

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-423

ROBERT PATTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on February 3, 1982, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number 81-19702, with committing, on September 2, 1981: (1) grand theft of Michael Snowden's car; (2) first degree murder of Nathaniel Broom; and (3) armed robbery of Maxime Rhodes. (DAR. 7-8A)¹ Trial commenced on February 16, 1982. (DAR. 11) After hearing the evidence and argument of closing and deliberating, the jury found Defendant guilty as charged on all counts. (DAR. 439-41) The trial court adjudicated Defendant guilty in accordance with the verdict. (DAR. 547-48)

The penalty phase commenced on February 26, 1982. (DAR. 36) During penalty phase deliberations, the jury informed the trial court that it had reached a 6 to 6 vote. (DAT. 1773) After consulting with the parties, the trial court gave the jury an *Allen* charge. (DAT. 1773-82) Thereafter, the jury recommended the imposition of a death sentence by a vote of 7 to 5. (DAT. 1784-85) The trial court followed the jury's recommendation and sentenced Defendant to death. (DAR. 558-68) In doing so, the

¹ The symbols "DAR." and "DAT." will refer to the record on appeal and transcripts of proceedings from Defendant's original direct appeal, Florida Supreme Court Case No. 61,945, respectively.

trial court found aggravating circumstances: (1) prior violent felony based on a 1975 robbery conviction; (2) avoid arrest and (3) CCP. (DAR. 558-61) The trial court also found that the murder was committed to hinder a governmental function but did not consider it as an aggravator because it had already found avoid arrest. (DAR. 560) In mitigation, the trial court found nothing and specifically rejected mental mitigation based on a credibility determination. (DAR. 561-64) The trial court also sentenced Defendant to 5 years incarceration for the grand theft and 110 years imprisonment for the armed robbery. (DAR. 566) All of the sentences were to be served consecutively. (DAR. 566)

Defendant appealed his conviction and sentence to this Court raising 13 issues:

I.

DEFENDANT'S PRIOR ADJUDICATION OF INSANITY REQUIRED THE STATE TO ESTABLISH HIS SANITY AS AN ESSENTIAL ELEMENT OF ITS CASE.

II.

THE TRIAL COURT WAS REQUIRED TO HOLD AN EVIDENTIARY HEARING TO DETERMINE IF EXCLUSION OF ELECTRONIC MEDIA WAS NECESSARY.

III.

THE SEARCH WARRANT FOR DEFENDANT'S RESIDENCE FAILED TO ESTABLISH PROBABLE CAUSE THAT THE ITEMS TO BE SEARCHED FOR WOULD BE FOUND AT THE LOCATION TO BE SEARCHED.

IV.

THE COURT ABUSED ITS DISCRETION BY LIMITING INDIVIDUAL VOIR DIRE, REFUSING TO SEQUESTER THE JURY DURING VOIR

DIRE AND TRIAL, FAILING TO ALLOW DEFENDANT ADDITIONAL PEREMPTORY CHALLENGES AND REFUSING TO REMOVE FOR CAUSE DEATH PRONE JURORS.

V.

THE COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER A DEATH QUALIFIED JURY IS ALSO A GUILT PRONE JURY.

VI.

THE COURT ERRED IN FAILING TO ACCEPT AS A RECOMMENDATION FOR LIFE THE JURY'S SIX/SIX DECISION.

VII.

THE TRIAL COURT FAILED TO COMPLY WITH TEDDER IN OVERRULING THE JURY'S RECOMMENDATION OF LIFE.

VIII.

BEFORE A TRIAL JUDGE OVERRULES A JURY RECOMMENDATION FOR LIFE IT MUST ORDER, IF REQUESTED BY THE DEFENDANT, A PRESENTENCE INVESTIGATION REPORT.

IX.

THE COURT ERRED IN REFUSING TO REQUIRE THE JURY TO MAKE SPECIFIC FINDINGS AS TO THE EXISTENCE OF BOTH AGGRAVATING AND MITIGATING FACTORS.

X.

THE COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A "COLD AND CALCULATED MANNER AND IN REJECTING EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

XI.

THERE IS NO BASIS TO OVERRULE THE JURY'S RECOMMENDATION FOR LIFE.

XII.

THE TESTIMONY OF THE DOCTORS ON BEHALF OF THE STATE DURING THE PENALTY PHASE VIOLATED DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS AND RULE 3.211(e).

XIII.

SECTION 921.141 IS UNCONSTITUTIONAL ON ITS FACE AND IN ITS APPLICATION IN THAT IT IS VIOLATIVE OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT TO THE CONSTITUTION

OF THE UNITED STATES AND ARTICLE I, SECTION 2, SECTION
9 AND SECTION 17 OF THE FLORIDA CONSTITUTION.

Initial Brief of Appellant, Florida Supreme Court Case No. 61,945. This Court affirmed Defendant's convictions and non-death sentences but reversed his death sentence, finding that the lower court should not have given the *Allen* charge during the penalty phase. *Patten v. State*, 467 So. 2d 975 (Fla. 1985). In doing so, this Court summarized the facts adduced at trial as:

The facts reflect that on September 2, 1981, the victim, a Miami police officer, attempted to stop appellant for traveling the wrong way on a one-way street. Appellant abandoned his car, which was later determined to have been stolen, and fled the scene on foot. He ran down an alley with the officer in pursuit. Witnesses heard gunshots and one witness testified that appellant had hidden in the alley and waited for the officer to approach before shooting him. The officer was found dead with two bullet wounds. One bullet had penetrated his heart, killing him instantly, and another had entered the officer's foot in a manner indicating that the officer had been shot after he was dead and lying prostrate.

Immediately after the shooting, appellant stole a car at gunpoint and fled the area. He was arrested later that day and charged with first-degree murder, armed robbery, grand theft, and violation of probation. Two days later, after obtaining a search warrant, the police recovered the murder weapon from beneath a heating grate in appellant's grandmother's home.

Id. at 975-76. Defendant petitioned the United States Supreme Court for certiorari review, which was denied on October 7, 1985. *Patton v. Florida*, 474 U.S. 876 (1985).

On remand, Defendant moved the trial court to accept the report of a deadlock as a life recommendation and to hold a hearing only on whether to override that alleged life recommendation, which the trial court denied. (RSR. 3360-62)² Defendant then sought a writ of prohibition from this Court, claiming that the resentencing proceedings should be limited to a hearing before the judge in which a determination of whether to override the alleged prior recommendation of life. Petition for Writ of Prohibition, Florida Supreme Court Case No. 69,000. On June 14, 1986, this Court denied the petition. *Patten v. Morphonios*, 492 So. 2d 1334 (Fla. 1986).

On April 28, 1987, Defendant filed a federal Petition for Writ of Habeas Corpus. *Patton v. Dugger*, 87-811-Civ-Spellman. The petition alleged that a new sentencing hearing would violate Defendant's double jeopardy rights. On November 23, 1987, the Magistrate issued his Report and Recommendation, that the petition be denied on the merits. On February 4, 1988, the district court adopted and affirmed the Magistrate's recommendation, and dismissed the petition with prejudice. Defendant appealed to the Eleventh Circuit Court of Appeals.

² The symbol "RSR." will refer to the record on appeal, which includes the transcripts of proceedings, from the resentencing, Florida Supreme Court Case No. 74,318.

The Eleventh Circuit, on January 13, 1989, in an unpublished opinion, ordered the district court to dismiss the action without prejudice. Rehearing was denied.

On April 24, 1989, the resentencing proceedings commenced before a new jury and judge. (RSR. 3337) On May 4, 1989, the jury recommended death by a vote of 11 to 1. (RSR. 3805) On May 15, 1989, the trial court followed the jury's recommendation and imposed the death penalty for the first degree murder of Nathaniel Broom. (RSR. 3837-40) It doing so, the trial court found two aggravating factors: prior violent felony conviction based on a 1975 armed robbery conviction and the contemporaneous conviction for the armed robbery of Maxime Rhodes; and hinder governmental function and avoid arrest, merged. (RSR. 3837-39) The trial court gave great weight to each of these aggravators. *Id.* The trial court found no statutory mitigating circumstances, specifically rejecting Dr. Toomer's testimony about the mental mitigators on credibility grounds. (RSR. 3839) The trial court did find as nonstatutory mitigation that Defendant was abused as a child and used drugs. (RSR. 3839-40)

Defendant appealed his death sentence to this Court, raising 7 issues:

I.
WHETHER THE TRIAL COURT ERRED IN REFUSING TO SUBMIT TO
THE JURY A SPECIAL VERDICT FORM WHEREON THE JURY WOULD

BE REQUIRED TO SPECIFY WHICH AGGRAVATING AND MITIGATING CIRCUMSTANCES IT FOUND APPLICABLE AND HOW IT WEIGHED THE AGGRAVATING CIRCUMSTANCES VERSUS THE MITIGATING CIRCUMSTANCES.

II.

WHETHER [DEFENDANT] WAS DEPRIVED OF A FAIR ADVISORY SENTENCING TRIAL AND OF THE DUE PROCESS OF LAW BY THE PROSECUTION'S CONTENDING TO THE JURY THAT HE SHOULD BE SENTENCED TO DEATH BECAUSE HE WAS GUILTY OF COMMITTING THE AGGRAVATING CIRCUMSTANCE OF KILLING A POLICE OFFICER WHILE IN THE PERFORMANCE OF HIS OFFICIAL DUTIES WHEN THAT STATUTORY AGGRAVATING CIRCUMSTANCE WAS NOT YET IN EXISTENCE AT THE TIME OF THE INVOLVED CRIME.

III.

WHETHER THE DEATH PENALTY DEFENDANT [] WAS DENIED A FAIR SENTENCING TRIAL BY THE PROSECUTORIAL MISCONDUCT OF THE STATE'S PROSECUTORS.

IV.

WHETHER THE TRIAL COURT ERRED IN BASING ITS IMPOSITION OF THE DEATH PENALTY UPON TWO SEPARATE STATUTORY AGGRAVATING CIRCUMSTANCES BECAUSE THEY EACH REFER TO THE SAME ASPECT OF DEFENDANT'S CONDUCT.

V.

WHETHER THE TRIAL COURT ERRED IN ITS FINDING THAT NO MITIGATING CIRCUMSTANCES EXISTED WITH DEFENDANT'S MENTAL STATE AND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED ANY MITIGATING CIRCUMSTANCES.

VI.

WHETHER IT IS IN THE INTEREST OF JUSTICE THAT THE DEATH PENALTY IMPOSED UPON [DEFENDANT] BE MODIFIED TO A LIFE SENTENCE WITH NO PAROLE FOR TWENTY-FIVE YEARS.

