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

ANSWER BRIEF OF APPELLEE

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PROCEDURAL HISTORY

Eric Kurt Patrick ("Patrick") was indicted on November 9, 2005 for first degree murder, kidnapping, and robbery. The jury trial began on February 2, 2009 and concluded on February 20, 2009 when the jury returned guilty verdicts on all counts. The penalty phase trial began on June 12, 2009, and ended with the jury recommending death by a vote of seven to five. The court held a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), on August 20, 2009. The court issued the sentencing order on October 9, 2009, sentencing Patrick to death.

Patrick appealed the conviction and sentence to this Court which upheld both. *Patrick v. State*, 104 So. 3d 1048 (Fla. 2012). He then filed a petition for writ of certiorari in the United States Supreme Court, which was subsequently denied. *Patrick v. Florida*, 134 S. Ct. 85 (2013).

In affirming the judgement and sentence, this Court found the following facts:

> Eric Kurt Patrick was recently released from prison and homeless when he met Steven Schumacher at Holiday Park during a rain shower when both men took shelter under a pavilion. Schumacher invited Patrick to lunch, then to stay with him at his home until Patrick was back on his feet. On the night of Sunday, September 25, 2005, Patrick beat Schumacher to death. Patrick left Schumacher's apartment and took Schumacher's truck and parked it at the Tri–Rail station. Patrick withdrew approximately $900 from Schumacher's bank account using his ATM card in three separate transactions. Patrick was arrested after a separate, unrelated encounter with Deputy Kurt Bukata. Patrick confessed to beating Schumacher, stated that he was afraid Schumacher was dead, and that he didn't mean to kill him.
>
> On November 9, 2005, Patrick was charged by indictment. The jury

trial began on February 2, 2009. At trial, the State called twelve witnesses during its case-in-chief.

On the night of the murder, Patrick and Schumacher drank beers and went to bed. Patrick gave Schumacher a massage, then they both lay naked in bed. According to Patrick, Schumacher attempted anal sex, which Patrick refused. Patrick stated that Schumacher was "riding up on me squeezing me." After Patrick told him to stop, Schumacher stopped but tried again later. Patrick then explained that he "cut loose on [Schumacher]."

Patrick admitted and the evidence verified that Patrick beat Schumacher in the bedroom, beginning in the bed. He began hitting Schumacher with his fists but also beat him with a wooden box because his hands hurt so badly. Schumacher's nose was broken and his face was cut. He was hit so hard that his teeth were broken. Patrick then tied up Schumacher using a telephone cord at the base of the bed, then taped his mouth when Schumacher yelled for help. Patrick did not want Schumacher "to go to the law" on him. Patrick put Schumacher in the bathtub on his side where Schumacher was later found dead.

Jenny Scott and Robert Lyon, Schumacher's friends, usually saw him daily. They last saw Schumacher on September 25, 2005, when they went over to offer him dinner. Scott did not hear from Schumacher and she also noticed his truck was missing. When Scott went to check on Schumacher on Tuesday, he did not answer so she called the Sheriff's Department.

Deputy James Snell responded to Scott's call. They both went into the apartment and saw that the bedroom was dark and disarrayed. Both Deputy Snell and Scott saw blood stains throughout the room. At that point, Scott ran out of the apartment. Deputy Snell found Schumacher's body in the bathtub. The body was very bloody and the hands and ankles were bound in the back; the head and face were taped, with the face resting on the drain. The pants were pulled down although still on the body. The body was cold and stiff and the blood had pooled. The ankles were bound with torn sheets and a knotted lamp cord. The wrists were bound by a telephone cord and tape. There was bruising on an elbow, the chin, and the top of the head. The tape on the head went both horizontally and vertically and there was a pillow case folded over the

mouth under the tape. The tape seemed to be one continuous piece. Deputy Snell informed Scott that Schumacher was dead. Scott then provided the police with a description of Patrick.

