No. _____

OCTOBER TERM 2020

IN THE SUPREME COURT OF THE UNITED STATES

ERIC KURT PATRICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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*Suzanne Myers Keffer**
Fla. Bar No. 0150177
Chief Assistant CCRC–South
Capital Collateral Regional Counsel – South
110 SE 6th Street, Suite 701
Fort Lauderdale, FL 33301
Tel. (954) 713–1284
keffers@ccsr.state.fl.us

*Counsel of Record

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302 So.3d 734
Supreme Court of Florida.

Eric Kurt PATRICK, Appellant,
v.
STATE of Florida, Appellee.

No. SC19-140
|
June 4, 2020

Synopsis

Background: After convictions and death sentence for capital murder and related crimes were affirmed on direct appeal, 104 So. 3d 1046, defendant filed motion for postconviction relief. The Circuit Court, 17th Judicial Circuit, Broward County, Ilona M. Holmes, J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court, 246 So.3d 253, granted habeas petition and awarded defendant new penalty phase, and remanded evidentiary hearing on claim that defense counsel were ineffective for failure to challenge for cause juror who had expressed actual bias against defendant. On remand, the Circuit Court denied relief after evidentiary hearing. Defendant appealed.

Holdings: The Supreme Court held that:

defendant was prejudiced by trial counsel's failure to challenge for cause prospective juror who was actually biased against defendant;

evidence supported finding that trial counsel's failure to move to strike juror for cause was matter of trial strategy; and

defendant failed to show that defense counsel's trial strategy was objectively unreasonable.

Affirmed.

*736 An Appeal from the Circuit Court in and for Broward County, Ilona Maxine Holmes, Judge - Case No. 062005CF016477A88810

Attorneys and Law Firms

Neal A. Dupree, Capital Collateral Regional Counsel, and Suzanne Myers Keffer, Chief Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Lisa-Marie Lerner, Assistant Attorney General, West Palm Beach, Florida, for Appellee

Opinion

PER CURIAM.

Eric Kurt Patrick appeals an order denying a claim of ineffective assistance of counsel for failure to challenge a biased juror. Because the order concerns postconviction relief from a first-degree murder conviction for which a sentence of death was imposed, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. Based upon the postconviction court's finding that Patrick's trial counsel had a reasonable strategic basis for not challenging the juror, a finding supported by competent, substantial evidence, we affirm the order denying postconviction relief.

BACKGROUND

Patrick was convicted of the kidnapping, robbery, and first-degree murder of Steven Schumacher. *Patrick v. State* (*Patrick I*), 104 So. 3d 1046, 1054 (Fla. 2012). He was sentenced to death for the murder, and this Court affirmed his convictions and sentences on direct appeal. *Id.* at 1055. Thereafter, Patrick filed his initial motion for postconviction relief under Florida Rule of Criminal Procedure 3.851, raising seven claims, all of which were denied. *Patrick v. State* (*Patrick II*), 246 So. 3d 253, 259 (Fla. 2018). Patrick appealed the denial of that motion and also filed a petition for writ of habeas corpus raising a claim under *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in State v. Poole*, 45 Fla. L. Weekly S41, —— So.3d ——, 2020 WL 370302 (Fla. Jan. 23, 2020), *clarified*, 45 Fla. L. Weekly S121, —— So.3d ——, 2020 WL 1592953 (Fla. Apr. 2, 2020). We granted Patrick's petition for writ of habeas corpus and directed the circuit court to hold a new penalty phase. *Patrick II*, 246 So. 3d at 257, 265. As for the appeal, we affirmed the denial of relief as to all but one claim. *Id.* at 259.[1] That claim,

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which alleged ineffective assistance of counsel for failure to challenge a biased juror, had been summarily denied. *Id.* at 259-60. We reversed that summary denial and remanded for an evidentiary hearing. *Id.* at 264.

The bias at issue, in the juror's own words, was against any person the juror "felt ... was a homosexual." *Id.* at 263. This juror stated that he "personally believe[s]" that any such person "is morally depraved enough that he might lie, might ***737** steal, might kill." *Id.* He also said that he "would have a bias if [he] knew the perpetrator was homosexual" and confirmed that this bias might affect his deliberations. *Id.* This juror was never asked to, and did not, back away from this position. Based on the voir dire record, we concluded that the juror was actually biased against Patrick. *Id.* at 263-64.

The facts surrounding Patrick's crimes are set forth in detail in our two prior opinions in this case. *Patrick I*, 104 So. 3d at 1053-54; *Patrick II*, 246 So. 3d at 257-58. However, briefly stated, Patrick beat Schumacher to death after staying with Schumacher in Schumacher's home for one to two weeks. *Patrick I*, 104 So. 3d at 1053. In an interview with police, Patrick explained that he was homeless when he met Schumacher and that Schumacher had offered to help him.

In the same interview with police, Patrick said that Schumacher was kind and generous with him and that, in exchange, Patrick had shown him affection and allowed Schumacher to perform certain sex acts on him. In Patrick's opening statement at trial, his counsel told the jury that Patrick was not "a gay man" but "put up with what he believed to have been wrong" because he was "as down and out as a human being could be" and wanted the help Schumacher offered. In Patrick's interview with the police, which was played for the jury at trial, Patrick tried to distance himself from being characterized as homosexual, through words and inflection. He referred to Schumacher as an "old gay guy." Patrick said that he was "kind of repulsed by" the sexual activity and exchanges of affection between Schumacher and himself but that he participated in them because Schumacher was "such a nice person" and Patrick did not think his requests were "to[o] much [for Schumacher] to ask for."

According to Patrick's statement to police, on the night he killed Schumacher, Schumacher attempted to engage in a sex act that Patrick had not previously allowed and did not agree to. Patrick said that when Schumacher persisted and "came onto [Patrick] a little bit too powerful," Patrick lost control of himself and began beating Schumacher. In this same interview with police, Patrick stated that, on prior occasions, he had met other men at bars and let them perform sex acts on him in exchange for help when he was struggling with homelessness. Patrick referred to the men he met at the bars as "these gay guys," in an apparent effort to distinguish them from himself. Counsel and the trial court were all aware of this information before trial, and it was ultimately presented to the jury, along with evidence that Patrick had taken Schumacher's truck, ATM card, watch, and some money from his wallet after severely beating Schumacher, tying him up, placing him in a bathtub, and leaving the apartment. *Id.* at 1064.

With regard to the murder charge, Patrick's counsel attempted to secure a verdict for the lesser-included offense of second-degree murder, or possibly manslaughter. Patrick's counsel argued, "Mr. Patrick was just a poor homeless pathetic drug addict who let all of his frustration of his whole life overload him and erupt at what Mr. Schumacher asked him to do" while under the influence of alcohol and cocaine. Patrick's counsel argued that Patrick had gone along with the prior sexual activity but that it "ate him up inside" because it was "against [his] instincts" and that a sense of guilt fueled the "explosive result" that occurred. Patrick's counsel acknowledged that the beating was "completely unjustified" but contended that it "happened for a reason," which was that Schumacher "pushed ***738** an issue that was for some reason a button that this man had," causing Patrick to go "over the edge." The details Patrick provided in his confession to the beating were part of the basis for his counsel's arguments in support of a second-degree murder conviction. Indeed, Patrick's counsel urged the jury to find Patrick honest and candid in that statement.

In reversing the summary denial of Patrick's claim that his counsel was ineffective for failing to challenge the juror at issue, we explained that, to survive the pleading stage of a claim of ineffective assistance of counsel, a defendant must sufficiently allege both prongs required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)—deficient performance by counsel and prejudice—presenting facts that are not conclusively refuted by the record. *Patrick II*, 246 So. 3d at 260. With respect to the specific requirements of a claim alleging ineffective assistance for failure to challenge a biased juror, we applied our holding in *Carratelli v. State*, 961 So. 2d 312, 323-24 (Fla. 2007), that a defendant establishes prejudice by showing that "one who was actually biased against the defendant sat as a juror." *Patrick II*, 246 So. 3d at 263. We further explained that "actual bias" means "bias-in-fact that would prevent service as an impartial juror." *Id.* (quoting *Carratelli*, 961 So.

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2d at 323-24). We concluded that Patrick's motion met the prejudice prong because the juror's answers showed that he was "predisposed to believe that Patrick is morally depraved enough to have committed the charged offenses." *Id.* at 264. We acknowledged that the juror's bias would have extended to the victim as well but concluded that this additional bias did not negate the bias the juror would have felt concerning Patrick. *Id.* Accordingly, we held that Patrick's motion met the required prejudice standard under *Carratelli. Id.*

We further concluded that Patrick's motion was facially sufficient to suggest deficient performance in failing to challenge this juror. *Id.* At the same time, we recognized the possibility that Patrick's counsel's decision not to strike this juror was strategic. *Id.* Because of this possibility, we held that an evidentiary hearing was required on this claim. *Id.*

At the evidentiary hearing on remand, the court considered the testimony of two members of Patrick's trial team: George Reres and Dorothy Ferraro. Reres was Patrick's lead counsel and the attorney primarily responsible for the guilt phase. By the time of Patrick's trial, he had been a practicing attorney for approximately twenty-seven years. He had tried his first capital case about five years into his career and had consistently tried capital cases, along with other serious criminal cases, from that time forward. By the time of Patrick's trial, Reres had tried twenty-two or twenty-three first-degree murder cases and about thirty manslaughter cases.

After reviewing parts of the record and being questioned about them at the evidentiary hearing, Reres said that, although he did not have a significant independent recollection of the trial or recall of his thought process at the time, he had no reason to believe that the juror in question should have been stricken. In addition, Reres testified that he had never left a juror on the panel without a strategic basis for doing so unless he had no remaining peremptory strikes, in which case he would have asked for more.[2] Ferraro testified ***739** that no juror was either stricken or kept on the panel without the approval of Patrick, who Reres said was intelligent and engaged in the process and "had strong opinions."

During the course of the hearing, Reres embraced two reasons that this juror was desirable from a defense perspective under the particular facts of this case, which he opined made a strong case for guilt.

First, while acknowledging that, when necessary, he would have chosen a juror who was more favorable for the penalty phase than for the guilt phase despite Patrick's personal emphasis on the guilt phase, Reres testified that the juror in question was "probably a good juror for the defense" in the guilt phase. Reres explained that one of the defense theories was that Schumacher preyed on Patrick. He opined that this juror's bias would have made him predisposed to accept that claim and "listen carefully to" the defense that Patrick beat Schumacher in reaction to Schumacher's sexual advance and therefore committed something less than first-degree murder.

Second, when Reres was reminded of statements this juror made concerning the death penalty, he said that he had become "enamored" of this juror from a penalty-phase perspective. Specifically, although this juror had said early in the process that he was "open minded" and "in the middle" concerning the death penalty, when later asked if the death penalty was worse than a life sentence, he answered as follows:

> 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.

Further, this juror said that he would like to ask the defendant which penalty he preferred. Although Reres did not mention this point, we note that the juror made these comments after his earlier statements about how he would view the "perpetrator" if he "knew the perpetrator was homosexual." Reres opined that this juror was reexamining his feelings concerning the death penalty during the course of voir dire, which suggested that he might lead other jurors down the same path. Reres concluded unequivocally that this juror was good for the defense for the penalty phase.

Notes Reres had made during voir dire are consistent with his theories of why this juror would not have been struck by the defense. These notes include the struck-through words "[Defendant] wants out," followed by the word "peremptory." In addition, these notes reflect attention to the fact that this juror had indicated that a life sentence might be worse than death.

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Also, the trial record reflects that at the end of voir dire Patrick told the court that he was "fine" with the jury and that his attorneys had consulted with him about the jurors.

After the evidentiary hearing, the postconviction court denied the claim, finding that Reres had chosen not to challenge the juror in question as part of a reasonable trial strategy. The postconviction court concluded, based on this Court's precedent, that choosing not to challenge a juror who is unfavorable for the guilt phase because the juror is favorable for the penalty ***740** phase is reasonable. The postconviction court noted Reres's testimony indicating that concern for the penalty phase was part of his strategy in not challenging this juror; recited testimony from Reres that, in any event, he thought this juror's bias would operate in favor of Patrick during the guilt phase; pointed out that Patrick said under oath at jury selection that his attorneys consulted with him about the jury and that he was "fine" with the jury; and observed that the juror comment in question contains wording consistent with second-degree murder, which is one of the lesser included offenses the defense argued for, where the alternative, manslaughter, was a "farfetched" theory in light of the "beating that the victim received in this case."

