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IN THE SUPREME COURT OF FLORIDA

Case No. SC16-801

ERIC KURT PATRICK
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Eric Kurt. Patrick's motion for postconviction relief. The following symbols will be used to designate references to the record in this appeal:

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

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

"PCR." – Record on appeal to this Court following the rule 3.851 motion.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Patrick requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE

Patrick was indicted on November 9, 2005 for first degree murder, kidnapping, and robbery. Patrick pled not guilty, was tried before a jury, and convicted on all counts on February 18, 2009. After a penalty phase proceeding, the jury recommended death by a vote of seven to five. After a Spencer hearing,[1] the court entered its order sentencing Patrick to death on October 9, 2009 for the count of First Degree Murder, finding that six statutory aggravators outweighed sixteen non-statutory mitigating circumstances. His convictions and sentence was affirmed by this Court on direct appeal. *Patrick v. State*, 104 So. 3d 1048 (Fla. 2012).

The Office of the Capital Collateral Regional Counsel-South (CCRC-South) was appointed to represent Patrick in his postconviction proceedings upon the issuance of the mandate on January 13, 2013. Patrick timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 23, 2014[2] (PCR. 359-443). Following the State's response (PCR 572-624), the circuit court held a case management conference after which the court entered an order granting a limited evidentiary hearing.

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

[2] On October 2, 2014, Patrick filed his Corrected Motion to Vacate Judgement of Conviction and Sentence with Special Request for Leave to Amend (PCR. 449-571).

The circuit court held an evidentiary hearing on August 31-September 2, 2015. Undersigned counsel presented fifteen witnesses and introduced nineteen exhibits into evidence; the State presented one witness. Additionally there were a number of potential defense witnesses that counsel for Patrick wished to present, but which the lower court allowed Patrick to waive. The circuit court heard testimony and received evidence related to Patrick's claims alleging ineffective assistance of counsel regarding trial counsel's failure to properly challenge Patrick's waiver of his *Miranda* rights and the voluntariness of his confession, Patrick's allegation that the State failed to disclose that much of the testimony of witness Martin Diez was false and coerced, and his claim alleging ineffective assistance of counsel at the penalty phase. The parties were allowed to file written closing arguments following the hearing. Patrick filed a post-hearing memorandum on February 1, 2016 (PCR. 1179-1263).

On February 1, 2016, Patrick filed his Amendment to his motion to vacate based on the United States Supreme Court's holding in *Hurst v. Florida*, 136 S. Ct. 616 (2016) (PCR. 1161-78). This amendment argued that Patrick was entitled to relief because a judge, and not the jury, was the sentencer in his case.

On April 4, 2016, the circuit court issued an order denying relief, and dismissing the *Hurst* claim without prejudice (PCR. 1358-94). Patrick timely filed a Notice of Appeal on May 3, 2016 (PCR. 1398). This appeal follows.

SUMMARY OF THE ARGUMENTS

ARGUMENT I:

Patrick is entitled to a new penalty phase pursuant to *Hurst v. Florida* ("*Hurst v. Florida*") and *Hurst v. State* ("*Hurst*"). His sentence became final after *Ring* issued. The *Hurst* error in his case cannot be harmless because of his seven to five jury recommendation and because the jury was instructed on an invalid aggravator.

ARGUMENT II:

Patrick's trial counsel was ineffective for failing to show the jury that Patrick was suffering from cocaine withdrawal at the time of his videotaped confession, and therefore, his confession was involuntary.

ARGUMENT III:

Patrick's trial counsel was ineffective for failing to investigate and present readily available mitigation evidence, to Patrick's substantial prejudice.

ARGUMENT IV

It was error for the trial judge to summarily deny Patrick's claims of ineffectiveness of his trial counsel for failing to hold a *Frye* hearing on the shoeprint evidence and during jury selection.

STANDARD OF REVIEW

The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT I

PATRICK IS ENTITLED TO A NEW PENALTY PHASE PURSUANT TO *HURST V. FLORIDA* AND *HURST V. STATE*

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the United States Supreme Court struck down Florida's capital sentencing statute as unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst,* 136 S. Ct. at 619. *Hurst v. Florida*, however, only addressed the Sixth Amendment implications to Florida's capital sentencing scheme. On February 1, 2016 Patrick filed an Amendment to his Rule 3.851 motion claiming that he was entitled to relief pursuant to *Hurst* (PCR. 1204 *et seq*.). The lower court dismissed the amendment without prejudice.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court addressed the Sixth **and** Eighth Amendment implications of *Hurst v. Florida*. The Court examined the federal precedent which led to the *Hurst v. Florida* decision, including *Apprendi v.*

New Jersey, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), as well as the longstanding, deeply entrenched Florida law regarding the right to unanimous jury trials in criminal cases, and held that "the jury—not the judge—must be the finder of fact, and thus every element necessary for the imposition of the death penalty." *Hurst*, 202 So. 3d at 53.

This Court has held that *Hurst v. Florida* and *Hurst v. State* apply retroactively to defendants whose sentences were not final when the United States Supreme Court issued *Ring*. *See Mosley v. State*, __ So. 3d __, 2016 WL 7406506 (Fla. Dec. 22, 2016). *Ring* was decided in 2002. Patrick's capital trial was in 2009. There is no question that *Hurst* is retroactive in Patrick's case.

The State cannot show that the *Hurst* error is harmless beyond a reasonable doubt. Patrick's jury recommended death by a verdict of seven to five. Furthermore the jury was instructed on the CCP aggravator which was later struck by this Court on direct appeal. Because of the non-unanimous vote in favor of death and the jury instruction on an invalid aggravator, Patrick must be entitled to relief. *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016). *See also Armstrong v. State*, __ So. 3d __, 2017 WL 224428 (Fla. Jan. 19, 2017), and *Hojan v. State*, __ So. 3d __, 2017 WL 410215 (Fla. Jan. 31, 2017).

ARGUMENT II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE VOLUNTARINESS OF PATRICK'S CONFESSION

The United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *Strickland* requires a defendant to plead and demonstrate (1) unreasonable attorney performance; and (2) prejudice. *Id*. at 687.

The United States Supreme Court has reaffirmed the right of a capital defendant to the effective assistance of counsel. In *Wiggins v. Smith*, the Court emphasized the principles set forth in *Strickland* when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984) (citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id*. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness."

Wiggins, 539 U.S. 510, 521 (2003). Patrick has established both deficient performance and prejudice which undermined the adversarial process at trial.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance through any

portion of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981) (Counsel may be held to be ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) (". . . [s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). *See also Strickland*, 466 U.S. 668; *Kimmelman*, 477 U.S. 365.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted that, in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, **the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged**. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the

> adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696 (emphasis added). The evidence presented herein demonstrates that the result of Patrick's trial is unreliable.

At trial, the State introduced a videotaped statement made by Patrick. This statement, however, was not voluntary. The trial court never heard crucial information about Patrick's mental health and life-long history of excessive drug abuse that would have demonstrated that he did not understand the *Miranda* warnings because trial counsel was ineffective in failing to discover and present to the court that crucial information. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Trial counsel was well aware of Patrick's chronic drug abuse and its escalation after his release from prison. During the evidentiary hearing, defense trial attorney, George Reres, testified that he thought that Patrick was "still extremely intoxicated at the time he was taken into custody. He had a long standing severe drug problem that reared its head shortly after he was released from prison, and I think quickly flew out of control, so that he was largely acting on impulse power just to support his habit" (PCR. Vol. 24 p. 45). However, counsel did not consult with an addictionologist or a psychopharmacologist with regard to the voluntariness of the statement. Counsel testified that his second chair attorney, Dorothy Ferraro, consulted with a forensic toxicologist (PCR. Vol 24 p. 46). However, no member of the team considered the possibility of hiring an expert

who could observe and evaluate Patrick's behavior during his statement made only twenty-eight hours after he was taken into custody. It is imperative that the experts retained in a capital case be chosen based on the specific facts of the case. A toxicologist was not the appropriate expert.

At the evidentiary hearing, psychopharmacologist Dr. William A. Morton, Jr., PharmD, explained why a toxicologist was not the right kind of expert to use in this context. He explained the difference between a toxicologist and a psychopharmacologist as follows:

> …as a psychopharmacologist I would see active, live patients and seeing how the medicine is helping or hurting them. I would have thoughts and comments about the pharmacokinetics, how the drug is broken down and handled, by the body and various side effects, risk of side effects of continuing that.
>
> I would also have opinions about what would be lethal levels. On the other hand, a toxicologist would be [dealing] primarily with people that have become very toxic on the substance and possibl[y] died. Toxicologists generally work[ ] in a laboratory and ensures that the laboratory process for evaluating drug levels is done in a standard way and that quality control is done and assists, administrates a laboratory and they would be experts in the various procedures, such as the laboratory tests, actually how they are done and does that -- can that be reliable, is it predictable, within what degree of percent. They may have seen patients, but generally they see patients that have died.

(PCR. Vol. 25 p. 108). Patrick would not, and did not, benefit from the hiring of a toxicologist. What Patrick needed was an expert with training in the observation

and evaluation of living patients. Counsel was ineffective in selecting the appropriate expert for Patrick's trial.

The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*[3] ("*Supplemental Mitigation Guidelines*") are specific and explicit in the importance for trial counsel to consider the need to utilize experts specific to the individual requirements of the case. *Supplemental Mitigation Guideline* 10.11E. During the pendency of Patrick's trial, Ferraro contacted Dr. Teri Stockham, a forensic toxicologist, about potentially working with the defense. Ultimately, Dr. Stockham concluded that on the night of the crime, had Patrick been using the drugs that he self-reported, he would have been unconscious. According to Ferraro, she had "conveyed [the reported drug use] to Dr. Stockham and she basically said, 'There's no way anyone could have taken that amount of drugs.' She just could not help, she said it was basically ludicrous" (PCR. Vol. 27 p. 63). Ferraro also testified that the only information that she submitted to Dr. Stockham for review was her, Ferraro's, report of Patrick's drug use; that Dr. Stockham never met with Patrick; and that she did not send Dr. Stockham any records of Patrick's extensive history of drug abuse. Nor did Dr. Stockham review the videotaped statement. In coming to her conclusion, Dr.

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[3] Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 693 (2008).

Stockham had a bare minimum of information regarding Patrick's drug use. Trial counsel should have provided her with all of the relevant information necessary to make a complete and informed opinion.

Ferraro never considered Patrick's drug use beyond the night of the crime and the impact that it had on the voluntariness of his videotaped statement. *Id*. When asked on direct about the videotaped statement, Ferraro stated that she "was more focussed [sic] on the content of what he was saying" and was not looking for signs of "drug withdrawal or alcohol problems" or "whether he appeared to be on drugs or under the influence of any type of substance at the time" (PCR. Vol. 27 p. 84). However, she conceded on cross that she was not an expert in cocaine withdrawal and therefore, was not qualified to make such observations (PCR. Vol. 27 p. 110). Trial counsel should have consulted with someone who is an expert in cocaine withdrawal. Attorney Adam Tebrugge testified at the evidentiary hearing about what an attorney should do when challenging pretrial statements:

> …An attorney should always look at whether the defendant was under the influence of any controlled substances at the time of making the statement, because that can impact the voluntariness of the waiver. The attorney should look at whether the defendant suffered from any mental health problems that could affect the statement. And then the attorney should, if there's any hint of coercion, promises, threats or feeding of information, the attorney should consult with an expert who works with false confessions to review the statement.

(PCR. Vol. 23 p. 95). When asked about whether there are specific types of experts that are taught to evaluate the voluntariness of a confession in terms of a long history of drug abuse, he responded in the affirmative. He went on to describe two types of experts as either a (1) toxicologist who focuses on particular substances and how they affect a person's brain; or (2) an addictionologist who focuses on the entire pattern of substance abuse and behavior (PCR. Vol. 23 p. 96). As was appropriate here, trial counsel should have retained an expert who was trained to evaluate Patrick's "entire pattern of substance abuse and behavior" (*Id.*).

Had trial counsel consulted with an expert tailored to the specific needs of Patrick's case about the videotaped statement, he would have learned that Patrick's statement was not voluntary because Patrick was in withdrawal from cocaine intoxication at the time he made the statement. As Dr. Morton testified, Patrick's state of withdrawal made him uniquely susceptible to suggestion during the questioning:

> A. When I looked at that I saw that he was in mild to moderate cocaine withdrawal. He was also using some other substances, so that could have played effect, but I saw -- I did not see any significant withdrawal effects from opioids. And I asked him about those, and he said he had some, but it was not significant. It was not significant on the tape. He did have psycho motor retardation.
>
> Q. What's that?
>
> A. That's where you're just sitting in one spot very tired, very slowed down, predictable sign, you can also see some psycho motor agitation.

Q. What's that?

A. Which is a restlessness at the same time you're sitting there. Very predictable of cocaine withdrawal that you'll see someone tired, slowed down, confused, irritable. I counted six episodes of kind of spontaneous irritability. It's not like as if he jumped up and started swinging at the detective that was asking him, but a couple of times the detective would go like this, or he would put his hand like, wait, take it easy, that kind of response.

So at least the detective was seeing -- I don't know why he was touching him, I assume he was touching him because Eric was irritable and upset. I saw confusion. I saw him slowed down. I saw some episodes of slow thinking.

