No. _____

OCTOBER TERM 2020

IN THE SUPREME COURT OF THE UNITED STATES

ERIC KURT PATRICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

"[I]f 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). This was the unadulterated commentary of a juror serving at Petitioner's trial. And it was these comments that led the Florida Supreme Court to conclude that this "juror showed actual bias stemming from [Petitioner's] sexual activity." *Patrick v. State*, 246 So. 3d 253, 263 (Fla. 2018). In so concluding, the Florida Supreme Court rejected the idea that the juror was not biased against the defense because Petitioner is not homosexual:

> 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. Despite finding this juror was actually biased against Petitioner, the Florida Supreme Court recognized the possibility that the decision by Petitioner's counsel to not strike this juror was strategic, *id*. at 263-64, and ultimately, after remand for an evidentiary hearing in the circuit court, affirmed the circuit court's finding that counsel exercised reasonable strategy in not striking the juror for cause. *Patrick v. State*, 302 So. 3d 734 (Fla. 2020).

From these circumstances, Petitioner presents the following question:

Where the purpose of *voir dire* is to empanel an impartial jury as guaranteed by the Sixth Amendment, but an actual biased juror is not removed for cause, whether there can be any sound trial strategy attributed to trial counsel's actions thereby justifying the empaneling of a jury that is not impartial and essentially waiving a defendant's Sixth Amendment rights?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Eric Kurt Patrick, was the Defendant/Appellant in the state court proceedings.

The State of Florida was the Plaintiff/Appellee in the state court proceedings.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying trial:
Circuit Court of Broward County, Florida
State of Florida v. Eric Kurt Patrick, 05-016477-CF-10A
Judgement Entered: October 9, 2009

Direct Appeal:
Florida Supreme Court
Patrick v. State, 104 So. 3d 1048 (Fla. 2012)
Judgement Entered: December 6, 2012

Supreme Court of the United States
Patrick v. Florida, 571 U.S. 839 (2013)
Judgement Entered: October 7, 2013

Initial Motion for Postconviction Relief:
Circuit Court of Broward County, Florida
State of Florida v. Eric Kurt Patrick, 05-016477-CF-10A
Judgement Entered: April 4, 2016

Florida Supreme Court
Patrick v. State, 246 So. 3d 253 (Fla. 2018).
Relinquishment of jurisdiction back to lower court: June 14, 2018

Relinquishment proceedings:
Circuit Court of Broward County, Florida
State of Florida v. Eric Kurt Patrick, 05-016477-CF-10A
Judgement Entered: December 27, 2018

Florida Supreme Court
Patrick v. State, 302 So. 3d 734 (Fla. 2020)
Judgement Entered: June 4, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Kurt Patrick prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The Florida Supreme Court's opinion affirming the state circuit court order finding no deficient performance and that is at issue in this proceeding, is published and reported as *Patrick v. State*, 302 So. 3d 734 (Fla. 2020). (Appendix A). The order denying the motion for rehearing is referenced as *Patrick v. State*, Order, Case No. SC19-140 (Sep. 18, 2020). (Appendix B). The state circuit court order denying relief following the remand for an evidentiary hearing is referenced as State v. Patrick, Order, Case No. 05-16477CF10A (Fla. 17th Cir. Dec. 27, 2018). (Appendix C). The Florida Supreme Court's opinion finding actual bias and prejudice and remanding for an evidentiary hearing regarding deficient performance is published and reported as *Patrick v. State*, 246 So. 3d 253 (Fla. 2018). (Appendix D). The state circuit court order summarily denying postconviction relief following the is referenced as *State v. Patrick*, Order, Case No. 05-16477CF10A (Fla. 17th Cir. April 4, 2016). (Appendix E).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying collateral relief on June 4, 2020, and denied Petitioner's timely petition for rehearing on September 18, 2020. Pursuant to this Court's directive issued in light of the COVID-19 pandemic that extended the deadline to file any petition for writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court order denying a petition for rehearing, counsel now timely files this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner was indicted on November 9, 2005 for first-degree murder, kidnapping, and robbery. Petitioner 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,[1] the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida, sentenced Petitioner 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).

Petitioner 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) and filed a corrected motion shortly thereafter. (PCR. 449-571). After granting a limited evidentiary hearing, the circuit court held the hearing on August 31-September 2, 2015. On February 1, 2016, Petitioner 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

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

relief and dismissing the *Hurst* claim without prejudice. (PCR. 1358-94). Petitioner timely filed a Notice of Appeal to the Florida Supreme Court. (PCR. 1398).