In addition, the postconviction court noted that Patrick had not called any expert to challenge Reres's testimony. As a result, the postconviction court further concluded that Patrick had failed to carry his burden to establish his claim.

ANALYSIS

To prove a claim of ineffective assistance of counsel, a defendant must establish two prongs, both of which are mixed questions of law and fact and were established in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

See also Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010); *Jacobs v. State*, 880 So. 2d 548, 555 (Fla. 2004). To prevail, the defendant must make both showings. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

When a claim has been denied after an evidentiary hearing, the postconviction court's factual findings are reviewed for competent, substantial evidence, while its legal conclusions are reviewed de novo. *Bolin*, 41 So. 3d at 155. The ultimate conclusions as to whether a decision or omission by counsel constitutes deficient performance and whether a deficiency prejudiced the defendant are matters of law. *Patrick II*, 246 So. 3d at 260 (citing *Peterson v. State*, 221 So. 3d 571, 584 (Fla. 2017)).

In our consideration of the original denial of this claim, which was done without an evidentiary hearing, we concluded that Patrick had established the prejudice prong of his claim, at least as a matter of pleading sufficiency. *See id.* at 263-64. We made that determination based on the *Carratelli* standard, which provides that a defendant establishes the prejudice prong of an ineffective assistance of counsel claim concerning failure to challenge a juror by showing from the face of the record that a person who was actually biased against the defendant sat on the defendant's jury. *Id.*; *Carratelli*, 961 So. 2d at 323-24. We adhere to the conclusion that the juror in question was actually biased against Patrick. The postconviction court did not conclude otherwise after the evidentiary hearing. However, contrary to Patrick's suggestion that the juror's bias, in itself, defeats any claim that the failure to challenge the juror was reasonable and strategic, the satisfaction of the prejudice prong does not end our inquiry.

An ineffective assistance of counsel claim has two prongs, even when it concerns juror bias. As noted above, in addition ***741** to showing prejudice, the defendant must show that his counsel's performance was deficient, meaning that counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. In assessing this aspect of a claim of ineffective assistance of counsel, courts are to make "every effort ... to eliminate the distorting effects of hindsight" and require the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). The Supreme Court has instructed courts to "keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case." *Id.* at 690, 104 S.Ct. 2052.

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The defendant's task in proving deficiency is difficult by design. *See Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). That is because deference is owed to the attorney who "observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Id.* Counsel is entitled to even greater deference when he or she is highly experienced. *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). If the standard were not designed this way, then "[a]n ineffective assistance of counsel claim [could] function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial" and would "threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105, 131 S.Ct. 770.

Part of the adversary process is jury selection. Jury selection is a complex process. From the perspective of the courts, the goal of this process is to seat an impartial jury, one that will assess the facts of the case dispassionately and apply the law to the facts objectively. The parties to a particular proceeding, particularly those whose life and liberty are in jeopardy, may have a different goal in jury selection: naturally, the parties hope to seat a jury that will be predisposed to agree with their theory of the case. The jury selection process is designed to allow both sides to interview the jurors, voice concerns, and stand up for their own interests as they assess them in light of their knowledge of the facts of the case and the experience they and their attorneys bring to the process.

We have previously recognized that an attorney's representation of his client's interests in a criminal case may sometimes include a determination that, although the 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. For example, in *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995), this Court expressly held that a juror who admits to not being impartial for the guilt phase can be seated as part of a reasonable trial strategy when the evidence of guilt is so strong that defense counsel concludes that there is "no chance of obtaining an acquittal" and the juror expresses defense-friendly views of the death penalty. *See also State v. Bright*, 200 So. 3d 710, 741-42 (Fla. 2016) (upholding a finding that counsel made a reasonable strategic decision not to challenge a juror who said she would think "a tiny bit" that the defendant was hiding something if he did not testify and counsel testified in a postconviction hearing that he probably decided not to strike the juror because she was "middle of the road" regarding the death penalty, albeit while also concluding that the juror was not actually biased); *cf.* ***742** *Peterson v. State*, 154 So. 3d 275, 282 (Fla. 2014) (noting, in the context of a claim concerning the failure to exercise a peremptory strike, an attorney's testimony that "he has sometimes, including in the instant case, had to select jurors that were not favorable to the defense in the guilt phase, but were favorable in the penalty phase"); *accord Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1243-44 (11th Cir. 2011) (recognizing that an attorney may validly focus on the penalty phase of a capital trial over the guilt phase when there is overwhelming evidence of guilt and the defendant consents to the strategy); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992) ("Absent the showing of a strategic decision, failure to request the removal of a biased juror can constitute ineffective assistance of counsel.").

Indeed, this recognition was implicit in our prior decision in this case, where we acknowledged that the juror in question had a bias against Patrick but declined to foreclose the possibility that he was kept on the jury as part of a reasonable trial strategy. *See Patrick II*, 246 So. 3d at 263-64. While Patrick's postconviction counsel argues that our prior decision rejected the notion that this juror was in any way favorable to Patrick, we disagree. In fact, we explicitly noted that "the record in this case suggests possible strategic grounds, relating to both phases of the trial, for not striking this juror." *See id.* at 264.

By arguing that we have already rejected any finding that this juror could have been favorable to Patrick's case, Patrick is essentially claiming that a finding of prejudice under *Carratelli* dictates a finding of constitutionally deficient performance. On the contrary, in *Carratelli*, we explicitly stated that our decision addressed "only the requirements for establishing prejudice under *Strickland*" and that "we need not address the requirements for meeting *Strickland*'s first prong—deficient performance." 961 So. 2d at 327.

In consideration of the foregoing precedent and analysis, we conclude that the dispositive questions before this Court are (1) whether the postconviction court's factual finding that the juror at issue was seated as part of a trial strategy is supported by competent, substantial evidence and, if so, (2) whether the bias at issue was so strong as to render the claimed strategy objectively unreasonable under the specific facts of this case.

A. Competent, Substantial Evidence Supports the Finding of Strategy

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Here, the postconviction court found, based on the testimony of Reres, which the court characterized as "candid and credible," that the decision to seat the juror at issue was a strategic one. Reres's testimony provides competent, substantial evidence to support that finding. We also accept the postconviction court's alternative finding that Patrick failed to carry his burden to show that the seating of the juror in question was not strategic, as the only witnesses who testified at the hearing supported a contrary conclusion—that the decision was a reasonable strategic choice.

Reres testified that the juror at issue was favorable for the defendant in the penalty phase given his statements about the death penalty versus a life sentence and his evolving view during the course of jury selection. While Reres acknowledged that this juror was better for the defense in the penalty phase than in the guilt phase, he also stated that for the guilt phase he would have been looking for jurors who "would be predisposed to listen carefully to" the defense theory that the killing was done, not with premeditation or during the commission of a felony, but simply in a rage in response to Schumacher's repeated sexual advances. Reres's ***743** stated belief that this juror's bias would have favored his defense theory is not unreasonable, and was accepted by the postconviction court as credible.

Furthermore, although Reres testified that he did not have a specific recollection of the juror at issue or his own thought process at the time of trial, a specific recollection is not necessary to support a finding that the attorney was indeed employing a specific strategy. *Cf. Monlyn v. State*, 894 So. 2d 832, 837 (Fla. 2004) (upholding a finding that an attorney advised his client of the right to testify based on the attorney's certainty that he did in light of his standard practice, developed over the course of twenty years). The attorney's confident testimony about what his thought process must have been is sufficient when that testimony is based on extensive trial practice. *Cf. id.*; *Harvey*, 629 F.3d at 1245 (opining that, because it is the defendant's burden to prove a claim of ineffective assistance, lapses in counsel's memory should not be weighed in favor of the defendant). Reres's testimony in the instant case is, therefore, competent, substantial evidence to support a finding of what his strategy was at the time of trial, despite his admitted lack of a specific memory of his thought process at the time of trial.

Although Patrick correctly points out that some of Rere's testimony at the evidentiary hearing was equivocal or inconsistent with the record, that observation does not defeat the postconviction court's findings.[3] It was within the province of the postconviction court, as the trier of fact, to weigh Reres's testimony and accept parts of it as accurate and credible even if other parts were less accurate and credible. *See Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001) ("[T]his Court will not substitute its judgment for that of the postconviction court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court."); *cf. also Wynne v. Adside*, 163 So. 2d 760, 763 (Fla. 1st DCA 1964) (explaining that a jury, as the trier of fact, "may believe a part of a witness' testimony and disbelieve other parts of his testimony"). Reres's testimony was sufficient to support the postconviction court's finding that Reres had a strategic basis for not challenging the juror in question, and his testimony does not contradict the record as to the salient points driving that finding.

For the foregoing reasons, the postconviction court's finding that Reres had a strategic reason not to challenge the juror in question is supported by competent, substantial evidence, and the postconviction court's finding that Patrick failed to carry his burden to show otherwise is also supported by the record. Patrick's challenge to that finding is an attempt to have this Court reweigh the evidence, which we will not do. *See Porter*, 788 So. 2d at 923.

B. Reres's Strategy was Not Objectively Unreasonable

We also conclude that Reres's strategy was not objectively unreasonable from the perspective of a defense attorney, whose role is to protect his or her client's personal interests in the case within the bounds of the rules of professional conduct. Reres's belief that the juror in question would serve Patrick's personal interests in the trial was objectively reasonable.

***744** Specifically, it was logical for 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 and that, if the jury convicted Patrick of first-degree murder, this juror was more likely than other potential jurors to recommend a life sentence. We note, too, that Patrick was actively and intelligently involved in the jury selection, as reflected by Reres's testimony and his contemporaneous notes, as well as the testimony of Ferraro; that Reres testified that he would have discussed all the issues that came up at the postconviction evidentiary hearing with Patrick at the time of jury selection if Patrick had said he wanted to strike this

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juror; and that Patrick advised the trial court at the end of jury selection that he was "fine" with the panel and had discussed it with his attorneys. Because the seating of the juror in question was part of a reasonable strategy that Reres implemented to serve Patrick's interests in this trial, it cannot be said that Reres "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," which is the concern of *Strickland*'s performance prong. 466 U.S. at 687, 104 S.Ct. 2052.

CONCLUSION

Ultimately, because competent, substantial evidence supports the postconviction court's finding that Reres made a strategic decision not to challenge the juror at issue, and because this strategy was objectively reasonable from the perspective of believing that it would operate to Patrick's advantage in this particular trial, we affirm the denial of postconviction relief.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

COURIEL, J., did not participate.

All Citations

302 So.3d 734, 45 Fla. L. Weekly S177

Footnotes

1 We did not reach the merits of the claims related to the penalty phase, as they were moot due to the grant of *Hurst* relief. *Patrick II*, 246 So. 3d at 260.

2 Reres mistakenly thought he had no peremptory strikes left when the panel was finally determined. He refused to accept the jury due to the objections he had raised throughout jury selection, but he expressly stated on the trial record that he was not seeking additional peremptory strikes.

3 One example of an inconsistency with the record is that Reres would not agree that it was important for the jury to believe Patrick's statement to the police, even though he had argued in closing that Patrick was honest and candid and the main facts supporting the theory of second-degree murder came from that statement.

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Supreme Court of Florida

FRIDAY, SEPTEMBER 18, 2020

CASE NO.: SC19-140
Lower Tribunal No(s).:
062005CF016477A88810

ERIC KURT PATRICK vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.
COURIEL and GROSSHANS, JJ., did not participate.

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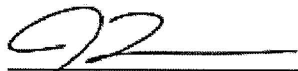

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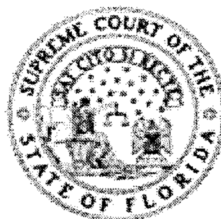
Clerk, Supreme Court



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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
v.

