IN THE SUPREME COURT OF FLORIDA
Case No. SC19-140
Lower Court Case No. 05016477CF10A

ERIC KURT PATRICK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

MOTION FOR REHEARING

COMES NOW THE APPELLANT, ERIC PATRICK, by and through his undersigned counsel, and herein submits this Motion for Rehearing with respect to this Court's decision entered June 4, 2020, affirming the denial of his motion to vacate judgment of convictions and sentences with respect to his claim of ineffective assistance of counsel for failing to challenge an actually biased juror. In support of his motion, Mr. Patrick states:

On June 4, 2020, this Court issued its opinion in affirming the circuit court's denial of his motion to vacate judgments of conviction and sentence. *Patrick v. State*, No. SC19-140, 2020 WL 2961996 (Fla. June 4, 2020). The slip opinion indicates, "NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED." *Patrick v. State*, No. SC19-140, 2020 WL 2961996, Slip Op. at 20 (Fla. June 4, 2020) (hereafter "Slip. Op. at"). This Motion for

Rehearing is timely filed pursuant to Florida Rule of Appellate Procedure 9.330(a).

Rehearing is warranted because the Court overlooked or misapprehended points of fact and law which require relief be granted in this case. Due to the shortness of time in which a Motion for Rehearing is to be filed, this motion does not and cannot raise all arguments that Mr. Patrick has with respect to this Court's decision. Mr. Patrick only addresses a few of the more salient arguments and the errors which he believes permeate the Court's conclusions. Mr. Patrick in no way abandons and/or waives any claims or arguments previously presented which are not expressly addressed in this Motion for Rehearing.

ARGUMENT I

Significantly, this Court adheres to its finding that juror Martin was actually biased against Mr. Patrick. Slip Op. at 12. Given that determination, Mr. Patrick's jury could not then have been impartial. And 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 objectively unreasonable. No reasonably competent attorney would have failed to adequately challenge for cause the actually biased juror where his responses indicated a very strong bias against the defendant and that his bias would affect his deliberations. Yet, in denying Mr. Patrick relief this Court is condoning precisely such an outcome by maintaining that counsel's purported "strategy" to seat a biased juror can justify empaneling a jury that is not impartial.

This Court relies on *Johnson v. Armontrout*, 961 F. 2d 748 (8th Cir. 1992) to support its conclusion that failing to remove a biased juror may be the result of a strategic decision. However, where "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors" *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), "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). Juror Martin's bias, admittedly, would affect his deliberations and 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). (RT. 425). Empanelling a jury that is not impartial cannot be strategic.

At least one other circuit agrees. In *Hughes v. United States*, 258 F.3d 453, 462-63 (6th Cir. 2001), "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision." The Court explained:

> The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). "Failure to remove biased jurors taints the entire trial, and therefore…[the resulting] conviction must be overturned." *Wolfe*, 232 F.3d at 503. "A court must excuse a prospective juror if actual bias is discovered during voir dire." *Allsup*, 566 F.4d at 71. "Actual bias is 'bias in fact'-the existence of a state of mind that leads to an inference that he person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood,* 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936))
>
> If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury.

Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001). The *Hughes* court agreed that the presence of a biased juror is a "fundamental structural defect," and concluded "no sound trial strategy could support counsel's effective waiver of [a

defendant's] basic Sixth Amendment right to trial by impartial jury." *Hughes, 258 F.3d* at 463, (citing *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992)).

Indeed, the *Hughes* Court relied on *Johnson* throughout its decision and explained:

> If *Johnson* is consistent with the position that sound trial strategy may support counsel's decision not to challenge a juror on voir dire, despite the juror's obvious bias against counsel's client, then we depart from *Johnson* on this point. **However, such a reading of *Johnson* is in tension with its own language and conclusion.** The *Johnson* court noted that the state, "somewhat incredibly," argued trial strategy in support of counsel's failure to request removal for cause of the recycled jurors. *Johnson*, 961 F.2d at 755. Further, the *Johnson* court concluded that counsel's "failure to attempt to bar the seating of obviously biased jurors constituted ineffective assistance of counsel of a fundamental degree." *Id*. at 756.

Hughes v. United States, 258 F.3d 453, 462–63 (6th Cir. 2001) (emphasis added). Read together, both *Johnson* and *Hughes* make clear that where juror bias is present, no sound trial strategy could be attributed to counsel's failure to remove such a juror for cause. And where that does not occur, it amounts to a structural defect that cannot be remedied under the guise of 'reasonable trial strategy.'

The fact that Mr. Patrick stated he was "fine" with the jury is of no consequence. As *Hughes* explains, an ineffective assistance of counsel claim is not about whether the defendant is satisfied with trial counsel, but whether trial

counsel's performance was objectively unreasonable. *Id*. at 461. *Johnson* likewise makes a similar finding:

> When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias.

Johnson, 961 F.2d at 754. As noted by this Court, Mr. Patrick has proven actual bias. Furthermore, trial counsel recognized 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). This does not indicate acquiescence on Mr. Patrick's part and a mere "I'm fine" at the conclusion of *voir dire* should not be given much significance at all.

Despite this Court's recognition that "although [a] juror is biased against the defense in some sense, overall, the juror is one whose participation may benefit the defendant's personal goals in the case," that logic does not describe a juror who is actually biased. Courts have recognized a difference:

> The label "biased" is applied to two sorts of jurors. In the usual sense, a biased juror is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot 'conscientiously apply the law and find the facts.'

