IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-423
(Lower Court Case No. 81-19702)

ROBERT PATTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of post-conviction relief following an evidentiary hearing on Mr. Patton’s claim that trial counsel provided ineffective assistance at the guilt phase. That hearing was ordered by this Court in Patton v. State, 784 SO. 2d 380 (Fla. 2000). The circuit court had previously denied post-conviction relief on Mr. Patton’s other post-conviction claims.

The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal of Mr. Patton’s 1982 trial and sentencing;

“R2.” – record on direct appeal to this Court from Mr. Patton’s 1989 resentencing;

“PC-R.” -- record on prior Rule 3.850 appeal to this Court;

"PC-R2." -- record on instant 3.850 appeal to this Court;

"Supp. PC-R2." -- supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Patton has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural 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. Mr. Patton, through counsel, accordingly urges that the Court permit oral argument.

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A. TRIAL AND RESENTENCING

Mr. Patton was arrested on September 2, 1981, the day of the offense. On September 25, 1981, the trial court announced it was considering a late November trial date (R. 30). At that time, the court ore tenus ordered that Mr. Patton be evaluated for competency and sanity; four experts were appointed by the court.

A competency hearing was held on October 9, 1981. The State acknowledged that Mr. Patton had been previously declared incompetent as well as not guilty by reason of insanity (R. 47). Following a brief hearing, the court found Mr. Patton competent to stand trial (R. 91-93).

Trial began on February 16, 1982, with a verdict on February 22, 1982 (R. 1528-29). At the penalty phase, the jury returned a life recommendation after indicating that it was deadlocked at 6-6 (R. 1773). The court refused to accept the vote, and gave the jurors an Allen charge, instructing them to deliberate further. The jury then returned with a 7-5 death recommendation, which the court followed. On direct

appeal, this Court affirmed Mr. Patton's convictions, but reversed the sentence of death because the court erred in giving the Allen charge to the jury and remanded for a jury resentencing. Patton v. State, 467 So. 2d 975 (Fla. 1985).

Resentencing commenced on April 29, 1989, and on May 4, 1989, the jury returned a death recommendation. The trial court imposed the death penalty, and this Court affirmed. Patten v. State, 598 So. 2d 60 (Fla. 1992), cert. denied, 113 S. Ct. 1818 (1993).[1]

B. POSTCONVICTION PROCEEDINGS

A Fla. R. Crim. P. 3.850 motion was filed on June 8, 1994, nearly ten (10) months prior to the two-year deadline (Supp. PC-R. 7-170), alleging, inter alia, the State's failure to comply with Chapter 119 (Supp. PC-R. 13 et. seq.).[2] The lower court[3] scheduled several status hearings following the filing of the 3.850 motion.

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[1]Mr. Patton's name has been spelled both as "Patton" and "Patten." "Patton" is the correct spelling.

[2]A verification to the motion was later filed (Supp. PC-R. 601-03).

[3]The case was heard by Judge Carol Gersten. The original trial judge was Judge Thomas Scott, and the resentencing was presided over by Judge Frederico Moreno, neither of whom were on the circuit bench when Mr. Patton initiated his Rule 3.850 proceedings.

Another amended Rule 3.850 motion was subsequently filed on July 22, 1995 (PC-R. 202-380); a verification was later filed (R. 457-58). On August 4, 1995, a Huff[4] hearing was held. On September 21, 1995, the court contacted the parties by phone and summarily denied the motion for the reasons set forth in the State's response, and requested the State to prepare an order to that effect.[5] On October 2, 1995, the State faxed two proposed orders to Mr. Patton's counsel.

On October 11, 1995, Mr. Patton formally objected to the State's proposed orders (Supp. PC-R. 646). The State submitted its proposed orders to Judge Gersten notwithstanding, although noting, Mr. Patton's objections (Supp. PC-R. 647-48)

On September 26, 1996, the court signed one of the State's proposed orders summarily denying Mr. Patton's motion with prejudice (PC-R. 459-62). On September 27, 1996, Mr. Patton received via fax from the State Attorney's Office a copy of the order signed by Judge Gersten (PC-R. 463).

Mr. Patton filed a motion for rehearing, the State filed a written response to the rehearing motion (PC-R. 470), and

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[4]Huff v. State, 622 So. 2d 982 (Fla. 1993).

[5]This telephone conference was not attended by a court reporter; however, in her letter to the judge, Assistant State Attorney Brill referred to this telephonic status as well as the court's request to draft an order indicating that the motion was to be summarily denied for the reasons set forth in the State's response. See PC-R. 637.

the lower court, following a hearing (T. 395), entered an order denying rehearing (PC-R. 474). A notice of appeal was timely filed by Mr. Patton (PC-R. 475). The State filed a cross-appeal (PC-R. 477).

This Court remanded to the circuit court for the purpose of conducting an evidentiary hearing on the issues of trial counsel's ineffectiveness for failing to present evidence of intoxication and insanity during the guilt/innocence phase of trial and for failing to question jurors regarding mental illness during voir dire. Patton v. State, 784 So. 2d 380 (Fla. 2000).

Initially, the circuit court set an evidentiary hearing on these issues for August 9 and 10, 2001.

On June 13, 2001, Mr. Patton filed a Motion to Interview Jurors based on this Court's remand on the issue of trial counsel's failure to voir dire jurors regarding mental health biases. The State filed a response to Mr. Patton's motion on June 19, 2001. A combination status and motion hearing was held on July 31, 2001. Judge Bagley heard argument on Mr. Patton's Motion to Interview Jurors and considered the State's unopposed request to reschedule the evidentiary hearing for reasons unrelated to Mr. Patton's motion. At that time, Judge Bagley rescheduled the evidentiary hearing for October 18 and 19, 2001. Also, Judge Bagley denied Mr. Patton's Motion to

Interview Jurors, entering a signed order on August 1, 2001. Mr. Patton filed an interlocutory appeal with this Court on August 30, 2001, along with a Motion to Stay Lower Court Proceedings Pending Disposition of Petition for Interlocutory Review. The Court ordered a response from the State and the State filed a response on October 19. 2001. Mr. Patton's motion to stay the lower court proceedings was denied. A reply to the response was then filed by Mr. Patton.

On October 18, 2001, the circuit court conducted an evidentiary hearing and subsequently denied relief (PC-R2. 159).

On January 3, 2002, Mr. Patton filed a Motion for Reconsideration (PC-R2-Supp. 2). The circuit court denied the motion (PC-R2. 308). Mr. Patton timely appealed. On March 21, 2002, this Court dismissed the interlocutory appeal as moot since the lower court proceedings were concluded and a notice of appeal was filed.

Statement of Facts

On October 18, 2001, the circuit court conducted an evidentiary hearing on the issue of ineffective assistance of counsel during the guilt phase of Mr. Patton's trial. Evidence was heard on October 18, 2001. Mr. Patton presented the testimony of trial counsel, Marsha Lyons, and pursuant to a stipulation by the State, relies on the 1982 and 1989 testimony of Dr. Jethro Toomer and the 1989 testimony of Dr. Harry Krop. The State presented the testimony of trial counsel's associate, Bart Billbrough. The testimony and evidence heard by this circuit court corroborates trial counsel's ineffectiveness for failing to present evidence of intoxication and insanity at the time of trial and for failing to question jurors regarding mental illness during voir dire.

Ms. Lyons testified that while she had been an attorney for a number of years, Mr. Patton's case was the first capital case she had tried (PC-R2. 346). Ms. Lyons overall strategy was to achieve a result of something less than first-degree murder (PC-R2. 348). As part of this strategy, Ms. Lyons decided to address Mr. Patton's appearance (Id.). She indicated he looked very "ragged," with "straggly long hair," so she had him cleaned up (PC-R2. 349). From the beginning, Ms. Lyons started looking at the possibility of an insanity defense and an intoxication defense (PC-R2. 350). She was aware that Mr. Patton had previously been adjudicated insane in connection with a prior proceeding (Id.) and had in fact, filed a notice of intent to rely on an insanity defense early on in the proceedings (PC-R2. 351). However, Ms. Lyons never asked for a confidential defense expert (Id.).

The court initially appointed four experts to evaluate Mr. Patton only for competency (PC-R2. 351-52). The four doctors were Dr. Herrera, Dr. Jacobson, Dr. Mutter and Dr. Jaslow (PC-R2. 352). Ms. Lyons also contacted Dr. Jethro Toomer to become involved in the case (PC-R2. 353). He was given various background materials and was asked to determine if Mr. Patton was insane at the time of the offense (PC-R2. 354). Ms. Lyons explained that there was a problem with the insanity defense because Mr. Patton had told numerous people

he was simply faking it (PC-R2. 354). However, she agreed that she would have considered the insanity defense if she would have had an expert to explain Mr. Patton's statements that he was faking his mental illness (PC-R. 355). Ms. Lyons had no recollection of her communications with Dr. Toomer or of the scope of what he was asked to do (PC-R2. 364). However, there were several memos in Ms. Lyons files reflecting her conversations and correspondence with Dr. Toomer(PC-R2. 364, 366; Defense Exihibits B and C).

Likewise, Ms. Lyons was aware that Mr. Patton had a substance abuse problem (PC-R2. 357). Mr. Patton's abuse problem began when he was fairly young and continued off and on until the time of the crime (PC-R2. 357). Ms. Lyons was aware of evidence and witnesses indicating that Mr. Patton had taken drugs prior to the crime and was intoxicated or high during the commission of the crime (PC-R2. 358). Ms. Lyons considered the information regarding his intoxication as it pertained to Mr. Patton's lack of specific intent in committing the crime (Id.). Although some evidence of Mr. Patton's drug use came out during the state's case, no evidence to that effect was presented during the defense case in chief (PC-R2. 358-59). Ms. Lyons conceded that the evidence of drug use which came out through the state's case was consistent with her argument regarding Mr. Patton's level

of culpability (PC-R2. 359). Yet, Ms. Lyons explained why she did not present further corroboration of his drug use:

> I said I did not want to taint the jury in the guilt phase by putting in a lot of things about him being, you know, quote unquote a druggy because I just did not think that this was a very popular kind of defense to use. This was the 80's in Miami. Miami was like a place that was terrorized, for lack of a better word, with drugs where drugs were in the headlines everyday, and I think – I just don't think it was the kind of thing that would of made him a sympathetic character to present that in the guilt phase of the proceedings.

