IN THE SUPREME COURT OF FLORIDA
Case No. SC19-140

ERIC KURT PATRICK
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

CORRECTED INTIAL BRIEF OF APPELLANT

NEAL A. DUPREE
Capital Collateral Regional Counsel-South
Florida Bar No. 311545

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177

CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
1 East Broward Blvd., SUITE 444
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT[1]

This proceeding involves the appeal of the circuit court's denial of Eric Kurt Mr. Patrick's claim of ineffective assistance of counsel for failing to strike an actually biased juror following this Court's remand for evidentiary development. The following symbols will be used to designate references to the record in this appeal:

"R." – Record on direct appeal to this Court;

"RT." – Record on direct appeal trial transcript;

"PCR." – Record on appeal to this Court following the initial postconviction appeal; and

PCR2 – Record on the instant appeal.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Patrick requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than

[1] Mr. Patrick files this Corrected Initial Brief with the Court following the filing of his Initial Brief earlier today, June 3, 2019, under an older case number. This Corrected Initial Brief now reflects the proper case number assigned to Mr. Patrick's current appeal from the denial of postconviction relief.

appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE AND FACTS

Eric Patrick was indicted on November 9, 2005 for first-degree murder, kidnapping, and robbery. Mr. Patrick pled not guilty, was tried before a jury, and convicted on all counts on February 18, 2009. After a penalty phase proceeding, the jury recommended death by a vote of seven to five. After a *Spencer* hearing,[2] the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, sentenced Mr. Patrick to death on October 9, 2009. His convictions and sentence became final on December 6, 2012 by this Court on direct appeal. *Patrick v. State*, 104 So. 3d 1048 (Fla. 2012).

The Office of the Capital Collateral Regional Counsel-South (CCRC-South) was appointed to represent Mr. Patrick in his post-conviction proceedings upon the issuance of the mandate on January 13, 2013. Mr. Patrick timely filed his initial motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 23, 2014. (PCR. 359-443). Shortly thereafter, Mr. Patrick filed his Corrected Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend. (PCR. 449-571). The circuit court held a case management conference after which the court entered an order granting a limited

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

evidentiary hearing.

The circuit court held an evidentiary hearing on August 31-September 2, 2015. On February 1, 2016, Mr. Patrick filed an amendment to his motion to vacate based on the United States Supreme Court's holding in *Hurst v. Florida*, 136 S. Ct. 616 (2016). (PCR. 1161-78). On April 4, 2016, the circuit court issued an order denying relief and dismissing the *Hurst* claim without prejudice. (PCR. 1358-94). Mr. Patrick timely filed a Notice of Appeal. (PCR. 1398).

Mr. Patrick filed a Petition for Writ of Habeas Corpus with this Court on February 13, 2017, requesting relief under *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Then the following day, he filed an Initial Brief with this Court on February 14, 2017, requesting relief under five claims in his appeal to the denial of his Rule 3.851 Motion.

On June 14, 2018, this Court granted Mr. Patrick a new penalty phase under *Hurst v. Florida* and *Hurst* in response to his petition for writ of habeas corpus. *Patrick v. State*, 246 So. 3d 253 (Fla. 2018). This Court also affirmed the lower court's denial of relief to all claims except for one claim regarding biased jurors and remanded for an evidentiary hearing on one aspect of that claim: whether Mr. Patrick's counsel was ineffective during *voir dire* for failing to challenge a juror who was biased against him based on participation in homosexual activities with the male victim. *Id.* Specifically, the juror in question stated that he "would have a bias if [he]

knew the perpetrator was homosexual." The juror further explained "Put it this way, if I felt the person was a homosexual, I personally believe that person is morally depraved enough that he might lie, might steal, might kill." Additionally, the juror said "yes" when asked if this bias might affect his deliberations. This Court found that an evidentiary hearing was needed to determine if counsel's failure to challenge this juror was a strategic choice. *Id.* at 264.

The circuit court held an evidentiary hearing on October 5, 2018 wherein Mr. Patrick called George Reres, who was his trial counsel, to testify, and wherein the State called Dorothy Ferraro, who was also Mr. Patrick's trial counsel, to testify. (PCR2.136). No other witnesses testified. Mr. Patrick and the State both filed Post-Hearing Memorandums in November 2018. On December 27, 2018, the Circuit Court denied Mr. Patrick's Corrected 3.851 Motion as it relates to the aforementioned claim. Thereafter, Mr. Patrick timely filed a Notice of Appeal with this Court. On April 25, 2019, this Court entered an order scheduling Mr. Patrick's Initial Brief for June 3, 2019.

Mr. Reres and Ms. Ferraro testified at the evidentiary hearing as follows:

George Reres's Testimony

At the evidentiary hearing, Mr. Reres testified that he has been an attorney since 1982 and currently has a private practice. (PCR2. 141; 143). Mr. Reres tried his first capital case about five years into his career as an attorney at the Broward

County Public Defender's Office and defended capital cases for the next 30 years. (PCR2. 142). He eventually became the first supervisor of a newly created homicide unit. (PCR2. 143). Mr. Patrick's trial was in 2009, and at that time, Mr. Reres had tried 22 or 23 first-degree murder trials, including cases where the State was seeking death. (PCR2. 174). He testified that he was not familiar with the Timely Justice Act, which provides for sanctioning attorneys who are found ineffective twice. (PCR2. 173).

Mr. Reres testified that he briefly read this Court's opinion in this case and looked at the *voir dire* proceedings a couple of times as well as some sections he was asked to focus on. (PCR2. 149). He was asked by the State to review the materials in preparation for the subject evidentiary hearing. (PCR2. 172). Mr. Reres spoke to Ms. Ferraro and Melisa McNeil, also counsel for Mr. Patrick at trial, about Juror Martin "at varying times" since the Florida Supreme Court opinion was published. (PCR2. 173).

Mr. Reres testified that he represented Mr. Patrick but could not remember if he chose the case himself or if it was assigned to him. (PCR2. 144). He could not recall if Mr. Patrick was charged with robbery in this case. (PCR2. 159). He recalled that he and Ms. McNeil were on the case for a period of time before Ms. Ferraro was assigned. (Id.). However, he could not recall testifying previously that Ms. McNeil was assigned late to the case. (Id.). He also could not recall if Ms. Ferraro was death-

qualified at the time she was assigned to the case but believe she was assigned to this case and a couple of others to become death-qualified. *Id.* He admitted that he had "very little, if any recollection of exactly what happened." (PCR2. 145).