I didn't see anything that was dangerous on that particular tape other than people do commit suicide when they are in that kind of withdrawal, especially in that kind of situation. It's not unusual that people would hang themselves in a jail cell, it happens, and that's why you need to be watching people. Frequently gave some recommendations about how long I would wait before I would suggest that you would get a statement, because the statement is not going to be as accurate if you wait. There may be some coercion to get a statement when someone's in withdrawal also.

Q. Is he susceptible to suggestion?

A. Oh, absolutely

(PCR. Vol. 25 p. 132-34).

Dr. Morton opined that Patrick's state of mind at the time was "uncomfortable, feeling horrible, feeling bad, looking for some relief, very hungry" (PCR. Vol. 25 p. 134). Dr. Morton also testified that it normally takes "weeks to months" to withdraw from cocaine (PCR. Vol. 25 p. 134). The time between Patrick's arrest and his statement was a mere twenty-eight and a half hours (PCR. Vol. 25 p. 135). Had trial counsel retained the appropriate expert, this

information would have been presented to the trial court. It would have provided counsel with the evidence it needed to properly challenge Patrick's invalid *Miranda* waiver. None of this testimony was ever presented to the jury.

Trial counsel's failure to investigate Patrick's withdrawal from cocaine at the time of his statement meant that the jury were unaware of his level of impairment and susceptibility at that time. Counsel failed to consult with an addictionologist or a psychopharmacologist who could have reviewed the videotape for signs of cocaine withdrawal, and explained the effect of cocaine withdrawal to the trial court and how it negatively impacted his comprehension of his *Miranda* rights. This information was critical to the court's assessment of Patrick's waiver, and trial counsel's failure to present it prejudiced Patrick.

One of the factors to be considered by courts when determining if a waiver is voluntary is the background and intelligence of the subject. *Ramirez v. State*, 739 So. 2d 568, 576 (Fla. 1999). Clearly, Patrick's cognitive and emotional deficits were important to this calculation. As Dr. Morton testified to, "the most likely explanation of his videotaped behavior is that it's a combination of cocaine withdrawal, of PTSD, as well as depressive symptoms, as well as cocaine exacerbating those two psychiatric conditions" (PCR. Vol. 24 p. 155). Trial counsel failed to consult an expert who could explain to the Court the effects that these deficits had on Patrick's ability to understand his *Miranda* rights, and

withstand a highly stressful and coercive situation such as a police interrogation. Had such an expert conducted a constitutionally adequate investigation, they would have discovered that Patrick's psychiatric condition and his emotional and cognitive deficits affected his ability to understand and waive his constitutional rights. Failure to do so was ineffective performance that prejudiced Patrick.

In denying relief to Patrick on this claim, the lower court stated that:

> 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

(PCR. 1372).

The lower court's reasoning is circular. The purpose of using expert witnesses is exactly to educate the triers of fact as to the details of any condition that a defendant may be suffering from that may not be apparent to the untrained eye. If the lower court's reasoning were applied to other fields of expertise, it would be very rare for any mental health mitigation ever to be found because the defendant appeared "normal" to the untrained eye. This is not a case involving a "battle of the experts". There was nothing presented at trial or at the evidentiary hearing to counter Dr. Morton's testimony. The fact remains that trial counsel was ignorant as to the type of expert that she should have consulted, and did not consult with an appropriate expert. The lower court cannot just baldly assert that the jury

would have believed their untrained eyes, rather than the testimony of a highly trained expert. Relief is warranted.

ARGUMENT III

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO FULLY INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATION EVIDENCE AT THE PENALTY PHASE RESULTING IN PREJUDICE TO PATRICK

A. Introduction

Patrick's counsel was ineffective for failing to present significant available mitigation to both the penalty phase jury and the sentencing judge. Trial counsel's failure in this regard rendered Patrick's death sentence unreliable. "To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. at 521. *Wiggins* recognizes that the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*[4] ("*ABA Guidelines*") are a "guide to what is reasonable." The Supreme Court further held that counsel has a duty "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 668 (citation omitted). Patrick submits that he proved both deficient performance and prejudice and, therefore, a new penalty phase proceeding should be ordered.

[4] *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).

Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. *Williams v. Taylor*, 529 U.S. 362, 415 (2000). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that "in assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527. Furthermore, "[s]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690-691.

The 2003 *ABA Guidelines* impose a duty on counsel to perform an extensive search into the client's background, "[b]ecause the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,' penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." *ABA Guideline* 10.7 – Investigation. (excerpt from commentary, citations omitted). Among the areas the ABA requires counsel to investigate are the client's medical, educational, family, social, employment, and any prior juvenile and adult correctional histories.

Patrick's consistent reluctance and in some instances decisions to forgo certain witnesses and evidence, both at trial and at the evidentiary hearing, cannot be overlooked. However, this Court must not only look at his reluctance, but the reasons for his reluctance and more importantly the fact that his trial team was ill-equipped to adequately inform him of the information he was waiving and ill-equipped to adequately address his mental state and emotional distress. His decision to not present critical mitigation evidence at trial, as well as at the evidentiary hearing, was not a decision founded in logic and reason, but rather a decision made while under emotional stress. In contrast to the trial presentation of mitigation, postconviction counsel was able, with appropriate experts and resources, to present a more thorough and complete picture of Patrick's life history despite his reluctance.

Patrick's reluctance to allow certain mitigation witnesses and testimony to be presented to the jury began prior to trial. As trial counsel Ferraro testified at the evidentiary hearing, Patrick limited her ability to present certain mitigation evidence:

> Q. I want to talk a little about the fact that you stated Mr. Patrick was vacillating throughout your representation about whether to present a penalty phase; correct?
>
> A. Correct.
>
> Q. When you say vacillating, some days he was --
>
> A. Okay with it.

> Q. Other days he may have been reluctant about it?
>
> A. Actually there were other days he said, "I don't want it, because if I'm found guilty I'd rather just give up."
>
> Q. And we talked about a mitigation specialist would have been helpful with Mr. Patrick in terms of his reluctance?
>
> A. Presumably. Maybe, maybe not.
>
> Q. Okay. But at no time did Mr. Patrick say "stop investigating my case"; correct?
>
> A. I can't recall that he specifically said that.
>
> Q. And, again, he was vacillating?
>
> A. Yes.
>
> Q. And, in fact, he initially didn't want his mother as a witness and he did agree to that?
>
> A. Correct.

(PCR. Vol. 27 p. 104-5). In fact, Ferraro testified that "**sometimes he was cooperative, sometimes he wasn't**…there were issues with, 'I don't want you talking to this person,' or '[l]eave this person out of it'" (PCR. Vol. 27 p. 49) (emphasis added). Significantly, counsel was never told to not investigate mitigation. It is clear from Ferraro's testimony that it was an ongoing conversation.

In fact, during Patrick's evidentiary hearing, he was again vacillating about certain witnesses and evidence. During the second day of the hearing, undersigned counsel informed the court that Patrick had changed his mind overnight about what witnesses and testimony he wanted to be presented:

> MS. KEFFER: I already have spoken to Mr. Patrick. I spoke to him at the end of the day yesterday, I spoke to him this morning and while -- after Your Honor's ruling yesterday we were able to keep Mr. Patrick on board with the presentation as we saw fit. Yesterday during the cross-examination of Mr. Reres I think that Mr. Klinger's cross-examination, in directly looking at the client, gesturing to the client when he was using such really inflammatory terms as to what happened to Mr. Patrick, shut the doors on that. The cross-examination was extremely inflammatory and based partially on that, Mr. Patrick is not willing to go forward with certain witnesses at this time.

(PCR. Vol. 25 p. 22-3). During the colloquy, Patrick reiterated his position that he was adamant about his decision to not present certain witnesses and testimony and that he understood the consequences of his decision (PCR. Vol. 25 p. 31-5). Counsel went on to inform the court of the witnesses that were present and willing to testify had Patrick been willing.[5] Sharon Compton, Patrick's stepmother, was one of those witnesses.[6] When the court asked Patrick if he was absolutely sure

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[5] Present and willing to testify were: Sharon Compton, Diana Thoreson, and Sherri Jamelle Deloney. Ray Quirk was not present at the courthouse, but would be present when needed. Patrick had four expert witnesses on his witness list that he had originally intended to call to testify. They are, Dr. William Alexander Morton; Dr. Robert Ouaou; Dr. Steven Gold; and Dr. David Price. Ultimately Drs. Morton, Gold, and Ouaou did testify and Dr. Price did not.

[6] Ultimately, Patrick allowed Ms. Compton to testify. The wealth of information that she offered revealed a much darker and tragic childhood of chronic abuse and violence that Patrick, and those that he loved, suffered at the hands of his father, Don Patrick. Had the jury heard her testimony, it is likely that at least one more juror would have voted for life, and under the law as it existed at the time, a life sentence would have been imposed. As the law stands today, Patrick's non-unanimous, seven to five jury recommendation would also result in a life sentence. *See Hurst v. Florida*, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on

that he did not want these witnesses presented, he replied that he was "absolutely certain" and went on to explain that he was troubled by the thought of presenting testimony that further tarnished his father's reputation (PCR. Vol. 25 p. 38-9). Patrick loved his father, Don Patrick, and whenever he wanted affection, it was his father that he would turn to, and not his mother. Although Don was a very violent man, he was also capable of being warm and caring. As Ms. Compton would testify to at the evidentiary hearing, her early years of marriage to Don "were wonderful" and he "was very attentive…and caring and loving" (PCR. Vol. 26 p. 30-1). She would go on to describe her marriage to Don:

> Q. Even during these good times of your marriage, was he binge drinking?
>
> A. Well, at first not very often, it was maybe six months would go by and then he would -- there were just always the signs sort of, I later began to call it **"the dance."** Because he would be just wonderful and then he'd start to get morose and irritable. And then the next thing you know, he would be drinking heavily.

(PCR. Vol. 26 p. 31) (emphasis added). As violent a man as Don was, he was also capable of being a loving and tender father. Patrick also knew what it was like to "dance" with his father. He wanted his father to be remembered for his loving side

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March 7, 2016 ("the Act"), and the Florida Supreme Court's decisions in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Perry v. State*, __ So. 3d __, 2016 WL 6036982 (Fla. Oct. 14, 2016), and *Mosley v. State*, __ So. 3d __, 2016 WL 7406506 (Fla. Dec. 22, 2016).

and not his dark side. Despite all of the abuse Patrick suffered at the hands of his father, he loved him very deeply.

In an effort to explain his decision, Patrick recognized that he is not an attorney and "couldn't present a case like [his attorneys] do, but personally speaking it's what matters, so that's what I'm basing this on" (PCR. Vol. 25 p. 44). Ultimately, Patrick allowed counsel to present the testimony of Drs. William A. Morton, Steven Gold, and Robert Ouaou. However, at the conclusion of Dr. Morton's testimony, once again, the stress of the hearing caused Patrick to vacillate and again impose restrictions on what witnesses and what evidence could be presented to the court. Patrick asserted that it was his decision to not allow his brother to testify because he didn't "think that any testimony that [his] brother [could] give would be significant" (PCR. Vol. 25 p. 160). Ultimately, with Patrick's agreement, Dr. Gold and Patrick's brother, Carsten, did testify and each gave compelling testimony that the jury never heard because it had either not been discovered at all or had not been presented by trial counsel. *See infra*.

Patrick was vacillating as to what witnesses and evidence could be presented because of the sensitive nature of the testimony and also not wanting to drag those that he loved into his trial. Or as Patrick put it he did not want anyone to be dragged into the "mire of his life" (PCR. Vol. 25 p. 173). Indeed, Patrick assumes a great deal of responsibility for the events in his life.

Aside from his own sense of responsibility and not wanting to trouble his family, the fact that Patrick did not want to present certain aspects of his history, specifically instances of sexual abuse is not surprising. Dr. Gold explained that wanting to avoid thinking about the trauma is part of the diagnosis of PTSD. On cross-examination, when asked why he only briefly mentioned Patrick's childhood sexual abuse, Dr. Gold elaborated that the subject matter was very disturbing to Patrick (PCR. Vol. 27 p. 9). The witnesses and testimony that Patrick did not want presented at trial and subsequently at his evidentiary hearing would have spoken to the traumatic physical and sexual abuse he repeatedly experienced during his childhood. He did not want to relive his traumas through the witnesses' testimony. Nonetheless, at the evidentiary hearing the information was presented in a manner Patrick was comfortable with.

Repeatedly, Patrick informed the court that he did not want Ms. Compton; Drs. Morton, Ouaou, and Gold; and Carsten to testify. However, because postconviction counsel fulfilled its duty by employing a mitigation specialist and hiring experts tailored to meet the specific needs of Patrick, counsel was able to educate him of the importance of each witnesses' testimony and how, had it been presented at trial, it would have more than likely resulted in at least one more juror voting for life over death. More importantly, postconviction counsel, unlike trial counsel, was able to address to some extent his concerns in presenting sensitive

mitigation.

The importance of choosing the appropriate experts, and not just any expert, is vital in a capital trial. "The bottom line is that it needs to be specific with respect to the facts of your particular case. There's not a one-size-fits-all expert. And, in fact, usually you're going to need several different expert witnesses in a capital case" (PCR. Vol. 23 p. 80).