(PC-R2. 361). Instead, Ms. Lyons wanted to present Mr. Patton as "the kid who had a drug problem but not to be a druggy" (PC-R2. 361). Additionally, Ms. Lyons considered and rejected the possibility of using an expert to explain Mr. Patton's drug addiction. She state that the expert she consulted was not very helpful and, again, she thought the jury would not be very sympathetic to this defense (Id.).

Despite not having presented evidence of Mr. Patton's intoxication, Ms. Lyons argued to the jury during closing that Mr. Patton was intoxicated and the jury should consider a lesser verdict as a result (PC-R2. 362). Ms. Lyons was not concerned about arguing intoxication without any specific evidence having been presented:

> I didn't really have a concern. I mean, it was to me the level of intoxication kind of thing, we were using, sort of the same kind of thing you would of used to say that, you

> know, he had, had a few too many drinks or he had a fight with his wife or, you know, it was kind of what we were trying to say, he had made an instantaneous decision. He did not make a premeditated decision. He was scared. He was running. His thinking was muddled, so to speak, by events around him in particular case he had used some drugs, not so much that he was a person who had chronic history of drug disease, that wasn't what we were trying to do. We were specifically not doing that.

(PC-R2. 363). The record reflects and Ms. Lyons agreed that she requested a jury instruction on voluntary intoxication and one was given (PC-R2. 367).

Ms. Lyons recalled that the jury was not asked any questions relating to biases with respect to drug use, intoxication, mental illness or insanity (PC-R2. 368). Although Ms. Lyons had asked to have juror questionnaires submitted, Judge Scott refused until after voir dire had already begun (Id.). The original questionnaire Ms. Lyons requested did contain some questions pertaining to drug use, but the questionnaire eventually submitted to the jury did not (PC-R2. 369). Ms. Lyons agreed that had any jurors harbored any bias with respect to intoxication issues, this "would certainly be useful to an attorney in selecting, selecting jurors, obviously" and may potentially result in a peremptory or cause challenge (Id.). This line of questioning during voir dire would not only have been useful for the guilt phase,

but also in preparation for the penalty phase of the trial (PC-R2. 370).

During cross-examination, Ms. Lyons reiterated that her overall strategy was to make Mr. Patton as sympathetic as possible, in a manner which was consistent with a majority of the witnesses and evidence presented (PC-R2. 371). In developing her strategy, Ms. Lyons consulted with various attorneys with experience trying homicide cases and death penalty cases, including Roy Black and the public defender's office (PC-R2. 373). Again, Ms. Lyons stated that she did not want to bring forth evidence which would portray Mr. Patton as somebody affiliated with the "drug business" (PC-R2. 374). Ms. Lyons testified during cross-examination:

> As I tried to explain, what I wanted to do was, you know, make him – I believed that middle class people and your common jurors would understand that kids got involved in drugs. That there are, because people were reading about these things, and they knew these things were happening, that good kids sometimes get involved with drugs, and I wanted him to be the good kid that we could understand, that kids down the street, the neighbor's kid, the people we went to church with, kid that we heard about took some drugs, got into some drugs, had some bad times, but they were going to be okay kind of thing. That was what we were trying to portray him as. Not as a drug dealer or a long time, a person who was involved in the drug trade.

(PC-R2. 375). Therefore, when some evidence of drug use came out in the state's case, she thought it was fine "as long as

it was mild enough [she] considered it to be something [she] could deal with" (PC-R2. 376).

Ms. Lyons testified that she had no evidence that Mr. Patton was heavily intoxicated at the time of the crime (PCR2. 377). She noted that there was nothing to indicate intoxication in the records, the police officers did not indicate Mr. Patton was intoxicated when he was arrested and the two men he was with just prior to the shooting testified in their depositions that he was not intoxicated (Id.). Ms. Lyons further explained that Mr. Patton's behavior immediately following the crime was inconsistent with drug intoxication as he was able to get the keys to a car and drive away. However, her main reason for not presenting an intoxication defense was "the drug culture thing" (PC-R2. 378). She did believe there were witnesses who could support Mr. Patton's intoxication at the time of the crime (Id.).

Ms. Lyons agreed that her file was well documented with the action she took in Mr. Patton's case. The State presented the affidavits Ms. Lyons submitted for payment which documented all the work she had done (PC-R2. 381). The State then had Ms. Lyons read through her affidavits and inform the court the names of the defense attorneys she consulted with and the nature of the consultation (PC-R2. 382-86). Ms. Lyons testified that her records indicated telephone conferences

with various defense attorneys, but when asked what she was looking to gain from these conferences, Ms. Lyons indicated she hoped “to gain incite (sic) for various things that we were doing to bounce ideas off of them” (PC-R2. 386). Ms. Lyons had several attorneys prepare affidavits for her when she was asking the court for investigative costs or a second chair attorney (Id.).

Ms. Lyons was cross-examined regarding the insanity issue, and indicated she did not have a recollection of consulting with other attorneys about this issue, but she was sure she discussed “every important issue with all of these people” (PC-R2. 388). Ms. Lyons expressed that it was her belief the insanity defense had very little success (Id.). The State introduced various letters from Ms. Lyons files written by Mr. Patton to his sister and girlfriend indicating Mr. Patton’s thoughts that he was fooling the doctors into believing he was mentally ill (PC-R2. 390-392). Ms. Lyons stated that if she knew that Mr. Patton was feigning mental illness, she ethically could not have presented the defense to a jury (PC-R2. 392).

Additionally the State entered into evidence memos from Ms. Lyons file written by her co-counsel, Bart Billbrough, detailing a conversation between Mr. Billbrough and Mr. Patton. The memo indicates that Mr. Billbrough impressed upon

Mr. Patton to be candid during his evaluation by Dr. Toomer (PC-R2. 393). It also indicates that in Mr. Billbrough's opinion, Mr. Patton did not understand the serious nature of the offense, nor the steps necessary to build a defense (PC-R2. 394). A second memo by Mr. Billbrough provides Mr. Patton's version of the crime, specifically the shooting and the events following the shooting (Id.). Ms. Lyons testified that his "clear recollection of the events" seemed to indicate he was not intoxicated or insane at the time of the events (PC-R2. 395).

Ms. Lyons indicated that the information provided by Dr. Toomer did not support an insanity (PC-R2. 397). The State introduced into evidence the reports of Dr. Mutter, Dr. Jacobson, Dr. Herrera and Dr. Jaslow. Dr. Mutter's report indicated that Mr. Patton was competent to aid counsel in his defense, knew right from wrong and understood the consequences of his acts (PC-R2. 401). His report also details some of the facts of the case as recalled by Mr. Patton (PC-R2. 402). Dr. Jaslow's report reveals that Mr. Patton did not know he was being charged with first-degree murder, but only thought he was charged with driving a stolen car and possibly an earlier charge of robbery (Id.). Ms. Lyons testified that inconsistencies between the various doctors would not have been helpful and recognized that a number of the doctors

stated their belief that Mr. Patton was attempting to fool them with his symptoms (PC-R2. 403). Because it was Dr. Jacobson's opinion that Mr. Patton "at the time of the alleged offense, absence any information to the contrary, was able to meet the test for criminal responsibility," Ms. Lyons would not have called the doctor to testify (PC-R2. 404).

In his report to Dr. Herrera, Mr. Patton denied all wrong doing, which Ms. Lyons, again, recognized as inconsistent with Dr. Mutter's report. Dr. Herrera concluded that Mr. Patton was competent to stand trial and assist with his defense and was "engaging in conscious simulation" (PC-R2. 405). Furthermore, Dr. Herrera concluded that he was sane according to the McNaughten Rule and found no evidence of mental illness (Id.). As such, Ms. Lyons did not feel Dr. Herrera would be a good witness. Finally, Dr. Jaslow stated Mr. Patton appeared to have the "capability to know right from wrong and the nature and consequences of his actions" (PC-R2. 406). However, as Ms. Lyons pointed out, he could have reviewed some additional information to assist him in coming to an opinion(Id.). Ms. Lyons reiterated her consideration of the insanity defense and the effect the doctor's reports of malingering had on her decision not to present such a defense. She stated again that had she had an expert that could have

explained the faking as part of the diagnosis of insanity, that defense would be possible or reasonable (PC-R2. 407).

During re-direct, Ms. Lyons agreed that a defense of intoxication and lack of intent can be consistent in the guilt and penalty phase (PC-R2. 411). Although Ms. Lyons testified during cross-examination that Mr. Patton was a drug dealer, she conceded that he only sold drugs to buy more drugs and was not in a drug cartel (PC-R2. 414). She also agreed that she argued on during closing argument that Mr. Patton "needed drugs, was strung out on drugs and was trying to buy drugs" (Id.). Ms. Lyons recognized the difference between portraying Mr. Patton as someone with a lifelong substance abuse history, or a "druggie," and simply presenting evidence that he ingested drugs immediately prior to the crime (PC-R2. 415), and agreed that hiring an expert to talk about the drugs used just prior to the crime would have been a possibility (PC-R2. 416).

Ms. Lyons acknowledged that her conversations with other defense attorneys did not pertain solely to the issues of insanity and intoxication, but included inquiries regarding routine death penalty motions, excluding the media and many other issues (PC-R2. 418).