ERIC KURT PATRICK,
Defendant.

CASE NO.: 05-16477CF10A

JUDGE: ILONA M. HOLMES

COPY SENT TO:
STATE ATTORNEY
DEFENSE COUNSEL

ORDER DENYING DEFENDANT'S CORRECTED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE AS TO CLAIM 7

THIS CAUSE came on for evidentiary hearing On October 5, 2018, before this Court by order of the Florida Supreme Court as to claim 7 of Defendant's post-conviction motion, pursuant to Florida Rule of Criminal Procedure 3.851. After the conclusion of the hearing, counsels for both the State and the Defense asked this Court for time to submit their arguments in writing. This Court allowed counsels until November 5, 2018 to submit their memoranda. Defendant, through counsel, asked for an extension which was granted to November 20, 2018.

The Court has listened carefully to the testimony during the hearing, read the submissions of the parties and has conducted its own independent research. Being fully apprised in the premises, the Court finds as follows.

The procedural history and facts of this case are detailed in Patrick v. State, 104 So.3d 104 (Fla. 2012) (Patrick 1) and the Court's order directing an evidentiary

hearing is detailed in Patrick v. State, 246 So.3d 253 (Fla. 2018) (Patrick 2).[1] The Supreme Court held the following in the opinion:

"Because the juror's voir dire answers concerning homosexuality meet the Carratelli test for prejudice, the validity of the summary denial pf 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). Patrick (2), 246 So. 3d at 264.

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

[1] To distinguish between the two opinions, the Court refers to them as Patrick I and Patrick 2.

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 feel 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.**[2]

(ROA at 424).

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[2] There was an unlawful killing of (victim) by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life (third element of second degree murder instruction).

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 Defendant's 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).

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[3] Evidentiary hearing of October 5, 2018.

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, 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 at 282.

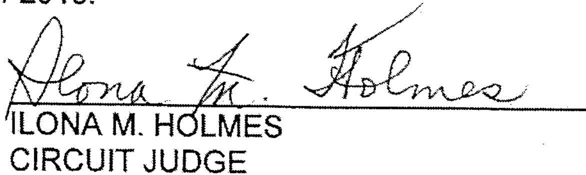
The Supreme Court has recognized that the strategy utilized by Mr. Reres is a reasonable one. Dillbeck v. State, 964 So. 2d 95, 102-103 (Fla. 2007) (held that counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence). See, 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.**

DEFENDANT SHALL HAVE THIRTY (30) DAYS FROM THE RENDITION OF THIS ORDER TO FILE AN APPEAL.

DONE AND ORDERED in chambers at Fort Lauderdale, Broward County Florida, this 27th day of December 2018.



TRUE COPY

ILONA M. HOLMES
CIRCUIT JUDGE

cc: Steven Klinger, Esquire, Assistant State Attorney
Suzanne Keffer, Chief Assistant, CCRC-South
Lisa-Marie Lerner, Assistant Attorney General

246 So.3d 253
Supreme Court of Florida.

Eric Kurt PATRICK, Appellant,
v.
STATE of Florida, Appellee.
Eric Kurt Patrick, Petitioner,
v.
Julie L. Jones, etc., Respondent.

No. SC16–801
|
No. SC17–246
|
[June 14, 2018]

Synopsis

Background: Following affirmance of murder conviction and death penalty, 104 So.3d 1046, defendant filed motion for postconviction relief. The Circuit Court, Broward County, Ilona M. Holmes, J., denied motion. Defendant appealed and filed petition for writ of habeas corpus.

Holdings: The Supreme Court held that:

defendant's waiver of *Miranda* rights and subsequent confession to murder were voluntary;

defendant failed to establish ineffective assistance in counsel's handling of shoeprint identification evidence;

juror's statements regarding the effect evidence of homosexual activity would have on his deliberations indicated actual bias; and

trial court could not impose death sentence upon jury's seven-to-five recommendation of death penalty.

Affirmed in part, and reversed and remanded in part; habeas petition granted and death sentence vacated.

Polston, J., concurred in part, dissented in part, and filed opinion in which Canady, J., concurred.

***256** An Appeal from the Circuit Court in and for Broward County, Ilona M. Holmes, Judge—Case No. 062005CF016477A88810, And An Original Proceeding—Habeas Corpus

Attorneys and Law Firms

Neal A. Dupree, Capital Collateral Regional Counsel, and Suzanne Myers Keffer, Chief Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant/Petitioner

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, Lisa–Marie Lerner and Ilana Mitzner, Assistant Attorneys General, West Palm Beach, Florida, for Appellee/Respondent

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Tallahassee, Florida, Amicus Curiae The Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Florida

Opinion

PER CURIAM.

***257** Eric Kurt Patrick, a prisoner under sentence of death, appeals an order denying his motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851. Patrick also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm in part and reverse in part the postconviction court's denial of Patrick's postconviction motion and remand for an evidentiary hearing on one claim. We grant Patrick's petition for writ of habeas corpus, which raises a valid claim under *Hurst v. Florida*, ––– U.S. ––––, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, ––– U.S. ––––, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).

I. BACKGROUND

In 2009, Patrick was convicted of the kidnapping, robbery, and first-degree murder of Steven Schumacher. *Patrick v. State*, 104 So.3d 1046, 1054 (Fla. 2012). On direct appeal, we affirmed his convictions and sentences, including a sentence of death for the murder, and summarized the guilt-phase evidence as follows:

> Eric Kurt Patrick was recently released from prison and homeless when he met Steven Schumacher at Holiday Park

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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 [later] confessed to beating Schumacher, stated that he was afraid Schumacher was dead, and that he didn't mean to kill him.

....

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 [him] squeezing [him]." 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 ***258** 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 [Sunday,] September 25, 2005 .... Scott did not hear from Schumacher [after that time,] 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.... DNA tests identified Schumacher's blood on Patrick's jeans.

Id. at 1053–54.

Patrick's jury recommended a death sentence by a vote of seven to five. The trial court followed the jury's recommendation, finding seven aggravators[1] and sixteen nonstatutory mitigating circumstances.[2] On appeal, this Court struck one ***259** aggravator (cold, calculated, and premeditated) but affirmed the death sentence, finding the consideration of this aggravator harmless error. *Id.* at 1055, 1068. Patrick's death sentence became final in 2013. *Patrick v. Florida*, 571 U.S. 839, 134 S.Ct. 85, 187 L.Ed.2d 65 (2013).

Thereafter, Patrick timely filed his initial motion for postconviction relief under Florida Rule of Criminal Procedure 3.851, followed by a corrected motion, raising

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seven claims with subparts.[3] Patrick later sought leave to amend his rule 3.851 motion to add a *Hurst v. Florida* claim. The postconviction court accepted the amendment and, after an evidentiary hearing on certain claims, denied the motion in its entirety. As to the *Hurst v. Florida* claim, the postconviction court noted that this Court had not yet determined whether the holding in that case would have retroactive effect and denied the claim without prejudice to Patrick's filing a future motion on the same grounds once this Court resolved the retroactivity issue in then-pending cases.

Patrick appealed the denial of his rule 3.851 motion and filed a petition for writ of habeas corpus with this Court, requesting relief under *Hurst v. Florida* and *Hurst*. In his appeal, Patrick argues that the postconviction court erred with respect to the following claims: (1) that he is entitled to a new penalty phase under *Hurst v. Florida*; (2) that trial counsel was ineffective for failing to contest Patrick's *Miranda* waiver and the voluntariness of his confession; (3) that trial counsel was ineffective for failing to raise a *Frye* challenge to shoeprint evidence or otherwise contest its credibility; (4) that trial counsel was ***260** ineffective for failing to investigate and present certain mitigation evidence at Patrick's penalty phase; and (5) that trial counsel was ineffective for failing to adequately question or challenge two jurors during voir dire. We find no reversible error in the postconviction court's procedural ruling that Patrick's *Hurst v. Florida* claim was premature, as it was presented to the postconviction court before this Court decided the retroactivity of that decision and *Hurst* in *Mosley v. State*, 209 So.3d 1248, 1276 (Fla. 2016). However, as explained below, we grant Patrick a new penalty phase under *Hurst v. Florida* and *Hurst* in accordance with his petition for writ of habeas corpus. Because Patrick is entitled to a new penalty phase as argued in his petition for writ of habeas corpus, the other penalty-phase claim raised before the postconviction court is moot and need not be addressed. We address each of the remaining claims in turn.

II. POSTCONVICTION APPEAL

Each of the non-*Hurst* claims at issue on appeal alleges ineffective assistance of trial counsel. Some of these claims were denied after an evidentiary hearing and some summarily. We review the summarily denied claims de novo, accepting their allegations as true to the extent they are not conclusively refuted by the record and reversing for an evidentiary hearing if they are facially sufficient to show entitlement to relief and raise an issue of fact. *Ault v. State*, 213 So.3d 670, 677–78 (Fla. 2017). As to the claims denied after an evidentiary hearing, we "defer to the postconviction court's factual findings as long as they are supported by competent, substantial evidence in the record" and review the postconviction court's legal conclusions de novo. *Seibert v. State*, 64 So.3d 67, 78 (Fla. 2010).

Substantively, each ineffective assistance of counsel claim required Patrick to show the following, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> 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 prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Abdool v. State, 220 So.3d 1106, 1111 (Fla. 2017) (quoting *Bolin v. State*, 41 So.3d 151, 155 (Fla. 2010)). These two prongs of the ineffective assistance of counsel test present mixed questions of law and fact, *Sochor v. State*, 883 So.2d 766, 771 (Fla. 2004) (citing *Strickland*, 466 U.S. at 698, 104 S.Ct. 2052)), but the ultimate conclusions on both prongs are matters of law, *Peterson v. State*, 221 So.3d 571, 584 (Fla. 2017) (quoting *Everett v. State*, 54 So.3d 464, 472 (Fla. 2010)).

A. Confession

Patrick argues that the postconviction court erred in denying the claim that his attorneys were ineffective for failing to consult a psychopharmacologist or addictionologist for the purpose of challenging the validity of his *Miranda* waiver and the voluntariness of his confession that followed. The motion would have been based on the premise that Patrick was experiencing cocaine withdrawal, which combined with his preexisting conditions of depression and post-traumatic stress disorder to render him unable to comprehend his rights sufficiently to waive them or have the mental capacity to withstand police coercion and speak voluntarily thereafter. Because counsel cannot be deficient for failing to file a meritless motion, *see* ***261** *Merck v. State*, 124 So.3d 785, 800 (Fla. 2013), we affirm the postconviction court's denial of this claim.

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The confession at issue was given during a video-recorded custodial interrogation after Patrick was read his *Miranda* rights, said he understood them, agreed to waive them, and signed a waiver form. To establish that the proposed motion would have been successful, Patrick presented the postconviction court with the video of the interrogation and the testimony of Dr. William Morton, a psychopharmacologist. After considering the video and Dr. Morton's testimony, the postconviction court made the following significant finding:

> While, arguably, an expert could point out the subtleties that would show withdrawal, that is exactly what they would have been in this case. In other words, there was no glaring behavior that would have led a reasonable judge or jury to believe that [Patrick] was under the influence of any drugs or alcohol or manifesting any drug withdrawal symptoms.

The court also stated that it noted no signs of impairment and that Patrick's answers to the detective's questions were relevant and responsive. Patrick argues that the lack of "glaring behavior" does not invalidate his claim but proves the need for expert testimony. Consistent with this position, Dr. Morton testified that he was able to detect nuances that would not be observed by the average lay person. Even so, the essential point of the postconviction court's finding—that the video belies Patrick's claim, even after consideration of his expert's testimony—remains valid.

