603-04).

The prosecutor noted that in all the transcripts of interviews and statements made by Mr. Salvador and in his deposition, there was no basis for asking any of these questions. "I still have no idea where the good faith basis was for this. And I would remind the Court that the law doesn't require the defendant to take the stand to open the door. The behaviour of defense counsel can open the door. And with that, I'll leave that in the Court's discretion." (A25/2612). One thing that bothered the prosecutor was the "specificity" of the questions, like "bringing a lawn mower and a gas can to come over to King's house" and suggests that

[22] The prosecutor argued that defense counsel's cross-examination had now opened the door for introduction of King's suppressed statements. The prosecutor maintained that once defense counsel asserted in cross-examination that Mr. Salvador later met King, and then shot and killed [D.L.], the lack of good faith or lack of factual basis, "is that he obtains that information from his client, that his client is telling him that that's what happened." "And, in fact, the tone and behaviour in which he yelled and pointed at the witness when he did it, was an implication that Mr. Meisner knew that to be true and that he had been told that by his client." (A25/2604-05). Consequently, the prosecutor asserted the defense had opened the door to King's suppressed statements that people he did not know, "wearing masks and gloves," kidnapped him and [D.L.] and that they are the ones who must have killed her, or, his prior statements that a "helicopter shot [D.L.]." (A25/2605). Those statements are obviously inconsistent with the "defendant knowing that Robert Salvador was the person who shot [D.L.]." (A25/2605).

the only person who would know that and the agreement is that it "suggests that that's what he told his attorney." (A25/2618).

The trial court again questioned the "good faith basis" for such questions. The court stated:

> Yeah, but the issue is really the good-faith basis matter.
>
> Quite frankly, Mr. Meisner, I do have some concerns in that regard. So I guess the question is what's the remedy? Because, obviously, I think you went beyond, number one, any legitimate inference from the evidence.

(A25/2618). In response, defense counsel Meisner stated: "Well, Judge. If you're considering - - you're asking me what a potential remedy is. I think I've established my position that I haven't opened the door. If you think otherwise, one possible remedy is simply striking it from the record and instructing the jury on that." (A25/2618).

The judge indicated he had to choose between two remedies, admitting the suppressed statements as requested by the State, or, the second option, suggested by defense counsel, striking those questions and instructing the jury to completely disregard it. The trial court thought the remedy proposed by the State would potentially create other issues down the road, "foreseeable but unforeseeable as well." (A25/2619). After some discussion, the trial court adopted the

remedy of an instruction, a middle ground approach that was initially suggested by defense counsel, as the better alternative to admission of King's suppressed statements. Ultimately, the judge instructed the jury to completely disregard those questions. (A25/2628-29).

King attempts to meet his AEDPA burden by submitting that the Florida Supreme Court's ruling conflicts with Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (2006). However, Holmes is easily distinguishable and therefore provides no basis to reverse the ruling of the state court.

The defendant in Holmes sought to introduce evidence that another man had attacked the victim, proffering at a pretrial hearing the testimony of witnesses who placed the other man in the victim's neighborhood on the morning of the attack, and the testimony of additional witnesses who testified at the pretrial hearing that the other man had either proclaimed the defendant's innocence or had actually admitted to having committed the crimes. Holmes, 547 U.S. at 323, 126 S. Ct. at 1730. The trial court excluded the defendant's evidence of third-party culpability. The South Carolina Supreme Court affirmed by referencing the strong evidence of the defendant's guilt without assessing the strength of the third party

evidence of guilt sought to be introduced by the defendant.

The United States Supreme Court explained why this holding was untenable:

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues. Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.

Holmes, 547 U.S. at 320, 126 S. Ct. at 1729. The Supreme Court noted that the defendant had challenged the credibility of much of the State's evidence, including its forensic evidence.

In this case, King had neither the quantity nor quality of third party culpability evidence that was at issue in Holmes. Indeed, King was not prevented from presenting a single piece of evidence on his own behalf. The three questions of Salvador simply had no factual basis unlike that **actual evidence** the defendant sought to introduce in Holmes. Thus, the holding in Holmes provides no support for King's argument in this case. To the contrary, Holmes, recognizes that "[w]hile the Constitution thus prohibits the exclusion of

defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." 547 U.S. 319, 326, 126 S. Ct. 1727, 1732 (citations omitted).

Essentially, King contends that he, unlike the State, does not need to have any good faith basis for his cross-examination questions. While true, courts have provided some leeway to defendants when the issue relates to a defendant's right to present a defense, it is not true, as he apparently contends, that no rules or restrictions apply to such evidence.[23]

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[23] As explained in Shields v. State, 357 Ark. 283, 288, 166 S.W.3d 28, 32 (Ark. 2004):

> This rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability; evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt. **There must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime**. *Burmingham, supra; Zinger, supra (citing People v. Kaurish*, 52 Cal.3d 648, 276 Cal.Rptr. 788, 802 P.2d 278 (1990))(emphasis added).

As for the merits of King's argument, it suffers from several fatal flaws. First, there was no evidence to support the facts defense counsel insinuated into his questions of Mr. Salvador. At no point did the defense present any evidence to support those facts, or, even an inference or logical supposition to support those facts from anything learned at trial or in pretrial discovery. When challenged, counsel failed to allude to, much less cite a statement, record, report, hearsay statement, or, even double hearsay statement from which the specific facts asserted in those three questions to witness Salvador could have been derived. Even when pressed by the trial court below, defense counsel did not cite any source for those facts, not even King. Nor, despite appellate counsel's best efforts, did he offer any factual basis for those questions on appeal in state court. Defense counsel below did not even assert he had unspecified or privileged sources for the facts contained in his questions. See People v. Dellarocco, 115 A.D.2d 904, 905, 496 N.Y.S.2d 801, 802 (N.Y.A.D. 3 Dept. 1985) (no abuse of discretion where trial court found no good-faith basis in fact for cross-examination questions where counsel "simply asserted that he had information from unspecified sources that the witness had been involved with drugs."). Consequently, it cannot be said

the trial court abused its broad discretion in instructing the jury to disregard questions which had no good-faith basis.

Nor was King denied the right to fairly cross-examine Salvador to assess his possible motive or bias as King contends here. (Pet. Memo, Doc. 18 at 30). The trial court in this case generously allowed defense counsel's accusatory question of witness Salvador to stand, alleging that Mr. Salvador, not King, killed the victim in this case. Since the defense did not present any evidence to support this allegation, the question and accusatory tone (A25/2604-05) by the defense counsel were improper. There was no evidence Mr. Salvador knew the victim, had any motive to kill her, that he was anywhere near the murder scene, or left any physical evidence in any of the relevant crime scenes [the victim's house, King's Camaro, King's house, or the burial site]. The trial court would have been well within its discretion to advise the jury to disregard that question as well.[24] See Cohen

[24] The State attempted to call Salvador's wife to testify after defense counsel accused Mr. Salvador of murder on cross-examination. The prosecutor planned to call Mrs. Salvador to testify that Salvador was home with her at the time of the murder but the defense objected on the grounds of a discovery violation. In what can only be described as a generous or cautious ruling, the trial court excluded her as a witness because she had not been listed prior to trial as a witness by the State. (A25/2707-10). Since Mr. Salvador cooperated with the investigation and there was ***no evidence*** that he was involved in King's kidnapping, rape and murder of the victim,

v. State, 581 So. 2d 926, 927 (Fla. 3d DCA 1991) (holding that "third party's possible culpability in the murder was properly excluded because there is insufficient evidence on the record to support its relevancy.") (string cites omitted); Johnson v. U.S., 552 A.2d 513, 518 (D.C. 1989) (where defendant sought to place blame on a witness against him the trial court did not err in restricting cross-examination of the witness and excluding evidence where defense failed to establish plausible or reasonable link between witness and the charged murder.).

What hurt the defense in this case, and, not unfairly, was the overwhelming amount of forensic and eyewitness testimony establishing King's guilt, not the court disallowing three questions of a single state witness. And, defense counsel was charitably allowed to accuse Mr. Salvador of murder on the witness stand, and, again, argue this theory to the jury without any factual support.

Another glaring flaw in King's argument is that since the defense presented not a scintilla of evidence during the trial from which the jury could find, much less infer the facts contained in defense counsel's questions, and, since Salvador emphatically denied the factual assertions contained in those

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the State obviously had no reason to call her and present evidence of Mr. Salvador's location at the time of the murder.

questions, the trial court's instruction to disregard those questions cannot have prejudiced the defense. The jury was properly instructed by the judge that their verdict must be based upon the **evidence** introduced during the trial. (A21/1887; A27/3045). There was no evidence presented to support any of the 'facts' contained in those questions.[25] In other words, the judge's instruction was superfluous because there was no evidence from which the facts asserted in those questions could have been found, or, even, inferred by the jury. Consequently, it cannot be said King suffered any prejudice as a result of the trial court's instructions to disregard those questions.

In an attempt to buttress his argument, he contends that the trial court in this case impermissibly commented upon defense counsel's credibility. King's argument is factually inaccurate. The trial court did advise the jury as discussed above to disregard those three questions and answers. The court also advised the jury: "I'm asking you to disregard such because there is no basis in fact from the evidence or the

[25] Salvador last had contact with King in the early afternoon of January 17th when King left the gun range in his Camaro. (A24/2550, 2587). During the course of his investigation Detective Morales confirmed through receipts and video [Home Depot] Salvador's whereabouts on the afternoon and evening of the charged offenses so that "he could not possibly be in that area at the same time." (A21/1887).

inference from the evidence for the asking of said questions." (A25/2629). The trial court's brief instruction did not comment upon defense counsel's credibility. The court did not chastise or otherwise condemn trial defense counsel in front of the jury. In any case, with *or without the court's inst*ruction the jury was obviously aware that no evidence supported the facts contained in those questions. Accordingly, the trial court's instruction was reasonable and no state court evidentiary error has been shown, much less a violation of Due Process.

Finally, King makes an unrelated burden shifting argument, referencing the prosecutor's closing argument. (Pet. Memo, Doc. 18 at 35). However, King fails to credibly link the comments to any claim of error relating to the trial court's disallowance of those three questions of Mr. Salvador. King's cryptic argument does not show that any improper argument was made by the State in closing, much less a prejudicial burden shifting comment.

In closing argument, the prosecutor properly addressed defense counsel's attempt to shift blame for the murder upon Mr. Salvador or some other, unspecified party. The law does not require the prosecutor to sit, deaf dumb and blind in closing argument. See McKenney v. State, 967 So. 2d 951, 955

(Fla. 3d DCA 2007)(rejecting claim that the prosecutor could not respond to defense counsel's "rhetorical question and comments to the jury during the State's closing" noting that "[t]he defense essentially asks that the State be prohibited from answering the question first posed by defense counsel..."). Since the defense counsel in opening statement told the jury that "the evidence" would "show" "the person who fired that single shot, the person who ended her life was not Michael King" (A21/1843-44) and in cross-examining Mr. Salvador, actually accused him of murdering the victim, the State was certainly allowed to ask the jury to consider the fact that no evidence presented during the trial supported such a theory. See Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003) (while it is not permissible to comment on the defendant's right to remain silent, "it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the State's response."); Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995) (Prosecutor's argument asking the jury to consider "what fact, what testimony, what anything have you heard" to contradict the State's evidence was not a comment on the defendant's failure to testify but merely asked "the jury to consider the evidence presented."), receded from on other

grounds, Topps v. State, 865 So. 2d 1253 (Fla. 2004); White v. State, 377 So. 2d 1149, 1150 (Fla. 1979) ("It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue.") (citations omitted).

B. In light of the overwhelming evidence of King's guilt, if any error can be discerned from the state court evidentiary ruling, the error was clearly harmless under *Brecht*.

Assuming *arguendo*, some constitutional error can be discerned in this matter, given the uncontradicted and overwhelming evidence of King's guilt, the error was clearly harmless. In Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993), the Supreme Court set forth the standard for relief where error is determined, on habeas review, to exist. "The test under Kotteakos is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, 507 U.S. at 637 (quoting Kotteakos v. U.S., 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). See Jamerson v. Secretary, Department of Corrections, 410 F.3d 682, 687-88 (11th Cir. 2005) (noting that "habeas proceedings

are not forums to relitigate state trials and that 'habeas proceedings are secondary and limited' and that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). King's argument before this Court provides conspicuously little argument in an attempt to show the alleged error below was harmful to the outcome of this case.

It must be remembered that King's assignment of error encompasses the trial court's instruction to disregard a total of **three questions** to a single state witness, and, in instructing the jury, redundantly perhaps, that the reason it so instructed them is that there were no facts or factual inferences to support those questions. This can hardly be considered an important or significant matter in this capital trial in which King was caught red-handed leaving the vicinity of [D.L.]'s fresh burial site, with compelling and uncontradicted eyewitness and physical evidence establishing that he kidnapped, raped, and murdered Denise. The victim was last seen and heard [911 call] alive in King's control, screaming and pleading for help, and in his car after having been taken from her home and her two young children. The State presented such a large amount of evidence establishing King's

guilt that calling the evidence against Mr. King overwhelming would be an understatement. See Trepal v. Sec'y, Florida Dept. of Corr., 684 F.3d 1088, 1119 (11th Cir. 2012) (noting that a substantial and injurious effect on the verdict from a constitutional error is less likely when the State's evidence is strong or overwhelming).

DNA testing confirmed that sperm cells inside of [D.L.]'s vagina and on her shorts found at the burial site, matched King at all 13 loci, to the exclusion of all other person's on the planet, or 1 in one quadrillion Caucasians.[26] (A24/2465-67). [D.L.]'s burial site was found within hours of her disappearance and her body had fresh bruising and injuries to her inner thigh, vagina, and anus which were consistent with forcible rape. (A26/2903, 2922). [D.L.] made a 911 call **from King's cell phone**, pleading for help, and begging to see her family again. (A23/2239-41). King's voice was identified on that same 911 call, demanding his phone. (A21/1978,1998). King was apprehended in his car with that same phone, in the vicinity of the burial site, still wet and muddy from digging

[26] The victim's boxer shorts, found a short distance from her burial site, contained a mixture stain, from which King's sperm cells separated and positively matched to King. The DNA match yielded population statistics of "one person in 3.5 trillion individuals." (A25/2756).

the hole in which [D.L.]'s body was ultimately found. DNA and fingerprint evidence established that Denise was held in King's car. The physical evidence included DNA from blood and hair, matched conclusively to [D.L.],[27] and [D.L.]'s palm print on the driver's side window, and her wedding/engagement ring was found on the back seat of King's car when King was apprehended. The evidence indicated that King's car was at least partially spattered by blood and fluid from [D.L.] as a result of the fatal gunshot wound. [D.L.]'s eyeball disintegrated as a result of the gunshot and blood on the hood of King's car consistent with [D.L.]'s was found, as well as head hair and a gelatinous material, consistent with the mucous or viscous material contained in a human eyeball. (A26/2895-96).

DNA evidence also establishes that Denise was held in King's home, the likely scene of the sexual battery. Hair,

[27] Hair from the back seat of King's car matched [D.L.] at all 13 locations, or the odds of it coming from anyone other than [D.L.] leaving that hair was one in 110 trillion Caucasians. (A24/2472). A blanket recovered from the back seat of King's Camaro had a blood stain which matched [D.L.]'s DNA profile to the exclusion of all other people on the planet." (A25/2748). Blood on the hood of King's car, also matched [D.L.] at 10 of 13 locations, sufficient to conclude that the blood came from [D.L.]. (A24/2472-73). Similarly, a swabbing of material or fluid on the bra of King's Camaro matched [D.L.]'s profile at 8 of 13 locations, sufficient for the analyst to conclude it came from [D.L.]. (A24/2473-74).

found on silver duct tape in King's kitchen trash can was matched to [D.L.] at all 13 locations, and therefore to the exclusion of all other people on the planet, or, one in 110 trillion Caucasians.[28] (A24/2470-71). Duct tape consistent with this tape was found on and around the hair on [D.L.]'s head when her body was found. Bruising along [D.L.]'s wrist suggests that her hands were bound with duct tape. (A26/2867). A roll of silver duct tape was found on the kitchen counter of King's house. This roll of tape was consistent with the piece found in the trash, and another wadded up piece found in King's master bedroom (A23/2270-71), as well as the duct tape found on [D.L.]'s body.[29] Blood stains or mixtures from a blanket on King's bed and carpeting in his master bedroom were consistent with [D.L.] as well as sperm matched to King.[30]

None of this forensic evidence was challenged or

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[28] Pursuant to stipulation, the parties agreed that "the hair tie found at Michael King's house on Sardinia Avenue is the same type as hair ties worn by [D.L.]" (A23/2338).

[29] The tape had the same class characteristics, color, width, "warp yarns" running in the same direction and spacing of the "fill yarns." (A24/2496).

[30] The blanket in King's master bedroom had a blood stain mixture, consistent with King and [D.L.]'s profiles. (A25/2751). That blanket also contained a semen stain which matched King, with a frequency of "one person in every 1.1 quadrillion." (A25/2752). An area of carpet which was tested revealed a stain with DNA consistent with [D.L.]'s profile, with a population frequency of 1 in every 19,000 individuals. (A25/2753).

countered by King, much less an innocent explanation offered. The physical and forensic evidence alone was more than sufficient to establish King's guilt. Nonetheless, compelling eyewitness testimony also established that King acted alone in kidnapping, raping, and murdering [D.L.].

[D.L.]'s neighbour identified a green Camaro with a dark cover over its headlights [matching the description of King's Camaro], circling the block slowly four or five times on the afternoon of her disappearance. The car parked in the victim's driveway and the sole occupant of the car had a physical description consistent with King's. (A21/1928, 1931, 1937).

Mr. Muxlow, King's cousin, after unknowingly providing the implements King would use for disposing of [D.L.]'s body [flashlight and shovel], heard Denise screaming out for help from King's car. Muxlow observed King push [D.L.]'s head down from the back seat and take off in his car. (A21/1963).

Two witnesses observed King in his Camaro in the vicinity of the burial site, shortly prior to her murder and heard Denise screaming for help. Both, positively identified King as the driver of the Camaro the screams were heard coming from. (A21/2007-08; A22/2116). One, in addition to hearing "horrific" screams, observed [D.L.]'s hand banging on the

window of King's car, "very loudly." (A22/2099).

Finally, King was pulled over by police in the vicinity of the burial site, alone, his jeans were still wet and covered in dirt and sand, fresh from burying [D.L.].[31] The victim was found some four feet deep and she was lying in water. King's car still had the shovel, flashlight, and gas can that Muxlow had lent him earlier that evening. The shovel had dirt and sand on it and was consistent with the rounded shovel that was used to dig [D.L.]'s grave. (A25/2790-91).

In conclusion, there is no conceivable view of the evidence in this case for which defense counsel's three cross-examination questions, without any record or, for that matter, non-record factual basis, could have altered the outcome of this trial. Balanced against the overwhelming and uncontradicted evidence of King's guilt in this case is an alleged error so insignificant, that it cannot have contributed to the verdict, much less be said to have had a substantial and injurious effect. See Hammonds v. Comm'r, Alabama Dep't of Corr., 15-11797, 2017 WL 4675707, at *8 (11th

[31] The fact that King's camouflage shirt had no blood on it when he was apprehended is explained by the fact he changed his shirt. Muxlow testified that when King borrowed his shovel, flashlight, and gas can, King was wearing a white shirt. (A24/2429). King's white shirt, like the murder weapon, has not been found.