VII.

WHETHER THE DEATH PENALTY IMPOSED UPON [DEFENDANT] SHOULD BE REDUCED TO A LIFE SENTENCE WITH A TWENTY-FIVE YEAR MANDATORY SENTENCE BECAUSE THE DEATH PENALTY IS CONSTITUTIONALLY INFIRM IN THAT IT VIOLATES THE NO CRUEL AND UNUSUAL PUNISHMENT PROVISIONS AND THE DUE PROCESS PROVISIONS OF THE FEDERAL AND STATE CONSTITUTIONS.

Initial Brief of Appellant, Florida Supreme Court Case No. 74,318. This Court affirmed Defendant's death sentence, rejecting each of Defendant's issues. *Patten v. State*, 598 So. 2d 60 (Fla. 1992). Defendant again sought certiorari review in the United States Supreme Court, which was denied on April 5, 1993. *Patton v. Florida*, 507 U.S. 1019 (1993).

On June 4, 1994, Defendant filed his initial motion for post conviction relief. (PCR-SR. 7-170)³ After years of public records litigation, on August 2, 1998, Defendant filed his second amended motion for post conviction relief, raising 26 claims:

I.

THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAD RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED SUFFICIENT TIME TO REVIEW THOSE MATERIALS AND AMEND HIS MOTION.

II.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE [DEFENDANT'S] CASE IN

³ The symbols "PCR." and "PCR-SR." will refer to the record on appeal and supplemental record on appeal in the appeal from the summary denial of Defendant's motion for post conviction relief, Florida Supreme Court Case No. SC89669, respectively.

CHALLENGE TO THE STATE'S CASE, AND FAILED TO ZEALOUSLY ADVOCATE ON BEHALF OF HIS CLIENT. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND THE STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

III.

[DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY DEFENSE COUNSEL'S FAILURE TO REQUEST A CHANGE OF VENUE IN LIGHT OF THE EXTENSIVE AND HIGHLY PREJUDICIAL PRETRIAL MEDIA COVERAGE OF HIS CASE. AS A RESULT, [DEFENDANT] WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

IV.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

V.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT [DEFENDANT'S] CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VI.

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL AND RESENTENCING BEFORE AN IMPARTIAL JUDGE AND JURY IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY THE IMPROPER CONDUCT OF THE TRIAL COURT AND JURY WHICH CREATED A BIAS IN FAVOR OF THE STATE. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING OR MOVING FOR MISTRIAL.

VII.

DESPITE A CLEAR INVOCATION OF HIS RIGHT TO SPEAK TO AN ATTORNEY, THE STATE OF FLORIDA VIOLATED [DEFENDANT'S] RIGHT TO REMAIN SILENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SUBSEQUENT ADMISSION OF HIS PURPORTED STATEMENTS AT TRIAL AND RESENTENCING WAS ERRONEOUS.

VIII.

THROUGHOUT [DEFENDANT'S] TRIAL AND RESENTENCING, THE STATE FILLED, OR ASSISTED IN FILLING, [DEFENDANT'S] COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS IN VIOLATION OF [DEFENDANT'S] RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

XI.

DUE PROCESS WAS DENIED WHEN THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE AND RELIABLE COMPETENCY HEARING AND TO ORDER FURTHER OBSERVATION TO RESOLVE DISPUTED ISSUES OF COMPETENCY, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

X.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS IN THAT COUNSEL FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH AVAILABLE INFORMATION WHICH THE EXPERTS NEEDED TO MAKE AN ACCURATE COMPETENCY DETERMINATION, COUNSEL FAILED TO REQUEST THE APPOINTMENT OF A CONFIDENTIAL DEFENSE EXPERT, AND THE STATE WITHHELD MATERIAL EXCULPATORY INFORMATION NEEDED TO REACH A DETERMINATION, IN VIOLATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XI.

THE MENTAL HEALTH EXPERTS WHO EVALUATED [DEFENDANT] REGARDING HIS COMPETENCE TO STAND TRIAL DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA, IN VIOLATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XII.

THE MENTAL HEALTH EXPERTS WHO EVALUATED [DEFENDANT]

AND WHO TESTIFIED AT HIS RESENTENCING PROCEEDING DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE. V. OKLAHOMA, IN VIOLATION OF [DEFENDANT'S] RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XIII.

DOUBLE JEOPARDY BARRED [DEFENDANT'S] CASE FROM BEING REMANDED FOR A JURY RESENTENCING WHEN HIS PRIOR JURY HAD RETURNED A LIFE RECOMMENDATION, AND THE TRIAL COURT ERRED IN NOT IMPOSING A LIFE SENTENCE, IN VIOLATION OF [DEFENDANT'S] RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

XIV.

[DEFENDANT] IS INNOCENT OF FIRST-DEGREE MURDER AND FELONY-MURDER AND HE WAS DENIED AN ADVERSARIAL TESTING, IN VIOLATION OF HIS RIGHTS AS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XV.

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

XVI.

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

XVII.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS

DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

XVIII.

THE PRIOR CONVICTIONS INTRODUCED TO THE JURY TO SUPPORT THE FINDING OF THE "PRIOR VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE WERE UNCONSTITUTIONALLY OBTAINED AND INADMISSIBLE TO SUPPORT THIS AGGRAVATOR UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XIX.

THE STATE'S DECISION TO SEEK THE DEATH PENALTY IN [DEFENDANT'S] CASE WAS BASED UPON RACIAL CONSIDERATIONS, AND MR. PATTON'S DEATH SENTENCE THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XX.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LAW SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE RESENTENCING COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT].

XXI.

[DEFENDANT'S] RESENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

XXII.

THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS RENDERED [DEFENDANT'S] DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

XXIII.

[DEFENDANT'S] TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE

FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XXIV.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND FOR VIOLATING THE CONSTITUTIONAL GUARANTEE PROHIBITING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XXV.

THE RULES PROHIBITING [DEFENDANT'S] LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

XXVI.

THE ARBITRARY ACCELERATION OF THE RULE 3.850 FILING DEADLINE TO [DEFENDANT'S] CASE HAS VIOLATED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

(PCR. 202-380) After the State responded and the lower court held a *Huff* hearing, the lower court summarily denied all of the claims, finding them to be procedurally barred, legally insufficient and/or refuted by the record. (PCR. 459-62)

Defendant appealed the summary denial of his motion for post conviction relief to this Court, raising 20 issues:

[T]he lower court erred by: (1) summarily denying his claims; (2) improperly dismissing his motion for lack of verification; (3) denying his public records request and the request for the police booking tape; (4) finding counsel was effective during the guilt phase of the trial; (5) finding counsel was effective during the resentencing trial; (6) finding the state

did not commit a *Brady* violation by failing to disclose that Patton had a cigarette package containing white paper and pills at the time he was arrested; (7) not finding counsel was ineffective for failing to request a competency hearing prior to his resentencing and failing to provide the experts who testified at resentencing with necessary psychological background; (8) not finding counsel was ineffective for failing to provide the court-appointed psychiatrists or defense experts with available documentation of Patton's history of mental problems prior to the competency hearing which preceded the guilt phase of the trial; (9) finding counsel was not ineffective for failing to object to the trial and the resentencing judges' bias; (10) failing to suppress statements taken by law enforcement that were illegally obtained; (11) failing to find that the presence of uniformed police officers prejudiced the jury; (12) failing to find this Court's decision to remand Patton's case for resentencing violated the double jeopardy clause; (13) failing to find that the death recommendation was improper because the jury was not instructed that two of the aggravating factors should have been merged; (14) failing to finding that Patton was not eligible for the death penalty because two of the aggravating factors should have been merged; (15) not finding that the resentencing judge erred in failing to find nonstatutory mitigation; (16) failing to find the death sentence was based upon an unconstitutional prior conviction; (17) failing to find the state exercised its discretion to seek the death penalty based upon racial considerations; (18) failing to find counsel was ineffective for failing to object to constitutional errors; (19) failing to hold the death penalty unconstitutional; and (20) allowing the motion for postconviction relief to be improperly accelerated.

Patton v. State, 784 So. 2d 380, 386 n.3 (Fla. 2000). This Court affirmed the summary denial of all of Defendant's claims except his claim counsel was ineffective for failing to raise intoxication or insanity as a defense in the guilt phase.

Patton v. State, 784 So. 2d 380 (Fla. 2000). This Court remanded the matter for an evidentiary hearing on claim of ineffective assistance of counsel for failing to present intoxication or insanity. *Id.* at 386-88, 390. In the course of discussing the granting of the evidentiary hearing, this Court stated:

In a related claim, Patton argues counsel was ineffective for failing to question the jury about mental illness during voir dire. This claim also depends upon whether counsel was motivated not to ask such questions for strategic purposes and is therefore intertwined with the intoxication and insanity defenses. Accordingly, this claim should be explored during the evidentiary hearing.

Patton next argues counsel failed to ask the jury questions about drug addiction during voir dire. This claim is conclusively rebutted by the fact that counsel submitted written questions to the jury addressing this issue. (FN6)

* * * *

(FN6.) Counsel was also utilizing a jury consultant/psychologist, which affected the voir dire strategy.

Id. at 390.