Indeed, while tired and distressed concerning his crimes, Patrick seemed intelligent, reflective, and engaged during the interview, even drawing a map for the interviewing officer to show where he left the victim's keys, while providing detailed instructions. Moreover, although Dr. Morton indicated that Patrick would have been experiencing a significant level of physical and emotional discomfort from drug withdrawal, he did not testify that Patrick was incapable of understanding the *Miranda* rights and the consequences of waiving them, and he found that Patrick's withdrawal symptoms were only "mild to moderate." Also, although Dr. Morton opined that Patrick showed "confusion" and "some episodes of slow thinking," Patrick made direct comments during the interview indicating that he understood the likely consequences of his statements. This evidence supports the postconviction court's findings and leads us to conclude that Patrick gave his statements with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," such that his *Miranda* waiver was valid. *Ramirez v. State*, 739 So.2d 568, 575 (Fla. 1999) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)). Accordingly, a motion to suppress challenging the validity of Patrick's *Miranda* waiver would have been unsuccessful. *Cf. Buzia v. State*, 82 So.3d 784, 793 (Fla. 2011); *Orme v. State*, 677 So.2d 258, 262–63 (Fla. 1996).

Likewise, Patrick could not have succeeded on a motion to suppress his confession due to his experience of withdrawal symptoms during the questioning itself, as this component of the motion would have relied on his subjective mental state, not any specific examples of external pressure from the police beyond the inherent pressure of a custodial interrogation. *See Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry."); ***262** *Thomas v. State*, 456 So.2d 454, 458 (Fla. 1984); *see also Rigterink v. State*, 193 So.3d 846, 865 (Fla. 2016).

For these reasons, we affirm the postconviction court's denial of this claim.

B. Shoeprint Evidence

Patrick also argues that the postconviction court erred in summarily denying his claim that counsel was ineffective for failing to request a *Frye* hearing concerning expert testimony that the boots found in his duffel bag matched bloody shoeprints at the scene, or to challenge the credibility of that evidence. This claim was based on articles indicating that the FBI has questioned the validity of shoeprint identifications. At trial, Patrick's counsel advised the court that he did not raise a *Frye* challenge to this evidence because, "candidly, there [was] so much other evidence" and the defense was not contesting that Patrick was at the murder scene. He also noted that he probably would not cross-examine the State's expert about the new studies because he did not find them "anywhere near important enough."

At the time of Patrick's trial, "new or novel scientific evidence" was admissible in Florida trials only when it passed the test set forth in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).[4] We have previously rejected a claim that shoeprint evidence is "new or novel." *Ibar v. State*, 938 So.2d 451, 467–68 (Fla. 2006). Thus, the postconviction court properly ruled that if a *Frye* hearing had been requested, it would have been denied.

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Whether counsel was ineffective for failing to cross-examine the State's expert concerning the validity of shoeprint identification is a separate question. This Court has explained that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Darling v. State*, 966 So.2d 366, 382 (Fla. 2007) (quoting *Howell v. State*, 877 So.2d 697, 703 (Fla. 2004)). A decision that lodging a particular challenge to the validity of evidence would be a waste of resources in light of counsel's knowledge of corroborating facts can be a reasonable strategic decision. *Id.* Here, the record establishes that counsel made a decision not to explore defects in shoeprint identification in part because he had chosen as a matter of strategy, and consistently with Patrick's confession and other evidence, to admit Patrick's presence at the scene. Accordingly, the record establishes that counsel's decision was a reasonable strategic one and, therefore, not deficient. *See id.* Moreover, given the concession both in defense argument and in Patrick's confession that Patrick was at the scene, there is no reasonable probability that a successful challenge to the validity of shoeprint comparison as a field would have affected the outcome of Patrick's trial. In other words, our confidence in the outcome is not undermined. Thus, we affirm the postconviction court's denial of this claim.

C. Jurors

In the last of the appellate issues that we address, Patrick argues that the postconviction court erred in summarily denying the claim that counsel was ineffective for failing to challenge or adequately ***263** question two jurors concerning alleged biases. We address this claim as to only one of the jurors, as the claim concerning the other juror relates to the penalty phase, and we have determined that the penalty-phase claims are moot.[5] In pertinent part, Patrick claims that his trial counsel was ineffective for failing to challenge a juror who was biased against him based on his drug use and participation in sexual acts with the male victim. We affirm the denial of this claim except as it relates to statements this juror made regarding the effect evidence of homosexuality would have on his deliberations. For the reasons explained below, we reverse and remand for an evidentiary hearing on that aspect of the claim.

A valid claim of ineffective assistance of counsel for failing to challenge a juror must demonstrate that "one who was actually biased against the defendant sat as a juror," meaning that the juror had a "bias-in-fact that would prevent service as an impartial juror." *Carratelli v. State*, 961 So.2d 312, 323–24 (Fla. 2007). The evidence of the juror's actual bias must amount to "something more than mere doubt about that juror's impartiality." *Mosley*, 209 So.3d at 1265. Otherwise, the defendant cannot show prejudice. *Carratelli*, 961 So.2d at 324. Our cases addressing such claims tend to focus on this prong of the *Strickland* test, as it is necessary to establish that the juror was actually biased before proving that counsel performed deficiently by failing to challenge that juror due to bias. *See, e.g., Hall v. State*, 212 So.3d 1001, 1016 (Fla. 2017); *State v. Bright*, 200 So.3d 710, 742 (Fla. 2016). Accordingly, our analysis of this issue begins with the prejudice prong.

The juror at issue said that he would give a witness's testimony less weight or credence if the witness was on drugs at the time that he observed the things about which he testified. These comments do not show bias, but rather reflect the reality of the effect that drug use can have on a person's ability to see, understand, and remember events. *See Trease v. State*, 768 So.2d 1050, 1054 (Fla. 2000) (quoting *Edwards v. State*, 548 So.2d 656, 658 (Fla. 1989) (describing the circumstances under which evidence of a witness's drug use is relevant for impeachment purposes)). Therefore, this aspect of the claim was properly denied.

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 ***264** 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

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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.

III. PETITION FOR WRIT OF HABEAS CORPUS

While Patrick's postconviction motion was pending before the circuit court, the United States Supreme Court issued its decision in *Hurst v. Florida*, in which it held that Florida's former capital sentencing scheme violated the Sixth Amendment because it "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" even though "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S.Ct. at 619. On remand from this decision, we reached the following holding:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst, 202 So.3d at 57.

We have held that *Hurst* applies retroactively to "defendants whose sentences became final after the United ***265** States Supreme Court issued its opinion in *Ring*[*v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)]." *Mosley*, 209 So.3d at 1276. Because Patrick's death sentence became final in 2013, *Hurst* applies retroactively to him. *See id.* And because the jury recommended the death penalty by a vote of seven to five, Patrick's death sentence violates *Hurst*. *See Kopsho v. State*, 209 So.3d 568, 570 (Fla. 2017).

Accordingly, we must consider whether the error is harmless beyond a reasonable doubt:

> The harmless error test, as set forth in *Chapman*[*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So.3d at 68 (quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986)). While at least three of the aggravators in this case are such that no reasonable juror would have failed to find their existence,[7] based on the jury's seven-to-five recommendation for a sentence of death, we cannot determine that the jury unanimously found that the aggravating factors were sufficient to impose a sentence of death. Nor can we "determine that the jury unanimously found that the aggravators outweighed the mitigation." *Kopsho*, 209 So.3d at 570. "We can only determine that the jury did not unanimously recommend a sentence of death." *Id.* Therefore, because we cannot say that there is no reasonable possibility that the error contributed to the sentence, the *Hurst* error in Patrick's sentencing was not harmless beyond a reasonable doubt. *Cf. id.*

Accordingly, the petition for writ of habeas corpus is hereby granted. We vacate the death sentence and remand to the circuit court for a new penalty phase. *See Hurst*, 202 So.3d at 69.

IV. CONCLUSION

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For the foregoing reasons, we affirm the denial of postconviction relief except as to the ineffective assistance of counsel claim concerning juror bias on the basis of homosexuality, and we grant Patrick's petition for writ of habeas corpus. Accordingly, we reverse the denial of the postconviction claim concerning juror bias and remand for an evidentiary hearing. We also vacate Patrick's death sentence and instruct the circuit court to hold a new penalty phase in the event that Patrick's conviction for first-degree murder is confirmed after the rule 3.851 motion at issue in this appeal is finally resolved at both the circuit court level and this level.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and LAWSON, JJ., concur.

POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, J., concurs.

POLSTON, J., concurring in part and dissenting in part.

I concur with the majority's decision to affirm in part and reverse in part the postconviction court's denial of Patrick's postconviction motion and to remand for an evidentiary hearing on one claim. I dissent as to its grant of Patrick's petition ***266** for writ of habeas corpus and vacating of the death sentence pursuant to *Hurst*. *See Mosley v. State*, 209 So.3d 1248, 1285 (Fla. 2016) (Canady, J., dissenting on retroactivity of *Hurst*). I would also affirm the denial of Patrick's other penalty phase claims.

CANADY, J., concurs.

All Citations

246 So.3d 253, 43 Fla. L. Weekly S263

Footnotes

1 The aggravators the trial court found were the following: (1) Patrick was under a sentence of imprisonment (great weight); (2) Patrick had a prior violent felony (great weight); (3) the murder occurred in the course of a felony, specifically robbery or kidnapping (great weight); (4) pecuniary gain (merged with the in the course of a felony aggravator); (5) the murder was especially heinous, atrocious, or cruel (great weight); (6) the murder was cold, calculated, and premeditated (great weight); and (7) the victim was particularly vulnerable due to advanced age (seventy-two) or disability (great weight).

2 The mitigating circumstances found were the following: (1) Patrick's father was physically and mentally abusive (little weight); (2) Patrick had a tragic youth (little weight); (3) his childhood was unstable (little weight); (4) there was family abuse (some weight); (5) substance abuse from an early age (little weight); (6) Patrick suffered from severe drug abuse at the time of the crime (some weight); (7) Patrick sought absolution and forgiveness (little weight); (8) Patrick had remorse (some weight); (9) he loves his family (little weight); (10) Patrick is close to his mother (some weight); (11) his brother attended the trial (little weight); (12) Patrick confessed (little weight); (13) he had good conduct throughout the trial (little weight); (14) he suffered from emotional stress combined with a history of family dysfunction (little weight); (15) he had experienced childhood sexual abuse and exploitation (some weight); and (16) he had some mental health history as discussed in number 14 (little weight). *Patrick*, 104 So.3d at 1055 n.2.

3 Patrick raised the following claims in his corrected rule 3.851 motion: (1) application of the one-year time limit of rule 3.851 to Patrick's case violates his rights to due process and equal protection; (2) section 27.7081, Florida Statutes (2014), and Florida Rule of Criminal Procedure 3.852 are unconstitutional both facially and as applied because public records in the possession of state agencies have been withheld; (3) Patrick is being denied various constitutional rights because of the rules prohibiting his attorneys from interviewing jurors to determine the extent to which constitutional error is present; (4.1) trial counsel was ineffective for failing to properly challenge Patrick's waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the voluntariness of his confession; (4.2) trial counsel was ineffective for failing to raise a challenge to the shoeprint evidence under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); (4.3) the State failed to disclose that much of the testimony of Martin Diez was false and coerced; (4.4) the cumulative effect of counsel's ineffective assistance, prosecutorial misconduct, and the other errors in this case entitles Patrick to a new trial; (5) trial counsel was ineffective in failing to investigate and present available mitigation evidence; (6) section 922.105, Florida Statutes (2014), and Florida's existing procedure for lethal injection violate article II, section 3 and article I, sections 9 and 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution, both as applied and facially; and (7) trial counsel was ineffective for failing to adequately question or challenge two jurors.

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4 The Florida Legislature has since amended the Evidence Code to replace the *Frye* test with the test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). We have declined to adopt that test to the extent it is procedural. *In re Amendments to the Fla. Evid. Code*, 210 So.3d 1231, 1238–39 (Fla. 2017).

5 Assuming *arguendo* that Patrick's claim that he was denied a fair trial because of the other juror's views concerning the death penalty extends to how the juror's views would have affected his guilt-phase deliberations, we note that the denial of the claim was proper. Patrick argues that this juror indicated a strong predisposition for recommending the death penalty by declaring that he leaned toward the death penalty at a level of "eight or nine" on a scale of one to ten. However, this juror later said that he was "[r]ight in the middle" concerning the death penalty, would "go by the law," and would have to "hear everything." His comments do not show actual bias. *Cf. Guardado v. State*, 176 So.3d 886, 899 (Fla. 2015).

