

IN RE: CLEMENCY APPLICATION  
OF TYRA PATTERSON

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)  
) AFFIDAVIT OF IRA MICKENBERG

I, Ira Mickenberg, being duly sworn and with personal knowledge of the facts,  
deposes and states:

1. I am an attorney, licensed to practice in the states of New York, West Virginia, Ohio (inactive), and the District of Columbia (inactive). I am also admitted to practice in the Supreme Court of the United States, the U.S. Courts of Appeal for the Second and Fourth Circuits, and several United States District Courts. I have represented clients in all of these jurisdictions.

2. I was first admitted to the bar in 1976, and have been practicing and teaching criminal law ever since. I specialize in criminal appeals and advanced training of criminal defense lawyers at the trial, appellate and post-conviction levels. Among other positions I have held, I was a tenured professor of law at the University of Dayton School of Law, and was a founder and Attorney-in-Charge of the Office of the Appellate Defender in New York. I am now Director of the National Defender Training Project, and have designed, taught and directed hundreds of training programs for public defenders in Ohio and throughout the nation. My resume is appended to this affidavit.

3. I have been certified as an expert witness, and testified in federal and state courts on the subject of ineffective assistance of appellate counsel and best practices by trial counsel. The cases in which I testified were *Gregory Wilson v. Phil Parker, Warden*, Civil Action 99-78 (E.D. Ky.) [Ineffective assistance of counsel - federal habeas corpus of state

death penalty case]; *George Franklin v. Carl S. Anderson, Warden*, 267 F.Supp2d 768 (S.D. Ohio, 2003) ) [Ineffective assistance of counsel - federal habeas corpus of state death penalty case]; and *Commonwealth of Kentucky v. Kevin Garrett*, Ind. No. 03-CR-000260 (Pulaski Circuit Court 2005) [Best practices by trial counsel in state felony case].

4. I have been asked to review the record and offer an opinion as to the quality and effectiveness of the representation Tyra Patterson received at her homicide trial in Montgomery County, Ohio in 1995. It is my understanding that my opinion is not being requested to determine whether the *Strickland* standard for constitutionally ineffective assistance of counsel has been met. Rather, the goal is to assist those considering clemency for Ms. Patterson to determine whether her trial counsel adequately presented to the jury significant existing evidence of her innocence.

5. I am donating my time and efforts to serve as an expert witness in this case. I have not asked for, nor will I accept a fee or reimbursement of expenses for my work on this case.

6. To prepare this report I reviewed the following materials: the transcripts of Ms. Patterson's trial; Ms. Patterson's statement to police, which was introduced against her at trial; the 911 call Ms. Patterson made to police immediately after the incident, which was not introduced at trial; the transcript of Holly Lai's testimony during the trial of co-defendant Kellie Johnson, which contradicted Holly Lai's testimony at the later trial of Tyra Patterson; the affidavit of Tyra Patterson, submitted in support of her clemency application; the affidavits of jurors Sharon Wilson, Robert Reed, June Ackerman, Nancy Day, and Clarence New.

### The Obligations Of Defense Counsel In A Criminal Trial

7. Once a criminal case has reached the trial stage, and the defendant is maintaining her innocence, defense counsel's most basic responsibilities are as follows:

a. To explain to the jury, in a coherent, factual manner, why the defendant is innocent of the charges. When this skill is taught to defense lawyers at trial skills training programs, it is referred to as "designing a theory of defense," and "telling your client's story of innocence." This does not only involve affirmatively presenting a factual theory of defense to the jurors. It also requires defense counsel to present a factual explanation of how and why the State's evidence does not establish guilt, and how the State's witnesses are either mistaken or false in their accusation of the defendant.

b. To present evidence to the jury that supports the client's assertion of innocence and tells the complete, factual story of the client's innocence.

c. To present evidence to the jury, by calling witnesses (including experts, when necessary) and cross-examining prosecution witnesses, in a manner that factually demonstrates how and why the State's witnesses are either mistaken or testifying falsely when they accused the defendant.

### The Obligations Of Defense Counsel In Tyra Patterson's Trial

8. The State's case against Tyra Patterson rested in large part on the testimony of police officers who claimed that Tyra Patterson had made an incriminating statement to them, and introduced that statement at trial.