The deputies found no evidence of forced entry into the apartment. Additionally, they discovered that the air conditioning was set at sixty degrees so all the windows had condensation on them. In the kitchen trash, the deputies found tape matching that used on Schumacher's face. Schumacher's wallet was in the living room. There were bloody footprints on the tile, a large blood stain on the bedroom carpet, and blood spatter on the dresser and wall. The bedroom lamp was cracked and missing its cord. A cord was in the bed under the sheets. There was blood spatter on the sheets and headboard. Teeth were found in the bedclothes. A broken box with blood on it was under the dresser.

Deputy Kurt Bukata ran into Patrick at a gas station and arrested him on an outstanding warrant. Patrick had injuries on his knuckles and was carrying a duffel bag. Patrick also had some abrasions on his upper body. Bukata inventoried the duffel bag and found blood-stained boots, jeans, briefs, and socks. He told Bukata that he had been involved in a fight with some men over his shoes. DNA tests identified Schumacher's blood on Patrick's jeans.

The trial ended on February 20, 2009, with the jury finding Patrick guilty of first-degree murder, kidnapping, and robbery.

On June 12, 2010, the court reconvened for the penalty phase. The State introduced two stipulations into the record. The State introduced a certified copy of Patrick's conviction for armed carjacking on April 17, 1998, for which he was sentenced to nine years' imprisonment. The State also introduced a certified copy of a document from the Department of Corrections showing that Patrick was released on August 9, 2005, and remained in the controlled release program until February 8, 2007. The State called Scott Tison and Dawn Allford. The defense called seven witnesses: Dorothy Dolighan, a friend of the family who grew up with Patrick's mother in Berlin, Germany; Carsten Patrick, Patrick's brother; Philip Arth, an investigator with the Broward County Public Defender's Office and former Ft. Lauderdale police homicide detective; Patrick's mother, Ingrid Franke; Father Jerry Singleton, the pastor at St. Anthony Catholic Church; Patrick, himself;

> and Dr. Christopher Fichera, a licensed clinical and forensic psychologist.
>
> On August 20, 2009, the trial court conducted the final sentencing hearing, pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla.1993). The defense called two experts, and Patrick and his mother made statements to the court. The defense presented a Spencer memorandum in support of a life sentence. Dr. Fichera and Dr. Allan Ribbler, also a licensed psychologist, testified.
>
> On October 9, 2009, the court issued its sentencing order. The court imposed the death penalty for the murder of Steven Schumacher. The court sentenced Patrick to a mandatory life imprisonment term for the kidnapping as a prison releasee reoffender, to run consecutive to the death sentence. In its sentencing order, the trial court found six aggravators FN1 and sixteen non-statutory mitigating circumstances.FN2 The Court sentenced Patrick to thirty years as a violent habitual felony offender, with a fifteen-year minimum-mandatory term for the robbery, to run concurrent with the life sentence. Patrick now appeals raising seventeen claims.

Patrick v. State, 104 So. 3d 1048, 1053-55 (Footnotes omitted).

Patrick filed his motion seeking post-conviction relief under Florida Rule of Criminal Procedure 3.851 on October 2, 2014. The State filed its response on December 1, 2014. The trial court denied an evidentiary hearing on claims 1, 2, 3, 4.2 and 6. It granted an evidentiary hearing on claims 4.1, 4.3, and 5. The evidentiary hearing occurred on August 31 through September 2, 2015. Patrick amended his motion to include a claim based upon *Hurst v. Florida*, 136 S. Ct. 616 (2016). In a written order the trial court denied relief on April 4, 2016.

Patrick appealed. He then filed a Petition for Writ of Habeas Corpus on February 13, 2017 on the basis of *Hurst* error. The next day he filed his initial brief

on the denial of post-conviction relief. On June 14, 2018, this Court granted Patrick a new penalty phase trial for *Hurst* error, affirmed the denial of post-conviction relief, save for one issue on which it remanded the case for an evidentiary hearing on the question of whether trial counsel was ineffective for failing to strike juror Martin due to his bias against homosexuals.