On cross-examination Ms. Lyons stated there was no evidence of drug use on the day of the offense in Mr. Patton's

jail records. On re-direct, Ms. Lyons was shown records from the jail, specifically a medical intake form, which indicated fresh track marks were observed on Mr. Patton's arms. Ms. Lyons testified that she did recall information about fresh track marks, but also recalled some inconsistency over whether the marks were fresh or old (PC-R2. 418-19). Ms. Lyons believed the inconsistency involved other documents which indicated he did not need medical assistance because he was not suffering from drug psychosis (PC-R2. 420). Ms. Lyons testified that the incident occurred at approximately 10:00 a.m. and Mr. Patton was not arrested until late in the afternoon, before 5:00 p.m. (PC-R2. 420). Additionally, Ms. Lyons was shown a second booking report and several property receipts. The booking report indicated Mr. Patton had track marks, although Ms. Lyons noted it did not say fresh track marks (PC-R2. 421). The property receipts indicated that white paper with yellow pills and powder were taken from Mr. Patton at the time of his arrest (Id.). Ms. Lyons had no recollection of this receipt, but was sure she received all property receipts (PC-R2. 422).

Ms. Lyons testified that Drs. Mutter, Jacobson, Herrera and Jaslow had never been given any background information pertaining to Mr. Patton, because it was too early on in the case and she had not obtained many records at the time of

their evaluation (PC-R2. 427). Ms. Lyons confirmed that these four doctors were only appointed to address the issue of competency which differs from insanity (PC-R2. 428). The State had called these doctors during Mr. Patton's penalty phase proceeding, however, Ms. Lyons could not recall their testimony with respect to Mr. Patton's intoxication (Id.).

Bart Billbrough testified that he has been an attorney since the Fall of 1981 and was employed by the law firm of Lyons & Farrar at that time (PC-R2. 452). Shortly after Ms. Lyons was assigned to represent Mr. Patton, Mr. Billbrough began working with her on Mr. Patton's case (PC-R2. 453). Mr. Billbrough described his role as "task or project oriented" (Id.). Because he was not sworn in as an attorney until October or November of 1981, he described his work as "law clerk type projects" (Id.). Mr. Billbrough spoke with many witnesses and characterized his contact with Mr. Patton as "very often" (PC-R2. 454). Mr. Billbrough recalled that Mr. Patton had a good recollection of the events of the crime on the occasions they met (Id.). Mr. Patton and Mr. Billbrough discussed pursuing an insanity defense (PC-R2. 455). In their conversations about Mr. Patton's interaction with the competency doctors, Mr. Patton explained he was going to "fake them out" (Id.). According to Mr. Billbrough, Mr. Patton indicated he had done this in the past (Id.). Mr. Billbrough

acknowledged he does not have a degree or training in psychology (Id.). As a lay person, he did not believe there was an insanity defense (Id.).

It was part of Mr. Billbrough's duties to gather mental health records and he confirmed that they spent a substantial amount of time tracking various persons mentioned in Mr. Patton's medical records (PC-R2. 456). Mr. Billbrough reiterated that several doctors were appointed to determine competency and these were the doctors who Mr. Patton claimed to be faking (PC-R2. 457). Mr. Billbrough testified that his recollection was the consultation with Dr. Toomer included a discussion regarding his mental capacity not only as it pertained to the penalty phase, but also the guilt phase (PC-R2. 458). However, he only recalled being present when Ms. Lyons conversed with Dr. Toomer on one occasion (Id.). Mr. Billbrough remembered being disappointed with Dr. Toomer's opinion because he thought it would have been stronger (PC-R2. 459).

Mr. Billbrough and Ms. Lyons discussed the possibility of an involuntary intoxication defense with Mr. Patton (PC-R2. 460). While Mr. Billbrough could not recollect the specific drugs Mr. Patton was using, he knew there had been a history of substantial drug use (PC-R2. 460). Mr. Billbrough testified that they had contacted a doctor at Jackson Memorial

Hospital with regard to Mr. Patton's drug use, but the doctor had informed them that "it wouldn't go anywhere from a defense prospective" (PC-R2. 461). Mr. Billbrough testified similarly to Ms. Lyons regarding the defense strategy with respect to Mr. Patton's drug use, stating that their intent was to minimize the drug use due to the fact that it was the 1980's in Miami and drug crimes were rampant (PC-R2. 463-64). Mr. Billbrough explained that they asked for an involuntary intoxication instruction although they weren't going forward with that defense in an attempt to give the jury a way out "if they were so inclined" (PC-R2. 466).

When cross-examined by Mr. Patton's counsel, Mr. Billbrough agreed that Ms. Lyons was lead counsel (PC-R2. 467), and as such Ms. Lyons made the ultimate strategy decisions in the case (PC-R2. 469). At that time Mr. Billbrough was a new lawyer and had never been involved with a capital case (PC-R2. 470).

During direct examination Mr. Billbrough testified that because Mr. Patton was able to provide specific details about the crime and subsequent events, he did not believe Mr. Patton presented any mental state issues. However, on cross-examination, Mr. Billbrough explained that there were many details that he changed during the course of the case (PC-R2. 471). For example, during their first meeting Mr. Patton had

stated he threw the gun off of a bridge, which was incorrect (Id.). Mr. Billbrough agreed that Mr. Patton did give the same scenario as to the events on the day of the crime every time he met with Mr. Billbrough (Id.).

In terms of Dr. Toomer's evaluation, Mr. Billbrough could not "recall specifically what his charge was" (PC-R2. 474). Instead, he deferred to Ms. Lyons and Dr. Toomer (Id.). Mr. Billbrough conceded that the memo dated October 7, 1981 (State's Exhibit 3) was fairly early in the case, and did not contain any discussion of the insanity issue (PC-R2. 476).

Mr. Billbrough recalled that drug paraphernalia was found in the vehicle Mr. Patton was driving at the time of the offense (PC-R2. 482). Although Mr. Billbrough recalled contacting a doctor at Jackson Memorial Hospital, he could not recall the doctor's background or area of expertise (PC-R2. 482). Mr. Billbrough believed the doctor's opinion was not supportive of "a conclusion that he lacked the appropriate capacity to be able to commit the crime" (PC-R2. 483). Counsel for Mr. Patton showed Mr. Billbrough a memo which he had written documenting his conversations with Dr. Bauzer, the doctor from Jackson Memorial Hospital (Id.). Mr. Billbrough acknowledged that the memo did not state that Dr. Bauzer had no helpful information with respect to Mr. Patton's

intoxication (Id.). When asked further whether the memo indicated any helpful information, Mr. Billbrough testified:

> A Depending on how you define helpful, sir.
>
> Q Helpful to, consistent with your defense in this case, correct?
>
> A I don't think so.
>
> Q You don't think so?
>
> A No.
>
> Q Why not?
>
> A Because the defense that was being advanced was not one predicate upon drug intoxication at the time or the offense. That was not the approach we were going with.
>
> You're asking whether or not ther[e]'s some evidence, or he may have been able to provide some testimony supporting that kind of approach. **I wouldn't argue that point.** I'm just telling you that's not the avenue we selected to deal with.

(PC-R2. 484)(emphasis added). Having been a new lawyer at the time of Mr. Patton's case, Mr. Billbrough had no experience or formal training with regards to intoxication defenses (PC-R2.485).

Pursuant to a stipulation by the State (PC-R2. 437), Mr. Patton relied on the 1982 and 1989 testimony of Dr. Jethro Toomer and the 1989 testimony of Dr. Harry Krop. Dr. Toomer first testified at Mr. Patton's original sentencing proceeding

in 1982. Dr. Toomer testified that he was asked to evaluate Mr. Patton to reach an opinion regarding whether he had the ability to conform his conduct to the requirements of the law and whether or not he was under the influence of emotional disturbance at the time of the crime (R. 1633). Dr. Toomer concluded that Mr. Patton was not able to conform his behavior to the requirements of the law and was functioning under emotional disturbance at the time of the crime (Id.). Dr. Toomer reviewed numerous medical and psychological reports (R. 1639). Dr. Toomer noted that the psychological treatment for Mr. Patton was first suggested at the age of 10 (R. 1640). At the age of 10, there were various diagnoses including Mr. Patton's inability to function under stress, behavioral difficulties and emotional disturbance based on his relationship with his mother (R. 1641). Throughout Mr. Patton's lifetime he received various diagnosis including, chronic behavior disorder with drug psychosis, psychotic, incompetent to stand trial because of an underlying schizophrenic process and organisity or brain damage (R. 1643).

Afer discussing Mr. Patton's life history and history of psychological evaluations, Dr. Toomer discussed the evaluations of the doctors appointed for competency. Dr. Toomer testified that there were indications in their reports

that Mr. Patton was attempting to fake symptoms, and explained that this phenomenon occurred during his evaluation also (R. 1644). Dr. Toomer explained further:

> It's the process of malingering or faking. It goes by a number of names. It represents an attempt on the part of an individual to fake, or whatever–pretend that a certain mental process is occurring, that a person is suffering some illness when, perhaps, he is not. That phenomenon in and of itself is representative of an underlying psychosis and also in Mr. Patton's case I'm of the opinion that Mr. Patton could do no other given his background and the history of brain damage and psychotic processes that were taking place. The fact that he attempts to–that he attempted to fool or fake symptoms with the doctors is indicative of the underlying illness that is there. It was not an act of choice, that you choose to do. He could do no other by virtue of the illness he suffered.

(R. 1644-45). Ultimately, Dr. Toomer concluded that during September of 1981, when the crime occurred, Mr. Patton was seriously emotionally disturbed and was incapable of any rational functioning (R. 1649).

During cross-examination, the State asked Dr. Toomer if it would be to Mr. Patton's advantage to fake symptoms of mental illness to avoid going to prison. Dr. Toomer explained that it would not because

> a psychologist or psychiatrist who's trained in terms of clinical evaluation would pick up on the faking right away and it's very difficult for an individual to fake symptomatology and it's very easy in

> most instances to pick up on a process of malingering.

(R. 1655). Dr. Toomer reiterated that although Mr. Patton generally knew right from wrong, he was unable to conform his conduct to that knowledge (R. 1656-57). The State then began questioning Dr. Toomer regarding Mr. Patton's sanity at the time of the offense (R. 1657). Ms. Lyons objected on the grounds that Mr. Patton's legal insanity was not at issue, the objection was sustained and Dr. Toomer never responded ®. 1658).