6 Patrick's counsel was aware that this evidence would be presented at trial, as it was part of his confession, and Patrick's counsel acknowledged at a sidebar before the voir dire questioning at issue that there would be evidence of "[h]omosexual acts."

7 Specifically, no reasonable juror would have failed to find that Patrick was under a sentence of imprisonment, that he had a prior violent felony, or, in light of the guilt-phase verdict, that the murder occurred in the course of a felony.

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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,	)	CASE NO.: 05-16477CF10A
	)	
Plaintiff,	)	JUDGE: ILONA M. HOLMES
v.	)	
	)	
ERIC KURT PATRICK,	)	
	)	
Defendant.	)	

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ORDER DENYING DEFENDANT'S CORRECTED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

THIS CAUSE is before the Court upon Defendant's Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend, pursuant to Florida Rule of Criminal Procedure 3.851, (filed September 23, 2014), and Defendant's Corrected Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend (filed October 2, 2014), and Amendment to Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend (filed February 1, 2016)[1].

The Court having considered Defendant's instant motion, the record of the direct appeal in this case, the Defendant's Amended Motion, the State of Florida's response to Defendant's motion and the testimony adduced at the evidentiary hearing on Defendant's subclaims 4.1, 4.3 and Claim 5, the post-hearing arguments of the parties

[1] This amendment added an additional claim based upon the United States Supreme Court's holding in Hurst v.Florida,136 S Ct. 616 (2016). The Court has not requested a response from the State of Florida on this claim.

submitted in written form, the applicable law, and being otherwise fully advised in the premises, this Court finds as follows[2]:

PROCEDURAL HISTORY

The trial of this case 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; Defendant Eric Patrick, 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 Dr. Fichera and Dr. Allan Ribler, Defendant and his mother.

The defense presented a Spencer memorandum in support of a life sentence.

[2] For the purposes of this order, ROA refers to the record on appeal; EH refers to the evidentiary hearing.

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 aggravating factors and assigned weights: (1) Patrick was under a sentence of imprisonment (great weight); (2) Patrick had a prior violent felony (great weight); (3) the murder occurred in the course of a felony (great weight); (4) pecuniary gain (merged with felony murder); (5) the murder was heinous, atrocious, and cruel (HAC) (great weight); and (6) the murder was cold, calculated, and premeditated (CCP) (great weight). While this aggravator was stricken, the sentence of death was upheld.[3]

The Court found sixteen non-statutory mitigating circumstances and assigned weights: (1) Patrick's father was physically and mentally abusive (little weight); (2) Patrick had a tragic youth (little weight); (3) his childhood was unstable (little weight); (4) there was family abuse (some weight); (5) substance abuse from an early age (little weight); (6) Patrick suffered from severe drug abuse at the time of the crime (some weight); (7) Patrick sought absolution and forgiveness (little weight); (8) Patrick had remorse (some weight); (9) he loves his family (little weight); (10) Patrick is close to his

[3] When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.' " *Williams v. State,* 967 So.2d 735, 765 (Fla.2007) (quoting *Jennings v. State,* 782 So.2d 853, 863 n. 9 (Fla.2001)); *see also Douglas v. State,* 878 So.2d 1246, 1268 (Fla.2004). In the present case, as discussed below, Patrick has five remaining aggravators, including two of the weightiest, and very little mitigation. In light of this, striking the CCP aggravator does not result in reversible error because there is no reasonable probability that the error affected the sentence. Patrick v. State, 104 So. 3d 1046, 1068 (Fla. 2012).

mother (some weight); (11) his brother attended the trial (little weight); (12) Patrick confessed (little weight); (13) he had good conduct throughout the trial (little weight); (14) he suffered from emotional stress combined with a history of family dysfunction (little weight); (15) he had experienced childhood sexual abuse and exploitation (some weight); and (16) he had some mental health history as discussed in number 14 (little weight).

On direct appeal, Defendant raised seventeen (17) arguments with subparts: (1) juror disqualification based upon hardship; (2) trial court limitation of cross-examination regarding "cruising"; (3) limitation of cross-examination of Martin Diez; (4) trial court's instruction on voluntary intoxication; (5) denial of motion to suppress; (6) admission of autopsy photographs; (7) the State of Florida's closing argument (guilt phase); (8) denial of motion for judgement of acquittal; (9) cumulative error; (10) sufficiency of evidence; (11) standard jury instructions denigrating jury's recommendation; (12) penalty phase closing arguments (of State) and limitation of defense closing; (13) sentencing order errors; (14) weight assigned aggravators; improper doubling; felony murder; victim vulnerability; (15) weight assigned mitigators; (16) failure to find mental health mitigator; (17) findings of HAC and CCP.

The Florida Supreme Court independently assessed the sufficiency of the evidence and the proportionality of Defendant's death sentence and affirmed the conviction and sentence of death. Patrick v. State, 104 So. 3d 1046 (Fla. 2012). The United States Supreme Court denied Defendant's petition for writ of certiorari on October 7, 2013. Patrick v. Florida, 134 Sc.D. 85 (2013).

FACTUAL BACKGROUND

The following factual background is excerpted from the Florida Supreme Court's opinion, affirming Defendant's convictions and death sentence:

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.

Patrick v. State, 104 So. 3d 1046, 1053-54 (Fla. 2012).

III. LEGAL ANALYSIS AND CONCLUSION

Claim 1

In claim I, Defendant argues that the one-year time limit set forth in Florida Rule of Criminal Procedure 3.851 for filing a post-conviction motion violates his rights to due process and equal protection under Article I, Section 2 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution. In support of this claim, Defendant alleges that the rule singles out defendants sentenced to death and without any legitimate reasons treats them differently from other criminal defendants. He further argues that as applied, the rule deprives him of his right to access the courts and of effective representation by collateral counsel.

Such claims repeatedly have been addressed and rejected by the Florida

Supreme Court and, therefore, Defendant is not entitled to any relief. See, e.g., Vining v. State, 827 So. 2d 201, 215 (Fla. 2002) (citing Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) and Koon v. Dugger, 619 So. 2d 246, 251 (Fla. 1993)) (noting that constitutional challenges to the one-year time limit imposed by rule 3.851 repeatedly have been considered and rejected by the Florida Supreme Court); and Gonzales v. State, 990 So. 2d 1017, 1034 (Fla. 2008) (reiterating that the rule as amended does not violate a defendant's due process or equal protection rights).

Defendant has not shown a clear constitutional violation and for the reasons set forth above, Defendant's claim I is summarily denied.

Claim 2

In Claim II, Defendant argues that section 119.19, Florida Statutes[4] and Florida Rule of Criminal Procedure 3.852 violate his rights under Article I, section 24, of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Defendant contends that the statute and rule are unconstitutional because of the requirement that he demonstrate that a public records demand is not overly broad or unduly burdensome.

Contrary to Defendant's allegations, section 27.7081, Florida Statutes and Florida Rule of Criminal Procedure 3.852 are not unconstitutional facially and do not deprive Defendant of his due process rights. See Wyatt v. State, 71 So. 3d 86, 110-11 (Fla. 2011) (rejecting the argument that Florida Rule of Criminal Procedure 3.852 and section

[4] Effective October 1, 2005, section 119.19 was renumbered as section 27.7081, Florida Statutes. Therefore, this Court will refer to section 119.19 under its new number throughout this order.

27.7081, Florida Statutes unconstitutionally restrict a capital defendant's right to public records access under the Florida and the United States Constitutions by impermissibly mandating that the demand for public records not be "overly broad or unduly burdensome").

Both provisions regulate the production of public records in capital post-conviction cases. They require that upon the Supreme Court of Florida's issuance of the mandate affirming a defendant's death sentence, records pertaining to that defendant's case be submitted to the records repository. Wyatt, 71 So. 3d at 111. The Supreme Court of Florida upheld as reasonable the requirement that a capital defendant make timely requests for additional public records, after a diligent search through the records already produced, and that he avoid making overly broad or unduly burdensome requests. See, e.g., Allen v. Butterworth, 756 So. 2d 52, 66 (Fla. 2000) (quoting Henderson v. State, 745 So. 2d 319, 326 (Fla. 1999)) (stating that "the Legislature has the authority to define the substantive right to public records" and "'to place reasonable restrictions' on the right of public records access") and Wyatt, 71 So. 3d at 111 (concluding that the requirement that a capital "defendant make a diligent search through records already produced and narrow his or her request to provide adequate notice to the agency from which he or she seeks information is reasonable").

Defendant's claim that access to public records in the possession of state agencies has been withheld has not been sufficiently pled because he does not specify what has been withheld. Defendant claims that he cannot ascertain whether any relevant and necessary records are still outstanding (motion p. 12). However, this Court cannot compel any agency to turn over documents that the Defendant has not

asked for or documents that might not exist. Thus, for the reasons set forth herein, this claim is summarily denied.

Claim 3

In this claim, Defendant challenges the constitutionality of rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar, alleging that it violates the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and burdens the exercise of his fundamental constitutional rights, including his due process rights.

Rule 4-3.5(d)(4) provides in relevant part that "after dismissal of the jury in a case with which the lawyer is connected," the lawyer may not "initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge." The rule further prohibits a lawyer from interviewing jurors for purposes of determining whether the verdict may be subject to legal challenge, "unless the lawyer has reason to believe that grounds for such challenge may exist." R. Regulating Fla. Bar 4-3.5(d)(4). Prior to conducting an interview with the jurors, the lawyer must file "a notice of intention to interview setting forth the name of the juror or jurors to be interviewed." Fla. Bar R. 4-3.5(d)(4).

Defendant's constitutional challenge to rule 4-3.5(d)(4) fails for three reasons:

First, this claim is procedurally barred because it should have been raised on direct appeal." Troy v. State, 57 So. 3d 828, 841 (Fla. 2011) (citing Reese v. State, 14 So. 3d 913, 919) (Fla. 2009)); see also Israel v. State, 985 So. 2d 510, 522 (Fla. 2008) (finding that the defendant's constitutional challenge to rule 4-3.5(d)(4) was procedurally barred in the post-conviction proceeding, because it could have and

should have been raised on appeal). Defendant's argument that this issue was not ripe for direct appeal does not have merit. The time for raising this issue or to request a juror interview was right after the verdict, if misconduct was suspected.

Second, claims of this nature have been repeatedly analyzed and rejected by the Supreme Court of Florida. Troy, 57 So. 3d at 841, see also Barnhill v. State, 971 So. 2d 106, 117 (Fla. 2007) (citing Power v. State, 886 So. 2d 952, 957 (Fla. 2004); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); and Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001)) (finding that rule 4-3.5(d) (4) does not violate a defendant's constitutional rights).

Third, Defendant has failed to show that there was any juror misconduct in this case that would call into question the integrity of the verdict. There is "a strong policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it." Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001) (quoting Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97, 100 (Fla. 1991)).

Juror interviews are permissible only when the moving party makes "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." Crain v. State, 78 So. 3d 1025, 1045 (Fla. 2011) (quoting Green v. State, 975 So. 2d 1090, 1108 (Fla. 2008)).

Lastly, Defendant contends that misconduct may have occurred that can only be discovered by juror interviews. (motion, p.13). Defendant never filed a sworn motion to interview the jurors in this case. Other than swearing that the contents of his post-

conviction motion are true, there are no other sworn allegations detailing anything that happened during either the trial phase or the penalty phase that leads to the belief that there was any juror misconduct or any need for an interview. Any interviews of jurors would only be a fishing expedition to try to find misconduct. This claim is summarily denied.

Claim 4

Defendant alleges three (3) sub-claims of ineffective assistance of counsel pretrial, trial and during the penalty phase of his trial. The requirements for a successful claim of ineffective assistance of counsel were established in the two-pronged Strickland[5] test, which requires a defendant to prove both deficient performance and prejudice.

To prove deficient performance, a defendant must identify specific acts or omissions of counsel that are so serious "that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. The prejudice prong requires a showing that "there is a reasonable probability that but for counsel's unprofessional errors," the outcome of the proceedings would have been different. Id. at 694. Unless a defendant proves both prongs, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687.