> In contrast, the juror showed actual bias stemming from Patrick's sexual activity. He said that he "would have a bias if [he] knew the perpetrator was homosexual." When asked if he would still hold the prosecutor to the proper burden of proof, he answered, "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." The juror said "yes" when asked if this bias might affect his deliberations.
>
> The State contends that this juror's bias was not against the defense, as there was no evidence that Patrick was homosexual, and instead suggested more bias against the victim. 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. 6 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.
>
> Because the juror's voir dire answers concerning homosexuality meet the *Carratelli* test for prejudice, the validity of the summary denial of this claim depends on the performance prong. Failure to raise a meritorious issue is not deficient performance when it results from the

> exercise of professional judgment after considering alternative courses. *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). As the State argues, the record in this case suggests possible strategic grounds, relating to both phases of the trial, for not striking this juror. We need not detail these grounds but note that when applying *Strickland*, "[g]enerally, an evidentiary hearing is required to conclude that action or inaction was a strategic decision." *Pineda v. State*, 805 So. 2d 116, 117 (Fla. 4th DCA 2002). On this record, we can neither ignore the possibility that counsel's failure to challenge this juror was strategic nor conclude that it was. Therefore, we reverse the postconviction court's denial of this claim and remand for an evidentiary hearing.

Patrick v. State, 246 So. 3d 253, 263-64 (Fla. 2018)(footnotes omitted).

The lower court held the evidentiary hearing on October 5, 2018. Patrick's trial counsels, George Reres ("Reres") and Dorothy Ferraro ("Ferraro"), testified. Reres said that he has been an attorney since 1982, working with the Public Defender's office for thirty years. He has done capital cases since 1987 and helped create the Public Defender's homicide unit which he then headed. (PCR2 141-43). By the time of Patrick's trial he had tried 22-23 first degree murder cases. (PCR2 174). Ferraro was Patrick's second chair and primarily handled the penalty phase with Reres doing the guilt phase. (PCR2 146-47). The remainder of the testimony will be detailed in the response to the issue.

SUMMARY OF THE ARGUMENT

Patrick failed to prove that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), given the evidence that showed Reres had strategic reasons, due to both his views on

homosexuals and the death penalty, for not striking juror Martin. Competent, substantial evidence supported the lower court's finding that Reres was credible and that he had a strategy for keeping Martin.

ARGUMENT

ISSUE IV

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE JUROR MARTIN DURING VOIR DIRE. (Restated)

Patrick argues that his counsel was ineffective for not challenging, during voir dire, juror Martin due to his bias against homosexuals. He contends that Juror Martin's bias against homosexuals might have prejudiced Patrick since there was testimony that the victim was homosexual and performed sex acts on Patrick, thereby giving the impression that Patrick was homosexual as well. Patrick failed to prove this claim during the evidentiary hearing. Trial counsel testified that he thought the juror's bias might help the defense in the guilt phase given the victim's actions and would definitely help Patrick in the penalty phase given his sentiment about the seriousness of recommending a death sentence. The trial record and the evidentiary hearing testimony show that counsel had a strategic reason to keep that juror on the panel and Patrick himself approved of that decision.

The standard of review for ineffective assistance of counsel claims is the two prong test established by *Stickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984). The United States Supreme Court ruled that:

> "[a] convicted defendant's claim that counsel's assistance was defective as to require reversal of a conviction or death sentence has two components. First, the defendant must shoe 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 errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland,* 104 S.Ct. at 2064.

The court in *Strickland* stated that when judging an attorney's performance, the standard is that of reasonably effective assistance, considering all the circumstances, and judicial scrutiny must be highly deferential. In order to show 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 2068.

This Court used this standard in *Bogle v. State,* highlighting the two factors need to be established:

> "First the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under the prevailing professional standards. Second, the clear, substantial deficiency shown must further be

> demonstrated to have affected the fairness and reliability of the proceeding that confidence in the outcome is undermined."

Boling v. State, 41 So. 3d 151, 155 (Fla. 2010) (quoting *Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)). This Court further noted that because the two prongs of *Strickland* present mixed questions of law and fact, the court employs a mixed standard of review, deferring to the trial court's fact findings that are supported by competent substantial evidence, but reviewing legal conclusions *de novo*. *Dennis v. State,* 109 So. 3d 680, 690 (Fla 2012).