On remand, the State moved to compel the production of trial counsel's file about this matter. (R. 81-83)⁴ At a status hearing on May 9, 2001, Defendant agreed to provide trial

⁴ The symbol "R." will refer to the record in the present appeal, which includes the transcripts of proceedings. The symbol "SR." will refer to the supplemental record in this appeal.

counsel's file to the State after reviewing the file for claims of exemption. (R. 327) The lower court set the evidentiary hearing for August 9 and 10, 2001. (R. 329)

On June 14, 2001, Defendant filed a motion to interview the jurors. (R. 85-87) Defendant asserted that it was necessary to interview the jurors to determine if he could show prejudice in support of his claim that counsel was ineffective for failing to question the venire about mental illness. (R. 85-87) The State responded to Defendant's motion, asserting, *inter alia*, that questioning the jurors was inappropriate because the test for ineffective assistance was an objective test. (R. 88-90)

On July 9, 2001, the State moved to reset the evidentiary hearing because Defendant had only recently made trial counsel's file available for copying and trial counsel needed to review the file to prepare to testify at the evidentiary hearing. (R. 92-93) The State set this motion, and Defendant's motion to interview the jurors, for hearing on July 30, 2001. (R. 91, 94)

At the July 20, 2001 hearing, the lower court reset the evidentiary hearing for October 11 and 12, 2001. (R. 498-500) On the issue of interviewing the jurors, Defendant asserted that such interviews were necessary if Defendant was going to show prejudice. (R. 500-01) The State responded that Defendant would have to reassemble the entire venire and that attempting to show

prejudice through the individual veniremember was contrary to the objective standard of *Strickland*. (R. 503) The lower court denied the motion. (R. 504) The lower court entered a written order denying the motion to interview the jurors on August 1, 2001. (R. 95)

On July 31, 2001, Defendant moved to stay the proceedings while he took an interlocutory appeal from the denial of the motion to interview jurors. (R. 98-100) On August 23, 2001, Defendant set his motion for stay for hearing on August 28, 2001. (R. 107-08) At the hearing on August 28, 2001, the lower court listened to argument of counsel and denied the stay. (R. 333-34) The lower court entered a written order denying the stay. (R. 113)

On August 29, 2001, Defendant filed a initial petition seeking interlocutory review of the lower court's order denying his motion to interview the jurors. Initial Petition, Florida Supreme Court Case No. SC01-1951. Defendant simultaneously moved to stay the evidentiary hearing scheduled for October 18 and 19, 2001, pending disposition of his petition. This Court requested a response from the State be filed by October 19, 2001. Defendant then renewed his motion for stay. This Court denied the motion for stay. (R. 116) On October 19, 2001, the State responded to Defendant's petition, asserting, *inter alia*,

that Defendant had been unable to show deficiency at the evidentiary hearing, as counsel made a strategic decision not to present insanity and intoxication defenses. On March 21, 2002, this Court dismissed the petition as moot. *Patton v. State*, 817 So. 2d 849 (Fla. 2002).

The evidentiary hearing commenced on October 18, 2001. (R. 336-40) At the evidentiary hearing, Defendant presented the testimony of Marsha Lyons, Defendant's original trial counsel. (R. 341-46)

Ms. Lyons stated that she was admitted to practice law in Florida in 1970. (R. 344) Initially, she was an Assistant United States Attorney in the Southern District of Florida. (R. 344-45) She eventually became lead of the criminal division of that office after several years. (R. 344-45) She then went into private practice for a year and then returned to the United States Attorney's Office to head its fraud division. (R. 344) In 1978, Ms. Lyons established her own firm with another former Assistant United States Attorney. (R. 344) In 1995, Ms. Lyons moved her practice from Miami to Tampa, where she was still practicing law at the time of the hearing. (R. 343-44) Between 1978 and 1995, Ms. Lyons' practice was mostly criminal cases in which she was court-appointed. (R. 345) She handled serious felony cases, including first degree murder cases. (R. 345-46)

Defendant's case was the only case that she had ever handled in which a death sentence was sought. (R. 346) Ms. Lyons was the only attorney appointed to represent Defendant. (R. 347) However, her partner, Charles Farrar, a former Assistant United States Attorney, and two associates, Bart Billbrough and Mark Wolf, assisted her. (R. 347)

Ms. Lyons was aware from the beginning of the case that a death sentence would be sought. (R. 348) Her strategy was to try to avoid a first degree murder conviction. (R. 347-48) Her first task was to change Defendant's appearance. (R. 348-49) At the time of his arrest, Defendant looked like Charles Mason with long straggly hair. (R. 349) Ms. Lyons wanted to make Defendant look like the boy down the block so that the jurors could identify with him. (R. 349)

Next, Ms. Lyons attempted to suppress evidence and statements, to find favorable evidence, and to locate witnesses and records. (R. 350) Ms. Lyons looked into the possibility of an insanity defense and an intoxication defense. (R. 350) She was aware that Defendant had a prior history in these areas. (R. 350) She was particularly aware that Defendant had been adjudicated not guilty by reason of insanity. (R. 349) As such, she sought records of that history. (R. 350) As a result of her search for records, Ms. Lyons compiled records going back

to the time Defendant was four years old. (R. 349)

Ms. Lyons seriously considered presenting insanity and intoxication defenses for the guilt phase. (R. 350-51) She even filed a Notice of Intent to Rely on Defense of Insanity. (R. 351) Ms. Lyons did not seek the appointment of a confidential experts because she believed that experts render legitimate opinions whether or not they are appointed as confidential experts. (R. 351) However, the trial court did appoint four experts early in the case: Drs. Herrera, Mutter, Jacobson and Jaslow. (R. 351-52) Ms. Lyons had previously worked with Dr. Jaslow and found him to be a very credible witness, who "called it like it was." (R. 352) Ms. Lyons was also acquainted with the work of the other three experts through her work in the criminal justice system. (R. 352)

Dr. Toomer was recommended to Ms. Lyons by an attorney with the Public Defender's office. (R. 353) Ms. Lyons confirmed Dr. Toomer's expertise with other attorneys and involved him in the case within a month of the crime. (R. 353) Ms. Lyons' request for Dr. Toomer's assistance was not limited to the penalty phase. (R. 353) Instead, from the beginning, Dr. Toomer was involved in all phases of the case. (R. 353) Ms. Lyons specifically testified that one of the things she asked Dr. Toomer 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." (R. 354)

Ms. Lyons' problem in presenting an insanity defense was that Defendant had made numerous statements to many people, including his probation officer, his girlfriend, Ms. Lyons and Mr. Billbrough, that he had feigned mental illness at the time that he had previously been adjudicated not guilty by reason of insanity. (R. 354, 355, 356) As such, Ms. Lyons determined that an insanity defense should only be presented if it could be strongly supported. (R. 354) Ms. Lyons would have considered presenting the defense if an expert could have offered a plausible explanation of these statements. (R. 355) However, in making her determination of whether to present such a defense, Ms. Lyons considered the slim chance of succeeding on such a defense and the impact of the negative information. (R. 355)

Ms. Lyons was aware that Defendant had a history of substance abuse. (R. 357) She knew that Defendant had continued to abuse substances until the time of the crime. (R. 357) She had information that Defendant had been using drugs before the crime. (R. 358) Defendant also provided information about his drug use at that time. (R. 358) However, Defendant was not consistent about what drugs he was using or when he used them.

(R. 358) Based on this information, Ms. Lyons considered presenting a voluntary intoxication defense. (R. 358)

However, Ms. Lyons' basic strategy was to present Defendant as a nice middle-class person who was using some drugs and had some problems as a result of a bad childhood. (R. 359-60) She wanted the jury to feel sympathy for Defendant. (R. 360) However, Ms. Lyons did not want to emphasize Defendant's drug use and abuse. (R. 360) She felt that presenting too much evidence of drug use and abuse might backfire because of the community disdain for drug users at the time. (R. 360) Ms. Lyons explained that in the 1980's Miami was terrorized by drugs. (R. 360) She felt that emphasizing Defendant's drug use and abuse would be contrary to her attempts to make Defendant sympathetic. (R. 360) As such, she limited the presentation of such evidence to make Defendant appear to be a nice kid with a drug problem and not a druggie. (R. 361)

Ms. Lyons considered having an expert attempt to make Defendant's drug problem appear sympathetic. (R. 361) However, she rejected this option because the expert she consulted was not helpful and because she was concerned that the jury would not accept it. (R. 361) In addition to an expert from Jackson Memorial Hospital, Ms. Lyons also had Dr. Toomer evaluate Defendant's drug dependency. (R. 361)

Ms. Lyons admitted that she argued intoxication in her guilt phase closing argument. (R. 362) However, she explained that she did so consistently with her claim that the murder was not premeditated because of the stress of the situation and the use of drugs. (R. 363) However, she specifically did not want, as a matter of strategy, to emphasize Defendant's abuse of drugs as part of that defense. (R. 363)

Ms. Lyons would have considered trying to couple mental illness and drug abuse. (R. 363) However, given her general misgivings about both insanity and intoxication as viable defenses, she could not say that she would have presented such evidence. (R. 363)

Ms. Lyons stated that she did not recall exactly how she asked Dr. Toomer to conduct his evaluation of Defendant. (R. 364) She identified two memorandum she did to her file about having Dr. Toomer testify in the penalty phase. (R. 365-66) However, Ms. Lyons stated that Dr. Toomer had been involved in the case long before these memos were written. (R. 365)

Ms. Lyons stated that while she had never previously conducted a death qualification voir dire, she consulted numerous times with numerous attorneys about doing so before trial. (R. 367-68) She attempted to have the trial court submit a questionnaire to the venire before voir dire. (R. 368)

However, that request was refused. (R. 368) She subsequently submitted a revised questionnaire, which the trial court allowed. (R. 368-69) The initial questionnaire had questions about drug use and abuse; the revised questionnaire did not. (R. 369)

On cross, Ms. Lyons stated that her overall strategy for the case was to make Defendant sympathetic in his appearance and in the defense presented. (R. 370) She also wanted to have a defense that would be consistent through both the guilt and penalty phases of trial. (R. 370) Finally, she wanted to have a defense that was consistent with the evidence that would be presented as possible. (R. 370-71) In this case, doing so was extremely difficult because of the amount of evidence that the State had. (R. 371)

Ms. Lyons stated that she was successful in making Defendant look like a nice college kid. (R. 372) In fact, she was so successful that some of the witnesses identified people in the audience instead of Defendant. (R. 372)

In preparation for this case, Ms. Lyons consulted with Roy Black and Assistant Public Defenders, all of whom had recently defended individuals accused of killing police officers. (R. 372-73) She consulted these attorneys because they had recent experience in defending murder charges and in defending against

the death penalty. (R. 372-73)

Ms. Lyons stated that in the 1980's people in Miami viewed people involved in drugs in the same way that people today view terrorists. (R. 373-74) This view was occasioned because the drug trade was rampant in Miami at that time. (R. 374) At that time, there had been a major shootout at the Dadeland Mall among people involved in the drug trade. (R. 374) Ms. Lyons stated that it seemed that every shooting that was reported involved drugs. (R. 374) This atmosphere caused people in Miami to have a very negative perception of people drugs. (R. 374) Because of this perception, Ms. Lyons did not want to portray Defendant as affiliated with drugs. (R. 374)

Ms. Lyons intentionally limited the evidence presented of Defendant's drug use so that Defendant would appear to be a good kid with a limited drug problem that caused him to be in trouble. (R. 375) She did not want the jury to think that Defendant had a long term drug problem or was a drug dealer. (R. 375) Consistent with this strategy, Ms. Lyons allowed some evidence of Defendant's drug use to be presented to show that Defendant dabbled in drugs and that his judgment was impaired. (R. 376)

Dr. Toomer stated in deposition that had Defendant been using drugs heavily about the time of the crime, there would be

notations in his jail records. (R. 377) However, the officers who were with Defendant at the time of his arrest had not seen anything like that. (R. 377) Additionally, the two people who were in the car with Defendant before the crime were of the opinion that Defendant was not intoxicated. (R. 377)