Furthermore, the use of a mitigation specialist is critical not only to the investigation of sensitive issues, but also in creating a trusting relationship with the client. At the evidentiary hearing, Ferraro recognized the same indicating a mitigation specialist would be helpful with a reluctant client especially one who was chosen to fit with a client's particular issues (PCR. Vol. 27 p. 92). In Patrick's case, someone with a background in childhood sexual abuse "absolutely" would have been helpful (PCR. Vol. 27 p. 92-3). Such was not the case here. Rather, the Public Defender's Office representing Patrick as a matter of policy did not utilize mitigation specialists.

The public defender's policy to not utilize mitigation specialists, to not permit travel as a key component of investigating mitigation and to further refuse to obtain even local investigative help in those parts of the country where important mitigation witnesses and evidence could be found flies in the face of the *ABA Guidelines* and the relevant standards of defending a capital case in Florida at

the time of Patrick's case. The institutional policy trial counsel labored under rendered them ill prepared to deal with a reluctant client harboring a great sense of remorse and responsibility and the emotional stress of confronting his lifelong trauma in an open courtroom. Had trial counsel been provided with the appropriate resources as reflected in the *ABA Guidelines* and the relevant Florida standards, counsel would have been able to keep Patrick in agreement with a more comprehensive presentation of mitigation, one which would have meant the difference between life and death. Because, Patrick's jury returned a seven to five recommendation for death, had at least one more juror voted for life, under the prevailing law at the time of his sentencing, Patrick would have received a life sentence. Even the mere addition of Sharon Compton's moving testimony and Carsten Patrick's more complete testimony, as well as presentation of an appropriate trauma expert, such as Dr. Gold, would have swayed one juror.

B. Deficient Performance

The *ABA Guidelines* were "prepared to establish national performance standards for capital representation" (PCR. Vol. 23 p. 63-4). As attorney Adam Tebrugge testified at the evidentiary hearing, these were in fact the standards of practice that were being followed in Florida at the time of Patrick's trial (PCR. Vol. 23 p. 66).

The *ABA Guidelines* provide that investigations into mitigating evidence

“should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). To that end, the *ABA Guidelines* and the *Supplemental Mitigation Guidelines* delineate the appropriate team to be compiled for that investigation and subsequent presentation of mitigation. Mr. Tebrugge agreed that “there’s a pretty well established defense team that’s memorialized in these guidelines and in [Public Defender] offices around the State of Florida, and also to some extent in the Florida Rules of Criminal Procedure” (PCR. Vol. 23 p. 69). It is well established that the team should consist of a lead attorney, a second chair attorney, as well as a fact investigator to look primarily at issues related to the guilt phase (PCR. Vol. 23 p. 70). Additionally the team should be comprised of a mitigation investigator or specialist and someone trained in mental health issues (*Id.*). The evidentiary hearing testimony of the trial lawyers and staff revealed that there was no complete or cohesive legal team in Patrick’s case as recommended by both the *ABA Guidelines* and the *Supplemental Mitigation Guidelines* and as is the standard practice in Florida. Significantly, Patrick’s team did not have a mitigation specialist, did not have someone trained in mental health issues, and did not have appropriate mental health experts.

After repeatedly being denied a mitigation specialist, Reres testified that the

team consisted of himself as lead counsel and Ferraro as second chair. Attorney Melisa McNeill came on late to assist Ferraro (PCR. Vol. 24 p. 39-40). He testified that he was asked to take Ferraro on the case because the Public Defender wanted her to become death qualified (PCR. Vol. 24 p. 39). Neither Ferraro nor McNeill had any real experience preparing a penalty phase for a capital trial. And the only investigator provided to the team was Philip Arth, a retired police officer with no mitigation training.

Reres testified that the primary division of work was that he would take the guilt phase and Ferraro would have responsibility for the penalty phase (PCR. Vol. 24 p. 40). However, Ferraro testified that because Patrick's penalty phase was her first, she "deferred to [Reres'] judgment" (PCR. Vol. 27 p. 88). At the evidentiary hearing, Reres was asked about whose decision it was when choosing mental health experts. Was it his, Ferraro's, or a team decision? Reres responded that it was Ferraro's decision (PCR. Vol. 24 p. 53). Reres believed it to be Ferraro's responsibility to determine which mental health experts were appropriate and Ferraro believed it to be Reres' and in fact indicated that he unilaterally chose Dr. Fichera and Dr. Ribbler (PCR. Vol. 27 p. 106). As a result, she sent no records to Dr. Ribbler because she "**[thought]** Mr. Reres took care of all of that" (PCR. Vol. 24 p. 40; Vol. 27 p. 88, 106) (emphasis added).

While, Reres attempted to counsel Ferraro on the conduct of the penalty

phase, he admitted that his overwhelming focus was on the guilt phase (PCR. Vol. 24 p. 31). Additionally, while Reres exercised a supervisory role over the team, his workload was excessive. At the time of Patrick's case, Reres was "reviewing all the cases that came in [to the public defender's office] and [was] assigning them to the various attorneys" (PCR. Vol. 24 p. 39). "At that point in time [the public defender's office] started to lose a lot of [its] capital lawyers" and cases were being assigned on "rotation" and "if [a lawyer] had eight cases and the next lawyer had nine, [that lawyer] got the ninth case that came in" (*Id.*). So the mitigation investigation was essentially divided up between two inexperienced attorneys and a former police officer fact investigator. As a result valuable mitigation evidence, which was readily available, was never investigated and presented to the jury. Because of the breakdown in Patrick's legal team, only part of his life narrative was presented to the jury.

i. No mitigation specialist was utilized

According to the *ABA Guidelines*, it is imperative that someone who functions as a mitigation specialist be part of the team:

> The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and

> reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Commentary to *ABA Guideline* 4.1 at 959. The *Supplemental Mitigation Guidelines* are also emphatic that a mitigation specialist be included as a member of the defense team. *Supplemental Mitigation Guideline* 4.1 states that: "In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government whose qualifications fit the individual needs of the client and the case." *Id*. at 680 The *Supplemental Mitigation Guidelines* further explain that such individuals should have:

> the training and ability to obtain, **understand and analyze** all documentary and anecdotal information relevant to the client's life history. Life history includes, but is not limited to: medical history; prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; **substance abuse history; mental health history; history of maltreatment and neglect; trauma history;** educational history employment and training history; military experience**; multi-generational family history**; genetic disorders and vulnerabilities; as well as **multi-generational patterns of behavior; prior adult and juvenile correctional experiences**; religious, gender, sexual orientation, socio-economic, historical and political factors.

Supplemental Mitigation Guideline 5.1B at 682 (emphasis added).

> Additionally mitigation specialists must be:
>
> ...skilled interviewers who can recognize and elicit information about mental health signs and symptoms both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others, that will be sufficient to

> overcome barriers those individuals may have against disclosure of sensitive information, and to assist the client with the emotional impact of such disturbances. They must have the ability to advise counsel on appropriate mental health and other expert assistance.

Supplemental Mitigation Guideline 5.1C at 682. As Tebrugge testified, a mitigation specialist "is somebody, who by virtue of their experience and training is qualified to conduct a wide ranging investigation of the influences upon the defendant that might be relevant in a capital sentencing proceeding" (PCR. Vol. 23 p. 74). No member of the defense team was able to fulfil this function.

Lead trial counsel Reres testified that he had attempted to have the Public Defender's Office hire a full-time, in-house mitigation specialist, but that it had been vetoed by the Public Defender, Howard Finkelstein (PCR. Vol. 24 p. 32). He further testified that Finkelstein had then said that he would look at hiring mitigation specialists on a case by case basis (PCR. Vol. 24 p. 37). However, in Patrick's case, the request for a mitigation specialist was declined, despite repeated requests by Reres (*Id*.). Reres also testified that Finkelstein did not believe in the use of mitigation specialists (*Id*.). When asked if he ever thought to bring to the attention of the Court that he felt the legal team was missing an essential component due to Finkelstein's refusal to hire a mitigation specialist, Reres responded:

> No I did not. It was very clear at that point in time that if I was going to be able to continue as a public defender I needed not to

> have any disagreement with any of his policies in any way public. I had been ordered not to be quoted in the press on any case for any reason. And that if he saw my name in the public in the press, he would fire me. And under those circumstances -- and I'm not quite sure what Judge Holmes would have been able to do. Certainly she couldn't order Mr. Finkelstein to do what was necessary.

(PCR. Vol. 24 p. 38).

He failed to see that the judge "retains supervisory authority over how the case is handled" (PCR. Vol. 23 p. 78). Throughout the course of preparing for Patrick's trial, Reres repeatedly asked for, and was repeatedly denied, a mitigation specialist (PCR. Vol. 24 p. 37). Had a mitigation specialist been hired, he testified that a mitigation specialist would have improved the quality of his investigation (PCR. Vol. 24 p. 64). He felt that by not having been allowed to hire a mitigation specialist, he had been "[q]uite clearly handcuffed, stabbed in the back. A little further than handcuffed." He felt that the denial "sent [them] back to the dark ages" (PCR. Vol. 24 p. 65).

Ferraro echoed the same sentiments of the importance of a mitigation specialist. During the evidentiary hearing when asked about the role of a mitigation specialist, Ferraro testified:

> A. A mitigation specialist is someone – my understanding is someone who assists the attorneys, the trial attorneys in developing background information. And usually they are from, my understanding, has some type of a specialty, more or less in psychology. To help with the case with the client, with the

family members, to gather information, to gather background and to help the attorneys put the case together.

Q. Okay. And a mitigation specialist would also be helpful with a reluctant client?

A. Yes, if the client got along with that person, yeah, sure.

Q. And you would want a mitigation specialist that was able to develop rapport with the client?

A. Certainly.

Q. You would choose a mitigation specialist who would sit (sic) with a particular?

A. Yes.

Q. And in Mr. Patrick's case, maybe somebody who had a background in childhood sexual abuse?

A. Absolutely.

Q. Okay. You would also want a mitigation specialist to help with the reluctant family members; correct?

A. Correct.

Q. And you talked with Mr. Klinger about Ms. Franke, Mr. Patrick's mom, being very reluctant to open up about the abuse in the home.

A. Correct.

Q. I think you said actually she minimized it?

A. My opinion was that she minimized the abuse in the home.

Q. And so these are all really very sensitive areas to be talking to a family about?

A. Yes, it is.

Q. They are areas most people would not want to bring light to?

A. Correct.

Q. So certainly somebody who had a background, a mitigation specialist who had a background in trauma or sexual abuse would have been able to assist in speaking to the family?

A. I agree.

(PCR. Vol. 27 p. 92-4). Clearly, Ferraro recognized the importance of having a mitigation specialist that would meet the specific needs of Patrick, but failed to seek to have one appointed. By her own admission, she was not "privy" to the conversations between Reres and Finkelstein regarding the hiring of a mitigation specialist even though she was the attorney responsible for the penalty phase. Ferraro, as the penalty phase attorney, had a duty to assure a proper mitigation investigation was conducted. She could have, and should have, informed the Public Defender that she needed a mitigation specialist in order to fulfill her duties, but nowhere in her testimony does she state that she asked for one. In fact, she admits that she was not "privy" to the conversations between Reres and Finkelstein regarding the hiring of mitigation specialists. She failed to fulfill her duty.

Although investigator Arth was assigned to the case, he was not a mitigation specialist by any means. Reres characterized Arth as not being "**particularly not suitable for that job…not at all**" (PCR. Vol. 24 p. 43).

When attorney McNeill took the stand, she also testified that she believed hiring a mitigation specialist would have been beneficial to Patrick's case (PCR. Vol. 24 p. 148). When asked why she went on to say:

> Well, mitigation specialists have training that I don’t have. A mitigation specialist is trained [in] mental health areas and social work and they are also trained in specific ways to deal with witnesses, family members. They also have a different focus, you know, they’re a mitigation specialist, they are not a lawyer. So they are not trying to lawyer and prepare the case for trial, they’re simply trying to develop mitigation and also to develop a relationship with your client. And so the time that they are with your client is spend [sic] talking to your client about potential mitigation or their life history.
>
> Where when you’re an attorney, your meetings are about the law, about motions you’re going to file. And you do the very best you can to discuss mitigation issues and develop that, but you’re wearing two hats when you do it as an attorney.

(PCR. Vol. 24 p. 148-9). With respect to whether or not it was an office policy to not have mitigation specialists, McNeill testified that she didn’t “know if it’s a policy, but it’s [her] understanding that our office does not employ them” (PCR. Vol. 24 p. 50). Finally, McNeill testified that she “met with [ ] co-counsel [Ferraro] and [she] recommended that [they] hire a trauma specialist” in light of the extensive trauma that Patrick had endured throughout his entire life (PCR. Vol. 24 p. 51). No such expert was ever hired.