Cir. Oct. 17, 2017) ("Where the State's evidence was overwhelming, the constitutional error is unlikely to have substantially influenced the jury's verdict.") (citing Hill v. Turpin, 135 F.3d 1411, 1417 (11th Cir. 1998)). Accordingly, habeas relief is not warranted.

Ground Six: Whether King's Death Sentence Is Unconstitutional Under Hurst V. Florida, 136 S. Ct. 616 (2016)?

This claim was raised on appeal from the denial of King's initial motion for post-conviction relief. After supplemental briefing and oral argument, the Florida Supreme Court issued an opinion denying King relief. The court found any Hurst error harmless in this case. The court provided the following analysis:

> During the pendency of King's postconviction appeal, the United States Supreme Court issued *Hurst v. Florida*, in which it held that Florida's capital sentencing scheme violated the Sixth Amendment. *See* 136 S.Ct. at 621. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. On remand from the Supreme Court, we held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State* (*Hurst v. State*), 202 So. 3d 40, 53 (Fla. 2016). We further held that a unanimous jury recommendation is required before

a trial court may impose a sentence of death. *See id.* Finally, we determined that a *Hurst* error is capable of harmless error review. *See id.* at 66–67. Recently, in *Mosley v. State*, Nos. SC14-436 & SC14-2108, 209 So. 3d 1248, 2016 WL 7406506 (Fla. Dec. 22, 2016), we further held that our decision in *Hurst v. State* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). *See Mosley*, 209 So. 3d at 1273–74, 2016 WL 7406506, at *18 ("We conclude that ... *Hurst [v. State*] should be applied to ... defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*.").

Accordingly, because King's sentence became final on October 15, 2012, when the United States Supreme Court denied King's petition for certiorari, *King v. Florida*, 133 S.Ct. 478, we must consider whether any *Hurst* error in King's penalty phase proceedings was harmless beyond a reasonable doubt. In *Hurst v. State*, we explained the standard by which harmless error should be evaluated:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. *State*, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.] DiGuilio*, 491 So. 2d [1129,] 1137 [(Fla. 1986)], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a Hurst error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

DiGuilio, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

Id. at 68 (alteration in original). Finally, in *Davis v. State*, 207 So. 3d 142, 41 Fla. L. Weekly S528 (Fla. Nov. 10, 2016), we determined that a *Hurst* error was harmless beyond a reasonable doubt and reiterated that "[a]s applied to the right to a jury trial with regard to the facts necessary to impose the death penalty, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." *Id.* at 174, 41 Fla. L. Weekly at S539.

When the jury recommended that King be sentenced to death, it did not make specific factual findings with regard to the existence of any aggravating circumstances, nor did it make any findings with regard to the relative weight of the aggravating and mitigating circumstances. Therefore, we conclude that his sentence was contrary to *Hurst v. Florida.*

However, as in *Davis*, we conclude that this is one of those rare cases in which the Hurst error was harmless beyond a reasonable doubt. We initially must emphasize the unanimous jury recommendation of death in this case. The jury reached this unanimous recommendation even though it was specifically

instructed, "In these proceedings it is not necessary that the advisory sentence of the jury be unanimous." Thus, this unanimous recommendation begins a foundation for us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. The instructions that were given informed the jury that it needed to determine whether the aggravation outweighed the mitigation before it could recommend a sentence of death:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.
>
> Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that you find exist.
>
> ....
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> ....
>
> If, after weighing the aggravating and mitigating circumstances, you determine that the aggravating circumstances found to exist sufficiently outweigh the mitigating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However,

> regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.

From these instructions, we can further conclude that the jury unanimously made the requisite factual findings to support a death sentence before it returned the unanimous recommendations. Although the record indicates that the jury did ask the trial court whether a juror could recommend death "without agreeing to all four of the aggravating circumstances beyond a reasonable doubt," the jury ultimately returned a unanimous verdict based on the conclusion of all twelve jurors that sufficient aggravating circumstances existed that outweighed the mitigating circumstances. Considering the effect on the fact-finder as the central focus of our Hurst harmless error analysis, we further note that when King first appealed his sentence to this Court, he did not challenge the finding of any aggravating circumstances found below.[fn7]

Finally, the egregious facts of this case and both the evidence and how it was presented further resolve any doubt that a rational jury would have unanimously found that there were sufficient aggravating circumstances that outweighed the mitigating circumstances. As we previously stated in King's direct appeal:

> King abducted a young mother from her home, leaving her two children—an infant and a toddler—unattended. He transported her to his house where she was bound with duct tape, raped, and sodomized. He then acquired a shovel, drove her to an abandoned construction [site], and shot her in the head. Given the angle of the entrance wound, and the fact that a substance appearing to be ocular fluid was found on the car, it is logical to conclude that [D.L.] was not blindfolded at the time of her shooting, and she saw the gun as it was placed against her head. Furthermore, because [D.L.] was abducted from her home between 1 and 2 p.m. on the 17th, and her 911 call was

> made at 6:14 p.m., it can be deduced that [D.L.] was held captive by King for over four hours. As noted in the sentencing order, rarely is a court able to experience what a deceased victim encountered. In this case, anyone who listens to the 911 call placed by [D.L.] will hear the abject terror she was experiencing plus her panicked, frantic pleas to the 911 dispatcher (for help) and King (to be returned home). This murder was unquestionably cold and cruel.

King, 89 So. 3d at 232. Here the evidence captured and presented placed the jury in the terrible circumstances imposed by King. Moreover, in the course of that 911 call, not only does the listener hear [D.L.]'s fear, the listener also hears King state multiple times that he had intended to release [D.L.] until she called out to King's cousin, Harold Muxlow, to call the police. *See id.* at 213–14. Multiple witnesses observed a woman screaming for help from a car driven by King, one of whom described the screaming as "[h]orrific" and "terrified." *Id.* at 213–16. Thus, the evidence of the HAC, CCP, and avoid arrest aggravating circumstances—which King did not contest on direct appeal—was overwhelming and essentially uncontroverted.

Against these facts, in a light most favorable to King the jury was presented mitigating evidence that addressed that: (1) King suffered a childhood sledding accident, which affected his judgment, risk-taking, and behavior; (2) King displayed unusually aggressive behavior toward family members when he was a teenager; (3) King suffered from headaches and other neurologic symptoms as an adult; (4) as an adult, King tried to live a stable, successful life, although he struggled with foreclosure; (5) King did not receive any disciplinary reports while he was incarcerated; and (6) King was placed in special education classes as a child. Id. at 219–20. Additionally, the jury considered King's intellectual functioning. Id. at 220. Ultimately, however, as emphasized above, the jury unanimously recommended a sentence of death.

> *Id.* at 221.[fn8]
>
> Although the Supreme Court in *Hurst v. Florida* cautioned against substituting the jury recommendation for the factual findings required by the Sixth Amendment,[fn9] we conclude that this is one of the rare cases in which a *Hurst* error is harmless beyond a reasonable doubt. We reach this conclusion in light of the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State. If any case were to present us with a harmless *Hurst* error, this is it.

King v. State, 211 So. 3d 866, 889-93 (Fla. 2017) (footnotes omitted).

King has not demonstrated that the state court ruling was either contrary to, or an unreasonable application of clearly established Supreme Court precedent. King's case was final on direct appeal on October 15, 2012, when the Supreme Court denied certiorari. Hurst v. Florida is not retroactive under federal law and has no application to King's case. In addition, the jury necessarily found King eligible for a death sentence by their guilt phase findings that King had committed the separate offenses of sexual battery and kidnapping. Finally, the jury recommendation in this case was unanimous, and any Hurst error was harmless, as determined by the Florida Supreme Court.

A. There was no constitutional violation.

King may not ask this Court to reverse and overturn the Florida Supreme Court's harmless error analysis to enforce a violation of state decisional law. There simply was no federal constitutional violation in King's case. Accordingly, habeas relief must be denied.

In King's case, a unanimous jury convicted him of sexual battery and kidnapping, and based on these convictions, he was indisputably eligible for his death sentence. Thus, his eligibility for a death sentence is supported by unanimous jury findings unlike Hurst. Hurst was in a distinctly different position from King. Hurst was convicted of first-degree murder, and did not have a prior criminal history or a contemporaneous felony conviction with the murder. Hurst v. State, 147 So. 3d 435, 440-41 (Fla. 2014). Accordingly, Hurst presented the Supreme Court with a 'pure' claim under Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), where the jury neither gave a unanimous recommendation nor were any of the established aggravating circumstances identifiable as having come from a jury verdict. Hurst, 147 So. 3d at 445-47.

The changes that the Florida Supreme Court made to the death penalty in Hurst v. State were not mandated by the holding in Hurst v. Florida. Hurst v. Florida did not require

a jury, rather than a judge, to find *every* aggravating circumstance, but only such *predicate* aggravators as are sufficient to render a defendant eligible for the death penalty. Likewise, Hurst did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and whether mitigation is sufficiently substantial to warrant leniency. Hurst does not hold there is a constitutional right to any jury sentencing. In Florida, a defendant is eligible for a capital sentence if at least one aggravating factor applied to the case. See Ault v. State, 53 So. 3d 175, 205 (Fla. 2010); Zommer v. State, 31 So. 3d 733, 752-54 (Fla. 2010). Thus, King's eligibility for a death sentence is supported by unanimous jury findings unlike Hurst.[32] See Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2162-63 (2013) (this Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.").

[32] Prior to the Court's decision in Hurst, the Florida Supreme Court had consistently rejected Ring claims in cases like this one, where the defendant is convicted of a qualfying contemporaneous felony set forth as an aggrvator under Florida's capital sentenincg scheme. See Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012) (noting that where jury finds a qualifying felony conviction as charged in the indictment, there is no constitiutional error under Ring).

Based on the Supreme Court's jurisprudence, it is clear that the only factual finding necessary to impose the death penalty is a conviction for murder plus the addition of an aggravating factor. Finding additional aggravators does not expose the defendant to any higher or additional penalty. Nor does the weighing of aggravation and mitigation. Supreme Court precedent does not require that the jury make determinations regarding the sufficiency of the aggravators or their relative weight in comparison to the mitigation, or whether death should be imposed. Those determinations are made by the sentencing court in the course of exercising its discretion with regard to sentence selection.[33] See United States v. O'Brien, 560 U.S. 218, 224, 130 S. Ct. 2169, 2174-75 (2010) (recognizing that Apprendi does not apply to sentencing factors that merely guide sentencing discretion without increasing the applicable range of punishment to which a defendant is eligible). See also State v. Belton, 149 Ohio

[33] In cases where the Florida Supreme Court has applied Hurst – either those cases in the pipeline or in those cases where the convictions were not final when Ring issued, the court has included as an "element" the weighing of aggravating and mitigating factors. Expansion of the Court's ruling in Hurst to include weighing [selection of the sentence] has effectively resulted in a rule requiring reversal in any case lacking a unanimous death recommendation. See, e.g., Dubose v. State, 210 So. 3d 641, 657 (Fla. 2017) ("We have also determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless.").

St.3d 165, 74 N.E.3d 319, 337 (Oh. 2016) ("[f]ederal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring.); In re Bohannon, 222 So. 3d 525, 532 (Ala. 2016) (noting that "Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment" and that [. . .] "Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible[.]").

Significantly, the Supreme Court's recent decision in Jenkins v. Hutton, 582 U.S. ___, 137 S. Ct. 1769 (2017), confirmed the constitutionality of an Ohio death sentence based on a jury's guilt-phase determination of facts. In Jenkins, the lower court ordered a new sentencing trial because, in that court's view, the penalty phase jury failed to make the necessary factual findings to support a death sentence. However, because the necessary aggravating factors were established beyond a reasonable doubt by the jury during the guilt phase, this Court reversed and reinstated the death sentence. Like Florida, a single aggravating factor under Ohio

law is sufficient to render a capital defendant death eligible. Because the requisite aggravators were established during the guilt phase, Jenkins entered the penalty phase with eligibility for a death sentence firmly established beyond a reasonable doubt. This Court concluded that the federal habeas court erred in concluding that inadequate factual findings invalidated his death sentence.

The Eleventh Circuit Court of Appeals provided a similar analysis in rejecting a claim that Ring as applied in Hurst invalidated a defendant's death sentence in Alabama. Waldrop v. Comm'r, Alabama Dep't of Corr., 15-10881, 2017 WL 4271115, at *20-21 (11th Cir. Sept. 26, 2017)(unpublished). In denying habeas relief, the court stated:

> The Alabama Supreme Court did not unreasonably apply *Ring* when it rejected Mr. Waldrop's Sixth Amendment claim. Mr. Waldrop became death-eligible under Alabama law when the jury convicted him of murder during a robbery in the first degree. The commission of a capital offense during a robbery is an aggravating circumstance under § 13A-5-49. As explained above, Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict. *See* § 13A-5-45(e). Mr. Ring and Mr. Hurst, by contrast, were not death-eligible based on their convictions alone. In their cases, it was the trial court's independent finding of a statutory aggravating factor that exposed them to a higher maximum punishment of death, rather than merely life imprisonment. Because the situation here is

materially distinguishable from those presented in Ring and its progeny, the Alabama Supreme Court's decision was not contrary to and did not involve an unreasonable application of Supreme Court precedent.[fn7]

Mr. Waldrop also argues that *Ring* requires more than a jury finding of a statutory aggravating factor at the guilt phase. He contends that the weighing of aggravating and mitigating factors must be done by the jury. *See* Supp. Br. of Appellant at 7–9. The Alabama Supreme Court disagreed with that argument, and we cannot hold otherwise unless its application of *Ring* was so unreasonable that no "fairminded jurist" could agree with the conclusion. *See Richter*, 562 U.S. at 101, 131 S.Ct. 770.

The Alabama Supreme Court's conclusion here—that the Sixth Amendment is satisfied under *Ring* if a jury finds a qualifying aggravating factor at the guilt phase—is one that fairminded jurists could agree with. Indeed, it is consistent with Justice Scalia's explanation of the holding in *Ring*:

> What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those [s]tates that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612–13, 122 S.Ct. 2428 (Scalia, J., concurring). It is also consistent with the rationale of Hurst, which applied *Ring*. *See Hurst*, 136 S.Ct. at 624 (explaining that the Sixth Amendment does not allow the trial court "to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty") (emphasis added).

> More importantly, Mr. Waldrop's alternative argument that the Sixth Amendment forbids the trial court from independently weighing the aggravators against the mitigators is foreclosed by *Lee v. Comm'r, Alabama Dept. of Corrs.*, 726 F.3d 1172 (11th Cir. 2013). In *Lee*, as here, an Alabama jury found the existence of an aggravating circumstance when it convicted the defendant of murder during the course of a robbery. *See id.* at 1197-98. We concluded that "[n]othing in *Ring*—or any other Supreme Court decision—forbids the use of an aggravating circumstance implicit in a jury's verdict." *Id.* at 1198. We went on to hold that "*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances." *Id. See also Ring*, 536 U.S. at 597 n.4, 122 S.Ct. 2428 ("[Mr. Ring] does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator.").
>
> The only distinction between this case and *Lee* is that here the trial court found an additional aggravating factor (that the crime was heinous, atrocious, and cruel) not found by the jury. But Ring concerned death eligibility. Once Mr. Waldrop was convicted, the jury had already found the only "aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609, 122 S.Ct. 2428. The trial court's finding of an additional aggravating circumstance did not increase the maximum penalty to which Mr. Waldrop was exposed, and therefore falls outside the clearly established holding in *Ring*.

In sum, aside from the question of retroactivity and harmlessness under state law, it is clear that there is no underlying constitutional error in King's case. The unanimous verdict by King's jury establishing his guilt of contemporaneous offenses was clearly sufficient to meet the

Sixth Amendment's factfinding requirement, and he was properly rendered eligible for a death sentence at that point. There is simply no underlying constitutional violation to remedy. Habeas relief must be denied.

B. *Hurst* is not retroactive to King under *Teague*.

King may not ask this Court to enforce a retroactivity ruling based upon state law. In Asay v. State, 210 So. 3d 1 (Fla. 2016), the Florida Supreme Court held that any case in which the death sentence was final before Ring v. Arizona, 536 U.S. 584 (2002), which was decided on June 24, 2002, would not receive relief based on Hurst v. Florida. In making its decision, the court recognized that its retroactivity test of Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)[34] "provides more

[34] As explained by the Florida Supreme Court:

> Under *Witt*, a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931. To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or, alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall*[fn16] and *Linkletter*."[fn17] *Id.* at 929. The *Stovall/Linkletter* test requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of

expansive retroactivity standards than those adopted in Teague." Asay, 210 So. 3d at 15 (citing Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005)) (emphasis in original). Subsequently, the Florida Supreme Court issued an opinion in which it granted retroactive application of Hurst v. State, 202 So. 3d 40 (Fla. 2016), under a state retroactivity analysis to those cases which were decided following Ring. Mosley v. State, 209 So. 3d 1248, 1276 (Fla. 2016) ("We conclude that under a standard Witt analysis, Hurst should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in Ring.").[35] This state law decision does not create a federal

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> the new rule would have on the administration of justice. (citations and footnotes omitted).

Asay v. State, 210 So. 3d 1, 16-17 (Fla. 2016), cert. denied, 16-9033, 2017 WL 1807588 (U.S. Aug. 24, 2017).

[35] The dissent in Mosley noted that following this Court's decision in Hurst v. Florida, the court expanded its understanding of what constituted a Sixth Amendment error under Ring and then gave short shrift to the State's competing interests under its retroactivity analysis. Justice Canady concluded:

> The new rule articulated in *Hurst v. Florida*—which simply requires that the jury find an aggravator—is an evolutionary refinement in the law that does not cast doubt on the veracity or integrity of penalty phase proceedings resulting in death sentences that are now final. Nothing in our retroactivity jurisprudence warrants setting aside the State's weighty interest in the finality of these sentences. The State's reliance on the old rule—as

constitutional right to retroactive application of any decision of the Supreme Court.

The Supreme Court has held that, in general, a state court's retroactivity determination is a matter of state law, not federal constitutional law. Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029 (2008). This was a matter of state law, and King cannot petition this Court to enforce a mere violation of state decisional law.

That the Florida Supreme Court held that Hurst was retroactive to King's case, does not mean that King can enforce that retroactivity ruling in federal court. See Asay v. State, 210 So. 3d 1 (Fla. 2016) and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. Griffith v. Kentucky, 479 U.S. 314, 323, 107 S. Ct. 708, 713 (1987). However, once a criminal conviction

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> articulated in *Hildwin* and *Spaziano*—was undeniably immense and entirely in good faith. Based on an indefensible misreading of *Hurst v. Florida* and a retroactivity analysis that leaves the *Witt* framework in tatters, the majority unjustifiably plunges the administration of the death penalty in Florida into turmoil that will undoubtedly extend for years. I strongly dissent from this badly flawed decision.

Mosley, 209 So. 3d at 1285 (Canady, J. dissenting).

has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[36] Schriro v. Summerlin, 542 U.S. 348, 351, 124 S. Ct. 2519, 2522 (2004).

As the Eleventh Circuit Court of Appeals recently recognized, "[n]o U.S. Supreme Court decision holds that its Hurst decision is retroactively applicable." Lambrix v. Secretary, DOC, 872 F.3d 1170, 1182 (11th Cir. 2017), cert. denied, 2017 WL 4456332, 86 USLW 3175 (U.S. 2017). Indeed, the Eleventh Circuit, in Lambrix v. Secretary, Fla. Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), has recognized that "under federal law Hurst, like Ring, is not retroactively applicable on collateral review". Summerlin controls and mandates that Hurst v. Florida is not retroactive

[36] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. Teague v. Lane, 498 U.S. 288, 310-13, 109 S. Ct. 1060 (1989); Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934 (1989) (abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212 (1990); Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257 (1990)).

in federal courts under Teague.