Franklin v. Anderson, 434 F.3d 412, 422 (6th Cir. 2006) (quoting *Wainwright v. Witt,* 469 U.S. 412, 423, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985)). The cases relied on by this Court in denying Mr. Patrick relief do not find actual bias or that the juror

could not "conscientiously apply the law and facts." In fact, this Court in *State v. Bright* addressed the lack of actual bias on the record:

> Bright has failed to prove that the juror in question was actually biased. Competent, substantial evidence supports the postconviction court's determination that the singular "tiny bit" comment did not prove actual bias in the context of the entire voir dire.

200 So. 3d 710, 742 (Fla. 2016). Rather, the juror at question in *Bright* certainly falls more within the latter category of a predisposition in favor or against the defendant.[1]

In *Peterson v. State*, 154 So. 3d 275 (2014), Peterson's specific argument was that trial counsel failed to exercise ***peremptory challenges*** for several jurors he alleged to have been biased. 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." *Id*. at 282. However, here Juror Martin was not impartial regardless of his view favoring life over death. Juror Martin's actual bias against homosexuals gave rise to a cause challenge, not merely a peremptory challenge. Further, unlike *Peterson*, Mr. Patrick has shown at least two venire members who were more qualified to serve: potential jurors Amparo and Viscarra;

[1]The juror at issue in *Bright* stated during voir dire that she would think "a tiny bit" that capital murder defendant was hiding something if he did not take the stand. *State v. Bright*, 200 So. 3d 710 (Fla. 2016).

both of whom expressed like-minded views with respect to the penalty phase as Martin but did not express his bias. This Court ignores these significant differences.

Harvey v. Duggar, 656 So. 2d 1253 (Fla. 1995) is likewise distinguishable. In that case, a juror stated that she could not be impartial because she had read in the newspaper and heard on television that Harvey had confessed to the crime. Harvey's trial counsel testified that Harvey's motion to suppress the confession had been denied, so he had concluded that there was no chance of obtaining an acquittal. The juror's knowledge of the confession was moot because, as counsel testified, the jury was going to hear the confession in any event. Contrastingly, quite the opposite scenario existed in Mr. Patrick's case. Mr. Reres testified in postconviction that with respect to the guilt phase, "[w]e were certainly trying to win." (PCR. Vol. 24 p. 43). The defense had not thrown in the towel during the guilt phase of Mr. Patrick's trial. 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).[2] 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). Thus, regardless of whether trial counsel claimed the attorneys knew they would likely end up in the

[2] Mr. Patrick's desire to have Mr. Reres handle the guilt phase because he did not want to be convicted as charged does not demonstrate consent to a strategy which focused on the penalty phase. *Cf. Harvey v. Warden, Union Corr. Inst.*, 629 F. 3d 1228 (11th Cir. 2011).

second phase, the defense was still putting forth a focused attempt to secure a verdict for a lesser offense than first degree murder and relying heavily on Mr. Patrick's statement, his candor and remorse to do so. This simply is not the scenario presented in *Harvey*.

This Court also ignores that counsel's purported strategy is objectively unreasonable under the totality of the record in Mr. Patrick's case. In fact, contrary to this Court's determination, the record refutes counsel's testimony. 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. Tellingly, with respect to juror Koehne, when the State moved for cause citing his bias towards homosexuals, Mr. Reres responded "***legally*** I think the State is correct, I would have no objection." (RT. 773)(emphasis added). This Court ignores the dismissal of all of the jurors who expressed a bias involving homosexuals, failing to even mention Mr. Reres' agreement with their dismissal.

Additionally, jurors that expressed similar views as Martin with respect to the death penalty 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. Given this record, this Court's conclusion that "this juror was more likely than other potential jurors to recommend a life sentence" is simply wrong. Slip Op. at 19.

That counsel was trying to seat jurors who expressed a dislike for homosexuals ignores the circumstances of the "unusual relationship" between Mr. Patrick and the victim. Despite the Court's detailing Mr. Patrick's attempts in his statement to the police to try and distance himself as being characterized as gay and distinguish himself from "these gay guys" he picked up in bars, Mr. Patrick was in fact engaging in a homosexual relationship. The fact that Mr. Patrick is not homosexual does not "eliminate the bias that this juror said he would feel." *Patrick v. State*, 246 So. 3d 253, 264 (Fla. 2018). And while this Court concluded "it was logical for Mr. Reres to believe that the juror's bias created a higher probability that he, as compared to other potential jurors, would return a verdict of a lesser degree of

murder," the Court ignores that Mr. Reres purported strategy was premised on his inaccurate characterization of this juror and the record. Slip Op. at 19. 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). These statements by Mr. Reres strike at the heart of the flaws in his purported reasoning. Mr. Reres failed to consider that this juror's bias extended to Mr. Patrick.

It cannot be said that Mr. Patrick's jury was free of partiality. No sound trial strategy can support what amounted to a waiver of Mr. Patrick's Sixth Amendment right to a fair and impartial jury. Even if the Court maintains that counsel's strategic decision may justify empaneling a jury that is not impartial, the record, viewed in its entirety, establishes that the failure to remove Juror Martin cannot be attributable to any objectively reasonable strategy.

WHEREFORE, Appellant Eric Patrick, through undersigned counsel, respectfully moves for rehearing in the above matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 19th day of June, 2020, and opposing counsel will be served on this date.

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