After being shown his testimony from the evidentiary hearing that was held on August 31, 2015 wherein he testified that Ms. Ferraro was the second chair attorney on Mr. Patrick's case and Ms. McNeil came in late on the case, Mr. Reres testified that he may be confused now or was confused back then regarding the circumstances of who and when a person came on the case. (Id.*).* He then testified that he and Ms. Ferraro did the vast majority of the trial work and could not recall exactly what Ms. McNeil's role was or even if she participated in *voir dire*. (PCR2. 146). He handled the guilt phase, and Ms. Ferraro handled the penalty phase. (PCR2. 147). However, he could not recollect what each member of the team's responsibility was with respect to *voir dire*. (PCR2. 149). In fact, he did not even remember Assistant State Attorney Schulman being involved in the case for the State. (PCR2. 154). However, he did testify that he was the most experienced attorney on Mr. Patrick's team. (PCR2. 150).

Mr. Reres testified Mr. Patrick asked him to handle the guilt phase because Mr. Patrick did not want to be found guilty and sentenced to life. (PCR2. 147). Mr. Reres's theory for the guilt phase was a "shotgun" approach. (Id.). He explained his "shotgun" approach entailed shooting at "anything that moves" in an attempt to

establish some doubt to the State's case in hopes of getting a lesser charge such as second-degree murder or manslaughter. (PCR2. 148).

Mr. Reres indicated he had no recollection of his team's roles or responsibility during *voir dire*. Despite being the most experienced member of the team, Mr. Reres testified that if there was a disagreement about a juror during *voir dire*, Mr. Patrick would have made the ultimate decision. (PCR2. 150). He explained when it comes to disagreements between him and his clients about jurors, he relies on how his client feels and tries to maintain "exceptional" client relationships. (Id.). He further explained that when representing someone who is facing the death penalty, he makes sure the defendant is comfortable with any decisions to be made. (Id.).

Mr. Reres testified he was looking for "winners" as jurors in this case. (PCR2. 151). He explained a lot of time the jurors that may help you in the penalty phase are not the same jurors who may help you in the guilt phase. (Id.). He further explained that it is a "difficult process" to figure out whether a certain juror is more favorable in the guilt or penalty phase. (Id.). On cross-examination, he elaborated on this thought process by agreeing that one has to weigh how a juror would react during the guilt phase and how that same juror would react during the penalty phase. (PCR2. 183).

Despite his continued lack of independent recollection, Mr. Reres testified Mr. Patrick's confession was more than likely presented to the jury during the guilt

phase. (PCR2. 156). He recalled that in Mr. Patrick's confession, Mr. Patrick was very sorry that he had to kill a man. (PCR2. 157). When asked if there were statements in the confession that Mr. Reres wanted the jury to believe, Mr. Reres indicated that it was difficult because usually a confession is unreliable whereas here he had to reconcile Mr. Patrick stating he had killed the victim, but he had to do it, with his remorse over killing the victim and the circumstances of the killing itself. (PCR2. 158). Mr. Reres testified that he was never concerned with the jury thinking Mr. Patrick was lying in his confession as he thought that Mr. Patrick came across as being truthful. (PCR2. 158). Yet he did not recall if the State at trial was arguing Mr. Patrick lacked candor in his statement. During redirect, Mr. Reres refused to answer whether Mr. Patrick's statement was critical to the defense, instead repeating he simply wished the confession would have been suppressed. (PCR2. 191). Although Mr. Reres testified that Mr. Patrick's statement was a compelling description as to what he did and agreed that Mr. Patrick's rage as a result of the victim trying to have sex with him would support the lesser offenses (PCR2. 177), he would not acknowledge the importance of Mr. Patrick's own description in his confession. (PCR2. 191).

Mr. Reres claimed that because he and Mr. Patrick's trial team knew they would end up in the penalty phase, they focused on securing a pro-life penalty phase jury even if it may have "circumvented some of [Mr. Patrick's] real intent here."

(PCR2.152). He also explained that when determining which jurors to keep, he considers how many strikes are left and how many strikes the State still has left, and then he proceeds to balance the jurors in the context of those strikes. (PCR2. 184). Mr. Reres could not discount that they were still presenting a strong defense in the guilt phase. (PCR2. 152).

Mr. Reres could not recall what he testified to at the prior evidentiary hearing in August 2015 regarding his strategy at the guilt phase of Mr. Patrick's trial. *Id.* However, after being shown his testimony, where he stated that he was trying to humanize Mr. Patrick to the jury in hopes that the jury would render a lesser verdict because of the "'unusual relationship" between Mr. Patrick and the victim, he then testified to the same in effect. (PCR2. 152-153). On redirect, he clarified that the "unusual relationship" involved homosexual activities between Mr. Patrick and the victim, and this fact was presented to the jury. (PCR2. 192).

Mr. Reres testified he had no recollection of Juror Martin. Even when he reviewed the *voir dire* proceedings prior to the evidentiary hearing, he still could not remember what Juror Martin had said during the proceedings. (PCR2. 154). After being shown the *voir dire* proceedings, if he had not refreshed his recollection previously he would not have recalled what Juror Martin said, but having done so he did recall what Juror Martin had said about homosexuals now. (Id.). Notably, he mistakenly testified that Juror Martin was biased against a ***predator*** who was a

homosexual when in fact the record reflects that Juror Martin was biased against ***perpetrators, who were homosexuals, because they are morally depraved and will lie, steal, and kill***. (PCR2. 155-156)(emphasis added). Mr. Reres had no reason to refute what the record reflected. *Id.*

Mr. Reres surprisingly remembered that one of their trial strategies was that they were going to rely on the defense that a homosexual (the victim) was preying on Mr. Patrick. (PCR2. 155). He explained that Juror Martin (who was biased against homosexuals) would probably make a good juror for the defense where the victim (who was a homosexual) attempted to anally penetrate someone without his/her consent. (PCR2. 156). He attempted to justify his strategy when he testified that the State Attorney (Ms. Tate) did an excellent job of trying to eliminate Juror Martin who would have been detrimental for her case because the victim was a homosexual and Juror Martin was biased against homosexuals. (PCR2. 155).

Mr. Reres agreed with the State's characterization of the defense during cross-examination that Mr. Patrick killed the victim in a "rage" because the victim had tried to anally penetrate Mr. Patrick without his consent and that rage would move the jury to come back with a lesser offense. (PCR2. 176-177; 179). However, Mr. Reres on re-direct, recharacterized Mr. Patrick's "rage" as "justifiable indignation." (PCR2. 190).