In Schriro v. Summerlin, the Supreme Court directly addressed whether its decision in Ring v. Arizona was retroactive. Summerlin, 542 U.S. at 349 holds that the decision in Ring was **procedural** and non-retroactive.

What King is really arguing in this case is that the State court erred in its application of the State's more lenient rule of retroactivity. Such a ruling is not enforceable in federal court. A state law ruling concerning retroactive application of a state sentencing statute, provides no grounds for habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions[] . . ." and that "a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") (citing 28 U.S.C. § 2241; and Rose v. Hodges, 423 U.S. 19, 21, 96 S. Ct. 175, 177 (1975) (per curiam)); Wilson v. Corcoran, 562 U.S. 1, 5, 130 S. Ct. 13, 16 (2010) (holding again that "only noncompliance with *federal law* [. . .] renders a State's criminal judgment susceptible to collateral attack in the federal courts][]" and that habeas "relief does not lie for errors of state law."

(citing Estelle v. McGuire, 502 U.S. 62, 67 (1991) (citation and internal quotation omitted)). Since King was not entitled under federal constitutional law to retroactive application of Hurst, this claim must be denied.

C. The Florida Supreme Court's determination that any *Hurst* error was harmless in this case is well supported by the record in light of the substantial aggravation and unanimous jury recommendation.

As an initial matter, King appears to argue this claim as if he is entitled to *de novo* review of the Florida Supreme Court's ruling under the Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), harmless beyond a reasonable doubt standard. However, this case comes to this Court on habeas review under the Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710 (1993) standard. Under this standard, it is King's burden to establish the constitutional error had a "substantial" or "injurious" effect on the result of his penalty phase. See Fry v. Pliler, 551 U.S. 112, 116, 127 S. Ct. 2321, 2325 (2007) (quoting Brecht, supra, at 631, 113 S. Ct. 1710 (quoting Kotteakos, supra, at 776, 66 S. Ct. 1239)). Moreover, the AEDPA provides substantial deference to the state court ruling on harmless error.[37] See Burns v. Sec'y,

[37] The determination that deficient factfinding under the Sixth Amendment can be harmless is cemented by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546 (2006), where the

Florida Dept. of Corr., 720 F.3d 1296, 1305 (11th Cir. 2013) (noting the interplay between Brecht and AEDPA, noting that when a state court has determined that the constitutional error was harmless under Chapman, "'a habeas petition cannot be successful unless it satisfies both AEDPA/Chapman and Brecht.'") (quoting Mansfield, 679 F.3d at 1307). The State court conclusion finding the underlying Hurst error harmless beyond a reasonable doubt is certainly not beyond fair minded disagreement.

The State can add little to the analysis of the Florida Supreme Court in this case. King's jury returned a unanimous death recommendation for the murder of [D.L.]. The record supports a conclusion, beyond a reasonable doubt, that a rational jury would have found the existence of the aggravators, the sufficiency of the aggravators, and that the aggravators outweighed the mitigators. The State presented a massive case in aggravation with six aggravating factors, including some of the most weighty in Florida's sentencing scheme, such as HAC and CCP. See, e.g. Larkins v. State, 739

United States Supreme Court reversed a Washington state court holding that error under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), was structural in nature and could never be harmless. Blakely is an Apprendi/Ring decision which requires jury factfinding where a sentence is to be enhanced due to the defendant's use of a firearm.

So. 2d 90, 95 (Fla. 1999) (noting 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..."). There is no conceivable argument that the jury would not have found the existence of the CCP, HAC, and avoid arrest aggravators applicable in this case. King, 211 So. 3d at 892 ("Thus, the evidence of the HAC, CCP, and avoid arrest aggravating circumstances—which King did not contest on direct appeal—was overwhelming and essentially uncontroverted."). Indeed, King made no such challenge to any of the aggravators in state court below or even now in this Petition.

The Florida Supreme Court has consistently found that that Hurst error is harmless in cases involving unanimous jury recommendations. See, e.g. Davis v. State, 207 So. 3d 142 (Fla. 2016); King v. State, 211 So. 3d 866 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Cozzie v. State, 225 So. 3d 717 (Fla. 2017); Knight v. State, 225 So. 3d 661 (Fla. 2017), Kaczmar v. State, 2017 WL 410214, 42 Fla. L. Weekly S127 (Fla. Jan. 31, 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017).

The murder of [D.L.] and her prolonged ordeal and terror

that preceded her murder, recounted partially in a chilling 911 call, is unquestionably heinous, atrocious and cruel. The facts of this case reveal that King committed a methodical crime, not the least bit impulsive, from targeting the victim, to the extended period of control and domination he exercised, to the planning for her demise and his attempt to cover up his crimes. See A11/2053-57 (discussing the CCP and Avoiding Arrest aggravators) (Sentencing Order). The horrendous facts of this case led the Florida Supreme Court to conclude: "If any case were to present us with a harmless Hurst error, this is it. King, 211 So. 3d at 893.

Given the massive case in aggravation presented by the State and the twelve to zero vote for death, any error was clearly harmless in this case. The Florida Supreme Court's finding the error harmless beyond a reasonable doubt is factually supported and inherently reasonable. That ruling is due substantial deference under the AEDPA. In addition, Petitioner has come nowhere near the mark of showing that the alleged error was harmful under the substantial or injurious standard of Brecht. Accordingly, this claim must be denied.

CONCLUSION

Respondents deny each and every allegation presented in the Petition for Writ of Habeas Corpus filed herein. Petitioner has failed to demonstrate that he is entitled to any relief, and this Court must summarily deny his petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Maria C. Perinetti, Raheela Ahmed and Lisa M. Bort, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel - Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 (**perinetti@ccmr.state.fl.us, ahmed@ccmr.state.fl.us, bort@ccmr.state.fl.us** and **support@ccmr.state.fl.us**).

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No. _____

IN THE

Supreme Court of the United States

MICHAEL L. KING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D

Petitioner's Memorandum of Law in Support of his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, filed August 25, 2017.

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

MICHAEL L. KING,
Petitioner,

v.

DEATH PENALTY CASE
CASE NO. 8:17-cv-985-T-33TGW

JULIE L. JONES, SECRETARY, DEPARTMENT OF CORRECTIONS and PAMELA JO BONDI, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

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INTRODUCTION

The Petitioner, Michael L. King, by and through his undersigned counsel, respectfully submits the following memorandum of law in support of his Petition Under 28 U.S.C.§ 2254 For Writ of Habeas Corpus By A Person In State Custody (Doc. 1), which was timely filed on April 27, 2017 ("Petition"). *See* 28 U.S.C. § 2244(d) (1996). Mr. King is currently incarcerated at Union Correctional Institution in the State of Florida under a sentence of death. The relevant facts were presented in the Petition under each Ground and will be incorporated in the following memorandum in support of a grant of relief. Furthermore, interrelated Grounds will be argued below in concert. This case heavily relies on the correct facts found in the record below to meet its clear and convincing burden; the citations to the record will be in accordance with the Supreme Court of Florida's record on appeal[1].

PROCEDURAL PREREQUISITES

Mr. King's Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Section §2254(d) of the AEDPA provides that this Court can grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits" in state court. Specifically, relief shall be granted if this Court concludes that the adjudication of the claim by state court (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

Under the "contrary to" clause, this Court may grant the writ if the state court arrived at a

[1] References to the record on appeal will be referred to as "(R ___)" followed by the appropriate volume number and then page number(s). The postconviction record on appeal will be referred to as "(PC ____)" followed by the appropriate volume number and then page number(s).

conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decided a case differently than that Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412-413, 120 S .Ct. 1495, 146 L. Ed. 2d 389 (2000). Under the "unreasonable application" clause, this Court may grant the writ if the state court identified the correct governing legal principle[2] established by the Supreme Court, but it unreasonably applied that principle to the facts of the prisoner's case." *Id*. at 413. In addition, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Id.* at 382.

This Court may also grant the writ if the state court's decision was based upon an unreasonable determination of the facts in light of the evidence presented. The determination of factual issues made by a state court "shall be presumed to be correct," and Mr. King "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e) (1). Mr. King submits to this Court that the limited factual findings by the lower state courts are not only unreasonable but incorrect in light of the evidence presented at trial and in postconviction. *See* 28 U.S.C. § 2254(d). This Court must look at the record below in determining whether the Petitioner has met the clear and convincing standard as presented below.

All of the habeas claims in Mr. King's Petition and discussed herein meet the procedural prerequisites and can be considered by this Court. *See* 28 U.S.C. § 2254(c). The state courts had full and fair opportunities to address and resolve the habeas claims, thus Mr. King has met the exhaustion requirement. *See* 28 U.S.C. § 2254(b); *see, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1,

[2] In postconviction cases involving ineffective assistance of counsel claims, the governing Supreme Court case is *Strickland v. Washington*, 466 U.S. 668. There are no procedural bar issues pursuant to *Teague v. Lane*, 489 U.S. 288 (1989).

9-10, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). Furthermore, the factual and theoretical bases of Mr. King's habeas claims were presented in state court and are the same before this Court. *See* 28 U.S.C. § 2254(c); *see Vazquez v. Hillery*, 474 U.S. 254, 257-260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (Supplementation and clarification of a factual record in federal habeas court is permitted and does not defeat the exhaustion rule of 28 U.S.C. § 2254(c)).

This Court may presume the absence of an independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 77 L .Ed. 2d 1201 (1983); *see Judd v. Haley,* 250 F. 3d 1308, 1313 (11th Cir. 2001) (citing *Card v. Dugger*, 911 F. 2d 1494 (11th Cir. 1990) ("[T]he last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim," … "the state court's decision must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law,'" … and "the state procedural rule must be adequate; *i.e.,* it must not be applied in an arbitrary or unprecedented fashion")).

A petitioner seeking to raise a claim as a federal issue in state court does so by "citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004). Petitioners are required to fairly present their federal claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995). In terms of fair presentment, the petitioner must identify the specific constitutional right that has been violated. *Gray v. Netherland*, 518 U.S. 152, 162–63, 116 S. Ct.

2074, 135 L. Ed. 2d 457 (1996). "[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* at 162. If the state court applies federal law to resolve the claim, the state court must issue a decision that addresses and adjudicates the Petitioner's actual habeas claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). The claim raised in federal court must then be the "substantial equivalent" of the claim presented in state court. *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). Mr. King's habeas grounds have been appropriately federalized and are suitable for this Court's review.

Mr. King will demonstrate below, as to each habeas ground, that his conviction and sentence of death are based on state court decisions that are contrary to, or involved an unreasonable application of, clearly established federal law, and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d) (1) & (2); *see Williams*, 529 U.S. at 362. Mr. King will also demonstrate the actual prejudice he suffered as to each ground. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

GROUND ONE

Mr. King alleged in Claim I of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance during the penalty phase when they failed to investigate and present evidence of toxic substances that Mr. King was exposed to throughout his life. The circuit court held an evidentiary hearing on this claim, and found that Mr. King failed to establish either deficient performance or prejudice. PC8/1186-88. The Florida Supreme Court affirmed the lower court's denial, finding:

> Quite simply, this case is not one in which counsel acted deficiently through a failure to investigate King's mental health or reliance upon previous social history reports. *Cf. Porter*, 558 U.S. at 39–40, 130 S.Ct. 447 (finding counsel to be deficient for failure to investigate the defendant's mental health, family background, or history of military service); *Wiggins v. Smith*, 539 U.S. 510, 524–26, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (concluding that counsel's reliance only on reports from a presentencing investigation report and the Baltimore City Department of Social Services for mitigation constituted deficiency). Rather, Schlemmer conferred with eight different neuropsychology or mental health experts, nearly all of whom concluded that King was malingering and a pathological liar, or were otherwise unable to provide helpful testimony. *See Hodges v. State*, 885 So.2d 338, 348–50 (Fla. 2004) (finding that counsel was not deficient for choosing not to present mental health mitigation after receiving unfavorable reports from two experts). Through her persistence, Schlemmer was able to present some mitigating mental health evidence via the testimony of Dr. Wu, which was corroborated by testimony from King's family members that his behavior changed after the sledding accident. Further, Schlemmer explained that the only indication that King may have been exposed to toxic substances were claims of exposure to rat poison and crack pipe fumes, which at least one expert did not believe. Schlemmer testified that she explored any potential avenues of mitigation based on information provided by King and his family—including hiring an independent medical examiner and interviewing helicopter pilots after King claimed that he and Lee had engaged in consensual sex and that she was killed after being shot from a helicopter—but there was simply no evidence to suggest that King's exposure to toxic substances would be anything more than pure speculation. Trial counsel did not render deficient performance regarding King's potential exposure to toxic substances.
>
> Because we conclude that King has failed to establish deficiency, we need not consider whether these decisions of trial counsel resulted in prejudice. *E.g., Zommer*, 160 So.3d at 377. Therefore, we deny this claim.

King v. State, 211 So. 3d 866, 882-83 (Fla. 2017).

The Florida Supreme Court's resolution of this claim was an unreasonable application of clearly established federal law. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Specifically, counsel

has a duty to investigate in order to make the adversarial testing process work in the particular case. *Id.* at 690.

> There are two prongs to an ineffective assistance of counsel claim.
>
> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

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

In *Wiggins v. Smith*, the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness . . ." *Strickland*, 466 U.S. at 690-91.

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

The deficient performance in this case stems not from a complete lack of investigation or consultation with experts, but rather from a lack of consultation with an expert specifically tailored to the needs of Mr. King's case. 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). Attorneys in capital cases commonly investigate and present mitigation regarding toxic substances that the defendant was exposed to and their effects on his or her behavior. *See, e.g., Hodges v. State*, 885 So. 2d 338, 346 (Fla. 2003) ("A toxicologist testified that the general area in which Hodges grew up was polluted, and that a river from which Hodges' family reported that Hodges caught and consumed fish contained lead."); *Rodgers v. State*, 113 So. 3d 761, 767 (Fla. 2013) (testimony from a psychologist during penalty phase about the lack of safety precautions regarding the use of pesticides on the family's farm).

Although, as the Florida Supreme Court correctly pointed out, trial counsel consulted with eight experts in preparation for penalty phase, they failed to investigate and present evidence of the toxic substances Mr. King was exposed to throughout his life, despite being aware that Mr. King grew up on a farm in Michigan and worked as a plumber for over a decade. PC11/1680. 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 Mr. King. He testified that Mr. 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 Mr. King was six years old. Ms. Schlemmer relied on Mr. King's family members, who are not experts, to attribute Mr. King's behavior to his sledding accident, and neither she nor her investigator, Ms. McClellan, questioned witnesses about or hired an expert to look into Mr. King's toxic exposures. PC11/1669, 1705. Dr. Sesta's findings that there was no neurotoxic exposure was limited to Mr. King's exposure to marijuana or crack pipe fumes, as well as a self-report that Mr. King passed out from rat poison, and there is no evidence that any expert

hired by trial counsel considered the effects of pesticides or chemicals used in the plumbing business. PC11/1681-82. As Ms. Schlemmer testified, her plan for penalty phase was to use the PET scan to present evidence of a brain injury from a sledding accident. PC11/1707. Evidence regarding Mr. King's toxic exposures would have been consistent with that strategy. However, counsel failed to hire a toxicologist to investigate how Mr. King's toxic exposures could have contributed to his brain abnormalities. *See Porter v. McCollum*, 130 S.Ct. 447, 453 (2009). Furthermore, any argument that counsel's failure to present evidence of Mr. King's toxic exposures constitutes a strategic decision on the part of trial counsel fails, as any strategic decision to forego the presentation of mitigating circumstances must be an informed strategic decision, made after sufficient investigation has taken place to enable counsel to make a reasonable choice among his available options. *Wiggins*, 539 U.S. at 527. In the case at hand, trial counsel could not have made a strategic decision not to present evidence of Mr. King's toxic exposures because it is not an area that they investigated.

Mr. King was prejudiced under *Strickland* by trial counsel's failure to investigate and present evidence of his toxic exposures, which would have helped explain Mr. King's behaviors and provided an additional explanation for Mr. King's low IQ and brain injury. At trial, the defense presented the testimony of Dr. Wu, who testified that a PET scan conducted on Mr. King demonstrated abnormal activity in Mr. King's frontal lobe, which is consistent with a traumatic brain injury, presumably from a sledding accident that occurred when Mr. King was six years old. Additional testimony from Dr. Wu, as well as several lay witnesses, established a history of poor judgment, strange, risk-taking behavior, difficulty regulating impulses, difficulty separating fantasy from reality, and a history of headaches and buzzing in his head. Dr. Visser performed IQ testing, and testified that Mr. King's full scale IQ of 76 placed him in the borderline intellectual

functioning range. The defense also presented testimony that Mr. King was a successful plumber, and Mr. King's employment records were introduced at the *Spencer* hearing. *King v. State*, 89 So. 3d 209, 219-22 (Fla. 2012).

At the postconviction evidentiary hearing, Mr. King presented testimony from Andrés Lugo, M.D. and Lori Wagoner regarding King's toxic exposures. Dr. Lugo, a certified medical toxicologist, was hired by postconviction counsel to perform a toxicology health assessment or public health assessment of King. Dr. Lugo testified that Mr. King suffered from chronic environmental exposure to pesticides when he was growing up in Michigan, as well as exposure to toxic substances during the 15 years he worked as a plumber. The side effects of these toxic exposures include brain damage, low IQ, developmental brain defects, cognitive and behavioral problems, headaches, orientation problems, difficulty concentrating, dizziness, sedation, amnesia, anesthesia, impaired thinking, and blackouts. Ms. Wagoner, Mr. King's coworker from Babe's Plumbing, provided additional testimony about the chemicals Mr. King was exposed to when he worked as a plumber, the conditions under which they worked, and the side effects she personally experienced when using these chemicals. As Dr. Lugo explained, in Mr. King's case, there was an additive effect due to Mr. King's history of head trauma, exposure to pesticides as a child, and later exposure to toxic chemicals when he worked as a plumber, which made Mr. King more susceptible to toxic exposures. This is especially significant in light of testimony at trial that in December 2007, shortly before the crime, Mr. King began to behave strangely, as if dazed, appeared at times to be in a catatonic state, and became excessively paranoid. *King*, 89 So. 3d at 219. Evidence regarding Mr. King's toxic exposures would have helped explain Mr. King's behaviors leading up to the murder and low IQ, and it would have provided additional evidence that Mr. King suffered from a brain injury. There is a reasonable probability that if this additional

information had been presented to the jury, Mr. King would have received a life sentence. Therefore, Mr. King is entitled to a new penalty phase trial.

GROUNDS TWO AND FOUR

Mr. King argued on direct appeal that the trial court erred in accepting as genuine the prosecutor's proffered reason for his peremptory strike of a minority juror (111) based on her questionnaire response, where the claimed reason was equally applicable or more applicable to other jurors whom the prosecutor did not challenge, and who served on the jury. The Florida Supreme Court denied relief, finding that the claim had not been properly preserved:

> 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 230–31.