Dr. Toomer testified again at Mr. Patton's 1989 resentencing. In 1989, Dr. Toomer testified that the purpose of his evaluation was to determine if there were any mitigating circumstances with regard to the offense (R2. 2709-10). The first mitigating circumstance found by Dr. Toomer was extreme emotional and physical abuse by family members (R2. 2718). Second, Dr. Toomer found long term drug abuse which takes into account drug use at the time of the incident on September 2, 1981 and the weeks leading up to that day. Dr. Toomer testified that Mr. Patton had been using toxic substances regularly, including but not limited to heroin and cocaine (R2. 2727). Dr. Toomer was aware of information describing Mr. Patton as very high the day before the incident and an account of an altercation in his apartment the early morning of the incident where Mr. Patton was described as out

of control (Id.). Dr. Toomer also had knowledge that drug paraphernalia was found in the vehicle driven by Mr. Patton and that there were reports of fresh track marks on Mr. Patton's arms (R2. 2728).

The third mitigating circumstance found by Dr. Toomer involves Mr. Patton's lifelong psychological processes including the diagnosis of schizophrenia, antisocial personality disorder, psychosis with mixed substance abuse (R2. 2729-30) and organicity (R2. 2736). Finally, Dr. Toomer again reached the conclusion that Mr. Patton was acting under extreme emotional or mental disturbance (R2. 2739) and his ability to conform to the requirements of the law was substantially impaired as a result of his personality disorder (R2. 2741). Dr. Toomer's explanation of Mr. Patton's malingering was consistent with his testimony in 1982 in that he described the malingering as a component of the psychological disorder suffered by Mr. Patton (R2. 2743).

On cross-examination Dr. Toomer explained that in 1982 he had not diagnosed Mr. Patton with antisocial personality disorder because he was not asked to come up with a diagnosis in terms of pinpointing the extreme mental or emotional disturbance (R2. 2762). When pressed by the State, Dr. Toomer responded:

> What I am saying is that I did not bother to pinpoint or to assign a category, a

> diagnostic category to the particular myriad of symptoms that I found. That is not what I was asked to do. I was not going to be involved in, nor was I asked to treat Mr. Patton. So, consequently there was no particular need, since I was not asked to – since I was not going to be involved in treatment over any period of time, with Mr. Patton, to pinpoint any particular diagnosis. **I did what I was requested to do by the attorneys.**

(R2. 2764)(emphasis added).

The State continued to question Dr. Toomer with respect to whether Mr. Patton knew the consequences of his actions (R2. 2767). Dr. Toomer indicated that Mr. Patton did "not necessarily" know the consequences of his actions and the State would need to be more specific as to what actions they were referring to (Id.). The State then questioned Dr. Toomer regarding his opinion as to whether Mr. Patton knew right from wrong at the time of the offense:

> Q. He Also knew the difference between right and wrong?
>
> A. At a point in time, yes.
>
> Q. At what point in time did he not know.
>
> A. There is a period of time where --
>
> Q. Let me ask you this question.
>
> A. Yes.
>
> Q. I will make it very specific for you.
>
> A. Yes.

Q. At the time that he murdered Officer Broom, did he know the difference between right and wrong?

A. No. He did not.

Q. He did not?

A. He did not.

Q. So what you are saying, then, is the defendant was insane when he killed Officer Broom?

A. Yes.

(R2. 2769). The State pointed out that in 1982 Dr. Toomer testified that Mr. Patton knew right from wrong and that by now stating Mr. Patton was insane at the time of the offense, he was indicating that Mr. Patton did not know right from wrong (R2. 2771). The State cross-examined Dr. Toomer further on this point:

Q The question before you, Doctor, is: You testified today before this jury that the defendant at the time he murdered Officer Broom did not know right from wrong.

A That is right, yes.

Q Your trial testimony says he did know right from wrong, Doctor. Isn't that correct?

A. Oh, yes. He knew right from wrong – not at that point in time, not at the actual time that the crime was committed.

Q Oh, I see. So, when is that time that you are referring to there, Doctor?

A We are talking about him knowing the difference between right and wrong as opposed to what was transpiring at the time that the officer was killed.

Q Well, Doctor, doesn't the question say September of '81?

A September of '81 is an entire twenty-four hour period.

Q Doctor, did you think the specific question dealt with what happened on September 2nd with Officer Broom – what did you think that question was referring to, Doctor?

A The question -- I understand what you are saying, but there is a difference in terms of looking at mental status functioning, generally with regard to a particular day, with regard to whether a person knows right from wrong and then looking at mental status functioning in terms of when a person commits a specific act. Those things can change.

Q So --

A And that is -- that is all that is being said here.

Q Okay. Excuse me. So, what you are saying, then, is between the whole month of September of 1981 he was fluctuating between insanity-sanity, in and out, in and out; is that what you are saying?

A Not necessarily in and out. What I am saying to you is, the nature of the antisocial personality disorder is such that behavior tends to break down when the individual is faced with unanticipated or with anticipated stressors.

So, that person, at a particular point in time on a particular day within a particular realm of hours, or whatever, can know the difference between right and wrong.

Q All right, Doctor.

A You take that same individual, you place them in a scenario where there are stressors, et cetera, the behavior breaks down. That is what I'm saying and that is the distinction being made.

(R2. 2772-74). Dr. Toomer's testimony was consistent with the deposition he gave in 1989. During his deposition Dr. Toomer was asked if he had an opinion regarding whether Mr. Patton was sane at the time he shot Officer Broom and responded that he "was not asked to deal with the issue of sanity verses insanity," however, the information he received from Mr. Patton, interviews with family members, and the numerous background materials are applicable to the issue of sanity. When pushed by the State, Dr. Toomer, while acknowledging it was not relevant to the penalty phase, did render the opinion that Mr. Patton was not sane at the time of killing Officer Broom.

Dr. Toomer explained how antisocial personality disorder manifests:

What you have asked with regard to whether a person knew – whether Mr. Patton knew right from wrong, whether he was able to act on that, that is fine. That is well and good. If you are dealing with an

> individual who is not subject to this particular disorder, as indicated earlier, a person suffering the effects of antisocial personality disorder behavior breaks down under stress. That means the person is unable to function according to a knowledge of right and wrong.
>
> -------
>
> What happens with the antisocial personality disorder is that when the individual is confronted with stressors, the behavior breaks down for that particular period of time.
>
> -------
>
> For that period of time, for that period of time in which the stressors are acting and impacting on the individual. When the stressors are removed there is a measure of reintegration and the person begins to respond and react, quote-unquote as what you might call normal.

(R2. 2788-89). This reintegration would explain the facts that Mr. Patton fled the scene, stole a car, and hid the gun (R2. 2791). According to Dr. Toomer, this behavior is logically and psychologically consistent with antisocial personality disorder (R2. 2792).

Dr. Krop also testified at the 1989 resentencing. Dr. Krop interviewed Mr. Patton and conducted psychological testing (R2. 2492). As part of his evaluation, Dr. Krop reviewed and "extensive amount" of material (R2. 2494). In terms of Mr. Patton's drug abuse, Dr. Krop found this to be a significant aspect of his behavior (R2. 2501). According to Mr. Patton's reports, Dr. Krop stated that the year prior to

Mr. Patton's incarceration he was using heroin and cocaine very heavily (Id.). In the three months before the incident, Dr. Krop reported that Mr. Patton was using the heroin cocaine combination "quite extensively" (Id.). Mr. Patton was also drinking, although it was not as heavy as his drug use (R2. 2502). Dr. Krop ascertained that Mr. Patton started using drugs when he was six or seven, taking pills from his mother (Id.).

Dr. Krop's testing revealed a significant discrepancy in verbal and performance IQ, which led him to suspect brain damage (R2. 2507). Dr. Krop testified that the reports he reviewed indicated that Mr. Patton had been "diagnosed as having various evidence of brain damage" on four or five occasions (R2. 2508-9). Dr. Krop noted that Dr. Mutter had previously found that the brain damage may have been caused by his drug abuse (R2. 2509-10). Dr. Krop opined that it was not unusual for a person with Mr. Patton's history of drug abuse to have brain damage (R2. 2510).

Dr. Krop diagnosed Mr. Patton with substance abuse disorder based on his history of using illicit substances (Id.). He also stated the substance abuse was supported by considerable evidence (Id.). Dr. Krop testified that Mr. Patton reported "using drugs on a consistent and heavy basis prior to the offense" (R2. 2512). Additionally, Mr. Patton

was not sleeping for months prior to the offense (Id.). In Dr. Krop's opinion, the drug use coupled with Mr. Patton's "longstanding personality disturbance" would have "resulted in impaired judgment and poor impulse control" (Id.). These factors related to his mental state at the time the crime occurred (Id.). Dr. Krop explained that Mr. Patton used drugs to cope with his emotional problems which resulted from his turbulent family background and rejecting and hostile mother (R2. 2513).

In addition to Dr. Mutter, Dr. Krop reviewed the report of Dr. Cantor who diagnosed Mr. Patton as psychotic, and whose impression was that the psychosis was drug induced (R2. 2520-21). At least two other psychiatrists diagnosed Mr. Patton with "psychotic organic brain syndrome associated with drug use" (R2. 2522). All of these reports formed a basis for Dr. Krop's opinion (Id.). Overall, Dr. Krop testified that due to the substantial amount of drugs Mr. Patton was using, he was not thinking rationally (R2. 2525) and the shooting "was a function poor judgment, very impaired judgment, poor impulse control" (R2. 2527).

The State questioned Dr. Krop's opinion that Mr. Patton was using drugs at the time of the offense:

> Q So, other than the abandoned syringe case, a needle, a tie off and a cooking spoon that was found in the Volkswagon that the three of them

abandoned, okay? None of the witnesses who observed or saw the defendant prior to the shooting would say he was high? Do you agree with that?

A That is what they said, but at the same time they did not see him, at least from my review of the information, under the stressful situation in which his adrenaline would have been higher and so forth, to really know whether the drugs were having an effect on him. I don't think as lay witnesses they would have been able to indicate that.

Q People that see druggies every day of their lives and probably see more people doped up than you will ever see, you don't think they could tell?

A I am not sure he would have demonstrated the effects of that.