Mr. Reres expounded on their theory of the case and testified that the defense

never presented to the jury that Mr. Patrick was a homosexual only that when he was down on his luck, he would let men perform oral sex on him. (PCR2. 179). On recross-examination, Mr. Reres testified they never presented to the jury that Mr. Patrick performed a sexual act on the victim; instead, it was the victim who performed oral sex on Mr. Patrick. (PCR2. 196-197).

Incredulously, Mr. Reres testified that in the estimated 300 jury trials he has tried, he has "never" left a juror on the jury without a strategy unless he was out of peremptory strikes in which case he would have asked for more. (PCR2. 181). Mr. Reres admitted he did not have an independent recollection of this particular case, but then says that after reviewing the records, he remembers the trial team was focused on the penalty phase in this case and that Juror Martin was a better juror for the penalty phase. (PCR2. 184). Mr. Reres could not recall if there was a specific strategy for not exercising a cause challenge on Juror Martin. (PCR2. 159). Additionally, he could not recall any discussions with the team and Mr. Patrick regarding Juror Martin. (Id.).

During this evidentiary hearing, Mr. Reres was shown Defense Exhibit 1, which were his handwritten trial notes of Juror Martin. (PCR2. 161). At the bottom of the page, there was a note that said "Δ wants out", but Mr. Reres could not recall making that notation. (PCR2. 162). He explained that the triangle symbol was used to identify the Defendant. (PCR2. 161-162). On cross-examination, Mr. Reres

testified that below that particular notation, the word "preemptory" is written and is "scribbled out" with a line. (PCR2. 188).

Mr. Reres also testified that above the notation "[Defendant] wants out", there is a line that stretches across the page; he additionally testified that below the word "preemptory", there is a seven with a slash under it. (PCR2. 188-189). Mr. Reres could not recall if the notation "[Defendant] wants out" and the word "preemptory" applied to Juror Martin or if the line across the page and/or the number seven referred to another juror; however, he did state that his "best guess" would be they were all uncertain about Juror Martin and claimed that "perhaps" Mr. Patrick had some initial concerns about Juror Martin, but once Juror Martin made those biased statements against homosexuals, maybe Mr. Patrick's opinion changed. (PCR2. 189).

On redirect, Mr. Reres testified that he recognized the handwriting as his own but could not independently recall what the line across the page meant and could not independently recall when he wrote "[Defendant] wants out", what the line through that particular notation meant, or when that line was drawn. (PCR2. 194-195). However, he did state that if he did in fact cross it out, it probably meant that he was no longer considering striking Juror Martin. (PCR2. 195).

Mr. Reres explained that he always marks the top of the page with his initial impression of the juror and that if he feels a juror is disqualified, he will mark an "X", and if he has a question about a juror, he will mark the page with a question

mark. (Id.). On recross-examination, Mr. Reres explained that when his notes about a potential juror change from a question mark to an "okay", it means that the potential juror is okay to sit on the jury panel. (PCR2. 196). He further explained that when the potential juror with the "okay" notation says something that raises questions or concerns, he will then cross out the "okay" notation and mark the page with a question mark or an "X." (Id.).

In this particular case, Defendant's Exhibit 1 (Mr. Reres's handwritten trial notes) reflects that there was an "X" marked at the top of the page, that the "X" was scratched out, that there was a question mark located in the top right, and that there was no "okay" notation, all indicating that at the very least Mr. Reres still had questions or at least concerns about Juror Martin and was not okay with him sitting on the jury panel.

After reviewing his notes on Juror Martin wherein "life can be worse than death" was written, Mr. Reres recalled that Juror Martin had made that statement during *voir dire*, which he found interesting from a defense perspective, because he always tries to avoid those jurors who thought that the death sentence was the worst thing that could happen. (PCR2. 162-163). On cross-examination, he agreed that Juror Martin was "sort of in the middle" when it came to having a position on the death penalty. (PCR2. 181). Mr. Reres agreed that Juror Martin had said something during *voir dire* to the effect that life imprisonment would give a person more time

to reflect on what he or she had done versus the death penalty. (PCR2. 182). He explained that a juror like Juror Martin, who expressed concerns about bearing the responsibility of sentencing a person to death, may lead other jurors to choose life over death. (Id.). However, on redirect, Mr. Reres admitted he could not recall what his thought process was at the time of trial in response to Juror Martin's position on the death penalty. (PCR2. 193). Mr. Reres also admitted he did not have an independent recollection of what the remainder of the venire panel looked like in Mr. Patrick's case and what statements were made by the potential jurors during *voir dire*. (PCR2. 193-194).

Mr. Reres was shown Defendant's Exhibit A for Identification which is the record on direct appeal pages 664 to 665, in an attempt to refresh his recollection regarding Juror Amparo's position towards the death penalty because he could not recall what Juror Amparo had said. (PCR2. 163-164). After reading the transcript, he pointed out what else Juror Martin had said about the death penalty during *voir dire* which he did not independently recall: "'Honestly, I don't think any of us here want to bear the burden that when we leave here, whether he's found innocent or guilty of thinking . . . I just sent somebody off to be executed. . . .'" (PCR2. 166). Mr. Reres could not independently recall why Juror Amparo was struck but could recall that Juror Martin shared a similar opinion of the death penalty with Juror Amparo. (PCR2. 166-167).

Mr. Reres also did not remember Juror Vizcarra and whether or not she was peremptorily struck. (PCR2. 169-170). Even after he was shown the Defendant's Exhibit B for Identification which is the record on direct appeal page 714, Mr. Reres's memory was not refreshed. *Id.* In fact, even though he stated that he did not remember what had happened that day, he had no reason to challenge the fact that Juror Vizcarra was "'middle of the road'" respective to her stance on the death penalty. (Id.). He continued to justify his approach with respect to Juror Martin by stating that there are a "myriad" of reasons why a trial attorney would keep or strike jurors. (PCR2. 167).

Mr. Reres testified that Mr. Patrick had strong opinions about his case and was intelligent enough that if Mr. Patrick did not want a particular venireman on his jury, then Mr. Patrick would voice his concerns, and Mr. Reres would strike him or her; however, if Mr. Patrick did like a particular venireman, then Mr. Reres would give very strong consideration to leaving that person on the jury even if Mr. Reres was not in agreement and could not otherwise persuade Mr. Patrick to change his mind. (PCR2. 150-151). He recalled being the one speaking on the record during *voir dire* but that he, Ms. McNeil, and Ms. Ferraro along with Mr. Patrick all participated in *voir dire*. (PCR2. 151). On cross-examination, Mr. Reres testified once again that Mr. Patrick fully participated in selecting his jury, that they talked "back and forth" during the entire process, and that Mr. Patrick engaged with him

regarding any questions or concerns of potential jurors. (PCR2. 185-186). And even though he had no recollection of Mr. Patrick 's position with respect to Juror Martin, Mr. Reres claimed that he would have spoken with Mr. Patrick about any concerns Mr. Patrick may have had of Juror Martin. (PCR2. 185).