Mr. King alleged in Claim II of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance for failing to properly preserve the *Batson* issue regarding the State's peremptory strike of juror 111 for direct appeal. The circuit court held an evidentiary hearing on this claim, and found that Mr. King failed to establish either deficient performance or prejudice. The circuit court further found that Mr. King did not have a valid *Batson*[3] claim to exercise on juror 111. The Florida Supreme Court affirmed the lower court's denial, finding (1) that Mr. King's underlying *Batson* claim is meritless, and (2) that trial court's alleged failures to preserve the *Batson* challenge and to conduct a comparative juror analysis did not amount to deficient performance. *King*, 211 So. 3d at 883-888.

The Florida Supreme Court's resolution of these claims on direct appeal and in postconviction involved an unreasonable application of clearly established federal law. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record. Although, as the Florida Supreme Court stated both on direct appeal and in postconviction, the fact that a juror has a relative who has been charged with a crime may be a valid race-neutral reason to exercise a peremptory strike, that is not the case here, where, as discussed below, the trial court's ruling was based on a misunderstanding of the facts, and a

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

comparative juror analysis reveals that the reason is pretextual. Furthermore, the Florida Supreme Court inaccurately stated in its opinion in postconviction that it "previously considered and rejected the merits of King's *Batson* challenge on direct appeal", *King*, 211 So. 3d at 885, despite the Court's clear findings on direct appeal that the *Batson* issues raised on direct appeal were waived by trial counsel. *King*, 89 So. 3d at 230–31. The failure of trial counsel to properly preserve Mr. King's *Batson* issue for direct appeal and to present both the trial court and the Florida Supreme Court with enough information to make a full and fair assessment of Mr. King's *Batson* claim regarding juror 111 denied him the right to a constitutionally fair trial. As demonstrated below, if Mr. King's *Batson* claim had been properly preserved by trial counsel, he would have prevailed on direct appeal.

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

Individual jurors, as well as the defendant, have a right to nondiscriminatory jury selection procedures, free from discrimination based on race, ethnicity, or gender. *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 2d 411 (1991). Defendants may raise *Batson* claims on behalf of

individual jurors under the doctrine of third party standing, even when the defendant and the excluded juror are not of the same race or gender. *See Powers*, 499 U.S. at 415-16; *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1317 (11th Cir. 2003). The discriminatory exclusion of prospective jurors is not subject to a harmless error review, as the United States Supreme Court has reversed convictions without even considering whether the improper exclusion of jurors had any effect on the outcome of the trial. *See Powers*, 499 U.S. at 416; *Batson*, 476 U.S. at 100.

Pursuant to *Batson*, when a defendant establishes a prima facie case of discrimination in the State's exercise of peremptory challenges and the prosecutor gives a race-neutral reason for those challenges, the trial court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 92 (citation omitted). Under *Batson's* three-step process, a defendant must first establish a prima facie case of discrimination by showing that the excluded jurors belong to a cognizable group and that a reasonable inference arises that the prosecutor used his peremptory challenges on the ground of group bias. *Johnson v. California*, 545 U.S. 162, 166, 125 S.Ct. 2410, 162 L.Ed. 129 (2005); *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995). The burden then shifts to the prosecutor to present race-neutral explanations for exercising each of his peremptory challenges. *Batson*, 476 at 96-98. Finally, "the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991).

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

> A trial court's decision to allow a peremptory strike of a juror is based primarily on an assessment of credibility, and, therefore, this decision will be affirmed unless it is clearly erroneous. *See Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996).

> Further, peremptory challenges are presumed to be exercised in a nondiscriminatory manner. *See id*. However, where a party alleges that a peremptory strike is racially based, a three-part procedure applies to resolve the allegation:
>
> > A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained.
>
> *Murray v. State*, 3 So. 3d 1108, 1119 (Fla. 2009) (quoting *Melbourne*, 679 So. 2d at 764). We have explained that in step 3, the focus of the court is on the genuineness, *not* the reasonableness, of the explanation. *See Rodriguez v. State*, 753 So. 2d 29, 40 (Fla. 2000).

King, 89 So. 3d at 229.

Mr. King's trial counsel provided prejudicial ineffective assistance of counsel for failing to properly preserve the *Batson* issue regarding the State's peremptory strike of juror 111 for direct appeal. *See Davis*, 341 F.3d 1310; *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed. 2d 985 (2000). Mr. King suffered prejudice under *Strickland* because, but for counsel's failure to properly preserve this issue, he would have prevailed on direct appeal. As the Eleventh Circuit Court of Appeals explained in *Davis*, "[W]hen a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved." *Davis*, 34 F.3d at 1316. This is in contrast to the usual *Strickland* prejudice analysis, as to show an effect upon the trial, as opposed to the appeal, would be impossible in such a case. *Davis*, 34 F.3d at 1315. Thus, it is necessary for this court to

assess how Mr. King would have fared on appeal if trial counsel had properly preserved his *Batson* claim for review. *Davis*, 34 F.3d at 1316.

Citing *Caratelli v. State*, 961 So. 2d 312 (Fla. 2007), the Florida Supreme Court rejected Mr. King's argument that he was prejudiced in his appeal, and argued that in order to demonstrate prejudice under *Strickland*, Mr. King would have to show that he was prejudiced in trial, not in his appeal. *King*, 211 So. 3d at 887. Therefore, in order to show prejudice, Mr. King would have to show that one of the jurors who was seated on his jury was actually biased. *Id.* at 888. Where the challenge in question involves a peremptory challenge, however, such a showing is impossible. *See Davis*, 34 F.3d at 1315. Unlike a cause challenge, where juror bias is at the center of the analysis, *Batson* challenges have nothing to do with jurors being biased, but are based on the right of both the defendant as well as individual jurors to a nondiscriminatory jury selection process. *Batson*, 476 U.S. at 85-86; *Powers*, 499 U.S. 400. With regard to a *Batson* claim, there is no analysis to be made in terms of whether an actually biased juror served on the jury (especially considering that the juror in question was excluded and did **not** serve on the jury), or whether the improper exclusion of jurors had any effect on the outcome of the trial. *See Powers*, 499 U.S. at 416; *Batson*, 476 U.S. at 100. If the prejudice standard with regard to ineffective assistance of counsel claims for failure to raise or preserve *Batson* claims is the effect on the trial, as opposed to the effect on direct appeal, it would be impossible for a defendant to ever prevail on such a claim. *See Davis*, 34 F.3d at 1315. The result of such an analysis is such that the constitutional right to effective assistance of counsel with regard to the exercise of *Batson* challenges could never be enforced. Such an interpretation of *Strickland* is unreasonable.

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

erroneous. This failure was a direct result of trial counsel's failure to properly preserve the claim for appellate review, which, if it had been done, would have resulted in relief.

Trial counsel performed deficiently in the following areas:

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

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

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

The State exhibited a clear pattern in this case of exercising peremptory challenges on female jurors. The jury was comprised of five males and seven females. There were three female alternate jurors and one male alternate juror. The State exercised a total of eight peremptory challenges, on jurors 47, 53, 54, 90, 94, 103, 111, and 133. R20/1759-61, 1764, 1767, 1772. The jury questionnaires, which were included in the record on appeal, reveal that each of the State's peremptory challenges was used to strike a female juror. SR2/257-61, 288-92, 294-98; SR3/483-87, 507-11, 558-62; SR4/603-07, 614-18. In contrast, the defense used seven peremptory challenges to strike male jurors (jurors 8, 15, 67, 81, 109, 126, and 157), and seven peremptory challenges to strike female jurors (jurors 23, 29, 33, 38, 40, 104, and 145). R20/1759-63, 1766, 1771-73; SR1/50-54, 88-92, 130-34, 163-66, 184-88; SR2/209-13, 220-24, 360-64; SR3/434-38, 564-68; SR4/592-96, 683-87, 782-86; SR5/845-49. The fact that seven women were seated as jurors is of no importance, as "number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate." *State v. Slappy*, 522 So. 2d 18, 21 (Fla.), *cert. denied* 487 U.S. 1219 (1988); *See also, United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986) ("[T]he striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even where valid reasons for the striking of some black jurors are shown.") Nevertheless, the State's pattern of striking only female jurors evidences a discriminatory intent. *Batson*, 476 U.S. at 97.

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

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

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

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

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

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

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

Appellate counsel argued on direct appeal that the State's assertion regarding juror 111's juror questionnaire was not entirely accurate. In response to questions 31 (Have you or a family member ever been arrested or charged with a crime?) and 32 (Have you or a family member been

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

This Court held on direct appeal:

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

King, 89 So. 3d at 230.

Trial counsel provided prejudicial ineffective assistance by failing to correct the trial court or the prosecutor about their misunderstanding of juror 111's questionnaire. Mr. Scotese testified at the evidentiary hearing that, although he had access to the juror questionnaires during jury selection, he could not recall whether he consulted juror 111's questionnaire when he was arguing his objection to see what her response was with regard to her brother's felony charge. PC10/1640-41. However, if he had consulted the questionnaire and found a discrepancy between what the State said and what was actually in the questionnaire, he would have brought that to the court's

attention. PC10/1641. By failing to correct this error, trial counsel waived his challenge to the striking of juror 111 based upon the erroneous reading of the questionnaire, and allowed for the use of a peremptory strike on this African American female juror based on a reason that the court found to be genuine and not pretextual, where in it does not appear to have been accurate.

4. Failure to conduct a comparative juror analysis

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

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

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

> Most tellingly, juror 114 [other/male], the very next juror up, gave answers on his questionnaire which – if the prosecutor's reason for striking juror 111 had been genuine – would have resulted in his being peremptorily challenged as well. Juror 114 checked Yes to question 31 ("Have you or a family member ever been arrested or charged with a crime?). Where is says "Please describe", he wrote "Private". To question 32 ("Have you or a family member been convicted of a crime?"), he again checked Yes and wrote "Private" (SR4/621). Obviously, if the prosecutor's genuine concern had been to excuse all prospective jurors who had family members charged with or convicted of crimes, he would either have peremptorily challenged juror 114 based on his questionnaire responses, or at the very least he would have questioned him outside the presence of other jurors to determine the nature of the relationship, the seriousness of the charges (and whether they were similar to any of the charges in the case to be tried), and whether they would affect his ability to serve impartially.
>
> In addition to juror 114, at least two other jurors, 92 [white/female] and 125 [white/male] (neither of whom were challenged by the state, and both of whom served on the jury) stated on their questionnaires that they had close family members who had been charged with driving without a license and convicted of felony offenses. Juror 92 has herself been charged with driving without a license, and her youngest brother is a convicted felon; she indicated that she does not recall the details (SR3/497). Juror 125's son was charged and convicted (possibly as a juvenile, based on her statement in voir dire that she has two sons who six or seven years ago "were in the juvenile system back and forth") of burglary of a conveyance and throwing an explosive device (SR4/679, see 19/1532-33). A forth selected juror (no. 75) [white/female] has a brother who was convicted of DUI (SR3/403; 20/1685).

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

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

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

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

> Prospective Juror 111: Yes.
> (19/1531)
>
> Immediately after juror 111's last answer, the prosecutor asked juror 114 [other/male] (the juror who said in his questionnaire that he or a family member had been charged with and convicted of a crime, and in response to "If yes, please describe" wrote "Private") if he had his hand up. Juror 114 replied, "No, I didn't" (19/1531-32). [Undersigned counsel is not suggesting that juror 114 was withholding information, since he may not have been in the courtroom when his relative was convicted. However, the prosecutor accepted him on the jury without ever inquiring into his questionnaire response.]
>
> During defense counsel's voir dire, she asked juror 111 if there was anything about the situation with her brother which could affect her in sitting on a criminal case; she answered no (20/1699).
>
> If the prosecutor's reason accepted by the trial court had been genuine rather than pretextual, then he [Mr. Arend] would at the very least have also struck juror 114, or at least examined him to find out which of his family members (or himself) had been convicted of a crime, what was the nature of the charge, and whether it was similar to the offenses being tried. And he would also have struck juror 92, whose brother – like juror 111's brother – is a convicted felon . . .
>
> In the instant case, juror 111's questionnaire revealed what her brother was convicted of a drug charge has nothing to do with Michael King's trial (or even his penalty phase, since King was never a drug user). Juror 111 had no hesitancy in mentioning this fact and gave no indication that it would affect her in any way. Juror 114's questionnaire response of "Private", on the other hand, not only failed to reveal who in his life was a convicted felon and what crime or crimes that person was found guilty of, it also suggests the existence of personal or emotional feelings on the juror's part. Yet the prosecutor neither delved into the matter, nor did he peremptorily challenge juror 114. The prosecutor also accepted juror 92, whose brother was a convicted felon, without any inquiry into the matter. All of this demonstrates that his reliance on his not-quite accurate assertion regarding juror 111 that "[a]ccording to her questionnaire, her brother has a pending drug charge" was nothing more than an impermissible and racially discriminatory[5] pretext.

Initial Brief of Appellant at 91-96.

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

The Florida Supreme Court rejected appellate counsel's argument that there were other jurors on the panel who had relatives with criminal charges because trial counsel waived that challenge by not raising it before the trial court. *King*, 89 So. 3d at 230. Mr. Scotese testified that, although he believes it makes for a better argument and it is something that he tries to do, he is not very good at conducting comparative juror analyses, and it is not his usual practice to do so. PC10/1640. He further testified that he has not received any training in or done any reading about comparative juror analysis. PC10/1640. Trial counsel provided prejudicial ineffective assistance by failing to conduct a comparative juror analysis before the trial court, which would have revealed that the reasons provided by the State for exercising a peremptory strike on juror 111 were pretextual and preserved the issue for appellate review.

Conclusion

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

GROUND THREE

Mr. King argued in postconviction that Section 945.10, Fla. Stat., which exempts from disclosure under Section 24(a), Article I of the Florida Constitution information that identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection, is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. The Florida Supreme Court denied relief, and held:

> King also asserts that section 945.10, Florida Statutes (2014), which exempts from disclosure the identity of those individuals who participate in the lethal injection procedure, is unconstitutional. This Court has rejected recent challenges to the

> statute's validity. See *Correll*, 184 So.3d at 486 (citing *McLean v. State*, 147 So.3d 504, 513 (Fla. 2014); *Darling v. State*, 45 So.3d 444, 447–48 (Fla. 2010); *Henyard v. State*, 992 So.2d 120, 130 (Fla. 2008)). Additionally, the Court presumes that those individuals charged with conducting an execution will perform their duties properly. *Lightbourne v. McCollum*, 969 So.2d 326, 343 (Fla. 2007). Although King asserts that executions in Florida and elsewhere have gone awry, undermining the presumption in *Lightbourne*, several executions have been conducted in Florida with no reported problems. See *Correll*, 184 So.3d at 486 ("[T]he recent executions of Johnny Kormondy, Chadwick Banks, Eddie Davis, John Henry, and Robert Hendrix have been carried out with no subsequent allegations of difficulties."). Thus, we reject this claim as well.

King, 211 So. 3d at 888-89.

Mr. King recognizes that there is a conflict between the State of Florida's need to protect only the identity of the execution team members pursuant to Fla. Stat. § 945.10 and his constitutional right to know that the ultimate sentence will be carried out in a humane and non-cruel and unusual manner. However, federal courts have found that concerns that execution team members would be publicly identified and retaliated against was an overreaction, supported only by questionable speculation. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Importantly, the Court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. *Id*. at 882. Pennsylvania courts have likewise found safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A. 2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The constitutionality of the sentence of death depends on who performs the execution and how the execution is done. *See Taylor v. Crawford*, No. 05-4173-CV-C-FJC, 2006 WL 1779035 (W.D. Mo. June 26, 2006); *see also Morales v. Tilton*, 465 F.Supp. 2d 972 (N.D. Cal. 2006) (Dr. Mark Heath highlighted the problems with regard to the qualifications of the executioners in lethal

injection protocols and the protocols themselves). The use of Fla. Stat. § 945.10 as an absolute curtain as to any information about the qualifications, experience, reliability, and relevant information as to the individuals involved goes too far and goes in the face of the public and Mr. King's right to know pursuant to his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Society's evolving standards of decency demand that this information be revealed; otherwise, the death sentence upon Mr. King is unconstitutional. *See* Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood,* 75 Fordham Law Review 2791-2829 (2007).

It is a constitutional necessity for Mr. King to know the identity, qualifications, and all related information about the executioners who will be administering his death because of the level of the skills that are involved in performing the lethal injection protocol, which is a medical procedure. Execution procedures have evolved and now go beyond a rope tied around the condemned prisoner's neck or the flip of a switch to electrocute the person. It is obvious that much more is demanded from the execution team members in administering lethal injection, and it is Mr. King's right to know if the individual(s) are qualified to ensure a humane sentence. Dr. Alan R. Doerhoff[6], who presided over 50 executions in Missouri, is one example of the very reason why the shroud must be lifted and Mr. King must be allowed to challenge his executioner. *See* Jeremy Kohler, *Lake Hospital's letters deal crucial blow to credibility of execution doctor*, St. Louis Post-Dispatch, January 20, 2008 at A1; *see also* Molly Hennessy-Fiske & Seth Klamann, *Doctors assist*

[6] In Missouri, Dr. Alan R. Doerhoff, a Missouri physician who wrote the state's lethal injection protocol and also supervised over 50 executions, was found to have his medical privileges from two hospitals; was found to have been reprimanded in 2003, by the state board of Healing Arts for failing to disclose malpractice suits against him; testified that he was dyslexic and often confused the names and amounts of the lethal injection drugs; and testified that he would change the drug protocol at will.

in executions despite ethics rules, LA Times, May 21, 2014 at A1; *see also* Cheryl Wittenauer, *Execution Doctor: 'Nothing will go wrong'*, Columbian Missourian, August 15, 2008 at A1. Other examples of what has gone wrong can be found in *Oken v. Sizer*, 321 F.Supp.2d 658, 667 n.7 (D. Md. 2004) (execution team failed to properly administer the IV line, which caused the lethal injection chemicals to leak onto the floor); *State v. Rivera*, Nos. 08CA009426, 08CS009427, 2009 WL 80619 (Ohio App. 9 Dist. Mar. 30, 2009); *Morales*, 465 F. Supp. 2d 972; *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 16, 2006).

Should this Court allow the State of Florida to completely conceal any and all information about the execution team members, then it has gone against society's evolving standards of decency and has returned the state to the archaic concept of the hooded executioner. There is a grave and real concern as to the individuals who are performing these executions. Therefore, Mr. King's constitutional right to know the identity and qualifications of the executioners overwhelmingly overrides Florida's unsubstantiated safety concerns for the executioners, who are paid by Florida to perform a medical procedure under the seal of Florida. *See, e.g., Travaglia v. Dept. of Corrections*, 699 A. 2d 1317, 1323 n.5 (Pa. Cmmw. Ct. 1997).

GROUND FIVE

Mr. King argued on direct appeal that his State and Federal Constitutional rights to present his defense and to fully cross-examine a key prosecution witness were violated by a series of trial court rulings, and compounded by the prosecution taking unfair tactical advantage of its own failure to contemporaneously object to the defense's cross-examination of Robert Salvador, as well as the prosecutor's burden-shifting arguments in closing argument. The Florida Supreme Court denied relief on this claim based on two grounds:

> For two reasons, we conclude that the trial court did not abuse its discretion when it instructed the jury to disregard the questions.