Ms. Lyons also decided not to emphasize intoxication because it was inconsistent with Defendant's actions immediately after the crime. (R. 378) Ms. Lyons noted that Defendant was able to get to the laundromat, find the owner of a car, demand the keys, drive away and hide the murder weapon. (R. 378)

Ms. Lyons did know of witnesses that could have supported an intoxication defense. (R. 378) However, Ms. Lyons stated that these people "were also not the kind of witnesses that [she] would necessarily want to bring to the courtroom." (R. 378)

Ms. Lyons attempted to show that the murder was not premeditated by showing that Defendant was trapped and responded without thinking. (R. 378) She wanted to portray the crime as a lapse of judgment done without ill will or malice. (R. 378-79)

Ms. Lyons did not simply act on the advice of the experienced attorneys that she consulted. (R. 379) Instead, she listened to their advice and made her own decisions. (R. 379)

Ms. Lyons stated that she personally believed in mental health and intoxication. (R. 379-80) However, she was aware that she was not typical of jurors. (R. 379-80)

Ms. Lyons stated that she documented some, but not all, of the time she spent in the case. (R. 380-81) Ms. Lyons' time records indicated that she began consulting attorneys and experts immediately upon her appointment in the case and did so frequently. (R. 381-86) Ms. Lyons consulted numerous jury selection experts in this matter. (R. 383-84) Ms. Lyons consulted with the attorney who had successfully argued an insanity defense on behalf of John Hinkley. (R. 384-85) Through these consultations, Ms. Lyons gained the insight of more experienced attorneys and bounced ideas off of these people. (R. 386) After consulting with numerous people and speaking to experts, Ms. Lyons decided that intoxication was not a viable defense in this matter. (R. 387)

Ms. Lyons also discussed the possibility of presenting an insanity defense with these other lawyers. (R. 388) Ms. Lyons also relied on her 12 years of experience in criminal law. (R. 388) Ms. Lyons knew that insanity was rarely successful as a defense. (R. 388)

Ms. Lyons was aware that Defendant had commented to her, his girlfriend Christine Castle and his probation officer about

attempting to fool the doctors into finding him insane. (R. 388) Ms. Lyons' file contained letters from Defendant to Ms. Castle and Diane Schwartz and numerous interoffice memos. (R. 389-91) These letters and memos documented Defendant's attempts to feign insanity. (R. 391-94) Ms. Lyons stated that as an ethical attorney, she could not present an insanity defense that she had reason to know was false. (R. 392)

During her conferences with Defendant, Defendant had a clear and detailed recollection of the crime. (R. 394) This ability to recall details was not consistent with an insanity or intoxication defense. (R. 395) Defendant's suggestion that the defense attempt to blame one of the other occupants of the car was also consistent with Defendant's ability to think rationally. (R. 396) Defendant also told his attorneys that he had taken training in shooting on the run like police officers did. (R. 396) This statement was particularly troublesome because it was consistent with the eyewitness's description of Defendant assuming a police stance before shooting. (R. 396-97)

Another problem with presenting an insanity defense was that Defendant had been evaluated by four court-appointed experts and Dr. Toomer, who was hired by Ms. Lyons. (R. 397-99) None of these doctors was of the opinion that Defendant was insane. (R. 397) Dr. Mutter's report reflected that Defendant provided Dr.

Mutter with details of the crime, and Dr. Mutter determined that Defendant was not insane. (R. 401-02) Dr. Jacobson's report showed that Defendant denied knowing anything about the murder and that Dr. Jacobson believed that Defendant was malingering and sane. (R. 402-04) Dr. Herrera's report reflected that Defendant denied any criminal activity, that Defendant was sane and that Defendant was attempting to manipulate the system. (R. 404-05) Dr. Jaslow's report showed that Defendant was exaggerating and sane. (R. 406) Ms. Lyons stated that the inconsistencies in Defendant's recitation of the facts to the different doctors would have been detrimental to any attempt to present an insanity defense. (R. 403)

Ms. Lyons explored the possibility of presenting an insanity defense despite the evidence of malingering and attempts to feign insanity. (R. 406-07) However, Ms. Lyons thought that a jury would not believe an insanity defense, particularly without a doctor who could credibly explain that Defendant's attempts to feign mental illness were symptoms of actual mental illness. (R. 407)

Ms. Lyons stated that Ms. Castle's testimony about Defendant's attempts to fool the doctor and his boast that he would be sent to a hospital was not helpful. (R. 407-08) Ms. Lyons stated that Dr. Toomer was not able to help her present an

insanity defense. (R. 408)

Ms. Lyons stated that she attempted to ask the venire general questions about drug use but that the trial court did not permit such general questions. (R. 409) She did not attempt to ask specific questions about intoxication because she did not wish to emphasize this area. (R. 409) She did not attempt to question the venire about insanity because she was not presenting an insanity defense. (R. 409) As such, she believed that attempts to question the venire about insanity would have been met by objections by the State, which would have been sustained. (R. 409)

Ms. Lyons stated that she did investigate Defendant's mental health treatment back to the time that Defendant was 4 years old. (R. 409) This investigation revealed that Defendant's history showed that Defendant had always been antisocial. (R. 410) It also showed that Defendant had never been legally insane. (R. 410) After a long and thorough investigation, Ms. Lyons decided against presenting an insanity defense. (R. 410)

On redirect, Ms. Lyons stated that the defense of lack of premeditation that she attempted to present had been successful in the Lonnie Walker case in having the defendant convicted of second degree murder in the shooting death of a police officer around the time this crime was committed. (R. 412-13) Ms. Lyons

had also succeeded in having a client convicted of lesser included offenses in a case in which he client had engaged in a shootout with multiple police officer by using this defense around that time. (R. 413)

Ms. Lyons stated that she was aware that Defendant was not a member of a drug cartel but was someone who used and sold drugs. (R. 414) Ms. Lyons admitted that she had stated that Defendant was strung out in closing. (R. 414) However, Ms. Lyons explained that this statement was consistent with the attempt to show some drug use but not a long history and involvement in the drug culture. (R. 414-15)

Ms. Lyons was aware that there were indications that Defendant had track marks at the time of his arrest. (R. 418) However, the information was inconsistent about whether those track marks were fresh or not. (R. 418-21) She also knew that white paper with yellow pills and powder were found on Defendant when he was arrested. (R. 421-22)

The State presented the testimony of Bart Billbrough, Ms. Lyons' associate. (R. 452) Mr. Billbrough stated that he was admitted to practice in the fall of 1981. (R. 452) Mr. Billbrough's major task in this case was to interview Defendant and the witnesses. (R. 453) During his frequent interviews with Defendant, Defendant was always able to recount details of the

crime. (R. 454) Mr. Billbrough recalled Defendant telling him that Defendant was attempting to feign mental illness in his examinations by the mental health professionals. (R. 455) Defendant informed Mr. Billbrough that he had successfully feign mental illness during a previous criminal prosecution. (R. 455) Additionally, Mr. Billbrough's interaction with Defendant did not reveal any evidence that Defendant was insane. (R. 455)

Despite the lack of evidence, Ms. Lyons vigorously pursued the possibility of an insanity defense. (R. 456) As part of this pursuit, Ms. Billbrough amassed records and looked for individuals referenced in those records. (R. 456-57) Dr. Toomer was hired before the guilt phase and his assistance was sought in presenting an insanity defense. (R. 457-58) All of this investigation was done with the knowledge that Defendant was attempting to feign insanity because the defense did not discount the possibility of insanity merely because of Defendant's actions. (R. 458)

Mr. Billbrough recalled being present during at least one discussion between Ms. Lyons and Dr. Toomer. (R. 458-59) Mr. Billbrough recalled being disappointed that Dr. Toomer was of the opinion that while Defendant had mental health issues, the issues were not of the nature that prevented Defendant from knowing right from wrong. (R. 459) After the extensive

investigation, Mr. Billbrough recalled that Ms. Lyons determined that insanity was not a viable defense and that it would not be presented. (R. 459-60)

Mr. Billbrough also recalled exploring an intoxication defense. (R. 460) He remembered Defendant having an involvement with drugs. (R. 460) Mr. Billbrough recalled consulting an expert at Jackson Memorial Hospital regarding the types of drugs that Defendant asserted that he had been using and the effects of these drugs on Defendant's behavior. (R. 460) The expert informed the attorneys that he could not assist them in presenting a defense. (R. 461)

Mr. Billbrough recalled discussing Defendant's drug use with Christine Castle, Defendant's girlfriend, and Mark Castle, Ms. Castle's brother. (R. 461-62) During these discussions, Mark Castle indicated that Defendant had stated that he would kill someone if he ever got caught committing a crime again. (R. 462-63) Mr. Billbrough stated that having this statement presented would have been detrimental to a lack of premeditation defense. (R. 463) Mr. Billbrough stated that a strategic decision was made to attempt to minimize the evidence of Defendant's drug usage was made. (R. 463-64) Instead, the defense was to attempt to show that the shooting was not intentional and was more of an accident. (R. 463-64)

Mr. Billbrough thought that minimizing the evidence of drug usage was important, given the climate in Dade County at the time. (R. 464) Mr. Billbrough stated that drug crimes were rampant in Dade County at the time and that the Dadeland shooting was recent. (R. 464)

Mr. Billbrough recalled that a voluntary intoxication instruction was given because of the evidence that came out during the State's case. (R. 465) Mr. Billbrough stated that it was requested to give the jury an out but was not the focus of the defense. (R. 465-66) Mr. Billbrough recalled investigating the pills and powder found on Defendant at the time of his arrest. (R. 466) The powder was a Moody's headache powder. (R. 466) Mr. Billbrough stated that after thoroughly investigating Defendant's background a strategic decision was made not to pursue insanity or intoxication as a defense. (R. 467)

Both parties submitted post hearing memoranda on November 16, 2001. (R. 117-58) On December 20, 2001, the lower court issued its order denying the motion for post conviction relief. (R. 159-81, 508-09) The lower court found that counsel made a valid strategic decision not to present an insanity defense after exhaustive investigation of the issue. (R. 161-74) The lower court also found that Defendant was not prejudiced by the failure to present the insanity defense, as it was not supported

by the evidence and would have resulted in the admission of damaging information. *Id.* The lower found also concluded that counsel was not ineffective for failing to question the jury about mental illness as there was no viable insanity defense. (R. 174) The trial court rejected the claim of ineffective assistance for failing to present more of an intoxication defense because trial counsel made a strategic decision to limit the evidence of intoxication and drug use presented. (R. 174-79) It also found that Defendant was not prejudiced by this decision because there was no reasonable probability of a different result if more evidence of intoxication had been presented. *Id.*

On January 3, 2002, Defendant moved for reconsideration of the denial of his motion. (SR. 2-7) With regard to the insanity defense, Defendant claimed that the lower court should not have considered the conclusion of Drs. Jaslow, Jacobson, Herrera and Mutter because they had not been provided with information gathered during Ms. Lyons' investigation. (SR. 2-3) He claimed that the lower court should not have found that Dr. Toomer was asked to evaluate Defendant's sanity before the original trial. (SR. 3-4) With regard to intoxication, Defendant asserted that the lower court should not have found that Ms. Lyons made a valid strategic decision to limit the presentation of

intoxication and drug use because Defendant believed that a better strategy would have been to present all of the evidence. (SR. 4-6) Finally, Defendant contended that the lower court failed to address the issue of the questioning the venire. (SR. 6) On January 15, 2002, the lower court denied the motion for reconsideration, and the next day, entered a written order denying the motion. (R. 308, 513-15)

This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claims of ineffective assistance of counsel. Counsel testified that she made strategic decisions not to present an insanity defense and more evidence of intoxication. Moreover, counsel stated that she did not question the venire about mental illness because she was not presenting a mental health defense. Additionally, Defendant was not prejudiced by the failure to present these defenses.