Mr. Reres testified that at the end of jury selection, the Court conducted a colloquy with Mr. Patrick wherein Mr. Patrick stated on the record that he was fine with the selected jury and was "happy" with his counsel's performance. (PCR2. 186). However, Mr. Reres never accepted the jury even though the State did. In fact, he had no independent recollection of how many peremptory strikes he had left, although he had three. (PCR2. 187-188). Ultimately, Mr. Reres testified that he did not strike Juror Martin because he did not think there was a reason for the strike. (PCR2. 189-190).

Dorothy Ferraro's Testimony

At the evidentiary hearing, Ms. Ferraro testified she is now retired but was an attorney with the Broward County Public Defender's Office, where she started in 1987. (PCR2. 202). Prior to Mr. Patrick's trial, she had tried between 25 and 30 first-degree murder trials. (PCR2. 205). At the time she joined Mr. Patrick's trial team in 2009 as second-chair, she was not death-qualified. (PCR2.206). But she had started her capital litigation training in 2000. (PCR2. 203-204).

Ms. Ferraro testified that she was asked to handle the penalty phase of Mr.

Patrick's trial. (PCR2. 204). She had previously worked a penalty phase but the first time she spoke on the record during a penalty phase was at Mr. Patrick's trial. (PCR2. 205). She confirmed that Mr. Reres was primarily responsible for the guilt phase and that she was primarily responsible for the penalty phase. (PCR2. 206). Ms. Ferraro explained that *voir dire* was conducted in two sections: the first section was designated for death qualification and the second section was designated for the guilt phase. (PCR2. 209). She death qualified the jury. (PCR2. 208).

Ms. Ferraro explained that Ms. McNeil was assigned to the case towards the end and that Ms. McNeil questioned Mr. Patrick's brother as a witness during the penalty phase of the trial. (PCR2. 207).

Ms. Ferraro testified that she read the Florida Supreme Court's opinion in Mr. Patrick's case regarding Juror Martin. (PCR2. 208). The opinion did not mention Juror Martin by his name. *See Patrick*, 246 So. 3d 253. She first testified that she had not spoken to Mr. Reres about the opinion but then corrected herself and testified that Mr. Reres had contacted her a couple of weeks prior to the evidentiary hearing. (PCR2. 216).

Ms. Ferraro remembered "absolutely nothing" about Juror Martin from *voir dire*, and she had no independent recollection of what any juror said during *voir dire*. (PCR2. 209). On cross-examination, she confirmed once again that she had no independent recollection of what transpired during *voir dire* or anything specific to

Juror Martin, and she testified that the record would be the best reflection of what occurred during *voir dire*. (PCR2. 214-215). She agreed with the record that there were other jurors who also had a bias against homosexuals (like Juror Martin) and were subject to cause challenges. (PCR2. 215).

Ms. Ferraro previously reviewed her trial notes regarding the jurors, and her notes indicated that Juror Martin was "open minded and fair" and did not have any "preconceived ideas" about the death penalty. (PCR2. 210). After being shown Defendant's Exhibit B for Identification, specifically page 665 from line 11 to line 20 of the transcript, Ms. Ferraro's recollection was not refreshed, and she "guess[ed]" from the record that Juror Martin was at least an "open-minded juror" when it came to the death penalty. (PCR2. 211-212). She did concede the fact that she did not remember what her thought process was during *voir dire*. (PCR2. 212).

Ms. Ferraro testified that Mr. Patrick was involved during *voir dire* and that no juror was struck or kept without his approval despite her lack of independent recollection and lack of refreshed recollection. (PCR2. 213). However, she remembered that there were a few times where there were disagreements with Mr. Patrick about keeping or striking a juror; however, she could not recall who those jurors were and also could not recall if Juror Martin was one of those jurors. (Id.). She also could not recall why Juror Martin was not struck from the venire panel and could only speculate as to why. (Id.). She did not recall the colloquy between the

Court and Mr. Patrick about the jury. (PCR2. 214).

SUMMARY OF THE ARGUMENT

Trial counsel had a duty to preserve Mr. Patrick's right to a fair and impartial jury. However, trial counsel failed to ensure that Mr. Patrick's jury was only comprised of impartial jurors where a juror who expressed actual bias towards homosexuals remained on the jury panel. Trial counsel's failure to remove the biased juror constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). Any purported strategy offered by trial counsel that the juror's expressed bias towards homosexuals would not have motivated trial counsel to remove the juror from the panel is unreasonable and unsupported by the record. No reasonably competent attorney would have failed to adequately challenge for cause or move to strike the actually biased juror when his responses indicated very strong bias against the defendant and the juror's bias would affect his deliberations. In previously finding that this juror expressed actual bias, this Court has already found prejudice.

ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE FOR CAUSE AND/OR STRIKE AN ACTUALLY BIASED JUROR IN VIOLATION OF MR. PATRICK'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY

"….**if I felt the person was a homosexual I personally believe that the person is morally depraved enough that he might lie, might steel (sic), might kill**." (RT. 424)(emphasis added). Such was the opinion of a juror serving at Mr. Patrick's trial. And such was the opinion that led this Court to conclude that this "juror showed actual bias stemming from Patrick's sexual activity." *Patrick v. State*, 246 So. 3d 253, 263 (Fla. 2018). In so concluding, this Court rejected the idea that the juror was not biased against the defense because Mr. Patrick is not homosexual:

> However, the evidence and arguments at trial indicated that, while Patrick denied being homosexual, he willingly participated in sexual and intimate acts with the male victim before the encounter in question and that he had engaged in similar activity in the past with other men. Applying this evidence to the juror's *voir dire* answers establishes that, by the juror's own acknowledgement on the record, he was predisposed to believe that Patrick is morally depraved enough to have committed the charged offenses. Although Patrick does not identify as homosexual and indicated in his confession that his sexual activity with men was for material support rather than personal fulfillment, **these points do not eliminate the bias that this juror said he would feel based on the evidence that trial counsel and the trial court knew the jury would hear during trial**. Also, **the fact that the juror's bias would have extended to the**

victim does not refute the bias he acknowledged or render him impartial.