First, Salvador's inconsistent statements and alleged evasiveness with regard to other facts do not provide a clear link to the death of Lee. *See Johnson,* 552 A.2d at 516. A huge inferential leap would be required to equate these alleged prior inconsistent statements with guilt of murder. In fact, during trial, Salvador provided more logical explanations as to why he provided police different facts and engaged in what could be perceived as suspicious conduct, such as deleting King's phone calls. Salvador explained that when the police appeared at his house at 1:30–2:00 a.m. on the morning of January 18, they only asked Salvador if he knew who King was—*not* whether he had seen King that day—and the visit lasted only five minutes. Although Salvador was informed during the visit that King had been apprehended in relation to a kidnapping, Salvador testified that he did not believe the matter was that serious and assumed it was only a domestic disturbance between King and one of his girlfriends.

Furthermore, Salvador admitted that he had lied to his wife about going to the firing range because he was supposed to be working, and he did not want her to think that he was not working to support the household. Salvador also explained that he deleted the phone calls from King *before* the 1:30–2:00 a.m. visit by police because his wife did not like King and did not want Salvador to spend time with him. Finally, Salvador stated that during his meetings with the police, he felt as though he was being treated as a suspect (which he was until January 20):

> I was terrified at the time, of course, the situation of being that close to somebody that could have done something like that. So I'm not going to sit here and say that I wasn't afraid. I'm not going to sit here and say that I wasn't tongue tied, and it was very difficult for me to try to remember everything that had gone on.

Thus, the fact that Salvador's actions and statements concerning other facts can be attributed to fear and also a desire to keep information from his wife demonstrates that there is no clear link between these actions and the murder of Lee.

Second, the facts asserted in the questions asked by defense counsel, and defense counsel's theory of the murder, were highly implausible. Under that theory, Salvador arranged to meet King near Plantation Boulevard for the sole purpose of shooting someone whom he had never met. Moreover, during trial, Detective Chris Morales testified that Salvador had established he could not have been in the area of the crime at the time it occurred. Given the sheer unlikelihood and improbability of defense counsel's scenario—unsupported by any evidence whatsoever—plus the elimination of Salvador as a suspect in the murder based on independent facts established by law enforcement, we conclude that the trial court's decision to strike the three questions for lack of sufficient evidence in the record to support those allegations (or defense counsel's theory for that matter) was a reasonable and sound use of discretion. *See Cohen,* 581 So.2d at 927.

King, 89 So. 3d at 225–26.

The Florida Supreme Court's resolution of this claim was an unreasonable application of clearly established federal law. Further, in many respects, the state court made an unreasonable determination of the facts in light of the state court record.

As the Florida Supreme Court acknowledged,

> The United States Supreme Court has held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

King, 89 So. 3d at 223. However, as the Florida Supreme Court further argued, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury" *King*, 89 So. 3d at 223 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326–27, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). This is not such a case.

A defendant has the constitutional right to present his defense, including a third party perpetrator defense, as long as there is some quantum of evidence connecting the third party to the crime. *See, e.g.*, Holmes, 547 U.S. 319, discussed in *Summers v. State*, 231 P.3d 125, 145-49 (Okla. Crim. App. 2010); *see also*, *Joyner v. State*, 678 N.E. 2d 386, 390 (Ind. 1997); *Diamen v. United States*, 725 A.2d 501, 528 (D.C. 1997). Additionally, a defendant has the right to test the veracity of an adverse witness by full and fair cross-examination regarding his possible motives and biases, including the witness' possible motivation to cover up his own involvement in the charged crime. *See McCoy v. United States*, 760 A.2d 164, 174 (D.C. 2000). An accused's right of full and fair cross-examination is a crucial means of testing the truthfulness of the witness' testimony; it "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *California v.*

Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970). Defendants enjoy these rights even in cases where there is strong forensic evidence of their guilt. *Holmes*, 547 U.S. 319. The trial court denied Mr. King these rights when he instructed the jury to disregard three questions defense counsel asked Mr. Salvador about his involvement in the murder.

The Florida Supreme Court's determinations that the only evidence linking Mr. Salvador to the murder was his "inconsistent statements and alleged evasiveness" and that "the facts asserted in the questions asked by defense counsel, and defense counsel's theory of the murder, were highly implausible" were unreasonable in light of the state court record. In the instant case, the evidence showed that Robert Salvador was target shooting with Mr. King until 1:00 p.m. on the day the murder occurred. We know, by his own admission, that Mr. Salvador owned a nine-millimeter firearm. Conversely, the only evidence that Mr. King possessed a nine-millimeter firearm was the testimony of Mr. Salvador. Assuming without conceding the admissibility and accuracy of firearms examiner John Romeo's testimony that three of the 47 cartridge cases gathered at the firing range were a 100 percent certain match to the shell casing found at the crime scene (and assuming further that the cartridge cases from the firing range were sufficiently connected to Mr. Salvador and/or Mr. King), it appears probable that Ms. Lee was killed with Mr. Salvador's ammunition since, according to Mr. Salvador, Mr. King did not have any of his own ammunition. Moreover, Mr. Salvador believed Mr. King's gun was empty when they left the firing range, and Mr. Salvador put the gun under Mr. King's passenger seat. Although Mr. Salvador allowed that Mr. King could have pocketed ammunition when Mr. Salvador was not looking, he had no reason to believe this occurred, and Mr. King turned down Mr. Salvador's offer to give him a box of ammunition. We also know that Mr. Salvador deleted, or tried to delete, all of Mr. King's calls to his cell phone made on January 17th. Also, during the investigation, Mr. Salvador withheld

information from the police about his contacts with Mr. King, and he gave inconsistent statements about his whereabouts on January 17th. In the last of his inconsistent statements to the police, made on January 20th, Mr. Salvador claimed to have gone to four places: his customer Mrs. Todd's house, Home Depot, Checkers, and his storage unit, and that he got home around 5:30 or 6:00 p.m. The police considered Mr. Salvador a suspect, at least until they decided they believed his alibi, but the only receipt he provided relating to the afternoon or evening of January 17th was from Checkers where he said he had a hamburger around 4:00 p.m. Detective Morales also referred to a video camera from Home Depot, where Mr. Salvador said he went before Checkers, around 3:30 p.m. Neither the receipt (which the prosecutor said was returned to Mr. Salvador, and which Mr. Salvador said he no longer had) nor any store surveillance tape was introduced into evidence. Mr. Salvador's wife did not testify, and there is no evidence that she made any statements to the police vouching for Mr. Salvador's whereabouts between 6:00 and 9:00 p.m. Furthermore, the period of time when the shooting could have occurred was at least several hours, from around 6:30 p.m. (Ms. Lee's 6:14 p.m. 911 call, followed by events witnessed by Shawn Johnson and June Kowalski when it was just starting to get dark) to around 9:00 p.m. when Mr. King's car was stopped by Trooper Pope near I-75 and Toledo Blade. Mr. Salvador had no alibi for the period between 6:00 and 9:00 p.m.

According to investigators (who were evidently assuming that Mr. Salvador's nine-millimeter was not connected to this case), no nine-millimeter firearm connected to this case was ever found, despite massive and ongoing searches of Mr. King's house and neighborhood, the vicinity where Ms. Lee's body was found, the nearby location where Ms. Lee's clothing was found, the area around Toledo Blade and I-75 where Mr. King's car was spotted and then stopped, and numerous lakes, retention ponds, canals, and sewers. Moreover, at the time of his arrest no blood

(except for spots of his own blood on the waistband of his boxers) was found on Mr. King's person or his clothing. The prosecutor's explanation for this was that, despite his leaving many other items of evidence of kidnapping and sexual battery in his house and car and despite the fairly quick discovery of Ms. Lee's clothing, Mr. King had somehow managed to successfully dispose of the firearm and his own bloody clothing. Defense counsel's explanation was that the gun was never found because somebody else (most likely Mr. Salvador) shot Ms. Lee and then either disposed of the gun or took it home with him. According to defense counsel, the reason no large amounts or even microscopic spots of blood were found on Mr. King's person or clothing is because he was not the shooter. Mr. Salvador's nine-millimeter firearm was never test-fired or compared to the shell casing found at the crime scene, not did the prosecution even submit it to the FDLE firearms examiner until the second day of trial, when (according to Mr. Romeo) there was insufficient time before his testimony to test it. With this backdrop, defense counsel cross-examined Mr. Salvador regarding his possible participation in the charged homicide.

Furthermore, the prosecutor in the case, in arguing that defense counsel opened the door to the introduction of Mr. King's suppressed statements, asserted that there was an implication from defense counsel's questioning of Mr. Salvador that he obtained the information from Mr. King. R24/2599-2600; R25/2604-05. However, even if defense counsel had received information from Mr. King that prompted him to formulate his questions to Mr. Salvador, this would tend to establish, rather than negate, a good faith basis for the inquiry. *See Scull v. United States*, 564 A.2d 1161, 1164 (D.C. App. 1989) ("Further, where counsel has information from her own client, which she does not know to be false and which is not 'inherently incredible', she has a sufficient good-faith basis for the proposed cross-examination.") Although Mr. King had previously made inconsistent statements which were themselves inherently incredible, including a claim that Ms.

Lee was shot from a helicopter, if Mr. King later told defense counsel that Mr. Salvador met him at Plantation and Panacea and shot the victim, defense counsel would have no knowledge that the information was false, especially in light of (1) Mr. Salvador's evasiveness about his whereabouts; (2) the fatal bullet appear to have come from Mr. Salvador's cache of ammunition; (3) Mr. Salvador's nine-millimeter handgun was never tested; (4) Mr. Salvador was the only witness who said that Mr. King owned a nine-millimeter handgun; and (5) no nine-millimeter handgun tied to Mr. King was ever found.

In the case at hand, where the State tried the case on the theory that no one but Mr. King was involved in any of the charged crimes and a principal instruction was not sought, the identity of the shooter was a defense to the murder charge. Given the various facts and circumstances pointing to Mr. Salvador's possible participation in the murder, and in light of his plausible motivation to cover up his own involvement, defense counsel's accusatory cross-examination was both proper and constitutionally guaranteed under the Sixth and Fourteenth Amendments. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974). A witness' possible involvement in the charged crime, as well as his desire to cover up that involvement, is certainly a strong factor bearing on his interest in the outcome of the trial and his motivation to testify as he does. *McCoy*, 760 A.2d at 174. That is especially true where, as here, the witness has already made inconsistent and evasive statements regarding his whereabouts on the day of the crime and regarding his contacts with the defendant. The jurors' assessment of Mr. Salvador's demeanor when confronted by defense counsel's unobjected-to questions concerning his activities on January 17, culminating in his possible commission of the murder, was critical to their determination of his credibility. Mr. King was further prejudiced by the judge's instruction to the jury that the reason why he was telling them to disregard the cross-examination questions was that "there is no basis in fact from the

evidence or the inference from the evidence for the asking of said questions". R25/2629. The judge's added comment appeared to disapprove of the defense, and instead validated the State's argument that Mr. Salvador had nothing to do with the murder. The comment also suggested to the jury that defense counsel had done something improper, which in turn enabled the prosecutor to basically accuse defense counsel of persecuting Mr. Salvador. This prejudice was compounded by the State's comment during closing arguments that "Wednesday of this week, August 26th of 2009, was the worst day in the life of Robert Salvador", R27/3001, and the court's ruling that defense counsel could not argue that there was any plan or agreement for Mr. Salvador to meet Mr. King at Plantation and Panacea to commit this murder, R26/2932-39, a theory which the State ridiculed during its own closing argument. R26/2987-88. Finally, in what clearly amounted to improper burden-shifting, the State in closing argument implored to the jury to ask the defense for the evidence that they said in opening "would show that someone other than Michael King committed this offense." R26/2990. The entire sequence of events, and the apparent departure from judicial neutrality destroyed the fairness of the trial and cannot be deemed harmless. Mr. King's conviction of first-degree murder, and the death sentence imposed on that count, should be reversed for a new trial.

GROUND SIX

In Florida, the maximum punishment for first-degree murder on the basis of a conviction alone is life imprisonment. The Sixth Amendment requires a jury to make the findings necessary to differentiate first-degree murder from first-degree murder for which a defendant may be sentenced to death. *Hurst v. Florida*, 136 S. Ct. 616, 621, 193 L.Ed. 2d 504 (2016) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 597, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)). In other words, the findings

justifying a death sentence are an element of the crime of death-eligible first-degree murder, and as such, they must be found by a jury beyond a reasonable doubt. *Id.*

The United States Supreme Court's decision in *Hurst v. Florida*, was issued during the pendency of Mr. King's postconviction appeal. The Court in *Hurst* ruled that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment in light of *Ring*, a decision that it reached 14 years prior. In reversing the judgment of the Florida Supreme Court and remanding the case, the United States Supreme Court specifically held that

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.

Hurst, 136 S.Ct. at 624.

Mr. King was sentenced under this unconstitutional scheme. Specifically, the Court held, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* at 619. In *Hurst*, the Supreme Court noted that former Fla. Stat. § 921.141(3) required the trial court *alone* to find "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 S. Ct. at 622 (emphasis in original). It furthermore specifically rejected the State's argument that the jury's advisory recommendation could serve as the required factual finding. *Id.* Mr. King's death sentence rests upon findings made by the Court as a result of the procedure now held unconstitutional. He was deprived of his Sixth Amendment right to have the jury determine every fact necessary for his capital sentence.

Following the issuance of *Hurst*, the Florida Supreme Court asked the parties in Mr. King's case to file supplemental briefs addressing the applicability of *Hurst* to the instant case. The

Florida Supreme Court entered a decision in this case in favor of Appellee/Respondent on January 26, 2017. In light of the recently decided *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), in which the Florida Supreme Court held that *Hurst* applies retroactively to those postconviction defendants whose sentences were final after the United States Supreme Court's 2002 decision in *Ring*, the court held that they must consider whether any *Hurst* error in Mr. King's penalty phase proceedings was harmless beyond a reasonable doubt. *King*, 211 So. 3d at 889-90.[7] Next turning to a harmless error analysis, the court emphasized the unanimous jury recommendation in this case and ultimately determined that the *Hurst* error in this case is harmless beyond a reasonable doubt:

> Ultimately, however, as emphasized above, the jury unanimously recommended a sentence of death.
>
> Although the Supreme Court in Hurst v. Florida cautioned against substituting the jury recommendation for the factual findings required by the Sixth Amendment, we conclude that this is one of the rare cases in which a Hurst error is harmless beyond a reasonable doubt. We reach this conclusion in light of the unanimous jury recommendation, King's failure to challenge evidence presented in aggravation, as well as the overwhelming and uncontroverted evidence of the four aggravating circumstances and the comparatively weaker mitigating evidence that was challenged by the State. If any case were to present us with a harmless Hurst error, this is it.

King, 211 So. 3d at 892-93. (footnotes and citations omitted).

The Florida Supreme Court's conclusion that his is one of the "rare" cases where *Hurst* error can be excused was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Additionally, the court's adjudication of the *Hurst* issue in this case was contrary to, or involved an unreasonable application of, clearly established federal law. Neither the "egregious" facts of this case nor the jury's unanimous advisory death recommendation support the court's holding that the extensive constitutional error in Mr. King's penalty phase could not reasonably have affected the outcome.

[7] Mr. King's case became final on October 15, 2012, when the United States Supreme Court denied his petition for certiorari. Under *Mosley*, there is no question that *Hurst* applies retroactively in this case.

First, the Florida Supreme Court's purported reliance on the "egregious facts" in affirming Mr. King's death sentence is misplaced, as several of the cases in which the court has already granted *Hurst* relief involve equally "egregious facts" as well as four or more aggravating circumstances. *See, e.g.*, *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (*Hurst* relief granted where the defendant was convicted of the kidnapping, robbery, and first degree murder of an 81 year old woman and the jury unanimously found four out of five aggravating factors on a special verdict form); *Mosley*, 209 So. 3d 1248 (*Hurst* relief granted where the defendant received a death sentence for the death of his infant son and a life sentence for the death of his girlfriend and the trial court found four aggravating factors and no statutory mitigators); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* relief granted where the defendant was convicted of three counts of first degree murder where one of the victims was a law enforcement officer and the trial court found five aggravating factors). Because the facts of all of these cases are undoubtedly aggravated, the only way to distinguish Mr. King's case and these others is the existence of a unanimous death recommendation here.

It is clear from the court's opinion that the jury's unanimous death recommendation was the driving force behind the court's affirmance of King's death sentence. However, it is a clear violation of the Fifth, Sixth and Eighth Amendments to the United States Constitution for the Florida Supreme Court to rely on, or even consider, the original sentencing jury's advisory death recommendation as evidence that the *Hurst* error in this case is harmless. As the Florida Supreme Court acknowledged on remand in *Hurst v. State*, the determinations regarding the sufficiency of aggravators and the relative weight of aggravating and mitigating circumstances are Sixth Amendment factual findings. 202 So.3d 40, 57 (Fla. 2016). It necessarily follows that, to comply with the constitution, <u>each</u> of these determinations must be made unanimously and beyond a

reasonable doubt, pursuant to instructions that accurately communicate the finality of those findings. Because the jury's sentence recommendation in this case was advisory and, to the extent that it involved a resolution of disputed facts, did so pursuant to an unstated burden of proof, it did not serve any Sixth Amendment function. Therefore, the court cannot treat the recommendation as a fact-finding, nor can it assume or speculate that the jury, if properly instructed, would have reached the same conclusion.

That the jury's ultimate advisory death recommendation was unanimous does not change the fact that Mr. King's penalty phase jury did not make any actual findings, so we have no way of knowing, for example, what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt.[8]

In addition, because the Sixth Amendment also necessitates that the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances be proven to a jury, those facts must, like the existence of aggravating circumstances, be established beyond a reasonable doubt. The Fifth Amendment's due process guarantee requires that, in all criminal prosecutions, the government prove each element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). This requirement attaches to any factual finding necessitated by the Sixth Amendment. As the United States Supreme Court noted in *Sullivan v. Louisiana*,

[8] Mr. King's jury asked the following question during penalty phase deliberations: "Can a juror recommend the death penalty without agreeing to all four of the aggravating circumstances beyond a reasonable doubt?" R30/3747-52. The jury was instructed by the court at 2:27 p.m. "that the answer to this question is contained in the instructions and you must rely upon the instructions that I gave you concerning this matter." R30/3752. Despite their apparent confusion and lack of unanimity regarding which aggravating circumstances had been established, the jury returned with an advisory verdict only minutes later, at 2:43 p.m. R30/3753-54. The question and lack of deliberations thereafter suggest that the jury did not unanimously find all four aggravating factors.

> it is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed. 2d 182 (1993).

The *Apprendi* line of cases clearly incorporate this requirement, as the Supreme Court noted time and time again that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*." *Apprendi*, 530 U.S. 466 (emphasis added); *United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005)("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *Cunningham v. California*, 549 U.S. 270, 273, 127 S.Ct. 856, 166 L.Ed. 2d 856 (2007)("[f]actfinding to elevate a sentence …, this Court's decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard"); *see also Rauf v. State*, 145 A.3d 430, 434, 488 (Del. 2016) (weighing determination in a death penalty case must be made by the jury, beyond a reasonable doubt).

The Florida Supreme Court's conclusion that jury findings regarding the sufficiency of aggravating circumstances and the relative weight of aggravating and mitigating circumstances fall under the Sixth Amendment's umbrella necessarily requires that these determinations must be made beyond a reasonable doubt. Any jury determination of these facts in the absence of the stringent standard of proof guaranteed by the Fifth Amendment, as occurred during the original penalty phase below, is insufficient to meet constitutional muster.