The standard of review for an appellate court reviewing a claim of ineffective assistance of counsel after an evidentiary hearing is mixed; clear error review applies to give great deference to the trial court's findings of fact whereby if competent substantial evidence supports the finding then it will not be disturbed, while the trial court's findings of law are subject to *de novo review*. *Bruno v. State*, 807 So. 2d 55 (Fla. 2001) and *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

This Court found that Martin had actual bias under *Carratelli v. State*, 961 So. 2d 312, 323-24 (Fla. 2007) and that "he was predisposed to believe that Partick is morally depraved enough to have committed the charged offenses." *Patrick*, 246 So. 3d at 263-64. It remanded the case for an evidentiary hearing on the performance prong of *Strickland*. After conducting that hearing, the lower court made the following factual findings and then denied relief on this claim:

The defense presented the testimony of George Reres and Dorothy Ferraro. Ms. Ferraro really had not independent recollection of the jury selection in this case. She had read her notes and the transcript but offered that she would just be speculating as to the reason or reasons why the defense did not strike Juror Martin. She did testify that no juror was struck or kept without Defendant's approval.

Mr. Reres, at the time of defendant's trial, had been in the Office of the Public Defender since 1982 (this case was tried in 2009). He had tried approximately 22-23 capital and murder cases. He had tried approximately 30 second degree murder and manslaughter cases.

Reres conceded that the State had a very strong case against Defendant. Because there was so much evidence, i.e., DNA, bloody shoeprint, eyewitnesses who could put Defendant inside of the victim's apartment and a confession, his strategy was a "shotgun" approach.

Reres testified that Defendant didn't want to be convicted and didn't want a life sentence. Reres felt that Juror Martin was a "winner" for the dense because he was very strong for a life sentence versus death.

Notwithstanding Martin's comments about homosexuals, Reres felt that he was a good juror to have for the penalty phase. Reres also testified that he was "going for a lesser offense." This Court took that to mean he was looking maybe for second degree murder or manslaughter.

Given the beating that the victim received in this case, manslaughter would have been farfetched in this Court's opinion. However, the second degree murder instruction contains the wording that Juror Martin used:

> 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 feet about it?
>
> **Mr. MARTIN: Put it this way, if I feel the person was a homosexual I personally believe that the person is morally depraved enough that he might lie, might steal, might kill.**

(ROA at 424).

Mr. Reres also testified that he always had a strategy for leaving a juror on-unless he'd run out of peremptories, then he would have asked for more. Mr. Reres testified that "sometimes objectionable

jurors become acceptable because of the feeling that he or she can lead other jurors the way the defendant wanted them to go. Reres candidly admitted that he was looking at the penalty phase and that Juror Martin was better for that phase.

Reres also testified that he wanted a juror that had a bias against homosexuality He thought that that would be favorable for one of the defenses advanced, that the victim had to tried to penetrate Defendant anally against Defendants will. Reres testified that it was his strategy to keep Juror Martin. Reres also testified that Defendant had the ultimate say regarding the jurors.

Volume 11 of the appeal proceedings contains the defense voir dire and the selection of jurors for this trial. There were instances where the defense wanted a person that the State challenged for cause. For instance in the case of Mr. Moreno, the defense wanted him as a juror. This Court allowed the challenge for cause because the juror thought Defendant was already guilty and thought the only job the jurors would have is to determine whether Defendant gets life or death. Mr. Reres responded:

> **"I know he said that Judge. I thought I could work with him anyway but maybe that's just my ego talking."**

(ROA, vol. 11, pp. 1183-1184).

Counsel for Defendant showed Mr. Reres a sheet of paper with his notes regarding Juror Martin (Defense exhibit 1). Reres agreed that they were his handwriting and his notes. At the bottom of the paper, but crossed off are the words, (symbol of triangle which connotes Defendant) want out. Prempt. When asked what that meant Reres stated:

> **"I honestly don't recall. My best guess would be, we were all uncertain about Martin. Perhaps Mr. Patrick had some concerns initially and then he made those statements about homosexuality changed his opinion."**

(EH p.55).3

The trial record also reflects that Mr. Reres did not formally accept the panel. He didn't ask for more peremptories or raise any cause challenges (vol. 11, pp. 1189-1190).