Id. at 264. Because this Court had already found that the juror in question showed actual bias the only question before the circuit court on remand was whether trial counsel made a decision as part of a reasoned strategy to allow an actually biased juror to remain on Mr. Patrick's jury and whether under the circumstances any purported strategy could be deemed reasonable.

The United States Supreme Court has repeatedly affirmed the right of a capital defendant to the effective assistance of counsel holding 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 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)(finding that counsel's performance "fell below an objective standard of reasonableness."). That Sixth Amendment right to effective assistance of counsel extends to all phases of trial following the lawyer's appointment. *Cuyler v. Sullivan*, 466 U.S. 335 (1980). As this Court has noted "*[v]oir dire* is an essential part of any first degree murder trial in which the death penalty is sought. *Johnson v. State*, 921 So. 2d 490, 503 (Fla. 2005). In the trial of a case, the jury selection and *voir dire* examination are just as critical to the outcome of the case as the presentation of the evidence. The change of a single juror in the composition of the jury could change the result. *Ter Keurst v. Miami Elevator Company*, 486 So. 2d 547 (Fla. 1986) (Adkins, J. dissenting). Undoubtedly, Mr.

Patrick had the right to the effective assistance of counsel during *voir dire*. Yet, trial counsel failed in that respect when an actually biased juror remained on the panel.

Juror Martin, like other jurors, was questioned by Assistant State Attorney Shari Tate regarding his feelings about homosexuality. He stated that "I would have a bias if I knew the **perpetrator** was homosexual." (RT. 424)(emphasis added). The following exchange then occurred:

> MS. TATE: If homosexuality in any way comes into play in this case with anyone involved would you not follow the law on that? Are you going to not hold me to the burden to prove those elements or hold me to a lesser burden or a higher burden or how do you feel about it?
>
> MR. MARTIN: Put it this way, if I felt the person was a homosexual **I personally believe that the person is morally depraved enough that he might lie, might steel (sic), might kill**.

(RT. 424)(emphasis added). Juror Martin confirmed that his bias would affect his deliberations. (RT. 425). Given Juror Martin's answers, trial counsel had a duty to preserve Mr. Patrick's right to a fair and impartial jury. Mr. Patrick was prejudiced when a jury was empaneled that included a juror with expressed bias and defense counsel failed to challenge him.

Strickland v. Washington established the legal principles that govern claims of ineffective assistance of counsel requiring a defendant to plead and demonstrate (1) unreasonable attorney performance; and (2) prejudice. *Strickland,* 466 U.S. at

687. Mr. Patrick has established both deficient performance and prejudice which undermined the adversarial process at trial. Despite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable. *See Id.* at 681. In order to prove prejudice, a claim of ineffective assistance of counsel for failing to challenge a juror must demonstrate that a juror was actually biased, meaning "bias-in-fact" that would prevent service as an impartial juror. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). Bias-in-fact is the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. *U.S. v. Torres*, 128 F.3d 38, 43 (2nd Cir. 1997), citing *U.S. v. Wood*, 299 U.S. 123, 133 (1932). Here, where the Court has found that Juror Martin's statements meet the *Caratelli* standard for actual bias, the proper inquiry for this Court must be whether the lower court's finding that counsel exercised a strategy in allowing this juror to remain on the panel is supported by competent, substantial evidence and whether that strategy was reasonable under the circumstances. Whether trial counsel's purported strategy was reasonable turns on counsel's independent recollection and credibility. To that end, trial counsel's testimony must be considered in conjunction with the totality of the record in Mr. Patrick's case, both at trial and in postconviction.

Testimony from trial counsel at the evidentiary hearing establishes that any argument that Juror Martin's expressed bias towards homosexuals would not have motivated trial counsel to remove him from the panel is unreasonable and unsupported by the record. No reasonably competent attorney would have failed to adequately question Juror Martin, challenge for cause or move to strike him from the jury when his responses indicated very strong bias against the defendant. Mr. Reres's answers as to his purported strategy for keeping Juror Martin on the panel were knee-jerk, flippant and most importantly contradictory. While the lower court found Mr. Reres testimony credible, the lower court failed to consider his lack of recollection and that his statements contradict the trial record.

Additionally, any reasons Mr. Reres offered for failing to challenge Juror Martin for cause are mere speculation. Admittedly, he had "very little, if any recollection of exactly what happened." (PCR2. 144). In fact, Mr. Reres did not even have a recollection of testifying at the previous evidentiary hearing in Mr. Patrick's case in August 2015. He did not remember specifics about Mr. Patrick's statement to the police which was played during trial. (PCR2. 156, 157). He could not recall that Mr. Patrick was charged with robbery. (PCR2. 159). And he did not even recall one of the prosecutors involved. (PCR2. 154). He had no specific recollection of Juror Martin. (PCR2. 144). Most importantly, he stated he had no recollection of a strategy for not exercising a cause challenge for Juror Martin and he had no

recollection of discussion with the other attorneys or Mr. Patrick regarding Juror Martin. (PCR2. 159). His testimony amounts to nothing more than hindsight and speculation to justify his egregious misstep in including an actually biased juror on Mr. Patrick's panel.

At the outset, Mr. Reres testified that Juror Martin was a good juror for Mr. Patrick because the victim was homosexual, not Mr. Patrick, and he believed that Juror Martin indicated he would be biased against a "predator" who was homosexual. (PCR2. 155). Even having reviewed Juror Martin's *voir dire* answers with respect to homosexuals, Mr. Reres was adamant that Juror Martin indicated bias towards a "predator" who was homosexual and believed that such a juror would be good for the defense. (Id.). These statements strike at the heart of the flaws in Mr. Reres purported reasoning. First, he was wrong about Juror Martin's statements. Significantly the record reflects Juror Martin "would have a bias if [he] knew the **perpetrator** was homosexual." (RT. 424). Upon being asked about the record reflecting differently, Mr. Reres was adamant the juror said predator. The lower court failed to consider Mr. Reres's incorrect characterization and failed to recognize that this Court had already rejected his purported explanation as a reasonable strategy. As previously emphasized, this Court rejected the idea that Juror Martin's statements were in any way favorable to Mr. Patrick in this regard when they found "[a]lthough Patrick does not identify as homosexual and indicated in his confession

that his sexual activity with men was for material support rather than personal fulfillment, these points do not eliminate the bias that this juror said he would feel based on the evidence that trial counsel and the trial court knew the jury would hear during trial." *Patrick,* 246 So. 3d at 264.