Neither can the court perform harmless error analysis on jury findings or verdicts that are based on an improper (or unspecified) standard of proof. Federal precedent requires that, before a reviewing court may apply harmless-error analysis, there must be a valid jury verdict, founded in proof beyond a reasonable doubt, in the original proceedings. *See Sullivan*, 508 U.S. at 279-80. A valid jury verdict is necessary because, to determine harmlessness, the appellate court must consider "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Id*. at 279. Where there is no valid jury verdict for the Court to consider, this analysis is impossible. *Id*.

Because there was no Sixth Amendment jury verdict here, *see Sullivan*, 508 U.S. at 278 ("the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"), the court cannot rely on the advisory recommendation, even when unanimous, to determine harmlessness. This practice necessarily involves an unconstitutional inquiry:

> The [proper] inquiry … is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Sullivan, 508 U.S. at 278. By concluding that the jury's sentencing recommendation, when unanimous, represents the "verdict" that would have been reached were there no Sixth Amendment errors, the Florida Supreme Court makes this same mistake.

Finally, there is doubt that a properly instructed jury would have unanimously returned a death recommendation. Mr. King's jury was instructed by the judge that, "the final decision as to what punishment shall be imposed is my responsibility" and that the law requires that they render an "advisory sentence" as to what punishment should be imposed upon Mr. King. R30/3730. In the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v.*

Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed 2d 231 (1985) must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*, 210 So. 3d 630 (Fla. 2016). As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *See Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). There is a probability that at least one juror would not join a death recommendation if a resentencing were now conducted if the proper *Caldwell* instructions would be required. The likelihood of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.").

In concluding that the jury would have unanimously found that there were sufficient aggravating circumstances that outweighed the mitigating circumstances, the Florida Supreme Court is improperly engaging in speculation and substituting its judgment for that of the jury. *See*

King, 211 So. 3d at 893-94 (Fla. January 26, 2017) (Perry, J., dissenting); *Davis v. State*, 207 So. 3d 142 (Fla. 2016) (Perry, J., dissenting). Because Mr. King's jury made no definitive findings as to the facts necessary to make him eligible for death, the court "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S.Ct. at 622. Thus, the *Hurst* error in this case is not harmless beyond a reasonable doubt, and Mr. King is entitled to a new penalty phase trial.

RELIEF REQUESTED

Under the AEDPA, this Court can grant habeas relief because the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. *See Wiggins*, 539 U.S. at 528; *see* 28 U.S.C. § 2254(d)(2). Mr. King has rebutted factual findings on which the state courts relied on by clear and convincing evidence. *See* 28 U.S.C. § 2254(e) (1). Furthermore, this Court can grant habeas relief because state courts unreasonably applied clearly established federal law to the evidence in the state court proceedings. Accordingly, Mr. King respectfully requests that this Court find that his Constitutional rights were violated in accordance with the foregoing Grounds, grant his writ, and vacate and set aside his conviction and sentences or grant such other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2017, I electronically filed the foregoing **PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS** with the Clerk of the United States Court of Appeals in and for the Middle District of Florida, Tampa Division, United States Courthouse, 801 North Florida Avenue, Tampa, Florida 333602, by using the CM/ECF system, which will send notice of electronic filing to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, at scott.browne@myfloridalegal.com and at CapApp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Michael L. King, DOC# 132254, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, a non-CM/ECF participant, on this 25th day of August, 2017.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

MICHAEL L. KING,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E

Petitioner's Reply to Respondent's Response to his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, filed January 31, 2018.

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

MICHAEL L. KING,
Petitioner,

v.

DEATH PENALTY CASE
CASE NO. 8:17-cv-985-T-33TGW

JULIE L. JONES, SECRETARY, DEPARTMENT OF CORRECTIONS and PAMELA JO BONDI, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO HIS PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Petitioner, Michael L. King, by and through undersigned counsel, respectfully submits the following Reply to the Respondent's Response ("Response") (Doc. 24) to his Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition")(Doc. 1). Mr. King previously filed a Memorandum of Law in Support of his Petition ("Petition") (Doc. 18) and relies in large part upon the arguments raised therein to refute Respondent's arguments. Pursuant to this Court's Order dated January 26, 2018 (Doc. 31), Mr. King represents that no additional claims are raised in this Reply.

REPLY TO RESPONSE ON GROUND ONE

Respondent 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 multiple experts in an effort to develop mitigation. Doc. 24 at 43. 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 Mr. 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 Mr. King. He testified that Mr. 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 Mr. King was six years old. Trial counsels' failure to investigate Mr. King's toxic exposures was objectively unreasonable because they were aware that Mr. 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 Mr. King's toxic exposures could have contributed to his brain abnormalities. *See Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 453, 175 L.Ed. 398 (2009). Although the Appellee argues that Dr. Sesta included in his report "a discussion of toxin exposure with King" (Doc. 24 at 44), 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 Mr. King's trial counsel investigated Mr. King's exposure to pesticides or the chemicals used in the plumbing industry. Respondent 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." (Doc. 24 at 53) This is an unreasonable inference because trial counsel failed to investigate Mr. 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, Respondent tried to undermine Dr. Lugo's extensive qualifications, which they refer to as "modest". Doc. 24 at 48. Andrés Lugo, M.D. testified on behalf of Mr. King at the post-conviction evidentiary hearing regarding his public health assessment of Mr. King.

PC10/1555-1613. Respondent points out that Dr. Lugo 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. Doc. 24 at 48. 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 Respondent is critical of the fact that Dr. Lugo is not licensed to practice medicine in the United States and refers to him at times as "Mr. Lugo", 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. Respondent 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 Respondent's implication.

REPLY TO RESPONSE ON GROUND TWO

Regarding Mr. King's claim of ineffective assistance of counsel for failing to properly preserve his *Batson*[1] claim regarding juror 111, Respondent argues that Ms. Schlemmer did not want Juror 111 on the jury, and that, "[a]s a tactical decision, counsel's performance is virtually immune from post-conviction challenge." Doc. 24 at 72-73. Respondent, in making this argument, ignores several key facts. First, Ms. Schlemmer testified at the post-conviction evidentiary hearing that she does not have an independent recollection of Mr. Scotese's *Batson* objection regarding juror 111. PC11/1685. Looking back, Ms. Schlemmer stated that she can see why she would not have wanted juror 111, so she would not have made the objection. PC11/1685. However, Ms. Schlemmer's assessment was made in hindsight, and has no place in a *Strickland*

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

analysis. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (holding that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); *see also, White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (holding that when assessing *Strickland* claims courts should avoid second guessing with the benefit of hindsight). Furthermore, even if Ms. Schlemmer did not want juror 111 on the jury, it was Mr. Scotese who made the *Batson* objection. Mr. Scotese did not recall any communications with Ms. Schlemmer or Mr. Meisner from the time he made the objection to the State's peremptory strike of juror 111 until the objection was denied. PC10/1641-42. Neither co-counsel urged him to abandon his objection in any way. PC10/1642. Mr. Scotese further testified that he was not at any point trying to lose his objection so that the State would be able to strike juror 111, and when he made the objection he was trying his hardest to preserve the issue for direct appeal. PC10/1642, 1657. Therefore, trial counsel's failure to preserve the *Batson* challenge regarding juror 111 can in no way be attributed to a tactical decision.

Respondent cites several cases from the Eleventh Circuit Court of Appeals for the proposition that the *Strickland* prejudice standard requires an examination of the prejudice to the trial, as opposed to the appeal. Doc. 24 at 76-79. While this is generally true, the Eleventh Circuit Court of Appeals in *Davis*[2] recognized a narrow exception where trial counsel is acting as appellate counsel. As the Eleventh Circuit explained in a subsequent case, there is a difference between cases in which trial counsel fails to raise any *Batson* objection and cases in which counsel raises a *Batson* objection and fails to properly preserve the objection for direct appeal:

> 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

[2] *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310 (11th Cir. 2003).

> 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 Respondent[3], 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, Mr. Davis' trial counsel objected to the State's peremptory strike of a minority juror, but failed to preserve the issue for appeal. Mr. King's case is similar to *Davis* because Mr. 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. Respondent's

[3] *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 in Ground Four that counsel's failure to properly preserve the *Batson* issue for direct appeal renders much of Mr. King's *Batson* claim from direct appeal procedurally barred in federal court (Doc. 24 at 94-95) is illustrative of the prejudice which resulted from trial counsel's deficient performance in voir dire.

REPLY TO RESPONSE ON GROUND SIX

I. Respondent's argument that no federal *Hurst* violation occurred is belied by the United States Supreme Court's holding in *Hurst* and by the Florida Supreme Court's *Hurst* precedent, including the Florida Supreme Court's decision in this case.

Respondent wrongly argues that no federal violation of *Hurst v. Florida*, 136 S. Ct. 616 (2016), occurred in Petitioner's case. Doc. 24 at 152. Respondent's argument is belied by the United States Supreme Court's holding in *Hurst* and the Florida Supreme Court's consistent *Hurst* precedent, including the Florida Supreme Court's decision in this case. The issue for this Court is whether the Florida Supreme Court's application of the harmless-error doctrine to deny relief for Petitioner's *Hurst* violation was a correct and reasonable application of federal law within the meaning of § 2254(d), not whether a *Hurst* violation occurred at all.

In *Hurst*, the United States Supreme Court held that Florida's prior capital sentencing scheme—the scheme pursuant to which Petitioner was sentenced—violated the Sixth Amendment because it required the judge, not the jury, to conduct the fact-finding required for a death sentence under Florida law. *See* 136 S. Ct. at 620-22. As the Florida Supreme Court subsequently recognized in applying *Hurst*, "these specific findings required to be made by a jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). Under the Florida Supreme Court's consistent precedent since *Hurst*, death sentences obtained through Florida's prior judge-fact-finding sentencing scheme, where a jury did not conduct the fact-finding regarding

the aggravating factors, their sufficiency, and their weight relative to mitigation, violated the Sixth Amendment.

The Florida Supreme Court's decision in Petitioner's case - in language quoted by Respondent, Doc. 24 at 134- clearly recognized that a federal *Hurst* violation occurred:

> When the jury recommended that King be sentenced to death, it did not make specific factual findings with regard to the existence of any aggravating circumstances, nor did it make any findings with regard to the relative weight of the aggravating and mitigating circumstances. *Therefore, we conclude that his sentence was contrary to Hurst v. Florida*.

King v. State, 211 So. 3d 866, 890 (Fla. 2017) (emphasis added).

Despite this clear language, Respondent asks this Court to revisit whether a *Hurst* violation even occurred in Petitioner's case. Respondent argues that the jury's guilt-phase findings insulated Petitioner's case from *Hurst* error because those findings were sufficient to support at least one aggravating factor at the penalty phase. This argument fails because *Hurst* does not merely require a Florida jury to find the existence of at least one aggravating factor, it also requires a jury to conduct the fact-finding regarding each of the elements for a death sentence under Florida law, including the sufficiency of the aggravating factors to justify death in a particular case, and the weight of the aggravating factors relative to the mitigation - determinations not made by Petitioner's jury at the guilt phase. *See Hurst*, 136 S. Ct. at 619. That is why the Florida Supreme Court has consistently rejected arguments that a judge's finding of certain aggravators based on prior convictions insulated the death sentence from *Hurst* error. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*.").[4]

[4] Respondent's attempts to analogize the application of *Hurst* to other states' capital sentencing schemes, Doc. 24 at 141-44, notably fail to recognize the "sufficiency" element that is a requirement for a death sentence under Florida law.

This Court should join the Florida Supreme Court in rejecting, under the clear language and meaning *Hurst*, Respondent's assertion that "the only factual finding necessary to impose the death penalty is a conviction for murder plus the addition of an aggravating factor." Doc. 24 at 141.

The Florida Supreme Court correctly recognized that there is no question whether *Hurst* error occurred in Petitioner's case. The only issue for this Court is whether the Florida Supreme Court's decision to ignore the constitutional error under a harmless-error analysis can be sustained under § 2254(d).

II. Respondent's request that this Court conduct a federal retroactivity analysis should be rejected because the Florida Supreme Court's independent and adequate state-law holding that *Hurst* is retroactive places the issue outside the scope of this Court's federal habeas review.

Despite the Florida Supreme Court's holding that *Hurst* is retroactive to Petitioner's death sentence as a matter of state retroactivity law—a ruling that is appropriate under United States Supreme Court precedent, which provides that states may afford more expansive retroactivity than minimum federal standards - Respondent asks this Court to apply a separate, more restrictive federal retroactivity analysis to deny *Hurst* relief. Doc. 24 at 138, 148.

Respondent's request should be rejected. Where, as here, a state court has explicitly resolved the question of retroactivity in a petitioner's favor as a matter of state law, and the state-law analysis meets minimum federal constitutional standards, principles of comity and federalism underlying the Antiterrorism and Effective Death Penalty Act ("AEDPA") restrain federal habeas courts from applying a more restrictive federal retroactivity analysis to deny relief. This Court should not revisit the issue of *Hurst* retroactivity in this case.

A. The Florida Supreme Court's ruling that *Hurst* applies retroactively to Petitioner rested entirely on state law and complied with minimum federal standards.

As Respondent acknowledges, the Florida Supreme Court's ruling that *Hurst* applies retroactively to Petitioner rested entirely on state law. *See* Doc. 24 at 147 ("[T]he Florida Supreme Court issued an opinion in which it granted retroactive application of *Hurst* . . . under a state retroactivity analysis".). The Florida Supreme Court ruled on *Hurst* retroactivity in Petitioner's case in accordance with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), which held that *Hurst* applies retroactively as a matter of state law to postconviction defendants, like Petitioner, "whose sentences of death became final after . . . *Ring*," *id.* at 1274. *See King*, 211 So. 3d at 889-890. The retroactivity analysis in *Mosley* rested on the state-law test first articulated in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). *Mosley*, 209 So. 3d at 1276. The Florida Supreme Court has consistently emphasized that its *Witt* retroactivity analysis is separate from the federal retroactivity analysis articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *See, e.g.*, *Falcon v. State*, 162 So. 3d 954, 955-56 (Fla. 2015).

The Florida Supreme Court's application of its state-law *Witt* analysis to extend *Hurst* retroactivity to Petitioner's death sentence complied with minimum federal standards. *Teague* and federal notions of retroactivity are best understood as the floor for retroactive application of constitutional rules, with states left free to create their own ceilings. The United States Supreme Court has explained that states are free to provide more expansive retroactivity rules. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (noting that states are free to make and enforce their own laws "as long as they do not infringe on federal constitutional guarantees."). In holding that *Hurst* applies retroactively to Petitioner under state law, the Florida Supreme Court ruled consistently with *Danforth*, regardless of whether a separate retroactivity analysis under *Teague* may have resolved the issue in Petitioner's favor.

B. The principles of comity and federalism underlying AEDPA restrain this Court from supplanting the Florida Supreme Court's valid retroactivity ruling.

Federal habeas courts may conduct a federal retroactivity analysis under *Teague* in § 2254 cases where there is no independent and adequate state-law retroactivity ruling. *See, e.g.*, *Horn v. Banks*, 536 U.S. 266 (2002) (holding that *Teague* retroactivity analysis was appropriate on federal habeas review because the Pennsylvania Supreme Court had conducted no retroactivity analysis at all). But where a state court, as here, has explicitly resolved the question of retroactivity in a petitioner's favor as a matter of state law, and the state-law analysis meets minimum federal constitutional standards, the principles of comity and federalism underlying AEDPA restrain federal habeas courts from applying a more restrictive *Teague* retroactivity analysis to deny relief. In Petitioner's case, as explained above, the Florida Supreme Court's retroactivity ruling rested entirely on state retroactivity law, which, consistent with United States Supreme Court precedent, provides for more expansive retroactive application of constitutional rules than the federal *Teague* analysis. This Court should therefore decline Respondent's invitation to supplant the Florida Supreme Court's state-law ruling, on a matter not raised or challenged in the § 2254 petition, with a federal analysis in order to deny relief.

Even prior to AEDPA, the Supreme Court admonished that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) *see also Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding that "[a] federal court may not issue the writ on the basis of a perceived error of state law"). This longstanding precedent promoted the "still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Id.*; *see also Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal

habeas corpus."). Inherent in AEDPA is this deference to state courts in order to promote the principles of "comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). In interpreting a habeas court's proper role under AEDPA with these underlying principles in mind, it has been recognized time and time again that "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus." *Bradshaw v. Rickey*, 546 U.S. 74, 76 (2005). The state court's retroactivity analysis in this case does not stray from this long held maxim. A state court's retroactivity analysis and ruling are entitled to consideration within the framework of these important principles. Nowhere is this more evident than in the *Teague* opinion itself, which explicitly noted its concern about the "costs imposed upon the State[s] by retroactive applications of new rules of constitutional law on habeas corpus," *Teague*, 489 U.S. at 310, and the "[a]pplication of constitutional rules [that were] not in existence at the time a conviction became final [which] seriously undermines the principle of finality," *id*. at 309. Nothing in *Teague* suggests that a state court's willingness to provide for more expansive retroactive application of a constitutional rule must be restrained.

The same principles underlying the Supreme Court's deference to state courts on the issue of their independently created retroactivity tests are present in many jurisprudential doctrines in habeas litigation. For instance, the well-established bar to the federal review of constitutional claims that state courts rejected for failing to follow state procedure vindicates the same interests, and is a useful analogy to the deference to a state court retroactivity test. *See Thompson*, 501 U.S. at 729-30 (1991) (Repeating that federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgement."); *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

Indeed, if federal habeas courts were required to apply *Teague* to overrule more expansive state-law retroactivity rulings, the principle articulated in *Danforth* would lose all meaning. If states are permitted to provide more expansive retroactivity to constitutional rules than *Teague*, it would make little sense as a practical matter to overturn those retroactivity rulings every time a case reached federal habeas review. And as a matter of AEDPA review, state retroactivity rules that provide for more expansive retroactivity than the minimum federal standards are necessarily sound under § 2254(d)(1), because they comply with the clearly-established federal law articulated in *Danforth*.

Schriro v. Summerlin, 542 U.S. 348, 364, (2004), which applied *Teague* to hold that *Ring* was not retroactive on federal habeas review, does not suggest that a *Teague* analysis is appropriate in this case. In *Summerlin*, unlike in this case, there was no retroactivity ruling regarding *Ring* by the Arizona Supreme Court. *Teague* analysis was appropriate in *Summerlin* because there was no state-law retroactivity ruling to which the federal habeas court could defer. Here, however, the Florida Supreme Court's state-law retroactivity ruling is entitled to deference. A *Teague* analysis intended to dictate the result of the retroactivity issue in this case would contravene notions of comity, federalism, and finality, which are essential not only to the Supreme Court's holding in *Teague*, but also to the broader foundation of AEDPA and habeas jurisprudence generally.

C. Even if this Court were to supplant the Florida Supreme Court's state-law retroactivity analysis with a federal analysis, *Hurst* should apply retroactively to Petitioner.

Even if this Court were to supplant the Florida Supreme Court's state-law retroactivity analysis with a federal analysis, *Hurst* should be applied retroactively to Petitioner because it is a "substantive" decision within the meaning of federal law.

Hurst established a substantive Sixth Amendment rule requiring that a jury find as fact: (1) each aggravating circumstance; (2) that those aggravators together are "sufficient" to justify imposition of the death penalty; and (3) that those aggravators together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Each of those findings is required to be made by the jury beyond a reasonable doubt. Such findings are manifestly substantive. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (holding that the decision whether a juvenile is a person "whose crimes reflect the transient immaturity of youth" is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an "instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish." *Id.* at 735.