The lower court properly denied Defendant's motion to interview the jurors. Defendant never showed that any of the jurors were unqualified or committed any misconduct. Moreover, the issue is now moot, as Defendant did not show that counsel was deficient.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant first asserts the lower court erred in denying his claim that counsel was ineffective for failing to present a defense of voluntary intoxication, for failing to present a defense of insanity and for failing to question the venire about mental illness. However, the lower court properly denied this claim after an evidentiary hearing.

In denying this claim after the evidentiary hearing, the lower court found:

INSANITY

The record and evidence contained with the court file show that:

1. The defendant had previously been adjudicated not guilty of receiving stolen property by reason of insanity in 1978 and had been involuntarily committed for treatment;
2. Records were available and presented that document the defendant's history of mental illness beginning in his early childhood;
3. Trial counsel filed a notice of intent to rely on the insanity defense and a motion requesting a competency hearing;
4. Trial counsel moved for the trial court to discard the M'Naughton Rule (a well-established criterion for the test for insanity adopted by the Florida Supreme Court) and adopt the A.L.I. Model Penal Code; and

5. Trial counsel did not assert the defense of insanity nor was the evidence of defendant's prior adjudication or commitment offered at trial.

On October 18, 2001, the Court held an evidentiary hearing in which the State presented two witnesses, Ms. Marsha Lyons and Mr. Bart Billbrough, the defendant's trial attorneys. Ms. Lyons testified that she had been admitted to the Florida Bar in 1970 and she worked for several years as an Assistant United States Attorney in the Miami office of the U.S. Attorney's office. After leaving the U.S. Attorney's office in 1978, Ms. Lyons developed a criminal practice handling largely State court appointments of felony crimes and federal criminal cases. She stated that although in the instant case she was court appointed as sole counsel to represent the defendant, in her first capital first degree murder case, she did receive court authorization to use the assistance of her entire office staff, including attorneys in her employ. One such attorney was Bart Billbrough, an associate who had recently passed the Florida Bar exam and subsequently had been admitted to the Florida Bar.

With respect to the guilt phase of the defendant's trial, Ms. Lyons further testified that her initial and primary strategy focused on four areas:

1. Suppressing evidence of defendant's statements;
2. Discovery of favorable evidence;
3. Investigating and presenting an insanity defense; and
4. Investigating and presenting an intoxication defense.

Ms. Lyons also stated that she immediately became aware of the defendant's prior adjudication of insanity. Therefore, she obtained the defendant's medical and psychological records dating back to when he was four years old. Furthermore, she stated that early on in the case she filed a Notice of Intent to Rely on Insanity since she had seriously considered using this defense on behalf of the defendant.

A review of State's Exhibit Number 1 (Affidavit in Support of Motion For Attorney's Fees, dated May 24, 1994) clearly corroborates Ms. Lyon's testimony that she consciously considered using the defense of

insanity in this case. First, the defendant is arrested on September 2, 1981 for the first degree murder of officer Nathaniel [sic] Broom. Second, Ms. Lyons is specially appointed by the court to represent the defendant on September 4, 1981. Thereafter, Ms. Lyons swiftly and meticulously investigated an insanity defense on behalf of the defendant by performing a flurry of tasks as chronicled in State Exhibit 1:

9/8/81 Interoffice conference regarding p. 1
insanity defense.

9/9/81 Conference with client and Bart p. 1
Billbrough, conference regarding
insanity defense, Interoffice
conference regarding insanity
defense.

9/11/81 preparation of letter to p. 1
psychiatrist, review information
regarding psychiatric defense.

9/14/81 Resumed research concerning p. 1
psychiatric reports, and insanity
defense.

9/15/81 Conference regarding research on p. 1
insanity.
Preparation of letter to p. 2
psychiatrist.

9/18/91 Interoffice conference regarding p. 2
insanity defense, strategy.

9/25/81 Reviewed new cases regarding p. 2
insanity.

9/29/81 Interoffice conference regarding p. 3
insanity defense.
Motion for hearing regarding
competency, letters to doctors,
Notice of Insanity, Interoffice
conference regarding strategy,
preparation of memo to file. p. 3

9/30/81 Review **Notice of Intent to Rely on** p. 3
Insanity.

10/1/81 Review research regarding psychiatric, telephone conference with Toomer, telephone conference With Jacobson's office, telephone conference with Dr. Toomer, Court appearance regarding bond, notice regarding Insanity, motion for hearing on incompetency. p. 4

10/5/81 Research on inanity; review of Dr. Jaslow's report review of psychiatric information. p. 4

10/6/81 Review psychiatric research, inter-office conference regarding strategy. p. 4

10/7/81 Inter-office conference regarding to strategy. Review cases on presumption of insanity. p. 4

10/8/81 Review psychiatric reports, review of Jaslow's reports, Telephone conference with Jaslow's office. p. 4

10/14/81 Continue research on psychiatric. p. 6

12/28/81 Receipt and review of information from Hinckley's attorney. p. 10

12/31/81 Review Hinckley motions; telephone to attorney for Hinckley. Review State's motion for Bill of Particulars Regarding Insanity defense, Preparation of letter to Waksman (Prosecutor) concerning same. p. 11

1/6/82 Review of Motion for Insanity Bill of Particulars. p. 11

1/18/82 Review summary of psychiatric history. Research on psychometric testing, brain damage. p. 15

1/27/82 Numerous telephone conferences or through conference with psychiatrist and 2/13/82 psychologists. Pp. 18-24

2/15/82 Preparation of Motion for Pretrial Pp. 24-25
Ruling on Insanity test to be
applied, telephone conference with
Dr. Toomer.

2/16/82 Inter-office conference regarding p. 25
psychiatric testimony.

In spite of her ambitious and vigorous attempts to pursue an insanity defense, Ms. Lyons testified that she ultimately decided against the use of an insanity defense essentially because the defendant surreptitiously attempted to feign or make-up his defense of insanity. The defendant's deception was discovered by trial counsel during her investigation and interviews with the defendant, his sister, girlfriend and probation officer, Carolyn Beaver. Commendably, Mr. Bart Billbrough studiously prepared several office memoranda documenting the defendant's attempt to deceive the court with a fake insanity defense. In his September 10, 1981 Office Memo to Marsha (Ms. Lyons), documenting his September 10, 1981 interview of the defendant, he noted that "[P]atton stated that he had been laying the ground work for his insanity defense 'playing the game.' He seemed very insistent upon not going to jail." (See State Exhibit #2 composite, Office Memo To Marsha from Bart, dated 9/11/81, RE: Patton Interview, 9/10/81, 2:00 p.m.)

Further evidence of the defendant's attempt to feign a defense of insanity is documented in his own handwritten words. In a September letter to Chris (Christine Castle, the defendant's girlfriend), the defendant writes, in part:

"Today I saw my first out of 4 psychiatrist. It Went okay, if you know what I mean, period. Everything's going as planed so far, I believe I convinced him, in fact I'm certain of it, he was a stereo type that exceeded any I've ever delt with, his Diagnoses shah be suitable for me in Court no Doubt of it!! So- as I said, everything is going as planed. You keep these words under your hat babe you hear Me!! We cant afford to let anyone monitor my letters, especially our establishment, Dig?"

(See State Exhibit 5, Defendant's Letter to

Chris dated 9/26/81, Pp. 1-2).

Similarly, a September 27, 1981 letter written by the defendant to his sister, Diane Schwartz, describes his mood about his plan to make up a defense of insanity:

"I feel okay though. Not happy not sad even glad, but I'm alright. BELIEVE ME I'M ALRIGHT!!! That's how I ran it to the psychiatrist who examined me yesterday. That guy thought I was slap gone, you should have seen him run out of my cell and down the hall just to get away from me. Funny - oh man I thought I was going to laugh all over him. He amused me more that I amused him. I'm sure his diagnosis will benefit me. I've got to see 3 more. I hope there ready for it!! Ha Ha."

(See State Exhibit 4, defendant's Letter to his sister Dyane Schwartz, dated 9/27/81, page 2.)

In that same letter, the defendant also writes about his hope to ease Kelly's mind by letting "her know I've got a ticket to ride and that I'm not going to burn on the last train out of Florida.") Id. Page 3 (Kelly is Kelly Halohoran, the defendant's stepsister).

In a November 20, 1981 meeting with the defendant, Mr. Billbrough observed a change from the defendant regarding his defense when he expressed a desire "to lay blame for the shooting on one of the other occupants of the green VW. His motivation is that since they are dumping on him he thought he would do the same." (See State Exhibit 2 composite, a memorandum to Marsha Lyons from Bart Billbrough, dated 11-20-81, RE: Patton Interview of 11-20-81.)

Additionally, Mr. Billbrough noted that in a subsequent interview with the defendant on September 18, 1981, the defendant "stated that his sister and brother-in-law had been to visit last week and any pleadings which we send to him are being forwarded at his request to his sister for safe keeping. He plans to write a book after this case concludes." (See State Exhibit #2 composite, Office Memo to Marsha from Bart, dated 9/18/81, RE: Patton Interview - 1275-1/CR.)