Petitioner filed a Petition for Writ of Habeas Corpus with the Florida Supreme Court on February 13, 2017, requesting relief under *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The following day, he filed an initial brief with the Florida Supreme Court, requesting relief under five claims in his appeal to the denial of his postconviction motion, including ineffective assistance of counsel based on trial counsel's failure to challenge a biased juror for cause. Specifically, Petitioner's claim set forth that the juror at issue, when questioned regarding his feelings about homosexuality, stated "I would have a bias if I knew the perpetrator was homosexual" (RT. Vol. 5 p. 424). The following exchange then occurred:

> [PROSECUTOR]: 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?
>
> [JUROR]: 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 steel (sic), might kill**.

(RT. Vol. 5 p. 424). Additionally, the juror said "yes" when asked if this bias might affect his deliberations. Despite the fact the victim in this case was homosexual and the Petitioner was engaged in a homosexual relationship with the victim, this juror remained on the jury.

On June 14, 2018, the Florida Supreme Court granted Petitioner a new penalty phase under *Hurst v. Florida* and *Hurst v. State* in response to his petition for writ of habeas corpus. *Patrick v. State*, 246 So. 3d 253 (Fla. 2018). The court also affirmed

the lower court's denial of relief to all claims except for Petitioner's claim regarding the juror who expressed actual bias due to the homosexual relationship between the victim and Petitioner and remanded for an evidentiary hearing on one aspect of that claim: whether Petitioner'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.* The Florida Supreme 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, at which Petitioner called trial counsel George Reres to testify and the State called Dorothy Ferraro, who was also Petitioner's trial counsel, to testify. (PCR2.136). Mr. Reres and Ms. Ferraro testified at the evidentiary hearing as follows:

George Reres's Testimony

Reres testified at the hearing that he has been an attorney since 1982 and currently is employed in private practice. (PCR2. 141; 143). Reres tried his first capital case approximately 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). Petitioner's trial was in 2009, and at that time 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).

Reres testified that he briefly read the Florida Supreme 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). Reres spoke to Ms. Ferraro and Melisa McNeil, also counsel for Petitioner at trial, about Juror Martin "at varying times" since the Florida Supreme Court opinion was published. (PCR2. 173).

Reres testified that he represented Petitioner but could not remember if he chose the case himself or if it was assigned to him. (PCR2. 144). He could not recall if Petitioner 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 believed she had been assigned to this case and a couple of others to become death-qualified. *Id.* Reres admitted he had "very little, if any recollection of exactly what happened." (PCR2. 145).

After being shown his testimony from the prior evidentiary hearing held on August 31, 2015, wherein he testified that Ms. Ferraro was the second chair attorney on Petitioner's case and Ms. McNeil came in late on the case, 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 Petitioner's team. (PCR2. 150).

Reres testified Petitioner asked him to handle the guilt phase because Petitioner did not want to be found guilty and sentenced to life. (PCR2. 147). 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 with the State's case in hopes of getting a lesser charge such as second-degree murder or manslaughter. (PCR2. 148).

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, Reres testified that if there was a disagreement about a juror during *voir dire*, Petitioner would have made the ultimate decision. (PCR2. 150). Reres explained that where disagreements arise between he and his clients about selection of jurors, his practice is to rely on the client's wishes in order to try and 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.).

Reres testified he was looking for "winners" as jurors in this case. (PCR2. 151). In Reres's estimation, in many instances jurors that may be helpful in the penalty phase are not the same jurors who may be helpful in the guilt phase. (Id.). According

to Reres, figuring out whether a certain juror is more favorable in the guilt or penalty phase is a "difficult process." (Id.). During, 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, Reres testified Petitioner's confession was more than likely presented to the jury during the guilt phase. (PCR2. 156). Reres recalled that Petitioner had expressed great remorse in his confession that he had been forced to kill a man. (PCR2. 157). When asked if there were statements in the confession that Reres wanted the jury to believe, Reres noted the difficulty in Petitioner's case where he was attempting to reconcile the generally unreliable nature of confessions with Petitioner's own admissions that he had killed the victim out of necessity and had also expressed remorse over killing the victim and the circumstances of the killing itself. (PCR2. 158). Reres testified that he was never concerned with the jury thinking Petitioner was lying in his confession as he thought that Petitioner came across as being truthful. (PCR2. 158). However, Reres was not able to recall if the State argued at trial that Petitioner had lacked candor in his statement. On redirect, Reres steadfastly refused to answer whether Petitioner's statement was critical to the defense, instead repeating only that he simply wished the confession would have been suppressed. (PCR2. 191). Despite acknowledging that Petitioner's statement was a compelling description of his actions, and agreeing that Petitioner's rage in response to the victim's attempt to have sex with him would

support the lesser offenses (PCR2. 177), Reres would not acknowledge the importance of Petitioner's own description of the events in his confession. (PCR2. 191).