The Florida Supreme Court's decision in *Hurst v. State* also established an Eighth Amendment rule that requires those three beyond-a-reasonable-doubt findings to be made unanimously by the jury. The substantive nature of the unanimity rule is apparent from the Florida Supreme Court's explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the sentencing determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida's death-sentencing scheme complies with the Eighth Amendment and to "achieve the important goal of bringing [Florida's] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law." *Id.* The rule is therefore substantive as a matter of federal retroactivity law. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the

rule"). This is true even though the rule's subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (noting that state's ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders "beyond the State's power to punish," *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, "[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on" the judge-sentencing scheme. *Id.* The "unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment*," *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state's power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes.").

Respondent attempts to dismiss the retroactive application of *Hurst* under federal law to the Petitioner's case by arguing that because the federal court in *Lambrix v. Sec'y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017) found *Hurst* not retroactive, such a ruling cannot be made by this Court. Doc. 24 at 149. However, this disregards the rulings under *Teague* and *Danforth*, which make clear that states are free to develop and apply their own more expansive retroactivity tests. Additionally, *Lambrix* dealt primarily with an idiosyncratic issue—the "retroactivity" of Florida's new capital sentencing statute—and did not focus squarely on the

retroactivity of the constitutional rules arising from the *Hurst* decisions. Thus, even if the Petitioner's case required a *Teague* retroactivity analysis, *Lambrix* is not dispositive of this issue. Because *Hurst* resulted in a substantive rule, even under the stricter federal rules of retroactivity under *Teague*, *Hurst* should be applied retroactively.

III. Respondent fails to recognize that the denial of *Hurst* relief in Petitioner's case was based on the Florida Supreme Court's application of an unconstitutional per se harmless-error rule, which the Florida Supreme Court has mechanically applied in every case in which the pre-*Hurst* advisory jury unanimously recommended death.

Respondent incorrectly contends that the Florida Supreme Court acted reasonably in holding the *Hurst* error in Petitioner's case harmless beyond a reasonable doubt. Doc. 24 at 151-154. Respondent fails to recognize that the denial of *Hurst* relief in Petitioner's case was based on the Florida Supreme Court's application of an unconstitutional per se harmless-error rule, which the Florida Supreme Court has mechanically applied in every case in which the pre-*Hurst* advisory jury unanimously recommended death. Although the Florida Supreme Court's harmless-error analysis in this case referenced part of the record in Petitioner's case in dicta, the entire record was never reviewed for harmlessness, and the partial review of the record was merely window dressing for yet another application of the court's unconstitutional per se rule. As explained further below, every unanimous-recommendation case is denied *Hurst* relief in the Florida Supreme Court pursuant to the court's per se rule, regardless of case-specific factors.

A. The Florida Supreme Court's per se harmless-error rule relies entirely on the underlying federal constitutional violation and precludes individualized review of that violation's impact in the context of the record as a whole.

After its decision in *Hurst*, the Florida Supreme Court subsequently created a per se harmless-error rule for *Hurst* claims. The rule relies entirely on the vote of a defendant's "advisory" jury – a jury that did not conduct the specific fact-finding required by the Sixth

Amendment, but only made a generalized recommendation that the judge impose the death penalty. Petitioner asks this Court to find that the Florida Supreme Court's harmlessness finding is an unreasonable application of federal law.

Since *Davis v. State*, 207 So. 3d 142 (Fla. 2016), the Florida Supreme Court's per se rule has been mechanically applied in every Florida *Hurst* case. If a defendant's advisory jury voted to recommend death by a majority vote – i.e., a margin between 7-to-5 and 11-to-1 – the *Hurst* error is deemed not harmless and the Florida Supreme Court vacates the defendant's death sentence. But if the defendant's advisory jury recommended death by a vote of 12-to-0, the *Hurst* error is automatically deemed harmless and the Florida Supreme Court upholds the defendant's death sentence. No other factors are meaningfully considered. To the extent that the Florida Supreme Court claims Petitioner's case is unique in light of its "egregious facts," *King*, 211 So. 3d at 891-92, that Court is simply offering a superficial pretext for its automatic finding of *Hurst* harmlessness when a jury returned a 12-0 death recommendation.[5]

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims fits a historical pattern. Over the past 30 years, this Court has overturned similar bright-line tests invented by the Florida Supreme Court because they failed to give full effect to the U.S. Supreme Court's death penalty jurisprudence. Nine years after the U.S. Supreme Court decided in *Lockett v. Ohio*, 438

[5] As Petitioner pointed out in his Memorandum of Law, the Florida Supreme Court has readily granted *Hurst* relief in cases with equally "egregious facts" and four (or more) aggravating circumstances. *See, e.g.*, *Williams v. State*, 209.So.3d 543 (Fla. 2017) (*Hurst* relief granted where defendant was convicted of kidnapping, robbery, and first degree murder of an 81 year old woman, and the jury found four aggravating circumstances using a special verdict form); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016) (*Hurst* relief where defendant was convicted of killing his infant son and girlfriend and the trial court found four aggravating factors with no statutory mitigators); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (*Hurst* relief where defendant was convicted of three counts of first degree murder, one victim was a law enforcement officer, and the five aggravating factors were found.) The only substantial factor distinguishing Petitioner's case is that his jury recommended death by a vote of 12-0.

U.S. 586 (1978), that mitigation could not be confined to a statutory list, the Court overturned the Florida Supreme Court's bright-line rule barring relief in cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after the U.S. Supreme Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, the Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-score test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986 (2014). And 14 years after the U.S. Supreme Court held in *Ring v. Arizona*, 536 U.S. 584 (2002), that fact-finding underlying a death sentence must be conducted by a jury, not a judge, the Court overturned the Florida Supreme Court's repeated rejection of *Ring* claims. *See Hurst*, 136 S. Ct. 616.

Despite this history, the Florida Supreme Court has refused to address arguments in Petitioner's or any other case that such a per se harmless-error rule for *Hurst* claims violates the United States Constitution. In so doing, that Court continues to uphold unconstitutional death sentences such as Petitioner's, while scores of other prisoners, who were sentenced at the same time, pursuant to the same unconstitutional scheme, are moved off death row. If this mechanical rule stands, Petitioner's case will never be given the individualized jury fact-finding required by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The United States Constitution imposes limits on a state court's use of a harmless-error rule to reject a federal constitutional claim. Whether a state court has exceeded constitutional boundaries in the denial of a federal claim on harmless-error grounds "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). Federal courts "cannot leave to the States the formulation of the authoritative laws, rules, and

remedies designed to protect people from infractions by the States of federally guaranteed rights." *Id.* Thus, the harmfulness of a constitutional violation must be assessed on a case-by-case basis in the context of the entire proceeding. *Id.* at 22-23.

The United States Supreme Court has emphasized that proper harmless-error analysis should consider the error's probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And the Court has made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error").

A federal constitutional error's impact must be assessed in the context of the entire record. *See, e.g.*, *Rose v. Clark*, 478 U.S. 570, 583 (1986). When the error's impact is unclear after the whole record is reviewed, courts should not undertake a harmless-error analysis that amounts to "unguided speculation." *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978); *see also O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("[T]he uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict.").

In capital cases, this Court reviews a state court's harmless-error denial of a federal constitutional claim with heightened scrutiny. *See, e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). As this Court has long recognized, capital cases demand heightened standards of reliability because "[d]eath is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Accordingly, courts are

forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.

The U.S. Supreme Court has previously applied these standards to review harmless-error rulings of the Florida Supreme Court. *See, e.g.*, *Schneble v. Florida*, 405 U.S. 427 (1972); *Barclay v. Florida*, 463 U.S. 939 (1983); *Parker v. Dugger*, 498 U.S. 308 (1991); *Sochor*, 504 U.S. 527. In some cases, the Florida Supreme Court's harmless-error analysis survived the U.S. Supreme Court's federal constitutional scrutiny. *See, e.g.*, *Schneble*, 405 U.S. at 432; *Barclay*, 463 U.S. at 958. In other cases, it did not. *See, e.g.*, *Parker*, 498 U.S. at 320; *Sochor*, 504 U.S. at 540.

However, as applied in this case, the Florida Supreme Court's per se harmless-error rule contravenes the U.S. Supreme Court's requirement that state courts, especially in capital cases, conduct an individualized review of the record as a whole before denying federal constitutional relief on harmless-error grounds. The Florida Supreme Court's per se rule operates mechanically, rather than individually, to deem *Hurst* errors harmless in every case in which the advisory jury unanimously recommended death. As Petitioner's case and other cases demonstrate, when a jury working under Florida's unconstitutional system reached a unanimous advisory recommendation of death, the Florida Supreme Court refuses to entertain any individualized, record-based arguments before holding the federal constitutional *Hurst* error harmless beyond a reasonable doubt.

The U.S. Supreme Court's precedent is clear and consistent that harmless-error analysis must include review of the whole record. *See, e.g.*, *United States v. Hastings*, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record *as a whole* and to ignore errors that are harmless."); *Rose*, 478 U.S. at 583 ("We have held that *Chapman* mandates consideration of the *entire record* prior to

reversing a conviction for constitutional errors that may be harmless."); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1967) ("Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt."); *Yates v. Evatt*, 500 U.S. 391, 403 (1991) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to *everything else the jury considered on the issue in question*, as revealed in the record."); *see also Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (explaining that the "common thread" connecting cases subject to harmless-error review under *Chapman* is that each involves "trial error" that may "be qualitatively assessed *in the context of the other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt"). And state courts outside of Florida have recognized and applied the U.S. Supreme Court's mandate that harmlessness be analyzed in the context of the whole record. *See, e.g.*, *State v. Cage*, 583 So. 2d 1125, 1128 (La. 1991) ("*Chapman* harmless error analysis . . . mandates consideration of the entire record.").[6]

That the *Brecht v. Abrahamson*, 507 U.S. 619 (1993), standard of review applies in a federal habeas context, rather than the *Chapman* harmless-beyond-a-reasonable-doubt standard in state post-conviction cases, makes no difference in the proper outcome of Petitioner's case. Indeed, the U.S. Supreme Court has emphasized the need to consider the whole record rather than mechanical application of a per se rule in *any* harmless error analysis, regardless of whether that

[6] *See, e.g.*, *Davis*, 207 So. 3d 142; *King*, 211 So. 3d at 889-93; *Kaczmar v. State*, 228 So. 3d 1, 7-9 (Fla. 2017); *Knight v. State*, 225 So. 3d 661, 682-83 (Fla. 2017); *Hall v. State*, 212 So. 3d 1001, 1034 (Fla. 2017); *Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017); *Jones v. State*, 212 So. 3d 321, 334 (Fla. 2017); *Middleton v. State*, 220 So. 3d 1152, 1184 (Fla. 2017); *Oliver v. State*, 214 So. 3d 606, 617 (Fla. 2017); *Morris v. State*, 219 So. 3d 33, 46 (Fla. 2017); *Tundidor v. State*, 221 So. 3d 587, 607 (Fla. 2017); *Cozzie v. State*, 225 So. 3d 717, 733 (Fla. 2017).

case is placed under the *Brecht* or *Chapman* onus. *See, e.g.*, *Brecht*, 507 U.S. at 642 (O'Connor, J., concurring) ("The purpose of reviewing the *entire record* is, of course, to consider all the ways that error can infect the course of a trial."); *United States v. Lane*, 474 U.S. 438, 448 (1986) ("That kind of inquiry requires a review of the *entire record*."); *Calderon v. Coleman*, 525 U.S. 141, 148 (1998) ("The test requires the reviewing judge to evaluate the error in the context of the *entire record*.").

The Florida Supreme Court's per se rule flouts the U.S. Supreme Court's essential assumption in *Barclay v. Florida* that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958. The Florida Supreme Court's rule is also at odds with the U.S. Supreme Court's decision in *Harrington v. California*, which explained that proper harmless-error analysis not only considers the impact of a constitutional error on the specific jury in the case, but also whether an average rational jury would have reached the same conclusion without the constitutional error. *See* 395 U.S. at 254. The Florida Supreme Court's per se rule is inconsistent with *Sochor v. Florida* and *Clemons v. Mississippi*, where the U.S. Supreme Court highlighted that harmless-error rulings must be accompanied by specific reasoning grounded in the whole record. *See Sochor*, 504 U.S. at 541; *see Clemons*, 494 U.S. at 752. And the Florida Supreme Court's per se rule's failure to consider mitigation contradicts *Parker v. Dugger*, where the United States Supreme Court rejected such a cursory harmless-error analysis by the Florida Supreme Court. *See* 498 U.S. at 320 ("What the Florida Supreme Court could not do, but what it did, was to ignore evidence of mitigating circumstances in the record.").

Even though it is undisputed that Petitioner's death sentence was imposed under a capital sentencing scheme that violated the Federal Constitution and that that unconstitutional scheme caused substantial and injurious effect or influence in determining the jury's verdict (satisfying the *Brecht* standard), the automatic per se harmlessness rule created by the Florida Supreme Court in cases with unanimous jury recommendations effectively leaves the State with no burden whatsoever, and leaves defendants with 12-0 jury death recommendations with no opportunity for full constitutional review of their sentence.

The spirit of *Hurst* – ensuring that capital defendants do not languish under death sentences arrived at through unconstitutional means – has been controverted through the mechanical rule applied in cases where the advisory jury unanimously recommended the death penalty. The Florida Supreme Court also seemed to recognize in *Hurst v. State* that a pre-*Hurst* advisory jury recommendation does not demonstrate on its own that the evidence presented at the penalty phase was sufficient to support a death sentence. *See* 202 So. 3d at 68. But even if it did, as Respondent and the Florida Supreme Court allege in this case, that still does not permit the Florida Supreme Court's per se rule to stand. *See Satterwhite*, 486 U.S. at 258 (explaining that the state does not meet burden of establishing that error in a capital sentencing is harmless merely by showing that the evidence in the record is sufficient to support a death sentence). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation, and that it would have done so beyond a reasonable doubt. As the next section explains, that is especially so in light of the improper role assigned to the jury by pre-*Hurst* instructions that violate *Caldwell v. Mississippi* by unconstitutionally minimizing the jury's responsibility in sentencing someone to death. *See Caldwell v. Mississippi*, 472 U.S. 320 (1987).

A reliable harmless-error analysis must begin with what the United States Supreme Court held in *Hurst* that a jury must do for a Florida death sentence to be constitutional. The Court ruled the Sixth Amendment requires juries to make the findings of fact regarding the elements required for a death sentence under Florida law: (1) the aggravating circumstances that had been proven beyond a reasonable doubt; (2) the aggravating circumstances were together "sufficient" to justify the death penalty beyond a reasonable doubt; and (3) the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. *See* 136 S. Ct. at 620-22.[7] The second and third of these elements cut against the harmless-error analysis in Justice Alito's dissent in *Hurst*. Justice Alito stated that he would have held the *Hurst* error harmless because the evidence supported the trial judge's finding of "at least one aggravating factor." *Id.* at 626 (Alito, J., dissenting). But, as the Florida Supreme Court recognized in *Hurst v. State*, 202 So. 3d at 68, unlike the Arizona capital sentencing scheme at issue in *Ring*, Florida's scheme required fact-finding as to the aggravators *and their sufficiency to warrant the death penalty*. The fact that sufficient evidence exists to prove at least one aggravator to the jury is not enough to conclude that a *Hurst* error is harmless. *See id.* at 53 n. 7. And, in any event, the United States Supreme Court has made clear that the State does not meet its harmless-error burden in a capital sentencing case merely by showing that evidence in the record is sufficient to support a death sentence. *See Satterwhite*, 486 U.S. at 258. "[W]hat is important is an *individualized determination*," given the

[7] Applying the U.S. Supreme Court's decision on remand, the Florida Supreme Court held, in *Hurst v. State*, that the Eighth Amendment also requires Florida juries to render unanimous findings of fact on each element, and that those findings must precede a unanimous overall death recommendation. *See* 202 So. 3d at 53-59. The Florida Supreme Court also emphasized that even if the jury unanimously finds each of the required elements satisfied, the jury is still not required to recommend death, and the judge is not required to impose death. *Id.* at 57-58.

well-established Eighth Amendment's requirement of individualized sentencing in capital cases. *Clemons*, 494 U.S. at 753.

Accordingly, the unanimity or non-unanimity of a defendant's pre-*Hurst* advisory jury's vote cannot by itself resolve a proper harmless-error inquiry. The fact that an advisory jury unanimously *recommended* the death penalty does not establish that the same jury would have made, or an average rational jury would make, the three specific *findings of fact* to support a death sentence in a constitutional proceeding.

Indeed, prior to *Hurst*, the Florida Supreme Court recognized the ambiguity inherent in Florida's advisory jury recommendations. In 2009, the Florida Supreme Court considered, but declined to mandate, interrogatory advisory jury recommendations in death penalty cases. *See In re Standard Jury Instructions*, 22 So. 3d 17 (Fla. 2009). A concurrence in that decision observed:

> The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no will ever know if one, more than one, any or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote.

Id. at 26 (Pariente, J., concurring). The same is true of Petitioner's advisory jury recommendation.

Even if, speculatively, the jury made all the necessary findings, the same sentence would not necessarily have followed. Jury findings in a constitutional proceeding may have yielded a lesser number of aggravators than the judge's findings. Jury findings may have yielded different "sufficiency" and "insufficiency" determinations than those made by the judge. The jury may have made different findings regarding the weight of the aggravating or mitigating circumstances. And the judge, with findings from a properly instructed jury, might have exercised his sentencing discretion differently. *See Hurst*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished

"the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.").

Moreover, in a constitutional proceeding where the jury was instructed that its findings of fact would be binding on the trial court in the ultimate decision whether to impose a death sentence, the jury may have considered the evidence more carefully, and given the mitigation more weight. This idea, explored further in the next section of this Petition, is at the heart of the United States Supreme Court decision in *Caldwell v. Mississippi*, 472 U.S. 320.[8]

The Federal Constitution requires state courts to apply this myriad of potential effects on a case-by-case basis. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*."). The Florida Supreme Court's per se rule automatically relieves the State of its burden, simply based on a reckless assumption that a 12-0 vote for death under an unconstitutional scheme would have been the same under a constitutional scheme. In a capital case, this violates the federal constitutional requirement for heightened reliability in death sentencing and allows for impermissible "unguided speculation." *Holloway*, 435 U.S. at 490-91; *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a

[8] Defense counsel's approach would also have been different absent the *Hurst* error. Counsel may have conducted his voir dire questioning of prospective jurors differently had he known that only one juror needed to be convinced, as to only one of the elements, in order to avoid a death sentence. Counsel may have presented evidence diminishing the aggravation differently had he known that the jury, rather than the judge, was required to unanimously find that each aggravating circumstance had been proven beyond a reasonable doubt and that the aggravating circumstances were together sufficient to justify the death penalty. Counsel's thinking and advice to the client on how to proceed may have been altered had he known that the jury would be instructed that it could recommend a life sentence even if it had unanimously agreed that all of the other elements for a death sentence were satisfied.

constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Instead of providing for the tailored harmless-error review the Constitution requires, the Florida Supreme Court has adopted a per se rule that works a fundamental injustice on Petitioner and others in his position. Petitioner sits on death row today while dozens of other Florida prisoners - some of whom were sentenced before him, some of whom were sentenced after him, and many of whom committed murders, including multiple murders, involving equally aggravating circumstances as in his crime - have been granted re-sentencings under *Hurst*. Because no culpability-related distinctions can justify this disparity of results, the rule that produced it violates the Eighth Amendment.