The institutional policy of the Public Defender in denying the team a mitigation specialist meant that Patrick’s defense team rendered deficient performance. Given the recognized importance of mitigation specialists to the investigation and presentation of mitigation in a capital case, had one been afforded to Patrick, the benefits would have been realized. A mitigation specialist

who had a background in childhood sexual abuse and trauma would have been beneficial in counsel's efforts to convince Patrick to allow testimony before the jury regarding his extensive history as a victim of sexual assault. One would have assisted in getting Patrick's mother, Ingrid, to be more forthcoming about the abuse she and her boys suffered. Succeeding in getting a witness to speak to a courtroom of strangers about sensitive and private information doesn't come easily. A mitigation specialist would have been able to build a rapport with the client, family members, and family friends allowing for more compelling mitigation evidence to be presented to the jury as it was done in Patrick's postconviction proceedings.

ii. Failure to travel to conduct witness interviews and gather records

Defense counsel in a capital case is required to seek and obtain records that will inform their trial strategy. *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). While trial counsel obtained numerous records with pertinent information, that information would have led a reasonable attorney to investigate further. Here, despite having knowledge of, and in some instances accurate addresses for, various mitigation witnesses and despite knowing that Patrick resided in several different states throughout his life, trial counsel failed to investigate further. The minimal investigation that was actually done, was done overwhelmingly by means of written correspondence and the telephone. This type of cursory investigation goes

against both the *ABA Guidelines* and the *Supplemental Mitigation Guidelines*. The *Supplemental Mitigation Guidelines* exhort that the interviews of potential mitigation witnesses be done face-to-face and one-on-one. *Supplemental Mitigation Guideline* 10.11C at 689. Importantly, the *Supplemental Mitigation Guidelines* acknowledge that multiple interviews will be necessary. *Id.* A mitigation investigation does not simply mean write a letter or make a phone call and accept no for an answer. Yet, that is exactly what was done in Patrick's case.

Reres was well aware of the need to conduct face-to-face interviews with potential mitigation witnesses. He was also aware that Patrick had extensive history in Alaska, Colorado, and California (PCR. Vol. 24 p. 46). He testified that he "felt it was necessary to have an on-the-ground investigator with some knowledge of the local records systems" in order for him to effectively prepare his defense (*Id.*). "[O]n numerous occasions" he sat down with Finkelstein and told him that it was "imperative" that there be "boots on the ground" (PCR. Vol. 24 p. 47). Reres was emphatic that face-to-face contact was not just a matter of better policy, but rather that he "would say **it's imperative, I mean, it's not better, it has to happen**" (PCR. Vol. 24 p. 50-1) (emphasis added). Ferraro, too, acknowledged that "it's hard to say no to someone who's right there in your face," but yet there was no face-to-face interviews with witnesses who would have been able to offer compelling mitigation on Patrick's behalf (PCR. Vol. 27 p. 114).

The importance of speaking to witnesses face-to-face was best illustrated by the testimony of Sharon Compton, Patrick's stepmother who testified at the evidentiary hearing. Ms. Compton offered compelling insight into the extent of Don Patrick's abuse. *See infra*. Ms. Compton lived in Hotchkiss, Colorado, and had been contacted by Phil Arth in 2009 by letter inquiring as to whether or not she had any information to offer in support of Patrick's defense (PCR. Vol. 26 p. 48). Although she did respond to that letter saying that she did not have any relevant information, no further attempts were made to explain how she could be of use to Patrick. Subsequent to those letters being exchanged, she did not hear again from Patrick's defense team (*Id*.). What trial counsel failed to do was explain to her the nature of mitigation. They made no attempt to explain to her what type of information she could provide that might be useful. Ms. Compton testified that she "last saw [Patrick] when [she] put him on the bus that Thanksgiving, that was in -- …, it was when – was it '91? Anyway, something like that" (PCR. Vol. 26 p. 46). Because trial counsel failed to explain to her what mitigation entails, she mistakenly believed that because it had been nearly fifteen years since she had seen or spoken to Patrick, she wouldn't have any valuable testimony to offer. At the evidentiary hearing, she testified that "absolutely" if someone had sat down with her and explained how the type of testimony she gave during the evidentiary hearing would have been helpful at Patrick's trial, she would have come to Florida

to testify (PCR. Vol. 26 p. 49). The jury was deprived of hearing compelling mitigation that Ms. Compton could have offered.

The Public Defender's policy of conducting social history investigations by letter and telephone is objectively unreasonable. The policy of not travelling, and not using "boots on the ground" compromised the social history investigation. Counsel's performance was rendered deficient by the failure of any team member to travel and conduct in-depth face to face interviews.

iii. Counsel was ineffective in failing to compile an adequate social history

The only defense witnesses put on at the penalty phase were family friend Doris Dolighan, who had only been contacted by telephone, and who testified via video conference from Denver (R. 132-7); Patrick's older brother, Carsten Patrick, who had only been contacted by telephone, and who had had no face-to-face contact with the defense team before he was flown to Florida to testify; investigator Phil Arth; Patrick's mother, Ingrid Franke; jail pastor Jerry Singleton; Patrick himself; and psychologist Dr. Christopher Fichera. However, the combined testimony of these witnesses barely scratched the surface of the extent and horrific nature of Patrick's life history. Because trial counsel honed in on the abuse doled out by Patrick's father, to the exclusion of a complete family picture, the jury only heard half of the story.

There was a plethora of mitigation that went undiscovered. If the witnesses presented at the evidentiary hearing had been contacted, interviewed, and presented, the defense team would have been able to present a cogent narrative as to Patrick's wretched life and social history, but without a mitigation specialist and an appropriate, comprehensive approach to the investigation, many witnesses were never located, nor relevant information discovered.

Carsten Patrick, Patrick's older brother testified at the penalty phase of his trial. He also testified at the evidentiary hearing. Carsten's testimony at the evidentiary hearing offered insight into the abuse that Patrick suffered at the hands of his mother. It wasn't just Don Patrick who was abusive. It was an unreasonable strategy for trial counsel to focus exclusively on Don and to completely ignore the extent to which the Patrick boys also suffered abuse at the hands of their mother. Carsten testified that he and Patrick "lived kind of in angst amongst **both of our [parents], but with my mom as much as my dad**" (PCR. Vol. 26 p. 5) (emphasis added). He elaborated by saying that:

> I think I felt like we walked on eggshells most of the time. And we were constantly worried about, you know, what was going to be the next infraction or what was going to be the next thing we were going to get slapped or yelled at or, you know, berated about, that kind of thing.

(*Id.*). When asked about his testimony at trial, he stated that the emphasis was solely on his father's abuse and no focus was given to his mother's abusive nature:

> …the testimony was mostly directed towards my father and his abusiveness. His abuse of my mother, of us, pretty much totally focused on my father's abuse, you know, with regard to Eric and myself.
>
> Q. Did they ask you any questions about your mother and her role as a disciplinarian in the home?
>
> A. If there was, it was -- I don't remember any -- it wasn't -- there was no real focus on my mom at all, it was mostly centered towards my father. It was very scant, if anything, with regard to my mother.

(PCR. Vol. 26 p. 7-8). It wasn’t just Don who was terrifyingly abusive. Their mother, Ingrid, was just as frightening and there is no sound strategic decision for trial counsels’ decision to not present this mitigation to the jury. As Carsten said himself, trial counsel did not present fifty percent of the abuse they suffered at home to the jury during the penalty phase (PCR. Vol. 26 p. 7).

At the evidentiary hearing, Carsten described his mother’s style of “discipline” as “very rigid” and if they “ever stepped out of line or said something she wasn't pleased with, it didn't matter where we were at, whether we were in a grocery store or at a friend's house or outside, whatever, no matter where we were at, she smacked you in the mouth or hit you with whatever was available to her to make sure that you understood” (PCR. Vol. 26 p. 10). When asked to describe how she would punish him and his brother, Carsten testified: “Well, with whatever was available most times. She had a particular affinity for a wooden spoon, but there was one time she hit me with a meat clever. She would go after either one of us

with whatever she happened to have in hand" (*Id.*) When asked if there was anything else that she would use to implement physical punishment, Carsten responded that a "[t]wo by four comes to mind" (PCR. Vol. 26 p. 10-1). But, the abuse didn't end with Don and Ingrid. The cycle of abuse would continue with others.

After divorcing Don, Ingrid began dating a man by the name of David House. Carsten testified that "[h]e was a drinker...This guy drank pretty heavily, and was pretty emotionally -- he was an ex -- he had been an amateur gold glove heavy-weight boxer, so he was a pretty formidable guy" (PCR. Vol. 26 p. 14). According to Carsten, at some point Ingrid began to question whether or not she wanted to continue the relationship with House. One evening while she was out of the home, House came over to the home that she shared with Carsten and Eric "drunk and woke [Carsten] up…and [ ] wanted to know where [Ingrid] was" (*Id.*). House "took [Carsten] down the road" and "drove down the street and [] waited until [Ingrid returned] home" (*Id.*). "At that point [Ingrid] didn't know [Carsten] was out of the house. And [House] grabbed [him] by [the] neck and held [him] up against the door and said, 'I've got your son out here, you need to open the door.' So she did and…[House] reached over and grabbed [Ingrid's date] by the tie and hit him so hard that the guy couldn't even see a thing…there was blood all over the place" (PCR. Vo. 26 p. 15). That wasn't the only incidence of violence that

occurred. Carsten testified that during a similar prior incident, Don "woke [him] up one night, again, in the middle of the night…[and] did kind of the same thing, he waited upstairs, waited in their room for [Ingrid and House] to get back. And when they did get back…he told me to just go back to bed…As soon as they came in and came upstairs, my dad rushed out of the bedroom and got in a fight with David…" (PCR. Vol. 26 p. 14-7). Throughout the Patrick boys' youth, they were exposed to violent, volatile relationships that purported to represent what it meant to be loved. They never knew what it felt like for home to be a safe-haven. Despite having information regarding House's abuse, trial counsel did nothing to find House (PCR. Vol. 27 p. 100). In fact, he would have been easily found as he had been living in the same place for at least ten years. Unfortunately, House is now deceased.

Carsten further testified that he and Eric never felt safe in the house with their parents, and often talked about running away from home: "there was many times that [Eric and I] sat there and talked about it. You know, how could [we] get away and who could we go live with so we didn't have to deal with them. I would say that most of our life we were probably spent wishing we were somewhere else" (PCR. Vol. 26 p. 19). They lived in constant fear, wishing to be anywhere but home. The jury never heard of the full extent of the abusive life Patrick survived, the jury only heard a very one sided version of Patrick's traumatized childhood.

Sharon Compton was Patrick's stepmother. As noted *supra*, she was contacted by Arth via letter and wrote back saying that she had nothing to offer. At the evidentiary hearing she offered captivating testimony that would have provided the jury with a more vivid picture of the man that Patrick called dad. The man that, as a child, if he needed a hug or a show of affection, he went to instead of his mother.

She testified that in the beginning of her marriage to Don, he was "wonderful" and "attentive [ ] and caring and loving" (PCR. Vol. 26 p. 30-14). But, as the years progressed, Don's binge drinking worsened. He would become irritated and frustrated and would "focus[ ] on [her] and everything was [her] fault" (PCR. Vol. 26 p. 32). She described Don as "a controller" and that "he was going to have things his way" (PCR. Vol. 26 p. 33). He was volatile and often he turned physically violent. According to Sharon, "[t]here were some bruises,…,on [her] arms, especially. When he tried to hit [her] in the face or the head, [she] would grab a pillow or something, because…, he would be so drunk" and "didn't have real good balance" (*Id.*) Sharon wasn't allowed any independence or autonomy. Don "would make [her] -- he wouldn't let [her] get dressed sometimes…[she] didn't have to be totally naked, but he wouldn't let [her] put on [her] bottoms…" so that she couldn't leave the house (PCR. Vol. 26 p. 34). But it wasn't just Sharon who was potentially at risk of suffering the consequences of Don's violence.

Sharon testified that "her greatest fear" was that if her son, from her first marriage, ever tried to intervene and protect her from Don that "Don would use that as an excuse to be very, very abusive. [He] was a very strong, physical man [ ]" and Sharon feared for her son's safety (PCR. Vol. 26 p. 36). Ultimately, it was fear for her own life that made her leave Don. During her testimony, she described an incident where Don "had gone on a binge and it just didn't end" (*Id.*). He "literally would not let [her] out of the house [ ]" and "wouldn't let [her] use the phone…" (PCR. Vol. 26 p. 37). One afternoon during a ten day binge, Don got "particularly rough" (*Id.*). She testified that:

> …he was just calling me names and blaming me for everything. And he just seemed more agitated than usual, than I had seen him, just more angry. And he almost just looked like he was going to explode.
>
> So he started trying to punch me. And I had a couch pillow up around my head and he lost his balance and fell. And at that point I ran for the door.
>
> And our, condo there was – our door was here and the other door, the next door neighbors were right here and there was a metal railing, and I ran out the door and grabbed that metal railing and was banging on the door. And Don had ahold of my arm on railing and was trying to pull me in and I was so afraid. I've never been that afraid in my life. I was afraid if he got me back in that condo, he would kill me….

(PCR. Vol. 26 p. 37-8). Even after surviving all the abuse she suffered at the hands of Patrick's father, she testified that she loves Eric "[l]ike he's her own" (PCR. Vol. 26 p. 47).