Mr. Billbrough also noted that "Mr. Patton also

examined the four Psychiatric reports of the doctors appointed by the Court in this case. It is clear from his reaction that he had failed to appreciate the serious nature of this case. He had not given any consideration whatsoever - until today - of the possibility that he might have to go to trial on the charges. It also seems clear that he lacks an understanding or had failed to contemplate the kind of steps necessary to prepare a defense. For the first time, Patton seemed interested in discussing some of the alternative theories or scenarios upon which to build a defense. He certainly does not understand that by pleading insanity at the time of the offense, he may very well have to acknowledge that he shot Patrolman Broom." (See State Exhibit #2 composite, Confidential report, re: Robert Patton Interview, dated 10/2/81).

Ms. Lyons testified that in light of the foregoing evidence, she was ethically prohibited from presenting a defense of insanity on behalf of the defendant. She testified that she did not believe that the defendant had a good faith defense of insanity. There was mounting evidence from the defendant himself which clearly demonstrated his attempt to feign an insanity defense. This evidence invariably would have been discovered by the State had the defendant pursued this defense and it unquestionably would have prevented an acquittal by reason of insanity.

Moreover, the following psychiatric opinions from the four court-appointed doctors and the one defense-appointed doctor clearly failed to establish a proven claim of insanity.

Dr. Charles B. Mutter, M.D. conducted the first psychiatric evaluation of the defendant in the Dade County Jail on September 26, 1981. It is of significant note that Dr. Mutter was one of the Psychiatrist who evaluated the defendant in 1978 when the defendant was adjudicated not guilty by reason of insanity on the charge of receiving stolen property, and he opined that the defendant was dangerous and should be committed in an inpatient structured facility. In the instant case, Dr. Mutter opined, in part, the following:

"[T]his individual meets the legal criteria that would enable him to properly aid counsel in the preparation of his defense to

stand trial. I feel that he knew right from wrong and understood the nature and consequences of his acts at the time of the alleged offense."

(See State exhibit Number 10, Dr. Charles Mutter's Psychiatric Report, Re: Robert Patton, page 2, dated September 28, 1981.)

Dr. Stanford Jacobson, M.D., conducted the second psychiatric evaluation of the defendant in the Dade County Jail on September 28, 1981. In concluding that the defendant was competent to proceed in the legal proceedings, he also noted the following regarding the issue of defendant's sanity:

"It is difficult to offer a specific opinion about the defendant's ability to meet the tests for criminal responsibility. 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. The mental status examination and interview do not, in my opinion, support the finding of an illness which would have been present at the time of the alleged offense. Therefore, it is my opinion that the defendant, at the time of the alleged offense, in the absence of any information to the contrary, was able to meet the tests for criminal responsibility."

(See State Exhibit Number 7, Dr. Stanford Jacobson's Psychiatric Report, Re: Robert Patton, page six, dated September 29, 1981)

Dr. Edward A. Herrera, M.D., who conducted the third psychiatric evaluation of the defendant on September 29, 1981, also opined that the defendant was competent to stand trial and concluded the following regarding the test for criminal responsibility:

There is nothing in the history that would indicate that Mr. Patton was unable to know right from wrong, or the nature or the quality of his actions at the time of the alleged commission of the offense with which he is charged. I therefore conclude that he was sane, according to the M'Naughten Rule then.

I don't find any evidence of a mental illness in the defendant at the present

time. He seems to be engaging in an effort to appear mentally ill at present.

(See State Exhibit Number 8, Dr. Edward Herrera's Psychiatric Report, RE: Robert Patton, page 3, dated September 20, 1981.)

A fourth court-appointed psychiatric evaluation of the defendant was conducted by Dr. Albert C. Jaslow, M.D. on September 30, 1981. Dr. Jaslow concluded the following regarding whether the defendant was incompetent to proceed or whether he was insane at the time of the offense.

Although he presented the picture of general incompetence, and claimed from his discussions to have active psychotic manifestations, there were a number of areas that suggested that this was contrived and exaggerated, rather than a truly active major mental disorder. There were various inconsistencies that did not support his alleged incompetence, but I would need 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. However, from sources such as the papers, without support reports concerning his statements and actions during that period of time, it would appear that he had the capacity to know right from wrong and the nature and consequences of his actions.

(See State Exhibit 9, Dr. Albert Jaslow's Psychiatric Report, RE: Robert Patton, page three, dated September 30, 1981).

With respect to Dr. Jaslow's opinion, Ms. Lyons testified that she was satisfied with the court-appoint of Dr. Jaslow primarily because (1) she had worked with him in the past on other cases and (2) she found him very credible because he was known to "call it like it is." With regard to the other court-appointed doctors, she was familiar with them and employed the strategy of giving them access to everything possible to aid her client's defense of insanity even though their opinions did not support the defendant's defense of insanity.

Finally, Dr. Jethro Toomer, a clinical

Psychologist who assisted trial counsel from the very beginning of the case, saw the defendant on October 5, 1981 to evaluate him and to render an opinion regarding (1) whether he had the ability to conform his conduct to the requirements of the law and (2) whether or not the defendant was under the influence of some type of emotional disturbance at the time of the alleged incident. Although Dr. Toomer did not prepare a written psychological report because none was requested by trial counsel, he did render an opinion to the latter inquiries in his testimony during the 1982 penalty proceedings. On the one hand, Dr. Toomer testified on direct examination "that his conclusion was, first of all, that the defendant was not able to conform his conduct to the requirements of the law at the time of the commission of the incident, and secondly, that he was functioning under the influence of emotional disturbance also at the time of the incident." (See State Exhibit 6, Transcript of Dr. Jethro Toomer's testimony during the Penalty Phase Proceeding, page 65, on February 26, 1982.)

On the other hand, Dr. Toomer was asked on cross examination the following questions relating to the issue of criminal responsibility:

Q. Do you have an opinion as to whether or not he knows it's wrong to kill? Would you say: Yes, he knows it's wrong to kill?

A. Oh, yes, that's what I was saying, yes.

Q. Yes, he does know?

A. Yes, he does know.

Q. Would the fact that - and I would like you to assume that the same day of this incident when he was arrested several hours later, he tells the police officer, Murder of a police officer? I'll fry for this one."

Does that indicate that he knows it's wrong to kill?

A. Yes.

Q. Does that indicate he knows the consequences of his actions?

A. Yes.

(See State Exhibit Number 6, Transcript of Penalty

Phase Proceeding of Dr. Jethro Toomer's Testimony, page 90, dated February 26, 1982.)

At the evidentiary hearing, Ms. Lyons testified that she asked Dr. Toomer to determine whether the defendant was sane or insane at the time the offense. State Exhibit Number 1 clearly documents frequent conferences between Ms. Lyons and Dr. Toomer.

Furthermore, Ms. Lyons consulted with counsel who successfully acquired a not guilty by reason of insanity verdict for John Hinckley who shot and seriously wounded President Ronald Reagan and his press secretary James Brady. However, Ms. Lyons expressed serious concern about most juries refusing to accept the defense of insanity in most criminal cases particularly after the Hinckley verdict and other similar cases.

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.

Therefore, the foregoing findings conclusively support and corroborate trial counsel's sound strategic decision to forego the use of the insanity defense on behalf of the defendant since the defendant attempted to feign this defense and the doctor's opinions failed to support a good faith basis for an insanity defense, notwithstanding the recorded documentation of defendant's history of mental illness and Dr. Toomer's 1989 testimony at re-sentencing that the defendant was legally insane at the time he shot officer Broom even though that is inconsistent with his 1982 testimony at the first sentencing.

Further, the court finds that the defendant's failure to establish a proven claim of insanity at the time of the offense effectively negates any assertion that trial counsel was ineffective for failure to question jurors about mental illness during voir dire.

INTOXICATION

The Court finds that defendant's allegation that trial counsel was ineffective for failing to adequately present an intoxication defense during the guilt phase proceeding is without merit. Ms. Lyons explained that in light of the overwhelming inculpatory evidence of the defendant's statements,

witnesses, physical evidence and the effects of drugs and violence in the City of Miami during the 1980's, she made a strategic decision not to present certain witnesses and prejudicial information about the defendant's drug history. Specifically, Ms. Lyons explained that in the 1980's Miami was literally under siege by the daily news reporting of drug crimes, including rampant drug-related shootings and deaths. She further explained that this climate, coupled with the defense of lack of intent for a lesser charge, influenced her decision not to over emphasize the evidence of the defendant's drug abuse.

The court is satisfied that the evidence presented at the evidentiary hearing clearly shows that Ms. Lyons adequately investigated an intoxication defense. There is incontrovertible and overwhelming evidence of the defendant's long and significant history of substance abuse involving illicit drugs and alcohol dating back to his youth and continuing up to the time of the offense. Each psychiatric evaluation addressed the defendant's abuse of drugs. However, Ms. Lyons explained that there was conflicting information from several witnesses as well as the defendant regarding his use of drugs before the offense and what effect the drugs had on him at the time of the offense.

Ms. Lyons testified that she did not introduce any evidence of the defendant's intoxication during the guilt phase of the trial, but rather, she relied on the evidence presented by the state which inferred the recent use of drugs by the defendant.

Ms. Lyons explained that her overall strategy was to show that the defendant shot the victim on an impulse or out of fear, thereby showing that he lacked the necessary performed intent to kill officer Broom. In order to maintain a consistent and credible position or defense throughout the case from the guilt phase to penalty phase, Ms. Lyons stated that her strategy included the following:

1. Change or clean up the defendant's appearance from that of a rugged Charles Mason look alike to a nice middle class person.
2. Avoid tainting the jury particularly during the guilt phase with information and 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 only.

Furthermore, Ms. Lyons marched an extra mile by consulting several highly experienced trial lawyers such as Roy Black, Michael Von Zampt, Elliot Scher and several assistant public defenders who possessed vast experience in handling murder cases, including cases involving the death of a police officer. She explained that she relied on their advice regarding the trial strategy used at trial. In fact, a review of State Exhibit 1 shows numerous conferences held with the aforementioned lawyers.

A review of the trial record shows that Ms. Lyons presented an intoxication defense 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. In her opening statement to the jury, Ms. Lyons explained "the evidence will also show that Robert Patten that time was our of work and on drugs and that he wanted to sell this gun to get some money so he could buy some more drugs." (R. pages 846-47).

Ms. Lyons further stated:

What we will be disputing and which we will contend the State cannot prove is that Robert Patton set out and wanted to kill Nathaniel Broom, that Robert Patton on that morning acted from any pre-meditated design to kill Nathaniel Broom, but rather that something happened in a moment of panic, that he was carrying a gun, a dangerous

thing, a dangerous loaded gun, that he was chased down into that alley after knowing that he had been in possession of a stolen vehicle and there was no way out, and that he panicked and shots were fired and tragically, that Nathaniel Broom was killed and killed instantly, but you, ladies and gentlemen of the jury, will have to weigh all the evidence presented by the State, and we believe that after listening to all that, you will be able to find that Robert Patton wanted Nathaniel Broom to die, that intended to kill him, but that this was something that was dangerous and tragic and happened, but not pre-meditated murder.