(R2. 2649). This information did not change Dr. Krop's opinion.

SUMMARY OF THE ARGUMENTS

1. Mr. Patton was denied the effective assistance of counsel at the guilt phase of his trial. Counsel failed to present the abundant evidence of Mr. Patton's intoxication and

insanity at the time of the offense. Had counsel presented the defenses of involuntary intoxication and insanity, the specific intent required for a first-degree murder conviction would have been negated. Where trial counsel conceded Mr. Patton's guilt, it was unreasonable to abandon these viable defenses. The lower court's factual findings are contrary to and unsupported by the record. Mr. Patton is entitled to a new trial.

2. Mr. Patton was denied a full and fair hearing as a result of the lower court's erroneous ruling denying Mr. Patton's request to interview jurors. Under Strickland v. Washington, Mr. Patton is required to show prejudice as a result of trial counsel's deficiency. With regard to trial counsel's failure to question the jurors about mental illness during voir dire, Mr. Patton has no other means of establishing prejudice but through the jurors themselves. His inability to fully explore possible biases of the jury prevents him from fully showing the unfairness of his trial and precludes a full and fair evidentiary hearing on this issue. Relief is warranted.

ARGUMENT

ARGUMENT I

MR. PATTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Analysis of an ineffective assistance of counsel claim proceeds under Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of deficient attorney performance and prejudice. Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A petitioner is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Strickland, 466 U.S. at 693.

A piece-by-piece prejudice analysis is erroneous. In Kyles v. Whitley, 115 S. Ct. 1555 (1995), the court addressed the materiality standard for claims under Brady v. Maryland, 373 U.S. 83 (1963). The court pointed out that the Brady

materiality standard and the Strickland prejudice standard are the same. 115 S. Ct. at 1566-67. The court pointed out that the Brady materiality standard and the Strickland prejudice standard are the same. 115 S. Ct. at 1566-67. The Court emphasized that this standard must consider the effect of omitted evidence "collectively, not item-by-item." Id. at 1567. Further, under Strickland, prejudice is established when the omitted evidence likely would have affected the "factual findings." Strickland, 466 U.S. at 695-96. The testimony presented at the evidentiary hearing conclusively demonstrated that Mr. Patton's trial counsel was deficient, and Mr. Patton was prejudiced by the deficiency.

The degree of deference given to trial counsel is based on counsel's experience at the time of trial; thus, the more experience counsel has, the greater deference counsel's decisions are given. See, Chandler v. U.S., 218 F. 3d 1305 (11th Cir. 2000). Although Ms. Lyons had experience as a trial attorney, she testified that Mr. Patton's case was the first capital case she tried. While the State pointed out that she had consulted with numerous experienced attorneys, Ms. Lyons could not recall the specifics of those consultations. As such, she could not say which conversations or how many were related to her strategy regarding the intoxication and/or insanity defenses (PC-R2. 418).

Additionally, Bart Billbrough testified that at the time Mr. Patton became a client of Ms. Lyons, Mr. Billbrough had only just passed the bar or passed shortly thereafter (PC-R2. 452). He also testified that he had no experience in dealing with capital cases (PC-R2. 470).

Ms. Lyons testified that the overall strategy was to achieve a verdict of less than first degree murder (PC-R2. 348). Mr. Billbrough agreed that the defense was that the shooting of Officer Broom was accidental or non-conscious. Both defenses of voluntary intoxication and insanity were consistent with the defense theory at trial. Therefore, where trial counsel's strategy was to concede Mr. Patton's guilt at trial, it was unreasonable to abandon these viable defenses.

A. INTOXICATION

Without a reasonable tactic or strategy, trial counsel failed to utilize plentiful and available evidence of Mr. Patton's voluntary intoxication at the time of the offense. Likewise, counsel failed to request the assistance of a mental health expert to assist in the preparation of a voluntary intoxication defense. Under Florida law, "[v]oluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985) (citations omitted). During the guilt/innocence phase of trial, defense counsel presented no

evidence regarding Mr. Patton's intoxication. Counsel failed to call any defense witnesses who could have testified to Mr. Patton's intoxication at the time of the offense and to his extensive history of drug and alcohol abuse.

A voluntary intoxication defense would not have been inconsistent with the theory of defense, nor would it have conflicted with the theory at the penalty phase. Ms. Lyons conceded the point that intoxication or lack of intent can be presented consistently in both the guilt and penalty phases (PC-R2. 411). Mr. Patton's counsel never argued that he was not present and did not present a defense of alibi. In fact, counsel conceded in opening statement that Mr. Patton shot officer Broom (R. 848). Moreover, defense counsel conceded all the material elements of the State's case against Mr. Patton except for his ability to form specific intent because she asserted that he was intoxicated.

The trial court outlined Ms. Lyons' strategy with regard to the intoxication defense as follows:

> 1. Change or clean up the defendant's appearance from that of a rugged Charles Manson look alike to a nice middle class person.
>
> 2. Avoid tainting the jury particularly during the guilt phase with information or evidence of the defendant's history of heavy drug use because during the 1980's Miami had a notorious image problem as the murder capital of the world stemming from

> the drug trade and the violence associated with it.
>
> 3. Show that the defendant made an instantaneous decision to shoot that was not premeditated or that he lacked the specific intent to kill.
>
> 4. Create a sympathetic person who was not a “druggie” by explaining both his mental and drug problem primarily in the penalty phase.

(PC-R2. 175). The trial court goes on to find that “Ms. Lyons presented an intoxication defense at trial that was consistent with her attempt to de-emphasize the defendant’s significant history of drug abuse because of the climate of fear and controversy over drugs and violence in the 1980's” (PC-R2. 176). However, a review of the trial record and post-conviction record reveals that Ms. Lyons’ purported strategy is in direct contradiction with what she presented at trial.

When asked at the evidentiary hearing regarding her reasons for not presenting the wealth of evidence indicating Mr. Patton's long term drug problem and that he was under the influence of drugs at the time of the shooting, Ms. Lyons indicated she did not want to portray Mr. Patton as a "druggie," but rather as a good kid who happened to have a drug problem (PC-R2. 360-61). Although, she could not recall how the scant information pertaining to Mr. Patton's drug use came out during trial, she believed it was "inferred" through cross examination of the State's witnesses. Ms. Lyons

presented no direct evidence of Mr. Patton's drug ingestion within hours of the offense or his long history of drug abuse because she felt her case would lose credibility with the jury.

First and foremost, Ms. Lyons' explanation for not presenting witnesses and expert testimony regarding Mr. Patton's intoxication is belied by her argument during closing argument. Ms. Lyons argued: "From the testimony that has come out, what we have shown to you is that that man was someone **who needed drugs and was strung out on drugs and was trying to buy drugs**" (R. 1488)(emphasis added). This argument is certainly not indicative of "a nice middle class guy" who was just the "kid who had a drug problem but not to be a druggy" (PC-R2. 360-61). Essentially, Ms. Lyons argued Mr. Patton was a "druggie," but failed to present any testimony to explain the extent of Mr. Patton's drug problem, the effect the drugs would have on his behavior and mental state at the time of the murder, or the impact the drugs had on his existing mental illness.

Furthermore, throughout the course of the State's case, Ms. Lyons elicited information on cross-examination which only touched on Mr. Patton's drug use. For example, as the trial court noted, Mr. Patton's probation officer testified that she knew he had used drugs, but not to what extent (R. 858).

Also, the two men that were in the car with Mr. Patton on the date of the incident testified that Mr. Patton had told them he wanted to sell a gun in order to get money for drugs (R. 1134). The trial court used these brief references to Mr. Patton's drug use, which do not indicate drug use on the day of the crime although there was ample evidence to support it, in support of the notion that Ms. Lyons did present a voluntary intoxication defense. Yet, the trial court overlooks the glaring inconsistency between this evidence and her closing argument that Mr. Patton was strung out on drugs. Ms. Lyons reasoning is further belied by the fact that she requested, and the jury was given, a voluntary intoxication instruction (R. 436). Because no evidence was presented to the jury, except the few inferences made during cross examination of state witnesses, the jury was able to disregard any consideration that Mr. Patton did not form the specific intent required for first degree murder.

The trial court fails to see that Ms. Lyons' testimony that she had no evidence that Mr. Patton was heavily intoxicated at the time of the crime (PC-R2. 377), is in conflict with her own files and the evidence presented at trial. Besides the numerous reports from hospitals and doctors detailing Mr. Patton's history of drug use from as early as age seven, there was an abundance of evidence

indicating his use of drugs on the days leading up to and the day of the crime. Ms. Lyons was in possession of booking reports indicating Mr. Patton had fresh track marks on his arms when he was booked into the jail on September 2, 1981. Property receipts from that day indicated that "white paper with yellow pills and powder" were taken from Mr. Patton at the jail. In its opinion remanding for an evidentiary hearing, this Court acknowledged the abundance of evidence which existed at the time of trial:

> With regard to the intoxication defense, counsel had information that the defendant was a heavy drug user and had a substantial history of drug and alcohol abuse dating back to when he was seven years old. Counsel knew of but did not present evidence that Patton had been doing speedballs (a mixture of cocaine and heroin) only seven hours prior to the shooting, that the stolen car Patton had driven prior to the murder had drug paraphernalia in it, or that Patton had fresh track marks on his arm at the time he was arrested.

Patton v. State, 784 So. 2d 380, 387 (Fla. 2000).

Ms. Lyons indicated that she did not want to bring to court those witnesses who could testify to Mr. Patton's drug use (PC-R2. 378). However, one of the witnesses able to testify regarding Mr. Patton's drug use just hours before the shooting was Christena Castle. In her statement to the police, Ms. Castle stated that when Mr. Patton left her at

3:30 a.m. on September 2, 1981, he was very, very high. Because Christena Castle did in fact testify at the penalty phase of Mr. Patton's original trial, Ms. Lyons' reasoning is contradicted by the record. Likewise, Ms. Lyons could have presented the aforementioned documentary evidence and the testimony of experts.