During her relationship with Don, Sharon spent time with Eric "off and on" (PCR. Vol. 26 p. 41). During those times, she observed Don with Eric. She testified that to her "Eric was like a young boy seeking his dad's approval. And kind of almost in a joking way his dad would kind of almost challenge Eric, or put himself -- he would say things like, oh, you'll never be as good as the old man. When Eric would talk about something he had done or, you know, bring something he had drawn, instead of just ever getting his dad to say, wow, son, that is really outstanding, he just never got that kind of a response. It was always more of a, it will work, that will do, but that's not quite as good as -- and I always kind of marveled at the fact that Eric and his brother were polite to Don, in lieu of the fact that he treated the both of them that way. Kind of, you'll never measure up" (PCR. Vol. 26 p. 42).

Hank Dube's, testimony was perpetuated at the evidentiary hearing from his home town of Delta Junction, Alaska. Dube recalled working with Don Patrick at Fort Greely, Alaska when they were in the military together as instructors at the Cold Weather Mountain School (PCR. Vol. 26 p. 65). He met the Patrick family when Eric was around three years old (PCR. Vol. 26 p. 67). He testified that initially, the Patrick family lived off base in "primitive" conditions without electricity (PCR. Vol. 26 p. 68).

Dube testified that on one occasion he had seen Don Patrick drinking on the job. This concerned him because of the hazardous nature of the work. Had this testimony been presented at trial, the jury would have better understood the nature of Don's alcoholism and had a better understanding of the environment in which Patrick grew-up. He testified that his family and the Patrick family would socialize together "about twice a month" either at the Dube's house or the NCO club (PCR. Vol. 26 p. 71). He said that the relationship between Don and Ingrid was "cold" and that he had seen bruises on Ingrid. He testified that Don was not engaged much with his children, and did not show them affection (PCR. Vol. 26 p. 73). He also testified that "there wasn't much love" between Ingrid and the children, and that she was extremely verbally abusive to the boys (*Id.*). He described Eric as a "loner" and said that he did not appear to be a happy child (PCR. Vol. 26 p. 74). He said that the Patrick family never participated in any of the family activities arranged on the base. Dube testified that he would have been available and willing to testify at the penalty phase in 2009 had he been asked.

Sharon and Dube would have provided critical corroboration to the testimony of Ingrid and Carsten. It was imperative that trial counsel conduct a complete mitigation investigation which necessitated going beyond interviewing the immediate family, but this thorough investigation was never conducted. There was no reasonable strategy decision, only institutional policies, contradictory to

well established standards of practice, which tied the hands of counsel at every turn.

Trial counsel failed to fully investigate Patrick's life history resulting in invaluable mitigation evidence never reaching the jury. The fact that trial counsel presented some witnesses does not preclude a finding of deficient performance. In *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009), this Court made clear that where trial counsel presents a "bare bones" rendition of some areas of mitigation despite the existence of a wealth of mitigating evidence through available witnesses who were not interviewed and numerous public records that were not sought out, counsel's performance falls well below established *ABA Guidelines*. The testimony presented at the evidentiary hearing demonstrates that Patrick's trial counsel's performance fell well below these established guidelines.

iv. Failure to choose experts tailored specifically to the needs of Patrick's case and to adequately investigate mental health mitigation

At the penalty phase, it is critically important to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors. *See* Scott E. Sundby*, The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case). To accomplish this goal, counsel should, in

part, “**choose experts who are tailored specifically to the needs of the case**, rather than relying on an ‘all-purpose’ expert who may have insufficient knowledge or experience to testify persuasively”. Commentary to *ABA Guideline* 10.11 at 1061 (emphasis added). Patrick’s trial counsel failed to choose experts specifically related to his needs, and instead chose an “all-purpose” expert, resulting in invaluable mental health mitigation information never being presented to the jury. At the evidentiary hearing Adam Tebrugge testified:

> Well, the bottom line is that it needs to be specific with respect to the facts of your particular case. **There’s not a one-size-fits-all expert**. And, in fact, usually you’re going to need several different expert witnesses in a capital case.

(PCR. Vol. 23 p. 80) (emphasis added). Beyond choosing an expert tailored to the client’s case and needs, because a “mental health professional is typically introducing concepts to a jury that they may not have been familiar with prior to coming into the courtroom” it is imperative that counsel “does a good job of explaining those concepts and making them resinate (sic) with the facts of your case” (PCR. Vol. 23 p. 86).

Additionally, the more complete the psychosocial history, the more tailored the experts can be. But, due to the fact that Patrick was not afforded a mitigation specialist, no one on Patrick’s team traveled to locate critical witnesses or conduct face-to-face interviews, and the investigation zeroed in on only half of Patrick’s abusive history, trial counsel failed to fully develop Patrick’s psychosocial history.

When asked about the limitations imposed on his ability to conduct a mitigation investigation, Reres responded that he felt “[q]uite clearly handcuffed, stabbed in the back. A little further than handcuffed….It sent us back to the dark ages” (PCR. Vol. 24 p. 65). Had trial counsel developed a complete psychosocial history for Patrick, experts specifically tailored to his needs could have been selected and the presentation to the jury would have explained how Patrick’s traumatic history resonated in the facts of his case. Instead, counsel chose a one-size-fits-all expert, an expert he had used over and over again.

The only defense expert presented to the jury was Dr. Fichera, a forensic psychologist. Even Reres testified that using Fichera was really in a general sense (PCR. Vol. 24 p. 121). Dr. Fichera interviewed Patrick on three occasions—November 17, 2006, March 23, 2007, and May 22, 2009. However, trial counsel failed to provide Dr. Fichera any guidance to “integrate his professional training with the facts of [the] case” or a reasonable mitigation presentation (PCR. Vol. 23 p. 86). Rather, Fichera presented Patrick’s life history, such as he was aware of it, via a PowerPoint presentation. The *exact same* PowerPoint presentation that he had presented on many prior occasions unrelated to Patrick’s litigation (PCR. Vol. 24 p. 54). Reres was well aware that “he had used [the presentation] several times” (*Id.*). Not only did Reres know that the PowerPoint was used for other capital defendants, but so did the jury (R. 3105). There simply was nothing individualized

about this presentation, a fact the State was quick to point out on cross-examination (*Id*.). It merely plugged Patrick's life history into a formula based on a study done some 50 years ago on a group of individuals unrelated in any way to Patrick. Another point the State capitalized on during cross-examination (R. 3106).

Dr. Fichera's area of specialization, if he has one, is forensic psychology, which is to say court work. He was not a specialist in trauma, drug addiction, or neuropsychology and could not explain the nuances of Patrick's tortured history to the jury in any more than the most general terms. The fact that he used a pre-existing PowerPoint which was merely tweaked to fit Patrick makes a mockery of the need to paint the client as a true individual with a unique life history. And more importantly, ignores that choosing the proper expert is crucial in assuring that a jury properly views mental illness as a mitigator as opposed to mistakenly viewing it as an aggravator. Reres recognized this at the evidentiary hearing:

> …it's a very delicate balance between presenting [mental illness] testimony and having jurors actually look at it as mitigating, because plenty of studies show jurors are not apt to do that unless they are properly educated as to what it really means in terms of the law…

(PCR. Vol. 24 p. 122). Even though trial counsel understood the importance of selecting the appropriate expert to educate the jury, they still chose an expert who failed to meet that need.

Dr. Fichera concentrated his testimony on Patrick's "moral culpability" and "predisposition" to violence and spoke of "risk factors" for criminal behavior. Dr. Fichera testified entirely in terms of predisposition to violence which opened the door for the State to talk about future dangerousness—which would have been entirely impermissible had the defense not opened the door—thus, turning mitigation into aggravation.

The only mental health witness presented to the jury failed to properly understand the delicate balance between presenting evidence of mental health mitigation and having jurors actually look at it as mitigating and not aggravating. What the jury heard was that of an ill-prepared and ill-informed expert witness, psychologist Dr. Christopher Fichera. While trial counsel did consult with other professionals, the investigation was tainted by a complete lack of understanding of the issues at hand and a breakdown in the uniformity of the legal team.

Trial counsel consulted with another forensic psychologist, Dr. Donna Weiss. Even though Dr. Weiss had developed a closer relationship with Ms. Ferraro, for reasons unknown to her, Reres made the unilateral decision to hire Dr. Fichera instead.

> A. I had hired her, and I just don't remember what happened, but at some point George said hire Dr. Fichera. Mr. Reres had made the decision that he wanted to use Dr. Fichera, so he hired Dr. Fichera. He also had hired Dr. Ribbler.
>
> Q. Can I stop you there?

> A. That was independent, I don't know when it happened. We had not communicated about that, that was a unilateral act.

(PCR. Vol. 27 p. 59). By her own admission, there was no communication between the trial attorneys about what expert would be best suited for Patrick. When asked what she learned from Dr. Weiss, Ferraro testified that "she said there was potentially maybe some post traumatic stress disorder" (PCR. Vol. 27 p. 60). Even though Dr. Weiss had recognized that Patrick was potentially suffering from PTSD, ultimately, she would not testify before the jury. Instead, Reres made the unilateral decision to hire Dr. Fichera. An expert who testified entirely in terms of predisposition to violence.

The defense also consulted with Dr. Terry Stockholm, a forensic toxicologist. Ferraro testified that she would not have been helpful at the penalty phase:

> ..she's a toxicologist, formerly worked at the Medical Examiner's Office as a toxicologist before she went into private practice. I had hired her because of the issue of Eric's substance abuse and potentially **his use of drugs on the night of the incident**.

(PCR. Vol. 27 p. 62-3) (emphasis added). First of all, toxicology was not the appropriate area of expertise to explore Patrick's drug addiction, and his drug related behavior on the night of the crime. The more appropriate expertise would have been in pharmacy, pharmacology, and especially psychopharmacology, which deals with the effect of substances on behavior. This choice of expert was the result

of Ferraro's lack of experience in death penalty cases. Reres, as lead counsel should have been able to direct her to a more appropriate expert, but for reasons unexplained, he did not.

The second problem with the way that Dr. Stockholm was utilized is that Ferraro was focusing solely on Patrick's drug use on the night of the crime. She did not attempt to look into his long history as an addict, nor did she look at the drug use in the weeks leading up to the crime. Those issues could have indicated powerful mitigation. As a result of Ferraro's inexperience, and Reres' hands off approach to his supervisory role, the jury never got to hear anything more than the most superficial evidence of Patrick's enormous history with drugs, and its effects on him.

Had trial counsel consulted with a suitable addictions expert, the jury would have heard the severity and extent of Patrick's addiction. At the evidentiary hearing, Dr. Morton gave a detailed description of Patrick's drug history which included very early and progressive use of marijuana, exposure to alcohol at an early age, use of hallucinogenic drugs as early as sixth grade, and finally use of opioids and heroin, which became his drug of choice (PCR. Vol. 23 p. 113-5). Trial counsel failed to choose an appropriately tailored expert for Patrick's needs. Dr. Stockholm failed to develop any information about Patrick's drug tolerance, his drug use leading up to the night of the crime, or his drug use after the crime.

Dr. Morton, however, did develop this information and during the evidentiary hearing opined as to Patrick's intoxication at the time of the crime:

> …he told me that he had drank approximately 18 to 20 beers. That's tolerance --
>
> Q. Uh-huh.
>
> A. It's not the same as someone that doesn't drink beer, and then drinks 18 beers, they would probably be passed out, but he might have the affect [sic] of five to eight beers. He would have been maybe intoxicated, feeling the effects. He used cocaine, he knows he used it in the morning, he used it throughout the day. He could not give me an accurate number of times he used cocaine. He also had some prescription opioids called narco, that was given to him by Dr. Schumaker [sic], the victim. And I think he knew he had 24 of those and he used those up. So he used those three drugs pretty much impulsively, compulsively throughout the day up to the evening.
>
> Q. What affect would that cocktail of drugs, of alcohol, have had on his behavior?
>
> A. That cocktail of drugs would have some effects of each. But more than likely the most dramatic would be from the cocaine, which would cause irritability, impulsivity, aggravation, anger, aggressiveness, aggression.

(PCR. Vol. 25 p. 125-7). Dr. Morton opined that Patrick was greatly affected by his intoxication on the night of the crime. Due to the fact that Patrick was quite intoxicated, his actions would have been overdone due to the stimulants. He would have been paranoid and engaged in unnecessary repetitive behavior. Both behaviors are typical responses to cocaine use (PCR. Vol. 125 p. 128).

Trial counsel also consulted with a neuropsychologist, Dr. Ribbler. According to Dr. Robert Ouaou, a neuropsychologist who testified on behalf of Patrick at the evidentiary hearing, the testing conducted by Dr. Ribbler "was very brief, it was a screen at best" as opposed "[t]o a diagnostic testing battery" (PCR. Vol. 25 p. 88). Because of the inadequate neuropsychological screening, no evidence of Patrick's brain impairment was ever presented to the jury. Dr. Ribbler's evaluation was cursory to the extreme. As Dr. Ouaou, testified at the evidentiary hearing:

> …**We need a comprehensive test battery. I mean, if you look at the battery of tests that he did, it approximately took, the face-to-face cognitive tests, approximately an hour, whereas we spent many hours together**.

(PCR. Vol. 25 p. 87-8) (emphasis added).