Reres claimed that because the defense 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 [Petitioner'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). Reres could not discount that they were still presenting a strong defense in the guilt phase. (PCR2. 152).

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

Reres testified he had no recollection of Juror Martin—the juror who remained on the jury despite his expressed bias against homosexuals. Even after reviewing the *voir dire* proceedings prior to the evidentiary hearing, Reres still could not remember Juror Martin's comments. (PCR2. 154). Upon being shown the *voir dire* proceedings

at the evidentiary hearing, Reres was eventually able to recall what Juror Martin had said about homosexuals now. (Id.). Notably, however, 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) (alteration to original). Reres had no reason to refute what the record reflected. *Id.*

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

Reres expounded on their theory of the case and testified that the defense never presented to the jury that Petitioner 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, Reres testified they never presented to the jury that Petitioner

performed a sexual act on the victim; instead, it was the victim who performed oral sex on Petitioner. (PCR2. 196-197).

Incredulously, 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). Reres admitted he did not have an independent recollection of this particular case, but testified that after reviewing the records, he remembered the trial team was focused on the penalty phase and that Juror Martin was a better juror for the penalty phase. (PCR2. 184). 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 Petitioner regarding Juror Martin. (Id.).

During direct examination, Reres was also presented with his handwritten trial notes of Juror Martin. (PCR2. 161). Rere's attention was directed to the bottom of one of the pages where there was a note indicating "Δ wants out." Reres could not recall making that notation. (PCR2. 162). His only explanation was that the triangle symbol was used to identify the Defendant. (PCR2. 161-162). On cross-examination, Reres testified that below that particular notation, the word "preemptory" was written and was "scribbled out" with a line. (PCR2. 188).

Reres also testified that above the notation "[Defendant] wants out," there was a line stretching across the page. He additionally testified that below the word "preemptory," there was also a seven with a slash under it. (PCR2. 188-189). 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" Petitioner had some initial concerns about Juror Martin, but once Juror Martin made those biased statements against homosexuals, maybe Petitioner's opinion changed. (PCR2. 189).

On redirect, 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 the note that "[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).

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 it with an "X", and if he has a question about a juror, he will mark the page with a question mark. (Id.). On recross-examination, 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, Reres's handwritten trial notes reflect 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 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, 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). 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, 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). Reres also admitted he did not have an independent recollection of what the remainder of the venire panel looked like in Petitioner's case and what statements were made by the potential jurors during *voir dire*. (PCR2. 193-194).

Reres was shown 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). 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).

Reres also did not remember Juror Vizcarra and whether or not she was peremptorily struck. (PCR2. 169-170). Even after he was again shown the 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).

Reres testified that Petitioner had strong opinions about his case and was intelligent enough that if Petitioner did not want a particular venireman on his jury, then Petitioner would voice his concerns, and Reres would strike him or her; however, if Petitioner did like a particular venireman, then Reres would give very strong consideration to leaving that person on the jury even if Reres was not in agreement and could not otherwise persuade Petitioner 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 Petitioner all participated in *voir dire*. (PCR2. 151). On cross-examination, Reres testified once again that Petitioner fully participated in selecting his jury, that they talked "back and forth" during the entire process, and that Petitioner engaged with him regarding any questions or concerns of potential jurors. (PCR2. 185-186). And even though he had no recollection of Petitioner 's position with respect to Juror Martin, Reres claimed that he would have spoken with Petitioner about any concerns Petitioner may have had of Juror Martin. (PCR2. 185).

Reres testified that at the end of jury selection, the Court conducted a colloquy with Petitioner wherein Petitioner stated on the record that he was fine with the selected jury and was "happy" with his counsel's performance. (PCR2. 186). However, 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, 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

Ms. Ferraro testified at the hearing that 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 Petitioner's trial, she had tried between 25 and 30 first-degree murder trials. (PCR2. 205). At the time she joined Petitioner'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).