Additionally, the entirety of the record in this case reflects that Mr. Reres recognized a relationship between the victim and Mr. Patrick, not that the victim was somehow the predator. During closing argument, Mr. Reres likened the relationship to that of a heterosexual relationship in which a man takes a woman to dinner a few times and then expects something in return or shows generosity in exchange for the woman being his lover. (RT. 1922, 1928). He went on to argue: "Changing into a heterosexual relationship, older man, younger girl, plenty of money…get what you want in hopes of you're going to love me, you're going to make love to me. Of course. This is **just because this is two men doesn't mean the rules of relationships don't apply**." (Id.). "No difference just because these are two men." (RT. 1922). In fact, Mr. Reres previously testified to the "unusual relationship" that had developed between the victim and Mr. Patrick. (PCR. Vol. 24 p. 43). As a result of the "unusual relationship" that developed, the defense theory was to try to humanize Mr. Patrick in hopes of getting the jury to return a verdict on a lesser offense. Based on his acknowledgment and reliance on the relationship that developed between the victim and Mr. Patrick, any claim that Mr. Patrick was not

homosexual and therefore the bias was not against him, but rather the victim, is patently unreasonable.

Mr. Reres later explained during cross examination, "I think there's a reasonable cross section of the community that if they are going to feel that a particularly brutal killing was in some way justified, repelling a homosexual assault, might be one of the ways the jurors might grab onto some aspect of weakness in the State's case, particularly as to premeditation, if in fact there was evidence to support that that was true." (PCR2. 177). So, Mr. Reres felt that a good juror would be someone who was so repulsed by homosexuality, that killing a homosexual person would be justified? Yet, as this Court pointed out, Mr. Patrick was likewise engaging in a homosexual relationship. That information was widely acknowledged by the parties and known by the jury. Given that fact, Mr. Reres's testimony that it was a form of trial strategy to seat jurors with a homophobic disposition cannot establish an objectively reasonable strategy under *Strickland*.

That any such strategy to seat homophobic jurors was part of a reasonable defense strategy is also undermined by the fact that each of the other jurors who expressed a similar bias towards homosexuals was removed from the jury either by agreement or without objection by the defense. The lower court ignored the dismissal of all of these jurors who expressed a bias involving homosexuals. After Juror Koehne expressed he could not be fair if he knew homosexuality was involved

and would be deeply prejudiced (RT. 445), the State moved for cause and Mr. Reres replied that the State was legally correct and he had no objection. (RT. 773). Jurors Ness, Garcia, Elovitz, Holland, Lindo and Montenegro all expressed they could not be fair and impartial "if there was any testimony in this case involving homosexuality[.]" (RT. 910-916).[3] While Ness was excused for a trip, Mr. Reres was in agreement. (RT. 1047). Garcia was excused for cause after Mr. Reres indicated he had "[n]o problem with excusing him." (RT. 1048). When asked by the trial court regarding Elovitz, Mr. Reres agreed for cause. (RT. 1049). Although Holland was excused by the State for "auto death," trial counsel agreed and made no argument to try to keep the biased juror. (RT. 1049). Finally, when the State moved to strike Montenegro and Lindo for cause, trial counsel requested to speak to them further, agreeing that at least in part he was hoping to change Lindo's mind. (RT.1049-50). Ultimately Lindo and Montengro were struck for cause with no objection from the defense. (RT. 1181-1182). This does not suggest a strategy of keeping jurors who expressed a bias if they were to hear testimony regarding a homosexual relationship. Mr. Reres' testimony at the evidentiary hearing to the contrary is merely an attempt at post-hoc rationalization that is refuted by the record.

[3] It should be noted that the bias expressed by Juror Martin was much more extreme than these other jurors in that he specifically indicated that if he ***felt*** someone was homosexual, that person is morally depraved enough to lie, cheat and steal.

Both the record at trial and in postconviction fail to support the argument that keeping Juror Martin was consistent with any theory of defense or reasonable trial strategy. While Mr. Reres indicated he had a shotgun approach to the guilt phase, challenging anything and everything including DNA, blood spatter and shoe prints, this too is belied by the record. Trial counsel did nothing to challenge the DNA (RT. 1729) and nothing to challenge the shoe print evidence (RT. 1604-1610), indicating at one point that he did not believe it to be "anywhere near important enough to contest at this point" (RT. 1552) and conceding that counsel was not contesting that Mr. Patrick was there or that his footprints were there. (RT. 1551). Mr. Reres went on to argue in closing that the medical examiner was very credible and "what the blood spatter showed was what Mr. Patrick said." (Id.). From the outset, Mr. Reres conceded guilt and ultimately argued that the State's experts supported Mr. Patrick's own statement. (RT. 1930, 1931).

Despite Mr. Reres's agreement with the State at the most recent evidentiary hearing that he was shooting at anything because the State's case was so strong, his argument at trial reflects that the entire defense centered on the credibility of Mr. Patrick's statement. Trial counsel admitted Mr. Patrick's guilt in the opening statement, told the jury that they would hear Mr. Patrick's truthful admission and argued only that the jury should find the crime was a lesser degree of murder because Mr. Patrick did not intend to kill the victim. (RT. 1232, 1234, 1236). Mr. Reres urged

the jury to use their common sense and common decency "to evaluate **more than anything else** the statement that Mr. Patrick waived his rights and gave voluntarily to the detectives." (RT. 1234). As Mr. Reres stated at the previous evidentiary hearing in this case, the strategy for the guilt phase was:

> To try to establish reasonable doubt as to; Number 1, premeditation or felony murder theory, and to as much as we could, to humanize Mr. Patrick to the jury in the hopes that because of the situation that developed, **because of the unusual relationship with the victim** here that we could somehow play that in to a lesser verdict.

(PCR. Vol. 24 p. 43). Mr. Reres previously testified with respect to the guilt phase that "[w]e were certainly trying to win." (Id.).

It was important for the jury to believe Mr. Patrick and believe the events as they were described by Mr. Patrick in order to secure the jury's return of a lesser degree of murder. This was evident in both the State and defense closing arguments. The State challenged the credibility of Mr. Patrick's statement through the testimony of jailhouse snitch Martin Dietz and repeatedly questioned the honesty of Mr. Patrick's statement during closing argument. (RT. 1890, 1891, 1903, 1908, 1910-12). The State's entire rebuttal focused on the lack of honesty in Mr. Patrick's statement (RT. 1940-48, 1955, 1962, 1964) and focused on the testimony of Martin Deitz refuting Mr. Patrick. (RT. 1948-1955). Mr. Reres countered with repeated argument that there was tremendous or "great honesty and candor" in his statement. (RT. 1914, 1915, 1917, 1921, 1923, 1924, 1932). Contrary to Mr. Reres' testimony

at the evidentiary hearing, he urged the jury that Mr. Patrick was sorry for what he did and acknowledged what he did. (RT. 1915). Mr. Reres repeatedly argued Mr. Patrick was a human being, not morally depraved as Juror Martin had expressed. Everything in his closing argument was about supporting Mr. Patrick's statement and his version of events.