In assessing an attorney's performance, a court must be highly deferential and make every effort "to eliminate the distorting effects of hindsight, to reconstruct the

[5] Strickland v. Washington, 466 U.S. 668 (1984).

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (explaining that the standard for assessing trial counsel's performance "is not how present counsel would have proceeded, in hindsight").

Due to the difficulties inherent in evaluating counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," which means that the defendant has to overcome the presumption that the challenged action was sound trial strategy. Strickland, 466 U.S. at 689.

With these principles in mind, this Court will assess the merit of each of Defendant's subclaims of ineffective assistance of trial counsel.

Claim 4.1

Defendant contends that trial counsel was ineffective by failing to properly challenge Defendant's waiver of his Miranda rights and the by failing to challenge the voluntariness of Defendant's confession.

As an initial matter, the defense did include allegations of physical, psychological, threats, tricks and false statements in their attempt to have this Court suppress Defendant's confession. The pertinent portion of the motion was as follows:

5. The statements, admissions and/or confession obtained by the police from ERIC KURT PATRICK following his arrest are inadmissible as evidence because:
a. The statements were not voluntary but were the result of the police subjecting to physical and psychological force and the use of threats, tricks, false pretenses and promises.
b. Eric Patrick was not mentally or emotionally capable of resisting the coercive interrogation methods employed by the police to obtain the statements in question. Nor was Eric Patrick mentally or emotionally capable of waiving any of the State and Federal Constitutional rights listed above. As a result of the combination of these factors, ERIC KURT PATRICK did not knowingly and

intelligently understand or waive his right to remain silent and his right to an attorney before and during questioning.

6. ERIC KURT PATRICK was read his rights by Detective Nicholson as follows:
a. "You have the right to remain silent, that is, you need not talk to me or answer any questions if you don't want to. Do you understand?" ERIC KURT PATRICK replied, "I understand."
b. "Should you talk to me, anything you say can and may be used against you in a court of law. Do you understand?" ERIC KURT PATRICK replied, "yes."
c. "You have the right to talk to an attorney/lawyer before talking to me and have an attorney or lawyer here with you during questioning now or in the future. Do you understand?" ERIC KURT PATRICK replied, "yes."
d. "If you cannot afford to retain you own attorney/lawyer and you want an attorney/lawyer, one will be appointed for you before we ask you any questions. Do you understand?" ERIC KURT PATRICK replied, "yes."
e. "If you decide to answer the questions now without an attorney present, you will still have the right to stop answering at any time till you talk to an attorney/lawyer. Do you understand?" ERIC KURT PATRICK replied, "yes."
f. "Knowing and understanding your rights as I've explained them to you, are you willing to answer my questions without an attorney or lawyer present?" ERIC KURT PATRICK replied "yes."
g. "And have you previously requested any law enforcement officer to allow you to speak to an attorney or lawyer? Today." ERIC KURT PATRICK replied, "no".

(ROA, 583-584).

Specifically, Defendant contends that counsel was deficient to discover and present evidence of Defendant's deficits to the court at the suppression hearing and failing to properly challenge the voluntariness of the statements (motion, p. 19) and that counsel failed to consult with a pharmacologist or pharmacist who could have reviewed the video tape for signs of cocaine withdrawal (motion, p. 20).

An evidentiary hearing was held on this subclaim. Dorothy Ferraro, second chair counsel, testified that she thought of hiring a toxicologist. She consulted with Dr. Teri Stockholm. After consulting Dr. Stockholm about the amount of drugs that Defendant self-reported that he had consumed, Dr. Stockholm opined that the Defendant couldn't have taken that amount of drugs. Ferraro felt that calling a toxicologist would not have

been helpful. (EH: Vol 5, 669-670). Ms. Ferraro testified that she decided that she would focus on the content of the video of Defendant's confession instead of pursing the mental health or issues. (EH: Vol 5, 670).[6] This decision was made in part because Defendant wouldn't allow his attorneys to develop fully mental health mitigation.

The Defendant presented the testimony of Dr. William Morton Jr., a psychopharmacologist during the evidentiary hearing. He testified that his focus is on addictions. He interviewed Defendant in preparation for this hearing. He relied upon Defendant's self-report of the drugs he had consumed prior to his confession.

Morton explained that a toxicologist studies dead people while his profession studies live patients. He opined that from his review of the video of Defendant's confession, he saw mild to moderate cocaine withdrawal. He saw no significant visual signs of opioid withdrawal. He saw some psycho-motor retardation and six (6) instances of agitation. His opinion was that the detectives should have waited to obtain Defendant's confession, which was obtained 28 ½ hours after Defendant's arrest.

He further opined that Defendant may have been intoxicated, may have been going through cocaine withdrawal, had posttraumatic stress disorder (PTSD) and depression. Morton testified that it was difficult to pin point just one. (EH: Vol. 3, 428-434; 448-452).

Defendant's confession was played at the hearing on the motion to suppress, during the trial and for the jurors, pursuant to their request, during their deliberations.

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[6] Defendant was tested and found to have high average intelligence. He had obtained a G.E.D and an associate's degree. Further, according to Reres, Defendant had a lengthy felony record and on at least six (6) occasions, Defendant had confessed. (EH: Vol, 2, 209).

The confession in this case, from the start, was video recorded. This Court had an opportunity to see and hear the Defendant at the time of the confession in this case. No signs of impairment were noted. His answers to questions asked were related to the question and responsive. The jurors were given the standard jury instruction regarding the Defendant's statement (ROA at 707). The jury was free to determine if Defendant's statement was freely and voluntarily made. They were also told that they could disregard the statement.

While, arguably, an expert could point out the subtleties that would show withdrawal, that is exactly what they would have been in this case. In other words, there was no glaring behavior that would have led a reasonable judge or jury to believe that Defendant was under the influence of any drugs or alcohol or manifesting any drug withdrawal symptoms.

Defendant testified during the penalty phase, that he was not under the influence of drugs when he gave his statement, instead he was coming down from the influence. The following exchange occurred during cross-examination:

> Q. And that statement that you gave to Detective Nicholson that's in evidence for this jury to hear, you were completely straight forward and honest from beginning to end in that statement?
>
> A. From what I remember about it, yes.
>
> Q. Well, what, you were under the influence in that statement now?
>
> A. I was under the influence ~- **no, I wasn't. I was coming down from drugs. I was under the influence when it happened.**
>
> Q. But you weren't under the influence when you gave that statement, were you, Mr. Patrick?

A. I know I wasn't myself. I know I look at that statement, I've read that statement and it doesn't seem like myself today. I still think I had some of the affects (sic) of the drugs in me.

Q. So if there's any inconsistencies in the statement that you didn't take full responsibilities it is now just because you weren't yourself?

A. It is not now anything, ma'am, it is what it is.

(ROA at 3033).

Even if this Court were to assume that Defendant could meet the first prong of the Strickland test, he still cannot show that had his confession been suppressed, the outcome of the trial would have been different. As already discussed above, even without Defendant's confession, there was ample evidence of guilt in this case sufficient to obtain a conviction. Thus, for the reasons set forth herein, Defendant's subclaim is denied.

Claim 4.2

In this claim, Defendant alleges ineffective assistance of counsel for failing to file a motion for a Frye[7] hearing to keep out evidence regarding the shoe prints from the crime scene. The State meticulously placed the expert's training, experience and education on the record.

The State of Florida called witness Thomas Hill. Prior to his testimony regarding the shoe print evidence in this case, he had been tendered by the State as an expert in blood pattern evidence. The State then asked the following:

Q. You also mentioned you work with shoe print impressions, is that correct?

A. Yes, ma'am.

[7] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Q. Have you had any specialized training in that particular discipline?

A. Yes, that's specialized training, cumulative hours are approximately 213.

Q. And have you published articles with regard to footwear and footwear Impression analysis?

A. Yes, I published an article back in 2002, again, through the Journal of Forensic Identification Entitled New Method of Obtaining Highly Detailed Exemplars of Shoe Soles and Friction Ridged Detail.

Q. Now, is the discipline, which you have already been tendered as an expert in at all related to the footwear comparison?

A. They overlap. When footwear is made from a shoe coming in contact with blood, when we get bloody shoe prints, yes, there is an overlap.

Q. Now, have you ever testified as an expert with regard to footwear comparison analysis?

A. Yes, that would be twenty-nine times also one in Washington State.

Q. So the twenty-nine times were here in Broward County?

A. Yes.

There was no objection or voir dire regarding Hill's training, education or experience. This Court finds that Mr. Hill had the training, experience and education to give an opinion regarding shoe prints. In fact Mr. Hill opined that the bloody footprint from the crime scene was made by the right foot of an Ozark boot (ROA 1570-1613).[8] Hill would have been allowed to offer his opinion even over the defense's objection.

As a general rule, a Frye hearing is "utilized in Florida only when the science at issue is new or novel." Branch v. State, 952 So. 2d 470, 483 (Fla. 2006) (citing Brim v. State, 695 So. 2d 268, 271-72 (Fla. 1997). "In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the

[8] The boot was found in a duffle bag in Defendant's possession at the time of arrest.

underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand." Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995).

Frye sets forth the test to be utilized when a party seeks the admission of expert testimony concerning new or novel scientific evidence. In this case, however, there was no new or novel scientific theory being presented by the shoe print testimony expert.

Shoe print evidence has been utilized for at least one hundred years. *See, e.g.,* Whetston v. State, 31 Fla. 240, 12 So. 661 (1893) (explaining that footprints found at or near the scene of a crime which correspond to those of the accused can be admitted into evidence). The use and reliance on footprint evidence is not new or novel and is not subject to Frye analysis. Ibar v. State, 938 So. 2d 451, 467-68 (Fla. 2006). See, e.g., McDonald v. State, 952 So. 2d 484, 495-96 (Fla. 2006) (holding that counsel was not ineffective for failing to request a Frye hearing to challenge the forensic science relied on by the State because there was general acceptance in the scientific community of that particular science at the time of defendant's 1995 trial).

The jurors in this case were instructed that Hill was only an expert if they believed him to be and that they could believe or disbelieve all or any part of Hill's testimony.

Defendant has failed to show how the failure of counsel to not seek a Frye hearing on evidence that has been generally accepted for over one hundred years, prejudiced him. Further, Defendant has not shown any deficiency or prejudice in counsel's decision not to ask for a Frye hearing, as it is doubtful that one would have been granted. This claim is summarily denied.

Claim 4.3

In this claim, Defendant claims that the State of Florida committed a Brady violation by failing to disclose that much of the testimony of state called witness, Martin Diez, was false and coerced.[9]

Brady requires the prosecution "to disclose material information within its possession or control that is favorable to the defense." Davis v. State, 136 So. 3d 1169, 1184 (Fla. 2014). To establish a Brady claim, Defendant must prove "(1) that favorable evidence – either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Rodriguez v. State, 39 So. 3d 275, 285 (Fla. 2010) (quoting Riechmann v. State, 966 So. 2d 298, 307 (Fla. 2007)). When assessing whether a defendant was prejudiced by the suppression, the court must determine whether the suppressed evidence was such that it would "undermine confidence in the verdict." Rodriguez, 39 So. 3d at 285 (quoting Smith v. State, 931 So. 2d 790, 796 (Fla. 2006)).

Counsel was able to cross-examine Diez during the trial, regarding his many instances of being a jailhouse informant. Additionally, the jury heard that Diez had been awaiting trial when he came forward, that Diez was convicted prior to giving his deposition in Defendant's case and sentenced before Defendant went to trial.

[9] Diez is alleged to have told an investigator from CCRC that he was heavily coached to testify the way that he did. Diez did not testify at the evidentiary hearing, instead he pled his 5th Amendment right to remain silent, upon advice of counsel. (EH: Vol 3, 359-361). No other witnesses were called to substantiate this claim.

The jury also heard that Diez was not promised anything and although he had faced multiple life sentences, he was only sentenced to twenty years' imprisonment. The jury had sufficient information to weigh the credibility of this witness.

Defendant has not provided this Court with any basis for the conclusory allegations that Diez was coerced to testify and that his testimony was false. There are no affidavits, certainly not from Diez, or anyone else alleging that Diez was coerced by law enforcement or the State attorney's office.