This Court colloquied Defendant, under oath. He was asked if his attorneys were talking with him about the jury selection process, whether they were listening to him and whether they answered his questions (vol. 11, pp 1190-1191). The Court explained to Defendant that Reres was not accepting the panel/jury. Defendant was asked about

the twelve (12) jurors. He was asked if he had a gut feeling about the jurors, that maybe his attorneys liked the juror but he didn't. His response was "I'm fine." The Court further asked if his attorneys had consulted with him about the jurors. Defendant responded "Yes" (vol. 11, p. 1191). Defendant did not raise any objections to the jurors or alternates (vol. 11, pp 1199--2000).

Mr. Reres' testimony was compelling to this Court. The defense argues that Reres' "purported strategy was "knee-jerk", "flippant", and "contradictory" (memorandum p. 4).

On the contrary, this Court found his testimony to be candid and credible. Yet no expert witnesses were called to dispute Reres' failure to challenge or preempt Juror Martin. Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The question is would any other attorney have done the same thing or similar to what Mr. Reres did in defending his client?

The Defendant has the burden of showing that counsel's performance fell below the standard guaranteed by the Sixth Amendment.

This Court finds guidance in the case of *Peterson v. State*, 154 So. 3d 275 (2014). In Peterson [sic], the attorney testified that in death eligible cases it was important for him to focus on the sentencing recommendation. He acknowledged that he sometimes, as in the post-conviction case, that he selected jurors that were not favorable to the defense in the guilt phases, but were favorable in the penalty phase. He testified that he had never, in 80 cases achieved seating a "perfect jury." Id [sic] at 282.

The Supreme Court has recognized that the strategy utilized by Mr. Reres is a reasonable one. *Dillbeck v. State*, 964 So. 2d 95, 102-103 (Fla. 2007) (held that counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence). See, also *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995) (juror seated even though she said she could not be impartial but she did not agree with the death penalty). Because Defendant has failed to carry his burden and based upon the foregoing, it is

ORDERED AND ADJUDGED that the Motion for Post-conviction Relief, as to Claim 7, is **DENIED**.

(PCR2 115-121). Those findings by the court are fully supported by record from the evidentiary hearing and should be given deference by this Court.

The prosecutor asked Martin about his feelings on homosexuality, saying the victim was one. Martin said that he would be biased if the perpetrator was one. (T. 5:423) Martin, and the rest of the jury, clearly heard Patrick tell the police that he was not gay numerous times during his confession and the testimony was, as Reres pointed out in his testimony, was that Patrick only ever allowed the victim, and other men, to give him oral sex. Additionally, Martin thought sentencing a murderer to life in prison rather than to death was better so he could have his whole life to think about what he did. (T. 7:742-48). Martin also commented on the gravity of imposing the death penalty, so strongly that Reres thought he would sway other jurors to do the same.

> MR. MARTIN: Honestly, I don't think any of us in here want to bear that burden when we leave here whether he's found innocent or guilty of thinking wow, I just sent somebody off to be executed, oh my God, I hope we all make the right decision. Or, life in prison, he has his whole life to think about what he did and climb the walls and torment -- I don't know, I would be tormenting myself trying to put myself in his shoes, in the meantime thinking what he may be thinking. But you know what, if it was a guilty verdict I would say, hey, no, we don't want to send this guy to death, ask him what he wants to do, do you want to die or spend the rest of your life in prison. We couldn't do that? That would relieve our I know it sounds silly but I agree with what she's saying.

(T 7:665-66).

Both Reres and Ferraro testified about jury selection; however, Ferraro had no independent recollection of Martin or her thoughts about him at the time of the trial. Both attorneys were experienced trial attorneys and Reres was the supervisor of the homicide unit in the Public Defender's Office. He had tried 22 or 23 capital cases before he tried Patrick's case. (PCR2 140-42, 173, 203-4). Both stated that they approached the trial as a team, including the voir dire process. Both also said that Patrick was closely involved in picking the jury and that he approved each of the sitting jurors. (PCR2 146, 150, 185-86, 206-7, 213). Both also thought Martin was a good defense juror; Reres thought Martin could possibly understand why Patrick had reacted the way he did when the victim tried to anally penetrate him. Both also thought he was "golden" for the penalty phase. (PCR2 155-61, 176-77, 192-93, 212).