The jury even asked to have Mr. Patrick's statement replayed after it started guilt phase deliberations. (RT. 2048). There is no other conclusion then, that it was critical for the jury to believe Mr. Patrick's statement and believe he was being honest in his recollection of the night in question. To that end, there is no objectively reasonable strategy in permitting a juror who expressed such a strong bias against homosexuals that he believed any such person would lie, cheat and steal. Given the record in this case, it was incredulous that Mr. Reres refused to acknowledge that Mr. Patrick's statement was critical to the defense at the guilt phase, as well as the penalty phase.

It was only after being asked to review the *voir dire* transcripts that Mr. Reres testified he believed, although without any specific recollection, that he may have chosen not to raise a cause challenge because Juror Martin understood the weight of making a life or death decision and had expressed a preference for a life sentence. (PCR2. 166, 182). That reasoning, however, was only secondary to his initial testimony that his strategy for not doing so was aimed at capitalizing on Juror

Martin's views on homosexuality and painting the victim as a predator for purposes of obtaining a lesser conviction at guilt phase. When viewed in their full context, Mr. Reres' answers in each instance establish contradictory vantage points that dispel any semblance of reasonably objective strategic decision making.

Furthermore, despite Mr. Reres protestations to the contrary, this was not merely a penalty phase case. The defense had not thrown in the towel during the guilt phase of Mr. Patrick's trial. In Mr. Reres own words, "[w]e were certainly trying to win." (PCR. Vol. 24 p. 43). In fact, Mr. Reres indicated that Mr. Patrick had asked that he handle the guilt phase because he did not want to be convicted as charged. (PCR2. 147). Even where there was a likelihood that the case would go to a penalty phase, the defense was "trying with everything we had, to get a lesser for Eric." (PCR2. 153). Regardless of Mr. Reres testimony that due to the nature of the case against Mr. Patrick, their focus was necessarily on the penalty phase and seating jurors who would recommend life, any strategy for seating fair jurors cannot disregard issues central to the guilt phase.

The actual bias of Juror Martin cannot be overcome by his statements regarding the death penalty, particularly in light of the fact that similar like-minded jurors were struck peremptorily and did not express bias against homosexuals. For example, Juror Amparo stated that she believed "the death penalty is the easy way out" and that a life sentence can be harsher. (RT. 664). Amparo's views favoring a

life sentence were just as strong as Juror Martin's views. Interestingly, it was Amparo that sparked Juror Martin's comments in the same regard as he expressed agreement with her. (RT. 665). Likewise, Juror Viscarra, after having thought about it for several days, expressed he was very much middle of the road when it came to the death penalty and would consider all the evidence. (RT. 714). The defense peremptorily struck both Amparo (RT. 783) and Viscarra. (RT. 1189). So while it may have been important to get jurors that would likely recommend life, two were struck peremptorily and Juror Martin who believed homosexuals were morally depraved remained. No reasonable strategy can be gleaned from this scenario.

The lower Court ignored that other like-minded jurors were preempted from the panel by defense counsel. The lower court's only reference to the trial record involves Juror Moreno, who was challenged for cause by the State because of his statements that he believed the trial was not as much about "guilty or not guilty" but rather about sentencing and the penalty for Mr. Patrick. The lower court relies on Mr. Reres's statements that he didn't agree with the challenge because he thought he "could work with him anyway" despite his acknowledgement that maybe it was his "ego talking." (RT. 1183-1184). Reference to this one isolated juror ignores the jurors who likewise were favorable to the penalty phase and were not biased but were removed from the panel peremptorily by the defense. Further, Juror Moreno's pontification as to the focus of the trial is a far cry from the strong bias expressed by

Juror Martin. Viewed in its entirety, the record establishes that the failure to remove Juror Martin cannot be attributable to any objectively reasonable strategy.

Mr. Reres acquiesced to the State's assessment that when determining whether to keep a juror, an attorney must weigh how that juror may react to the guilt phase and to the penalty phase. To say that an appropriate weighing occurred here is refuted by, not only Mr. Reres's initial reasoning that Juror Martin was not actually biased, but also by his own notes. When shown his notes Mr. Reres did not recall why he wrote specific phrases with respect to Juror Martin and could not explain how some of those phrases fit into what they were thinking with respect to Juror Martin. (PCR2. 162). While Mr. Reres latched on to a statement in his notes that Juror Martin thought life was worse than death, he did not recall why he wrote the "defendant wants out" at the bottom of his notes. (Id.). Although the State pointed out that there appeared to be a "scribble" through the notation regarding the Defendant's wishes, he too did not recall making the notation or what the notation meant. (PCR2. 188-189). He acknowledged, however, that a question mark remained at the top of the page with respect to Juror Martin and his "best guess would be we were all uncertain about Martin." (PCR2. 189). However, Mr. Reres's notes do not reflect the statements made by Juror Martin with respect to his bias against homosexuals, nor does it reflect Juror Martin's statement indicating he would

give less weight to a witness's testimony if that witness was using drugs at the time of his observations (RT. Vol. 7 p. 745), two significant things that Juror Martin said.

Ultimately, Mr. Reres concluded, once again without a specific recollection, that Juror Martin "might have been a better juror for my penalty phase, than he would've been for my guilt phase." (PCR2. 184). Mr. Reres's response demonstrates the lack of any strategy and/or the unreasonableness of his purported strategy as it undermines his initial testimony that Juror Martin was not biased or unfavorable to Mr. Patrick. Either Juror Martin was a "winner" (PCR2. 151) for both phases or his statements with respect to life outweighed any bias; Mr. Reres cannot have it both ways. And if this juror was a "winner" for both phases as Mr. Reres initially believed he was not biased, or if Juror Martin's beliefs with respect to the penalty phase overcame the extreme bias, there would no longer remain a question mark on Mr. Reres's notes and there would be no need for uncertainty. In the face of uncertainty, no reasonable strategy errs on the side of seating a biased juror.