What is telling is that Diez came forward early. In other words, he wrote a detailed letter to detailing what Defendant had said to him in 2005. The letter contained great detail. According to Diez, the police were surprised at how much detail he provided. (ROA 1657).

Defendant's allegations are conjecture that a witness like Diez had to have been coerced in order to get him to testify against Defendant. After all, Diez was a "professional snitch." He clearly admitted that he was an informant. He was "working" to get federal charges reduced or dismissed for him and his father. He was working and informing for the Florida Department of Law Enforcement in a case in Putnam County, Florida. The jury heard all of this testimony.

However, there is nothing in this record that controverts Diez's testimony that he was testifying in this case for any reason other than as he testified. He volunteered without expectation of gain or reward. In fact he had already been sentenced to twenty years in prison by the time he testified in this case. Diez testified that his testimony had placed him in danger if it were discovered that he is a snitch. He further testified that he was motivated by Defendant's lack of remorse for killing an elderly person. Diez's

testified, the what Defendant told him bothered him and "it made me sick." (ROA, 1622-1683). The jury got to see and hear from Diez. Notwithstanding the cross-examination, and hearing all about Diez, the triers of fact in this case chose to believe his testimony as was their prerogative to do so. Based upon the forgoing, this claim is denied.

Cumulative Error

Defendant's last argument under this subclaim is cumulative error. However, this claim is insufficiently pled as Defendant has failed to show any error, deficiency or prejudice within this claim or subclaims). *See* Hoskins v. State, 75 So.3d 250, 258 (Fla.2011); Schoenwetter v. State, 46 So.3d 535, 553 (Fla.2010); *Rogers,* 957 So.2d at 554; *Parker v. State,* 904 So.2d 370, 380 (Fla.2005); Griffin v. State, 866 So.2d 1, 22 (Fla.2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); Vining v. State, 827 So.2d 201, 219 (Fla.2002) (holding that where alleged individual errors are without merit, the contention of cumulative error is similarly without merit); Downs v. State, 740 So.2d 506, 509 n. 5 (Fla.1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit). Based upon the foregoing, this claim is summarily denied.

Claim 5

Defendant asserts that he was denied adversarial testing at his penalty phase because trial counsel was ineffective in failing to investigate and present available mitigation in violation of the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

This Court granted an evidentiary hearing on this claim. Restating this claim, Defendant claims his attorney was ineffective in the presentation of mitigation during the penalty phase and for failure to hire a mitigation specialist.

"In reviewing a claim that counsel's representation was ineffective based on a failure to investigate or present mitigating evidence, the Court requires the defendant to demonstrate that the deficient performance deprived the defendant of a reliable penalty phase proceeding." Hoskins v. State, 75 So.3d 250, 254 (Fla.2011). "As the Supreme Court noted in Strickland, 'the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.' " Cherry v. State, 781 So.2d 1040, 1050 (Fla.2000) (quoting Strickland v. Washington, 466 U.S. 668, 691, 104 Sc.D. 2052, 80 L.Ed.2d 674 (1984)). Even when the defendant is uncooperative, trial counsel must "conduct *some* sort of mitigation investigation." Porter v. McCollum, 558 U.S. 30, 40, 130 Sc.D. 447, 175 L.Ed.2d 398 (2009). Trial counsel cannot make a reasonable strategic decision when counsel does not "conduct a thorough investigation of the defendant's background." Sears v. Upton, 561 U.S. 945, 130 Sc.D. 3259, 3265, 177 L.Ed.2d 1025 (2010). "However, 'Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.' " Taylor v. State, 3 So.3d 986, 998 (Fla.2009) (quoting Wiggins v. Smith, 539 U.S. 510, 533, 123 Sc.D. 2527, 156 L.Ed.2d 471 (2003)).

To satisfy the prejudice prong of Strickland, Defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." Porter, 558 U.S. at 41, 130 Sc.D. 447. This does "not require a

defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' " *Id.* at 44, 130 Sc.D. 447 (quoting *Strickland,* 466 U.S. at 693–94, 104 Sc.D. 2052).

A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Hannon, 941 So. 2d at 1124-25 (quoting Wiggins v. Smith, 539 U.S. 510, 521-23 (2003)).

When evaluating claims that penalty phase counsel was ineffective for failing to investigate or present mitigating evidence, the Florida Supreme Court explained that a defendant's burden is of showing that counsel's ineffectiveness deprived him/her of a reliable penalty phase proceeding. Hannon, 941 So. 2d at 1124-25 (quoting Asay v. State, 769 So. 2d 974, 985 (Fla. 2000)).

To prove prejudice, a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." Porter v. McCollum, 13 Sc.D. 447, 453 (2009). The reasonable probability is assessed by considering the totality of available mitigation evidence adduced at trial and during the habeas proceeding and reweighing it against the aggravators. Id. at 453-54 (quoting Williams v. Taylor, 529 U.S. 362, 397-98 (2000)).

Defendant contends that counsel was ineffective in not hiring a mitigation specialist or locating witnesses who could have testified to the abuse Defendant

suffered as a child. Defendant also complains that the mental health testimony and evidence presented came from an ill-prepared witness, Dr. Chris Fichera.[10]

Phillip Arth, the investigator from the office of the Public Defender, was assigned to locate and talk to witnesses for the penalty phase. Mr. Arth was able to locate Defendant's father, but the father wanted nothing to do with the Defendant or this case. There were other witnesses, such as Defendant's ex-wife or ex-girlfriend, who wanted nothing to do with this case. Further, Defendant's mother was not helpful in naming family members who could have been contacted to testify on Defendant's behalf (EH: Vo. 2, 129-152). There is no ineffective assistance of counsel when an attorney can't call a witness who is unavailable. Simmons v. State, 105 So.3d 475 (Fla. 2012).

Another witness, Mr. Tebrugge testified regarding the standards established by the American Bar Association (ABA) and the Florida Association of Criminal Defense Attorneys (FACDL) regarding capital cases. He testified that the recommendation in investigating mitigation was to go back at least three generations. (EH: Vol 1, 87).[11] In fact, Dr. Fichera attempted in his presentation to do that but because of this Court's ruling, he was not allowed (ROA 2970-2891).[12]

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[10] After Defendant was found guilty during the guilt phase, the notice to rely upon mental health aggravators was withdrawn. Again, this was because Defendant would not allow his attorneys to fully develop the mental health mitigation.

[11] The Court allowed limited testimony epigenetics. The theory behind this field of study is that violence can be present from generation to generation.

[12] Prior to the hearing beginning, there was argument as to whether the Supreme Court had ruled on this Court's exclusion of this evidence. Just before offering his testimony, Dr. Fichera was ordered by the Court to remove certain slides from his presentation. All of the slides that this Court ordered removed were marked and put into the file as Court exhibit 2. Defendant is procedurally barred from raising the issue now, since it could have been raised on direct appeal.

This Court notes, that both Mr. Reres and Ms. Ferraro had difficulty in persuading Defendant that certain evidence was crucial to his mitigation. As Mr. Reres testified, this case was a penalty phase mitigation case from the beginning. (EH: Vol. 2, 195). However, because of office policy constraints as well as difficulty with Defendant agreeing to the presentation of crucial evidence, the case became more complex.

At the beginning of the evidentiary hearing, just as in the penalty phase of the case, this Court had to colloquy Defendant to make sure that the record was reflective that it was he, not counsel, that wanted evidence withheld (ROA 3052-3055; 3143-3148; EH: Vol 3, 328-330).

The following witnesses testified during the penalty phase: Dorothy Dolighan (was a friend of Defendant's mother and knew him while he was growing up); Carsten Patrick (Defendant's brother); Ingrid Franke (Defendant's mother), Father Jerry Singleton; Dr. Christopher Fichera and Defendant (licensed clinical and forensic psychologist); Phillip Arth (investigator with the Office of Public Defender) and Defendant.

During the penalty phase as well as the evidentiary hearing, Defendant limited his attorneys as to what evidence could be presented, (ROA 3052-3055; EH: Vol 2, 33-339), specifically, evidence of his sexual abuse as a child. Defendant did not want any testimony regarding anal sex or homosexual encounters. Ms. Ferraro testified that it was difficult to get information from Defendant.

George Reres testified that at the time of this trial he was the supervisor of the homicide unit. Both he and Ms. Ferraro testified that the elected Public Defender did not believe in mitigation specialists. (EH: Vol. 2, 163; Vol 5, 650). She didn't have

names of people she could contact to speak about the Defendant. She had no information regarding close family members except Defendant's mother and brother. The brother had been reluctant to testify for Defendant. She testified that Defendant vacillated between wanting to present mitigation at a penalty phase. He is quoted as saying, "if I'm found guilty, I might as well give up." (EH: Vol. 5, 711).

Over the three days of the evidentiary hearing, this Court listened carefully to the testimony of approximately 17 witnesses.[13] One of them hadn't seen Defendant since he (Defendant) was six years old (Dube)(EH: Vol. 4, 558); a neuropsychologist, Dr. Ouaou, who never spoke with Defendant about the crime (Vol. 3, 396); a psychopharmacologist , Dr. Morton; Dr. Gold, a psychologist, who presented testimony regarding epigenetics.[14] The only problem is that he had never treated a patient in this area (EH: Vol. 4, 594).[15]

To prove prejudice, a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence.

Whatever mitigation evidence that Defendant would allow his attorneys to present was presented in this case. The fact that current counsel was able to find certain witnesses that Ms. Ferraro or Mr. Reres could not located in 2009 does not mean that they were ineffective. The fact that there are experts who disagree with the experts from 2009, (Drs. Fichera, Weiss, Ribler or Dr. Stockholm) does not change the fact that in 2009, Defendant received a fair and full penalty phase hearing. *See* <u>Cherry</u>

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[13] Defendant's mother and brother also testified during the penalty phase; the other witnesses, while their testimony was interesting, it served no purpose in persuading the Court that the outcome would have been different if their testimony had been presented to the jury in this case.

[14] The Court allowed the doctor to testify over the objection of the State in this area. Because this is a death case, this Court wanted to hear anything that might have changed the outcome.

[15] He also testified that "Defendant was cooperative, for the most part." (EH: Vol. 4, 582).

v. State, 781 So.2d 1040, 1052 (Fla.2000). The mitigation evidence that existed was presented and was considered by the jury and this Court.

Lastly, Defendant has failed to establish prejudice, in that he has failed to show that any additional mitigation evidence would have outweighed the aggravating factors.[16] Defendant has not shown that he was deprived of a reliable penalty phase proceeding.

Claim 6

In this claim for relief, Defendant argues that the lethal injection protocol in Florida violates, facially and as applied, Article II, section 3 and Article I, sections 9 and 17 of the Florida Constitution, and the Eighth Amendment to the United States Constitution.

Defendant's complaints are with the Florida Department of Corrections (FDOC) 2011 protocol for the use of a the three (3) drug protocol and with the fear that FDOC might not follow its own protocols. Lastly, Defendant argues that the State of Florida needs to move to the use of a one drug protocol, as many other states have done.

The Court notes that these same general arguments have been made to the Florida Supreme Court and rejected. In the recent case of Muhammad v. State, 132 So. 3d 176, 194-97 (Fla. 2013, cert. denied 134 S Ct. 894 (2014). Defendant also cites to what he characterizes as the "botched execution of William Happ" (motion, pp. 57-58; 60-61) in support of the argument that lethal injection violated the Eight Amendment.

[16] There is a remote possibility that had Defendant allowed his attorneys to develop the sexual abuse evidence and had anyone of the doctors been allowed to present that evidence to the jury, there might have been at least one statutory mitigator. However, with the aggravators that existed in this case, this Court would still have imposed the same sentence.

Initially, it should be noted that the United Stated Supreme Court has held that the Constitution does not require the avoidance of all risk of pain in carrying our executions, only that it not present "the sort of 'objectively intolerable risk of harm'" that qualified as cruel and unusual. Baze v. Rees, 553 U.S. 35, 50 (2008). The Florida Supreme Court rejected the claim that the FDOC will not act in accordance with its lethal injection procedures. Mohammad, 132 So. 3d at 195. The use of the drugs, with the exception of midazolam hydrochloride, were approved in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007). As the Court noted, "Muhammad has not demonstrated that the conditions presenting this risk, are" sure or very likely" to cause serious illness or needless suffering and give rise to "sufficiently imminent dangers" under the standard set forth in Baze. Likewise, in this claim, Defendant has failed to show that the use of the substituted drug, sodium thiopental.