Ferraro testified that she was asked to handle the penalty phase of Petitioner'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 Petitioner's trial. (PCR2. 205). She confirmed that Reres was primarily responsible for the guilt phase and that she was primarily responsible for the penalty phase. (PCR2. 206). 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).

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

Ferraro testified that she had reviewed the Florida Supreme Court's opinion in Petitioner'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 Reres about the opinion but then corrected herself and testified that Reres had contacted her a couple of weeks prior to the evidentiary hearing. (PCR2. 216).

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).

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). Ferraro only "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).

Ferraro testified that Petitioner 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 Petitioner 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 Petitioner about the jury. (PCR2. 214).

Following the testimony from Reres and Ferraro, no other witnesses testified. On December 27, 2018, the circuit court denied Petitioner's motion to vacate judgment of convictions and sentences as it relates to the aforementioned claim. Thereafter, Petitioner timely filed a Notice of Appeal to the Florida Supreme Court.

On June 4, 2020, the Florida Supreme Court affirmed the denial of Petitioner's 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. *Patrick v. State*, 302 So. 3d 734 (Fla. 2020).

REASONS FOR GRANTING THE WRIT

TRIAL COUNSEL'S FAILURE TO STRIKE FOR CAUSE AN ACTUALLY BIASED JUROR CONSTITUTED FUNDAMENTALLY DEFICIENT PERFORMANCE WHICH PREJUDICED PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

"[I]f 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 Petitioner's trial. And such was the opinion that led the Florida Supreme 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 Petitioner 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. Based on these facts, Petitioner's claim of ineffective assistance of counsel is based on counsel's failure to strike a biased juror. Because the Florida Supreme 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 Petitioner's jury. And, whether under the circumstances, any purported strategy could be deemed reasonable.

Significantly, after remand to the circuit court, the Florida Supreme Court adhered to its finding that the juror at issue was actually biased against Petitioner. *Patrick v. State*, 302 So. 3d 734, 740 (Fla. 2020). Given that determination, Petitioner's jury could not then have been impartial. There simply is no sound trial strategy that could support what essentially amounts to a waiver of a defendant's basic Sixth Amendment right to a fair and impartial jury, and any purported strategy offered by trial counsel that the juror's expressed bias against 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 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 Petitioner relief, the Florida Supreme 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 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."). *Strickland* 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. 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.

That the Sixth Amendment right to effective assistance of counsel extends to all phases of trial following the lawyer's appointment is well established. *Cuyler v. Sullivan*, 466 U.S. 335 (1980). Because the purpose of *voir dire* is to empanel an impartial jury as required by the Sixth Amendment, the jury selection and *voir dire* examination are just as critical to the outcome of the case as the presentation of the evidence. Indeed, "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); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."). The Florida Supreme Court has similarly 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).

To effectuate the goal of an impartial jury, Florida law provides that where a juror has "a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality," that biased state of mind is grounds for a cause challenge. Fla. Stat. Ann. § 913.03 (West). "Actual bias is 'bias in fact'—the existence of a state of mind that leads to an inference that the 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 (1936)). While the burden is on the challenger to show that the prospective juror was actually biased, having such a "preconceived notion as to the guilt or innocence of an accused" of such "nature and strength" that "the juror [could not] lay aside his impression or opinion and render a verdict based on the evidence presented in court," *Teasley v. Warden, Macon State Prison*, 978 F.3d 1349, 1356 (11th Cir. 2020) (citing

Irvin v. Dowd, 366 U.S. 717, 723 (1961), Petitioner has satisfied that burden. The juror at issue, like other jurors, was questioned by the State regarding his feelings about homosexuality. He expressly stated "I would have a bias if I knew the perpetrator was homosexual." (RT. 424). The following exchange then occurred:

> [PROSECUTOR]: 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?
>
> [JUROR]: 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). This juror confirmed that his bias would affect his deliberations. (RT. 425). Notwithstanding the Florida Supreme Court's finding of actual bias, the court turns the meaning of actual bias on its head, explaining "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." *Patrick v. State*, 302 So. 3d 734, 741 (Fla. 2020). However, that logic does not describe a juror who is actually biased. There is a recognized difference between the bias described by the Florida Supreme Court and actual bias:

> 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 (1985)). Nor does the Florida Supreme Court's most recent rationale

comport with its own definition of actual bias. The court had previously explained that a juror who was actually biased against the defendant had a "bias-in-fact that would prevent service as an impartial juror." *Patrick*, 246 So. 3d at 263, (citing *Carratelli v. State*, 961 So. 2d 312, 323-24 (Fla. 2007)). Regardless of the court's contortions to allow a strategy to justify seating an impartial jury, the Florida Supreme Court's adherence to the fact that the juror at issue was actually biased against Petitioner, along with the record in Petitioner's case, support the conclusion that this juror had a preconceived notion of Petitioner's guilt and had admitted his bias would affect his deliberations. There was no indication that this juror could set aside that bias at any time during the trial. The very finding by the Florida Supreme Court of actual bias with respect to this juror inexorably means he was not impartial. *See U.S. v. Wood*, 299 U.S. 123, 133 (1932). Empaneling a jury that is not impartial cannot be strategic.