9. There was significant factual evidence known to defense counsel that refuted much of the State's reliance on the statement. This evidence included:

a. Tyra Patterson made the 911 call telling the police that a crime was being committed, and asking them to come quickly. Far from evidencing a consciousness of guilt, Tyra Patterson was the one who had called the police, reported the crime, and asked them to send help.

b. The statement ultimately obtained by the police bore all the hallmarks of a false confession. The tactics used by the police to obtain a statement from Ms. Patterson are well known to induce statements that are later proven false. The books, articles and treatises demonstrating this phenomenon were easily available to defense counsel. Experts who could have educated the jury about why people give false confessions, and how such statements can be recognized were also readily available to defense counsel.

10. Unfortunately, defense counsel did not introduce or use any of this evidence.

a. Defense counsel made no effort to introduce the 911 call made by Tyra Patterson. The jury was never told that Ms. Patterson was the one who called police to the scene.

b. Defense counsel made no effort to call expert witnesses about false confessions or to educate the jury with any of the voluminous literature on the subject of false confessions. The jury therefore never heard any claim that Ms. Patterson's statement was false, and never heard any explanation of why an innocent person would admit to a crime she had not committed.

c. Ms. Patterson's affidavit establishes that she repeatedly told her lawyers that the statement was false. Nonetheless, the lawyers repeatedly told the jury it was true. For example, in closing arguments, one of her lawyers said, "Tyra Patterson gave a videotaped statement where she skips ahead. ... And she admits to wrongdoing. She admits to snatching that necklace..." (Trial Transcript at 1116). Ms. Patterson also repeatedly told her lawyers she wanted to testify and tell the jurors why the statement was false. Her lawyers refused to call her as a witness.

11. Defense counsel never presented a single, factual theory of defense to the jury that explained why Ms. Patterson was innocent. Instead, contrary to their client's assertions, they told the jury that she committed the robbery. They then made two inconsistent and obviously absurd legalistic claims: (a) that it was not an *aggravated* robbery; and (b) that she had renounced her criminal purpose.

#### The Failure To Introduce The 911 Call

12. The State contended that Tyra Patterson was acting in concert with the girls who robbed the victims and killed Michelle Lai, and that Ms. Patterson knew LaShawna Keeney had a gun.

13. Defense counsel was aware that Ms. Patterson was the one who called 911, told the police about the crime being committed, and asked for police help.

14. The 911 call was powerful evidence that the State's theory was wrong - that Tyra Patterson was not acting in concert with the criminals, but was trying to get police help for the victims. It also corroborated Ms. Patterson's contention that the criminals fled together after the shooting, and that Ms. Patterson, who was not involved with them, called

the police from her home. This evidence was completely consistent with what Ms. Patterson told her lawyers she had been doing.

15. At one point during the 911 call, Ms. Patterson tried to distance herself from the trouble by mispronouncing and misspelling her name, and saying that a friend had seen the incident and told her about it. She knew that calling 911 might subject her to further questioning by the police. It could even have exposed her to threats from the criminals. Yet despite her fears, Ms. Patterson still tried to get help for the victims by calling officers to the scene.

16. There is no doubt that the 911 call was admissible as evidence of two crucial things: (a) Tyra Patterson's state of mind was that of a person trying to get help, not of a person committing a crime; and (b) Tyra Patterson had actually tried to get help by calling the police. Moreover, there were multiple legal grounds defense counsel could have used to get the call admitted into evidence. It was not hearsay because it was not admitted for the truth of the matter asserted. Moreover, even if the trial court classified it as hearsay, it was still admissible as both an excited utterance, and as a present sense impression.

17. The failure of defense counsel to introduce the 911 call is inexplicable. It was admissible, and it went directly to their client's innocence. It directly refuted the State's claim about Ms. Patterson's intent, it was fully consistent with what Ms. Patterson told them had happened, and it cast Ms. Patterson's role in the case in a very favorable light. It would have given the jury the one thing defense counsel never provided them – a factual reason to believe Tyra Patterson was innocent. All five of the jurors who submitted

affidavits in this case expressed surprise at learning about the 911 call, and said that it was important evidence of innocence. Any competent lawyer would have used this evidence.

### The Failure To Introduce Evidence About False Confessions

18. Tyra Patterson gave the police an incriminating statement. She told her lawyers that the statement she gave was false. If the jury believed the statement to be true, it would have no alternative but to find her guilty.

19. Most laypeople, including jurors, intuitively, but mistakenly, believe that innocent people will not confess to crimes they didn't commit.