Reres failed to recognize the superficiality of Dr. Ribbler's evaluation and did not request further, more comprehensive tests. Tests that would have shown the jury the brain damage that resulted from Patrick's extensive drug use, brain injuries, and childhood traumas and the effect that that damage would have had on his behavior. Dr. Ouaou's comprehensive battery shows that Patrick does indeed suffer from neuropsychological deficits, probably caused by his extreme drug abuse, and which contribute to his impulsivity and lack of judgment.

Dr. Ouaou met with and evaluated Patrick at Union Correctional Institution on July 10, 2015 where he "administered a fairly standard, comprehensive

neuropsychological test battery" (PCR. Vol. 25 p. 76). One test that he administered was the test of premorbid functioning and a current IQ test, to determine if his IQ has declined over the years. Dr. Ouaou explained:

> A. It is one way at getting at what somebody's I.Q. should be, given there are no intervening events or disease process. It's a vocabulary test, basically, that is correlated with I.Q. that has been known to be rather pervious to traumatic brain injury.
>
> Q. So it's what his I.Q. would be absent any traumatic brain injury?
>
> A. Yes.
>
> Q. And how did he do in the premorbid test?
>
> A. He scored in the high average range, at the 79 percentile. Meaning out of 100 folks of his age, he's better than 79 percent. As a point of reference with the rest of the test, we would predict that his I.Q. is in the high average range. And he came off -- his vocabulary to me came off as such during the initial period of our rapport building.
>
> Q. Okay. The next test?
>
> A. The Wechsler Adult Intelligence Scale IV Edition, which is the gold standard I.Q. test that's used. And it consists of ten subtests that measure various cognitive domains grouped together to create the, you know, the I.Q. score of somebody.
>
> Q. And how did he do on that?
>
> A. His I.Q. was at the, in the average range at 106.
>
> Q. So there's a difference between his premorbid I.Q. and his current I.Q.?
>
> A. There's somewhat of a difference, yes.
>
> Q. Is that significant?

> A. It's verging on significant. It's clinically significant. Statistically, depending on what sort of manuals you look at, it's right on the border. But what was significant about the WAIS, which is the Wechsler Adult Intelligence Scale, not only did he get a lower I.Q. score, was that his -- there are indices on the WAIS and his processing speed indices was in the low average range, at the 23rd percentile, which relative to his I.Q. or his predicted I.Q. is statistically impaired. And what's significant about that, and I'm sure we'll sum this up later, is that processing speed is often a finding in neurologic disease and brain injury.

(PCR. Vol. 25 p. 78-80). His low scoring processing speed is significant in that "in the research literature the indices is correlated to, again, to head trauma, to slow reaction time" (PCR. Vol. 25 p. 80). Dr. Ouaou also administered the Wechsler Memory Scale IV Edition (WAIS IV) memory test. When asked how Patrick performed, he stated:

> A. He had some difficulty relative to his age matched peers on that. In fact, he had some severe difficulty on that test. **His memory performance on the Wechsler Memory Scale Logical Memory Section was at the 1st percentile at recall, meaning, you know, 99 percent of the population of his age did better. It was a very abnormal finding relative to his I.Q., obviously**. Also he was in the low/average range on the visual memory test.
>
> Q. So what does that tell you in terms of his overall functions?
>
> A. Well, it tells me that, first of all, there's some abnormal findings, they shouldn't be there. It will tells me that cognitively there's some dysfunction, and so far we're seeing it in the areas of memory and processing speed and possibly general intellect decline.

(PCR. Vol. 25 p. 81-2) (emphasis added).

According to Dr. Ouaou, the frontal lobe is the last major part of the brain to develop and explained the functions of the frontal lobe:

> A. Well, it has multiple functions. When it's developed, fully developed, it functions to serve what's called an executive role, or executive functions.

Dr. Ouaou gave several tests of executive functioning and found that Patrick had some difficulty on that battery, reflecting to Dr. Ouaou that "possibly there is a problem there, yes" (PCR. Vol. 25 p. 82-3). Specifically, within the battery of tests pertaining to executive functioning, Dr. Ouaou administered the Wisconsin Card Sorting Test in which Patrick also exhibited difficulty. Dr. Ouaou explained the "Wisconsin Card Sorting Test, [ ] is a well-researched test that correlates to general brain dysfunction as well as frontal lobe executive functions, and he had difficulty on that test" (PCR. Vol. 23 p. 83). He further opined that "[h]is ability to learn how to do this task, as well as what's called maintaining set,…he performed from the second to the tenth percentile in both of those" which is "not expected for his I.Q. testing" (*Id.*).

Dr. Ouaou also testified that multiple records he reviewed support a finding of a possibility of impaired cognition (PCR. Vol. 25 p. 73). Overall, Dr. Ouaou summarized his results as follows:

> …it tells me that this is an abnormal – there are abnormal findings on his neuropsychological test battery. They are not as severe. He does okay on some executive functioning tasks, but he certainly does poorly on tasks that he shouldn't be

> performing poorly on, even in the context of giving adequate effort or maximum effort. So it tells me there are some cognitive impairments on neuropsych testing, that this is an abnormal battery.

(PCR. Vol. 25 p. 85). He further opined that this abnormal neuropsychological battery rose to the level of mitigation and that, in his opinion, "they likely were present when he was tested before" (PCR. Vol. 25 p. 85). In other words, these abnormalities were present at the time of Patrick's trial and should have been presented to the jury. In Dr. Ouaou's opinion, the damage seen was based on three criteria– his extreme drug use, some head injuries, including ones that caused unconsciousness, and his childhood trauma (PCR. Vol. 25 p. 85-6). However, because of trial counsel's failure to know the difference between a screen and a comprehensive battery, this mitigation was not developed, and the jury did not get the benefit of hearing it.

Finally trial counsel did not investigate the effects of Patrick's childhood trauma through the use of a trauma specialist. This was despite the fact that the third chair attorney, McNeill, had strongly recommended such an expert be hired following her attendance at a death penalty defense conference (PCR. Vol. 24 p. 151). Thus, the jury never learned about the effects of Patrick's childhood traumas on his life, how it factored into his drug use and addiction, and his brain damage. Had trial counsel fully investigated Patrick's trauma history he would have learned

the true nature, extent, and severity of the trauma experienced by Patrick, and the powerful mitigation it represented.

Dr. Steven Gold, a psychologist specializing in trauma related disorders, testified at the evidentiary hearing. Dr. Gold testified as to the nature and effects of trauma:

> Q. What sort of symptoms can be manifested by traumatization?
>
> A. Well, in terms of post traumatic stress disorder, which is the disorder most commonly associated with history of trauma. The disorder is characterized by a very intense push/pull. On one hand the person doesn't want to be thinking about the awful things that happened to them, but finds that they can't put them out of their minds.
>
> ***
>
> One of the more traumatic examples of not being able to shake recollections of trauma are traumatic flashbacks, where the person actually feels as if the traumatic event is occurring in the present. That could be so vivid that instead of seeing what's right in front of them, hearing what's right in front of them, the person may actually be seeing and hearing what happened during the actual events.
>
> Q. Is avoidance a symptom of traumatization?
>
> A. Yes, so that's part of the push/pull. On one hand even though the person doesn't want to, they find that their recollection of the trauma continues to visit them or haunt them. And they are working very hard not to be thinking about the trauma.
>
> So one of the major symptom areas behaviorally is that the person does their best to avoid things that might remind them of the trauma in order to do all they can not to think about the traumatic events and the consequences of that.

(PCR. Vol. 26 p. 104-6). Patrick has spent a majority of his life, childhood, and adulthood attempting to avoid thinking about the traumatic events and consequences that he has endured throughout his life. As a child, both he and his brother fantasized about running away from home to escape the abuse of their father and mother. When Patrick was unable to physically escape the violence, he turned to drugs and alcohol as a way to mentally escape. As Dr. Morton testified, he began using drugs as early as eight years old as a way to escape the trauma that defined his life.

When asked about the effects that childhood trauma have on a person's development, Dr. Gold referred to a major study conducted by the Center for Disease Control. This study, called the Adverse Childhood Experiences Study (ACES) identifies ten factors:(1) childhood physical abuse, (2) childhood sexual abuse, (3) childhood emotional/verbal abuse, (4) childhood emotional neglect, (5) childhood physical neglect, (6) the loss of a parent to death, divorce, or separation, (7) growing up in a household where the child was exposed to domestic violence, (8) growing up in a household where there was at least one member who had a significant alcohol or drug problem, (9) growing up in a household where there was a member who was incarcerated during the person's childhood, and (10) growing up in a household where there was at least one member with either a

mental illness, serious depression, or who had made suicide attempts (PCR. Vol. 26 p. 109-10).

Dr. Gold, significantly, found eight of the ten ACES that applied to Patrick, including: (1) childhood verbal abuse, (2) childhood physical abuse, (3) childhood sexual abuse, (4) childhood emotional neglect, (5) separation and divorce of his parents, (6) domestic violence against the mother by the father, (7) alcoholism on the part of the father, and (8) a household member who went to prison during his childhood. (T. 591). The finding of eight out of ten factors puts Patrick at the extreme level of risk for psychological and medical problems:

> …So one of the important findings of the study is that each of these factors increased someone's risk for a wide range of both psychological and medical problems, and that the more of these factors someone had in their background, this is what we call a dose response relationship, the higher the dose, or in other words the more of these factors they had in their background, the greater their risk for these problems, both psychological and medical. So that one of the more dramatic findings of the study is that someone who had four or more of the ten in their childhood history, had an average life expectancy of almost 20 years less than someone who had none of these factors in their history, which obviously relates as heavily to the medical side of the affects as it does to the psychological side.

(PCR. Vol. 26 p. 111-2). When asked what someone having eight out of ten meant to Dr. Gold, he opined:

> A. Well, again, there's a dose response relationship. The more of these things were present in the history growing up, the more intense the effects, the more effects you're likely to have. So

> eight out of ten is extremely rare and would be very severe in items of its impact.

(PCR. Vol. 26 p. 112). According to Dr. Gold, it's rare for a person to have more than four or five. So rare in fact, "the research literature doesn't even really talk about [trauma] once you go beyond four to five factors" (PCR. Vol. 26 p. 113). The severe nature of Patrick's childhood trauma, without doubt, had and continues to have, a significant negative impact on his state of mind.

When asked about Patrick's state of mind at the time of the crime, Dr. Gold opined:

> Certainly when I look at Mr. Patrick's history of traumatization and the circumstances leading up to the offense, they are -- **what happens at the time of the offense was very, very similar to traumas that Mr. Patrick had experienced as a child**. And the impulsivity of his behavior, the fact that -- one of the impacts of trauma on the brain, which we have not talked about and this is not about epigenetics, is that in general **when a child is growing up and experiences repeated trauma, what happens is the part of the brain that's responsible for thinking, that's responsible for controlling impulses is underdeveloped, and the part of the brain that fuels impulses and emotionality is overdeveloped**.
>
> So with repeated or constant trauma what's very likely to happen is you end up with an adult who has a lot of difficulty curbing impulses because of impact of the trauma on the brain. And **especially when someone encounters a situation that is similar to a trauma that they've experienced as a child, that can lead to the thinking part of the brain, at the very least, significantly reducing its activity, the feeling and impulsive part of the brain becoming very agitated and excited so that the person is not clearly aware of what's going on, not clearly aware of what they are doing.**

> It's similar to the affect of someone who is intensely intoxicated with alcohol, where their thinking brain is shutting down and their impulsive brain is being fueled. And in my opinion that seems to be the state of mind that Mr. Patrick was in at the time of the offense.
>
> Q. Could that be referred to as a flashback?
>
> A. It would be referred to as a flashback, yes.

(PCR. Vol. 26 p. 122-3) (emphasis added). Patrick was repeatedly the victim of sexual assault, beginning as young as eleven or twelve years old (PCR. Vol. 27 p. 9-10). Here, the crime was an impulsive reaction, triggered by repeated childhood traumas. Patrick was not "not clearly aware of what [ ] [was] going on, not clearly aware of what [he was] doing" (*Id.*).

Although defense counsel presented some mitigation evidence, they failed to present **to the jury** that Patrick suffers from a major mental illness, post-traumatic stress disorder (PTSD). Failed to present **to the jury** expert testimony of how the physical and emotional abused suffered by Patrick at the hands of his alcoholic, drug-addicted father impacted his development. And, failed to present **to the jury** expert testimony about the physical, emotional, and psychological effects that child abuse and witnessing spousal violence had on Patrick's still-developing brain. Furthermore, trial counsel failed to present evidence of the maternal emotional abandonment and neglect suffered by Patrick. And yet, five jurors voted for the imposition of a life sentence.

While they superficially touched on the subject of Patrick's drug addiction, they failed to present his pervasive drug abuse as a method of self-medication, which further compromised his developing brain during his childhood, adolescence, and early adult life. Trial counsel did not consult with any kind of pharmacologist or pharmacist who could have explained not only the deleterious effect that Patrick's pathological drug use had on his developing brain when he was a teenager, but also the acute effect of his drug use immediately before the crime, at the time of the crime, and after his arrest.