While it may be reasonable in certain circumstances for trial counsel to seat jurors who are more favorable for the defense in the penalty phase, *see Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007), that is not the case here. In *Dillbeck*, this Court found that trial counsel exercised a reasonable strategy in trying to seat jurors who were likely to recommend a life sentence. *Id*. at 103. Although some of the jurors expressed an inclination to vote for death, all of Dillbeck's jurors assured the court

they would vote for life if the mitigators outweighed the aggravators. Similarly, in Dillbeck's case, each of the jurors who indicated exposure to pretrial publicity likewise assured the court that they could lay aside any preconceived opinions and rely solely on the evidence presented at trial. *Id*. at 102; *see also Irvin v. Dowd*, 366 U.S. 717, 723 (1961)("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). No assurances were made by Juror Martin that he could set aside his bias upon convicting Mr. Patrick, nor was he asked any follow-up questions in this regard. In fact, the exact opposite is true: Juror Martin acknowledged his bias towards homosexuals would affect his deliberations. (RT. 425). He did not distinguish between the guilt phase and the penalty phase.

The lower court found misplaced guidance in *Peterson v. State*, 154 So. 3d 275 (2014). In *Peterson*, this Court found that "[t]rial counsel attempted to empanel a competent and impartial jury that would have been favorable to the defense in the penalty phase" and reiterated its acknowledgment in *Dillbeck* that such a strategy can be a reasonable one. *Id*. at 282. However, here Juror Martin was not impartial regardless of his view of favoring life over death. Further, unlike Peterson, Mr. Patrick has shown at least two venire members who were more qualified to serve: potential jurors Amparo and Viscarra, both of whom expressed like-minded views with respect to the penalty phase as Martin, but did not express his bias.

Significantly, this Court did not find that an actually biased juror served in either *Dillbeck* or *Peterson*.

The only conclusion that can be drawn from the totality of Mr. Reres's responses is that Mr. Reres's testimony amounts to speculation and hindsight.[4] This is the sort of "'post hoc rationalization' for counsel's decision-making that contradicts the available evidence of counsel's actions" that courts cannot indulge. *Cullen v. Pinholster*, 563 U.S. 170, 230 (2011) (internal citations omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Where neither counsel has any independent recollection of *voir dire*, the totality of the circumstances must be considered. *Id*. The record refutes that counsel was engaging in a strategy to seat biased jurors because every other juror who expressed an inability to be fair and impartial where homosexuality was an issue was struck for cause without objection or by agreement from the defense. That counsel was trying to seat jurors who expressed a dislike for

[4] Ms. Ferraro stated that she reviewed the *voir dire* transcript and based on her reading she saw nothing with respect Juror Martin that was pro-death. (PCR2. 212). She guessed that she would approach Juror Martin as pro-life or at least open minded with respect to penalty, but she had no recollection independently of Juror Martin, or of what anybody said at the time and did not remember what her thought process was during *voir dire.* (PCR2. 209, 212). Unlike Mr. Reres Ms. Ferraro declined to further speculate.

homosexuals ignores the circumstances of the "unusual relationship" between Mr. Patrick and the victim. Regardless of the fact that Mr. Patrick is not gay, he was engaging in a homosexual relationship. To be certain, this Court has already rejected the notion that Juror Martin was in some way favorable to Mr. Patrick.

While the State had a strong case against Mr. Patrick, the defense put forth a focused attempt to secure a verdict for a lesser offense than first degree murder, relying heavily on Mr. Patrick's statement and his candor and remorse therein. Regardless of whether trial counsel claimed the attorneys knew they would likely end up in the second phase, it is unreasonable to discount the guilt phase entirely particularly when faced with a juror whose bias would permeate the entire trial. Despite his belief that life in prison was a harsher penalty than death, at no time did Juror Martin indicate that his bias would not affect him in the penalty phase or that suddenly he could set aside his bias after convicting Mr. Patrick. At no time did Juror Martin waiver in his beliefs on homosexuality. Additionally, Mr. Reres struck at least one juror who expressed similar strong feelings in favor of recommending a life sentence and struck at least one other that was middle of the road when it came to the death penalty and agreed he could be fair minded. It is not objectively reasonable to not raise a cause challenge as to Juror Martin who expressed that he believed homosexuals are morally depraved and more likely to lie, cheat and steal because he was more favorable to recommending life, yet choosing to strike similar

minded jurors who did not harbor a bias against homosexuals. Trial counsel's reasoning is objectively unreasonable and amounts to deficient performance. Because this Court has already found that Juror Martin was actually biased, Mr. Patrick was prejudiced by counsel's deficient performance and is entitled to a new trial.

Finally, Mr. Patrick urges this Court that including an actually biased juror on the panel under the circumstances and facts of the case here should not be considered sound trial strategy. The purpose of *voir dire* is to empanel an impartial jury as required by the Sixth Amendment. As this Court has held:

> Maintaining the sanctity of the jury trial is both critical and integral to the preservation of *a fair and honest* judicial system. It is also significant to the trust and confidence our citizens place in the judicial system…Consequently, *a failure to ensure that our jury panels are comprised of only fair and impartial members renders suspect any verdict reached*.

Matarranz v. State, 133 So. 3d 473, 477 (Fla. 2013)(internal citation omitted) (emphasis added). The very finding of actual bias on the part of Juror Martin necessarily means that he was not impartial. *See U.S. v. Wood*, 299 U.S. 123, 133 (1932). Admittedly, Juror Martin's bias would affect his deliberations. (RT. 425). Whether he was more favorable to recommending a life sentence does not change his lack of impartiality. To the extent that counsel failed to ensure that Mr. Patrick's jury was only comprised of impartial jurors, "counsel made errors so serious that

counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It cannot be said that Mr. Patrick's jury was free of partiality, as such he is entitled to relief.

CONCLUSION

Based on the foregoing arguments, the evidence and testimony presented during this evidentiary hearing and the entirety of his postconviction proceedings, as well as the record at trial, Mr. Patrick submits that he was prejudiced by trial counsel's deficient performance where an actually biased juror was not challenged for cause. This Court should grant Mr. Patrick a new trial.

Respectfully submitted,

/s/ Suzanne Keffer
SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177
keffers@ccsr.state.fl.us

Capital Collateral
Regional Counsel - South
1 East Broward Blvd., Suite 444
Ft. Lauderdale, FL 33301
Telephone: 954-713-1284

COUNSEL FOR APPELLANT

CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 3rd day of June, 2019, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

/s/ Suzanne Keffer
SUZANNE KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177
keffers@ccsr.state.fl.us