Defendant's claim that Florida should convert to a one drug protocol is also without merit. "A condemned prisoner cannot successfully challenge a state's method of execution merely by showing a slightly or marginally safer alternative. Baze, 533 U.S. at 51.

Florida's current protocol does not violate the Constitution simply because other states have altered their method of lethal injection. Muhammad, 132 So. 2d at 197. Further, Baze, held that the "proffered alternative must effectively address 'a substantial risk of serious harm'. " Baze, 533 U.S. at 52. Defendant has failed to establish this in his claim. Thus, Florida is not obligated to adopt an alternative method of execution without

a determination that Florida's current three drug protocol is unconstitutional. *Muhammad*, 132 So. 3d at 197.[17] Based upon the foregoing, this claim is summarily denied.

Claim 7

In this claim, Defendant contends that his death sentence is unreliable and in violation of the Fifth, Sixth, eight and Fourteenth Amendments of the United States Constitution due to ineffective assistance of counsel during voir dire (jury selection).

Defendant specifically argues that counsel was ineffective for seating two jurors who "indicated that they were biased against the defense" (motion, p. 65). Counsel has mentioned certain comments but not in the context of which they were made. The jurors were Martin and Schapira. The pertinent voir dire that Defendant complains about are respectively:

Juror Martin

MR. MARTIN: **May I ask another question then?**

MS. TATE: **Sure.**

MR. MARTIN: **I would have a bias if I knew the perpetrator was homosexual.**

Ms. TATE: **If homosexuality in any way comes into play in this case with anyone involved would you not follow the law on that? Are you going to not hold me to the burden to prove those elements or hold me to a lesser burden or a higher burden or how do you feel about it?**

Mr. MARTIN: **Put it this way, if I 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)

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[17] The Eleventh Circuit has held similarly in Pardo v. Palmer, 500 Fed.Appx. 901, 904 (11th Cir.2012).

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.

(ROA 665-666).

The following occurred during Mr. Reres' questioning of the venire:

MR. RERES:	Let me ask Mr. Martin, because you are second chair and I apologize, you get more attention than others in the panel. I'm not trying to leave anybody else out but we can start here. How do you feel about hearing testimony about drug use, illegal drug use?
MR. MARTIN:	How do I feel about it?
MR. RERES:	Yeah?
MR. MARTIN:	Give me an example, please.
MR. RERES:	Let's say that a witness testifies and you hear that the witness was using drugs at the time they observed the things that they're testifying about. Hypothetically, just hypothetically the witness gets up there and says the car was red. Oh, by the way, I had three drinks that morning, I popped a few pills but I was still okay, I could tell red from blue even though I couldn't really stand up.
MR. MARTIN:	Okay.
MR. RERES:	How would you feel about the testimony?
MR. MARTIN:	Wouldn't be worth much if he was on drugs, would it?

MR. RERES:	You could diminish his testimony based on that?
MR. MARTIN:	Sure.
MR. RERES:	Still might be right but got the color correct?
MR. MARTIN:	But with those elements in play, drugs, I kind of wonder about his, about what he's saying, maybe thinking.
MR. RERES:	Well, what about if instead of talking about the color of the car the witness is talking about what the witness did. The witness is testifying that he saw something that looked like a robbery happen and even though he had a few drinks and had a few pills that morning, looked like a robbery to him, he walked up, grabbed the guy that it looked like was assaulting someone else, threw him to the' pavement and caused a serious injury and find out later those two people were just wrestling, fooling around, good friends, they weren't hurting each other. This drunk comes running out of nowhere, cause serious injury when he had no business interfering or being involved. Hearing that type of example, is an example. How would his being on drugs at the time influence your looking at him as a witness?
MR. MARTIN:	Diminished, would have to be.
MR. RERES:	Okay. He, let's say, you know, maybe it contributed to him being wrong about this wasn't really a fight going on, that he was suppose to (sic) break it up or had any reason to get involved in, it was just horseplay, he made it much worse?
MR. MARTIN:	Sure.
MR. RERES:	Would you all agree that that might go to what someone is thinking, what's going on in their mind, it's certainly affected by what kind of drugs they are using?
MR. MARTIN:	Ulterior thought process.
MR. RERES:	It does have an affect, (sic) doesn't it? Not asking anyone on this jury for any personal experiences, but all of you probably have had an experience with someone you believe to be intoxicated or use drugs at some point

in your life, correct? You have seen somebody and come to say that guy's messed up, what has she been drinking, she can barely drive, see somebody driving down the street...

(ROA 745-747).

There is nothing in this record that suggests that Mr. Martin was prejudiced against Defendant. There was no testimony regarding Defendant's sexual orientation. While Martin gave a response that suggested some bias when he stated that he'd have a problem if he found out the **perpetrator** of the crime was homosexual, he also gave answers that were helpful to the Defendant.

At the point of questioning, the venire knew that the victim of the crime was homosexual. If anything, the bias was more against the victim. Further, Mr. Martin was not pro-death. From his answers it was gleaned that he could be leaning towards a life sentence.

Regarding his answers to the hypotheticals regarding drug or alcohol use, Martin was, without knowing the law on credibility of witnesses, on point. A juror is free to believe or disbelieve all, some or none of the witnesses' testimony. The first consideration is whether the witness could see and know the things about which he/she testified. Alcohol and drugs diminish that ability.

Juror Shapira

MR. SCHAPIRA: **Yes, I did say I lean more towards the death penalty. On a scale from one to ten probably an eight or nine.**

MS. TATE: **But, you're not predisposed to that's the only recommendation you would make?**

MR. SCHAPIRA: **No.**

MS. TATE: Under certain scenarios depending on what the evidence would be you're open to a recommendation for maybe life or if you found the aggravators outweighed the mitigators a recommendation of death?

MR. SCHAPIRA: Yes.

(ROA 429).

However, during the defense questioning of the venire the following occurred:

MS. FERRARO: That's what I thought, okay. You said that you can be open-minded and do as best as you can, those are the notes I have written down. But I wasn't quite sure what you, and it was in the context of talking about listening to evidence in the case and as far as sentencing recommendations. I'm going to ask you how you feel, what your feeling is about the death penalty. What do you feel specifically? Are you pro against, do you think it should be reserved for the worse cases?

MR. SCHAPIRA: Right in the middle, I go by the law.

MS. FERRARO: Okay.

MR. SCHAPIRA: If I were Mr. Patrick I would like somebody like me in the jury because I think you have to be, you have to hear everything, you have to be, take it very seriously and open mind, that's the way I am, take everything inside.

MS. FERRARO: And I love that. I love the way you termed that. So you feel that you are so open that, that you have no preconceived ideas and that you would listen to the evidence?

MR. SCHAPIRA: Yes.

MS. FERRARO: You're going to follow the law?

MR. SCHAPIRA: Yes, absolutely.

MS. FERRARO: Is there any type of evidence, especially as it relates to mitigation, that you feel is more swaying than other evidence, and by that I mean, you know, from doctors,

you know, are you only open to listening to family members, are you open to listening to people other than professionals?

MR. SCHAPIRA:	**I'm open to listen to everything but I would take the weight of a doctor more than family, but in other cases family members can be against the defendant, you never know what's going to happen. So the State can bring the family member for against. So, I'm open-minded, I have to --**
MS. FERRARO:	**And you understand though that there are certain facts that you only know only when you live with someone?**
MR. SCHAPIRA:	**Yes.**
MS. FERRARO:	**You can distinguish that from opinion?**
MR. SCHAPIRA:	**Yes.**
MS. FERRARO:	**Okay, that's not going to be an issue for you?**
MR. SCHAPIRA:	**No.**
MS. FERRARO:	**Can I ask what you do at Horne Depot?**
MR. SCHAPIRA:	**I coordinate the export delivery.**
MS. FERRARO:	**Okay. And what type of law does your wife practice?**
MR. SCHAPIRA:	**She is health law.**
MS. FERRARO:	**Okay. Has she ever done any criminal work?**
MR. SCHAPIRA:	**No, she hate it.**
MS. FERRARO:	**She hates it, okay. Well, that's okay, there are areas that I don't like either.**

(ROA 710-713).

Mr. Schapira, during the State's voir dire did state that he was pro death penalty. He gave a number of 8 on a scale of 1 to 10. He did however state that he was not predisposed to automatically recommend the death penalty. Further, when questioned

by the defense, he stated that if he was Defendant, he'd be the type of juror for this case.

Even if Defendant could show deficient performance, he cannot show prejudice. The prejudice prong in a case where a defendant alleges that counsel failed to raise or preserve a challenge for cause requires the defendant to show "actual bias" on the part of the seated juror. Carratelli v. State, 961 So. 2d 312, 317, 324 (Fla. 2007) (noting that the test for prejudicial error on direct appeal is very different from the test of prejudice on collateral appeal and holding that "where a post-conviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased"). The Carratelli Court further explained that under the actual bias standard a defendant must show that the seated juror "was biased against the defendant, and the evidence of bias must be plain on the face of the record." Id. at 324.

The test of impartiality is a juror's ability to "lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Id. (internal citations and quotations omitted).

Defendant has failed to show that jurors Martin and Schapira were actually biased against him. The arguments made by Defendant could similarly be made against the victim in the case. Martin's comments that a homosexual person being morally depraved enough that he might lie, might steal, might kill, could have been held against the victim and possibly make the Defendant's imperfect self-defense claim more acceptable.

Finally, with regard to the use of drugs by Defendant, the jury was instructed, as a matter of law, that intoxication was not a defense to the crime charged. Because the record does not show actual bias, this claim is summarily denied.

Claim 8

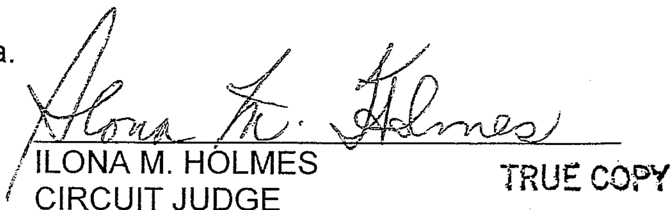
In this claim, Defendant argues that the sentence in this case should be stricken because of the holding of the United States Supreme Court in Hurst v. Florida, 577 U.S. ___ , 136 Sc.D. 616 (2016).[18] While it is true that the Supreme Court held that Florida's death penalty was unconstitutional, the opinion does not answer the question as to whether the holding is to apply retroactively.

This Court did not ask for a response from the State of Florida because this issue is before the Florida Supreme Court in the case of Lambrix v. State, SC16-8 and SC 16-56. The litigation involves whether Hurst will be applied retroactively. This Court denies this claim summarily without prejudice pending the ruling in Lambrix.[19] Accordingly, for the reasons set forth herein, it is

ORDERED AND ADJUDGED that Defendant's Corrected and Amended Motion to Vacate Judgement and Conviction of Sentence are hereby **DENIED**.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO FILE AN APPEAL.

DONE AND ORDERED on this 4th day of April, 2016, in chambers at Fort Lauderdale, Broward County, Florida.



ILONA M. HOLMES
CIRCUIT JUDGE

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[18] This claim was added on February 1, 2016.
[19] There is precedent for not applying Hurst retroactively. See, Ring v. Arizona, 536 U.S. 584 (2002) and Johnson v. State, 904 S0.2d 400 (Fla. 2005).

Copies furnished to:
Rachel L. Day, Assistant Capital Collateral Regional Counsel, Southern Region
1 East Broward Boulevard, Suite 444Fort Lauderdale, Florida 33301

Lisa-Marie Lerner
Assistant Attorney General
1515 North Flagler Drive, 9th Floor
West Palm Beach, Florida 33401

Steven Klinger, Assistant State Attorney
201 Southeast 6th Street
Fort Lauderdale, Florida 33301