Several other witnesses who could testify as to Mr. Patton's drug use did in fact testify for the State, yet trial counsel failed to adequately cross-examine them. In fact, the trial court found that Ms. Lyons highlighted "the importance of the police discovering and impounding evidence of drug paraphernalia in the stolen Volkswagon" and elicited from Sgt. Bohan that no drug or alcohol tests were administered to Mr. Patton when he was taken into custody (PC-R2. 177). At Mr. Patton's trial, it was established that drug paraphernalia was found in the green Volkswagen which Mr. Patton was driving. State witness Robert Snarnow, crime scene technician, processed all the evidence found in the green Volkswagen which Mr. Patton was driving. Robert Snarnow testified that he found inside the Volkswagen "an eyeglass holder with a spoon, two hypo syringes, [and] a cotton yellow needle holder" (R. 1010). Additionally, the following exchange occurred between defense counsel and Michael Snowden, owner of the Volkswagen:

Q. Mr. Snowden, do you recall the date when you last saw your automobile before it was apparently stolen?

A. Not the specific date, no.

Q. Now, when the police recovered your car and returned it back to you, they had found some things that they refer to as drug paraphernalia and also some marijuana cigarettes in the car. Were those yours?

A. No. They weren't.

®. 863). However, defense counsel presented no evidence establishing that Mr. Patton owned and used this drug paraphernalia. The trial court neglected to see the significance in Ms. Lyons' inadequate cross-examination.

In fact, defense counsel failed to cross examine state witnesses Leroy Williams and Henry Butler, passengers of Mr. Patton in the Volkswagen immediately prior to the offense, regarding ownership of the paraphernalia. Further, defense counsel failed to have the paraphernalia tested for the presence of drugs, fingerprints, or other information which would have assisted Mr. Patton's claim of voluntary intoxication.

Furthermore, Ms. Lyons testified that the person she had contacted about Mr. Patton's drug use did not prove to be helpful (PC-R2. 362). The doctor she contacted was a medical doctor from Jackson Memorial Hospital (Id.), who in fact,

according to a memo in Ms. Lyons files, gave preliminary information on the types of drugs Mr. Patton was using and the effect those drugs would have on his behavior. For example, the doctor reported:

> The doctor stated that the drug Patton was referring to in the memo was Tuinal, a barbituate or 'downer'... The doctor concluded that by taking these pills intravenously, an average person would have been overdosed and asleep. The only [way] Patton could have sustained the intake of such an amount would have been to have had a high tolerance toward this drug...
>
> The doctor also stated that Patton also took some cocaine... The coke would act as a counter to the Tuinal that was taken...
>
> The doctor noted that the use of these drugs, such as cocaine, would have the effect of making a person somewhat paranoid...
>
> The doctor concluded that the drugs taken should give Patton at least the effect of being very drunk or intoxicated.

(PC-R2. 482-83)(Defense Exhibit N; Memo regarding meeting with Dr. Bauzer). Trial counsel failed to follow up on this information with an expert that could testify during the guilt phase of trial.

Had Ms. Lyons followed up on the preliminary medical report, Dr. Harry Krop could have testified regarding Mr. Patton's lack of intent at the time of the shooting as a result of extensive drug use. In 1989, Dr. Harry Krop testified that Mr. Patton began using drugs at a very early

age which started a "vicious cycle" (R2. 2499). The cycle of drug abuse continued throughout his childhood and adolescence. Dr. Krop indicated that Mr. Patton had used various drugs and had become addicted to heroin and cocaine during the year leading up to the offense. Dr. Krop testified:

> Mr. Patton reports that he was using drugs on a fairly consistent and heavy basis prior to the offense.
>
> He was not sleeping and using drugs quite frequently, as I said, for about three months prior to the offense, and that interacting with the long term personality disturbance that he showed, would have resulted in impaired judgement and poor impulse control.

(R2. 2512). This testimony directly relates to his mental state at the time the offense occurred. Dr. Krop specifically stated "that the drugs did have an influence on his behavior at [the time of the shooting]" (R2. 2646). Because Dr. Krop only testified at Mr. Patton's resentencing in 1989, the original trial jury never heard this compelling and relevant evidence. Had the jury received an explanation of Mr. Patton's drug use and the effect the drugs had on his behavior, the jury would have reasonable doubt as to Mr. Patton's mental state at the time of the shooting.

B. INSANITY

Trial counsel unreasonably failed to present a defense of insanity. In light of Mr. Patton's prior adjudication of

insanity and Dr. Toomer's testimony at Mr. Patton's resentencing, an insanity defense was more than viable, yet counsel failed to even request a confidential mental health expert prior to Mr. Patton's competency hearing.

The trial court based its conclusion that Ms. Lyons was not ineffective for failing to present an insanity defense on the following factual findings: 1) Ms. Lyons ultimately decided not to pursue an insanity defense because Mr. Patton was attempting to feign insanity; and 2) the opinions of the four doctors appointed by the court to evaluate Mr. Patton for insanity, and the opinion of Dr. Toomer, failed to establish a claim of insanity. However, the record and the testimony and evidence from the evidentiary hearing directly contradicts these factual findings and demonstrates that Ms. Lyons basis for not presenting an insanity defense was unreasonable.

As the trial court recognized, much of trial counsel's concern regarding presenting an insanity defense revolved around Mr. Patton's statements and the conclusions of the doctors who evaluated him for competency, that he was faking insanity. The trial court ignored Ms. Lyons' testimony that if she had had someone to explain the "faking" she would have considered presenting an insanity defense. Her reasoning is contradicted by a memo in her files dated February 23, 1982, entitled "SUMMARY OF INTERVIEW WITH DR. TOOMER." The memo

details a conversation she had with Dr. Toomer regarding his evaluation of Mr. Patton. Specifically, she wrote:

> I asked him about the problem with malingering. He said that is symptomatic of their problem. They are very manipulative and will withhold information and pretend information and give false information in their attempts to control other people. The fact that they are giving this information based on their attempts to fool them, is simply symptomatic.
>
> I asked him then in view of the tests that were given whether or not knowing that this person is going to be providing him false information whether or not he can rely on the information he has received. He says that he can, because the tests have built in factors to account for persons that are trying to fool them. The tests are projective. That means that the person taking the test doesn't know what answer is being looked for.

(Defense Exhibit C).

Additionally, Dr. Toomer testified to the same effect at the penalty phase of the trial. He testified that the "phenomenon in and of itself is representative of an underlying psychosis and also in Mr. Patton's case I'm of the opinion that Mr. Patton could do no other given his background and the history of brain damage and psychotic processes that were taking place" (R. 1645).

Dr. Krop confirmed Dr. Toomer's explanation for the malingering testifying that Mr. Patton's attempt to feign symptoms was entirely consistent with his overall personality

disorder (R2. 2525). Therefore, Dr. Toomer could have rebutted any attack by the State that Mr. Patton was faking his mental status. Furthermore, the fact that numerous doctors in the past had diagnosed Mr. Patton with various mental disorders including anti-social personality disorder and psychosis associated with drug abuse, undermines claims that Mr. Patton was malingering.

The trial court failed to recognize the difference between an evaluation for competency and a complete evaluation to determine mental state at the time of the offense. As this Court pointed out, there is a distinction between experts appointed for a competency evaluation and experts appointed to evaluate a defendant's state of mind at the time of the offense:

> First, whether a defendant is competent to stand trial is not necessarily relevant on the question of whether the defendant was insane at the time of the killing. Competency to stand trial and insanity at the time of the offense involve two separate and distinct points in time. Second, the competency experts may not have been given the type of background information that would be necessary to evaluate Patton's true mental status at the time of the murder.

Patton at 387. The doctors appointed by the court to evaluate Mr. Patton prior to trial were only appointed for the purpose of determining competency.

Each of the doctors saw Mr. Patton less than a month after the crime. While the trial court found that Ms. Lyons was familiar with the court-appointed doctors and ”employed the strategy of giving them access to everything possible to aid her client’s defense” (PC-R2. 171), this was not her testimony. At the evidentiary hearing, Ms. Lyons acknowledged that, at the point in time of their evaluation, the doctors appointed for competency would not have had access to the numerous background materials pertaining to Mr. Patton's mental health since she had not gathered the extensive materials yet (PC-R2. 427). In fact, contrary to the trial court’s findings, Ms. Lyons stated to her knowledge they had never been given any background materials.

The trial court relies on the conclusions of Dr. Mutter, Dr. Jacobson, Dr. Herrera and Dr. Jaslow in finding that Ms. Lyons was not ineffective for failing to present an insanity defense. The court’s conclusion ignores the fact that none of these doctors had any information pertaining to Mr. Patton’s state of mind at the time of the offense. By their own reports, at least two of these doctors stated they did not have the appropriate background information.

With regards to Dr. Mutter, the trial court found it significant to note that he was one of the doctors who evaluated Mr. Patton in 1978 when Mr. Patton was adjudicated

not guilty by reason of insanity. Interestingly though, in 1978 Dr. Mutter did not find Mr. Patton to be insane at the time of the offense, whereas, the other doctors who evaluated him did and their opinions ultimately led to the insanity adjudication. Dr. Mutter made essentially the same findings in 1981 as he did in 1978, finding a significant history of drug abuse. Although Dr. Mutter indicated that Mr. Patton knew right from wrong at the time of the alleged offense, according to his report the only information he had regarding the offense was as follows:

> [Mr. Patton] stated that he was arrested September 2, 1981 for his present difficulties. He believes that there are other co-defendants. He stated, 'I was in a Volkswagon with two other guys. The cops pulled us over. I ran away and went home to my grandmother's house. They said I shot a police officer. They put this one on me.' He stated he was taking cocaine and heroin intravenously. He was also using Dilaudid, amphetamines and Quaaludes at the time of the offense.

(PC-R2. 239). There is no report by Mr. Patton of the events immediately surrounding the crime.