20. Over the past thirty years, there has been a considerable body of scientific research, clinical studies, and articles appearing in legal and medical journals establishing two important facts:

- a. Innocent people frequently confess to crimes they did not commit.
- b. Many interrogation tactics used by police, including tactics that are routinely taught to police officers at their academies and other training programs, increase the chance that an innocent person will confess to a crime she did not commit.

21. In cases where the defense can show that a defendant was interrogated in a manner that raises the possibility of a false confession, courts routinely allow the defense to call an expert witness on that subject to educate the jury about the counter-intuitive phenomenon of false confessions.

22. Any competent defense counsel is familiar with the literature and studies concerning false confessions, and of the body of law that permits use of expert witnesses on false confessions.

23. Since Tyra Patterson told her lawyers that the statement to police was false, and that statement showed many of the indicia of a false confession, defense counsel should have made efforts to educate the jury about the phenomenon of false confessions.

24. Defense counsel made no such efforts. They did not call expert witnesses. They did not introduce or refer to any legal or medical journals or treatises.

25. Despite the insistence of their client that it was false, defense counsel simply told the jury the statement was true. No competent lawyer would have done this.

#### Failure To Present A Coherent Theory of Defense

26. The primary responsibility of defense counsel at trial is to present the jury with a coherent, factual theory of defense that explains why the defendant is innocent. In Tyra Patterson's case, any theory of defense must explain to the jury why her statement was a false confession.

27. Defense counsel failed to do this on any level.

a. Instead of explaining why Ms. Patterson would give a false confession, defense counsel abdicated all responsibility for the issue by telling the jury the statement was true. This virtually guaranteed a conviction. Moreover, counsel did this despite the fact that Ms. Patterson repeatedly told them that the statement was not true.

b. Instead of presenting the jury with a single, coherent factual theory of defense, counsel adopted multiple, inconsistent legalistic claims which no jury would believe. The first defense lawyer to deliver closing argument told the jury that the statement was true. He admitted that Ms. Patterson was guilty of some level of crime, but it was not an *aggravated* crime. Given the nature of the incident and the fact that a gun was



used, it is hard to imagine any jury accepting this. The second defense lawyer to close made the different, and inconsistent claim that Ms. Patterson had started out participating in the crime, but renounced her criminal intent and involvement before the killing. This also flew in the face of the statement, which counsel admitted was true.

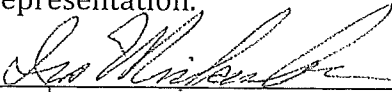
c. Finally, by admitting the statement was true, both lawyers not only undermined, but directly contradicted their efforts to impeach Holly Lai. Ms. Lai testified that Tyra Patterson grabbed a chain from Michelle Lai. At the earlier trial of co-defendant Kellie Johnson, Ms. Lai had testified that it was Johnson who grabbed the chain. By admitting, against Tyra Patterson's wishes, that Ms. Patterson's statement to the police was true, defense counsel rendered their attempted impeachment of Holly Lai irrelevant because they were now agreeing with Ms. Lai that it was Ms. Patterson who seized the chain. This was tantamount to admitting their client's guilt, and violated the most basic responsibilities of defense counsel in a criminal trial.

#### Conclusion

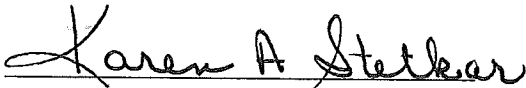
28. There was significant evidence known to and available to defense counsel that would have shown the jury that Tyra Patterson was not a participant in the robbery and murder of Michelle Lai. The fact that she was the one who called the police to report the crime and ask for help would have gone a long way toward convincing jurors that she was not a participant. Expert testimony showing that her statement to the police was a textbook example of how false confessions are induced would have helped the jurors understand why that statement should not be believed. Had the defense used all this evidence, they would have been able to present a coherent, factual theory of defense,

instead of arguing unbelievable, inconsistent legalistic theories of aggravation and renunciation.

29. Tyra Patterson deserved legal counsel that advocated on her behalf and used the available evidence to show the jury why she was innocent of this crime. She did not receive anything approaching that minimum level of representation.

  
Ira Mickenberg

Sworn to and subscribed in my presence this 1 day of <sup>July</sup>~~June~~, 2013, State of New York, Saratoga County.

  
Notary Public

KAREN A. STETKAR  
NOTARY PUBLIC, State of New York  
Qualified in Saratoga County  
My Commission Expires 7/23/14  
Reg. No. 4969612