B. The Florida Supreme Court's per se harmless-error rule relies entirely on advisory jury decisions infected with *Caldwell* error.

Respondent makes much of the fact that Petitioner's jury returned a 12-0 verdict. In doing so, Respondent erroneously relies on only one aspect of the *Hurst* decision (jury unanimity) and overlooks other constitutional requirements for a reliable sentence that were missing in Petitioner's case.

In *Caldwell v. Mississippi*, the penalty-phase jury did not receive an accurate description of its role in the sentencing process due to the prosecutor's suggestion that the jury's decision to impose the death penalty would not be final because an appellate court would review the sentence. 472 U.S. at 328-29. The U.S. Supreme Court found that the prosecutor's remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Id.* at 329. The Court concluded that, because it could not be ascertained that the remarks had no effect on the jury's sentencing decision, the jury's decision did not meet the Eighth Amendment's standards of reliability. *Id.* at 341. Accordingly, *Caldwell* held

that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Id.* at 328-29.

This is the situation at bar. Petitioner's jury was instructed by the judge:

> As you have been told, the final decision as to what punishment shall be imposed is my responsibility. However, the law requires that you render an advisory sentence as to what punishment should be imposed upon the defendant.

R30/3730.

Although Respondent erroneously contends that the State presented six aggravating factors (Response at 152), the jury was actually instructed that they could consider four aggravating circumstances: (1) The murder was especially heinous, atrocious, or cruel (HAC); (2) The murder was especially cold, calculated, and premeditated (CCP); (3) The murder was committed for the purpose of avoiding a unlawful arrest; and (4) The murder was committed while Petitioner was engaged in the commission of a sexual battery or kidnapping. R30/3730-34. The judge went on to instruct the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find aggravating circumstances do exist to justify the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that do exist.

R30/3734-35. The jury was instructed that "[m]itigation may also consist of any factor that could reasonably bear on the sentence", and they were specifically asked to consider two statutory mitigating factors and thirteen non-statutory mitigating factors. R30/3735-37. The judge ultimately found that all four aggravating factors existed. R11/2048-58. He afforded great weight to the first three aggravating factors, and only moderate weight to the aggravating factor that the murder was committed while Petitioner was engaged in the commission of a sexual battery or kidnapping. R11/2048-58.

Petitioner's jury deliberated for less than two hours regarding their advisory sentence. Penalty phase deliberations began at 11:51 a.m. on September 4, 2009. R30/3746. From approximately 2:21 to 2:27 p.m., the court addressed the following question from the jury: "Can a juror recommend the death penalty without agreeing to all four of the aggravating circumstances beyond a reasonable doubt?" R30/3747-52. The jury was instructed by the court at 2:27 p.m. "that the answer to this question is contained in the instructions and you must rely upon the instructions that I gave you concerning this matter." R30/3752. At 2:27 p.m., court adjourned and the jury returned to their deliberations. R30/3752. Despite their apparent confusion and lack of unanimity regarding which aggravating circumstances had been established, they returned with an advisory verdict only minutes later, at 2:43 p.m. R30/3753-54.

Where a jury is told that the ultimate responsibility regarding sentencing lies with the judge, there are "specific reasons to fear substantial unreliability as well as bias in favor of death sentences." *Caldwell*, 472 U.S. at 328-29. Empirical research supports the notion that Florida's advisory juries were imbued with a diminished sense of responsibility for the imposition of death sentences before *Hurst*. *See, e.g.*, William J. Bowers, et. al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making*, 63. WASH. & LEE L. REV. 931, 950-62 (2006). Research conducted through the Capital Jury Project ("CJP") concludes that jurors in states with "hybrid systems" where their sentencing decision is merely a recommendation (such as Florida) "are more likely to deny responsibility, invest less energy in understanding instructions, and more often rush to judgment". *Id.* at 950.

Interviews with Florida jurors yielded narrative accounts highlighting the detrimental impact of Florida's pre-*Hurst* instructions on jurors' sense of their sentencing role. Bowers, *supra*

p. 29, at 961-62. Jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id.* The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id.* As another Florida juror said approvingly of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*

In the decades since *Caldwell*, the Florida Supreme Court has rejected numerous *Caldwell* challenges to Florida's pre-*Hurst* jury instructions. Beginning in *Pope v. Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court dismissed the relevance of *Caldwell* on the theory that, unlike with the Mississippi scheme at issue in *Caldwell*, Florida's instructions accurately described the jury's "merely" advisory nature: "[I]n Florida it is the trial judge who is the ultimate sentencer," and the jury "is merely advisory." *Id.* at 805. The Florida Supreme Court, finding "nothing erroneous about informing the jury of the limits of its sentencing responsibility," for the valid purpose of "reliev[ing] some of the anxiety felt by jurors impaneled in a first-degree murder trial," held that its advisory jury instructions complied with *Caldwell* and accurately described a constitutionally-valid scheme. *Id.*

In *Combs v. State*, 525 So. 2d 853, 856 (Fla. 1998), the Florida Supreme Court reaffirmed its holding in *Pope* that Florida's advisory jury scheme complied with *Caldwell*. The Florida Supreme Court further noted that it was "deeply disturbed" by decisions of the United States Court of Appeals for the Eleventh Circuit, in cases like *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir.

1986), and *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988) (en banc), which had expressed doubts as to whether Florida's scheme complied with *Caldwell*. For years after *Pope* and *Combs*, the Florida Supreme Court continued to reject *Caldwell* challenges to Florida's advisory jury instructions. *See, e.g., Davis v. State*, 136 So. 3d 1169, 1201 (Fla. 2014).

In light of *Hurst*, the rationale underlying the Florida Supreme Court's rejection of *Caldwell* challenges has evaporated, but as in Petitioner's case, the Florida Supreme Court continues to refuse to address Petitioner's argument that it should revisit the applicability of *Caldwell* to Florida's pre-*Hurst* scheme. *Cf. Truehill v. Florida*, 138 S. Ct. 3 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where the court was the final decision-maker and the sentencer—not the jury."). The Florida Supreme Court also refused to engage Petitioner's argument below that a proper harmless-error analysis must consider the combined impact of the *Hurst* and *Caldwell* errors, instead of simply relying on a per se rule.

In Petitioner's case, the short duration of the jury's penalty phase deliberation, including the almost immediate rendering of an advisory sentence after the judge answered their question, suggests that the jury did not engage in the careful weighing of the four aggravating circumstances and fifteen mitigating circumstances that they were asked to consider. The instructions that were given to Petitioner's jury, which reassured them that their decision was only advisory and placed the ultimate decision regarding whether Petitioner should live or die in the hands of the judge, minimized their role and relieved them of the weight that sentencing another human being to death would place on one's conscience. *See Caldwell*, 472 U.S. at 333 (expressing concern that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest on

others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role" and may, in the case of a divided jury, cause jurors who are reluctant to invoke the death sentence to give in). The jury may have decided to "'send a message' of extreme disapproval for the defendant's acts" even if it was unconvinced that death was the appropriate punishment, with the belief that if they were wrong and sentenced Petitioner to death when the sentence should be life, the judge would correct their mistake and spare his life. *See Caldwell*, 472 U.S. at 331.

The Florida Supreme Court's per se harmless-error rule for *Hurst* claims cannot predict, without review of the specific record, that a jury with full awareness of the gravity of its role in the capital sentencing process would have unanimously reached the same conclusion as the advisory jury that was told that its role was subordinate. *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988) (holding in the mitigation context that the Eighth Amendment is violated when there is uncertainty about jury's vote); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (same).

Caldwell errors must be assessed in light of the entire record. *See, e.g.*, *Cordova v. Collens*, 953 F.2d 167, 173 (5th Cir. 1992); *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998); *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). However, given its belief that no *Caldwell* error occurred, the Florida Supreme Court did not conduct an analysis of the entire record in Petitioner's case. The failure of the Florida Supreme Court's per se harmless-error rule to account for the inherent *Caldwell* error in all *Hurst* cases, including Petitioner's, is inconsistent not only with the U.S. Supreme Court's harmless-error precedents, but also with the Eighth Amendment.

C. The Florida Supreme Court's per se harmless-error rule relies entirely on advisory jury decisions not capable of supporting harmless-error analysis under *Sullivan.*

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the U.S. Supreme Court recognized that there are some jury errors that cannot be subjected to harmless-error analysis. The error in *Sullivan* was the trial court's defective instruction to the jury regarding the requirement that each element

of the offense must be found beyond a reasonable doubt—an error that the Court found affected all of the jury's findings. *Sullivan*, 508 U.S. at 277. The Court unanimously held, in an opinion by Justice Scalia, that even though the jury had rendered a decision on each of the elements of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard "vitiate[d] *all* the jury's findings" and meant, for purposes of harmless-error review, that "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 281 (emphasis in original). The Court instructed that a constitutionally-valid review would necessarily require determination of "the basis on which the jury *actually rested* its verdict," *id.* at 279 (emphasis in original). The Florida Supreme Court's per se rule harmless-error rule for *Hurst* claims presents the question whether *Brecht* and the United States Supreme Court's other harmless-error precedents permit state courts in capital cases to rest harmless-error rulings *entirely* on the votes of advisory jurors whose ultimate decision, like the jury's decision in *Sullivan*, did not constitute a "verdict" under the Sixth Amendment.

Florida's pre-*Hurst* advisory jury recommendations are no more verdicts under the Sixth Amendment than the jury findings in *Sullivan*. The U.S. Supreme Court held in *Sullivan* that the jury's findings did not constitute a verdict that could form the basis for a harmless-error ruling because the trial court's failure to properly instruct the jury on the beyond-a-reasonable-doubt standard negated all the jury's findings. *Id.* at 281. Florida's advisory juries were also given a defective instruction, which impacted all the elements for a death sentence under Florida law. As the U.S. Supreme Court recognized in *Hurst*, Florida juries were improperly instructed that it was the duty of the trial judge, not the jury, to make findings of fact. Florida's improper jury

instructions did not only "vitiate *all* the jury's findings," *id.*, they resulted in no jury findings at all.[9]

Sullivan instructs that where there is no verdict within the meaning of the Sixth Amendment, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* (emphasis in original). The Florida Supreme Court's per se harmless-error rule directly contradicts that principle. The Florida Supreme Court's rule relies entirely, to the exclusion of all other considerations, on the votes of advisory juries. This is an unreasonable application of federal law. The U.S. Supreme Court held in *Hurst* that those juries conducted no valid fact-finding within the meaning of the Sixth Amendment. Under *Sullivan*, the Florida Supreme Court's per se rule is unconstitutional because it relies entirely on a non- verdict to uphold a sentence of death.

Although Petitioner's jury recommended death by a vote of 12-0, this is not in itself sufficient for a court to find harmless error. Jurors must make several inquiries under *Hurst v. Florida*. Those inquiries did not occur in this case. Petitioner's penalty phase jury did not return a verdict making any additional findings of fact, so it is impossible to know what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Because Petitioner's jury

[9] Florida's pre-*Hurst* advisory jury decisions are distinguishable from the "incomplete verdict" at issue in *Neder v. United States*, 527 U.S. 1 (1999), which the U.S. Supreme Court found salvageable for purposes of harmless-error analysis. In *Neder*, the constitutional error was a jury instruction that omitted one of multiple elements of the offense. *Id.* at 8. The Court distinguished that error from *Sullivan*, where the error was a defective reasonable-doubt instruction on all of the elements of the offense. *See id.* at 10-11 ("[T]he jury-instruction here did not vitiate *all* the jury's findings.") (emphasis in original). As in *Sullivan*, Florida's unconstitutional jury instructions infected all the elements for a death sentence, and advisory juries rendered no findings, leaving no valid jury verdict within the meaning of the Sixth Amendment upon which to rest a proper harmless-error analysis.

made no specific findings as to the facts necessary to make a defendant eligible for death, the State "cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S.Ct. at 622.

D. The Florida Supreme Court's partial review of the record in Petitioner's case impermissibly substituted a sufficiency-of-the-evidence analysis for a harmless-error analysis.

Respondent and the Florida Supreme Court appear to misunderstand the terms "sufficiency" and "sufficient" as they apply to the necessary standard of review in this case. While a jury must find "sufficient" aggravating circumstances for a defendant to be eligible for a death verdict in the first place, this does *not* mean that a *Hurst* claim may be evaluated under the sufficiency-of-the-evidence standard of review. The sufficiency-of-the-evidence standard is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This places a much higher burden on a habeas petitioner than the *Brecht* and *Kotteakos* harmless error standard, which simply requires a petitioner to show that the raised error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Thus, the Florida Supreme Court acted in a manner contrary to federal law when it based its finding of harmless error on the premise that the jury unanimously returned a general finding that "sufficient" aggravating circumstances existed to justify a death sentence, and that the evidence of aggravating circumstances "was overwhelming and essentially uncontroverted." *King*, 211 So. 3d at 891-92. This premise at best supports a contention that a rational juror *could* make a specific finding that these aggravating circumstances existed beyond a reasonable doubt (the *Jackson* standard). It does *not* mean that the jury's lack of specific findings did not have a

substantial and injurious effect or influence on the jury's ultimate penalty recommendation (the *Brecht* standard).

In *Hurs*t, the Florida Supreme Court "declined to speculate why the jurors voted the way they did[,] but in Petitioner's case, that court "substitute[ed] its weighing of the evidence to determine which aggravators the jurors found." *King*, 211 So. 3d at 893 (Perry, J., dissenting.) Of the four aggravators found in King's case, "only one can be said to be clearly established by the evidence – a unanimous jury found that King was guilty of sexual battery and kidnapping. The remaining aggravators each required factual findings that under Hurst must now be considered and weighed by a jury." *Id*. at 893 (Perry, J., dissenting). The Florida Supreme Court concluded that the Hurst error was harmless "because no reasonable jury would have failed to find. . . .that the evidence of [the other three aggravators] was proven beyond a reasonable doubt. However, this is an incomplete review of the record before that court. Petitioner's jury specifically asked during deliberations "whether a juror could recommend death 'without agreeing to all four of the aggravating circumstances beyond a reasonable doubt.'" *Id.* at 894 (Perry, J., dissenting) (internal citations omitted). Justice Perry's inference, and the only reasonable inference to be drawn from this question, is that at least one juror did not find all four aggravating circumstances.

Respondent incorrectly argues that because only one aggravating circumstance is necessary to support a death verdict, and that because the jury convicted Petitioner of kidnapping and sexual battery, "he was indisputably eligible for his death sentence." Doc. 24 at 139. Presumably, Respondent is referring to the presented aggravating circumstance that "[t]he murder was committed while King was engaged in the commission of a sexual battery or kidnapping." Respondent's argument fails for two reasons.

First, not only did the jury not make specific factual findings regarding this aggravator in the penalty phase, the jury's factual finding at the guilt phase was limited to the convictions themselves. The jury made no specific findings regarding the convictions as they would later apply to the penalty phase, such as whether the murder was committed *while* Petitioner was engaged in the commission of a sexual battery or kidnapping. A death sentence cannot be supported merely by relying on facts from the guilt phase, without specifically applying them to the findings required at the penalty phase. To hold otherwise would vitiate the purpose of a bifurcated capital trial.

Additionally, the existence of one or more aggravating circumstances does not automatically mandate that a defendant be sentenced to death under Fla. Stat. § 921.141. In *Ring*, the factual determination required by the Arizona statute before a death sentence was authorized was the presence of at least one aggravating factor. 536 U.S. 584. In contrast, *Hurst* explained that the requisite facts required to render a defendant death-eligible under Fla. Stat. § 921.141 (3) are whether "sufficient aggravating circumstances exist" and whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Hurst*, 136 S. Ct. at 622. Neither of these factual determinations was made by Petitioner's jury. Nowhere in the statute does it say that if one aggravating circumstance is established, the defendant may automatically be sentenced to death, or that the existence of one aggravator without further findings is sufficient to warrant a sentence of death. Rather, the plain language of the statute requires a judge to find that there are "sufficient aggravating circumstances" before a death sentence can be returned. Fla. Stat. § 921.141 (3).

In the case at hand, the judge found that the aggravating factor that the murder was committed while Petitioner was engaged in the commission of a sexual battery or kidnapping was

established, but he only afforded it moderate weight. R11/2057-58. This aggravating circumstance alone, without more fact-finding, is never "sufficient" to warrant a death penalty. While this is true in any case, it is particularly significant in Petitioner's case, where there is a wealth of mitigation evidence that could – when weighed by a properly instructed jury who conducts a proper inquiry and deliberates under the proper standard – outweigh the presented aggravators. The mere existence of one aggravating circumstance, even if it is uncontroverted, does not prove either of the factual determinations required by Fla. Stat. § 921.141 (3) and *Hurst v. Florida*.

Finally, Respondent's contention that *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) is in any way applicable or instructive to this Court's harmless error review is incorrect. Doc. 24 at 142-143. The issue in *Hutton* was whether a habeas petitioner, who received a unanimous death recommendation from the jury, had demonstrated whether he could overcome a procedural default pursuant to *Sawyer v. Whitley*, 505 U.S. 333 (1992). As the Court explained:

> In that decision, this Court established that a habeas petitioner may obtain review of a defaulted claim upon 'show[ing] by clear and convincing evidence that, but for a constitutional error, no reasonable jury would have found [him] eligible for the death penalty under the applicable state law.

Jenkins v. Hutton, 137 S. Ct. at 1771. The Court further noted that "Hutton had not argued that this exception to default applied to his case." *Id*. The Court concluded that "[n]either Hutton nor the Sixth Circuit has shown by clear and convincing evidence that – if properly instructed – no reasonable juror would have concluded that the aggravating circumstances in Hutton's case outweigh the mitigating circumstances." *Id*. at 1772 (internal quotations omitted).

Hutton is incomparable to Petitioner's case for many reasons. First, the procedural posture is markedly different as Mr. Hutton was a habeas petitioner seeking an extraordinary remedy - overcoming a procedural default. In contrast, Petitioner's *Hurst* claim arose when the Florida

Supreme Court ordered supplemental briefing while the appeal of his properly and timely filed 3.851 motion was pending before them. Next, Mr. Hutton's jury was instructed that it could only recommend death if it unanimously found that the State had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigation. Hutton's jury necessarily made those findings when it recommended death. Petitioner's jury was not similarly instructed. Thus, the standard of review is different for these cases, with *Brecht* controlling harmless error analysis in Petitioner's case. As laid out above, Petitioner has satisfied the *Brecht* standard.

REPLY TO RESPONSE ON GROUNDS THREE, FOUR, AND FIVE

The remaining Grounds have been fully argued in the Petitioner's Memorandum, with specific references to the records on appeal and relevant federal case law showing that Mr. King is entitled to habeas relief in accordance with AEDPA on all of these Grounds. Based upon the state courts' unreasonable determination of the facts in light of the evidence and objectively unreasonable application of clearly established federal law, Mr. King requests that this Court grant his habeas writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 31st day of January, 2018, I electronically filed the foregoing PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO HIS PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS with the Clerk of the United States Court of Appeals in and for the Middle District of Florida, Tampa Division, United States Courthouse, 801 North Florida Avenue, Tampa, Florida 333602, by using the CM/ECF system, which will send notice of electronic filing to Scott A. Browne, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, at scott.browne@myfloridalegal.com and at CapApp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Michael L. King, DOC# 132254, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, a non-CM/ECF participant, on this 31st day of January, 2018.

Respectfully submitted,

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