Reres explained their voir dire and trial strategy, saying that he had a shotgun approach to attempt to get rid of the premeditation. "[W]e were hoping for a lesser -- trying with everything we had, to get a lesser for Eric, but recognizing that you know, we may very well be in the second phase and that it was extremely important to get jurors that would likely recommend life." (PCR2 153). Reres was not concerned that the jury would disbelieve Patrick's statements in his confession because it was clear to all that he told the truth. (PCR2 155-59).

> Q. So in preparation for your case and your presentation to the jury, as part of that effort to have the jurors come back with a lesser included,

to get off the issue of premeditation, would you have wanted a juror who may have had some type of a bias against homosexuality?
A. Absolutely.
Q. And that would be because, your theory was that the victim tried to perform on the defendant, anal sex, was in fact a homosexual act, and jurors who may have had somewhat of a bias toward that, toward homosexuality, would be favorable for the defense.
A. Absolutely.
Q. And it's also -- is it also not true that you are not presenting to the jury that the Defendant was a homosexual?
A. He adamantly denied it. He indicated it when he was down on his luck, he would [let] the[m] perform oral sex on him, but that's as far as it went.

(PCR2 179). Reres also firmly thought Martin was a good defense juror.

I love Mr. Martin's answer here. I think that's consistent with what I've said.
Q. What was Mr. Martin's answer?
A. "Honestly, I don't think any of us here want to bear burden that when we leave here, whether he's found innocent or guilty of thinking, wow, I just sent somebody off to be executed. Oh, my God. I hope we all make the right decision."
Q. Okay.
A. I can't imagine why you're challenging our decision to leave him on, when he makes that kind of statement.

(PCR2 166).

Q. And I believe discussed on direct examination, almost to the point where Mr. Martin sort of said, and I'm paraphrasing, but life imprisonment would give a person time, a long time to think about what they had done. Versus, if they were put to death, they wouldn't have that opportunity?
A. Yes, and I think more importantly than that, the portion that they showed me just now, where he volunteered and talked about the personal sense of responsibility that he would bear should he have to make a decision on life or death and God forbid that if it had to be a death decision enamored me of him and his attitude towards death penalty. Some people maintain a strong law-enforcement front. Oh yes,

> I would - you know, I vote for death if he killed a child, or if he raped someone and killed them. But then when they -- as one juror said, I think it was in context that Mr. Martin responded, when you're here and suddenly this is all very real, your feelings about the death penalty and about what you do, have to be reexamined. When you see a juror volunteer that they are already reexamining how they felt, a person you never would have accepted before or wanted on your jury, can suddenly become the best juror you have and lead the other jurors, simply because they're strong, law-enforcement minded people down a path to life.

(PCR2 181-82).

Reres also explained that there are a myriad of reasons why attorneys choose or do not choose a particular juror and one cannot simply point to one answer and compare that single factor to a similar answer from another venireman's. (PCR2 166-67). About Martin specifically, Reres said:

> Q. So then overall, at this point having discuss both Mr. Martin's issues about homosexuality, and Mr. Martin's feelings about the death penalty, is there anything from those two areas that would have caused you to want to strike him or exclude him from the jury?
> ...
> THE WITNESS: It would've caused us to think very carefully about where he fit in the scheme of things that we were looking for as jurors. The other thing that's critically important in voir dire, is it's not as if you can just strike anybody you want. You have to look at who's left on the panel, where you would go from there, how many strikes you have and how many strikes the State has, is this juror perhaps better for the Defense than somebody you'll get stuck with if you strike them. All those considerations, are occurring at the same time. And then in a death penalty case, you've got the double consideration to the fact that I've already mentioned. Many times, your guilt-phase jurors, are not the best jurors that you would want in penalty phase and you have to make a decision. You have to weigh where you're really going. This case it's pretty clear, and I don't have independent recollection of that, but from what I've asked – been asked to read, I do remember that we were

> looking primarily at the penalty phase in terms of jurors and all the responses I've seen from Mr. Martin at this point indicate to me that he might have been a better juror for my penalty phase, than he would've been for my guilt phase.