(R. page 848.)

With the State's first witness, Carolyn Beaver, the defendant's probation officer at the time of the shooting, Ms. Lyons elicited on cross examination the following information about the defendant's drug problem:

Q. Now, during this time that you dealing with him, were you also aware that he had a prior history of drug usage?

Mr. Waksman: Objection; hearsay.

THE COURT: Overruled.

THE WITNESS: I knew that he had used drugs. I did not know to the extent of what problem it was.

(R. 857-58)

Furthermore, Ms. Lyons highlighted the importance of the police discovering and impounding evidence of drug paraphernalia in the stolen Volkswagen driven by the defendant shortly before the shooting. She questioned the vehicle's owner, Michael Snowden, about an eyeglass holder with a spoon, two hypo syringes and some marijuana cigarettes which he stated did not belong to him nor were these items present in his vehicle when it was stolen. (R. 864.) Ms. Lyons also elicited testimony from a homicide sergeant, Richard Bohan, that when the defendant was taken into custody, the police did not administer any drug or alcohol tests on the defendant. (R. 1074.)

As revealed by the trial record, the State launched its own counterattack. Two state witnesses,

Leroy Williams and Henry Butler, both who were with the defendant in the stolen vehicle before it was stopped by officer Broom, testified that the defendant appeared not to be under the influence of drugs. Witness Leroy Williams testified at trial that he was able, based on his daily experience with all types of drugs and his contact with drug users, to recognize the signs of someone being under the influence of drugs. He testified that the defendant did not show any signs of being under the influence of drugs. (R. 1101-1103.) Although Henry Butler testified that he did not see the defendant use any drugs during the one hour period they were together, Ms. Lyons elicited the following on cross examination from him:

Q. When you talked to Mr. Patten on the morning of the shooting, did he indicate to you what he wanted to sell the gun?

A. No.

Q. Didn't he tell you he wanted to sell the gun so he could get some drugs?

A. He told Leroy, "I want to sell the gun to get some drugs." I told him, "I ain't use it."

Q. You told him you don't use drugs, but you heard him say he wanted to sell the gun so he could get some drugs right?

A. Yes, yes.

Q. Part of the deal, he was going to get Leroy drugs, too, because he does drugs, too; right?

A. Right.

(R. 1129-34.)

Next, Ms. Lyons explained that convincing the jury that the defendant was intoxicated proved extremely difficult because the defendant's actions during and after the shooting did not support this defense. First, there was an independent and credible eyewitnesses, Preston Steward, who saw the defendant running from officer Broom around the street corner, stopping and then swinging back around the corner to take aim in a deliberate shooting stance with both hands holding the gun before shooting officer Broom who was in pursuit of the defendant. (R. 976 978.)

The defendant after fleeing from the shooting scene then went to a nearby Laundromat where he robbed at gunpoint Maxine Rhodes of his vehicle to make good his escape. (R. 1160-70.) After his successful escape from the scene, the defendant hid the firearm at his grandmother's house where it was later discovered by the police.

Nevertheless, Ms. Lyons requested and received a voluntary intoxication jury instruction. (R. 436.) Further, she addressed this defense, along with the defense of lack of intent, in the defendant's closing argument. (R. 1485-95).

Finally, the Court finds that even if trial counsel was ineffective for failing to present an adequate intoxication defense during the guilt phase proceeding, the defendant has not demonstrated prejudice since any defense that trial counsel chose to present would have been overshadowed by the overwhelming evidence of the defendant's guilt.

Therefore, the Court finds that the defendant has failed to meet his burden of proving that trial counsel's representation was unreasonable under the prevailing professional norms and that the challenged action was not sound strategy. Strickland, 466 U.S. at 688-89, 104 S. Ct. 2052.

(R. 161-79)

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent, substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

With regard to the claim of ineffective assistance for failing to present more evidence of intoxication, Defendant appears to claim that the lower court should not have found that Ms. Lyons' testimony that she made a strategic decision not to emphasize this aspect of the case incredible. However, the lower court's factual finding that Ms. Lyons made a strategic decision to limit the testimony about drug use is amply supported by the record. *Bolender v. Singletary*, 16 F.3d 1547, 1558 n.12 (11th Cir. 1994)(determination that counsel made a strategic decision is a factual finding). Ms. Lyons testified that she was aware of Defendant's history of drug abuse and obtained evidence of it. (R. 350, 357-58, 361) She stated that the information that she had about the crime, including information that Defendant gave her, was inconsistent with intoxication. (R. 377-78, 394-95) She stated that she was concerned that emphasizing drug use would backfire because of the prevailing community attitude about drugs and drug violence. (R. 360, 373-74) She testified that the information about track marks and drug usage near the time of the crime was not consistent. (R. 358, 418-21) She also stated that the witnesses who could have provided testimony about drug usage around the time of the crime were not good witness. (R. 378) She explained her statement in closing argument and the presentation

of some evidence of drug use as consistent with her strategy of presenting Defendant as a nice kid with some problems and as part of her defense that Defendant's shooting of Officer Broom was reflective and not premeditated. (R. 362-63, 375-76, 414-15) Defendant has not shown any additional investigation that counsel should have done. As this court has held, strategic choices made by a criminal defense counsel after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." They may only be overturned if they were "so patently unreasonable that no competent attorney would have chosen it." *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmer v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))). This Court has recognized that decision about intoxication defenses based on perceptions about juries acceptance of them are not unreasonable strategic decisions. *Johnson v. State*, 769 So. 2d 990, 1001-02 (Fla. 2000). As such, the lower court's denial of the claim should be affirmed.

Defendant also appears to claim that the lower court erred in finding that there was no prejudice from failing to present more evidence of intoxication. Defendant seems to claim that such a defense could have been based on hearsay testimony provided to Dr. Krop, on Dr. Krop's opinion about Defendant's

history of drug usage and on Ms. Castle's statement that Defendant appeared high at 3:00 a.m. However, the lower court also properly determined that Defendant was not prejudiced.

While Defendant contends that counsel could have presented the intoxication defense through the testimony of Dr. Krop based on hearsay, this is simply not true. An expert can only testify that a defendant was intoxicated if direct, non-hearsay evidence of the defendant's consumption of intoxicants is presented. *Holsworth v. State*, 522 So. 2d 348, 352 (Fla. 1988); *Burch v. State*, 478 So. 2d 1050, 1051-52 (Fla. 1985); *Cirack v. State*, 201 So. 2d 706 (Fla. 1967). As such, counsel cannot be deemed ineffective for failing to attempt to prove intoxication solely through the presentation of hearsay. *Strickland*. The denial of the claim should be affirmed.

Moreover, the use of testimony by Ms. Castle and Dr. Krop's testimony about a history of drug abuse would not be sufficient to establish an intoxication defense. As this Court has stated:

We note that evidence of [intoxicant] consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to voluntary intoxication. As this Court determined in *Jacobs v. State*, 396 So. 2d 1113 (Fla.), *cert. denied*, 454 U.S. 933, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981), where the evidence show the use of intoxicants but does not show intoxication, the instruction is not required.

Linehan v. State, 476 So. 2d 1262 (Fla. 1985). Ms. Castle was with Defendant at 3 a.m.; the crime was not committed until 10 a.m., 7 hours later. As such, she could not have shown that Defendant was intoxicated at the time of the crime. Testimony regarding a history of drug abuse does not establish that Defendant was intoxicated at the time of the crime. Showing that Defendant possessed pill and a headache powder hours after the crime would not show that Defendant was intoxicated at the time of the crime. As none of this evidence would have shown that Defendant was intoxicated at the time of the crime, counsel cannot be deemed ineffective for failing to claim that it did. *Lambrix v. State*, 534 So. 2d 1151, 1154 (Fla. 1988).

Additionally, attempting to present testimony from witnesses such as Mark Castle to show that Defendant was intoxicated at the time would have resulted in the disclosure of harmful evidence. Defendant had told Mr. Castle that he planned to kill someone if anyone tried to arrest him again. Counsel cannot be deemed ineffective for failing to open the door to unfavorable evidence. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). The claim would properly denied, and the lower court should be affirmed.

Moreover, the evidence at trial showed that the two people who were with Defendant in the 2 to 2½ hours before the crime

testified that Defendant was not intoxicated. Moreover, the deliberateness of Defendant's actions at the time of the crime was inconsistent with intoxication. Defendant escaped, robbed another victim of his car, drove without mishap, went to his grandmother's house, changed his clothes, cleaned the murder weapon, and hid it. Sgt. Bohan testified that Defendant appeared to have scratches on his arms but did not know if they were track marks. (DAT. 221) The jail records indicated that Defendant did not experience any drug withdraw. (RSR. 2958) Given this evidence, the lower court properly found that Defendant was not prejudiced by the failure to present more evidence of voluntary intoxication. See *Lambrix*, 534 So. 2d at 1154; *White v. State*, 559 So. 2d 1097, 1099 (Fla. 1990). It should be affirmed.

With regard to insanity, Defendant asserts that the lower court erred in finding that counsel made a valid strategic decision not to present an insanity defense. However, both Ms. Lyons and Mr. Billbrough testified that a strategic decision was made not to present an insanity defense. Moreover, the record reflects that this determination was made after abundant investigation, which included obtaining all of Defendant's records and having Defendant evaluated by numerous experts. In fact, Defendant has been unable to show that Ms. Lyons'

investigation was deficient in any way. A strategic decision made after thorough investigation does not form the basis for a claim of ineffective assistance of counsel. *Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmer v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))). The denial of the claim should be affirmed.

Defendant also contends that the lower court should not have relied on the opinions of Drs. Mutter, Jacobson, Jaslow and Herrera because they did not evaluate Defendant's sanity at the time of the offense. However, the lower court's reliance on these doctors was proper as the doctors were appointed to, and did, evaluate Defendant's sanity at the time of the offense. At arraignment, the trial court appointed the doctors. (DAT. 30) In doing so, the trial court expressly stated that the doctors were to evaluate Defendant for both competence and sanity. (DAT. 30) The reports of the doctors indicated that they evaluated Defendant for sanity at the time of the crime as well as competence. (R. 397-406) Dr. Herrera expressly testified that he evaluated Defendant for sanity, as did Dr. Mutter. (RSR. 2942, 3076-79) Under these circumstances, the lower court properly relied on these opinions.