At least one circuit agrees. In *Hughes v. United States*, 258 F.3d 453, 462-63 (6th Cir. 2001), the Sixth Circuit found "[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 the 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 venire person 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.

Id. at 463. 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." *Id*. (citing *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992)). In *Miller v. Webb*, 385 F.3d 666, 675–76 (6th Cir. 2004), the Sixth circuit, again relying on *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) reaffirmed that the decision whether to seat a biased juror cannot be a discretionary or strategic decision.

Similarly, *Johnson v. Armontrout,* 961 F. 2d 748 (8th Cir. 1992) explained:

> Finding that two members of Johnson's jury were actually biased against him, we have no difficulty concluding that Johnson's Sixth and Fourteenth Amendment rights were violated. The state argues that Johnson waived his challenge to the recycled jurors because he failed to object when they were seated. Even though the defendant failed to object to the seating of the jurors, our determination is not affected. When a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias. *Robinson v. Monsanto*, 758 F.2d 331, 335 (8th Cir.1985). If a defendant proves that jurors were actually biased, the conviction must be set aside.

Id. at 754. While the Johnson court suggests that failing to remove a biased juror may be the result of a strategic decision, the court ultimately concluded "[c]ounsel's failure to attempt to bar the seating of obviously biased jurors constituted ineffectiveness of

counsel of a fundamental degree." *Id*. at 756. Relying on *Johnson*, the Florida Supreme Court overlooked or misunderstood the *Johnson* court's ultimate conclusion and ignored *Hughes* and the authority of this Court.

However, the *Hughes* court, in relying on *Johnson v. Armontrout*, explained what is seemingly a conflict within the *Johnson* opinion:

> 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, 258 F.3d at 462–63. (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. When a court determines there was actual bias, the biased juror's inclusion on the jury is never harmless error. *See McDonough v. Power Equipment, Inc. v. Greenwood, et. al.*, 464 U.S. 548 (1984); *see also United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001).

Even if trial strategy could justify empaneling an actually biased juror, here counsel's purported strategy was objectively unreasonable under the totality of the

record in Petitioner's case. In fact, contrary to the Florida Supreme 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 one juror, when the State moved for cause citing his bias towards homosexuals, Reres responded "legally I think the State is correct, I would have no objection." (RT. 773). The Florida Supreme Court ignored the dismissal of all of the jurors who expressed a bias involving homosexuals, failing to even mention trial counsel's agreement with their dismissal.

Additionally, jurors that expressed similar views as the juror at issue 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 and Viscarra. (RT. 783, 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, the Florida Supreme Court's conclusion that "this juror was more likely than other potential jurors to recommend a life sentence" is simply wrong. *Patrick v. State*, 302 So. 3d 734, 743 (Fla. 2020). Furthermore, whether he was more favorable to recommending a life sentence does not change his expressed bias and lack of impartiality.

The right to a jury free of biased persons is of constitutional magnitude. *Smith v. Phillips*, 455 U.S. 209 (1982). It cannot be said that Petitioner's jury was free of partiality. No sound trial strategy can support what amounted to a waiver of Petitioner's Sixth Amendment right to a fair and impartial jury. Even if counsel's purported strategic decision may justify empaneling a jury that is not impartial, the record, viewed in its entirety, establishes that the failure to remove the biased juror cannot be attributable to any objectively reasonable strategy. To the extent that counsel failed to ensure that Petitioner'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. Because the opinion of the Florida Supreme Court does not comport with Supreme Court jurisprudence and misguidedly condones a result that justifies empaneling a jury that is not impartial, Petitioner submits that this matter is worthy of certiorari review.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari to review the Florida Supreme Court's flawed

decision affirming the denial of postconviction relief based on its finding that trial counsel made an objectively reasonable strategic decision not to strike for cause the actually biased juror.

Respectfully submitted,

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February 15, 2021