The trial court also relies on Dr. Sanford Jacobson's finding that Mr. Patton meets the test for criminal responsibility. In the same paragraph of the report cited to by the trial court, Dr. Jacobson specifically states **"I do not have any information from him which would describe his**

thinking, his behavior, or his mood at the time of the alleged offense” (PC-R2. 247)(emphasis added). Dr. Jacobson also commented that he is making the finding regarding Mr. Patton’s criminal responsibility “in the absence of information to the contrary” (Id.). This statement highlights the point that absent the extensive background materials and information that Dr. Toomer was privy to, the court cannot place much credibility in his conclusory opinion regarding Mr. Patton’s insanity. The trial court found no significance in Dr. Jacobson’s lack of information. Dr. Herrera, likewise, had no information as to Mr. Patton’s state of mind at the time of the offense.

Finally, the court ignored Dr. Jaslow’s claim of the need for **“additional objective material from other sources to give a more valid opinion concerning his present mental state and that which was present at the time of the alleged offenses”** (PC-R2. 255)(emphasis added). Dr. Jaslow goes on to state that he relied on information from non-objective sources such as the newspapers (Id.). None of this was taken into account by Judge Bagley. The trial court finds that Ms. Lyons testified that she asked Dr. Toomer to determine whether Mr. Patton was sane or insane at the time of the offense (PC-R2. 173). This is not entirely accurate. When asked at the evidentiary hearing if she had a specific recollection of

asking Dr. Toomer to look at the issue of insanity she replied:

> I'm sure at the time that we hired him that was one of the things we asked him to do, was to see whether or not he could determine whether or not he could reach an opinion that he was insane at the time of the offense.

(PC-R2. 354). Ms. Lyons was pressed further regarding her recollection of communications with Dr. Toomer:

> Q I wanted to go back a little to Dr. Toomer in terms of the scope of what you had asked him to look for. Do you have a specific recollection that you had asked him to look specifically at the issue of insanity, or was it more of generally look at this guy and, you know, what can you help me with.
>
> A Did I write him a letter and say here are your instructions, what's your criteria, no. I have no recollection of how that was done.

(PC-R2. 364). While the court below recognized that Ms. Lyons' billing documents several conference with Dr. Toomer, there is nothing to reflect that he was charged with looking into insanity. The memos from Ms. Lyons file that were entered into evidence are absent any reference of a request to explore the issue of insanity (PC-R2. 365-66, Defense Exhibit B and C).

On numerous occasions, Dr. Toomer has stated he was not asked to reach an opinion regarding whether or not Mr. Patton was insane at the time of the crime. In 1982, Dr. Toomer

testified that he evaluated Mr. Patton and was asked to render an opinion regarding whether he had the ability to conform his conduct to the requirements of the law, and secondly, whether or not he was under the influence of extreme emotional disturbance at the time of the incident (R. 1633). Again in 1989, in his pretrial deposition, and on both direct and cross examination, Dr. Toomer testified that the purpose of his evaluation, including the evaluation in 1981, was to determine if there were any mitigating circumstances with regard to the offense (R2. 2709). During his deposition Dr. Toomer was asked if he had an opinion regarding whether Mr. Patton was sane at the time he shot Officer Broom and responded that he "was not asked to deal with the issue of sanity verses insanity," however, the information he received from Mr. Patton, interviews with family members, and the numerous background materials are applicable to the issue of sanity. When pushed by the State, Dr. Toomer, while acknowledging it was not relevant to the penalty phase, did render the opinion that Mr. Patton was not sane at the time of killing Officer Broom.

Contrary to the court-appointed doctors, Dr. Toomer was a given a wealth of background materials. While Dr. Toomer did not testify regarding insanity in 1982 when asked by the State, due to Ms. Lyons' objection, Dr. Toomer did testify at

Mr. Patton's resentencing. During cross-examination at the resentencing in 1989, the State questioned Dr. Toomer regarding his opinion as to whether Mr. Patton knew right from wrong at the time of the offense:

> Q. He also knew the difference between right and wrong?
>
> A. At a point in time, yes.
>
> Q. At what point in time did he not know.
>
> A. There is a period of time where --
>
> Q. Let me ask you this question.
>
> A. Yes.
>
> Q. I will make it very specific for you.
>
> A. Yes.
>
> Q. At the time that he murdered Officer Broom, did he know the difference between right and wrong?
>
> A. No. He did not.
>
> Q. He did not?
>
> A. He did not.
>
> Q. So what you are saying, then, is the defendant was insane when he killed Officer Broom?
>
> A. Yes.

(R2. 2769). Dr. Toomer very clearly explained his basis for opining that Mr. Patton was insane at the actual time the crime was committed:

A. The question -- I understand what you are saying, but there is a difference in terms of looking at mental status functioning, generally with regard to a particular day, with regard to whether a person knows right from wrong and then looking at mental status functioning in terms of when a person commits a specific act. Those things can change.

Q. So --

A. And that is -- that is all that is being said here.

Q. Okay. Excuse me. So, what you are saying, then, is between the whole month of September of 1981 he was fluctuating between insanity-sanity, in and out, in and out; is that what you are saying?

A. Not necessarily in and out. What I am saying to you is, the nature of the antisocial personality disorder is such that behavior tends to break down when the individual is faced with unanticipated or with anticipated stressors.

So, that person, at a particular point in time on a particular day within a particular realm of hours, or whatever, can know the difference between right and wrong.

Q. All right, Doctor.

A. You take that same individual, you place them in a scenario where there are stressors, et cetera, the behavior breaks down. That is what I'm saying and that is the distinction being made.

(R2. 2774).

As additional support for its denial of Mr. Patton's ineffective assistance of counsel claim with respect to the

failure to present an insanity defense, the trial court states:

> Additionally, Ms. Lyons explained her strong belief that the factual witnesses coupled with the defendant's own actions and statements before, during and after the shooting of police officer Broom would not have supported a viable insanity defense in this case.

(PC-R2. 173). However, Dr. Toomer's testimony regarding the process of "reintegration" directly refutes this concern. Dr. Toomer explained:

> A. What happens with the antisocial personality disorder is that when the individual is confronted with stressors, the behavior breaks down for that particular period of time.
>
> Q. Oh, for the whole day?
>
> A. For that period of time, for that period of time in which the stressors are acting and impacting on the individual. When the stressors are removed there is a measure of reintegration and the person begins to respond and react, quote-unquote, as what you might call normal. That is not a term that I would use, but it is a term that individuals are familiar with. So, what you have is behavior that is not acceptable behavior. You have behavior that is out of the ordinary. You have behavior that is broken down during the period of time and once the stressors are removed, the person reintegrates (sic) and observations would make it appear as though this person were operating as a normal person would. But, once again, whenever there are other stressors the behavior is going to repeat itself.

> Mr. Patton's history is filled with examples where the antisocial personality disorder has broken down, time after time after time.

(R2. 2789-90). Pressed further on the issue, Dr. Toomer was able to explain Mr. Patton's seemingly rational behavior following the crime:

> Q. Was the defendant acting in an antisocial manner, and I just want you to assume these facts in my question, as if this were true. He took the gun. He shot Officer Broom with it and he hid it and wiped the fingerprints clean. He hid it inside his house. There is no stressors there. This is after the fact, now, isn't that right, doctor?
>
> A. That is just what I indicated.
>
> Q. So he was acting –
>
> A. That was the behavior I indicated to you.
>
> Q. He was acting like a normal person when he hid the gun?
>
> A. When the stressors are removed, there are some integration of behavior. That is the pattern of antisocial personality disorder.
>
> Q. I want you to assume, in addition to the – let's go back to this hypothetical where the defendant had taken another car and escaped the area after he murdered Officer Broom. I also want you to assume that as he is fleeing the area, he had just taken, at gunpoint, the car that he is ow fleeing the area in, and I want you to assume those facts for a moment. I want you to assume, now, that he sees

> a police car driving by that same area, okay? Now, he is driving away in this new getaway car that he has stolen at gunpoint. He slows down. He obeys all the traffic laws while he is passing the police car. I want you to assume those facts right now, okay? Assuming those facts, Doctor would you agree with me the defendant, at that time, was conforming his actions to the requirements of the law?
>
> A. Exactly. It is logically consistent and psychologically consistent.

(R2. 2791-92). According to Dr. Toomer, these behaviors were rational responses "after the stressors are removed" (R2. 2792). The trial court failed to evaluate Ms. Lyons' testimony in light of the testimony of Dr. Toomer.

Although Dr. Toomer touched on the insanity issue at the resentencing, it was not presented at all at trial. With regard to the insanity defense, this Court found

> there was also ample evidence available which could have suggested to defense counsel that Patton was legally insane at the time he committed this murder, including the fact that Patton had previously been adjudicated insane. The State argues that counsel was unable to find an expert who would testify that Patton was legally insane, and therefore she was not ineffective for failing to present this defense. This argument is rebutted by the record. Dr. Toomer testified at resentencing that Patton was legally insane at the time he shot the police officer. In addition there are records available which document Patton's history of mental illness.

Patton at 387. Counsel had no reasonable tactical or strategic decision for not doing so.

In Florida, the standard for insanity is the McNaughton rule which requires consideration of the following factors: 1) the individual's ability to distinguish between right and wrong at the time of the incident, and 2) his ability to understand the wrongness of the act committed. See, Childers v. State, 782 So. 2d 513 (Fla. 1st DCA 2001). Mr. Patton has established that an insanity defense was feasible.[6] The testimony of Dr. Toomer, that Mr. Patton did not appreciate the wrongfulness of his conduct, was available at the time of trial. It cannot be said that trial counsel reasonably rejected an insanity defense where there is no evidence that she even asked Dr. Toomer to evaluate Mr. Patton for insanity. But for the ineffectiveness of counsel, for not inquiring of Dr. Toomer regarding insanity at the time of the offense and not offering the clear evidence of insanity at trial, the out come would have been different.

Even had the State presented the competency doctors to show Mr. Patton was malingering, Ms. Lyons could have impeached the doctors; as the Florida Supreme Court pointed

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[6]Even if Mr. Patton's severe mental condition was not so acute as to constitute legal insanity, it was, however, serious enough to negate specific intent. Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994); Bunny v. State, 603 So. 2d 1270 (Fla. 1992).

out an evaluation for competency is very different than one for insanity at the time of the offense. When faced with Dr. Toomer's testimony, the jury would have found a doubt as to Mr. Patton's specific intent during the moments leading up to and when the shooting occurred.