Defendant also appears to contend that the lower court

should not have relied upon those reports because the doctors did not have background material. However, Dr. Jaslow, Herrera and Mutter testified that they remained of the opinion that Defendant was not insane even after reviewing medical records. (DAT. 1697-1702, RSR. 2943-44, 3080-81, 3089) Defendant presented no evidence that the provision of background materials would have altered Dr. Jacobson's opinion. Under these circumstances, the lower court properly relied on the doctors' opinions in rejecting Defendant's claim. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997); *Oats v. Dugger*, 638 So. 2d 20 (Fla. 1994). It should be affirmed.

Defendant also contends that the lower court should have found that Dr. Toomer was not asked to evaluate Defendant's sanity by Ms. Lyons and that Dr. Toomer's 1989 opinion that Defendant was insane should have been found credible. However, the trial court's factual findings are supported by competent substantial evidence and should be affirmed. *Stephens*.

Both Ms. Lyons and Mr. Billbrough testified that Dr. Toomer was asked to consider Defendant's sanity at the time of the crime and provided no useful information. (R. 353-54, 397-99, 408, 457-59) At the original trial, Dr. Toomer stated that he first met with Defendant on October 5, 1981, approximately a month after the crime. (DAT. 1632) The record amply reflects

that Ms. Lyons was actively pursuing an insanity defense at that time. Given Ms. Lyons and Mr. Billbrough's testimony and the fact that they were actively pursuing an insanity defense at the time, the lower court properly found that their testimony was more credible than Dr. Toomer's testimony. The lower court's factual finding is supported by competent substantial evidence and should be affirmed.

Moreover, a review of Dr. Toomer's original trial testimony shows that he had reached a conclusion about Defendant's mental state at the time the crime was committed. During his original testimony, Dr. Toomer stated that Defendant knew the difference between right and wrong and the requirements of the law but was not able to conform to them. (DAT. 1649) Dr. Toomer was not able to diagnose any particular mental illness in Defendant. (DAT. 1652) Dr. Toomer admitted that Defendant knew that his behavior was criminal. (DAT. 1655-57) However, he did not believe that Defendant could control his impulse to behave in that manner. (DAT. 1655-57) Dr. Toomer also agreed that Defendant knew the consequences of his actions. (DAT. 1657) Under Florida law, the M'Naghton test for insanity is used. *Nowitzke v. State*, 572 So. 2d 1346, 1355 n.5 (Fla. 1990). This test requires proof that a defendant was unable to understand the nature and quality of his act or its consequences or was

incapable of distinguishing right from wrong because of a mental infirmity, disease, or defect. *Mines v. State*, 390 So. 2d 332 (Fla. 1980); *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977). As seen above, Dr. Toomer testified at the original penalty phase that Defendant did not meet the requirements of this test. Given this testimony, the lower court properly determined that Dr. Toomer's change of opinion at resentencing was not credible is supported by competent, substantial evidence and should be affirmed. *Stephens*.

Even if counsel could be considered deficient for failing to present the defense, the denial of the claim should still be affirmed. The four experts who were appointed to determine Defendant's sanity at the time of arraignment found Defendant sane and malingering.. Dr. Krop, who testified for Defendant at resentencing, also found Defendant sane. (RSR. 2537) Further, in an attempt to conform his resentencing opinion with his opinion at the time of the original trial and Defendant's statements and actions at the time of the crime, Dr. Toomer had to claim that Defendant was only insane when he fired the shots and not when he realized that the police were about to arrest him for a probation violation and when he later fled the scene, stole another car, drove carefully to his grandmother's home and concealed evidence of the crime by change clothes, cleaning up

and hiding the gun. (RSR. 2769-76, 2785-92) Given the limited nature of Dr. Toomer's testimony and the opinions of the other experts, there is no reasonable probability that an insanity defense would have succeeded. *Strickland*. As such, the claim was properly denied, and the denial should be affirmed.

Moreover, presenting of this defense would have opened the door to a great deal of harmful testimony. As Ms. Lyons stated, Defendant had informed numerous people that he was attempted to fool the doctors into finding him mentally ill and had done so in the past. (R. 388-94, 407-08) Further, Defendant had told Mark Castle that he planned to kill if he was about to be caught committing a crime again. (R. 461-62) Given that presenting an insanity defense would have opened the door to this testimony, counsel cannot be deemed ineffective for failing to do so. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). As such, the lower court's denial of this claim should be affirmed.

Defendant finally contends the lower court erred in finding that counsel's decision not to question the venire about mental illness was not ineffective.⁵ Defendant asserts that no evidence was presented regarding why Ms. Lyons did not ask these

⁵ Defendant also refers to alleged ineffectiveness for failing to question the venire about intoxication. However, this Court has already affirmed the summary denial of that claim. *Patten v. State*, 784 So. 2d 380, 390 (Fla. 2000). As such, it is not properly before this Court.

questions. However, Ms. Lyons directly testified that she did not question the venire about mental illness because she had made a strategic decision not to present insanity as a defense. As such, the record amply supports the lower court's rejection of this claim and it should be affirmed. *Reaves v. State*, 826 So. 2d 932, (Fla. 2002)(counsel not ineffective for failing to voir dire jurors about a defense that counsel was not going to present); see also *Stephens; Haliburton v. State*, 691 So. 2d 466, 471 (Fla. 1997)(quoting *Palmer v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984)(quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983))).

II. THE LOWER COURT PROPERLY DENIED THE MOTION TO INTERVIEW THE JURORS.

Defendant next contends that the lower court erred in denying his motion to interview the jurors. Defendant contends that such interviews were necessary for Defendant to establish that he was prejudiced by the failure of counsel to question the venire about mental health. Defendant asserts that had be established that counsel was deficient for failing to ask these questions, the only manner in which Defendant could have established prejudice was by presenting testimony from the jurors. However, this motion was properly denied.

This Court has repeatedly held that trial court's should not grant juror interviews unless a defendant can show that a particular juror was unqualified to serve or that juror misconduct has occurred. *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2001); *Kearse v. State*, 770 So. 2d 1119, 1127-28 (Fla. 2000); *Johnson v. State*, 593 So. 2d 206, 210 (Fla. 1992). This Court explained the rationale behind these decisions in *Baptist Hospital of Miami v. Maler*, 579 So. 2d 97 (Fla. 1991). There, this Court explained that jurors were incompetent to testify about matter that inhere in the verdict, such as their mental processes, and are only competent to testify about overt acts of misconduct.

Moreover, there is a strong public policy against allowing litigants to either harass jurors or to attempt to upset a verdict by showing that it was improperly motivated.

Here, Defendant has not shown that any juror was, in fact, unqualified to serve or that any misconduct occurred. Instead, he sought to engage in fishing expedition interviews with the jurors to inquire into their mental processes. Under these circumstances, the lower court properly followed this Court's precedent and refused to permit the interviews. The lower court should be affirmed.

Despite this precedent, Defendant asserts that he should have been permitted to interview the jurors because this Court remanded this matter for an evidentiary hearing on his claim that counsel was ineffective for failing to voir dire the venire about mental illness.⁶ However, a review of this Court's opinion remanding this matter indicates that this Court did not intend for the claim of ineffective assistance of counsel at voir dire to be considered as a separate claim. In remanding this matter for an evidentiary hearing, this Court stated:

Patton also argues counsel was ineffective for

⁶ Defendant also seems to claim that counsel was ineffective for failing to question the venire about intoxication. However, this Court affirmed the summary denial of this claim. *Patton v. State*, 784 So. 2d 380, 390 (Fla. 2000).

failing to investigate and present voluntary intoxication and insanity defenses. There is some doubt as to counsel's possible strategy for not presenting these defenses as discussed above; therefore, this claim is remanded for an evidentiary hearing. See *Remeta v. Dugger*, 622 So. 2d 452, 455 (Fla. 1993)(approving, after an evidentiary hearing, counsel's tactical decision to forego a voluntary intoxication defense which was inconsistent with defendant's theory of the case that the accomplice was the main perpetrator and triggerman in the murder). In a related claim, Patton argues counsel was ineffective for failing to question the jury about mental illness during voir dire. This claim also depends upon whether counsel was motivated not to ask such questions for strategic purposes and is therefore intertwined with the intoxication and insanity defenses. Accordingly, this claim should be explored during the evidentiary hearing.

Patton, 784 So. 2d at 390. Given the manner in which this Court expressed itself, it appears that this Court envisioned exactly what occurred below. Counsel was questioned about her strategy. Thus, the lower court properly denied the motion. It should be affirmed.

Moreover, such a limited understanding of this Court's opinion is entirely consistent with *Strickland*. The inquiry regarding prejudice is objective. *Strickland*, 466 U.S. at 695; *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985). It does not depend on the "idiosyncrasies of the particular decisionmaker." *Strickland*, 466 U.S. at 695. As such, if Defendant had been able to prove that his counsel was ineffective for failing to present an insanity defense, the claim of ineffective assistance

of counsel for failing to question the venire would be moot. If Defendant could not prove his claim of ineffective assistance of counsel for failing to present insanity, allowing Defendant to attempt to overturn his conviction and sentence would be contrary to *Strickland's* objective standard. As such, the lower court properly refused to allow Defendant to interview the jurors in an attempt to do so. It should be affirmed.

Moreover, any error in the failure to grant the jury interviews was harmless. In order to prove a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that that deficiency prejudice him. *Strickland*. A claim of ineffective may be rejected because of a failure to met either prong and it is not necessary for a court rejecting a claim of ineffective assistance to discuss both prongs. *Strickland v. Washington*, 466 U.S. 668, 697 (1984)(where either prejudice or deficiency prong of ineffectiveness claim was lacking, courts do not need to address other prong).

Here, counsel testified that she did not question the venire about mental illness because she had made a strategic decision not to present insanity as a defense. This testimony amply supports the lower court's determination that counsel was not deficient for failing to question the venire about mental

illness. As argued in Issue I, *supra*, the rejection of the claim based on a failure to prove deficiency should be affirmed. Because Defendant never proved that counsel was deficient, the issue of whether Defendant could interview the jurors in an attempt to show prejudice is now moot, as this Court held in rejecting Defendant's interlocutory appeal on this issue. *Patton v. State*, 817 So. 2d 849 (Fla. 2002); *see also Reaves v. State*, 826 So. 2d 932, (Fla. 2002)(counsel not ineffective for failing to voir dire jurors about a defense that counsel was not going to present). Moreover, because the lower court could have properly denied this claim based on the lack of deficiency, any error in the denial of the motion to interview jurors is harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The denial of the motion should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to Suzanne Myers, Assistant CCRC, 101 N.W. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida, 33301, this 6th day of January, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-

point font.

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