(PCR2 183-84). He also explained that an attorney would look to who else would be coming up from the panel to replace a stricken juror as well as where in the voir dire process it was. (PCR2 192-95). After reviewing the transcript and his notes, he did not think Martin should have been stricken. (PCR2 189-90). He also said: "What I can add is in close to 300 jury trials, I have never left a juror on the jury without a strategy reason." (PCR2 181). Simply because Reres could not specifically recall exactly what he was thinking at the time of the trial does not mean that he did not have a strategy at the time for keeping Martin on the jury. Further, given the overwhelming evidence of Patrick's guilt, choosing a thinking juror like Martin made sense for the penalty phase as explained by both Ferraro and Reres. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. Id. at 1254." *Strickland*, 466 U.S. at 681 citing *Washington v. Strickland*, 693 F. 2d 1243 (11th Cir. 1982). Competent, substantial evidence supports the trial court's findings regarding trial counsel's strategic reasons for keeping Martin on the jury and this Court should affirm them. Consequently, the defense failed to meet its burden of showing the counsel's performance was deficient under *Strickland*.

The State still contends, despite this Court's position, that Patrick also cannot show the necessary prejudice from having Martin sit on the jury during the guilt phase. There was more than sufficient evidence of Patrick's guilt to support the guilty verdicts. Patrick confessed to both the police and his mother; the jury heard the recordings to both of those statements. (T. 15:1751-58; 16:1786-1840) Lyon and Scott identified him as the man staying with the victim the Sunday night of the murder. (T. 12:1282-84, 1324) Patrick had bloody clothing in his bag when arrested which later tested positive for DNA matching the victim. (T. 13:1453-57;15:1701-1728) Patrick had cuts on his hands and abrasions on his upper body when he was arrested. (T. 14:1558-59) The shoes in Patrick's duffle bag had blood on them that matched the victim's blood and also had a pattern consistent with the shoe prints left at the murder scene. (T. 14:1564-1611; 15:1701-1728) All of this evidence supported the guilty verdicts. Furthermore, Patrick did not testify during the guilt phase so Martin could not dismiss his testimony. Any distrust and biased feelings Martin may have had against homosexuals could in no way have affected the verdict given the scope and quality of the evidence of Patrick's guilt.

Patrick points to the excusal of other veniremen who expressed reservations about homosexuals, namely Montenegro, Elovitz, Garcia, Holland, and Lindo. However, each of those individuals expressed views on the death penalty which, under the law, could/should not sit on a jury in a death penalty trial. *Rimmer v. State*,

825 So. 2d 304, 319 (Fla. 2002). Holland believed in the death penalty for murders, no matter what. No defense counsel would keep such a person and the court properly excused him for cause. (T. 1049). The others were all opposed to the death penalty in any case, often on religious grounds. Garcia fell into that category, saying he would never vote for death. (T. 8:893, 1043-44). Montenegro said repeatedly that she would never vote for the death penalty, even after Reres tried to rehabilitate her. Additionally, she was distraught about the case for personal reasons, so much so that the court expressed concern for her and forbad counsel from questioning her further about homosexuality. (T. 8:893-4, 958). Elovitz stated, more than once, that he would only vote for the death penalty in a case where the defendant confessed to premeditated murder. (T. 895-96). Lindo also said that she would never impose the death penalty and shut down the defense counsel when he tried to rehabilitate her. (T. 8:894, 9:960-61, 9:1018, 10:1085). The State exercised cause challenges on them all. When it came to Lindo Reres said that he could not, in good conscious, object. (T. 10:1049-50, 11:1181-82). Reres knew the law and knew that these veniremen could not sit on this jury, thereby placing them in an entirely different category than Martin.

Patrick failed to prove deficient performance as required under *Strickland*. This Court should affirm the denial of this claim.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court should affirm the denial of relief on the post-conviction claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been electronically furnished to: Suzanne Keffer, Chief Assistant CCRC-South, keffers@ccsr.state.fl.us, 1 East Broward Blvd., Suite 444, Ft. Lauderdale, FL 33301; this 24th day of June, 2019. I further certify that this brief is typed in Times New Roman 14-point font.

/s/ Lisa-Marie Lerner
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