C. FAILURE TO CONDUCT ADEQUATE VOIR DIRE

In the face of substantial and compelling evidence of mental illness, trial counsel asked not one question of any potential juror regarding mental health issues. Not one question was asked regarding the jurors' feelings about the defense of insanity. Not one question was asked about the jurors' feelings about their perceptions of mental health issues as viable defenses in a criminal case. Not one question was asked about the jurors' understanding of the concept that evidence of mental illness can negate the specific intent required for a finding of first-degree murder. Not one question was asked about the jurors' understanding or feelings about mental health issues relating to mitigating circumstances. No evidence was adduced about the potential jurors' biases and feelings about psychiatrists and psychologists in general, and the importance of forensic mental health testimony. No questions were asked to jurors regarding their attitudes and biases towards drug abuse and addiction. This is prejudicially deficient performance.

Given defense counsel's awareness of Mr. Patton's obvious mental health problems, the failure to even ask one question in this area falls below reasonably professional standards.

Ms. Lyons testified that the questionnaire she requested inquired regarding drug use, but the one the court submitted to the jury did not (PC-R2. 369). She also testified that Judge Scott hurried voir dire (Id.). Ms. Lyons offered no tactical reason for failing to question the jury regarding mental illness. In brief, the trial court found "that the defendant's failure to establish a proven claim of insanity at the time of the offense negates any assertion that trial counsel was ineffective for failure to question jurors about mental illness during voir dire" (PC-R2. 174). The trial court's conclusion ignores the fact that Mr. Patton's mental state and mental health was at issue during the penalty phase as well the guilt/innocence phase of trial. Ms. Lyons' herself recognized this line of questioning during voir dire would not only have been useful for the guilt phase, but also in preparation for the penalty phase of the trial (PC-R2. 370).

Mr. Patton went to trial alleging mental health issues relating to substance abuse, intoxication and severe childhood abuse without his counsel even asking the jurors their

feelings on these important issues. This is deficient performance.

D. CONCLUSION

The evidence presented below established that trial counsel's performance was deficient and that Mr. Patton was prejudiced. Had counsel presented evidence of Mr. Patton's intoxication and insanity at the time of the offense, the jury would have found support for Mr. Patton's lack of specific intent defense. The evidence likely would have affected the outcome of the trial. This Court should grant Mr. Patton relief.

ARGUMENT II

THE TRIAL COURT ERRONEOUSLY DENIED MR. PATTON'S DISCOVERY REQUEST TO INTERVIEW JURORS IN ORDER TO ESTABLISH THAT HE WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO VOIR DIRE THE JURORS REGARDING BIASES TOWARDS MENTAL ILLNESS.

In determining a claim of ineffective assistance of counsel, the proper standard to follow is set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the two-prong test laid down in Strickland, Mr. Patton must show (1) that the performance of his counsel was deficient and (2) that the deficient performance prejudiced the defense. Prejudice is demonstrated where the evidence shows a reasonable

probability that the outcome of the proceeding would have been different absent the ineffective assistance. This Court recently reaffirmed the Strickland standard it used in Jones v. State, 732 So. 2d 313 (Fla. 1999):

> In *Jones,* we recognized that to prove ineffective assistance of counsel, a defendant must show: (1) that counsel made errors so serious that counsel was not operating as the "counsel" guaranteed the defendant by the Sixth Amendment; *and* (2) that such deficient performance prejudiced the defense by depriving the defendant of a trial whose result was reliable. 732 So.2d at 319 (quoting *Rutherford v. State,* 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052)). Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that rendered the result unreliable. *Id.*

Brown v. State, 755 So. 2d 616 n.8 (Fla. 2000)(emphasis added). In fact, in Brown, the Court affirmed the circuit court's denial of the defendant's ineffective assistance of counsel claim because he did not meet the prejudice prong of Strickland. Id. at 623.

With regard to trial counsel's failure to question the jurors about mental illness during voir dire, Mr. Patton has no other means of establishing prejudice but through the jurors themselves. His inability to fully explore possible biases of the jury prevents him from fully showing the unfairness of his trial and precludes a full and fair

evidentiary hearing on this issue. Juror bias pertaining to mental illness may have existed and may have required that juror to be disqualified from hearing Mr. Patton's case, but Mr. Patton can only discover this through juror interviews. Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

In Rule 3.850 proceedings, this Court has authorized pre-hearing discovery: "On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are **relevant and material**...." State v. Lewis, 656 So.2d 1248, 1250 (Fla. 1994)(quoting and adopting language from Davis v. State, 624 So. 2d 282, 284 (Fla. 3d DCA 1993))(emphasis added). But, this Court cautioned: "We conclude that this inherent authority should be used **only** upon a showing of good cause." Lewis, 656 So. 2d at 1250 (emphasis added).

Mr. Patton is aware that Florida law prohibits litigants from disturbing the privacy of jury deliberations. Pesci v. Maistrellis, 672 So. 2d 583 (Fla. 2d DCA 1996) (citing Baptist Hospital of Miami, Inc. v. Maler, 579 So. 2d 97 (Fla. 1991). In Baptist Hospital of Miami, Inc. v. Maler, this Court stated: "To the extent an inquiry will elicit information about overt prejudicial acts, it is permissible; to the extent an inquiry will elicit information about subjective

impressions and opinions of jurors, it may not be allowed." 579 So. 2d at 99. Furthermore, the prohibition against juror testimony contained in the Florida Evidence Code pertains only to matters which inhere in the verdict, such as emotions, mental processes and mistaken beliefs of jurors. Id.; Fla. Stat. §90.607(2)(b). In Kearse v. State, 770 So. 2d 1119 (Fla. 2000), the Court reaffirmed its holding in Baptist Hospital v. Maler, and explained that the standard for interviewing jurors "was formulated 'in light of the strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it.'" Kearse at 1128, quoting Baptist Hospital v. Maler, 579 So. 2d 97, 100 (Fla. 1991).

Mr. Patton is only seeking to question the jurors regarding any extraneous bias they may have possessed. This is a factual question which can only be discovered through depositions, as one of the issues on which the Court remanded for an evidentiary hearing was whether counsel unreasonably failed to conduct this inquiry during voir dire. Mr. Patton's inquiry falls outside the realm of prohibited juror testimony. As such, the privacy of the jury deliberations will not be disturbed.

Under the parameters of Lewis, Mr. Patton has clearly shown good cause for the request to interview jurors. In his

rule 3.850 motion Mr. Patton alleged that trial counsel was ineffective for failing to question the potential jurors about mental illness. This Court found the claim warranted an evidentiary hearing. Whether or not the jurors possessed any bias pertaining to mental illness is essential to the resolution of Mr. Patton's claim that trial counsel was ineffective during voir dire. If trial counsel's testimony indicates there was no strategic reason for failing to voir dire the jury on mental illness, Mr. Patton must proceed to establish prejudice. There is nothing in the record to indicate jury bias towards mental illness because counsel failed to ask, and there is nothing in the record to indicate if such bias existed, it could be set aside in order to render a verdict solely on the evidence and law presented. Kearse v. State, 770 So. 2d 1119 (Fla. 200); Lusk v. State, 446 So. 2d 1038 (Fla. 1984). Mr. Patton cannot establish prejudice without this additional information from the jury. If in fact any juror was biased, this is a structural defect which does not require a showing of prejudice. Akins v. State, 26 Fla. L. Weekly, October 3, 2001 (citing Strickland, Hughes v. U.S., ____F. 3d ____, 2001 WL 761343 (6th Cir., Jul. 9, 2001)).

In its response to Mr. Patton's motion to interview jurors, the State cites to Washington v. Strickland, 693 F. 2d 1243 (5th Cir. Ct. App. 1982), rev'd. on other grounds

Strickland v. Washington, 466 U.S. 668 (1984), to support its objection to juror interviews (PC-R2. 89). Following the reasoning in Washington that it is improper for a judge to explain his reasons for imposing a death sentence, the State reasons that it is inappropriate to ask the jurors how they would have considered the insanity and intoxication evidence had it been presented (Id.). However, this is not the line of questioning Mr. Patton wishes to undertake with the jurors. It is only necessary for Mr. Patton to inquire regarding jurors biases towards mental health issues and if any bias did exist, whether the juror reasonably believes he would have been able to set that aside. These are simply the questions trial counsel failed to ask. Mr. Patton does not want to inquire into the thought processes of the jurors during deliberations.

Any concerns the State and Court may have regarding an intrusion into the privacy of jury deliberations may be relieved by formulating a limited set of questions narrowly tailored to fit Mr. Patton's purpose. See Baptist Hospital v. Maler, 579 So. 2d 97 (Fla. 1991)(although this Court reversed the circuit court's grant of jury interviews, the facts of the case indicate the circuit court defined two limited questions to be asked of the jury). See also United States v. Gaffney, 676 F. Supp. 1544 (M.D. Fla. 1987) (following Fed. R. Evid.

606(b), the court set forth four questions to be asked of jurors). The circuit court may define the questions to address only mental illness bias.

The State further argued that the jurors have done nothing inappropriate and deserve to be left alone because there is no valid reason to interrupt their lives. This ignores Mr. Patton's state due process and Eighth and Fourteenth Amendment rights which require that Mr. Patton be given a fair trial and a full and fair evidentiary hearing. His inability to fully explore biases of the jury prevented Mr. Patton from fully detailing the prejudice which resulted from trial counsel's ineffectiveness. Any privacy rights the jury has must be weighed against Mr. Patton's constitutional rights.

This Court remanded for an evidentiary hearing on the issue of ineffective assistance of counsel for failing to question jurors regarding mental illness. The circuit court's denial of Mr. Patton's request to interview jurors denied Mr Patton his right to a full and fair evidentiary hearing. Relief is warranted.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Patton respectfully urges the Court to reverse the lower

court and vacate his judgments of conviction and sentence of death.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Lisa Rodriguez, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 on October 4th, 2002.

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CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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