As a result, the jury was not able to understand the background of the man they were tasked with sentencing to either life or death and did not understand how that background impacted him on the night of the crime. Because counsel did not investigate Patrick's social history in a constitutionally adequate manner or counsel Patrick bearing in mind his history of trauma, the jury heard only a small part of Patrick's life and only in the context that his life events "predisposed him to violence" and yet five jurors still voted for life. A vote that today would mandate that a life sentence be imposed.

v. Failure to present the impact of multi-generational trauma on Patrick

Trial counsel attempted to introduce evidence relating to Ingrid's traumatic childhood during World War II in Germany. The State objected on relevance grounds, and the court ruled that the details of Ingrid's childhood were not relevant

to Patrick's penalty phase (R. 126-28). Trial counsel was unprepared to effectively argue the relevance of such trauma, and therefore failed to give the court any justification for presenting this evidence. The jury never got to hear it.

In fact there are two strong arguments that could have been made. First of all, the *Supplemental Mitigation Guidelines* specifically require that counsel conduct a multi-generational investigation into family history as well as multi-generational patterns of behavior. *Supplemental Mitigation Guidelines* 10.11B at 689. When conducting a mitigation investigation, to be effective, trial counsel should be going back three generations. As attorney Tebrugge testified, this recommendation is reflected in both "the supplementary as well as the 2003" guidelines (PCR. Vol. 23 p. 91). Second, trial counsel was apparently unfamiliar with the literature and research that deals with the effect of multi-generational trauma and the fact that an individual whose parents and grandparents were exposed to trauma are themselves far more likely to be traumatized and suffer from PTSD. Tebrugge further testified about the relevance of multi-generational information:

> A. Well, as I indicated before, for genetic basis of illness and
> for behavioral patterns within the family.
>
> Q. So it's not simply just genetic issues?
>
> A. No.
>
> Q. What do you mean by behavioral patterns?

> A. Let’s say, for instance, a theme of mitigation was that the defendant came from a dysfunctional family. You want to be able to explain to the jury what that means and how it got that way, and usually if you can go back a little further, the patterns start to become clear.

(PCR. Vol. 23 p. 91-2).

Counsel should have been prepared to counter an objection to the presentation of this type of testimony:

> You would want to hopefully prepare ahead of time so that you would be able to make a compelling presentation to the judge to give the judge the information that he or she needed in order to rule on the objection. And it's something that I don't know if it's prone to caselaw as much as it is practice and ABA guidelines, but more importantly why does it fit into this particular case.
>
> Q. You talked about preparing to respond to that ahead of time. Is there an extensive motion practice in capital defense cases?
>
> A. Yes.
>
> Q. And why do you want to do that ahead of time?
>
> A. Because when the jury is in the courtroom the judge has a responsibility to the members of the jury as well and that's really not the time to be having extensive argument on legal issues, at least not with my judges.

(PCR. Vol. 23 p. 92-3). Here, trial counsel was on notice prior to the start of the penalty phase that the State would object to any mitigation not directly related to Patrick. Specifically, the State filed a motion in limine months in advance of the penalty phase to exclude any “evidence of the character or health of [Patrick’s] family members” (R. 866-9). Certainly, reasonable trial counsel would have

mounted a response to the exclusion of that evidence. Instead, counsel failed to present the Court with case law, literature or most obviously the *ABA Guidelines* and the *Supplemental Mitigation Guidelines*. Had counsel been prepared the jury would have learned the extensive history of trauma in Patrick's family and how that impacted him psychologically and behaviorally.

The history of family trauma is evident on both sides of the Patrick family. Ingrid Franke testified at the evidentiary hearing that her father fought in World War II, and that he was captured and held as a prisoner of war in England until three years after the war ended. Ingrid never knew her father until she was ten years old (PCR. Vol. 24 p. 127). And, while Ingrid's home was in Berlin, she was evacuated away from her mother to stay with an aunt:

> …My mother's sister took care of -- who lived in Kalamunda[7] [sic], it's a small town about two and-a-half hours away from Berlin, and she came and got me because the bombing was so bad that, according to the stories that I've heard, that I was screaming the whole time. And so she took me to Kalamunda [sic].
>
> Q. Did your mother go to Kalamunda [sic] with you?
>
> A. No.

(PCR. Vol. 24 p. 128).

Ingrid was not spared the relentless bombing even after she was evacuated from Berlin. She reported that the bombs would drop, and they would retreat to the

[7] The correct spelling of the town is, Tangermunde.

basement to hide. She testified that she was "scared to death" (PCR. Vol. 24 p. 131). Food was scarce (*Id.*). And when the family returned to Berlin in 1950 the whole street where their apartment had been was obliterated from the bombing (PCR. Vol. 24 p. 132).

Ingrid's war experience compromised her ability as a parent. Investigative journalist and author, Sabine (Frau) Bode testified at the evidentiary hearing about what has become known as "The Lost Generation":

> A. Yes, the books that I became known for in regards to how the N. S. Time and the war today, still, do cause damage to families.
>
> Q. Okay. And when you say N. S., what do you mean?
>
> A. The time period between 1933 and 1945.
>
> Q. And did you write a book called the Forgotten Generation?
>
> A. Yes.
>
> Q. How did you do the research for that book?
>
> A. My interest was to find out how the children during the war, how they were influenced and how they later in life dealt with it.

(PCR. Vol. 25 p. 10). Based on her extensive research, Frau Bode is considered an expert on the children from this generation and the trauma they suffered as a result of the war. Her book "The Forgotten Generation" is used as a standard text in universities and she frequently gives presentations to "psychologists and

physicians" on the subject (PCR. Vol. 25 p. 12). She interviewed Ingrid Franke and found that:

> She is really is a very typical child of the war. She practically only lived war. She's one of the people that made it very successfully for her professional life, through life. But in her private life she was not successful and/or had a big problem.

(PCR. Vol. 25 p. 13-4). Frau Bode further explained that she had written a second book about the children of the lost generation, and how the parents' war experiences affected them in turn:

> Q. Okay. What did you find out?
>
> A. It has a very big influence.
>
> Q. Can you explain what that is?
>
> A. They often times grew up in a very cool atmosphere.
>
> Q. Can you explain that a little further?
>
> A. That is a lack of emotions.
>
> Q. In the parents?
>
> A. On behalf of the parents. The parents were not very -- they would not side with the children very much.
>
> Q. Were they loving?
>
> A. They did not show solidarity with their children very much.
>
> Q. Can you explain that a little further?
>
> A. When the children had problems, if they did something wrong then it was always their own fault.
>
> Q. Were these very stern parents then?

> A. On the one hand, and also really no feeling for the world of the children.

(PCR. Vol. 25 p. 17).

Aside from the psychological component, Frau Bode testified that there was research in neurobiology that suggested that multi-generational trauma has a biological component:

> A. In different countries neurobiologists are working on the question whether or not genes are actually formed or altered by the trauma of parents. The research area is called epigenetics.
>
> Q. Epigenetics?
>
> A. And the answer is yes.

(PCR. Vol. 25 p. 21). Frau Bode's studies were further supported by the testimony of Dr. Steven Gold:

> Q. Now I want to turn to multi-generational trauma. In your opinion, Doctor, can trauma be transmitted between generations within a family?
>
> A. Yes, there's research literature that supports that.
>
> Q. And I mean, is that a psychological thing or is it a biological thing or is it both?
>
> A. It's both. So someone who is traumatized is more likely to have difficulties in parenting than someone who is not traumatized. So that would be psychological transmission that the traumatization of the parent affects how they interact with the child. But in addition, there's growing evidence that the physical or medical, or biological impact on someone can be transmitted to the next generation epigenetically.

(PCR. Vol. 26 p. 113-5). Dr. Gold explained the means by which trauma can be transmitted between generations:

> Q. What happens in the brain when it is traumatized?
>
> A. In general terms -- well, okay, so one of the things that happens is that they're -- the fight/flight reflex, the reflex that protects us when we're in serious danger is set off in response to trauma. For someone with traumatization, or post traumatic stress disorder, that reflex becomes sensitized so that situations that remind them of the trauma are likely to set off the fight/flight reflex. Or for some people the fight/flight reflex is constantly elevated, so there's a constant level of psychological arousal and a central component of that constant physiological arousal is the elevation of cortisol levels, which are part of the fight/flight reflex and which are experienced as anxiety.
>
> Q. And is it possible for these elevated cortisol to be passed to the next generation?
>
> A. Yes. So these elevated cortisol levels can impact the person's genetic structure. The genetic function, so they turn on certain components of genes, and that impact on the genes can be passed on biologically to the next generation. It doesn't change the structure of it, but it changes the parts of the genes that are turned on and off.
>
> Q. So is trauma inheritable from your parents or grandparents?
>
> A. Yes, the impact of trauma is inheritable.

(PCR. Vol. 26 p. 116-7).

The history of trauma was not confined to only Patrick’s maternal side. Sharon Compton testified that Don Patrick served in the Korean War and Vietnam War. She indicated that he served on the border between Laos and Vietnam, “in the areas that were being heavily sprayed by Agent Orange” (PCR. Vol. 26 p. 45). As

a result, she observed Don "rub and rub" his arms in the areas that were left uncovered by his fatigue shirts" and Don would describe to her intense burning as if his arms were on fire (PCR. Vol. 26 p. 46).

Patrick's German grandfather fought in a major war, was shot and captured, and held as a prisoner of war. His German mother endured terrifying conditions as a small child. And, Patrick's father saw active service in Korea and Vietnam. The multi-generational aspect of his PTSD is clear. Patrick was not only psychologically but biologically destined to suffer from PTSD and all the symptoms and behaviors that result from that condition. However, trial counsel failed to understand the science and failed to present to the jury this component of Patrick's heritage.

C. Prejudice

In *Sears v. Upton*, 130 S. Ct. 3259 (2010), the United States Supreme Court made clear that there can still be deficient performance and prejudice, even when counsel presents some mitigation evidence at trial. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.
>
> ***
>
> We certainly have never held that counsel's effort to present

> some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in *Porter*, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation." 558 U.S., at—[, 130 S. Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . .

Sears, 130 S. Ct. at 3266-67 (footnotes and internal citations omitted). Thus, postconviction courts must speculate as to the effect of un-presented mitigation evidence, or risk failing to engage with the evidence in violation of the defendant's constitutional rights. *See also Porter v. McCollum*, 558 U.S. 30, 44 (2009).

Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different, or that the deficiencies substantially impaired confidence in the outcome of the proceedings. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). As the Eleventh Circuit Court of Appeals recently explained in *Cooper v. Sec'y, Dept. of Corr.*,

> In the penalty phase of a trial, "[t]he major requirement ... is that the sentence be individualized by focusing on the particularized

> characteristics of the individual." *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987). Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 455 (2009). Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." *Johnson*, 2011 WL 2419885, at *27 (collecting cases).

Cooper v. Sec'y, Dept. of Corr., 646 F.3d 1328, 1354 (11th Cir. 2011). The court found that Cooper's case was "strikingly similar" to its recent decision in *Johnson v. Sec'y, Dept. of Corr.*, 643 F.3d 907, 936 (11th Cir. 2011). Like *Johnson*, "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper*, 646 F.3d at 1353. What *Cooper* and *Johnson* highlight is that, even in cases where some mitigation is presented at trial, when the description, detail, and depth of mitigation presented in postconviction far exceeds what the jury heard, prejudice exists. As in *Cooper*, "Given that some jurors nonetheless 'were inclined to mercy even with [...] having been presented with [so little] mitigating evidence and that a great deal of mitigating evidence was available to [Patrick's] attorneys had they more thoroughly investigated,' it is possible that, if additional mitigating evidence had been presented, at least one more juror would have voted for life." *Cooper*, 646 F.3d at 1356; (quoting *Blanco v. Singletary*, 943 F.2d 1477, 1505 (11th Cir. 1991)).

The fact that trial counsel hired a mental health expert and presented some witnesses does not preclude a finding of prejudice, especially given the limits on Patrick's experts' evaluations due to counsel's failings. In *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009), trial counsel presented five mitigation witnesses and one mental health expert on the defendant's behalf. This Court granted a new penalty phase, finding that the additional testimony offered during collateral proceedings "fleshed out the 'bare bones'" presented at the penalty phase proceeding and provided a stark picture of Parker's chaotic childhood. *Parker*, 3 So. 3d at 983-85; see also *Orme v. State*, 896 So. 2d 725 (Fla. 2005) (granting relief for failure to follow up on indications of bipolar disorder that were evident in jail medical records even though mental health experts were utilized). Furthermore, in *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), this Court granted penalty phase relief to a capital defendant who had been convicted of a strangulation murder and received a unanimous jury recommendation for death. There, this Court noted that at the penalty phase, trial counsel did present "some evidence in mitigation at sentencing" which was "quite limited." *Id.* at 110. n.7. Nonetheless, this Court granted relief, finding that "[a]t his 3.850 hearing, Hildwin presented an abundance of mitigating evidence which his trial counsel could have presented at sentencing." *Id.* at 110. This evidence included two mental health experts, who testified to the existence of mental health mitigating factors, as well as a number of nonstatutory mitigating

factors. *Id*. This Court found that Hildwin did not receive an adversarial testing at the penalty phase despite the presentation of some evidence, despite a 12-0 death recommendation, and despite the existence of four aggravating circumstances. In *Rose v. State,* 675 So. 2d 567 (Fla. 1996), this Court also granted penalty phase relief to a capital defendant when the record reflected that "counsel never attempted to meaningfully investigate mitigation" and did not hesitate to find prejudice:

> In short, Rose has demonstrated, largely without dispute, that there was substantial mitigation present and available in this case and was not investigated or presented by defense counsel. In fact, the trial court, in subsequently sentencing Rose after the penalty phase in question, found no mitigating circumstances to have been established by the defense.

Id. at 572.

"The description, details, and depth of abuse in [Patrick's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011). Even in cases where some mitigation is presented at trial, when the description, detail, and depth of mitigation presented in postconviction far exceeds what the jury heard, prejudice exists. Patrick is entitled to a new trial.

As a result of counsel's deficient investigation and preparation, compelling mitigation was never presented to the jury to help them determine whether Patrick

would live or die. Had trial counsel adequately investigated and prepared, and prepared their client for the presentation of difficult mitigation, Patrick would have established substantial statutory and non-statutory mental health and other mitigating evidence. In fact, Dr. Ouaou believed his cognitive impairments rose to the level of mitigation and Dr. Morton was able to explain how his long standing drug use and use of drugs and alcohol altered his thinking on the night of the crime, fueling his impulsiveness (PCR. Vol. 25 p. 128). Most significantly, Dr. Gold was able to provide the link between Patrick's childhood trauma and the events of night of the crime.

Based on the testimony and evidence, there is at least a reasonable probability that the outcome of the penalty phase would have been different. This is particularly the case since Patrick's jury recommended the death penalty by the slimmest of majorities, a seven to five recommendation, a vote that today would result in a mandatory life sentence, notwithstanding the existence of aggravating circumstances. Given the fact the jury was erroneously instructed on the CCP aggravator, which was stricken by this Court on direct appeal, and five jurors still recommended life, it cannot be said that the failure to present the wealth of mitigation that trial counsel failed to present is harmless. Had just one more juror voted for life the court, under the law at the time of Patrick's trial, would have been required to give great weight to the life recommendation. Because we now

know that in order to impose a death sentence the jury vote must be unanimous, given all the additional mitigation adduced at the evidentiary hearing and without the erroneous CCP instruction, and given the fact that five jurors have already voted for life, it cannot be said that any *Hurst* error in this case is harmless.

The State may attempt to argue that the evidence at the evidentiary hearing was cumulative with that adduced at trial. That argument should be rejected. First of all, the evidence at the 2015 hearing was qualitatively and quantitatively superior to that adduced at trial. Of the lay witnesses, Hank Dube and Sharon Compton provided additional and corroborative mitigation evidence relating to Patrick's early years which trial counsel agreed was critical and missing. Carsten provided a plethora of new evidence that trial counsel failed to discover, notwithstanding the fact that Carsten was a witness at the penalty phase in 2009. His testimony provided a complete picture of Patrick's early years, one in which there was ***no*** parent to offer solace or reprieve from the abuse. And, as far as mental health mitigation is concerned, the jury never heard any expert on drug history and intoxication, nor on childhood trauma and the ACE factors, nor on Patrick's neuropsychological deficits due to counsel's failure to investigate them properly. The qualitative difference between the packaged PowerPoint presentation seen by the jury, and the combined effect of Patrick's childhood trauma, his resultant PTSD and drug use, and the neuropsychological deficits that resulted

from that is enormous. The combined effect of the drug use, frontal lobe damage, impaired executive functioning, and trauma paints a vivid picture lost to the jury. This court should speculate on the likely effect that this would have had on the jury, and grant a new penalty phase. Dr. Gold summed it up best:

> The significance. In addition to the -- a lot of these elements were mentioned, but there wasn't an integrated picture of the exponential impact. All of these elements were mentioned, and there wasn't a clear picture of the exponential impact of the things that Mr. Patrick did and did not experience growing up, on his development and ultimately on his adult functioning.

(PCR. Vol. 27 p. 19).

Mitigation is not just a game of numbers. It is a way of telling the story of the client's life in order to explain how it was that he reached the point where he found himself facing the death penalty. If the jury had heard the evidence at the evidentiary hearing, they would have recommended a life sentence. Relief is warranted and Patrick is entitled to a new penalty phase.

In finding that there was no deficient performance, the lower court dismissed the mitigation presented at the evidentiary hearing, stating that "the mitigation that existed was presented and was considered by the jury and this Court" (PCR. 1348).This is factually inaccurate in two regards. Firstly the quality and detail of evidence presented at the evidentiary hearing, both expert and lay, was much deeper than that adduced at trial. Second, a lot of the mitigation, specifically Dr. Ribbler's testimony, only came out at the *Spencer* hearing and so the jury never got

to hear it. The lower Court's prejudice analysis is also deficient pursuant to *Strickland* and its progeny. The lower court merely said that Patrick has "failed to show that any additional mitigating evidence would have outweighed the aggravating factors" (PCR. 1348). However the correct analysis is whether there is a reasonable probability of a different outcome. *See Strickland*. We now know that *Hurst v. Florida* establishes that the jury and not the judge is the sentencer, so that any prejudice analysis must focus on whether the jury verdict would have been different. However, the lower court did not mention the jury verdict, the fact that it was a mere seven to five majority, nor the fact that the jury was instructed in an invalid aggravating circumstance. Relief is warranted.

ARGUMENT IV

THE TRIAL COURT'S SUMMARY DENIAL OF CERTAIN OF PATRICK'S CLAIMS DEPRIVED HIM OF DUE PROCESS AND ACCESS TO THE COURTS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court summarily denied certain of Patrick's claims, allowing only a truncated hearing on several discrete issues (PCR. 819).

This Court has indicated a preference for evidentiary hearings to be held on an initial postconviction motion. *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) (Pariente, J., specially concurring). This Court promulgated Florida Rule of

Criminal Procedure 3.851(f)(5)(A)(i), which requires that an evidentiary hearing be held on all initial postconviction motions where claims, as in the instant case, require a factual determination. As the Court noted in *Gaskin*, "[t]he rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion." *Gaskin*, 737 So. 2d at 516.

The court denied a hearing on two of Patrick's claims regarding ineffective assistance of trial counsel. Claim IV (2) related to trial counsel's ineffectiveness for failing to raise a *Frye* challenge to the State's shoeprint evidence. Claim VII raised the issue of trial counsel's ineffectiveness during jury selection.

A. Failure to raise a *Frye* challenge to the shoeprint evidence

The State presented the testimony of Tom Hill who testified about a bloody shoeprint found at the crime scene. Counsel failed in his duty to attack this questionable testimony that was presented to the jury under the guise of "science." Furthermore, when the witness testified defense counsel either was unprepared to cross-examine him or unreasonably forfeited that opportunity. Trial counsel should have known that a *Frye* hearing is required before scientific evidence can be admitted. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (applying *Frye* standard in Florida case); *see also Ramirez v. State*, 651 So. 2d 1164, 1166-7 (Fla. 1995) (laying out four step test). As the State began to present its case, defense counsel's lack of

preparation became evident.

Trial counsel admitted on the record that he was aware of literature that suggested that the FBI had disavowed the use of shoeprint evidence in court, and specifically noted that he had not filed a *Frye* motion (R. 1551-53). Instead of requesting that this Court conduct a *Frye* hearing, counsel went no further than to merely object to the testimony for the record, which the court duly permitted. And, while counsel did conduct a derisory cross examination of the witness, he did not ask any questions about the reliability of the science behind this type of forensic evidence. In fact, there was a great deal of literature available at the time of Patrick's trial that would further discredit the shoeprint testimony. In *Strengthening Forensic Science in the United States: A Path Forward*, published in 2006, well before Patrick's trial, the National Research Council addressed the shortcomings of several types of forensic evidence including shoeprints. The report listed the problems with shoeprint analysis noting that:

> Following analysis of the impression, an identification is determined or ruled out according to the number of individual characteristics the evidence has in common with the suspected source. But there is no defined threshold that must be surpassed, nor are there any studies that associate the number of matching characteristics with the probability that the impressions were made by a common source. It is generally accepted that the specific number of characteristics needed to assign a definite positive identification depends on the quality and quantity of these accidental characteristics and the criteria established by individual laboratories.

> According to Cassidy, many factors and accidental characteristics are required before a positive identification can be established; however, the most important are the examiner's experience, the clarity of the impression, and the uniqueness of the characteristic.

(NRC Report at 5-16).

Because counsel failed to file a *Frye* motion and request a *Frye* hearing, the jury got to hear unreliable testimony, which, they would have assumed, was rigorous science. Patrick should have been afforded the opportunity to question counsel about his strategy in this regard.

B. Ineffectiveness during jury selection

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance through any portion of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 626 F.2d 903, 906 (5th Cir. 1981) (Counsel may be held to be ineffective due to a single error where the basis of the error is of constitutional dimension); *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) (". . . [s]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"). *See also Strickland*, 466 U.S. 668; *Kimmelman*, 477 U.S. 365. Patrick had the right to the

effective assistance of counsel during voir dire. *Miller v. Webb*, 385 F.3d 666, 671 (6th Cir. 2004).

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980). The United States Supreme Court noted that, in the context of ineffective assistance of counsel, the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, *the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged*. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696 (emphasis added). The evidence presented in this claim demonstrates that the result of Patrick's trial is unreliable.

Two jurors indicated during voir dire that they were biased against the defense, and counsel failed to adequately question them, challenge them for cause, or exercise peremptory challenges. The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on

the evidence presented and the instructions on the law given by the court. *Busby v. State*, 894 So. 2d 88, 95 (Fla. 2004). *See also Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (a juror must be able to lay aside his impression or opinion and render a verdict based on the evidence presented in court). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *Id*.; *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). Counsel's failure to challenge or properly preserve a challenge for cause can constitute ineffective assistance of counsel. *See Thompson v. State*, 796 So. 2d 511, 516-17 (Fla. 2001) (remanding for evidentiary hearing on claims of ineffective assistance of counsel for failure to challenge jurors for cause). In the postconviction context, a defendant must demonstrate that a juror was actually biased, meaning "bias-in-fact" that would prevent service as an impartial juror. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). Bias-in-fact is the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. *U.S. v. Torres*, 128 F.3d 38, 43 (2nd Cir. 1997), citing *U.S. v. Wood*, 299 U.S. 123, 133 (1932).

Juror Martin was questioned by Assistant State Attorney Shari Tate about his feelings about homosexuality. He stated that "I would have a bias if I knew the perpetrator was homosexual" (RT. Vol. 5 p. 424). The following exchange then occurred:

> MS. TATE: If homosexuality in any way comes into play in this case with anyone involved would you not follow the law on

> that? Are you going to not hold me to the burden to prove those elements or hold me to a lesser burden or a higher burden or how do you feel about it?
>
> Mr. MARTIN: Put it this way, if I feel the person was a homosexual **I personally believe that the person is morally depraved enough that he might lie, might steal, might kill**.

(RT. Vol. 5 p. 424).

Juror Martin also expressed prejudice against the testimony of drug users stating that it "wouldn't be worth much if he was on drugs, would it?" (RT. Vol. 7 p. 745). On further probing, Juror Martin stated that "I kind of wonder about this. About what he's saying, maybe thinking" (RT. Vol. 7 p. 746), and stated that he would give "diminished" weight to such testimony (*Id*.). Trial counsel failed to challenge Juror Martin to Patrick's undoubted prejudice. Not only did Juror Martin sit on the jury, but his remarks were heard in open court by the entire section of the venire. As such, his comments may well have tainted any other jurors from that section who heard these remarks.

Given that a very large part of the case involved Patrick's drug use before and after the crime, and given that he testified himself at the penalty phase, the prejudice resulting from counsel's failure to challenge Juror Martin is apparent. This is compounded by Martin's stated bias against homosexuality. While trial counsel voiced his opinion to the court that Patrick is not gay, the circumstances surrounding the crime could very easily suggest otherwise, particularly to someone

with the kind of beliefs evinced by Juror Martin. If that were the case, his comments that Patrick "might lie, might steal, might kill" show a bias against Patrick, particularly given that Patrick testified at penalty phase.

Similar considerations apply to Juror Schapira, who voiced a great enthusiasm for the death penalty, stating that "I lean more towards the death penalty. On a scale of one to ten, probably an eight, or nine." Again, counsel failed to exercise a challenge to Juror Schapira, despite his overwhelming support for the death penalty.

Trial counsel had a duty to preserve Patrick's right to a fair and impartial jury. Patrick was prejudiced when a jury was empaneled that had not been thoroughly questioned regarding their backgrounds and any outside influences or biases. Additionally, jurors expressed bias against Patrick, and defense counsel failed to challenge them. No reasonably competent attorney would have failed to adequately question potential jurors and/or move to strike them from the jury when their responses indicated bias against the defendant. This is particularly so, given that Patrick's death sentence was recommended by the slimmest of jury majorities possible. If just one of these jurors had been challenged, there is a reasonable probability that the recommendation would have been for life. A new trial with an unbiased jury is required.

The trial court's denial of a full and fair evidentiary hearing deprived Patrick

of this due process rights and access to the courts, and Patrick requests a remand to the circuit court for a full evidentiary hearing on his claims.

CONCLUSION

Based on the foregoing arguments, the evidence and testimony presented during the evidentiary hearing, and the arguments and authorities contained in Patrick's Rule 3.851 motion. Patrick submits that the Court should grant him a new trial and/or a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 13th day of February, 2017, and opposing counsel will be served on this date. Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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